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A Limited Liability Law Partnership

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REALTY LAUA LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEWERS FALETOGO; HAZEL)	CIVIL NO. 08-1-2608-12 (SSM)
MCMILLON; GENE STRICKLAND;	)	(Other Civil Action)
TRUDY SABALBORO; and LEE)	
SOMMERS, individually and on behalf of	)	DEFENDANT REALTY LAUA LLC'S
a class of past, present, and future residents	)	REPLY MEMORANDUM IN SUPPORT OF
of Kuhio Park Terrace,	)	MOTION FOR SUMMARY JUDGMENT,
	)	FILED JUNE 18, 2009; CERTIFICATE OF
Plaintiffs,	)	SERVICE
)	
vs.	)	<u>HEARING:</u>
)	
STATE OF HAWAII; HAWAII PUBLIC	)	Date: September 1, 2009
HOUSING AUTHORITY; REALTY	)	Time: 9:00 a.m.
LAUA LLC, formerly known as R & L	)	Judge: Hon. Sabrina S. McKenna
Property Management LLC, a Hawai'i)	
limited liability company; and Does 1-20,	)	NO TRIAL DATE
)	
Defendants.)	
)	
STATE OF HAWAII; HAWAII PUBLIC)	
HOUSING AUTHORITY,)	
)	
Third-Party Plaintiffs,)	
)	
vs.)	
)	
URBAN MANAGEMENT)	
CORPORATION DBA URBAN REAL)	

ESTATE COMPANY, DOES 1-20,)
)
Third-Party Defendant.)
_____)

DEFENDANT REALTY LAUA LLC'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED JUNE 18, 2009

I. INTRODUCTION

Plaintiffs, in their Memorandum in Opposition to Defendant Realty Laua LLC's ("Realty") Motion for Summary Judgment filed herein on June 18, 2009 ("the Motion"), fail to raise a genuine issue of material fact that would preclude summary judgment in favor of Realty. Indeed, Plaintiffs cannot because the issues before this Court are based on the interpretation of the property management contract between Defendant Hawaii Public Housing Authority ("HPHA") and Realty. Plaintiffs do not argue that the management contract at issue is in any way ambiguous. Therefore, "[i]f the language of a contract is unambiguous, . . . the interpretation of the contract presents a question of law to be decided by the court." Wittig v. Allianz, A.G., 112 Hawai'i 195, 201, 145 P.3d 738, 744 (Haw. App. 2006) (citations omitted).

In looking at the management contract, it is clear that Plaintiffs are not third-party beneficiaries of that contract and, therefore, cannot enforce it in whole or in part against Realty. Moreover, even if Plaintiffs can be deemed to be third-party beneficiaries, under the specific terms of the management contract, Plaintiffs were required to seek administrative remedies. Having failed to do so, Plaintiffs cannot maintain the present action against Realty as a matter of law.

Finally, Plaintiffs' lack standing to maintain a claim against Realty pursuant to Hawaii Revised Statutes ("HRS") § 480-2 because as to the management contract, Plaintiffs are not consumers within the meaning of HRS § 480-1. Therefore, Realty is entitled to summary judgment as a matter of law.

II. ARGUMENT

A. While Plaintiffs May Ultimately Benefit, The Purpose And Intent Of The Management Contract Between HPHA and Realty Is To Create An Owner-Property Manager Relationship.

Under AOAO Newtown Meadows v. Venture 15, Inc., 115 Haw. 232, 167 P.3d 225 (Haw. 2007), Plaintiffs bear the burden of overcoming the presumption that HPHA and Realty intended to contract only for themselves. See id. at 272, 167 P.3d at 265. To do so, they must identify a “virtual express declaration” in the management contract that its purpose is to *directly* benefit Plaintiffs. See id.

Plaintiffs, however, do nothing more than cite provisions in the RFP (Exhibit “E” to the Motion) which refer to tenants and residents. The fact that HPHA contemplated that the management contract would ultimately benefit the tenants and residents of KPT and Kuhio Homes, and nothing more, is insufficient under Newtown Meadows:

Absent clear contractual language to the contrary, a property owner does not attain third-party beneficiary status merely because the parties to the subcontract knew, *or even intended*, that the construction would ultimately benefit the property owner.

Id. at 271, 167 P.3d at 264 (emphasis added).

Moreover, it is clear that the management contract was intended not to benefit Plaintiffs, but to delegate some of HPHA’s responsibilities at KPT/Kuhio Homes to Realty. In this regard, Plaintiffs’ position overlooks the stated purpose of the RFP:

The purpose of this RFP *is to procure property management services to manage, operate and maintain the low income public housing properties and commercial property within the HPHA’s Management Unit 40. This solicitation is designed to capture industry best practices and establish an owner-property manager relationship that more closely approximates similar arrangements common in the private sector.* The HPHA expects this relationship will help streamline its operations, reduce costs, and provide improved services to the Hawaii families residing in its housing units.

