

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

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N. MIYATA
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ASSOCIATION OF OWNERS OF KALELE KAI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ASSOCIATION OF OWNERS
OF KALELE KAI,

Plaintiff,

vs.

HITOSHI YOSHIKAWA;
DOE DEFENDANTS 1-10,

Defendants.

CIVIL NO. 15-1-0102-01 KTN
(Declaratory Judgment)

**ORDER GRANTING MOTION TO
DISMISS "COUNTERCLAIM; CROSS-
CLAIM" FILED 4/29/2015 (FILED 5/27/15)**

HEARING:

Date: July 30, 2015

Time: 9:00 a.m.

Judge: The Honorable Karen T. Nakasone

No Trial Date

ORDER GRANTING MOTION TO DISMISS
"COUNTERCLAIM; CROSS-CLAIM FILED 4/29/2015 (FILED 5/27/15)

On May 27, 2015, Plaintiff ASSOCIATION OF OWNERS OF KALELE KAI (the “AOAO”) filed its Motion to Dismiss “Counterclaim; Cross-Claim” Filed 4/29/2015 (the “Motion”).

On July 22, 2015, Defendant HITOSHI YOSHIKAWA (“Yoshikawa”) filed his Opposition to the Motion (“Opposition”).

On July 27, 2015, the AOAO filed its Reply in support of the Motion (“Reply”).

On July 30, 2015, the Motion came on for hearing before The Honorable Karen T. Nakasone. John D. Zalewski, Jana M. Naruse, and Christopher S. Goodwin appeared on behalf of the AOAO. Lauren C. McDowell appeared on behalf of Yoshikawa.

The Court having carefully considered the Motion, the Opposition, the Reply, the oral arguments of counsel, the information adduced at the hearing, and the record and files of this action, and for the reasons stated at the hearing and as set forth in the Motion and Reply, and for other good cause appearing, hereby GRANTS the Motion with respect to the Counterclaim; Cross-Claim filed herein on April 29, 2015, as follows:

A. Count 1 (Breach of Contract), Count 2 (Breach of Fiduciary), and Count 3 (Bad Faith Pursuant to HRS §514B-9 and Common Law): DISMISSED WITH PREJUDICE in favor of AOAO and Cross-Claim Defendants BRADFORD OAKES and DARLA SABRY (“Cross-Claim Defendants”);

B. Count 4 (Intentional Infliction of Emotional Distress): DISMISSED WITHOUT PREJUDICE in favor of AOAO and Cross-Claim Defendants. Yoshikawa may file a non-hearing motion for leave to amend in accordance with the Hawaii Court Rules.

C. Count 5 (Violation of §6.13 and §6.14 of the Restatement, 3d of Servitudes) and Count 6 (Prima Facie Tort): DISMISSED WITH PREJUDICE in favor of AOA and Cross-Claim Defendants.

D. Count 7 (Abuse of Process): DISMISSED WITH PREJUDICE in favor of the AOA. DISMISSED WITHOUT PREJUDICE with respect to Cross-Claim Defendants. Yoshikawa may file a non-hearing motion for leave to amend with respect to Cross-Claim Defendants in accordance with the Hawaii Court Rules.

E. Count 8 (Misrepresentation): DISMISSED WITHOUT PREJUDICE in favor of AOA and Cross-Claim Defendants. Yoshikawa may file a non-hearing motion for leave to amend in accordance with the Hawaii Court Rules.

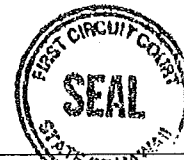
F. Count 9 (Bad Faith): DISMISSED WITH PREJUDICE in favor of AOA and Cross-Claim Defendants.

G. Count 10 (Violation of HRS §514B) and Count 11 (Violation of HRS §514B-148): DISMISSED WITHOUT PREJUDICE in favor of AOA and Cross-Claim Defendants. Yoshikawa may file a non-hearing motion for leave to amend in accordance with the Hawaii Court Rules.

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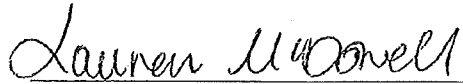
DATED: Honolulu, Hawaii, _____.

