

NO. 23041

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

VICKERMAN ZACHARY MILLER, a Division of TRANSYSTEMS  
CORPORATION, Plaintiff-Appellee, v. GMP ASSOCIATES,  
INC., a Hawaii corporation, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIVIL NO. 97-5211-12)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant GMP Associates, Inc. (GMP) appeals the December 10, 1999 judgment of the circuit court of the first circuit, the Honorable Gail C. Nakatani, judge presiding, granting summary judgment and attorneys' fees to Plaintiff-Appellee Vickerman Zachary Miller (Miller), in an action for assumpsit.

GMP raises the following two points on appeal: (1) summary judgment, pursuant to Rule 56 of the Hawai'i Rules of Civil Procedure (HRCPP) (1999), was unwarranted due to a discrepancy between the principal amount prayed for in Miller's verified complaint and the principal amount ultimately awarded; and (2) the attorneys' fees awarded, under Hawai'i Revised Statutes (HRS) § 607-14 (1999), did not meet the requisite reasonableness standard. We conclude that summary judgment was

appropriate; however, we vacate and remand for a determination whether the amount of attorneys' fees sought was reasonable.

### **I. Background.**

On July 3, 1996, Miller and GMP entered into an agreement, dated June 10, 1996, for port planning services. According to the agreement, an account not paid within thirty days of the invoice date would be subject to a service charge of 1.5 percent per month. Also, the agreement provided for an award of "reasonable attorneys' fees, expert fees and other costs incurred" to the prevailing party "[i]n any action, arbitration or other proceeding instituted to collect fees and costs due under this Agreement[.]"

On December 23, 1997, Miller filed a verified complaint alleging, in paragraph 3, that GMP was "indebted to [Miller] in the sum of \$85,000.00 for goods and/or services delivered by [Miller] to [GMP] pursuant to the June 10, 1996 letter from [Miller] to [GMP.]" Also, in paragraph 5, that "[d]espite demand for payment from [GMP] by [Miller], [GMP] refuses and continues to refuse to pay[.]"

Paragraph 4 of Miller's complaint alleged, in pertinent part, that

[Miller] requests recovery of attorney's fees of 25% of the amount claimed or recovered by its attorneys, or \$22,500.00, and interest of 1.5% per month on the balance outstanding over 30 days beginning on March 29, 1996, as described by the transaction record

attached as Exhibit B, and a payment of \$5,000.00 by [GMP] on December 11, 1997.

The "transaction record attached as Exhibit B" referred to indicated that the principal amount of \$90,000.00 was 151 days overdue as of October 31, 1997. In the closing paragraph of its complaint, Miller prayed for "judgment against [GMP] in the amount of \$85,000.00, together with [Miller's] costs incurred herein, [Miller's] reasonable attorney's fees, and interest at the rate of 18% per annum from March 29, 1996."

On June 11, 1999, Miller served GMP with a request for admissions addressing each and every allegation in the complaint. GMP's responses to the request for admissions were served upon Miller on July 13, 1999. According to HRCP Rule 36(a) (1999), GMP's responses should have been served on or before July 12, 1999.

On July 29, 1999, Miller filed a motion to confirm the admissions, and for summary judgment. GMP failed to file any written opposition to the motion. At the August 31, 1999 hearing on the motion, the circuit court concluded that "because you've no opposition to the motion, and I deem it to be unopposed, and, so as to all issues raised by the motion it is granted, all right."

The court granted judgment in the amount requested in the motion. In an affidavit attached to the motion, one of Miller's officers requested an award of \$152,546.16 as of July 6,

1999. Miller determined the total amount of \$152,546.16 by calculating interest, on the principal sum of \$90,000.00, at the rate of 18 percent per annum from September 27, 1996 through July 6, 1999. This interest was added to the outstanding principal of \$90,000.00. Then, Miller subtracted GMP's \$5,000.00 payment made on December 11, 1997. This resulted in an interim balance of \$129,916.16. Miller arrived at the \$152,546.16 total damages figure by adding \$130.00 in court costs and \$22,500.00 in attorney's fees (25% of \$90,000.00 = \$22,500.00) to the \$129,916.16 interim balance. The December 10, 1999 judgment awarded Miller the requested \$152,546.16 as of July 6, 1999, plus 10 percent interest thereafter on the principal sum of \$90,000.00. On December 16, 1999, GMP filed a timely notice of this appeal.

