NO. 20112

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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| STEPHEN GILLIS THOMAS, JOHN BOWEN THOMAS, and TERRENCE LEE HARRIS, | ) | CIV. NO. 92-3677-10 |
| Plaintiffs/Counterclaim Defendants-Appellants/ Cross-Appellees, | ) | FIRST CIRCUIT COURT |
| vs. | ) | |
| PANKOW HOLDINGS, INC., a California corporation, and PDI-MOLOKAI, a California limited partnership, | ) | |
| Defendants/Counter-claimants-Appellees/ Cross-Appellants. | ) | |

MEMORANDUM OPINION

This dispute arises out of an agreement between plaintiffs/counterclaim defendants-appellants/cross-appellees Stephen Gillis Thomas, John Bowen Thomas, and Terrence Lee Harris (collectively, Plaintiffs) and defendants/counter-claimants-appellees/cross-appellants Pankow Holdings, Inc. (Pankow) and PDI-Molokai (PDI) (collectively, Defendants). After a jury-waived trial, the circuit court concluded that Defendants breached the subject agreement by failing to perform according to its terms and entered judgment in favor of Plaintiffs. On

appeal, Plaintiffs contend that the circuit court erred in: (1) failing to use the proper measure of damages; (2) awarding damages in an uncertain amount; and (3) denying plaintiffs an award of attorneys' fees and costs without explanation. On cross-appeal, Defendants contend that the circuit court erred in: (1) denying their motion for summary judgment because the terms of the subject agreement are clear and unambiguous; (2) concluding that the subject agreement was a binding and enforceable contract, even assuming that the January 26, 1989 Letter Agreement is ambiguous; (3) interpreting the agreement as imposing a duty on them, even assuming that the January 26, 1989 Letter Agreement is ambiguous; (4) admitting hearsay evidence on the subject of damages; and (5) finding that Plaintiffs are entitled to an award of damages when Plaintiffs failed to prove damages with reasonable certainty and without speculation. For the reasons discussed below, we hold that the circuit court erred in concluding that the terms of the subject agreement were ambiguous and in denying Defendants' motion for summary judgment. Accordingly, we vacate the circuit court's judgment filed August 28, 1996, and remand this case with instructions to enter summary judgment in favor of Defendants.[1]

[1] Because we remand this case and direct the circuit court to enter summary judgment in favor of Defendants, the points of error raised by

(continued...)

## I. BACKGROUND

At the jury waived trial on July 21, 1994, the parties submitted a joint exhibit with the following stipulated facts. Except as noted, the material facts in this appeal are undisputed.

### A. Lot 395

On August 16, 1982, Plaintiffs purchased a piece of property, located on the island of Molokaʻi and referred to as "Lot 395" (hereafter, Lot 395), from Kaluakoi Corporation (Kaluakoi) which has an area of 5.952 acres. The parties agreed on a total purchase price of $500,000.00 for Lot 395 with a down payment of $75,000.00. Plaintiffs executed and delivered to Kaluakoi a promissory note in the amount of $425,000.00 (hereafter, the Note), together with a purchase money mortgage (hereafter, the Mortgage), which secured the obligations under the Note and which was recorded against Lot 395.

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[1](...continued)
Plaintiffs in the appeal and the remaining points of error raised by Defendants in the cross-appeal are moot inasmuch as our decision has effectively extinguished Plaintiffs' claims in this case. See In re Application of Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992) (noting that "[a] case is moot where the question to be determined is abstract and does not rest on existing facts or rights") (quoting Wong v. Board of Regents, Univ. of Hawaii, 62 Haw. 391, 394 616 P.2d 201, 203-04 (1980)). Accordingly, we need not discuss the remaining issues.

B. The May 4, 1984 Option Agreement

On May 4, 1984, Kaluakoi and Kaiaka Associates (hereafter, Kaiaka) entered into an option agreement (hereafter, the May 4, 1984 Option Agreement). Kaiaka was a limited partnership whose general partner was T.H.T., Ltd., and Plaintiff Stephen Thomas was the president and agent of Kaiaka. Pursuant to the May 4, 1984 Option Agreement, Kaiaka agreed to develop a hotel on one of four lots owned by Kaluakoi on Molokaʻi (collectively, the "Group A" properties). The May 4, 1984 Option Agreement provided that Kaluakoi would convey to Kaiaka the "Group A" properties, subject to the fulfillment of all of the following conditions: (1) Kaiaka exercised its option to purchase the "Group A" properties under the May 4, 1984 Option Agreement; (2) satisfaction of the conditions listed in the May 4, 1984 Option Agreement; and (3) payment of $10.5 million from Kaiaka to Kaluakoi.