KAREN T. NAKASONE



JUDGE OF THE ABOVE-ENTITLED COURT


APPROVED AS TO FORM:



TERRANCE M. REVERE
LAUREN C. McDOWELL
Attorneys for Defendant
HITOSHI YOSHIKAWA

Association of Owners of Kalele Kai vs. Yoshikawa, Civil. No. 15-1-0102-01 (KTN); ORDER
GRANTING MOTION TO DISMISS "COUNTERCLAIM; CROSS-CLAIM" FILED 4/29/2015
(FILED 5/27/15)

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
AUG 14 2015
9:46 A.M.


J. YAMAGATA
Clerk, 22nd Division (jh)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII


ASSOCIATION OF OWNERS
OF KALELE KAI,

Plaintiff,

vs.

HITOSHI YOSHIKAWA;
DOE DEFENDANTS 1-10,

Defendants.

CIVIL NO. 15-1-0102-01 KTN 
(Declaratory Judgment)

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT FILED
3/17/15 AND INJUNCTION AGAINST
HITOSHI YOSHIKAWA; NOTICE OF
ENTRY**

Hearing:

Date: April 28, 2015

Time: 10:00 a.m.

Judge: The Honorable Karen T. Nakasone

No Trial Date

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT FILED 3/17/15
AND INJUNCTION AGAINST HITOSHI YOSHIKAWA**

Plaintiff ASSOCIATION OF OWNERS OF KALELE KAI's ("**Association**") Motion for Summary Judgment filed March 17, 2015 ("**Motion**") came on for hearing on April 28, 2015, with the Honorable Karen T. Nakasone presiding. The Association was represented by John D. Zalewski, Esq. and Christopher Shea Goodwin, Esq. Defendant HITOSHI YOSHIKAWA ("**Yoshikawa**") was represented by Terrance M. Revere, Esq.

The Court, after careful consideration of the Motion, Yoshikawa's Opposition memorandum filed April 20, 2015, and the Association's Reply memorandum filed April 23,

EXHIBIT B

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2015, and having heard additional argument presented at the hearing, and for good cause appearing, hereby issues the Court's Findings of Fact, Conclusions of Law, and Order Granting Association's Motion for Summary Judgment and Injunction Against Hitoshi Yoshikawa.

FINDINGS OF FACT

1. Any findings of fact herein constituting conclusions of law shall be so construed.
2. The facts set forth herein are undisputed.

The Parties, the Project, the Governing Documents, and Yoshikawa's Deed

3. The Association is a Hawaii condominium association and Hawaii nonprofit corporation organized and existing under Chapters 514B and 414D of the Hawaii Revised Statutes. Mem. in Support of Motion at 2; Exs. 1-2.¹

4. The Association operates and administers the residential condominium project known as Kalele Kai, which includes the Kalele Kai marina, located in Hawaii Kai at 1 Keahole Place, Honolulu, Hawaii 96825 (the "**Project**" or "**Kalele Kai**"). Id.

5. The Association's governing documents include the Declaration of Condominium Property Regime ("**Declaration**") and the Bylaws of the Association of Owners of Kalele Kai ("**Bylaws**"), both of which were recorded in the Hawaii Bureau of Conveyances on 6/1/93. Exs. 1-2, respectively.

6. Yoshikawa is a member of the Association by virtue of his ownership of Apartment No. 106 and Boat Mooring Nos. 28-33 appurtenant thereto, as set forth in the

¹ References herein to "**Ex. ___**" mean Exhibits submitted by the Association which are numeric. Because Yoshikawa's Opposition also used numeric exhibits, reference to those exhibits herein are to "**Opp. Ex. ___**."

“Apartment Deed (With Boat Moorings)” recorded in Hawaii Bureau of Conveyances on 11/11/10 (“Deed”). Ex. 4.

7. Under the Deed, Yoshikawa’s ownership to his unit and Boat Mooring Nos. 28-33² was expressly subject to the Declaration and Bylaws. Ex. 4 (Deed at KK00919-22, ##13-14).

8. Prior to closing in 2010, Yoshikawa acknowledged his receipt of the Declaration and Bylaws, and that he had read and approved them. Ex. 5 (Realtor form executed by Yoshikawa, twice, under headings, “RECEIPT” and “APPROVAL”).

9. The Declaration and Bylaws run with the land and have at all times applied to Yoshikawa. Ex. 2 (Bylaws §1.1, at 2, “The Declaration and Bylaws shall constitute covenants running with the land and shall apply to all present and future owners”); accord, Pelosi v. Wailea Ranch Estates, 91 Haw. 478, 489 (1999) (defendants “had constructive notice by virtue of their deeds, of the ... covenants”).

