Hawaii

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I. Mechanic's Lien Basics

Hawaii's Mechanic's Lien Law is very broad, protecting all "persons furnishing labor or material in the improvement of real property." HAW. REV. STAT. § 507-42. This includes materialmen of subcontractors, *H. Hackfeld & Co. v. Hilo R.R. Co.*, 14 Haw. 448 (1902), trustees of an employee benefit trust fund, *Hawaii Carpenters' Trust Funds v. Aloe Development Corp.*, 63 Haw. 566, 577, 633 P.2d 1106, 1113 (1981) and design professionals, *Nakashima Associates, Inc. v. Pacific Beach Corp.*, 3 Haw. App. 58, 641 P.2d 337 (1982).

The lien may attach to equitable interests in property, *C.B. Hofgaard & Co. v. Smith*, 30 Haw. 882 (1929), but it is limited to private projects, and cannot attach to lien public property. *A.C. Chock, Ltd. v. Kaneshiro*, 51 Haw. 87, 91, 451 P.2d 809, 812 (1969).

Where a lessee contracts for the improvement, the lien will attach only to the lessee's interest. *Tropic Builders, Ltd. v. U.S.*, 52 Haw. 298, 304, 475 P.2d 362, 365-366 (1970). However, under leases *requiring* the construction or improvements, the lien may attach to both the lessor's and the lessee's interest. HAW. REV. STAT. § 507-42; *Media Five Limited v. Yakimetz*, 2 Haw. App. 339, 343, 631 P.2d 1211, 1214-1215 (1981).

Mechanic's Liens on condominium property are also limited. Under HAW. REV. STAT. § 514B-43 there can be no lien on the common elements at any time, not for contracts with the developer and not for contracts with the association of apartment owners. Prior to the first meeting of the association – which will normally occur after units have been sold to individual owners – a lien will attach to "all units owned by the developer described in the declaration at the time of visible commencement of operations." This would appear to apply to units which were owned by the developer "at the time of visible commencement", including those which may have since been transferred by the developer. Liens may of course arise against individual apartments and the individual apartments' share in the common elements if the owner has consented to the improvements.

A. Requirements

Under HAW. REV. STAT. § 507-42, to obtain a mechanic's lien, proof is required that:

a. Labor or materials were furnished in the improvement of real property.

b. The price agreed to be paid, or the fair and reasonable value for the labor or materials.

The procedural requirements of the mechanic's and materialman's lien statutes have been strictly enforced. *Moore v. Tablada*, 68 Haw. 228, 708 P.2d 140 (1985).

1. Application for a Lien

Claimants are required to file an application for a lien in the state circuit court. As set forth in HAW. REV. STAT. § 507-43, the claimant must file an "Application for a Lien" and a "Notice of Lien" setting forth the alleged facts by virtue of which the person claims the lien. HAW. REV. STAT. § 507-43(a). The two documents are filed together.

The Application for a Lien must identify the general contractor (even if the lienor did not contract with him); the parties who contracted for the improvements; the amount of the claim; and the labor and/or material furnished. It is not necessary to provide a detailed list of labor and/or material furnished, but it is necessary to state that the labor and/or material was furnished by the lien claimant for the improvement of the project in question. HAW. REV. STAT. § 507-43(a). If the claim has been assigned, the statute also requires the name of the assignor.

HAW. REV. STAT. § 507-43(a) requires that the owner of the property and any person with an interest therein be named and served with notice of the lien application. The name of the mortgagees and other encumbrancers can be included in the application and notice of lien, but this is not required. The lien claimant must also make demand for payment. HAW. REV. STAT. § 507-47. The demand may be included in the lien application itself and need not be a separate demand. *Id.*

2. Procedure on A Mechanic's Lien

The lien process in is a two-stage court proceeding: Having the lien attach, and then foreclosing on it. For the attachment, Hawaii HAW. REV. STAT. § 507-43(a) states: "The application and notice shall be returnable not less three, no more than ten days after service." When the claimant files his application, the court will assign a return date, at which the owner, general contractor and other named parties must appear to admit or deny the lien. The lien application must then be served on each of these parties in the eight day window that occurs between ten and 3 days before the hearing. It must not be served **too soon** as well as tjoo late. This provision is mandatory so that when an application is filed, service must be made with the period provided. *Moore v. Tablada*, 68 Haw. 228, 708 P.2d 140 (1985).

