CAAP-14-0000828

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

COUNTY OF KAUAI, Plaintiffs, vs. HANALEI RIVER HOLDINGS, LTD, a Cook Islands corporation, et al. Defendants.	Civil No: 11-1-0098 (Condemnation) APPEAL FROM JUDGEMENT ENTERED ON April 25, 2014 FIFTH CIRCUIT COURT HONORABLE Judge KATHLEEN N.A. WATANABE

DEFENDANTS-APPELLANTS' REPLY BRIEF

APPENDIX

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DEFENDANTS-APPELLANTS' REPLY BRIEF

Plaintiff-Appellee County of Kauai ("County") breakdown their argument into two essential points:

> "Appellants in the Opening Brief **1)** fail to show how they are aggrieved by any of the trial court's decisions relating to their three points on appeal. Appellants **2)** received full just compensation for their former property condemned by the County; they are entitled to nothing more."

Answering Brief at 2 (numbers and emphasis added). The record however demonstrates that Defendants-Appellants Hanalei River Holdings, Ltd. and Michael G. Sheehan ("Appellants") were not only aggrieved by the trial court's decisions, but that they did not receive full compensation for their property, including interest as required by law.

I. APPELLANTS WERE AGGRIEVED BY THE TRIAL COURT'S DECISIONS

The County contends that Appellants were not aggrieved by the trial court's orders. (Summary of Argument, pages 6-8 of Answering Brief) If Appellants were not aggrieved, which ought to be a relatively straightforward proposition to prove, they have no standing to appeal. *See, Hana Ranch, Inc. v. Kamakahi*, 6 Haw.App. 341, 720 P.2d 1023 (1986). Yet curiously the County expends the next 20 pages of its answering brief in a vain attempt to defend those very same orders which supposedly did not aggrieve Appellants.

Putting aside the County's peculiar arguments, Appellants were obviously aggrieved by all three of the subject trial court's orders. Appellants were precluded from the use of $1.030 million in just compensation during for months, did not received severance damages to which Appellant Sheehan was entitled, and did not received all of the interest which was statutorily due.

II. APPELLANTS WERE AGGRIEVED BY THE COURT'S IMPROPER ORDER ALLOWING THE COUNTY TO WITHDRAW 20% OF ITS ESTIMATE OF JUST COMPENSATION

For starters, the term "excess deposit" – repeatedly emphasized by the County – is not mentioned in any section in Haw.Rev.Stat. Chapter 101 (Eminent Domain). The Chapter does refer to the phrase "[t]he sum of money estimated [] to be just compensation or damages" (§101-29(3)); "such estimated sum of money" (§101-29); and "the amount of the estimated compensation or damages" (§101-30 and 31). It is clear from the language – estimate of just compensation or damages – that payment of that sum of money to the clerk of the court was not meant to be a simple "deposit" which could be arbitrarily withdrawn by the County at its whim.[1]

The funds deposited with the clerk of the court were meant to represent the estimated value of the property subject to condemnation which would permit the State or county to take immediate possession of the property.[2] The estimate of just compensation was also meant to encourage the landowner to accept the amount and thereafter abandon "all defenses interposed by [him or her], excepting [his or hers] claim for greater compensation or damages." Haw.Rev.Stat. §101-31. The County's "bait and switch" tactics – offering Appellants $5.89 million for them to accept and waive their defenses, only to arbitrarily reduce the amount by $1.03 million AFTER being accepted – finds absolutely no support in the statute.

Indeed, there is no provision or mechanism in Chapter 101 which would allow the condemning authority to withdraw the amount of the estimated compensation. The absence of any such provision would indicate that the Legislature did not intend to permit the condemning authority to withdraw the funds once deposited with the clerk. If the amount was in excess of what was ultimately determined to be the value of the condemned property, the condemnee (assuming the funds were withdrawn) would owe the condemning authority interest in the rate of 5%. *City and County of Honolulu v. Bonded Inv., Co.*, 54 Hawaii 523, 511 P.2d 163 (1973)(the

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[1] The consequence of the County's argument is that its deposit **could never be unconditional**.

[2] The County's argument that "[n]early six million dollars of the **County's money** remained on deposit with the trial court, **accruing no interest or otherwise benefiting the County and its residents**" is utterly bizarre and demonstrates that the County clearly misunderstands the purpose of depositing the amount of the estimate of just compensation. (Answering Brief at page 10)(emphasis added) Once the money was deposited, the County received full value – it was permitted to and immediately seized the property. It had possession of the property almost a full two years before final judgment was entered. Accordingly, the County and all of its residents immediately benefitted from the money deposited with the trial court.