10. Section 13 of the Declaration requires Yoshikawa, as a unit owner, to “comply strictly” with the Declaration and Bylaws or be subject to injunctive relief and other remedies available to the Association, as follows:

13. Compliance with Declaration, Bylaws and the Act. All owners, their tenants, families, employees, servants, guests, and any other persons who may in any manner use the Project, shall be bound by and comply strictly with the provisions of this Declaration, the Bylaws, the Act, all agreements, decisions and determinations by the Association as are lawfully made or amended from time to time, that certain Declaration of Restrictive Covenant (Private Park) dated June 3, 1991 recorded in the Bureau as Document No. 91-119313 (hereinafter referred to as the “Declaration of Restrictive Covenant (Private Park)”), and the Declaration of Protective Provisions (Hawaii Kai Marina), and failure to comply with any of the same shall be grounds for an action to recover sums due for damages or injunctive relief, and any other remedies

² The Project’s boat moorings are sometimes identified with the prefix “B.” See Ex. 1, Declaration §5 (quoted in Paragraph 11, below).

available in law or in equity, maintainable by the Board or managing agent on behalf of the Association or, in a proper case, by any aggrieved owner. [...]

Ex. 1, Declaration, page 20 (emphasis added); accord, HRS §514B-112(c).

11. Section 5 of the Declaration provides that the Project's boat moorings are limited common elements (except that boat mooring nos. B7-B8 are designated as common elements), and provides that the boat moorings – without exception – “shall be restricted to use by boats no larger than twenty-three (23) feet in length,” as follows:

5. **Common Elements.** One freehold estate is hereby designated in all of the remaining portions and appurtenances of the Project (hereinafter referred to as the “common elements”), including specifically, but not limited to:

- (a) The Land in fee simple;
- (b) All structural components [...];
- (c) All walkways, including the boat mooring walkways, and interior roadways located upon the Land; [...]

(j) **Two (2) boat moorings (designated B7 and B8 on the Condominium Map). The boat moorings shall be restricted to use by boats no larger than twenty-three (23) feet in length** and shall be subject to that certain Declaration of Protective Provisions dated January 30, 1991, recorded in the Bureau as Document No. 91-026955, as amended (hereinafter referred to as the “Declaration of Protective Provisions (Hawaii Kai Marina)”) and any rules and regulations promulgated thereunder, this Declaration, the Bylaws and any house rules adopted by the Board. **All remaining boat moorings of the Project shall be designated as “limited common elements” appurtenant to designated condominium units as described in more detail herein below; [...]**

Limited Common Elements.

The following common elements, (hereinafter referred to and designated as “limited common elements”), are hereby set aside and reserved for the exclusive use of certain condominium units, and such condominium units shall have appurtenant thereto exclusive easements for use of such limited common elements. **The limited common elements so set aside and reserved are as follows: [...]**

(b) **All boat moorings shall be identified by the letter “B” and a number. Condominium unit 3110 initially shall have appurtenant thereto boat moorings B1 through B6, inclusive, and B9 through B60, inclusive, as designated on the Condominium Map.** Notwithstanding any provision of this Declaration, the Developer, as the initial owner of condominium unit 3110, shall have the right to amend this Declaration (1) prior to the conveyance of condominium unit 3110, to transfer and redesignate any unsold boat moorings from condominium unit 3110 to any other condominium unit(s), and (2) as often as is necessary thereafter, to transfer and redesignate any unsold boat moorings from any condominium units owned by the Developer to any other condominium unit(s). Such transfers and redesignations shall be effectuated by amendments to the Declaration signed by the Developer and recorded in

the Bureau. Such condominium units shall enjoy the exclusive use of the boat moorings appurtenant thereto, subject to that certain Declaration of Protective Provisions (Hawaii Kai Marina) and any rules and regulations promulgated thereunder, this Declaration, the Bylaws and any house rules adopted by the Board. The relocation and/or removal of boat moorings may be undertaken only in accordance with such rules and regulations as may be adopted by the Board.³ Notwithstanding any provision of this Declaration, owners shall have the right to transfer and change the designation of boat moorings which are appurtenant to their respective condominium units by recordation in the Bureau of an amendment to this Declaration and appropriate conveyance document, both signed by the seller and the buyer of the boat mooring, and their respective mortgagees, if any.

