

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NAM SOON JEON, individually and
as Estate administrator of her deceased
husband, JUN SUNG KWAK,

Plaintiff,

vs.

445 SEASIDE, INC., AQUA HOTELS
AND RESORTS US/CANADA, and
ASSOCIATION OF APARTMENT
OWNERS OF ISLAND COLONY,

Defendants.

CV11-00015 SOM/BMK

ORDER GRANTING DEFENDANTS'
MOTION TO REQUIRE PLAINTIFF
TO FILE AN APPEAL BOND OR
PROVIDE OTHER FINANCIAL
SECURITY TO ENSURE PAYMENT
OF COSTS ON APPEAL

**ORDER GRANTING DEFENDANTS' MOTION
TO REQUIRE PLAINTIFF TO FILE AN APPEAL BOND OR
PROVIDE OTHER FINANCIAL SECURITY TO ENSURE
PAYMENT OF COSTS ON APPEAL**

Before the Court is Defendants 445 Seaside, Inc. ("445 Seaside"),
Aqua Hotels and Resorts, LLC ("Aqua") and Association of Apartment Owners of
Island Colony's ("Association") Motion to Require Plaintiff To File An Appeal
Bond or Provide Other Financial Security to Ensure Payment of Costs on Appeal.
(Doc. 565.) The Court heard this Motion on February 13, 2014. After careful
consideration of the Motion, the supporting and opposing memoranda, and the
arguments of counsel, the Court GRANTS Defendants' Motion. As discussed

below, the Court, however, reduces the amount of the bond, previously ordered at the motion hearing from \$15,000 to \$5,000.

BACKGROUND

This lawsuit arises from the drowning and subsequent death of Jun Sung Kwak (“Kwak”), who was visiting Hawaii from South Korea in January 2009. Mr. Kwak’s wife, Plaintiff Nam Soon Jeon (“Jeon”), brought this action against the Defendants as Mr. Kwak’s estate administrator and wife.

On January 29, 2013, the District Court entered an order granting summary judgment in favor of Defendant Association and against Jeon with respect to all claims in the Third Amended Complaint. On January 31, 2013, the District Court entered an order which in part denied Defendant Association’s motion to dismiss Defendant 445 Seaside’s Cross-Claim.

The case was tried before a jury commencing on August 27, 2013. On September 5, 2013, after Jeon rested her case, the District Court granted Defendant Aqua’s and 445 Seaside’s oral motion for judgment as a matter of law pursuant to FRCP Rule 50(a) based on Jeon’s failure to present any evidence on legal causation. On September 5, 2013, a Judgment was entered in the District Court. On September 5 and 25, 2013, Jeon filed notices of appeal from the Judgment.

DISCUSSION

The Federal Rules of Appellate Procedure (“FRAP”) Rule 7 provides:

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.

In determining whether to require an appellant to file a bond or other security pursuant to Rule 7, courts consider several factors including: (1) the merits of the appeal; (2) the risk that the appellant would not pay costs in the event the appeal loses; (3) the appellant's financial ability to post a bond; and (4) whether there is any evidence of bad faith or vexatious conduct. Dennings v. Clearwire Corp., 928 F. Supp. 2d 1270, 1271 (W.D. Wash. 2013). In considering the three factors, this Court finds as follows:

1. The merits of the appeal.

This Court has been involved in this case almost from its inception, has met with the parties and counsel on a number of occasions, and has been presented with a number of motions filed by all of the parties. This Court is therefore intimately familiar with the case and it is this Court’s opinion that the likelihood that Jeon will succeed on her appeal is very small. Therefore, this factor favors the Defendants.

2. The risk that the appellant would not pay the appellee's costs if the appellant loses.

There is no evidence before the Court that Jeon is willing to pay costs if her appeal is unsuccessful. Jeon is a Korean national who does not reside in this jurisdiction. There is no evidence that she owns any property or other possessions in this jurisdiction. Therefore, the Court finds that there is a risk that Jeon will not pay costs if her appeal is unsuccessful. This factor favors the Defendants.

3. The appellant's financial ability to post bond.

Although Jeon's counsel argues that she is financially unable to post a bond, her counsel fails to present any evidence to the Court beyond his plain argument to establish such inability to pay. The Court therefore finds that this factor favors Defendants.

4. Evidence of Bad Faith or Vexatious Conduct.

The Court does not find evidence of bad faith or vexatious conduct. Accordingly, this factor favors the Jeon.

Having considered the foregoing factors, the Court holds that it is appropriate to require Jeon to post an appeal bond. The Court, however, reduces the amount of the bond previously ordered at the February 13, 2014, hearing from \$15,000 to \$5,000. The Court's prior calculation encompassed both expected costs on appeal and previously awarded costs before the district court. On reconsideration, the Court holds that an appeal bond, when required pursuant to

FRAP Rule 7, may be used only for costs on appeal and not for costs incurred in district court. See In re American President Lines, Inc., 779 F.2d 714, 717 (D.C. Cir. 1985) (holding that the size of an appeal bond may not be increased based upon nonsatisfaction of a judgment below); see also U.S. for Use of Terry Inv. Co. v. United Funding and Investors, Inc., 800 F.Supp. 879, 882 (E.D. Cal. 1992) (“A bond under Rule 7 . . . may not be used as a surety against the original judgment.”)

CONCLUSION

For the foregoing reasons, this Court GRANTS Defendants’ Motion to Require Plaintiff to File an Appeal Bond, and modifies the Court’s prior oral ruling. Jeon is required to post an appeal bond in the amount of \$5,000 no later than March 17, 2014.

DATED: Honolulu, Hawaii, February 24, 2014.



/S/ Barry M. Kurren
Barry M. Kurren
United States Magistrate Judge

Nam Soon Jeon, individually and as Estate administrator of her deceased husband, Jun Sung Kwak v. 445 Seaside, Inc., Aqua Hotels And Resorts Us/Canada, and Association of Apartment Owners of Island Colony, CV11-00015 SOM/BMK, ORDER GRANTING DEFENDANTS’ MOTION TO REQUIRE PLAINTIFF TO FILE AN APPEAL BOND OR PROVIDE OTHER FINANCIAL SECURITY TO ENSURE PAYMENT OF COSTS ON APPEAL.