

NO. 26036

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

HERMAN B.K. LEE and SAM MOI LAU LEE,  
Plaintiffs-Appellees, Cross-Appellants,  
v.  
YU-SEN HWANG aka JOHNSON HWANG,  
Defendant-Appellant, Cross-Appellee

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STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CV. NO. 01-1-2833)

MEMORANDUM OPINION

(By: Watanabe, Presiding Judge, Nakamura, and Fujise, JJ.)

Defendant-Appellant/Cross-Appellee Yu-Sen Hwang (hereinafter "Hwang" or "Defendant") and Plaintiffs-Appellees/Cross-Appellants Herman B.K. Lee and Sam Moi Lau Lee (hereinafter collectively referred to as "the Lees" or "Plaintiffs") both appeal from the Amended Final Judgment entered on July 25, 2003, in the Circuit Court of the First Circuit (circuit court).<sup>1</sup>

BACKGROUND

I. Statement of Facts

The Lees owned six and one-half acres of farm land in Waianae, which they leased to Hwang. The property included a house and adjacent packing shed. Hwang used the property to cultivate and package basil and allowed his workers to sleep in the house at night.

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<sup>1</sup> The Honorable Eden Elizabeth Hifo presided.

In 1993, the parties entered into a written lease agreement (the Lease) in which the Lees agreed to lease the property to Hwang subject to terms and conditions that included the following:

3. The Lessee shall personally occupy said demised premises and shall keep the same in good repair, including all improvements which may hereafter be added, damage by the elements excepted, and shall not make any alterations thereon without the written consent of the Lessor and shall not commit or suffer to be permitted any waste upon said premises.

. . . . .

9. Should the Lessee occupy said premises after the date of the expiration of this lease with the consent of the Lessor, express or implied, such possession shall be construed to be a tenancy from month to month only, subject to all the conditions and restrictions of this lease, and the Lessee agrees to pay rent therefor at the rate prevailing at the time of the expiration of said term.

. . . . .

11. At the expiration of said term or the sooner determination thereof, the Lessee shall peacefully quit and surrender possession of said premises in as good condition as reasonable use and wear thereof will permit.

The Lease expired on June 30, 1998, but pursuant to Paragraph 9 of the Lease, Hwang continued to occupy a smaller portion of the property which included the house and packing shed (hereinafter referred to as "the subject property") on a month-to-month basis, paying a reduced rent. Hwang was still occupying the subject property on August 24, 2000, when a fire substantially destroyed the house and packing shed. After the fire, Hwang abandoned the subject property without performing any cleanup and stopped paying rent.

The exact source and cause of the fire were unknown. However, there was evidence that Hwang had kept flammable materials such as wood, paper, paper products, wood products, and

vegetation on the subject property. In addition, Hwang had allowed an inordinate amount of household trash to accumulate on the subject property that would add to the spread of a fire. The Honolulu Fire Department (HFD) responded to the fire and extinguished it. An incident report by the HFD stated:

The use, or purpose of the material that was first ignited was "rubbish, trash, or waste." "Improper container or storage" contributed to the ignition of the fire.

II. Proceedings Below

On November 5, 2001, the Lees filed a First Amended Complaint, which alleged two causes of action. Count 1 alleged that Hwang had breached covenants in the Lease requiring him to keep the subject property in good repair, to not commit waste, and to surrender the subject property in good condition. Count 2 alleged that the fire was caused by the negligence or other fault of Hwang and that he was liable for damages resulting therefrom. The Lees prayed for judgment awarding them "damages resulting from the Fire or otherwise resulting from Defendant's breaches of the Lease, plus Plaintiffs' costs and attorneys' fees . . . ."

The case proceeded to a jury trial. The circuit court submitted a Special Verdict Form with eleven questions to the Jury, which the jury answered as follows:

Question No. 1: Was the Defendant negligent?

Yes:  No:

If you answered "Yes" to Question No. 1, go on to Question No. 2. If you answered "No" to Question No. 1, go on to Question No. 6.

Question No. 2: Was the Defendant's negligent [sic] a legal cause of damage to Plaintiffs' property?

Yes:  No:

If you answered "Yes" to Question No. 2, go on to Question No. 3. If you answered "No" to Question No. 2, go on to Question No. 6.

Question No. 3: Were Plaintiffs contributorily negligent?