Under paragraph 9.a.(vii) of the May 4, 1984 Option Agreement, if Kaiaka exercised the option to purchase the "Group A" properties, which did not include Lot 395, Plaintiffs, including Stephen Thomas, who was the president of Kaiaka, would receive from Kaluakoi the Note marked "Paid" and a release of the Mortgage on Lot 395 at the closing of the sale of the "Group A" properties. In the event that the option was not exercised

(i.e., the sale of the "Group A" properties did not close), paragraph 5(d) of the May 4, 1984 Option Agreement gave Plaintiffs the right to satisfy the Note by paying Kaluakoi.

On August 29, 1986, Kaiaka assigned all of its rights and interest in the May 4, 1984 Option Agreement to PDI through a letter agreement dated August 29, 1986. Plaintiffs' interest in Lot 395 was not assigned to PDI and remained with Plaintiffs. Plaintiffs' interest in Lot 395 was not addressed in this August 29, 1986 letter, and, accordingly, such rights continued to be governed by the May 4, 1984 Option Agreement.

C. The Kaiaka Rock Litigation

After Kaiaka transferred its interest in the May 4, 1984 Option Agreement to PDI, PDI attempted to exercise the option, but a dispute arose between PDI and Kaluakoi. Kaluakoi contended that PDI failed to properly exercise the option granted in the May 4, 1984 Option Agreement and that the option had expired. Therefore, Kaluakoi concluded that it was free to sell the "Group A" properties subject to the May 4, 1984 Option Agreement to a third party, Tokyo Kosan Company, Ltd. (Tokyo Kosan). This dispute between Kaluakoi and PDI became known as the Kaiaka Rock Litigation.

PDI, who was the plaintiff in the Kaiaka Rock Litigation, sued Tokyo Kosan based in part on PDI's specific

performance claim. Prior to the expiration of PDI's option under the May 4, 1984 Option Agreement and some time around the end of 1987, Kaluakoi had conveyed to Tokyo Kosan certain property on Molokaiʻi that included the "Group A" properties.

Lot 395 was not conveyed to Tokyo Kosan, and title remains with Plaintiffs. Kaluakoi still holds the Note and the Mortgage to Lot 395. Tokyo Kosan never received, held, or owned any interest in the Note and the Mortgage on Lot 395.

D. The January 26, 1989 Letter Agreement (the Subject Agreement)

Because of the Kaiaka Rock Litigation and the failure of the August 29, 1986 Assignment from Kaiaka to PDI to address Plaintiffs' interest in Lot 395, Plaintiffs were concerned that, in the event of a subsequent settlement of the Kaiaka Rock Litigation, there would be a failure to take into account their rights with regard to Lot 395 under the May 4, 1984 Option Agreement. Because of these concerns during the Kaiaka Rock Litigation, PDI and Plaintiffs entered into the January 26, 1989 Letter Agreement, which is the subject of this case. The January 26, 1989 Letter Agreement provides in relevant part:

> PDI acknowledges the right of [Plaintiffs] pursuant to the May 4, 1984, Option Agreement between Kaluakoi and Kaiaka Associates, Paragraph 9.a.(vii) to receive from Kaluakoi and/or Tokyo Kosan the promissory note dated August 16, 1982 marked "Paid" and a release of that certain mortgage on Lot 395 of even date therewith in favor of Kaluakoi given by Thomas, Harris and Thomas.

> Further, any settlement agreement with Kaluakoi and/or Tokyo Kosan by PDI will recognize and provide for the right of [Plaintiffs] to receive the benefit of the release of the August 16, 1982 Mortgage on Lot 395 and to receive the promissory note marked "Paid" of even date therewith pursuant to the May 4, 1984 Option Agreement.

(Emphases in original).

The January 26, 1989 letter agreement was negotiated and drafted over a one-year period. The drafts of this agreement are as follows: (1) a February 22, 1988 draft, addressed to George Hutton, vice president of Pankow, from Plaintiff Stephen Thomas (Joint exhibit 5); (2) an October 19, 1988 draft, from Eric A. James (James), attorney for PDI (Joint exhibit 6); (3) a December 1988 draft, from Plaintiff Stephen Thomas to Eric A. James (Joint exhibit 7); and (4) the January 26, 1989 Letter Agreement (Joint exhibit 8).