County will be entitled to a return of the excess with "interest at the rate of 5% per annum from the date of withdrawal of such excess deposit.")

There are circumstances, not present in this case, where courts have allowed the condemnor to reduce the amount of the estimate of just compensation. *E.g.*, *United States v. 1,997.66 Acres of Land*, 137 F.2d 8 (8th Cir. 1943)(before any part of the money had been paid out to the respective landowners and before there had been any attempt to obtain possession of the property condemnor discovers that a mistake has occurred, condemnor permitted to withdraw the excess of the cash deposited over the revised estimate). Appellants concede that the condemnor would be permitted to withdraw a portion of the estimate of just compensation for clerical or typographical errors (the actual estimate of just compensation is $3.4 million but the clerk of the condemning authority mistakenly transposed the 4 over the 3 and deposited $4.3 million). In this case there were no clerical errors, the County moved to withdraw 20% of its estimate of just compensation almost a year *after* it had seized possession of the property and *after* Appellants had applied for payment.

Since there are no relevant legal authorities and there is no provision in Chapter 101 allowing the condemning authority to withdraw any portion of its estimate of just compensation once deposited, after having taken possession of the property being condemned almost a year earlier, and after Appellants had applied for payment, the County's fallback is that Appellants were not aggrieved.[3] The record establishes otherwise.

First, Appellants abandoned all of the "other" defenses when they applied for payment of the estimate of just compensation based upon the $5.89 million deposit. Appellants did so with the understanding that they would receive the full amount of the deposit when they applied for payment. Receiving 20% less was not what they bargained for.[4] Second, Appellants were aggrieved because they were unable to use the additional $1.03 million for almost an entire year. While Appellants would receive 5% interest on what was the ultimate difference between

[3] "At most, their arguments are abstract propositions of law without real-world effect." Answering Brief at page 14.

[4] "Well, because we have already gotten a partial release. We've waived every other claim, every other defense other than the amount of value for the property; and we did that based on their appraisal or their estimate at 5.89 million." Transcript of the May 1, 2013 hearing at page 20.

the reduced amount of $4.86 million of the estimate of just compensation and the jury's verdict $5.8 million ($940,000.00), Appellants could have obtained a rate of return greater than 5%.

It is clear from the record that Appellants were aggrieved when the trial court erroneously allowed the County to withdraw approximately 20% of its estimate of just compensation after it took possession and after Appellants applied for payment.

II. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE COUNTY ON THE MATTER OF SEVERANCE DAMAGES

The issue of severance damages did not "first ar[i]se" when the County received the Paul Cool report. Severance damages were always an issue since the adjacent parcel was once part of the boatyard.[5] That is a fact of which the County admitted in another proceeding. Moreover since the County struck all of Appellants' witnesses and acknowledged that the only testimony would be presented by experts, one wonders why the County was purportedly surprised by the Cool report. Where else did it expect the issue of severance damages to be contained or discussed?[6]

It should be clear to this Court that the trial court misapplied the summary judgment standard.[7] Instead of construing all disputed facts in a light most favorable to Sheehan, it summarily concluded on an incomplete and limited record that the County was entitled to judgment as a matter of law.

The County contends in its Answering Brief that there were no disputed issues of material fact concerning the three-unities test (unity of title, physicality and use). *City and County of Honolulu v. Bonded Investment*, 54 Hawaii 23, 511 P.2d 163 (1973). In support of its motion, the County only provided public documents (*e.g.*, deeds, easements) which it claimed were the "full evidentiary record supportive of its position." Answering Brief at 16. The

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[5] The County condemnation proceeding took a little more than half of the boatyard property.

[6] Appellants adequately responded to the County's interrogatories. If the County was indeed concerned about severance damages, it should have drafted an appropriate interrogatory, *e.g.*, "If you contend you are entitled to severance damages, please 1) identify the subject property, 2) describe how you maintain title, 3) where the property is located, and 4) its past and present uses." No such interrogatory was sent.

[7] The County takes issue with Defendants-Appellants not submitting their proposed form of the Order granting it summary judgment on severance damages. Their decision to forgo doing so has no impact on this appeal. The consequence was that Appellants merely approved the order "as to form." Hawaii Rules of the Circuit Court Rule 23(b). Approval as to the form "shall not affect the right, or constitute waiver of the right, of any party to appeal from any judgment, decree, or order issued." Hawaii Rules of the Circuit Court Rule 23(c).