The boat mooring shall be restricted to use by boats no larger than twenty-three (23) feet in length. The owner of a condominium unit to which a boat mooring is appurtenant, at such owner's sole expense, shall maintain and repair the boat mooring in a good, safe and clean condition; provided, that if owner fails to maintain and/or repair the boat mooring in a good, safe and clean condition, the Association may arrange for the maintenance and/or repair work to be performed and the actual cost of such work plus a reasonable administrative fee as may be levied by the Board shall be charged to the owner so long as the Association (i) has provided the owner with written notice of the maintenance and/or repair work, the estimated cost of such work and the estimated administrative fee for arranging for such work on behalf of the owner, and (ii) the owner fails to notify the Association in writing within seven (7) days of owner's receipt of the Association's notice that owner has made arrangements for such maintenance and/or repair work to be performed, the person or persons who will perform such work, and the date such work will begin.

Ex. 1, Declaration, pages 5-8 (emphasis added).

12. Section 12 of the Declaration entitled, "**Common Expenses**," provides in part:

[I]f the limited common elements are appurtenant to more than one (1) condominium unit, the owners of such condominium units to which such limited common elements are appurtenant shall be severally liable in proportion to the ratio that the percentage share in the common interests of their respective condominium units bears to the sum of the percentage shares in the common interests of all the condominium units to which such limited common elements are appurtenant (such charges, costs and expenses incurred only for or in connection with any condominium unit or limited common element being herein called "limited common expenses")[...].

Ex. 1, Declaration, page 18.

³ This sentence was added by the Tenth Declaration Amendment. Ex. 3.

Yoshikawa Knew of the Declaration's 23' Boat Length Restriction and Knew the Association's Objected to His Intention to Moor a 49' Boat at the Project, Yet He Purchased and Moored the Boat at the Project Anyway, and Refused to Remove It, Despite Demand

13. On 11/21/12, after Yoshikawa indicated an intent to purchase and moor a boat of 49 feet in length, the Association, through its general counsel, informed Yoshikawa that the Board of Directors lacked authority to approve the mooring of a boat at the Project over 23 feet in length, emphasized that there are "express restrictions set forth in the project's Declaration and Bylaws," and concluded, "the Board will not and cannot expressly approve the mooring of any boat at Kalele Kai in excess of 23 feet in length." Exs. 6-7 (separate emails sent to Kazuhiko ("KC") Udagawa and Maiko Sakata, Yoshikawa's agent and fiancé, respectively).

14. In spite of being so informed, Yoshikawa thereafter ordered and purchased a customized boat, "Rola," of 49 feet, 4 inches in length.

15. By 5/6/13, Yoshikawa hired an attorney, who stated that Yoshikawa purchased a new boat "which at 49'4" requires no modification of the current 69' boat mooring," and that Yoshikawa "will soon be docking it in his boat moorings," pursuant to his (alleged) "legal rights." Ex. 16 (KK001147).

16. Yoshikawa's attorney stated that absent a written objection from the Association within 7 days, Yoshikawa "will proceed to moor his new boat," and he stated that if the Association did object, "we will have [no] choice but to bring an action to enforce Mr. Yoshikawa's rights." Ex. 16 (KK001149).

17. On 5/7/13, the next day, the Association's counsel responded, "your client is advised the Board objects, at least preliminarily, to his proposed mooring of a boat at the Kalele Kai Marina in violation of the 23 foot length restriction set forth in the project's Declaration." Ex. 20 (KK001175).

18. On 6/4/13, the Association informed Yoshikawa's counsel that, "your client's request to moor a 51' boat at Kalele Kai has been denied, as the requisite boat length violated the 23' boat length restriction expressly stated in the Declaration." Ex. 22.⁴

19. In August 2013, Yoshikawa sold his old boat (the "Ariel") to make room for his larger, 49' boat (the "Rola"). Ex. 14 (T. at 630).

20. On 10/28/13, with actual knowledge of the 23 foot boat length restriction, and the Association's denial of his request to moor his new 49' boat, Yoshikawa moored the Rola at the Project's marina anyway.