Plaintiff Stephen Thomas testified that when he sent the February 1988 Draft, he was concerned about a settlement by PDI in the form of another option agreement that would nullify the May 4, 1984 Option Agreement. Plaintiff Stephen Thomas also testified that "my intent in writing [the February 1988 Draft] was, any settlement agreement that [PDI] make[s,] [PDI] will not prejudice my right under the existing option agreement. In other words, whatever deal [PDI] make[s] towards development out there[,] if [PDI] abandon[s] this option agreement, you know, my rights will be protected." The October 1988 Draft sent to

Plaintiff Stephen Thomas from James did not change the language drafted by Plaintiff Stephen Thomas regarding Lot 395.

With respect to the December 1988 Draft, Plaintiff Stephen Thomas testified about how the situation changed between the time he sent the February 1988 Draft and the time he sent the December 1988 Draft and about his understanding of the changes in the language in these two drafts:

> [Plaintiffs' counsel]: How had the deal changed between February and October?
>
> [Plaintiff Stephen Thomas]: . . . . In the interim [between February and October 1988], George [Hutton]'s position went from P.D.I. was going to go forward to develop a project to the extent we're not going to develop a project over there, we don't have any answer, we don't have a hotel operator so we're going to go towards settlement in in [sic] lawsuit.
>
> And it was at that point in time that my mind went from an option agreement or an agreement to develop over there to a complete settlement of this lawsuit. And that was my intent in changing that language to say all right, we're going towards a settlement here. You make any settlement, I'm going to get my lot [Lot 395].

Although Plaintiff Stephen Thomas' intent had allegedly changed, the changes he made as embodied in the December 1988 Draft did not reflect his intent. The December 1988 Draft continued its reference to the May 4, 1984 Option Agreement with the term "pursuant to the May 4, 1984 Option Agreement."[2] Although

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[2] For comparison purposes, the following illustrates the changes between Plaintiff Stephen Thomas' February 1988 Draft and his December 1988 Draft (the deleted language is bracketed and the new language is boldfaced):

> PDI acknowledges the right of Stephen G. Thomas ("Thomas"), Terry L. Harris ("Harris") and John B. Thomas ("Thomas") [under the May 4, 1984 Agreement with] **pursuant to the May 4, 1984 Option Agreement between** Kaluakoi and Kaiaka Associates, paragraph

(continued...)

Plaintiff Stephen Thomas testified that he discussed his understanding of the January 26, 1989 Letter Agreement with Hutton prior to its execution, Defendants maintain that Plaintiff Stephen Thomas never told Defendants that it was his intent under the January 26, 1989 Letter Agreement that Plaintiffs would get Lot 395 upon "any settlement," regardless of whether the option under the May 4, 1984 Option Agreement was exercised.

With respect to his understanding of Plaintiff Stephen Thomas' changes reflected in the December 1988 Draft, James testified as follows:

> [Eric James]: . . . when [Plaintiff Stephen Thomas] made the language changes to the December, 1988, draft and indicated the words "provided for" in lieu of "in no way prejudice," it was my understanding and P.D.I.'s understanding that that was to deal with the possibility that a settlement agreement would be silent, totally silent, with regard to Lot 395 and therefore, would not prejudice his rights which was consistent with the rights he inserted in Paragraph 7. I understood it to mean in any settlement agreement that P.D.I. might have with the entity, either Kaluakoi or Tokyo-Kosan, that had the right to deliver the note and mortgage.

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[2](...continued)
9.a.(vii) to receive from Kaluakoi **and/or Tokyo Kosan** the promissory note dated August 16, 1982 marked "Paid" and a release of that certain mortgage on Lot 395 of even date therewith in favor of Kaluakoi given by Thomas, Harris and Thomas.

Further, any settlement agreement with Kaluakoi and/or Tokyo Kosan by PDI will recognize and [in no way prejudice] **provide for** the right of Thomas, Harris and Thomas to receive the benefit of the release of the August 16, 1982 Mortgage on Lot 395 and to receive the promissory note marked "Paid" of even date therewith **pursuant to the May 4, 1984 Option Agreement.**

(Underline emphases in original).

James further testified that he understood that the term "pursuant to the May 4, 1984 Option Agreement" was intended to make clear that the right referred to in the January 26, 1989 Letter Agreement was the right contained in the May 4, 1984 Option Agreement and that the right was not absolute, but would be honored to the extent provided for in the May 4, 1984 Option Agreement. James maintained that the changes in the language in the December 1988 Draft, prepared by Plaintiff Stephen Thomas, were agreed to by PDI based upon the understanding that it was merely a recognition of Plaintiffs' pre-existing right to receive a release of the Note and the Mortgage on lot 395 pursuant to the terms of the May 4, 1984 Option Agreement.