Service can be made in any manner allowed for the service of a summons and complaint, but it can also be done all persons by posting the application for lien and notice of lien on the improvement. *See* HAW. REV. STAT. § 507-43(a).

If nobody shows up to defend the lien at the return date, the claimant is entitled to have lien imposed by default. However, if it is contested, the parties will either enter into a stipulation that the lien will attach, or will proceed to a probable cause hearing.

The hearing is conducted as a bench trial, with the Court hearing testimony and then ruling. The lien claimant has the burden of proving the elements of a mechanic's lien. However, the burden of proof required of these elements is only probable cause and not a preponderance of the evidence HAW. REV. STAT. § 507-43 (1976). The Courts have indicated that this is an easy burden to meet:

> The dispositive question upon appeal is whether the appellant established ***probable cause for the existence of a lien*** upon the Maalaea land. To do so, ***the appellant must have demonstrated that an improvement was made upon the subject property***.

Haines, Jones, Farrell, White, Gima Architects, Ltd. v. Maalaea Land Corp., 62 Haw. 13, 15 (Haw. 1980)(emphasis added).

If the lien claimant is successful, the court will issue an order directing the lien to attach to the property. He then proceeds to a foreclosure, as discussed below. The owner and general contractor cannot appeal the granting of a lien, absent permission from the Court "'Ordinarily, an order granting . . . an attachment is interlocutory and non-appealable.' 9 Moore's Federal Practice, ¶ 110.13(5) (1975)." *VTN Pac., Inc. v. Bishop Development, Inc.*, 58 Haw. 104, 105, 565 P.2d 980, 981 (Haw. 1977). Similarly, a lienor cannot immediately as of right appeal an order partially granting and partially denying its lien application. *Koga Eng'g & Constr. v. Castle Hills Ventures, LJ*, 7 Haw. App. 151, 152, 748 P.2d 1370, 1371 (1988)

B. Enforcement and Foreclosure

Under HAW. REV. STAT. § 507-43(e), the action to foreclose the lien must be filed within three months of the order directing the lien to attach. This proceeding is entirely de novo; the rulings from the probable cause hearing do not carry over, (a) because they are not based on a preponderance of the evidence and (b) because they are interlocutory. See, e.g., *VTN Pac., Inc. v. Bishop Development, Inc*., 58 Haw. 104, 105, 565 P.2d 980, 981 (Haw. 1977): "the court's determinations in a proceeding on an application for a mechanics lien have no effect upon the determination of any issues in the action to enforce the lien."

C. Waiver, Release and Bonding of Lien Rights

There is very little case law in Hawaii regarding contracts which waive the right to a lien in advance. The main case is from 1894, and provides that "The lien for material such as the plaintiff advances, is a strictly legal one, expressly given by statute, and *it ought not to be* considered *as waived or released except by plain facts*." *Allen v. Lincoln*, 9 Haw. 364, 367 (Haw. 1894)(emphasis added). There is a subsequent case from 1911 which further indicates that a contractor can contract away his right to a mechanic's lien, provided the waiver is knowing. *Lucas v. Hustace*, 20 Haw. 693 (1911) (a waiver in the main contract is not effective against materialmen without notice of the provision; the issue of whether materialman has waived the benefit of the statutory remedy is a question of fact to be determined in view of the circumstances of each particular case.). This would seem to indicate that an advance waiver, if properly worded, would be accepted. This would be in line with the courts of most states that have faced this issue, and

which do allow waiver. See generally VALIDITY AND EFFECT OF PROVISION IN CONTRACT AGAINST MECHANIC'S LIEN, 76 A.L.R.2d 1087 (1961).

Parties can, of course, release their lien claims. Many owners or contractors require releases before making payment. A subcontractor or contractor should review the language of any such partial release carefully, to ensure that it is only effective to the extent that payment is actually made, and only to the extent of the payment received.