## **II. Standards of Review.**

### *A. Summary Judgment.*

We review the circuit court's award of summary judgment *de novo*, under the same standard applied by the circuit court. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

HRCF Rule 56(c). Furthermore, “[b]are allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact, and therefore, insufficient to reverse a grant of summary judgment.” Reed v. City and County of Honolulu, 76 Hawai‘i 219, 225, 873 P.2d 98, 104 (1994) (citations omitted).

*B. Award of Attorneys’ Fees.*

We review an award of attorneys’ fees, and the amount thereof, under the abuse of discretion standard. Piedvache v. Knabusch, 88 Hawai‘i 115, 118, 962 P.2d 374, 377 (1998). “An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.” Id. (citation and internal quotation marks omitted).

**III. Discussion.**

*A. Summary Judgment.*

GMP contends that the discrepancy between the principal amount of the relief requested in Miller’s complaint (\$85,000.00), and that requested in Miller’s motion for summary judgment and ultimately awarded (\$90,000.00), raised a genuine issue of material fact precluding summary judgment. We disagree with GMP’s assertion. The circuit court correctly granted Miller’s motion for summary judgment because there was no genuine issue of material fact.

Miller's motion for summary judgment was predicated, in part, upon its accompanying motion to confirm admissions. HRCP Rule 36(a) provides that, "[a] matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter[.]" See also W.H. Shipman, Ltd. v. Hawaiian Holiday Macadamia Nut Co., Inc., 8 Haw. App. 354, 365, 802 P.2d 1203, 1209 (1990) ("[HRCP] Rule 36(a) imposes a sanction of automatic admission from a failure to respond within the time provided for in the rule" (citation omitted)); In Re Trade Wind Tours of Hawaii, Inc., 6 Haw. App. 260, 263-66, 718 P.2d 1122, 1125-27 (1986). GMP did not oppose Miller's motion to confirm the admissions, either in writing or at the hearing on the motion. It nowhere requested, either expressly or impliedly, that its late responses to Miller's request for admissions be allowed to supersede the admissions deemed automatic by HRCP Rule 36(a). Indeed, as detailed infra, GMP itself relied to a certain extent upon the automatic admissions at the hearing on the motion. Cf. Shipman, 8 Haw. App. at 365-68, 802 P.2d at 1209-10 (trial court abused its discretion when it refused the defendant's implicit request to allow its late responses to the plaintiff's requests for admissions); Trade Wind Tours, 6 Haw. App. at 263-66, 718 P.2d at 1125-27 (tax appeal court did not abuse its discretion in deeming the HRCP Rule 36(a) automatic admissions withdrawn upon

filing of the government's late responses to the taxpayer's request for admissions).

Accordingly, in granting Miller's motion, the circuit court properly confirmed the admissions served upon GMP but not responded to in the time required by HRCF Rule 36(a).

Pursuant to those admissions, GMP admitted each and every allegation in Miller's complaint. GMP admitted its indebtedness to Miller for the services provided under the June 10, 1996 agreement. The issue arises, however, because GMP in one instance admitted to being "indebted to [Miller] in the sum of \$85,000.00 for goods and/or services delivered by [Miller] to [GMP] pursuant to the June 10, 1996 letter from [Miller] to [GMP.]" Although it had denied that allegation in its late responses to Miller's request for admissions, GMP confirmed that admission during the hearing on the motion:

THE COURT: I have received no opposition.

[GMP's COUNSEL]: That's correct, Your Honor.

We agree that we -- as far as the verified complaint was for \$85,000. We agree that that is the amount that we owe.

Consequently, GMP argues that the summary judgment award of \$90,000.00 in principal debt, when the complaint requested only \$85,000.00, raises a genuine issue as to the principal balance Miller was owed. We note, however, that in another instance, GMP admitted to the allegations contained in paragraph 4 of the complaint, that included the allegation that

"the balance outstanding over 30 days beginning on March 29, 1996, as described by the transaction record attached as Exhibit B," was \$90,000.00 as of October 31, 1997. This allegation GMP had also previously denied in its late response to Miller's request for admissions. Hence, for all intents and purposes, GMP admitted it owed Miller the \$90,000.00 principal balance.

Apparently, the discrepancy arose because of GMP's \$5,000.00 payment on December 11, 1997. That payment, if deducted from the \$90,000.00 principal outstanding, would yield the \$85,000.00 principal Miller prayed for in its complaint. If deducted from accrued interest, however, it would not affect the \$90,000.00 principal Miller requested in its motion for summary judgment.