21. That same day, Association issued a written citation to Yoshikawa for violating the Declaration. Ex. 25.

22. It is undisputed that Yoshikawa's boat, the Rola, exceeds the maximum length that is permitted under Section 5 of the Declaration. Ex. 16 (KK001147); Ex. 27 (photos).

23. On 11/5/13, the Association's counsel wrote to Yoshikawa's counsel, in which the Association: (1) Restated that Yoshikawa was informed on 6/4/13 that the Board denied his request to moor his boat; (2) Quoted the Declaration's 23' restriction; (3) Demanded that Yoshikawa "remove any boat exceeding 23 feet in length" and cease and desist from any such violation in the future; and (4) Placed him on notice that failure to remove his boat by 12/31/13 may result in fines and assessment of attorneys' fees for enforcing the Declaration. Ex. 26.

24. Regardless, Yoshikawa has continued to moor his 49' vessel at the Project, in open, material, and intentional violation of the Declaration. Declaration of Alan Takumi, ¶18.

⁴ As admitted by Yoshikawa, the length of the Rola is at 49'4, Ex. 16 (KK001147), not 51' as stated Ex. 20.

25. Yoshikawa's boat, the Rola, is presently the only boat in excess of 23 feet moored at the Project's marina. Takumi Decl., ¶18.

26. The Court finds and concludes that there are no genuine or material issues of fact and that the undisputed evidence shows that Yoshikawa has violated the boat length restriction in Section 5 of the Declaration, which entitles the Association to summary judgment as a matter of law and an injunction against Yoshikawa to enjoin his violation and to enforce compliance.

The Boat Length Restriction in Section 5 of the Declaration is Unambiguous, and the Extrinsic Evidence Relied Upon By Yoshikawa is Inadmissible

27. The Court finds that Yoshikawa has presented no admissible evidence to create a genuine issue of material fact to dispute his violation of the boat length restriction set forth in Section 5 of the Declaration.

28. The Court finds and concludes that the boat length restriction contained in Section 5 of the Declaration is unambiguous, and restricts the use of all boat moorings at the Project, including Yoshikawa's boat moorings, to boats not exceeding 23 feet in length.

29. Section 5's boat length restriction is clear on its face, not capable of being reasonably understood in more ways than one, using terms according to their plain, ordinary, and accepted sense in common speech.

30. Nowhere in the Declaration, or the Bylaws, are the restriction's plain terms contradicted, or is there any indication that they should be interpreted differently.

31. Yoshikawa does not dispute the existence of the 23 foot boat length restriction set forth in Section 5 of the Declaration. Rather, Yoshikawa contends that the restriction does not apply to him. Yoshikawa relies on extrinsic evidence in alleged support of that contention. All such extrinsic evidence is inadmissible. Thus, Yoshikawa has failed to raise a genuine issue of material fact in opposition to the Motion.

32. None of the extrinsic evidence submitted by Yoshikawa is codified or referenced in the Declaration. Mooring configurations, perpendicular moorings, and side-tying are not mentioned in the Declaration. The Declaration contains no exceptions to the express boat length restriction set forth in Section 5.

The Assessment Which Yoshikawa Challenges Was and Is Valid, Proper, and In Accordance with the Declaration

33. The Court finds and concludes that there are no genuine issues of material fact and that the undisputed evidence shows that the special assessment for repairs to the Project's marina and boat moorings imposed on Yoshikawa was and is valid, proper, and in accordance with the Declaration.

34. The Court finds and concludes that Yoshikawa was fairly and validly assessed for costs attributable to the repairs and renovations. The boat moorings are limited common elements, and the costs and allocations were based upon Bellingham Marine Industries' computations. See Ex. 1 (Declaration §5(j), KK002092); Ex. 4 (Deed, KK000919, Boat Moorings 28-33: "limited common elements"); Ex. 28 (KK000043, computations); Ex. 17 (T. at 782-86).

35. Yoshikawa's contention that the Association is "absolutely not entitled to the declaration that this assessment was proper," predicated on one paragraph of argument in the Opposition (p. 19), which the Court finds is conclusory and without merit.

36. The Court finds that Yoshikawa has presented no admissible evidence to create a genuine issue of material fact to dispute the Court's determination that the special assessment imposed on Yoshikawa was and is valid, proper, and in accordance with the Declaration.