Under HAW. REV. STAT. § 507-45, the mechanic's lien can be discharged at any time by the owner, lessee, contractor or intermediate subcontractor filing with the clerk of the court or with the land court, cash or a bond for twice the amount of the sum for which the lien is filed, conditioned upon the payment of any sum for which the claimant may obtain judgment. At that point, the action to foreclose the lien no longer exists, and the claimant should proceed with its contract claim, without naming other parties. *Shelton Engineering Contractors, Limited v. Hawaiian Pac. Industries, Inc.,* 51 Haw. 242, 248-249, 456 P.2d 222 (Haw. 1969).

D. Limitations on Lien Rights

1. Deadline for Filing

A lien claimant must assert a claim not later than forty-five (45) days after the date of completion of the improvement against which it is filed. HAW. REV. STAT. § 507-43(b). The date of completion is the date on which an affidavit is filed in the circuit court, attesting to the fact that a notice of completion was published. HAW. REV. STAT. § 507-43(f). The notice must be published twice, seven days apart, in a newspaper of general circulation, printed and published in the county in which the property involved is situated. Id. The publishing newspaper must promptly file the affidavit of publication in the office of the appropriate circuit court. Id. The forty-five (45) day time period runs from the date that the affidavit is filed with the circuit court, not the dates that the notice of completion is published.

Although a lien cannot be filed more than forty-five (45) days after the date of completion, a lien may be filed prior to that date. State Savings & Loan Ass'n v. Kauaian Dev. Co., 50 Haw. 540, 560-562, 445 P.2d 109, 123 (1968).

The notice of completion must not be filed prior to substantial completion, or it is invalid. HAW. REV. STAT. § 507-43(f). Substantial completion is defined as the date on which the improvement can be used for its intended purpose.

If the notice of completion is not published by either the owner or the contractor, the "date of completion" shall be deemed to be one year after actual completion or abandonment of the project. HAW. REV. STAT. § 507-43(g). Neither actual completion nor abandonment are defined terms and, thus, it may be difficult to pin those dates down.

2. Improper Advancement Of Credit

Under HAW. REV. STAT. § 507-49, where a subcontractor or materialman does work on a residence on credit, while knowing that his immediate contracting party is, in fact, a poor risk, he

can be denied a lien. The statute also provides that, if the materials supplier has a credit application form from the general contractor or the subcontractor to whom the materials were furnished, or has reasonably inquired into the credit status of the general contractor or subcontractor, the advancement of credit by the furnisher of materials shall be prima facie reasonable.

3. Lack of License

Under Section 507-49(b), no contractor who is required to be licensed under Hawaii Law (HAW. REV. STAT. Chapter 444) can assert a mechanic's lien unless they were licensed when the improvements to the real property were made. In addition, no subcontractor or sub-subcontractor, even if they are licensed, has lien rights if his work was subcontracted to him by an unlicensed general contractor or subcontractor. This does not apply to design professionals, since they are licensed under a different chapter of Hawaii law. *G.J. Haw., Ltd. v. Waipouli Dev. Co.*, 57 Haw. 557, 560 P.2d 490 (1977).

4. Improper Contract Forms for Homeowners

HAW. REV. STAT. § 444-25.5 of the contractor licensing laws set forth certain information that must be provided to homeowners and included in contracts with homeowners, and further empowers the Contractors' License Board to add additional requirements by regulation, which they have done in Section 16-77-80 of the HAWAII ADMINISTRATIVE CODE. These include information regarding mechanic's liens; information regarding bonding; contractual clauses regarding the costs of the improvement and the time for completing it; and a disclosure of the right of the contractor under the Contractor's Repair Act to repair his work and to mediate any disputes.

Under HAW. REV. STAT. § 444-25.5(d), a contract which does not contain this language is in violation of the Unfair and Deceptive Trade Practices Act. Such a contract is void, and it bars the contractor from seeking to impose a mechanic's lien. *Hiraga v. Baldonado*, 96 Haw. 365, 371-73, 31 P.3d 222, 228-30 (Haw. App. 2001).

5. It Must Reach An Interest In Real Property

A mechanic's lien may attach only to a recognized interest in real property, because the sole remedy permitted by law is foreclosure of the interest, in the manner of foreclosing a mortgage, followed by sale at auction. Thus, a mechanic's lien cannot attach simply to a structure, which cannot "be sold under legal process," but must also attach to the real property itself. See *City Mill Co. v. Horita*, 21 Haw. 585, 589 (1913)(emphasis added), where it expressly ruled that "a lien cannot exist or be enforced separately from the interest of its owner ***in the land upon which it is situated***." *Accord Emmeluth & Co. v. Au In Kwai*, 20 Haw. 180, 183 (1910).