Yes:   ✓   No:       

If you answered "Yes" to Question No. 3, go on to Question No. 4. If you answered "No" to Question No. 3, go on to Question No. 6.

Question No. 4: Was Plaintiffs' contributory negligence, if any, a legal cause of damages to Plaintiffs' property?

Yes:   ✓   No:       

If you answered "Yes" to Question No. 4, go on to Question No. 5. If you answered "No" to Question No. 4, go on to Question No. 6.

Question No. 5: Assuming the combined negligence of the Defendant and the contributory negligence of the Plaintiffs, if any, to be 100%, what proportion of such combined negligence is attributable to (1) the Plaintiffs, and (2) the Defendant?

Plaintiff	<u>  49  </u> %
Defendant	<u>  51  </u> %
TOTAL (Note: the total must equal 100%)	100%

Now go on to Question No. 6.

Question No. 6: What is the replacement cost of the property destroyed?

\$94,074

Now go on to Question No. 7.

Question No. 7: What is the depreciated value of the cost of replacement of the property destroyed?

\$34,947

Now go on to Question No. 8.

Question No. 8: What was the amount of loss of use (rentals) caused by the fire?

\$  0  

Now go on to Question No. 9.

Question No. 9: What, if any, other economic damages were caused by the fire?

\$26,000

Now go on to Question No. 10.

Question No. 10: If you answered "No" to either Question No. 1 or 2, do not answer this question and go on to Question No. 11. If you answered "Yes" to both Questions Nos. 1 and 2, then go on to answer the following question:

Without taking into consideration the issue of reduction of damages due to the contributory negligence of the Plaintiffs, if any, what are Plaintiffs' total damages?

\$60,947

Now go on to Question No. 11.

Question No. 11: Do not consider any damages caused by the fire in answering this question. What is the cost of restoring the property to its original condition less normal wear and tear?

\$26,000

Prior to the return of the special verdict, the circuit court granted the Lees' motion for partial judgment that, as a matter of law, Hwang had breached the covenant to surrender the subject property in good condition by failing to clean up and restore the subject property with respect to conditions unrelated to the fire damage. Hwang did not object to the court's entry of this partial judgment. After the special verdict was returned, the court used \$26,000 -- the jury's answer to Question No. 11 regarding the "cost of restoring the property to its original condition less normal wear and tear" without considering any damages caused by the fire -- as the measure of damages for the breach of the covenant to surrender the subject property in good condition apart from the fire damage.

The parties disagreed on how damages related to the fire should be assessed. The parties argued about whether the Lees' claim for fire-related damages lay in contract or in tort, what the proper measure of damages should be, and whether the damages should be reduced by the jury's finding that the Lees'

contributory negligence had been 49 percent of the combined negligence of the parties. The Lees elected their remedy for breach of contract instead of their remedy in tort. Based on that election, the Lees argued that their damages should not be reduced by the jury's finding of their contributory negligence since contributory negligence is not a defense to breach of contract. They also argued that the proper measure of damages for the property destroyed by fire was its replacement cost. Hwang argued that the Lees' claim was grounded in negligence not in breach of contract, that the measure of damages for the destroyed property should be the depreciated value of its replacement cost, and that the total fire-related damages found by the jury should be reduced by 49 percent to reflect the Lees' contributory negligence.

In awarding damages caused by the fire, the circuit court started with \$60,947, the amount the jury found in Question No. 10 was the total damages suffered by the Lees without considering their contributory negligence, which in turn was the sum of the amounts the jury found for "the depreciated value of the cost of replacement of the property destroyed" (\$34,947 -- Question No. 7) and the "other economic damages" caused by the fire (\$26,000 -- Question No. 9). The court then applied comparative negligence principles and reduced the \$60,947 figure by 49 percent based on the contributory negligence the jury attributed to the Lees, resulting in a figure of \$31,082.97. The court noted that although contributory negligence is not normally

a defense to breach of contract, it was appropriate to reduce the damages by the Lees' contributory negligence because proof of Hwang's negligence was required to prove his breach of contract relating to the fire.

