NOT FOR PUBLICATION

NO. 25110

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FIRST HAWAIIAN BANK, Plaintiff

vs.

MARCO A. RADOMILE, in his individual capacity, Defendant-Appellant

and

JAMES PARK, as Trustee of Dissolved Corporation JAMES & CECILE, INC., Defendant-Appellee

and

COLONY SURF DEVELOPMENT CORPORATION; COLONY WEST, INC.; CHARLES J. BARKHORN, JR., also known as CHARLES JOHN BARKHORN, JR., JOHN BARKHORN, and CHARLES JOHN BARKHORN; MARCO A. RADOMILE, as Trustee of the Charles J. Barkhorn III Trust Dated August 3, 1994; MARIA JUAREZ MEDEIROS; KURT KAWAFUCHI,[1] in his official capacity as DIRECTOR OF TAXATION OF THE STATE OF HAWAI'I; LIBERTY HOUSE, INC.; CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF HAWAI'I; BANK OF HAWAII; TOUCHSTONE MANAGEMENT, INC.; JOHN DOES 2-20; JANE DOES 1-10; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 3-20; DOE ENTITIES 1-20; and DOE GOVERNMENTAL UNITS 1-20, Defendants

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JAMES PARK, as Trustee of Dissolved Corporation, JAMES & CECILE, INC., Cross Claimant-Appellee

vs.

MARCO A. RADOMILE, in his individual capacity, Cross-Claim Defendant-Appellant

and

[1] Pursuant to Hawai'i Rules of Appellate Procedure Rule 43(c)(1), Kurt Kawafuchi, the current Director of Taxation of the State of Hawai'i, has been substituted for Ray K. Kamikawa, the director at the time this case was decided by the first circuit court.

COLONY SURF DEVELOPMENT CORPORATION, MARCO A. RADOMILE, as Trustee of the Charles J. Barkhorn III Trust Dated August 3, 1994, Cross-Claim Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 95-3848)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant/Cross-Claim Defendant-Appellant Marco A. Radomile (Radomile) appeals from the September 10, 2002 second amended final judgment of the circuit court of the first circuit[2] (the court), ruling in favor of Defendant/Cross-Claimant-Appellee James & Cecile, Inc. (JCI) and against (1) Radomile, both as Trustee of the Charles J. Barkhorn III Trust dated August 3, 1994 and in his individual capacity, and (2) Cross-Claim Defendant Colony Surf Development Corporation (Colony Surf) on JCI's fraudulent concealment cross-claim, Counts I and II. For the reasons stated herein, the September 10, 2002 second amended final judgment is affirmed.

On August 2, 2000, the court entered the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

2. The cross-claim herein arises out of a dispute concerning a commercial lease agreement for a 12,556 square foot space (hereinafter "Commercial Space") in a building known as the Colony Surf East, which is located at 2885 Kalakaua Avenue in the City and County of Honolulu, State of Hawaii.

. . . .

[2] The Honorable Gary W.B. Chang presided.

8. On or about January 1, 1994, Colony Surf Development (as the landlord) entered into a 10 year lease (hereinafter "Grill Lease") for the Commercial Space with Touchstone Management, Inc. [(Touchstone)] (as the tenant).

9. On or about August 8, 1994, [First Hawaiian Bank (the Bank)] notified Colony Surf Development of its position, that [the Bank's] consent to the Grill Lease was required under various mortgage agreements between [the Bank] and Colony Surf Development.

. . . .

11. On or about November 15, 1994, [the Bank] and Colony Surf Development entered into a Restructuring Agreement, which consolidated and restructured Colony Surf Development's debt.

12. The Restructuring Agreement contained, inter alia, the following provisions: [Sections 17.3,[3] 17.4, 23].

. . . .

15. The Restructuring Agreement was not filed with the Bureau of Conveyances of the State of Hawaii.

16. Subsequent to the date of the Restructuring Agreement, JCI entered into negotiations with Colony Surf Development for JCI to lease the Commercial Space.

17. Colony Surf Development was represented by its agent, Radomile, in negotiations with JCI.

18. JCI did retain attorney David Fong for the limited purpose of reviewing the proposed drafts of what ultimately became the Space Lease, which he (attorney Fong) did accomplish in a competent manner.