Regarding the words "Pursuant to the May 4, 1984 [O]ption agreement[,]" Plaintiff Stephen Thomas testified as follows:

> [Plaintiffs' counsel]: I note here in looking at the various drafts that the words "Pursuant to the May 4, 1984 option agreement" appears in this second paragraph. Do you see that?
> [Plaintiff Stephen Thomas]: Yes, I do.
> [Plaintiffs' counsel]: Who added that phrase?
> [Plaintiff Stephen Thomas]: I did.
> [Plaintiffs' counsel]: Why did you add that phrase?
> [Plaintiff Stephen Thomas]: To identify the right that was being recognized and provided for.
> [Plaintiffs' counsel]: What right is that?
> [Plaintiff Stephen Thomas]: The right to get Lot 395 without having to pay anything more for it.

E. PDI's Settlement with Tokyo Kosan

A jury trial in the Kaiaka Rock Litigation was conducted in the circuit court from approximately January to May 1990. After a mistrial in the Kaiaka Rock Litigation that resulted from a hung jury, the circuit court in a post-trial motion dismissed with prejudice PDI's specific performance claims, leaving only the issue of the parties' damage claims to be litigated in the retrial.

On August 30, 1991, Plaintiffs' filed in the Kaiaka Rock Litigation a motion to intervene seeking to protect their rights in Lot 395. In this motion, Plaintiffs admitted that the only rights they had under the May 4, 1984 Option Agreement with respect to Lot 395 was for Kaluakoi to release the Mortgage if the sale of the "Group A" properties closed under the May 4, 1984 Option Agreement, or if the May 4, 1984 Option Agreement expired, to pay off the Mortgage:

> [Plaintiffs] desired to own Lot 395 free and clear of the Mortgage, and negotiated such a provision into the Option Agreement. . . . Per the Option Agreement, Paragraph 9(a)(vii), Kaluakoi agreed that, upon closing of the "A Lots" it would deliver up to [Plaintiffs] the Note, marked "Paid", and a release of the Mortgage. In other words, in exchange for the exercise of the option and closing of the sale, [Plaintiffs] were to have the encumbering Mortgage removed from Lot 395, and hold title free and clear.
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> The Option Agreement further provided (Paragraph 5(d)) that if the option expired, Kaluakoi would within sixty days of the deadline, present an "offer" to [Plaintiffs] to pay off the remaining balance of the Note. Said offer was to be in writing. [Plaintiffs] would then have 60 days to accept the offer. If the offer was not so accepted, Kaluakoi had the right to have the property transferred from [Plaintiffs]

> to Kaluakoi; a pre-executed Transfer Deed was to be attached to the Option Agreement to facilitate this transfer.

During February 1992, prior to the start of the retrial of the Kaiaka Rock Litigation, Tokyo Kosan was dismissed from the Kaiaka Rock Litigation. PDI and Tokyo Kosan reached a settlement and executed a mutual release (Tokyo Kosan Release) based upon the dismissal of PDI's specific performance claim, as well as for concerns for costs, potential liability, and other reasons. The Tokyo Kosan Release did not involve any exchange of money.

F. The Expiration of the May 4, 1984 Option Agreement

The remaining damage claims in the Kaiaka Rock Litigation between PDI and Kaluakoi were retried by agreement before Special Master Arthur Fong. The retrial occurred from around the middle of March 1992 through June 1992. On July 8, 1992, Special Master Arthur Fong entered his judgment in the Kaiaka Rock Litigation in favor of PDI on Kaluakoi's counterclaims and in favor of Kaluakoi on PDI's claims. The Special Master's Judgment included a ruling that the May 4, 1984 Option Agreement had expired. The parties in the instant appeal do not contest the expiration of the May 4, 1984 Option Agreement.

At various times, Plaintiffs demanded that Defendants perform under the terms of the January 26, 1989 Letter Agreement. Pursuant to paragraph 5(d) of the May 4, 1984 Option Agreement,

Plaintiffs executed a deed in lieu of foreclosure in favor of Kaluakoi. Kaluakoi agreed, however, not to record the deed in lieu of foreclosure until a specified date.

G. Procedural History

On October 9, 1992, Plaintiffs filed a complaint against Defendants alleging that Defendants breached the January 26, 1989 Letter Agreement. Specifically, Plaintiffs alleged that Defendants breached the January 26, 1989 Letter Agreement by failing to "procure a release of the Mortgage encumbering Lot 395 and deliver[ing] . . . the promissory note marked 'Paid.'"