Whatever the cause of the alleged discrepancy might have been, in the context of the motion for summary judgment, GMP failed to raise the discrepancy as a genuine issue of material fact.

As of July 29, 1999, the day Miller filed its motion for summary judgment (the attached certificate of service indicates that the motion was served on July 20, 1999), GMP knew from several references in the motion and from the transaction record attached to the complaint and the motion that Miller sought a \$90,000.00 principal award. Based on a hearing date of August 31, 1999, GMP had about a month to raise, and factually support, the issue of the discrepancy. However, GMP chose not to



file any written opposition to Miller's motion. In addition, GMP chose not to explain, and failed to file a single affidavit or present any evidence in support of, its contention that the discrepancy between the amount sought in Miller's verified complaint, and that sought in its motion for summary judgment, raised a genuine issue of material fact.

Indeed, it was not until the hearing on the motion that GMP first brought the discrepancy to the court's attention. However, GMP failed to there demonstrate how the discrepancy created a genuine issue of material fact. GMP merely pointed to the quantitative difference between the principal award prayed for in Miller's verified complaint, and that requested in Miller's motion for summary judgment:

THE COURT: Can you address that issue first, [GMP's counsel]. I mean we have received no written opposition for us to even consider your --

[GMP's COUNSEL]: [Miller] isn't entitled to anything more than what this complaint asks for. And his complaint asks for, even if it was coming forward on that, his complaint asked for \$85,000 because -- and so we are saying that that amount is correct.

But as far as the calculation of interest and attorneys' fees, we'd be pointing out that in [Miller's] own submittal to the court [Miller] has an inconsistency in calculating it at different times.

We're asking that this should be determined on the \$85,000 amount. [Miller has] calculated it on a different amount.

GMP did not file an affidavit or otherwise submit any evidence that created a genuine issue of material fact as to the discrepancy. It did not declare, for example, that the parties

intended that payments be applied first to principal. Nor did it swear, for other example, that the application of payments was at its option and that it chose to pay the December payment on the principal amount.

Mere representations by counsel in oral argument, like that proffered by GMP at the hearing as its sole opposition to summary judgment, "cannot be considered in determining a motion for summary judgment." Au v. Au, 63 Haw. 210, 213, 626 P.2d 173, 177 (1981). Cf. Freitas v. City and County, 58 Haw. 587, 589, 574 P.2d 529, 531 (1978) (a party opposing a motion for summary judgment may not rely on unverified statements in counsel's memorandum in opposition to the motion). Hence, GMP's opposition to summary judgment constituted "[b]are allegations or factually unsupported conclusions . . . insufficient to raise a genuine issue of material fact, and therefore, insufficient to reverse a grant of summary judgment.'" Hawaii Broadcasting Co. v. Hawaii Radio, 82 Hawai'i 106, 115, 919 P.2d 1018, 1027 (App. 1996) (quoting Reed, 76 Hawai'i at 225, 873 P.2d at 104) (brackets and ellipsis in the original).

Instead, GMP appears to have been presenting the issue of the discrepancy to the court as a matter of law. But GMP's reliance upon the bare fact of a quantitative discrepancy avails it nothing as a matter of law.

Although court rule cautions that "[a] judgment by default shall not be different in kind from or exceed in amount

that prayed for in the demand for judgment[,]" HRCF Rule 54(c) (1999) (emphasis supplied), so that the defending party has adequate notice upon which to make an informed judgment whether to default or actively defend, In Re Genesys Data Technologies, Inc., 95 Hawai'i 33, 38, 18 P.3d 895, 900 (2001); Matsushima v. Rego, 67 Haw. 556, 559, 696 P.2d 843, 846 (1985), the same rule expressly allows that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." HRCF Rule 54(c).

We are a notice pleading jurisdiction. All that HRCF Rule 8(a) (1999) requires is "a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief to which he deems himself entitled." Significantly, "[r]elief in the alternative or of several different types may be demanded." Id. Hence, any assertion that Miller was somehow bound by or held to its \$85,000.00 principal prayer for relief must fail. Cf. HRCF Rule 8(e) (2) ("[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically").

Although GMP merely mentions the phrase, "due process," once in passing in its reply brief, we consider that issue here. Even though Miller's verified complaint prayed for relief based on an \$85,000.00 principal debt, the summary judgment award,

based on a \$90,000.00 principal debt, did not deprive GMP of due process.