19. Eventually, on April 27, 1995, Colony Surf Development (as landlord) and JCI (as tenant) entered into a 10 year lease (hereinafter "Space Lease") agreement for the Commercial Space.

20. Radomile executed the Space Lease on behalf of Colony Surf Development.

21. Under the terms of the Space Lease, JCI was required to construct, at its sole cost and expense, all interior improvements to the Commercial Space, the hard costs for which was not be less than $500,000.00.

22. The term of the [L]ease was a fact that was basic to the Space Lease transaction.

23. Radomile knew during the [L]ease negotiations that JCI was interested in a long term lease for 10 years (with an option for another consecutive 10 year term thereafter), not a short term lease for no more than 3 years; particularly in light of the requirement that JCI expend not less than $500,000.00 for tenant improvements.

24. Prior to JCI's execution of the Space Lease, Radomile failed to disclose to JCI facts that were basic to the Space Lease transaction.

25. Prior to the execution of the Space Lease, Radomile knew that JCI was about to enter into the Space Lease based upon mistakes of facts that were basic to the transaction and that JCI, because of the relationship between them, would reasonably have expected the disclosure of those facts.

26. JCI would have neither entered into the Space

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[3] Section 17.3 references that the Bank refused to consent to the Touchstone lease.

Lease nor incurred expenses for tenant improvements (in the amount of $163,509.20), if it (JCI) were informed of undisclosed facts that were basic to the Space Lease transaction.

27. Colony Surf Development entered into the Space Lease with JCI without [the Bank's] prior written consent.

28. Therefore, Radomile breached his duty to disclose owed to JCI.

29. Radomile's breach was a legal cause of damage to JCI.

30. JCI's total special damages is $163,509.20.

. . . .

32. There is sufficient evidence to show that Radomile acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations by failing to disclose material information to JCI during the negotiations.

. . . .

CONCLUSIONS OF LAW

. . . .

3. Radomile owed JCI a duty to exercise reasonable care to disclose to JCI, before the Space Lease was executed, all facts that were basic to the transaction.

4. One who fails to disclose to another a fact that he knows may justifiably induce the other to act in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose.

5. JCI is entitled to an award of special damages against Colony Surf Development, Trustee and Radomile, individually, joint and severally in the amount of $163,509.20.

. . . .

ORDER

. . . .

1. Cross-claim Plaintiff JCI is entitled to judgment on the cross-claim in its favor and against cross-claim defendants Colony Surf Development, Trustee and Radomile, individually, joint and severally in the amount of $163,509.20.

. . . .

(Emphases added.)

On appeal, Radomile argues that findings nos. 15, 18, 24-26, 28-30, and 32 "are clearly erroneous and not support[ed] by the substantial evidence elicited during the bench trial" and that conclusions nos. 3-5 "are wrong." Findings may be overturned if clearly erroneous. See Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 258 (2004) ("[T]his court reviews

the trial court's findings of fact under the clearly erroneous standard."). Conclusions of law are reviewed de novo under the right/wrong standard. Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999).

Restatement § 551(1) applies and provides as follows:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

Restatement (Second) of Torts § 551(1) (1977) [hereinafter Restatement] (emphasis added). Because conclusion no. 4 is an accurate reiteration of Restatement § 551(1), which this court adopted in Molokoa Village Dev. Co. v. Kauai Elec. Co., 60 Haw. 582, 593 P.2d 375 (1979), Radomile's challenge to conclusion no. 4 is unfounded.

The first element for the tort of nondisclosure is the failure to disclose. The court made this determination in finding no. 24. Radomile challenges finding no. 24[4] as clearly erroneous to the extent that "the [] Agreement, specifically, the consent provision, was not a fact basic to the transaction." To the contrary, a "basic fact" at issue was that the Lease was

[4] Radomile also challenges the related finding no. 28 that "Radomile breached his duty to disclose owed to JCI." He contests this finding by arguing that "[t]here is no evidence that demonstrated [JCI] relied on Radomile for information, or that Radomile held himself out as [JCI's] fiduciary." These arguments are addressed infra.