On November 27, 1992, Defendants filed an answer to Plaintiffs' complaint and a counterclaim for declaratory relief. The counterclaim sought a declaration that "Defendants have no obligation to procure a release of the Mortgage or cancellation of the Note" under the January 26, 1989 Letter Agreement from Kaluakoi. On the same day, Defendants filed a motion to dismiss, or in the alternative, a motion for summary judgment. On July 2, 1993, the circuit court denied Defendants' motion to dismiss, or, in the alternative, motion for summary judgment.

The circuit court held a jury-waived trial on July 21, 22, and 25, 1994. Subsequently, the circuit court entered its findings of fact (FOFs), conclusions of law (COLs), and judgment

in favor of Plaintiffs and against Defendants. From the circuit court's judgment, Plaintiffs filed a timely notice of appeal. Defendants later filed a timely cross-appeal.

## II. STANDARD OF REVIEW

> We review [a] circuit court's award of summary judgment de novo under the same standard applied by the circuit court. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). As we have often articulated:
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> > [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
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> Id. (citations and internal quotation marks omitted); see Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) (1990). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).
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> Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997) (quoting Dunlea v. Dappen, 83 Hawai'i 28, 36, 924 P.2d 196, 204 (1996)) (brackets in original). In addition,
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> > "[t]he evidence must be viewed in the light most favorable to the non-moving party." State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d 316, 323 (1997) (citing Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)). In other words, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to [the party opposing the motion]." Maguire, 79 Hawai'i at 112, 899 P.2d at 395 (citation omitted).
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> State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 287-88, 965 P.2d 1284, 1287-88 (1998) (quoting Estate of Doe v. Paul Revere Ins. Group, 86 Hawai'i 262, 269-70, 948 P.2d 1103, 1110-11 (1997)) (some brackets in original and some added).

TSA v. Shimizu, 92 Hawai'i 243, 251-53, 990 P.2d 713, 721-23 (1999).

## III. DISCUSSION

Defendants contend in their cross-appeal that the circuit court erred in denying their October 9, 1992 motion to dismiss the complaint, or, in the alternative, motion for summary judgment (the October 9, 1992 motion). Because there were no genuine issues of material fact and Defendants were entitled to judgment as a matter of law, we agree.

At the time of the October 9, 1992 motion, both parties agreed that the language of the January 26, 1989 Letter Agreement was clear and unambiguous. Indeed, the parties agreed that "[s]ummary judgment is especially appropriate in this case." Because matters outside of the pleadings were presented to the circuit court at the time of the October 9, 1992 motion,[3] we treat the motion as one for summary judgment under Rule 56 of the Hawai'i Rules of Civil Procedure (HRCP) (1992), as opposed to a motion to dismiss under HRCP Rule 12(b)(6) (1992). See HRCP Rule 12(b)(6) (providing that a motion brought under HRCP Rule 12(b)(6) may be treated as a Rule 56 motion for summary judgment

[3] Defendants attached the following separate documents to their motion: (1) the January 26, 1989 Letter Agreement; (2) the May 4, 1984 Option Agreement; and (3) Stephen G. Thomas, John Thomas and Terry Harris' Motion for Intervention filed August 30, 1991 in Civil No. 87-3336-10 (the Kaiaka Rock Litigation). In response, Plaintiffs attached numerous affidavits, correspondence letters, and deposition transcripts to their memorandum in opposition to Defendants' motion. Because these items are matters outside the pleadings, we treat Defendants' motion as a motion for summary judgment under HRCP Rule 56.

if "matters outside the pleading are presented to and not excluded by the court").

A. Principles of Contract Interpretation

With respect to the interpretation of contracts, this jurisdiction has long adhered to the following principles:

> When the terms of a contract are definite and unambiguous there is no room for interpretation. It is only when the language used by the parties leaves some doubt as to the meaning and intention that the courts will apply the rules of construction and interpretation in an effort to ascertain the intention of the parties to the contract.

Hanagami v. China Airlines, Ltd., 67 Haw. 357, 364, 688 P.2d 1129, 1144-45 (1984) (quoting Hackfeld & Co. v. Grossman, 13 Haw. 725, 729 (1902) (quoted in DiTullio v. Hawaiian Ins. & Guar. Co., 1 Haw. App. 149, 155, 616 P.2d 221, 226 (1980)) (emphasis added). Consistent with the principle that there is no room for judicial interpretation of a contract with definite and unambiguous terms, this court has pronounced on numerous occasions that "it is well established that the court's function is to construe and enforce contracts made by the parties, not to make or alter them." Heatherly v. Hilton Hawaiian Village Joint Venture, 78 Hawai'i 351, 365, 893 P.2d 779, 793 (1995) (citing Strouss v. Simmons, 66 Haw. 32, 657 P.2d 1004 (1982), and Scotella v. Osgood, 4 Haw. App. 20, 659 P.2d 73 (1983)). In other words, where the language of a contract admits of only one reasonable interpretation, the court need not look to extrinsic evidence of the parties' intent