The circuit court entered the Amended Final Judgment in favor of the Lees and against Hwang on Counts 1 and 2 of the First Amended Complaint, awarding to the Lees:

1. Damages caused by the fire in the amount of \$31,082.97;
2. Damages unrelated to the damages caused by the fire, for the cost of restoring the property to its original condition less normal wear and tear, in the amount of \$26,000.00;
3. Prejudgment interest from August 24, 2000 until February 24, 2003 in the amount of \$14,270.74, plus interest of \$15.64 per day, for every day after February 24, 2003, until the entry of this Judgment; and
4. Attorneys' fees in the amount of \$17,797.37 and costs in the amount of \$1,607.85.

The attorney's fees were awarded pursuant to Hawaii Revised Statutes (HRS) § 607-14 (Supp. 2006), which authorizes courts to award attorney's fees in actions in the nature of assumpsit, but limits the amount that can be awarded to no more than twenty-five percent of the judgment. The Lees submitted documentation representing that attorney's fees in the amount of \$75,921.44 had been incurred. The circuit court's award of \$17,797.37 in attorney's fees was calculated by using the twenty-five percent limit imposed by HRS § 607-14 and applying it to the court's total award of damages, including prejudgment interest up through February 11, 2003.

III. Issues Raised by the Parties on Appeal

On appeal, Hwang argues that the circuit court erred in awarding attorney's fees pursuant to HRS § 607-14 because the Lees' case was based on negligence, not breach of contract, and "[t]here is no recovery of attorney's fees for a case sounding in tort." On cross-appeal, the Lees argue that the circuit court erred in: 1) awarding damages based on the depreciated value of the replacement cost of the property destroyed in the fire instead of the property's replacement cost; and 2) reducing the Lees' breach-of-contract damages related to the fire by 49 percent for their contributory negligence.

We hold that the Lees were entitled to elect their breach-of-contract remedy instead of their remedy in tort and thus the circuit court properly awarded attorney's fees pursuant to HRS § 607-14. We further hold that the court did not err in calculating the total damages attributable to the fire but that the court did err in applying comparative negligence principles to reduce those damages by 49 percent for the Lees' contributory negligence. Accordingly, we remand the case for entry of an award of damages attributable to the fire that is not reduced for the Lee's contributory negligence. We also remand the case to permit the circuit court to recompute other aspects of the judgment which may be affected by the increased damages award.

DISCUSSION

I.

In Orient Ins. Co. v. Pioneer Mill Co., 27 Haw. 698 (1924), the Supreme Court of the Territory of Hawai'i construed lease covenants which obligated the tenant to "keep all buildings, structures and erections now on the demised premises in good order and repair" and to "deliver up to the lessor said premises with all improvements and erections thereon" at the "expiration or sooner determination of the lease." Id. at 700. The court held that these covenants did not obligate the tenant to rebuild, or pay for losses attributable to, a building on the leased premises that was destroyed by fire through no fault of the tenant. Id. at 712.

This is case is different from Orient, however, because Hwang was found to be negligent in causing the damages resulting from the fire. See Brinton v. Sch. Dist. of Shenango Twp., 81 Pa. Super. 450 (1923) (concluding that a lessee is subject to an implied covenant to return the demised premises without injury caused by the lessee's willful or negligent acts, which renders the lessee responsible for the loss of a building by fire caused by the lessee's negligence); Williams v. Bd. of Comm'rs. of Kearny County, 60 P. 1046, 1047-48 (Kan. 1900) (holding that lessee who entered into a building lease containing covenants obligating the lessee to return the premises in good condition and to not make or suffer waste was responsible for damages caused by the lessee's negligent destruction of the building by

fire). We conclude that Hwang breached the Lease by negligently causing damages to the subject property that resulted from the fire. See Brinton, 81 Pa. Super. 450; Williams, 60 P. at 1047-48.

Hwang covenanted to keep the subject property, including all improvements, "in good repair" but with "damage by the elements excepted." The "damage by the elements" exception did not exclude damage by fire due to Hwang's negligence from the scope of the covenant to keep the subject property in good repair. See Edwards v. Ollen Rest. Corp., 98 N.Y.S.2d 815, 820 (1950); Salina Coca-Cola Bottling Corp. v. Rogers, 237 P.2d 218, 221-22, 224 (Kan. 1951); Carstens v. Western Pipe & Steel Co., 252 P. 939, 941-42 (Wash. 1927). Hwang covenanted that he would not commit waste upon the subject property. Waste includes "injury resulting from failure to exercise reasonable care in preserving the property," R.C. Bowen Estate v. Continental Trailways, Inc., 256 S.W.2d 71, 72 (Tex. 1953), and thus Hwang agreed to avoid negligently causing damage to the subject property. Hwang further covenanted to "peacefully quit and surrender possession of said premises in as good condition as reasonable use and wear thereof will permit." This obligated Hwang to return the subject property upon surrender in substantially the same condition as he received it, subject to normal deterioration and wear and tear. See 2 Milton R. Friedman and Patrick A. Randolph, Jr., Friedman on Leases, § 18:1, at 18-2

(5th ed. 2006); Schimmelfennig v. Grove Farm Co., 41 Haw. 124, 129 (1955).