6. Actual Improvement Must Take Place

Although design work is lienable, if the design work does not result in actual improvement to the property, then the design work is not lienable. *Haines, Jones, Farrell, While, Gima Architects, Ltd. v. Maalaea Land Corp.*, 62 Haw. 13, 17, 608 P.2d 405, 408 (1980).

II. Public Project Claims

A. State and Local Public Work

Hawaii requires contractors to obtain performance and payment bonds on county and state public works projects. HAW. REV. STAT. § 103D-324. It is closely modeled after the federal Miller Act and is sometimes referred to as a "Little Miller Act."

Under the Hawaii statute, every person who has furnished labor or material "to the contractor" for the work has the ability to make a claim on the payment bond. The terms "labor" and "material" have the same meanings in HAW. REV. STAT. § 103D-324 as they do in Hawaii's lien statute, HAW. REV. STAT. § 507-41. Although there has not been any Hawaii case law on the point, it has been argued that the Hawaii Little Miller Act is limited to persons with a direct relationship with the general contractor (i.e., subcontractors and suppliers to the general contractor). By contrast, the federal Miller Act is available to subcontractors and suppliers of the general contractor **and** to subcontractors and suppliers of subcontractors.

All claimants need to provide notice to both the contractor and the surety within ninety (90) days from the date on which person performed the last labor or furnished or supplied the last material. The notice must be made by registered or certified mail.

Payment bond claims are subject to the State's priority on the bond. If the full amount of the liability of the sureties on the payment bond is insufficient to pay the full amount of the claims, then after paying the full amount due the State, the remainder shall be distributed pro rata among the valid payment bond claimants. HAW. REV. STAT. § 103D-324(d).

If contractor or supplier is unpaid after the ninety-day period expires following the last labor or material furnished, and he has given the proper notice, then he may institute a lawsuit immediately and must do so within one year after the date that the last labor or material was supplied to the project by that contractor. HAW. REV. STAT. § 103D-324(e). The suit must be filed in the circuit court of the circuit within which the project is located. *Id.* The public entity obligee is not required to be joined as a party in the lawsuit. *Id.*

B. Claims to Public Funds

Hawaii does not have a statute or case law adopting the public fund remedy.

III. Statutes of Limitation and Repose

A. Statutes of Limitation for Construction Contract Claims

The statute of limitations for construction claims that do not involve personal injury or property damage is the six year statute for claims for breach of contract. HAW. REV. STAT. § 657-1 (1) provides that "actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court" shall be commenced within six years after the cause of action. The statute of limitations for contract claims

accrues at the time of a breach of contract, even if actual damages have not been sustained: "[T]he statute of limitations begins to run on a contract when the contract is breached." Au v. Au, 63 Haw. 210, 219 (Haw. 1981). See also Blair v. Ing, 95 Haw. 247, 264 (Haw. 2001); Paulson, Inc. v. Bromar, Inc., 808 F. Supp. 736, 744-45 (D. Haw. 1992)(summary judgment granted; cause of action accrued at time of first breach of contract).

B. Statute of Limitations and Repose for Construction Injury Claims

There is a combined 2-year statute of limitations/10-year statute of repose for all construction-related claims that cause injury to persons or property. HAW. REV. STAT. § 657-8(a) provides that "[n]o action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of any deficiency or neglect in the planning, design, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action accrued, but in any event not more than ten years after the date of completion of the improvement."

This statute does not apply to actions against property owners for negligent repair or maintenance, nor to actions for damages against surveyors for their own errors in boundary surveys. HAW. REV. STAT. § 657-8(b)

With respect to accrual of the cause of action, Hawaii follows the discovery rule. Thus "statute of limitations begins to run when the plaintiff knows, or in the exercise of reasonable care should have discovered that an actionable wrong has been committed." *Bd. of Dirs. of Ass'n of Apartment Owners v. Regency Tower Venture*, 2 Haw. App. 506, 511, 635 P.2d 244, 248 (1981).