The HPHA intends to focus on performance results through measurements including but not limited to, occupancy rate, amount and percentage of rent collection, and customer satisfaction. The HPHA expects the property manager to fully execute its business practices consistent with quality standards and will judge performance on the basis of outcome.

Exhibit “E” at 11 (emphasis added). The obvious intent of the management contract was to establish an “owner-property manager relationship” between HPHA and Realty; not to confer a direct benefit to Plaintiffs. HPHA expected that such a relationship could “help streamline its operations, [and] reduce costs” Id. Although it also anticipated “improved services to the Hawaii families residing in its housing units,” any such benefits are incidental to the formation of the “owner-property manager relationship.” Id.

These facts are nearly identical to those in Newtown Meadows. There, the Hawaii Supreme Court held that a homeowner is not an intended third-party beneficiary of a contract between a general contractor and a subcontractor. Just as a general contractor enters into an agreement with a homeowner, HPHA has entered into leases with Plaintiffs. The general contractor then delegates some of its responsibilities to a subcontractor, just as HPHA has delegated some of its responsibilities under the leases to Realty. The intent of the construction subcontract is to create a general contractor-subcontractor relationship, which ultimately benefits the homeowner. The intent of the management contract is to create an owner-property manager relationship, which ultimately benefits Plaintiffs and other residents at KPT and Kuhio Homes. On this record, Newtown Meadows is controlling and entitles Realty to summary judgment on Plaintiffs’ third-party beneficiary claims.

If Plaintiffs have complaints regarding the living conditions they experience, their only recourse (if any) is against HPHA. Their leases explicitly set forth an administrative grievance procedure. See Exhibit “C”, Declaration of Chad Taniguchi, Exhibit “2” thereto,

Rental Agreement at 4, ¶10 (n). In turn, if HPHA believes that Realty has been remiss, it can separately proceed against Realty (as set forth in detail below). There is no basis, in law or in fact, to permit Plaintiffs to bring a direct contractual claim against Realty.

B. **Even Assuming That Plaintiffs Can Be Deemed To Be Third-Party Beneficiaries Under The Management Agreement, Plaintiffs Are Limited To Administrative Remedies Which They Have Failed To Exhaust.**

A third party beneficiary cannot assert greater rights than those of the promisee under the contract. Because the foundation of any right the third person may have is the promisor's contract, "[w]hen [a] plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take the contract as he finds it. ... [T]he third party cannot select the parts favorable to him and reject those unfavorable to him."

Souza v. Westlands Water District, 38 Cal. Rptr.3d 78, 91 (Cal. App. 2006) (citation omitted); Bloom v. NCAA, 93 P.3d 621, 625 (Colo. App. 2004) ("a third-party beneficiary . . . has rights no greater than those of the parties to the contract itself[.]") (citing United Steelworkers v. Rawson, 495 U.S. 362, 363 (1990)); NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417, 431 (Del. Ch. 2007) ("a third-party beneficiary of the agreement has no greater rights to compel or avoid arbitration than does one of the signatories to the contract."); Stoll v. United Way of Champaign County, Ill., Inc., 883 N.E.2d 575, 581 (Ill. App. 2008) ("[T]hird-party beneficiaries generally have no greater rights in a contract than does the promisee.") (also citing United Steelworkers v. Rawson). Thus, if Plaintiffs are deemed to be third-party beneficiaries under the management agreement between HPHA and Realty, Plaintiffs are limited to the remedies specified in the contract.

Paragraph III of Section 2 of the RFP specifies the contract monitoring and remedies available under the management contract should the Successful Offeror, in this case Realty, fail to fulfill certain obligations under the contract. See Exhibit "E" at K00003123-K000003124. Nothing in that paragraph permits the filing of a lawsuit for any alleged breach of

the management contract by Realty. Instead, the provisions of Paragraph III of Section 2 only provide for HPHA's right to require Realty to correct any breaches or, in failing to do so, permit HPHA to secure substitute services with the costs to be deducted from monies due to Realty. See Exhibit "E" at K000003124.

