NO. 22787

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EHP CORP., Plaintiff-Appellee, v.
TIMOTHY H. HENDLIN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(CIV. NO. 98-286)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Timothy H. Hendlin (Tenant) appeals the June 29, 1999 Judgment of the district court holding him liable to EHP Corp. (Landlord) for assumpsit regarding a property lease between Tenant and Donrey, Inc., doing business as North Kona Shopping Center, EHP Corp.'s predecessor in interest.

The June 29, 1999 Judgment is in the principal amount of $20,000[1] and a total amount of $25,439.41. We vacate the July 29, 1999 judgment and remand for further proceedings.

BACKGROUND

On February 15, 1990, Tenant and Donrey, Inc., doing business as North Kona Shopping Center, entered into a lease (the Lease) of office space in the shopping center. The Lease provided Tenant with approximately 1,240 square feet in which

[1] When the damages proven exceeded the $20,000 jurisdictional limit of the district court stated in Hawaiʻi Revised Statutes § 604-5 (Supp. 1999), Plaintiff-Appellee EHP Corp. waived the excess.

Tenant was to operate his chiropractic office and related health care services.

The Lease required Tenant to pay $1,240 per month and his pro rata share of the operating expenses (PROE) of the shopping center as follows:

> Tenant shall pay the Landlord:
>
> . . . .
>
> (b) Tenant's prorata share of Landlord's operating expenses of the Shopping Center including, but not limited to:
>
> (i) Real property taxes and assessments,
>
> (ii) Water and sewer charges,
>
> (iii) Premiums for fire and extended coverage, public liability and property damage insurance,
>
> (iv) Electric power costs, excluding air conditioning,
>
> (v) Landscaping,
>
> (vi) Common area maintenance and repairs,
>
> (vii) Sanitary control, including cleaning and rubbish removal,
>
> (viii) Landlord's overhead expense, including salaries and associated payroll costs, management fees, telephone expense and supplies,
>
> (ix) All other direct costs of the operation and maintenance of the Shopping Center.
>
> Tenant's prorata share of such operating expenses shall be such proportion of the operating expenses as the gross leasable area of the Leased Premises bears to the gross leasable floor area of the Shopping Center.
>
> (c) Tenant's prorata share of the operating expense of the Shopping Center central air conditioning system, including electric power costs, repairs and maintenance, if the Leased Premises are served by such central air conditioning system. Tenant's prorata share of such air conditioning expense shall be such proportion of the air conditioning expense as the

> gross leasable area of the Leased Premises bears to gross leasable floor area of the Shopping Center served by the central air conditioning system.

Expressly not included in the PROE were the

> Landlord's costs of maintenance and repair of the roof, electric conduits, water or sewer pipes, or structural portions of the buildings of the Shopping Center or painting of exterior surfaces and common areas, general excise or similar tax on Landlord's gross rents, advertising, depreciation, or other expenses not properly constituting out of pocket operating expenses.

The Lease stated that Tenant was to be billed monthly for his PROE for the previous month and that overpayments would be applied to future rent or refunded to the tenant. Upon Tenant's request, Landlord would furnish a detailed breakdown of the operating expenses as may reasonably be required to satisfy Tenant that Tenant was being charged no more than Tenant's own pro rata share of the operating expenses.

The initial term of the Lease was for a period of two years which commenced on June 1, 1990, and ended on May 31, 1992. The Lease allowed Tenant an option for an additional five years at the same rate. After Tenant exercised the option, the Lease ran until May 31, 1997.

Tenant fell behind on the payment of his monthly rent and PROE and, in December 1995, he promised Landlord to pay "$1,000 on February 1 . . . and an additional $1000 every two weeks until we are able to receive enough to make a lump sum payment to you for the back rent."

By letter dated June 5, 1996, Landlord demanded payment of $13,207.95 allegedly due.

By letter dated July 3, 1996, Landlord demanded payment of $14,159.10 allegedly due. The increase was computed as follows:

June 5, 1996 balance due	$ 13,207.95
June 27, 1996 payment	(1,118.00)
PROE	829.15
Rent	1,240.00
July 3, 1996 balance due	$ 14,159.10

Around that time, Tenant allegedly had "come into possession of information which caused him to question whether or not Landlord was charging him the appropriate pro rata share for the Landlord's operating expenses, and [Tenant] began to demand documentation of the expenses in accordance with the terms of the lease."

By letter dated August 12, 1996, to Landlord's counsel, Tenant gave notice of his intent to vacate "by September 1, 1996." The letter further stated:

> I am aware of rent in arrears and agree to pay you $5000 now and will continue to make monthly payments of $1000 until the back rent is paid in full. I am awaiting the requested documentation per my lease in regards to the disputed portion of [PROE] expenses and payment for these will be included in the monthly payments, pending clarification of these expenses and receipt of the requested documentation. By acceptance of this first payment enclosed of $5000, check number 5321, you will acknowledge acceptance of this offer and I am released from any further responsibilities from my February 15, 1990 lease[.]