County's "full evidentiary record" apparently does not include positions it took in other proceedings against Appellant Sheehan, arguing that he owned Area 51.

With respect to the unity of title, the County claimed "[m]ost importantly, Sheehan did not own the property ("Area 51") for which he claimed severance damages." Answering Brief at page 7. In support of that claim the County argued that "these records and documents proved that Defendant Patricia Sheehan, not HRHL or Sheehan, owned the property of which Area 51 was part." *Id*. at 17. Interestingly the County did not provide any evidence or testimony that Ms. Sheehan considered herself as the "owner" of the property. Rather than coming forward with any evidence or testimony, the County merely argued that its "interpretation" of the subject easement and presumption that Ms. Sheehan owned the property was correct as a matter of law.

The County is being disingenuous. The reason the County stood on the "records" was that it was simultaneously alleging in *County of Kauai, et al. v. Michael G. Sheehan, et al.*, Civil No. 11-1-0206, the Appellant Sheehan owned not only Area 51, but all of the remaining property – TMK (4) 5-5-01: 2. Appellants ask the Court take judicial notice of the complaint in Civil No. 11-1-0206 filed by the County against Appellant Sheehan and several others concerning activities occurring at his boatyard property. (Apendix) At paragraph 3 of the Complaint, the County affirmatively alleged as follows:

> Defendant **MICHAEL G. SHEEHAN** ("Sheehan") **owns and operates a boatyard**, known as the Hanalei River Boatyard ("HRBY") **on his property**, identified as Tax Map Key No.s **(4) 5-5-01: 2**, 33, 34, and 49 ("Property").

(Emphasis added) Area 51 is part of TMK (4) 5-5-01: 2. When convenient and outside the condemnation action the County affirmatively claims that Appellant Sheehan owns the property. However, when he seeks compensation for damages resulting from condemnation, the County disavows any knowledge of his ownership (and its own pleadings) and claims he does not own the property.

The County should be estopped from claiming that Appellant Sheehan does not own Area 51. *Lee v. Puamana Community Ass'n*, 109 Hawaii 561, 576, 128 P.3d 874, 889 (Hawaii 2006)(3-part test: clearly inconsistent position, has the party succeeded in persuading a court to accept that party's earlier position, would asserting an inconsistent position would derive an unfair advantage or impose an unfair detriment) On January 20, 2015, the trial court in Civil No. 11-1-0206 granted summary judgment in favor of the County. A material issue resolved in

the County's favor was that Appellant Sheehan owned Area 51. The Court should apply judicial estoppel in this case from arguing that Appellant Sheehan is not the owner of Area 51.[8]

Moreover, Appellant Sheehan received a TMK number, indicating that the County designated the lot "as a separate lot of record." Since the easement had never been canceled, Appellant Sheehan had possession, use and a TMK for Area 51, title was a disputed issue of material fact. It was error to conclude as a matter of law that Sheehan could not establish unity of title.

With respect to physical unity, the County argued that Sheehan's lot 49 was not contiguous with Area 51 because it was separated by lots 33 and 34. However under *Bonded Investment*, there is no requirement that the lots actually abut one another. In that case, Defendants owned three properties, lot 59, 60 and 65. Lot 65 was the subject of the condemnation action. Lot 59 separated lots 60 and 65. The Court concluded that the owners would be able to claim severance damages for both adjacent lot 59 **and** for lot 60 **even though** lot 60 did not physically abut lot 65. The Court held that "[t]here is no question as to the unity of title and physical unity of the **three lots**." *Id*. at 166 (Emphasis added). The Court looked at the property as a whole because the Defendants had considered and previously used them as a whole.

In this case the lots, 49, 33, 34 and Area 51 were all integral parts of Appellant Sheehan's boatyard. *See*, paragraph 3 of the Complaint filed in Civil No. 11-1-0206, *supra*. There is no question that there was physical unity of all of the lots which made up the boatyard. At a minimum, there were disputed issues of material fact concerning the issue of physical unity precluding the granting of summary judgment.

With respect to unity of use, there were no disputed issues of material fact that the property (including Area 51) was used as Appellant Sheehan's boatyard.[9] Again, the County admitted as much in the complaint it filed in Civil No. 11-1-0206.

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[8] The County's positions are clearly and absolutely inconsistent. While the trial court was the same in both instances, and accepted the inconsistent positions without question. Under the circumstances, the issue of judicial integrity is an issue. Lastly the County's use of the court has given it a clear unfair advantage over Appellant Sheehan.