CONCLUSIONS OF LAW

1. Any conclusions of law herein constituting findings of fact shall be so construed.

2. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions 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. HRCP Rule 56(c).

3. A fact is “material” if proof of that fact would have the effect of establishing or refuting an essential element of a cause of action asserted by one of the parties. The court must view the evidence in the light most favorable to the non-moving party. Gurrobat v. HTH Corp. 133 Haw. 1, 14 (Haw. 2014).

4. “Once the movant has satisfied the initial burden of showing that there is no genuine issue of material fact, the opposing party must come forward, through affidavit or other evidence, with specific facts showing that there is a genuine issue of material fact.” Makila Land Co., LLC v. Kapu, 114 Haw. 56, 67 (Haw. App. 2006). “If the non-moving party fails to meet this burden, the moving party is entitled to summary judgment as a matter of law.” Id. at 67.

5. Here, the Court finds and concludes that the Association, as movant, satisfied its initial burden of showing that there is no genuine issue of material fact, that Yoshikawa, as the opposing party, failed to come forward with admissible and specific facts showing that there is genuine issue of material fact, and thus, the Association is entitled to summary judgment as a matter of law.

6. The Court finds and concludes the Association is entitled to summary judgment against Yoshikawa on both matters set forth in the Motion: That Yoshikawa violated the Declaration’s boat length restriction, and that the special assessments imposed on Yoshikawa were proper.

7. By Hawaii statute, Yoshikawa, as a unit owner, “shall comply strictly with the covenants, conditions, and restrictions set forth in the declaration, the bylaws, and the house rules adopted pursuant thereto. Failure to comply with any of the same shall be grounds for an action to recover [...] injunctive relief, or both, maintainable by the managing agent, resident manager, or board on behalf of the association.” HRS §514B-112(c); accord, Ex. 1 (Declaration §13, page 20).

8. “[W]here a deed makes a specific reference to a restrictive covenant, the grantee is on notice that his interest is subject to the terms of that restrictive covenant.” Lee v. Puamana Comm. Assoc., 109 Haw. 561, 568 (2006); see also, Pelosi v. Wailea Ranch Estates, 91 Haw. 478, 489 (1999) (“defendants in the present matter had constructive notice by virtue of their deeds, of the ... covenants”); Rawlins v. Izumo Taisha Kyo Mission of Hawaii, 36 Haw. 721, 726 (1944) (equity will enforce a contract “containing restrictive covenants in a deed or lease limiting the use of the land in a particular manner or prescribing a particular use which creates equitable servitudes”).

9. Here, Yoshikawa’s Deed placed him on actual notice of the Declaration, and he both read and approved the Declaration prior to closing. Ex. 4 (Exhibit A thereto); Ex. 5.

10. A covenant runs with the land and binds successor purchasers where: (1) it “touches and concerns” the land; (2) the covenanting parties intended it to run with the land; and (3) there is privity of estate. Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 383 (1993).

11. Here, the Association’s governing documents expressly provide that they run with the land and apply to present and future owners, in accordance with Hawaii law. Ex. 2 (Bylaws §1.1); Pelosi v. Wailea Ranch Estates, 91 Haw. 478, 489 (1999).

12. “[K]nowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows.” Am. Sur. Co. of New York v. Pauly, 170 U.S. 133, 153, 18 S. Ct. 553, 560, 42 L. Ed 977 (1898); Restatement (Third) of Agency § 5.03 (2006) (re: Imputation of notice of fact to principal); Ranieri v. Kersenbrock, 2011 WL 5520609 at *10, n.9 (D. Haw. 2011) (the Restatement (Third) of Agency §5.03 is simply an elaboration of an established principle of Hawaii law, i.e., notice to an agent is imputed to the principal, citing Medeiros v. Udell, 34 Haw. 632, (Haw. Terr. 1938)).

13. The attorney-client relationship is that of principal and agent. Shin v. Shin, 96 Haw. 122, 126 (Haw. App. 2001); Alt v. Krueger, 4 Haw. App. 201, 207 (1983) (same); see also, Medeiros v. Udell, 34 Haw. 632, 1938 WL 6814, at *2 (Haw.Terr. 1938)(“Knowledge on the part of an attorney is imputable to this client”); 7 Am. Jur. 2d Attorneys at Law §253 (2014) (“Notice or knowledge of an attorney, acquired during the time he or she is acting within the scope of his or her employment, is imputed to the client. In the context of an enduring attorney-client relationship, knowledge acquired by the attorney is imputed to the client as a matter of law”).