The basic requirements of due process are notice and a meaningful opportunity to be heard:

Due process is not a fixed concept requiring a specific procedural course in every situation. Rather, due process is flexible and calls for such procedural protections as the particular situation demands. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 388, 984 P.2d 1198, 1214 (1999) (citations omitted).

Although Miller's verified complaint closed with a prayer for \$85,000.00 in principal debt, the verified complaint described Miller's claim so that GMP had sufficient notice of the damages sought. In particular, paragraph 3 thereof alleged that GMP was "indebted to [Miller] in the sum of \$85,000.00 for goods and/or services delivered by [Miller] to [GMP] pursuant to the June 10, 1996 letter from [Miller] to [GMP.]" The very next paragraph alleged a "balance outstanding over 30 days beginning on March 29, 1996, as described by the transaction record attached as Exhibit B, and a payment of \$5,000.00 by [GMP] on December 11, 1997." Both the verified complaint, and the subsequent motion for summary judgment, attached a copy of the transaction record that clearly showed the \$90,000.00 principal balance outstanding, along with the information about the \$5,000.00 payment that may have explained, and should have

alerted GMP to, the discrepancy. GMP was certainly aware of the issue, because it raised the issue of the discrepancy during the summary judgment hearing. Furthermore, Miller's motion provided clear notice, in several places therein, that it was seeking a \$90,000.00 principal award.

After it was served with Miller's motion, GMP had ample opportunity to file written opposition and affidavits in its own defense. GMP chose neither of these options. This inaction was the sole reason GMP mustered no meaningful opposition at the hearing on the motion. It had an otherwise meaningful opportunity to be heard. Cf. Genesys, 95 Hawai'i at 43, 18 P.3d at 905 (concluding that a defaulting defendant was not denied due process by an award of damages not pled, because it had adequate notice of the damages sought by way of allegations in the complaint, notice of the default judgment damages hearing and the specific amounts to be claimed therein, and the opportunity to defend at the damages hearing).

Accordingly, we conclude GMP had notice of the \$90,000.00 principal outstanding, and an opportunity to defend against it, and hence was not denied due process.

*B. Reasonable Attorneys' Fees.*

GMP appeals the circuit court's award of attorneys' fees, in the amount of \$22,500.00 (twenty-five percent of the \$90,000.00 principal award). GMP asserts that the court abused

its discretion when it awarded Miller attorneys' fees, pursuant to HRS § 607-14, allegedly without considering the reasonableness of the fees. Miller, on the other hand, argues that the 1993 amendments to HRS § 607-14 empowered the court to award attorneys' fees solely on the basis of an agreed upon fee.

Prior to the legislature's passage of the 1993 amendments, HRS § 607-14 provided for an award, "to be paid by the losing party" in an assumpsit action, of attorneys' fees "which the court determines to be reasonable but which shall not exceed the amount obtainable" under a schedule consisting of a sliding scale of percentages of the judgment amount. HRS § 607-14 (1985). HRS § 607-14 now reads, in relevant part, as follows:

In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

In his affidavit in support of the attorneys' fees requested, Miller's counsel averred:

(7) The House and Senate Joint Conference Committee Report #127, dated April 29, 1993, which stated in part the purpose and intent of H.B. No. 1089 (later enacted and more commonly known as HRS [§

607-14), noted that “[y]our Committee finds that attorneys’ fees in assumpsit actions are often based on a percentage as opposed to an hourly rate, and the current law does not fairly compensate a creditor for the expense of retaining an attorney to prosecute its claim, . . .” (emphasis added)[.]

(8) In his personal capacity and as Founder and Chair of the Collection Law Section of the Hawaii State Bar Association, your affiant had the privilege of drafting the original version of HRS [§] 607-14 that was submitted to the Legislature and testifying about the purposes of the change from the old “default schedule.” As reflected in the Legislative history, the Legislature wanted contingent fees to be deemed reasonable and to be awarded. In affiant’s opinion, Plaintiff’s request for attorney’s fees is exactly the type of case that the Legislature specifically wanted to cover.

(Emphases, some brackets, and parenthetical in the original.) It is true that, as a result of the 1993 amendments, “if the fee is not based on an hourly rate,” Miller could submit an affidavit stating “the amount of the agreed upon fee[,]” instead of “an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment[.]” HRS § 607-14. This does not mean, however, that an attorneys’ fee request need not demonstrate, and the court need not consider, the further issue of the reasonableness of the fee.

