

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26682

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

GE CAPITAL HAWAII, INC., a Hawaii corporation,
Plaintiff-Appellee, v. SHANGHAI INVESTMENT
COMPANY, INC., now known as HOTELS IN PARADISE,
INC., a Hawaii corporation; KVR INCORPORATED, a
Hawaii corporation; and SIMON BEBB, Defendants-
Appellants, and THOMAS T. ENOMOTO; ALTEKA CO.,
LTD., a Japan corporation; ASSOCIATION OF
APARTMENT OWNERS OF KUHIO VILLAGE RESORT I; and
ASSOCIATION OF APARTMENT OWNERS OF KUHIO VILLAGE
RESORT II, Defendants-Appellees, and JOHN DOES 1-
50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE
CORPORATIONS 1-50; DOE ENTITIES 1-50; and DOE
GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 00-1-3657)

SUMMARY DISPOSITION ORDER

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

Defendants-Appellants Shanghai Investment Company, Inc., now known as Hotels in Paradise, Inc. (Shanghai), KVR Incorporated (KVR), and Simon Bebb (Bebb) (collectively, Defendants),¹ appeal from the June 23, 2004 "Deficiency Judgment Against Defendants Shanghai Investment Company, Inc., now known as Hotels in Paradise, Inc., KVR Incorporated, and Simon Bebb" (Deficiency Judgment) and in favor of Plaintiff-Appellee GE Capital Hawaii, Inc. (GECH) entered by the Circuit Court of the First Circuit (circuit court).²

On appeal, Defendants challenge (1) the denial of their ex parte motion for leave to file sur-reply, (2) the "Order Granting Plaintiff GE Capital Hawaii, Inc.'s Motion for

¹ Defendants Thomas T. Enomoto and Alteka Co., Ltd., who were also named in the complaint, are not parties to this appeal.

² The Honorable Karen N. Blondin presided.

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

Deficiency Judgment Against Defendants Shanghai Investment Company, Inc., now known as Hotels in Paradise, Inc.; KVR Incorporated, and Simon Bebb, Filed on April 16, 2004" (Deficiency Order), and (3) the Deficiency Judgment.

Upon careful consideration of the issues raised and briefed, the authority cited and the record in this case, we resolve Defendants' appeal as follows:

The circuit court did not err in denying Defendants' leave to file a sur-reply. Rules of the Circuit Courts of Hawai'i (RCCH) Rule 7(b) provides that, "[u]nless permitted by another rule or statute, no party may file or serve any papers other than those provided for in this rule." Defendants direct us to no such other authority. Defendants' remedy, if they believed the reply contained matters outside the scope of RCCH Rule 7(b) (replies confined to response to arguments raised in the opposition), was to file a motion to strike.

The circuit court did not err in the amount³ of the deficiency award in the Deficiency Order and Deficiency Judgment. Under the doctrine of avoidable consequences, damages are not recoverable for loss that could have been avoided "without undue risk, burden or humiliation." Restatement (Second) of Contracts § 350(1) (1979). See also Malani v. Clapp, 56 Haw. 507, 517, 542 P.2d 1265, 1271 (1975) ("the plaintiff has a duty to make every reasonable effort to mitigate his damages."). Assuming that acceptance of a partial payoff of a loan would be considered "mitigation" of damages, Defendants failed to show that it was unreasonable in the circumstances of this case to reject the terms of Defendants' proffered partial payoff.

Therefore,

IT IS HEREBY ORDERED that the June 23, 2004 "Deficiency Judgment Against Defendants Shanghai Investment Company, Inc.,

³ Defendants have appealed solely from the deficiency judgment and "no appeal from a deficiency judgment shall raise issues relating to the judgment debtor's liability for the deficiency judgment (as opposed to the amount of the deficiency judgment)." Hawaii Revised Statutes §667-51(a)(3) (Supp. 2006).

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now known as Hotels in Paradise, Inc., KVR Incorporated, and Simon Bebb" is affirmed.

DATED: Honolulu, Hawai'i, July 18, 2007.

On the briefs:

James A. Wagner,
James F. Evers, and
Neil J. Verbrugge,
(Wagner Choi & Evers),
for Defendants-Appellants.

Ted N. Pettit,
Christopher J. Muzzi, and
Seth R. Harris,
(Case Bigelow & Lombardi),
for Plaintiff-Appellee.

Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Awa Ono Fujino
Associate Judge