Whether Hwang breached the Lease because of the damages resulting from the fire turned on whether he was negligent in causing those damages. Hwang argues that because the focus of the litigation was on whether he was negligent, the Lees' lawsuit was necessarily a tort action, not a contract action, and thus attorney's fees could not be awarded pursuant to HRS § 607-14. We disagree.

The fact that proof of Hwang's negligence was required to establish his breach of the Lease with respect to the fire-related damages does not mean that the Lees' claim sounded only in tort and not in contract. Hwang's conduct constituted both negligence and breach of contract. See Brinton, 81 Pa. Super. 450; Williams, 60 P. at 1046-48. The Lees' complaint alleged both causes of action. The Lees were entitled to, and did, elect their breach-of-contract remedy instead of their remedy in tort. See Hawai'i Rules of Civil Procedure (HRCP) Rule 8(e)(2) (party may plead as many separate claims as the party has without regard to consistency and whether based on legal or equitable grounds); Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 71, 905 P.2d 29, 46 (1995) (explaining election of remedies doctrine). Accordingly, the Lees' lawsuit qualified as an "action[] in the nature of assumpsit" under HRS § 607-14, and the circuit court properly awarded attorney's fees pursuant to HRS § 607-14.

II.

The Lees argue that the circuit court erred in awarding damages based on the depreciated value of the replacement cost of the property destroyed instead of its replacement cost. We conclude that the circuit court did not err in calculating the total damages attributable to the fire.

"Leases are essentially contractual in nature and are reviewed under principles of contract law." Hi Kai Inv., Ltd. v. Aloha Futons Beds & Waterbeds, Inc., 84 Hawai'i 75, 78, 929 P.2d 88, 91 (1996). Consistent with the traditional contract remedy, a lessor is entitled to recover as damages for the breach of lease covenants an amount that "will place [the lessor] in the same position it would have been in had the covenant[s] . . . not been breached by the lessee." Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 606, 617, 575 P.2d 869, 877 (1978). Stated another way, "a party who sustains loss by the breach of another is entitled to compensation that will actually or as precisely as possible compensate the injured party." Aloha Futons, 84 Hawai'i at 80-81, 929 P.2d at 93-94 (internal quotation marks omitted).

Question No. 10 of the jury's special verdict asked the jury to determine the Lees' total damages without considering any reduction for the Lees' contributory negligence. During its deliberations, the jury submitted the following question to the court:

Does question #10 include the depreciated value of the property or not?

With the agreement of both parties, the court answered the question as follows:

The primary object of an award of damages is to provide just compensation for the loss sustained. The measure of damages should not provide a windfall for either party. Each of the various methods of calculating damages set forth in Questions 6 through 9 may be considered by you. You are instructed to determine the actual damages which in your judgment will adequately and fairly compensate the landlord for damages legally caused by the tenant's negligence.

The jury thereafter answered Question No. 10 with the figure "\$60,947," which is the sum of the amounts the jury found in its previous answers for "the depreciated value of the cost of replacement of the property destroyed" (\$34,947 -- Question No. 7) and "other economic damages" caused by the fire (\$26,000 -- Question No. 9). In answering Question No. 10, the jury obviously did not use the replacement cost of the property destroyed which it had determined was \$94,074 in its answer to Question No. 6.