subject to Bank consent. Thus, Radomile's contention that finding no. 24 is clearly erroneous, then, is wrong.[5]

The second element of the tort inquires as to whether Radomile knew that failure to disclose the consent requirement "may [have] justifiably induce[d]" JCI from refraining to act "in a business transaction," or, stated in the alternative, whether Radomile knew that failure to disclose "may [have] justifiably induce[d]" JCI to act "in a business transaction." Restatement § 551(1). Radomile maintains that finding no. 26 is clearly erroneous "because there were no undisclosed facts that were basic to the transaction." But Radomile does not challenge finding no. 23, in which the court found "Radomile knew during the lease negotiations that JCI was interested in a long term lease for 10 years (with an option for another consecutive 10 year term thereafter), . . . particularly in light of the requirement that JCI expend not less than $500,000.00 for tenant improvements." There was substantial evidence to support this finding inasmuch as James Park (Park), founder of JCI, testified that, had he known about the consent requirement, he would not have entered into the Lease. Radomile's failure to disclose the existence of the consent requirement in the Agreement may have "helped induce" JCI to agree to lease the premises and to $500,000 in tenant improvements resulting, subsequently, in

[5] Based upon the same analysis regarding finding no. 24, Radomile's objection to finding no. 32, that "it incorporates the prior finding that he did fail[] to disclose material information to [JCI,]" must also be rejected.

actual damages suffered. Thus, finding no. 26 is not clearly erroneous. See Pancakes of Hawaii, Inc. v. Pomare Prop. Corp., 85 Hawai'i 300, 944 P.2d 97 (App. 1997) (holding that a lessor had a duty to disclose pursuant to subsections (b) and (c) of Restatement § 551(2)).

As to finding no. 29, which states that "Radomile's breach was a legal cause of damage to JCI[,]" Radomile contends that the Lease "was extinguished not because the Bank withheld consent, but because it was subordinated to the four recorded mortgages encumbering the Hotel and [JCI] did not seek or obtain a non-disturbance agreement from the Bank."[6] But JCI maintains that "[t]he lease provision that mandated JCI to make interior improvement was the legal cause of the damages in the amount of $163,509.20." Park testified that he would not have entered into the Lease, nor actually expended money on the improvements, if he had known about the consent requirement. The court apparently found Park's testimony to be credible; thus finding no. 29 is owed "due regard" and is not clearly erroneous. Lanai Co. v.

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[6] JCI contends that "[t]he foreclosure action was definitely not the cause of damages regarding the monies and costs of the interior improvements." It argues that

> [h]ypothetically, even assuming arguendo that JCI would have entered into the lease regardless of the length of the lease, had JCI known about the length of the lease, it could have entered into a different lease arrangement without the requirement that it must make tenant improvement of over $500,000. The lease provision that mandated JCI to make interior improvement was the legal cause of damages in the amount of $163,509.20. Being that a reasonable finder of fact can so find, there is no evidence of any error, let alone any clear error by the finder of fact.

(Emphasis added.)

Land Use Comm'n, 105 Hawai'i 296, 307 n.23, 97 P.3d 372, 383 n.23 (2004) ("'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'") (Quoting Hawai'i Rules of Civil Procedure Rule 52(a).).

The final element of an action under § 551(1) is that the defendant had a duty to exercise reasonable care to disclose. Restatement § 551(2) refers to five modes of such a duty. This appeal concerns the fifth mode stated in § 551(2)(e).

Restatement § 551(2)(e) provides as follows:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
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> . . . .
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

(Emphases added.)

The first step, then, in determining whether Radomile owed a duty involves identification of facts basic to the transaction. It is undisputed that the transaction involved the letting of a lease to JCI for the purpose of establishing a restaurant business. As a condition of the lease JCI was required to "construct, at its sole cost and expense, all interior improvements to the [premises], the hard costs for which was not to be less than $500,000.00." Finding no. 21. Radomile does not challenge finding no. 23 that JCI was interested in a "long term lease" "in light" of the obligation to make

$500,000.00 worth of improvements. He does not contest JCI's assertion that the "length of the lease is directly relevant to how much a lessee would agree to invest so as to improve [the lessor's] premise[s]." He also does not challenge finding no. 22, to the effect that the term of the lease was a fact basic to the transaction. The interrelationship of finding no. 22 and no. 23 is that the term was related to the obligation to make improvements of a specified amount. The ten-year term itself, moreover, was dependent on a basic fact that was not disclosed.