The date of completion under HAW. REV. STAT. § 657-8(b) is "when there has been substantial completion of the improvement or the improvement has been abandoned." The filing of an affidavit of publication of a notice of completion under the Mechanic's Lien law, discussed above, is prima facie evidence of the date of completion.

IV. Pre-suit Notice of Claim and Opportunity to Cure

Hawaii has adopted a Contractor's Repair Act ("CRA"), Chapter 672E of the Hawaii Revised Statutes, but it applies only to residential construction. Under the CRA, a "Contractor" is very broadly defined to include "any person, firm, partnership, corporation, association, or other organization that is engaged in the business of designing, manufacturing, supplying products, developing, constructing, or selling a dwelling." HAW. REV. STAT. § 672E-1. It does not apply to purely commercial property, and it does not apply if there are claims of personal injury or death. HAW. REV. STAT. § 672E-2.

When a construction defect claim arises, a party must give the contractor a written notice of claim at least 90 days before filing suit. HAW. REV. STAT. § 672E-3. That includes filing for arbitration. The owner must describe the claim in detail and include the results of any testing. HAW. REV. STAT. § 672E-3. The contractor may serve responsible subcontractors with the notice of the claim.

This notice of claim is not deemed to be a claim under insurance, and will not give rise to a duty to defend until the initial steps under the CRA are completed.

After receiving the notice of a construction defect claim, the contractor has 30 days to respond, by denying the claim, offer to settle the claim (by doing repairs, paying compensation or a combination of the two), or can request an inspection of the premises. HAW. REV. STAT. § 672E-4. If he does not respond, it is deemed a rejection. If he seeks an inspection, the homeowner must allow it. If the initial inspection or testing reveals a condition that requires additional testing, then the contractor can request additional testing and the homeowner is required to provide additional access to the premises.

Within 14 days following the inspection and testing, the contractor must then either reject the claim or offer to settle it, as discussed above. Again, failure to meet the deadline is a rejection. If an offer is made, the homeowner now has 30 days to accept or reject the offer (condominiums and homeowners associations have 45 days to respond). Again, the failure to respond is deemed a rejection.

If the parties don't resolve the dispute at this time, then they are required to mediate the dispute, even if the contract did not call for mediation. HAW. REV. STAT. § 672E-7. If the homeowner files suit before all of this take place, the suit will be dismissed without prejudice. HAW. REV. STAT. § 672E-13. The only exception is if the statute of limitations or statute of repose is going to run, in which case he or she can file suit, which suit will then be stayed pending the procedures for inspection, offer and mediation discussed above. HAW. REV. STAT. § 672E-8.

V. Insurance Coverage

In *Group Builders, Inc. v. Admiral Insurance Company*, 123 Haw. 142, 148-49, 231 P.3d 67, 73-74 (Ct. App. 2010) the Hawaii Intermediate Court of Appeals held that construction defect claims do not constitute an "occurrence" under a CGL policy:

> "[U]nder Hawai'i law, construction defect claims do not constitute an 'occurrence' under a CGL policy. Accordingly, breach of contract claims based on allegations of shoddy performance are not covered under CGL policies. Additionally, tort-based claims, derivative of these breach of contract claims, are also not covered under CGL policies."

Accordingly, in Hawaii, there is no duty to defend or indemnify a construction defect claim under a standard CGL Policy. In response to this opinion an effort was undertaken to overrule the decision through legislation. That law was altered so that it only provides that "[t]he meaning of the term 'occurrence' shall be construed in accordance with the law as it existed at the time that the insurance policy was issued." HAW REV. STAT. § 431:1-217(a). Some carriers doing business in Hawaii now do offer riders that restore this coverage.

VI. Contractual Indemnification

Hawaii law permits indemnification generally, but contracts of indemnity are to be strictly construed, particularly where the indemnitee claims that it should be held safe from its own negligence. *Kamali v. Hawaiian Electric Co., Inc.*, 54 Haw. 153, 161 (1972). With respect to construction, Hawaii law bars indemnification provisions that indemnify a party for its sole negligence or willful misconduct, where the result is bodily injury or damage to property. See HAW. REV. STAT. § 431-10-222:

> Any covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or wilful misconduct of the promisee, the promisee's agents or employees, or indemnitee, is invalid as against public policy, and is void and unenforceable; provided that this section shall not affect any valid workers' compensation claim under chapter 386 or any other insurance contract or agreement issued by an admitted insurer upon any insurable interest under this code.