This is evident from the plain and clear language of HRS § 607-14. Regardless of whether prevailing counsel’s affidavit states the agreed upon fee, or the time spent on the case, the court must “then tax attorneys’ fees, which the court determines to be reasonable[.]” HRS § 607-14 (emphasis added). And the statute provides, overall, for an award of “a fee that

the court determines to be reasonable[.]” Id. See Amantiad v. Odum, 90 Hawai‘i 152, 160-161, 977 P.2d 160, 168-169 (1999) (in the absence of ambiguity in the language of a statute, construction of the statute is to be obtained primarily from the language contained in the statute itself).

In this case, Miller submitted an affidavit of counsel that, in essence, simply set forth the agreed upon fee; in pertinent part:

4. [Miller] hired Dun & Bradstreet, a commercial collection agency, to collect this debt for a contingent fee. Defendant refused to pay. Counsel was retained through Dun & Bradstreet as agent for [Miller]. [Miller] is paying an overall legal collection fee of 37% of the first \$3,000.00 collected, and 30% of sums above \$3,000.00. Counsel is paid some of this fee on a non-contingent basis, and some as a contingent fee upon collection.

This recital, and the assertion that the requested fee does not exceed the twenty-five percent cap set by HRS § 607-14, do not automatically trigger a conclusion that the fee is reasonable. This, however, remains Miller’s position on appeal, predicated upon its assertion that “the true reasoning and legislative intent of [HRS] § 607-14 was to make the creditor whole.” Answering Brief at 10 (footnote omitted).

Attorneys’ fees are not presumptively reasonable. Finley v. Home Ins. Co., 90 Hawai‘i 25, 38-39, 975 P.2d 1145, 1158-59 (1998). As the prevailing party, Miller had the burden of demonstrating the reasonableness of the fee. Sharp v. Hui Waihine, Inc., 49 Haw. 241, 247, 413 P.2d 242, 246 (1966);



Smothers v. Renander, 2 Haw. App. 400, 408, 633 P.2d 556, 563 (1981). As we have concluded, HRS § 607-14 requires that Miller had to show, not only the agreed upon fee, but its reasonableness. See also Finley, 90 Hawai'i at 38, 975 P.2d at 1158 (emphasizing the phrase in HRS § 607-14, "a fee that the court determines to be reasonable").

Aside from the foregoing, the affidavit of Miller's counsel was devoid of evidence adequately demonstrating that the fees incurred in this particular case were reasonable. The affidavit contained several *non sequiturs* quite unrelated to the issue of the reasonableness of the requested attorneys' fees. For example, the assertion that GMP used Miller's work "as a component of a government project[,] " but did not pay Miller. Or the plaint that GMP "forced [Miller] to have to file suit and retain an attorney in order to protect [Miller's] rights."

The affidavit also asserted that the contingent fee agreed upon in this case

is based upon the national standard used to pay attorneys for the approximately two million commercial collection cases forwarded yearly under the auspices of the Commercial Law League of America. This case was forwarded under that system. It is a reasonable fee because it is the nationwide standard fee for these two million cases, the fee paid by the business creditors.

In this connection, the affidavit also asserted that a contingency fee "is a commercially reasonable method of attorney compensation." While these assertions may or may not be relevant to the issue of the reasonableness of attorneys' fees under HRS §

607-14, cf. Sharp, 49 Haw. at 244-47, 413 P.2d at 245-46 (suggesting that the customary fees charged by attorneys in the locality where the services were performed is relevant to an inquiry into their reasonableness), they remain, in the context of this case, indistinguishable from Miller's position that the agreed upon fee is *ipso facto* reasonable under the statute because it makes the creditor whole. Overall, the affidavit of Miller's counsel remains an adamant insistence that "[t]he Legislature amended [HRS § 607-14] to specifically allow a creditor to be made whole by stating that contingent fees were reasonable."

The affidavit's most relevant proffer is that "[GMP] has considerably delayed the instant action through not responding to [Miller's] inquiries, making settlement offers, then reneging on them, and responding [(sic; presumably, "not responding")] to discovery." Yet, this proffer focuses on GMP's actions, and fails to illuminate the work Miller was required to perform in response that made the requested fees reasonable. A perusal of the record on appeal reveals, in this respect, Miller's simple verified complaint; its requests for answers to interrogatories, production of documents and admissions; its two-page pretrial statement; and its rudimentary motion for summary judgment based primarily upon GMP's default in properly responding to Miller's discovery requests. We do not consider

relevant in this respect matters in the record relating to Miller's efforts to stave off dismissal due to its failure to timely file its pretrial statement.