14. Here, Yoshikawa is imputed and noticed with all facts and information set forth in all writings and communications to and from Yoshikawa’s agent (Mr. Udagawa) and his legal counsel (Mr. Revere) as a matter of law.

15. The burden of proof is placed on the party attempting to avoid a covenant. See Restatement (Third) Property (Servitudes) §3:1, comment a (2000) (“the effect of the rule is to shift to the party claiming invalidity of a servitude the burden to establish that it is illegal or unconstitutional, or violates public policy”).

16. Here, Yoshikawa has failed to come forward with admissible or specific facts to avoid the Declaration provisions at issue, or to create any genuine issue of material fact.

17. Here, the Court finds and concludes that Yoshikawa did not merely fail to “comply strictly” with the boat length restriction in Section 5 of the Declaration. The Court finds and concludes, based upon the undisputed facts, that Yoshikawa deliberately, materially, openly, and continuously has violated the restriction. Yoshikawa moored his boat at the Project, despite knowing of both the restriction and the fact that his boat is more than double the maximum length permitted. The Court finds and concludes that Yoshikawa’s violation is intentional, or that he recklessly assumed the risk that a court of competent jurisdiction would conclude that he has materially violated obligations which he owes to the Association under the Declaration and Hawaii law.

18. The granting of equitable relief is within the sound discretion of the trial court, and will not be set aside unless manifestly against the clear weight of the evidence. Sandstrom v. Larsen, 59 Haw. 491, 494 (1978) (citing Jenkins v. Wise, 58 Haw. 592, 598 (1978)).

19. A basic consideration in the enforcement of restrictive covenants “is that they are enforceable through the equitable relief afforded by an injunction.” Sandstrom, 59 Haw. at 499.

20. “[W]here a property owner deliberately and intentionally violates a valid express restriction running with the land or intentionally takes a chance, the appropriate remedy is a mandatory injunction to eradicate the violation.” Id. at 500 (internal quotes omitted); see also Royal Kunia Comm. Assoc. v. Nemoto, 119 Haw. 437, 449-51 (Haw. App. 2008) (affirming mandatory injunction to enforce restrictive covenant against owners who built Japanese rock garden over association’s objection and without approval).

21. “[M]andatory injunctive relief must be granted as the remedy for a violation of a restrictive covenant if two requirements are met: (1) the defendant had actual or constructive knowledge of the restrictive covenant; and (2) despite such knowledge, the defendant deliberately and intentionally proceeded with construction violative of the covenant or intentionally assumed the risk of violating the covenant without first obtaining a resolution of the covenant.” Pelosi v. Wailea Ranch Estates, 91 Haw. 478, 486 (1999).

22. The Court finds and concludes that the appropriate remedy is a mandatory injunction to eradicate Yoshikawa’s violation, that such a remedy is expressly contemplated and specified in Section 5 of the Declaration and HRS §514B-112(c) (failure to “comply strictly” with “covenants, conditions, and restrictions set forth in the declaration ... shall be grounds for an action to recover [...] injunctive relief, or both, maintainable by the managing agent, resident manager, or board on behalf of the association”).

23. An injunction in favor of the Association and against Yoshikawa is appropriate and necessary to enforce the restriction against Yoshikawa, and enjoin any future violations.

24. The Court finds and concludes that the special assessment for repairs to the Project’s marina and boat moorings imposed on Yoshikawa was and is valid, proper, and in accordance with the Declaration.

25. HRS §514B-41(c) provides (emphasis added):

Unless otherwise provided in the declaration or bylaws, if the board reasonably determines that the extra cost incurred to separately account for and charge for the costs of maintenance, repair, or replacement of limited common elements is not justified, the board may adopt a resolution determining that certain limited common element expenses will be assessed in accordance with the undivided common interest appurtenant to each unit. In reaching its determination, the board shall consider:

- (1) The amount at issue;
- (2) The difficulty of segregating the costs;
- (3) The number of units to which similar limited common elements are appurtenant;

- (4) The apparent difference between separate assessment and assessment based on the undivided common interest; and
- (5) Any other relevant factors, as determined by the board.

The resolution shall be final and binding in the absence of a determination that the board abused its discretion.