We conclude that the jury's answer to Question No. 10 of the special verdict was a reasonable measure of the damages sustained by the Lees as a result of Hwang's breach of the Lease that was attributable to the fire. The jury's assessment of damages was consistent with Hawai'i law, see Food Pantry, 58 Haw. at 617, 575 P.2d at 877 and Aloha Futons, 84 Hawai'i at 80-81, 929 P.2d at 93-94, and cases from other jurisdictions. See Dodge St. Bldg. Corp. v. United States, 341 F.2d 641, 644 (Ct. Cl. 1965) (concluding that the proper measure of damages for a lessee's breach of its obligation to restore the premises is the lesser of the cost of restoration and the diminution in the fair

market value of the property caused by the lessee's nonperformance); Lipton Realty, Inc. v. St. Louis Housing Authority, 705 S.W.2d 565, 569 (Mo. Ct. App. 1986) (concluding that the diminution in fair market value and not the cost of restoring the premises was the proper measure of damages regardless of whether the action was for breach of contract or for waste); Missouri Baptist Hospital v. United States, 555 F.2d 290, 295 (Ct. Cl. 1977) (holding that recovery cannot be based on the cost of repairs when such costs exceed the diminution in fair market value attributable to the lessee's breach); Lemon v. Fein, 467 So.2d 548, 554 (La. Ct. App. 1985) (holding that the proper measure of damages for the destruction of a building by fire was the building's replacement cost reduced by 40 percent to reflect depreciation); Container Co. v. United States, 90 F. Supp. 689, 693-94 (Ct. Cl. 1950) (using cost of restoring building reduced by depreciation in measuring damages for breach of covenant to repair).

It was reasonable for the jury to conclude that using the replacement cost of the property destroyed to calculate damages would have resulted in a windfall to the Lees. The house was over 50 years old and apparently had no functioning bathroom when it was destroyed by the fire. Because the house was destroyed, it was difficult to determine the true condition of the house immediately prior to the fire and thus to assess its fair market just before it was destroyed. Under these circumstances, the depreciated value of the replacement cost of

the destroyed property provided a reasonable measure of the amount necessary to fairly compensate the Lees for the property destroyed. We conclude that the circuit court did not err in using \$60,947, the jury's answer to Question No. 10, as the total fire-related damages suffered by the Lees.

III.

The Lees argue that the circuit court erred in applying comparative negligence principles to reduce the damages attributable to the fire by 49 percent for the Lees' contributory negligence. We agree.

Contributory negligence and comparative negligence are principles of tort law and do not provide a defense to actions for breach of contract. E.g., Carter v. Hawaii Transp. Co., 201 F. Supp. 301, 303 (D. Hawaii 1961) ("Contributory negligence is not a defense to breach of contract."); Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 493 (Tex. App. 1994) ("[R]eduction in damages under comparative negligence is applicable to negligence actions only and not to recoveries for breach of contract."). "The difference between a tort and a contract action is that a breach of contract is a failure of performance of a duty arising under or imposed by agreement, whereas a tort is a violation of a duty imposed by law." Haysville U.S.D. No. 261 v. GAF Corp., 666 P.2d 192, 201 (1983). While comparative negligence serves to reduce a plaintiff's recovery of damages in tort proportionately to the plaintiff's own comparative fault in proximately causing the injury,

"contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault." 3 E. Allan Farnsworth, Farnsworth on Contracts, § 12.8, at 195-96 (3d ed. 2004).

Parties to a contract have the power to specifically delineate the scope of their liability at the time the contract is formed. Thus, there is nothing unfair in defining a contracting party's liability by the scope of its promise as reflected by the agreement of the parties. Indeed, this is required by the very nature of contract law, where potential liability is determined in advance by the parties.

Bd. of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley, 517 N.E.2d 1360, 1365 (N.Y. 1987).

The Lees elected their breach of contract remedy rather than their remedy in tort. Accordingly, we conclude that the circuit court erred in reducing the damages for breach of the Lease that were attributable to the fire by 49 percent for the Lees' contributory negligence. On remand, the circuit court is directed to enter judgment for damages caused by the fire without reduction for the Lees' contributory negligence.

#### CONCLUSION

Our holding that the circuit court erred in reducing the damages caused by the fire for the Lees' contributory negligence affects not only those damages but may also affect the circuit court's award of prejudgment interest and attorney's fees. We therefore vacate the portions of the Amended Final Judgment awarding 1) damages caused by the fire, 2) prejudgment interest, and 3) attorney's fees, and we remand the case with instructions that the circuit court redetermine those items in a manner consistent with this memorandum opinion. We affirm the

remaining portions of the Amended Final Judgment which awarded 1) damages unrelated to the damages caused by the fire in the amount of \$26,000.00 and 2) costs in the amount of \$1,607.85.

DATED: Honolulu, Hawai'i, March 29, 2007.

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