While we do not hold, as GMP urged below and argues on appeal, that an "hourly breakdown of services" is necessary to show the reasonableness of agreed upon attorneys' fees requested under HRS § 607-14, Smothers, 2 Haw. App. at 409, 633 P.2d at 563 (citation omitted), absent some adequate basis for determining the reasonableness of the fee, we fail to see, in what appears to be a fairly simple and straightforward collection action in which the defendant in essence admitted its liability by default, how the court concluded that the fee was reasonable, as required by HRS § 607-14. Cf. Finley, 90 Hawai'i at 39, 975 P.2d at 1159 (concluding that the trial court's award of attorneys' fees was supported by its access to the prevailing party's "complete, detailed billing statements"); Smothers, 2 Haw. App. at 409, 633 P.2d at 563 (trial court's award of \$19,000.00 in attorneys' fees affirmed where the record on appeal provided "ample support for the lower court's award[,]" in that it showed a two-year period of litigation and "a great deal of pretrial and post-trial activity and five trial days").

While there is very little in the record of this case that reveals the court's rationale for its award of attorneys' fees, and we hasten to add that is no defect, Finley, 90 Hawai'i at 39, 975 P.2d at 1159 ("[a] detailed explanation of the

rationale underlying the reduction in attorneys' fees awarded is not necessary"), we are concerned the court might have adopted Miller's erroneous position that an agreed upon fee is *ipso facto* reasonable under HRS § 607-14. Or that the court granted Miller's fee request, not because the fee request was reasonable, because GMP had filed no written opposition to Miller's motion:

[GMP'S COUNSEL]: Additionally, Your Honor, as a far as attorneys' fees, there's a provision for reasonable but that doesn't mean that it's automatically 25 percent. It should be calculated on the actual amount of time and billings that the attorney spent on the case.

And we would ask that that be --

[MILLER'S COUNSEL]: Your Honor, I just wish that I had had a written --

THE COURT: Well, I didn't realize there was going to be any opposition to any extent at all, [GMP's counsel] so.

. . . .  
THE COURT: Can you address that issue first, [GMP's counsel]. I mean we have received no written opposition for us to even consider your --

. . . .  
[GMP'S COUNSEL]: And, also as far as attorneys' fees, Your Honor, he can't get more than what's reasonable. What's reasonable is based on his actual time rather than some set amount. And that's what is provided for.

So all I'm saying is we're agreeing as to the amount prayed for of 85,000. We're just saying that there should be a recalculation of the interest and attorneys' fees.

THE COURT: All right. Well, because you've no opposition to the motion, and I deem it to be unopposed, and, so as to all issues raised by the motion it is granted, all right.

{Emphasis supplied.) We also observe, in passing, that neither the order granting Miller's motion nor the final judgment thereon contained an express determination that the attorneys' fees awarded were reasonable. Indeed, neither document used the adjective "reasonable" when referring to the attorneys' fees awarded.

Under the circumstances, we find ourselves with a dilemma similar to that faced by the Sharp court:

In view of the inadequacy of the present record, not only to support the fees allowed and awarded but to even enable the trial judge to exercise his discretion in determining "reasonable" attorneys' fees, the attorneys' fees allowed and awarded are set aside. The matter of attorneys' fees is remanded for further hearing so as to enable the trial judge to properly exercise his discretion in determining the true value of the services rendered by counsel and to fix "reasonable" attorneys' fees therefor in accordance with this opinion.

Sharp, 49 Haw. at 251, 413 P.2d at 249.

#### **IV. Conclusion.**

Based on the foregoing discussion, we affirm the December 10, 1999 order for summary judgment. However, we vacate the award of attorneys' fees therein and remand for a

determination whether the amount of attorneys' fees sought were reasonable under HRS § 607-14.

Dated: Honolulu, Hawaii, July 31, 2001.

On the briefs:

|  |  |
|--|--|
| Richard C. Sutton, Jr.<br>Frank P. Richardson<br>(Rush Moore Craven<br>Sutton Morry & Beh)<br>for defendant-appellant. | Chief Judge<br><br><br><br>Associate Judge |
| Remy Luria (The Luria<br>Law Firm) for<br>plaintiff-appellee.  | Associate Judge                            |