26. Here, in accordance with Hawaii law and the Declaration, the costs to renovate the Project's marina were reasonable, necessary, in accordance with the Board's authority and business judgment, were fairly allocated among the boat mooring owners and the general membership in accordance with computations made by professionals, and did actually benefit all boat mooring owners, including Yoshikawa.

27. The Court finds and concludes that Yoshikawa's Opposition did not assert that the boat length restriction in Section 5 of the Declaration was ambiguous, Yoshikawa has waived that argument. Hawaii Ventures, LLC v. Otaka, Inc., 114 Haw. 438, 500 (Haw. 2007).

28. Assuming arguendo that the foregoing argument as to whether the boat length restriction is ambiguous has not been waived, the Court nonetheless finds and concludes that the boat length restriction in Section 5 of the Declaration is unambiguous, for the reasons noted. (See Findings of Fact, supra.)

29. "The preliminary question of whether a covenant is ambiguous is a question of law that may be resolved on summary judgment." Hiner v. Hoffman, 90 Haw. 188, 190 (1999) (citing Pelosi v. Wailea Ranch Estates, 10 Haw.App. 424, 436, recon. denied, 10 Haw.App. 631 (1994), cert. denied, 77 Haw. 373 (1994)).

30. "In construing restrictive covenants governing the use of land, we are guided by the same rules that are applicable to the construction of contracts ... The fundamental rule is that the intent of the parties, as gleaned from the entire context of the covenant, governs." Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 435-36 (1994).

31. Where a contract is complete and not uncertain or ambiguous, the writing will be presumed to contain the entire agreement, and parole or extrinsic evidence is inadmissible to vary the terms of the written instrument. Honolulu Fed. Savings & Loan Assoc. v. Murphy, 7 Haw.App. 196, 200 (1988).

32. “[C]ourts should not draw inferences from a contract regarding the parties' intent when the contract is definite and unambiguous. In fact, contractual terms should be interpreted according to their plain, ordinary meaning and accepted use in common speech. The court should look no further than the four corners of the document to determine whether an ambiguity exists.” Williams v. Aona, 121 Haw. 1, 14 (2009) (citations omitted).

33. The Court, having concluded that the restriction is unambiguous, concludes that all extrinsic facts submitted with the Opposition are inadmissible.

ORDER GRANTING SUMMARY JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Association's Motion for Summary Judgment filed 3/17/15 is GRANTED.
2. All claims in Plaintiff's First Amended Complaint have hereby been adjudicated in favor of the Association and against Yoshikawa.
3. The Association shall be considered the prevailing party with respect to the First Amended Complaint in a motion for an award of its attorneys' fees and costs against Yoshikawa.

INJUNCTION AGAINST HITOSHI YOSHIKAWA

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Yoshikawa is hereby ORDERED to remove his boat, the Rola, from the Project's marina, within ten (10) days from the date of entry of this Order and Injunction.

2. This injunction is MANDATORY and PERMANENT. Yoshikawa is hereby PERMANENTLY ENJOINED from mooring the Rola at the Project's marina at any time after ten (10) days from the date of entry of this Order and Injunction.

3. Yoshikawa including his agents, representatives, successors, and assignees, are hereby PERMANENTLY ENJOINED from any further or future violation of the 23 foot boat length restriction in Section 5 of the Declaration.

4. For as long as he remains a member of the Association, Yoshikawa is hereby PERMANENTLY ENJOINED from mooring or causing to moor any boat at the Project that is in excess of 23 feet in length, unless and until the Association duly approves an amendment in accordance with HRS § 514B-32(a)(11) to modify the 23 foot boat length restriction set forth in Section 5 of the Declaration.

DATED: Honolulu, Hawaii, AUG 14 2015



JUDGE OF THE ABOVE-ENTITLED COURT

NOTICE SENT TO:

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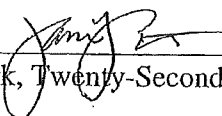
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NOTICE OF ENTRY

The foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT FILED 3/17/15 AND INJUNCTION AGAINST HITOSHI YOSHIKAWA, in Civil No. 15-1-0102-01 KTN, has been entered and copies thereof served on the above-identified parties by placing the same in the United States Postal Service mail, postage prepaid, on AUG 14 2015.



Clerk, Twenty-Second Division