Under *Pancakes of Hawaii, Inc. v. Pomare Properties Corp.,* 85 Haw. 286, 291-292, 944 P.2d 83, 89 (Haw. App. 1997), where the indemnity provision states that the indemnitor will "defend and indemnify", the duty to defend is analogous to "first dollar" defense under an insurance policy. In other words, the indemnitor must pay for the defense from the start of the case. However, in *Arthur v. State*, 138 Haw. 85, 377 P.3d 26 (2016), the Hawaii Supreme Court held that this rule would no longer apply to construction litigation. Citing the above-referenced HRS Section 431:10-222, the Hawaii Supreme Court reasoned that this statue would apply equally to paying defense costs, as it would to paying for the actual damage caused. The Court further reasoned that, until the cause of liability was established, it could not be determined who was at fault. As a result, it held that in construction cases, in order to carry out the purpose of the statute – which was largely to protect small Contractors and Subcontractors from undue expense – defense costs would not be determined until after the litigation was concluded.

VII. Contingent Payment Agreements

To date, there are no appellate level decisions in Hawaii on the issue of "pay when paid" or "pay if paid" clauses. There has been at least two decision on the Circuit Court level. The first was by Judge Robert Klein. In Barrett Consulting Group, Inc. v. Architects Hawaii, Ltd., Civ. No. 88-0245-01 (1st Cir.), a consultant sought payment on a sub-contract with an architect. The architect argued that payment was not required because of the following clause in its contract:

> The fee will be paid as monies are received from the client [Owner], based on the same percentage to fee billed to and received from the client [Owner].

Judge Klein ruled that this language did not create a condition precedent, and that the architect was required to make payment to his consultant:

> The contract does not clearly establish as a condition precedent to Barrett's payment that Aiga Tasi first pay Defendant Architects Hawaii. As such, Plaintiff is entitled to full payment on its invoiced bills.

Minute Order dated September 29, 1989.

In a Mechanic's Lien Proceeding, Harris Rebar South Pacific vs. Nordic PCL Construction, 1 ML 18-1-0012 (1st Cir.), Judge Jeffrey P. Crabtree held that pay-when-paid clause was not a bar to payment, and in particular was not appropriate as applied to a mechanic's lien proceeding:

> Lienor's request for a mechanic's lien is hereby granted. The "Pay When Paid" clause is an outer limit on the timing of payment, not a condition precedent to payment. To read it otherwise would violate a fundamental purpose of the mechanic's lien statute, which is to protect those who supply material and labor to a real estate project and thereby improve its value

Minute Order dated August 2, 2018.

VIII. Scope of Damage Recovery

A. Personal Injury Damages vs. Construction Defect Damages

In *Francis v. Lee Enters.*, 89 Haw. 234, 240, 971 P.2d 707, 713 (1999), the Hawaii Supreme held that tort-like damages for emotional distress and mental suffering, as well as punitive damages, are generally not recoverable in contract.

B. Attorney's Fees Shifting and Limitations on Recovery

Under Hawaii law, attorneys fees may be awarded where authorized by "statute, agreement, stipulation, or precedent." *Smothers v. Renander*, 2 Haw. App. 400 (1981). The statute most cited is HAW. REV. STAT. § 607-14, which covers all claims for breach of contract or in assumpsit. Assumpsit is a common law form of action which allows for the recovery of damages for the nonperformance of a contract, either express or implied, written or verbal, as well as quasi-contractual obligations." *Schulz v. Honsador Inc.*, 67 Haw. 433, 690 P.2d 279, 281 (1984). "When there is a doubt as to whether the action is in assumpsit or tort, there is a presumption that the suit is in assumpsit." *Leslie v. Estate of Tavares*, 93 Haw. 1, 994 P.2d 1047, 1052 (2000).