or to rules of construction to ascertain the contract's meaning. See Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawaii, Ltd., 76 Hawai'i 277, 299, 875 P.2d 894, 916 (1994) (citing American Home Prod. Co. v. Liberty Mut. Ins. Co., 748 F.2d 760, 765 (2d Cir. 1984) (insurance policy context). "Absent an ambiguity, contract terms should be interpreted according to their plain, ordinary, and accepted sense in common speech." Hi Kai Inv., Ltd., et al. v. Aloha Futons Beds & Waterbeds, Inc., 84 Hawai'i 75, 78, 929 P.2d 88, 91 (1996) (quoting Cho Mark Oriental Food v. K & K Int'l, 73 Haw. 509, 520, 836 P.2d 1057, 1064 (1992)); Aickin v. Ocean View Inv. Co., Inc., 84 Hawai'i 447, 457, 935 P.2d 992, 1002 (1997) (citations omitted); Brown v. KFC Nat'l Management Co., 82 Hawai'i 226, 240, 921 P.2d 146, 160 (1996) (quoting Amfac, Inc. v. Waikiki Beachcomber Inc. Co., 74 Haw. 85, 108, 839 P.2d 10, 24, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992)).

"Ambiguity exists only when the contract taken as a whole is reasonably subject to differing interpretation." County of Kaua'i v. Scottsdale Ins. Co., Inc., 90 Hawai'i 400, 406, 978 P.2d 838, 844 (1999) (citation omitted); State Farm Mut. Auto. Ins. Co. v. Fermahin, 73 Haw. 552, 556, 836 P.2d 1074, 1077 (1992) (quoting Sturla, Inc. v. Fireman's Fund Ins. Co., 67 Haw. 203, 209, 684 P.2d 960, 964 (1984) (citations omitted)) (internal

quotation marks omitted). Further, a complex provision and/or policy does not in itself create ambiguity. Fermahin, 73 Haw. at 556, 684 P.2d at 964. "A court must 'respect the plain terms of the [contract] . . . and not create ambiguity where none exists.'" Id. (quoting Smith, 72 Haw. at 537, 827 P.2d at 638 (citation omitted)).

Where the language of the contract is ambiguous, however, "a court's principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen." Brown, 82 Hawai'i at 240, 921 P.2d at 160 (quoting University of Hawaii Professional Assembly v. University of Hawaii, 66 Haw. 214, 219, 659 P.2d 720, 724 (1983) (citations and internal quotation marks omitted)). In construing a contract with ambiguous language, the trier of fact may consider evidence extrinsic to the written contract in order to ascertain the parties' intent. Stewart v. Brennan, 7 Haw. App. 136, 143, 748 P.2d 816, 821 (1988). Further, "[a]n agreement should be construed as a whole and its meaning determined from the entire context and not from any particular word, phrase, or clause." Hawaiian Isles Enters., Inc. v. City and County of Honolulu, 76 Hawai'i 487, 481, 879 P.2d 1070, 1074 (1994)

(quoting Maui Land & Pineapple Co. v. Dillingham Corp., 67 Haw. 4, 10, 674 P.2d 390, 394 (1984)) (internal quotation marks omitted).

Generally, the construction and legal effect to be given a contract is a question of law freely reviewable by an appellate court. Hi Kai, 84 Hawai'i at 78, 929 P.2d at 91 (citing Cho Mark, 73 Haw. at 520, 836 P.2d at 1064); see also Hanagami, 67 Haw. at 364, 688 P.2d at 1144; Reed & Martin, Inc. v. City and County of Honolulu, 50 Haw. 347, 348-49, 440 P.2d 526, 527 (1968). The determination of whether a contract is ambiguous is likewise a question of law that is freely reviewable on appeal. Brown, 82 Hawai'i at 240, 921 P.2d at 160 (citing MPM Hawaiian, Inc. v. World Square, 4 Haw. App. 341, 345-346, 666 P.2d 622, 626 (1983) (citing United States ex rel. Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568 (9th Cir. 1978))).

B. The Plain and Unambiguous Language of the January 26, 1989 Letter Agreement

The plain and unambiguous language of the January 26, 1989 Letter Agreement states in relevant part:

> PDI acknowledges the right of [Plaintiffs] pursuant to the May 4, 1984, Option Agreement between Kaluakoi and Kaiaka Associates, Paragraph 9.a.(vii) to receive from Kaluakoi and/or Tokyo Kosan the promissory note dated August 16, 1982 marked "Paid" and a release of that certain mortgage on Lot 395 of even date therewith in favor of Kaluakoi given by Thomas, Harris and Thomas.