Furthermore, the "General Conditions" of the contract provides that "[d]isputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time." Exhibit "E" at K000003324. HRS § 103D-703 provides as follows:

- (a) This section applies to controversies between a governmental body and a contractor which arise under, or by virtue of, a contract between them, including, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
- (b) The chief procurement officer or a designee is authorized, prior to commencement of an action in a court brought pursuant to section 103D-711, to settle and resolve a controversy described in subsection (a). This authority shall be exercised in accordance with rules adopted by the policy board.
- (c) If such a controversy is not resolved by mutual agreement, the chief procurement officer or a designee shall promptly issue a decision in writing. The decision shall:
 - (1) State the reasons for the action taken; and
 - (2) Inform the contractor of the contractor's right to initiate a judicial action as provided in this part.
- (d) A copy of the decision under subsection (c) shall be mailed or otherwise furnished immediately to the contractor.
- (e) The decision under subsection (c) shall be final and conclusive unless the contractor commences a judicial action in accordance with section 103D-711.
- (f) If the chief procurement officer or a designee does not issue the written decision required under subsection (c) within ninety days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

HRS§ 103D-703 (amended 1999); see also Haw. Admin. R. § 3-126-28 (administrative rules implementing HRS § 103D-703).

HAR Chapter 3-126 provides the following:

This subchapter establishes procedures and remedies to resolve contract and breach of contract controversies between the State and a contractor. It is the State's policy to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreement and are encouraged. If informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities are encouraged at this stage.

Haw. Admin. R. § 3-126-25 (2004).

As noted above, if a dispute between the State and a contractor cannot be amicably resolved, then the parties must proceed under HAR § 3-126-28 which implements the provisions of HRS § 103D-703. There is no allegation in the Complaint nor any evidence produced that Plaintiffs ever complied with the provisions of HRS § 103D-703 and HAR Chapter 3-126. If Plaintiffs are deemed to be third-party beneficiaries under the management agreement, Plaintiffs, like HPHA, are required at a minimum to comply with such provisions.

In Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81 (1987), the Hawaii Supreme Court explained that the doctrine of exhaustion of administrative remedies “comes into play ‘where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.’ . . . ‘The exhaustion principle asks simply that . . . the avenues of relief nearest and simplest should be pursued first.’ . . . ‘Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process.’” Id. at 93 (citations omitted).

Having failed to exhaust the administrative remedies specifically delineated in the management agreement, Plaintiffs cannot maintain the present judicial action against Realty as a matter of law. Realty therefore submits that even if Plaintiffs can be deemed to be third-party beneficiaries under the management contract, Realty is entitled to summary judgment as to Plaintiffs' third-party beneficiary claims against Realty.

C. **Plaintiffs Cannot Maintain A Claim Pursuant To HRS § 480-2 Regarding The Management Agreement.**

Plaintiffs' HRS Chapter 480 claim fails for the lack of privity. In Hough v. Pacific Insurance Co., Ltd., 83 Haw. 457 (Haw. 1996), the plaintiff argued that he was an intended third-party beneficiary of a workers' compensation insurance policy which was purchased by his employer, for his benefit, and that the insurance company violated HRS § 480-2. See id. at 470. The Hawaii Supreme Court first looked at whether the plaintiff was a "consumer" as defined in HRS § 480-1 with respect to the workers' compensation insurance policy. The court concluded that because the policy was not purchased by the plaintiff but instead was purchased by the plaintiff's employer, plaintiff could not be a "consumer" within the meaning of HRS § 480-2 with respect to the workers' compensation policy. See id. at 470.

Likewise, in this case, Plaintiffs did not purchase or attempt to purchase goods or services with respect to the management contract nor were Plaintiffs solicited to purchase goods or service with respect to the management contract. Therefore, like the plaintiff in Hough, Plaintiffs herein cannot be "consumers" with respect to the management agreement.

The Hawaii Supreme Court further held in Hough that even if the plaintiff was a third-party beneficiary of the workers' compensation policy that was purchased by his employer, plaintiff could not maintain an HRS § 480-2 claim against the insurance company because the named insured, the employer, (i.e., one of the parties to the contract), was not a "consumer"

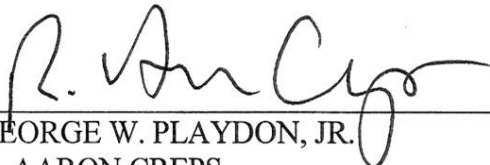
because the employer was not a "natural person." 83 Haw. 471. In this case, neither of the contracting parties to the management agreement, i.e. HPHA or Realty, is a natural person. Therefore, as in Hough, even if Plaintiffs are deemed to be third-party beneficiaries of the management agreement, they cannot bring an HRS § 480-2 claim against Realty based on alleged breaches of the management contract.

Realty therefore submits that Plaintiffs cannot maintain their HRS § 480-2 claim against Realty as a matter of law.

III. CONCLUSION

Based on the foregoing, Realty respectfully requests that this Honorable Court grant the instant motion and enter summary judgment in Realty's favor as to all claims asserted against it in Plaintiffs' Complaint, filed herein on December 18, 2008.

DATED: Honolulu, Hawaii, August 28, 2009.


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