The award of reasonable attorneys' fees for HAW. REV. STAT. § 607-14 mandatory. *Finley v. Home Ins. Co.*, 90 Haw. 25, 975 P.2d 1145, 1158 (1998). However, fees are limited to 25% of the total amount recovered, if the plaintiff prevails; and to 25% of the amount sued for, if the defendant prevails. "'[W]here the plaintiff prevails on both his complaint and on the

defendant's counterclaim, the maximum amount of § 607-14 attorney's fees awardable is computed by applying the schedule to the judgment amount in plaintiff's favor and to the amount sued for in the counterclaim separately and adding the resulting products.'" *Advanced Air Conditioning, Inc. v. Smith*, 134 Haw. 180, 339 P.3d 534 (Haw. App. 2014), *quoting Rodrigues v. Chan*, 5 Haw. App. 603, 608, 705 P.2d 67, 71 (1985).

The basis for assessing attorney's fees includes accumulated interest to the time of judgment. *Lennen & Newell, Inc. v. Clark Enters*., 51 Haw. 233, 234, 456 P.2d 231, 233, 1969 Haw. LEXIS 108, *2 (Haw. 1969); *Forbes v. Hawaii Culinary Corp.*, 85 Haw. 501, 511, 946 P.2d 609, 619 (Haw. Ct. App. 1997)(" the amount of the judgment upon which attorneys' fees are calculated under HRS § 607-14 should include prejudgment interest.")

C. Consequential Damages

Consequential damages "are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable. *Francis v. Lee Enters.*, 89 Haw. 234, 239-40, 971 P.2d 707, 712-13 (1999). Moreover, a limitations of remedies clause which foregoes consequential damages is valid so long as it is not unconscionable. *Jorgensen Company v. Mork Construction, Inc.*, 56 Haw. 466 (1975) and HAW REV. STAT. § 490:2-719(3) (consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable).

D. Delay and Disruption Damages

The Hawaii Supreme Court has held that, "[w]here time of performance is of the essence of the contract, a party who does any act inconsistent with the supposition that he continues to hold the other party to his part of the agreement will be taken to have waived it altogether. When a specific time is fixed for the performance of a contract and is of the essence of the contract and it is not performed by that time, but the parties proceed with the performance of it after that time, the right to suddenly insist upon a forfeiture for failure to perform within the specified time will be deemed to have been waived and the time for performance will be deemed to have been extended for a reasonable time." *Stevens v. Cliffs at Princeville Assocs.*, 67 Haw. 236, 243-44, 684 P.2d 965, 970 (1984) (citations omitted).

In addition, Hawaii courts have held that when time is of the essence or a delay has become so serious as to justify discharge of the contractor, an owner may assume control of the work, cause it to be completed, and hold the contractor for his reasonable expenditures if in excess of the unpaid balance of the contract price. *Mayer v. Alexander & Baldwin, Inc.*, 56 Haw. 195, 198 (1975).

E. Economic Loss Doctrine

In *Hawaii. v. United States Steel Corp.*, 82 Haw. 32, 40, 919 P.2d 294, 302 (1996), the Hawaii Supreme Court adopted the "economic loss doctrine," holding that the economic loss doctrine bars "claims for relief based on a product liability or negligent design and/or manufacture theory," where the damages sought are purely in the nature of economic losses, and the injury is

essentially only to the product itself.. The Hawaii Supreme Court has defined economic loss damages as "those that pertain solely to the costs related to the operation and value of the building itself." *The Association of Apartment Owners of Newton Meadows v. Venture 15, Inc.*, 115 Haw. 232, 286, 167 P.3d 225, 279 (2007). "Excluded are costs for personal injuries caused by the defective design or damage to property other than the building itself." Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'" *Hawaii. v. United States Steel Corp.*, 82 Haw. 32, 40, 919 P.2d 294, 302 (1996), quoting *East River S.S. Corp v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

In *City Express, Inc. v. Express Partners*, 87 Haw. 466, 469, 959 P.2d 836, 839 (1998), the Hawaii Court held that the economic loss doctrine bars claims against design professionals for alleged negligence where the damages are solely economic.