Radomile does not challenge finding no. 8, which establishes that the commercial space was the same space previously leased to Touchstone on or about January 1, 1994. The necessity of the Bank's consent, then, was a fact basic to the transaction, inasmuch as the length of the lease was tied to the obligation to make improvements. The consent requirement was a fact that went to the "basis, or essence, of the transaction." Restatement § 551 cmt. j.[7] In finding no. 27, which is not disputed, the court stated that "Colony Surf Development entered

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[7] According to the official comments to § 551(2)(e),

> [a] basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic. If the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure.

Restatement § 551 cmt. j (emphasis added).

into the Space Lease with JCI without [the Bank's] prior written consent" and as declared by the court in finding no. 28, that "[t]herefore, Radomile breached his duty to disclose[.]" Third-party consent has been determined a fact basic to a lease transaction. See Apte v. Japra, 96 F.3d 1319, 1321 (9th Cir. 1996).

With regard to the second element under Restatement § 551(2)(e), the court found, in finding no. 25, that "Radomile knew that JCI was about to enter into the Space Lease based upon mistakes of facts that were basic to the transaction[.]" (Emphasis added.) Radomile posits that Bank consent was not necessary because the Lease fell within the "ordinary course of business" exception to consent in the mortgages. However, Radomile knew that the Bank refused to consent to the prior Touchstone lease of the same commercial space for a similar ten-year term. This was evidenced by section 17.3 of the Agreement, to which Radomile was a signatory. Radomile also knew that under the Agreement, the Bank would consent to a lease with a three-year term of the commercial space to Touchstone, but that it would not consent to a longer term or a term that lasted beyond October 31, 1997.

Radomile, then, had knowledge that JCI was entering the Lease, agreeing to make improvements, upon the mistaken belief that it had received a ten-year term with an option to renew for another ten years. Hence, the court's finding that Radomile knew

Park was proceeding under a mistake was supported by substantial evidence. Thus, finding no. 25 is not clearly erroneous.

The final step in resolving the question of duty under § 551(2)(e) rests on whether JCI would "reasonably expect" that Radomile would disclose an external agreement that might impact the ten-year lease. Radomile does not address the reasonable expectation element directly.[8] However, under the Restatement § 551, "when [the defendant] knows that the [plaintiff] is unaware of the fact, could not easily discover it, would not dream of entering into the bargain if he knew and is relying upon the [defendant's] good faith and common honesty to disclose any such fact if it is true[,]" "the plaintiff is entitled to be compensated for the loss he has sustained." Restatement § 551 cmt. l (emphasis added).

In that regard, JCI could "reasonably expect" Radomile to disclose the existence of an agreement that might impede the ten-year term under the Lease. First, Restatement § 551(2)(e) does not employ the term "fiduciary." The duty based upon a

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[8] Radomile challenges finding no. 18, which states, to reiterate, that "JCI did retain attorney David Fong for the limited purpose of reviewing the proposed drafts of what ultimately became the Space Lease, which he (attorney Fong) did accomplish in a competent manner." Radomile argues that this fact is "clearly erroneous" because "Fong was retained for more than just to review the Space Lease." He cites to various testimony, including a statement that Fong was hired to "conduct some sort of due diligence." He also asserts that Fong "did not discharge his duties and responsibilities in a competent fashion."

However, Radomile does not clarify how finding no. 18 has any bearing upon his liability for nondisclosure. Moreover, it appears that the court's determination as to the scope of Fong's services and his competency were based upon testimony by Fong and Park at trial. Finding no. 18 is owed "due regard." Lanai Co. v. Land Use Comm'n, 105 Hawai'i 296, 307 n.23, 97 P.3d 372, 383 n.23 (2004). In light of the evidence adduced, it cannot be said that the finding was "clearly erroneous."

fiduciary relationship is described in § 551(2)(a). Radomile was, in effect, JCI's "sole source of information regarding" the consent requirement. While the mortgages encumbering the Hotel referenced the Agreement and were filed with the Bureau of Conveyances, the Agreement itself was never so filed.[9] Hence, JCI did not have "an equal opportunity," Restatement § 551 cmt. k, to learn about the consent requirement.