> Further, any settlement agreement with Kaluakoi and/or Tokyo Kosan by PDI will recognize and provide for the right of [Plaintiffs] to receive the benefit of the release of the August 16, 1982 Mortgage on Lot 395 and to receive the promissory note marked "Paid" of even date therewith pursuant to the May 4, 1984 Option Agreement.

(Some emphases in original and some added.) Based upon this language, the clause "pursuant to the May 4, 1984 Option Agreement" in each paragraph qualifies "the right of [Plaintiffs] to receive the benefit of the release of the August 16, 1982 Mortgage on Lot 395 and to receive the promissory note marked 'Paid'." (Emphases omitted.) Therefore, under the unambiguous language of the January 26, 1989 Letter Agreement, Plaintiffs' right to receive the benefit of the release of the Mortgage and to receive the Note marked "paid" is "pursuant to the May 4, 1984 Option Agreement." (Emphasis added.) Accordingly, the interpretation of the January 26, 1989 Letter Agreement requires us to interpret and give effect to the term "pursuant to."

Black's Law Dictionary 1237 (6th ed. 1990) defines the word "pursuant" as follows:

> A following after or following out. To execute or carry out in accordance with or by reason of something. To do in consequence or in prosecution of anything. "Pursuant to" means "in the course of carrying out: In conformance to or agreement with: according to" and, when used in a statute, is a restrictive term.

(Citation omitted.) Given this definition, the word "pursuant" restricts the object it modifies. In other words, the object

being modified by the word "pursuant" is effectively made conditional upon something else.

Given the common and ordinary meaning of the word "pursuant," Plaintiffs' right to receive the benefit of the release of the August 16, 1982 Mortgage on Lot 395 and to receive the Note marked "Paid" was made conditional upon the May 4, 1984 Option Agreement. In other words, Plaintiffs' right to the benefit made "pursuant" to the May 4, 1984 Option Agreement was made "in accordance with" or "by reason" of the May 4, 1984 Option Agreement.

Indeed, the words "pursuant to" are not reasonably susceptible to an alternative interpretation. Defendants fail to proffer an alternative meaning of the words "pursuant to." To interpret the January 26, 1989 Letter Agreement to require Defendants to obtain the Note marked "paid" and a release of the Mortgage on Lot 395 absent a valid exercise of the May 4, 1984 Option Agreement would require a total disregard of the clause "pursuant to the May 4, 1984 Option Agreement." By considering extrinsic evidence of the parties' intent and construing the January 26, 1989 Letter Agreement to mean that "any settlement" between Defendants and Tokyo Kosan would result in Plaintiffs' entitlement to having the Note marked "paid" and the Mortgage of Lot 395 released, the circuit court rendered the words "pursuant

to" superfluous. Because the terms of the January 26, 1989 Letter Agreement were plain and unambiguous, the circuit court erred in concluding that the terms of the January 26, 1989 Letter Agreement was ambiguous and in considering extrinsic evidence of the parties' intent.

Inasmuch as the right conferred to Plaintiffs was made "in accordance with" or "by reason" of the May 4, 1984 Option Agreement, we note that Plaintiffs rights were dependent upon the May 4, 1984 Option Agreement. Plaintiffs could not have claimed a right to the benefit of the release of the August 16, 1982 Mortgage and to have the Note marked paid if their rights under the May 4, 1984 Option Agreement had been extinguished. Indeed, the underlying basis for Plaintiffs' rights under the January 26, 1989 Letter agreement was Plaintiffs' rights under the May 4, 1984 Option Agreement. Without the May 4, 1984 Option Agreement, Plaintiffs would have no interest in Lot 395 other than to pay and satisfy the Note. We therefore review Plaintiffs' rights under the May 4, 1984 Option Agreement.

C. Plaintiffs' Rights Under the May 4, 1984 Option Agreement

Under paragraph 9.a.(vii) of the May 4, 1984 Option Agreement, if Kaiaka exercised the option to purchase the "Group A" properties, which did not include Lot 395, Plaintiffs would receive from Kaluakoi the Note marked "Paid" and a release of the

Mortgage on Lot 395 at the closing of the sale of the "Group A" properties. In the event that the option was not exercised, paragraph 5(d) of the of the May 4, 1984 Option Agreement gave Plaintiffs the right to satisfy the Note by paying Kaluakoi. In other words, the May 4, 1984 Option Agreement gave Plaintiffs the limited right to either: (1) have Kaluakoi return the Note and release the Mortgage on Lot 395 if the sale to Kaiaka of the "Group A" properties closed, or (2) elect to pay off Kaluakoi on the Note.