After the $5,000 check was credited to Tenant's account on October 2, 1996, Landlord's records showed that the total

balance due was $8,748.25. Landlord accepted additional payments of $1,000 in October and November 1996, as well as June 1997.

On April 27, 1998, Landlord filed its complaint in district court seeking the remaining $5,748.25, plus attorney fees and costs.

On May 27, 1998, Landlord obtained a default judgment for a principal amount of $5,748.25 and a total of $6,390.05. After Tenant moved to set aside the default judgment, Landlord filed a "Release of Judgment" on July 14, 1998.

In his response to Landlord's opposition to set aside default, Tenant wrote, in relevant part, as follows:

> 3. As pertains to the letter dated August 12, 1996, the actual amount of back rent was not agreed on and was and still is in dispute. No amount owing was recorded in that document nor period of time for which payments would be made. I agreed to, and fulfilled my obligations in reference to that document by paying, (perhaps overpaying) $5000 (five thousand dollars) down and subsequent payments of $1000 (one thousand) until such time as rent in arrears was fully paid. Per that document, the payment for disputed [PROE] charges was contingent on the [Landlord] providing documentation (which had been requested in writing on multiple occasions, and are included in the defenses [sic] Exhibits), which to this date, after years of requests, the [Landlord] has failed to provide.
>
> 4. Evidence to be presented in the [Tenant's] Exhibits include the Managers [sic] report from the North Kona Shopping Center which clearly shows major discrepancies in the [PROE] expenses being charged to [Tenant] and which were contrary to the provisions of the lease.

The first day of trial was on October 6, 1998. Tenant testified that his August 12, 1996 letter and the Landlord's acceptance of his $5,000 check obligated him to pay the unpaid balance of the rent due through August 1996, absolved him of rent due after August 1996, and obligated him to pay the unpaid

balance of the PROE "pending clarification of these expenses and receipt of the requested documentation."

Reacting to Tenant's position that there had been no agreement to pay a sum certain, Landlord, on November 12, 1998, filed its First Amended Complaint seeking $15,668.25 for all of the unpaid rent and PROE through May 1997, plus interest, attorney fees, and costs.

The second day of trial was on April 6, 1999.

At the conclusion of the trial, counsel for Tenant stated Tenant's position that the August 12, 1996 letter was a substituted contract whereby Tenant agreed to pay the undisputed back rent through August 1996 and to pay the disputed PROE when, and not before, the Landlord documented them as Tenant requested. In the view of counsel for Tenant, if there was a dispute over a PROE charge, "then the court can interpret the lease to see whether or not it was legitimate [PROE] or not a legitimate [PROE]."

The court orally decided in favor of Landlord, in relevant part, as follows:

> [T]he court will find that the [August 12, 1996 letter] does not constitute a [sic] enforceable contract. Contract [sic] requires a mutual assent of the mind on all essential terms and conditions if the contracts [sic] terms and conditions are complete and certain and no future negotiations is [sic] contemplated then the contract is enforceable. Uh, goes [sic] without saying that I think there is a disagreement even now about what the terms and conditions of [the August 12, 1996 letter] are. Despite both councils [sic] argument that [Tenant] had a clear and, uh, consist [sic] understanding about what was required by his testimony and by the pleadings presented he disagrees there is any amount owed. The [Landlord's] position at the outset was the agreement provided

> the [Tenant] pay the amount due under as, as, uh, provided to him by the [Landlord's], uh, invoices, uh, as of the date of his desired [sic] to vacate. Uh, but the [Tenant] believes that his agreement was that he would pay, uh, only the base rent and the amount of common area expenses would be paid only upon prevision [sic] to him of the, uh, of requested documentation, clarification of his expenses, and records to [sic] satisfactory to him. [Tenant's] testimony during cross examination was he [sic] even less clear, uh, I did not get a [sic] understanding of what was required from [Landlord] to meet, uh, the terms and conditions of the contract, so, I don't think this is an enforceable contract because of those efficiencies [sic].

The Judgment was entered on June 29, 1999. On that same date, Tenant filed his Motion for New Trial or to Amend Judgment and to Make Findings of Fact and Conclusion of Law. On August 6, 1999, the court entered its order denying the motion. Tenant filed a notice of appeal on August 25, 1999.

POINTS ON APPEAL

Tenant submits the following points on appeal.

1. The trial court was wrong (a) when it concluded that the August 12, 1996 letter did not constitute an enforceable contract and (b) failed to conclude that the August 12, 1996 letter was a substituted contract barring Landlord from recovering under the Lease.