[9] The County's challenge to Appellant Sheehan's declaration in support of Appellants opposition to the County's motion for partial summary judgment is misplaced. The original executed version of his declaration was submitted to the trial court and is part of the record.

The County failed to establish its fallback position that Appellant Sheehan is estopped from claiming severance damages. The material elements of equitable estoppel require one person to willfully cause another person to erroneously believe a certain state of things and the other person to reasonably rely on his or her erroneous belief to his or her detriment. *Strouss v. Simmons,* 66 Hawaii 32, 657 P.2d 1004 (1982); *Aehegma v. Aehegma,* 8 Haw.App. 215, 223, 797 P.2d 74, 80 (1990). In order to prevail on its equitable estoppel claim, the County must prove 1) Appellants Sheehan willfully caused it to erroneously believe that he was not asserting a claim for severance damages, 2) it reasonably relied on its purported belief that Appellant Sheehan was not asserting a claim for severance damages, and 3) it suffer prejudice.

The County's sole hook on the issue of estoppel is that Sheehan failed to identify any other properties he owned in response to an interrogatory. In its motion to compel discovery, the County claim the information regarding other properties owned by Appellants was important because:

> At trial, the County expects Sheehan to attempt to testify. If he does, the County will examine him regarding his conveyance of Lots 33 and 34 for $500,000 each. **His general knowledge of Kauai property is relevant** (e.g., if he recently acquired Kauai property, what price did he pay).

(RA: Vol. 3, page 197)(emphasis added) The County did not argue that ownership was relevant to damages, including severance damages. Its only argument was that Appellant Sheehan's "general knowledge" of Kauai property values was relevant in the event that he testified. The County did not argue or claim that this interrogatory concerned severance damages.

In light of the County's posture and argument regarding the relevancy of the information, Appellant Sheehan responded as follows:

> The County is not interested in anything other than discovering Sheehan's personal assets[10] which are irrelevant and immaterial to any matter pending in this case. The County's definition of "Own" (Definition no. 4) is telling. Note that it does not limit ownership to legal title to property. Instead, the County equates the definition of "own" as having a beneficial interest in real property through any trusts, foundations or other agreements. As an Atherton, would Sheehan have to identify all real property interests controlled by the Atherton Foundation? Would Sheehan have to disclose all of his corporate investments, and real property held by any of those companies? According to the definitional section he would.

[10] The County has all relevant information concerning any land transactions. First, all sales on Kauai which were relevant as comps (*e.g.,* location and timing) are a matter of public record. Second, as a matter of public record they were available to the County's expert appraiser. Third, the sales data would have identified the seller and buyer.

> None of this information is relevant to valuing parcels 33, 34 and 49. Moreover, there is no timeframe limiting the sale or purchase by Sheehan or real property to May 31, 2011[11] (the date of the summons).

(RA: Vol. 4, pages 37-38)(emphasis added) Clearly Appellant Sheehan was not willfully attempting to mislead the County concerning severance damages.

Moreover, the County cannot claim that it relied upon Appellant Sheehan's interrogatory response. Not only did the County succeed in precluding Appellant Sheehan as a property owner from testifying at trial (negating any possible reliance upon his interrogatory responses), but it conceded that the only evidence of valuation and damages would be proffered by Appellants' expert valuator Paul Cool. Since Appellant Sheehan was barred from testifying (along with all of his percipient witnesses), the only information which the County could possibly rely upon concerning value and damages was the Cool report. If Mr. Cool failed to include information concerning severance damages in his expert report and then at trial attempted to testify about those damages, the County would have a point.

Lastly, the County has failed to demonstrate any prejudice. The County and its expert had more than sufficient time to prepare for and oppose the Cool report.

III. BLIGHT OF SUMMONS DAMAGES WERE INCORRECTLY CALCULATED

Before addressing the County's miscalculation of the blight of summons damages, Appellants have to comment on its claim that

> "Sheehan 'personally agreed' to indemnify the County in the case of overpayment to HRHL. This was **not a condition imposed by the County**. The County accepted Sheehan's offer to facilitate Sheehan's withdrawal of the deposit."

Answering Brief at 28 (emphasis added). Unbelievable; the County now for the first time contends that Appellant Sheehan simply volunteered, on his own, to indemnify the County for any overpayment to HRHL. The County argues that the transcript from the April 10, 2013 proceedings "presents the full picture."[12]

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[11] The interrogatories state that the relevant timeframe is from January 1, 2000 through the present. (Definition no. 22) Even is one assumes that this timeframe applies to interrogatory no. 2, how is any sale or purchase of real property in, say, 2001, relevant to valuation of the properties as of May 31, 2011?