The parties do not dispute that Kaiaka did not exercise its option to purchase the "Group A" properties. In addition, the circuit court's decision regarding the May 4, 1984 Option Agreement included a ruling that the May 4, 1984 Option Agreement had expired. The parties in the instant appeal do not dispute that the option has expired. Inasmuch as the option to purchase the "Group A" properties has expired, Plaintiffs may retain Lot 395 only if they pay off the Note and the Mortgage held by Kaluakoi.

D. Because Plaintiffs' Right to Exercise the Option Under the May 4, 1984 Option Agreement Expired, Defendants' Had No Duty to Perform Under the January 26, 1989 Letter Agreement

Given that Plaintiffs' only remaining option under the May 4, 1984 Option Agreement is to pay off the Note and the Mortgage, Defendants have no duty under the January 26, 1989

Letter Agreement. As discussed above, under the plain and unambiguous terms of the January 26, 1989 Letter Agreement, Plaintiffs would be entitled to receive the benefit of having the Note marked "paid" and getting a release of the Mortgage in accordance with (i.e., "pursuant to") the May 4, 1984 Option Agreement. Because the May 4, 1984 Option Agreement no longer recognizes Plaintiffs' right to receiving the Note marked "paid" and the release of the Mortgage, Plaintiffs can no longer have that benefit under the January 26, 1989 Letter Agreement.

Indeed, any other interpretation would result in a windfall to Plaintiffs. It is undisputed that Plaintiffs' right to take Lot 395 without satisfying the Note and the Mortgage arises solely from the May 4, 1984 Option Agreement. Under the plain language of the May 4, 1984 Option Agreement, Plaintiffs were to have the Mortgage removed from Lot 395 and hold title free and clear in exchange for the exercise of the option and closing of the sale of the "Group A" properties. Because Plaintiffs failed to close the sale of the "Group A" properties, Plaintiffs were not entitled to the removal of the encumbering mortgage without satisfying the Note and the Mortgage. In other words, Plaintiffs should not receive the benefit of the bargain (i.e., the release of the Mortgage) because they failed to exercise the option and to perform as agreed (i.e., either to

close the sale of the "Group A" properties or to satisfy the Note and the Mortgage). Therefore, given the expiration of the option, Defendants owed no duty to deliver the Note marked "paid" and to release the Mortgage on Lot 395.

Plaintiffs argue that this court should focus on the language that "any settlement" between Defendants and Tokyo Kosan triggered Defendants' duty to deliver the Note held by Kaluakoi against Plaintiffs marked "paid" and to remove the Mortgage on Lot 395. However, we reject Plaintiffs' construction of the language of the January 29, 1989 Letter Agreement. Although the settlement of the Kaiaka Rock Litigation between Defendants and Tokyo Kosan satisfied one condition of the January 26, 1989 Letter Agreement, the right to the release of the August 16, 1982 Mortgage and to have the Note marked paid was still subject to the May 4, 1984 Option Agreement. Inasmuch as the option had expired as a result of the non-performance of the terms (i.e., either to close the sale of the "Group A" properties or to satisfy the Note), Plaintiffs no longer had the right to the release of the Mortgage encumbering Lot 3
95 and to have the Note marked "paid." Therefore, given that the terms "pursuant to" are plain and unambiguous, the circuit court erred in denying Defendants' motion for summary judgment.

## IV. CONCLUSION

For the reasons discussed above, we vacate the circuit court's judgment filed August 28, 1996 and remand this case with instructions to the circuit court to enter summary judgment in favor of Defendants.

DATED: Honolulu, Hawai'i,[4] June 19, 2000.

On the briefs:

Mark D. Bernstein for plaintiffs/counter-claim defendants-appellants/cross-appellees

Wendell H. Fuji and Nathan H. Yoshimoto, of Kobayashi, Sugita & Goda, for defendants/counterclaimants-appellees/cross-appellants

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RONALD T.Y. MOON, Chief Justice

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STEVEN H. LEVINSON, Associate Justice

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PAULA A. NAKAYAMA, Associate Justice

_____
MARIO R. RAMIL, Associate Justice

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JOHN LIM, Substitute Justice

[4] Substitute Justice Lim was assigned by reason of the vacancy created by the resignation of Justice Klein, effective February 4, 2000. On May 19, 2000, Simeon R. Acoba, Jr. was sworn-in as associate justice of the Hawai'i Supreme Court. However, Substitute Justice Lim remains on the above-captioned case, unless otherwise excused or disqualified.