2. The trial court was wrong when it failed to conclude that Tenant's performance under the August 12, 1996 letter contract was conditioned upon Landlord's duty to provide documentation to satisfy Tenant that he is being charged no more than his pro rata share of the operating expenses.

STANDARD OF REVIEW

Hawai‘i appellate courts review conclusions of law de novo, under the right/wrong standard. See Associates Fin. Services Co. of Hawai‘i, Inc. [v. Mijo], 87 Hawai‘i [19] at 28, 950 P.2d [1219] at 1228. "Under the right/wrong standard, this court 'examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it.'" Estate of Marcos, 88 Hawai‘i at 153, 963 P.2d at 1129 (citation omitted). Robert's Hawai‘i School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai‘i 224, 239, 982 P.2d 853, 868 (1999).

Contract validity is a question of law, Bambino v. Perez, 2 Haw. App. 298, 631 P.2d 592 (1981), and freely reviewable on appeal. Brown v. KFC National Management Company, 82 Hawai‘i 226, 921 P.2d 146 (1996).

DISCUSSION

In concluding the August 12, 1996 letter did not constitute a valid contract, the district court relied on the fact that "there is a disagreement even now about what the terms and conditions of [the August 12, 1996 letter] are."

We conclude that the terms and conditions of the August 12, 1996 letter are certain and definite. We agree with Tenant that according to the August 12, 1996 letter, the Landlord's acceptance of Tenant's $5,000 check obligated Tenant

to pay the unpaid balance of the rent due through August 1996, absolved him of rent due after August 1996, and obligated him to pay the unpaid balance of the PROE "pending clarification of these expenses and receipt of the requested documentation."

This quid pro quo, however, causes us to conclude that the August 12, 1996 letter fails as a contract due to a more basic and fundamental rule in the law of contracts and that is the lack of consideration. A compromise, like any other contractual agreement, must be supported by consideration. Dowsett v. Cashman, 2 Haw. App. 77, 83, 625 P.2d 1064 (1981). In this context, the following rules define consideration.

"[A] compromise . . . is supported by good consideration if it is based upon a disputed or unliquidated claim and if the parties make or promise mutual concessions as a means of terminating their dispute; no additional consideration is required." 15A Am. Jur. 2d *Compromise and Settlement* § 13 (1976).

> As a general rule, "[c]onsideration is either a benefit to the person making the promise or a detriment to the person to whom a promise is made." John Deere Co. v. Broomfield, 803 F.2d 408, 410 (8th Cir. 1986). Thus, generally, a promise is without consideration "where no benefit is conferred on the promisor nor detriment suffered by the promisee[.]" 17 C.J.S. *Contracts* § 74, at 761 (1963).

Sylvester v. Animal Emergency Clinic of Oahu, 9 Haw. App. 85, 90, 823 P.2d 745, 749 (1990).

A "promise to perform an existing legal obligation is not valid consideration, except where the very existence of the

duty is subject to honest and reasonable dispute." 17 C.J.S. *Contracts* § 100 at 827-28 (1963).

In this case, Tenant made or promised no concession in the August 12, 1996 letter. While Tenant stated in the August 12, 1996 letter that he would pay the back rent and PROE expenses accruing up until the time he vacated the premises, subject to Landlord's proof of the PROE expenses, those debts were already owed by Tenant and that duty to prove was already owed by Landlord. Under the August 12, 1996 letter, Tenant's obligation was less than under the Lease and Landlord's duty was the same as under the Lease. As a result, the August 12, 1996 letter fails as a substitute contract for lack of consideration.

CONCLUSION

We agree with the district court's conclusion that the February 15, 1990 lease is enforceable and the August 12, 1996 letter is not enforceable.

We conclude that Tenant's unpaid rent became due when incurred.

Prior to Tenant's demand for proof of the validity of the PROE assessments, Tenant's unpaid pro rata share of the PROE assessments became due when assessed.

Tenant does not owe the PROE assessments that were assessed subsequent to Tenant's demand for proof of the validity of the PROE assessments unless and until Landlord satisfies the

following requirement in the Lease: "Upon request, Landlord will furnish Tenant with a detailed breakdown of the operating expenses as may reasonably be required to satisfy Tenant that Tenant is being charged no more than Tenant's pro rata share of the operating expenses."

Accordingly, we vacate the district court's June 17, 1999 Judgment and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, January 16, 2001.

On the briefs:

William I. Zimmerman
(Van Pernis, Smith & Vancil,
of counsel)
for Defendant-Appellant.

Chief Judge

S. V. (Bud) Quitiquit and
Charles M. Keaukulani
(Brooks Tom Porter &
Quitiquit, of counsel)
for Plaintiff-Appellee.

Associate Judge

Associate Judge