In *Newton Meadows v. Venture 15, Inc.*, 115 Haw. 232, 295, 167 P.3d 225, 288 (2007), the Court found that the "product" was the entire building. Accordingly, allegedly defective floor slabs used in the construction of a condominium complex which caused cracked floor tiles, demising walls, skewed door jambs and windows, and termite damage did not constitute damage to 'other property,'" even though the slabs were poured as part of a separate contract. The Court also held that the economic loss rules applies even when the plaintiff and the defendant are not in privity of contract. 115 Haw. At, 292, 167 P.3d at 285

In *Newtown Meadows*, the Court did create an exception to the Economic Loss Doctrine, permitting tort claims and tort damages where the construction defect is a violation of a building code, because the building code creates a separate duty. 15 Haw. at 295, 167 P.3d at 288. Similarly, in *Hawaii. v. United States Steel Corp.*, 82 Haw. 32, 919 P.2d 294 (1996), the Court held that the economic loss rule did not bar a claim for negligent misrepresentation because that is also founded on the breach of a duty separate duty (not to give false information).

F. Interest

Hawaii law supports recovery of interest, as necessary to fully compensate an injured party. As the Hawaii Supreme Court stated in *Lucas v. Liggett & Myers Tobacco Co.*, 51 Haw. 346, 348, 461 P.2d 140, 143 (Haw. 1969), "[I]nterest is compensatory in nature, not punitive." *Accord Honolulu v. Caetano*, 30 Haw. 1 (Haw. 1927)(prejudgment interest should be allowed wherever it is properly proved).

The default prejudgment interest rate is 10% per annum as set forth in HAW. REV. STAT. § 478-2(1), which provides for a rate of ten percent interest per year "for money due on any bond, bill, promissory note, or other instrument of writing, or for money lent, after it becomes due." In awarding interest in civil cases, "the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred." HAW. REV. STAT. § 636-16

G. Punitive Damages

Punitive damages may be awarded only in cases where the wrongdoer has "acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to circumstances." *Masaki v. Gen. Motors Co*., 71 Haw. 1, 16-17, 780 P.2d 566, 575 (1989). The standard of proof for all punitive damages claims is "clear and convincing." Id. at 16, 780 P.2d at 575. In addition, the Hawaii Supreme Court has explained that "punitive damages are in no way compensatory and are not available as a matter of right. An award of punitive damages is purely incidental to the cause of action. They may be awarded by the grace and gratuity of the law. They also act as a means of punishment to the wrongdoer and as an example and deterrent to others." *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978). In a case involving, among other things, the alleged wrongdoing of a site development general contractor and a soils compaction subcontractor, the court remarked that "a positive element of conscious wrongdoing is always required" and "punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment." *Ass"n of Apt. Owners of Newtown Meadows v. Venture 15, Inc*., 115 Haw. 232, 297-298, 167 P.3d 225, 290-291 (2007) citing *Masaki*, 71 Haw. at 7, 780 P.2d at 570-71.

In *Francis v. Lee Enters.*, 89 Haw. 234, 240, 971 P.2d 707, 713 (1999), the Hawaii Supreme held that punitive damages are generally not recoverable in contract.

H. Liquidated Damages

Under Hawaii law, a liquidated damages provision must be enforced if there is a "reasonable relation" between the liquidated damages and the amount of the party's damages. *Shanghai Inv. Co., Inc. v. Alteka Co. Ltd.*, 92 Haw.482, 494, 993 P.2d 516, 528 (2000), overruled on other grounds, *Blair v. Ing*, 96 Haw. 327, 31 P.3d 184 (2001). However, a liquidated damages clause that constitutes a penalty will not be enforced. See *Kona Hawaiian Assocs. v. Pac. Group*, 680 F. Supp. 1438, 1449 (D. Haw. 1988) ("Hawaii law is clear that a liquidated damages clause that constitutes a penalty will not be enforced. If the breach was not in bad faith, the nonbreaching party may be required to return any amount in excess of what is reasonably related to [ ] its damages.)

Hawaii courts have used actual damages as a measure for the reasonableness of liquidated damages. *Shanghai Investment Co., Inc.*, 92 Hawai'i at 495, 993 P.2d at 529; *Dias v. Vanek*, 67 Haw. 114, 117, 679 P.2d 133, 135 (1984) Ventura, 3 Haw. App. at 374-75, 650 P.2d at 622-23; Gomez, 1 Haw. App. at 75, 613 P.2d at 662