Therefore, the court correctly determined in conclusion no. 3 that "Radomile owed JCI a duty to exercise reasonable care to disclose to JCI, before the Space Lease was executed, all facts that were basic to the transaction." In not disclosing the consent requirement, Radomile was "subject to the same liability" to JCI as "though he had represented the nonexistence of the matter[.]" Restatement § 551.

Finding no. 30[10] states that "JCI's total special damages is $163,509.20." Radomile requests a remand for the court "to explain or otherwise justify how the damages were calculated." In its answering brief, JCI argues that Radomile's "assignment of error is again defective," and Radomile "does not

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[9] Radomile asserts that finding no. 15 is clearly erroneous because "it implies that [the existence of the Agreement] was not a matter of public record" when, instead, "the [] Agreement was prominently referenced in each of the four recorded mortgages." He argues that there "should be no difference between" "whether the document was 'filed' at the Bureau of Conveyance and whether it was simply referenced in a related filed document."

But finding no. 15 is not clearly erroneous. Radomile does not deny that the Agreement was not "filed." That the document was not filed is a factor in the determination of whether JCI "could not easily discover" the document for itself.

[10] Radomile's challenge here also encompasses his challenge to conclusion no. 5.

even address any objections he made on the record with respect to evidence[.]" Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) requires appellants to "show where in the record the alleged error occurred and where it was objected to," along with other requirements "where applicable." Radomile argues that the court's calculation of special damages was "unsupported by the evidence at trial[,]" but he does not identify the evidence that was presented to calculate damages, nor does he explain why the evidence was insufficient. Thus, his challenge to the amount of special damages as determined in finding no. 30 need not be addressed. See HRAP Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented."). Moreover, the record indicates that there were approximately sixty-five exhibits related to damages. This court need not review each of these exhibits to decipher the ones Radomile believes were questionable. See Lanai Co., 105 Hawai'i at 309 n.31, 97 P.3d at 385 n.31 ("This court is not obligated to sift through the voluminous record to verify an appellant's inadequately documented contentions.").

Finally, Radomile argues that the court committed reversible error when it refused to take judicial notice of purported judicial admissions by JCI regarding the following statements made by JCI in previously filed memoranda:

> 1. The subject Lease executed between [JCI] and Colony Surf[] for the [premises] was within the ordinary course of [Colony Surf's] business.

2. [The Bank's] consent was not a necessary prerequisite to the Lease, thus, it was irrelevant.
3. [The Bank] had no right to preapprove the Lease.

(Citations omitted.)

JCI's statements as to the Lease were not facts that fell within the designated categories of "generally known," "capable of accurate and ready determination," Hawai'i Rules of Evidence (HRE) Rule 201(b)(2003), nor of "common knowledge," State v. Arena, 46 Haw. 315, 341, 379 P.2d 594, 609 (1963). Hence, the statements were not proper for judicial notice under HRE Rule 201(e).

Radomile argued that JCI's "judicial admissions made previously in this action bind [JCI]." (Emphasis added.) In his opening brief, he argues that JCI "should not be allowed to reverse course to meet its present litigation goals." The doctrine of judicial estoppel "estops a party from assuming inconsistent positions in the course of the same judicial proceeding." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 219, 664 P.2d 745, 752 (1983). However, the doctrine "does not preclude a party from pleading inconsistent claims or defenses within a single action." Id. See Hawai'i Rules of Civil Procedure Rule 8(e)(2) (1998) ("A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses." (Emphasis added.)). Thus, JCI could assume alternative positions. Therefore,

In accordance with HRAP Rule 35, and after carefully

reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's September 10, 2002 second amended final judgment is affirmed.

DATED: Honolulu, Hawai'i, October 12, 2005.

On the briefs:

Richard E. Wilson for
Defendant/Cross Claim
Defendant-Appellant
Marco A. Radomile.

Gary Y. Shigemura and
Junsuke Otsuka for
Defendant/Cross-Claimant-
Appellee James & Cecile,
Inc.