[12] As counsel for Appellants conceded, "[w]e've had some marathon discussions and negotiations[,]" in order to get the County to agree to release the funds to Appellants. April 10, 2013 transcript at page 5. Not the sort of thing one would expect if, as the County claims, there were no conditions placed on the withdrawal of the funds.

> Well, to make this work, Mr. Sheehan personally agreed to cover any overpayment. **Something he didn't have to do**. **But because it was a concern of the County, he said okay**. * * * [B]but just to let you know Mr. Sheehan, **when asked, agreed to cover that**.

April 10, 2013 transcript at page 8 (emphasis added).

> "Mr. Sheehan really did try to make it **palatable for the County**. * * * And I think that was the thing – you know, whether legally -- **and I don't believe that the County had a legal basis for making that argument** because the land owner is the land owner[.]"

Id., at page 9 (emphasis added).

Putting aside the pleasantries of the interaction between counsel and the trial court, it's clear from the exchange that the County required Appellant Sheehan to execute the stipulation which conditioned release of the funds upon him agreeing to indemnify the County for any overpayment to HRHL. It is beyond imagination to conclude that Appellant Sheehan would have suggested a separate stipulation requiring him to indemnify the County for Appellant HRHL's potential exposure from an overpayment. Of course not; the language of the stipulation made it crystal clear that this condition was imposed by the County for the County's benefit.[13]

Moreover, the Court will recall the County's position that it has the unlimited right to withdraw any portion of the amount of its estimate just compensation **even after it has taken possession of the subject property and the funds have been disbursed to the condemnee**.

> There's no interest, and **it is the County's money**. So the County is entitled to withdraw the money. … But **it's the County's money**. It was only -- it was deposited only as an estimate of just compensation. Now that we have a more accurate analysis of what the market value is of the condemned property, **the County should be entitled to withdraw the money**.

(Transcript of the May 1, 2013 hearing, page 7, lines 7-19).

> THE COURT: Okay. Ms. Fazio, just one question I would like you to respond to, the concerned stated which Mr. Wilson -- as to what would preclude the County from having another appraisal done and saying it comes in lower and coming back before the Court again.

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[13] The **County and Sheehan are entering into this Agreement in order to allow Sheehan to withdraw a portion or all of the present estimate of just compensation**, upon the terms and conditions set forth in this Agreement, and **further to address the concerns of the County regarding overpayment of the deposit to HRHL**. Agreement, paragraph 8 of the recitals. (Emphasis added) (RA: Vol. 6, page 364)

> MS. FAZIO: Actually, your Honor, nothing would preclude the County from doing that[.]

(Transcript of the May 1, 2013 hearing, page 26, lines 3-9) In fact, according to the County, it "has an absolute right to withdraw the money[.]" (Transcript of the May 1, 2013 hearing, pages 25-26)

Since according to the County and its counsel the County can come back at any time and reduce the amount of the estimate of just compensation, **its deposit was never unconditional**. Based upon the record and the County's own admissions, the deposit of its estimate of just compensation was not unconditional. It did not toll the accrual of interest.

There are three relevant dates: 1) May 31, 2011 (the date the complaint was filed, 2) April 10, 2013 (the date the County agreed to release just compensation [$4.8 million] was to Appellants, and 3) final payment. There is no dispute about the interest paid (on the $940,000.00 – the difference between the $4.86 million and the final judgment of $5.8 million) by the County for the period April 28, 2012 through final payment.

Since the County's deposit on May 5, 2012 was not unconditional, 5% blight of summons damages accrued on the $5.8 million dollar judgment until the agreement allowing Appellant to withdraw the $4.86 deposit. Rather than the 347 days (Answering Brief at n. 23 [5/31/11-5/4/2012), interest continued to accrue for an additional 332 days (5/31/11 to 4/10/13 totaling 679 days) on $5.8 million. Per diem interest for the three parcels was $794.52. Therefore, blight of summons interest should have been $539,479.08 (679 x $794.52), and not $275,698.63 as claimed by the County. Defendants-Appellants are entitled to an additional $263,780.45 in interest.

IV. CONCLUSION

Defendants-Appellants request that this Court remand this matter for a determination on severance damages and enter judgment on blight of summons damages consistent with Defendants-Appellants' calculations.

DATED: Honolulu, Hawaii, February 17, 2015.

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