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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE DEVELOPMENT LP;
ALAKU POINTE LP,

Plaintiffs,

vs.

COUNTY OF MAUI, et al.,

Defendants.

CIVIL NO. CV07-00447 DAE/LEK
(Civil Rights)

COUNTY DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF COUNTY
DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING IN PART AND DENYING IN
PART COUNTY DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL SUMMARY
JUDGMENT FILED JULY 3, 2008;
CERTIFICATE OF SERVICE

Trial Date: January 13, 2009

**COUNTY DEFENDANTS' REPLY MEMORANDUM IN
SUPPORT OF COUNTY DEFENDANTS' MOTION FOR RECONSIDERATION
OF ORDER GRANTING IN PART AND DENYING IN PART COUNTY
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL SUMMARY JUDGMENT FILED JULY 3, 2008**

Defendants COUNTY OF MAUI, COUNCIL CHAIR G. RIKI HOKAMA, in his official capacity; COUNCIL VICE-CHAIR DANNY A. MATEO, in his official capacity; COUNCILMEMBER MICHELLE ANDERSON, in her official capacity; COUNCILMEMBER GLADYS COELHO BAISA, in her

official capacity; COUNCILMEMBER JO ANNE JOHNSON, in her official capacity; COUNCILMEMBER BILL KAUAKEA MEDEIROS, in his official capacity; COUNCILMEMBER MICHAEL J. MOLINA, in his official capacity; COUNCILMEMBER JOSEPH PONTANILLA, in his official capacity; COUNCILMEMBER MICHAEL P. VICTORINO, in his official capacity; MAYOR CHARMAINE TAVARES, in her official capacity; and VANESSA A. MEDEIROS, DIRECTOR, MAUI COUNTY DEPARTMENT OF HOUSING AND HUMAN CONCERNS, in her official capacity (collectively "County Defendants"), by and through their attorneys BRIAN T. MOTO, Corporation Counsel, and MADELYN S. D'ENBEAU, Deputy Corporation Counsel, submit their reply memorandum in support of their Motion for Reconsideration of Order Granting in Part and Denying in Part County Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment filed on July 3, 2008 [filed July 18, 2008], as follows:

I. COUNTY DEFENDANTS DO NOT HAVE THE BURDEN OF PERSUASION WITH RESPECT TO THE CONSTITUTIONALITY AND VALIDITY OF THE ORDINANCE

More than twenty years ago, the United States Supreme Court decided three cases that transformed summary judgment from a procedural device that was infrequently granted into a powerful tool for early resolution of cases. As set forth below, these cases make it clear that, having established that Maui County's Residential Workforce Housing Ordinance ("Ordinance") was duly promulgated and thus entitled to a presumption of validity and constitutionality, County Defendants have no further burden with

respect to the Plaintiffs' equal protection and substantive due process claims regarding that Ordinance.

Furthermore, the "class of one" equal protection claim allegedly arising from the waiver request heard by the Maui County Council must fail because there are no similarly situated parties.

A. Celotex Corp. v. Catrett

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986), is the most widely cited of the three cases. In Celotex, the court stated that Rule 56 of the Fed.R.Civ.P. should be construed with due regard for the rights of defendants to demonstrate prior to trial that there is no factual basis for plaintiffs' claims. Before Celotex, a party seeking summary judgment had the burden of both production and persuasion even if the other party would have the burden of persuasion at trial. After Celotex, a party that does not have the burden of persuasion at trial is no longer obliged to present evidence that negates the non-movant's claim. Arthur R. Miller, The Pretrial Rush to Judgment, 78 N.Y.U. L.Rev. 982, 1038-1039 (2003).

Furthermore, a party moving for summary judgment is entitled to the burden-shifting effect of presumptions in its favor. In Cal-Farm Ins. Co. v. U.S., 647 F.Supp. 1083, 1086 (E.D. Cal. 1986) aff'd 820 F.2d 1227 (9th Cir. 1987), an action challenging the assessment of a deficiency by the Internal Revenue Service ("I.R.S."), the court held that the determination by the I.R.S. is presumed correct and "the government is entitled to the benefit of that presumption in moving for summary judgment." Accord: Coca-

Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254 (9th Cir. 1982), in which the court held that, by raising the presumption that a trademark is not generic, Coca-Cola met its burden of demonstrating that the question of whether or not the trademark "Coke" is generic "does not raise a genuine issue of material fact." U.S. v. General Motors Corp., 518 F.2d 420, 441-42 (D.C. Cir. 1975), in which the court held that "the moving party for summary judgment is entitled to the benefit of any relevant presumptions that support the motion." 6 J. Moore, *Moore's Federal Practice*, 56.15(3) at 2342-43 (2d ed. 1974).

Likewise, by raising the presumption that the Ordinance is valid and constitutional, County Defendants met their burden of production and were not required to present evidence negating Plaintiffs' claims that the Ordinance is facially unconstitutional.

B. Matsushita Electric Industrial Co. v. Zenith Radio Corp.

The second case in the trilogy, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), holds that the inferences drawn in favor of the non-moving party must be reasonable in light of the entire record. If plaintiffs' claims are implausible, a heightened burden of proof is required to defeat summary judgment. Accord: Swarner v. U.S., 937 F.2d 1478, 1483 (9th Cir. 1991), in which the court reversed summary judgment in plaintiff's favor because its arguments were implausible in the factual context of the case. The plaintiff, a newspaper publisher, argued that the military command had inexplicably began discriminating against it on the basis of its views despite having

allowed the paper to be distributed for nearly forty years.

Tanner v. Heise, 879 F.2d 572, 577-78 (9th Cir. 1989), in which the court affirmed summary judgment despite the inferences that could be drawn from the non-moving party's argument because the factual context made the claim implausible.

C. Anderson v. Liberty Lobby, Inc.

In the third case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Supreme Court held that, in order to defeat summary judgment, the non-moving party must present sufficient evidence to support a favorable jury verdict using the evidentiary standard of proof that would apply at a trial on the merits. In Anderson, a trial on the merits would have required the plaintiffs to prove actual malice because the defendants who allegedly libeled the plaintiffs were public figures. The Court of Appeals held that for purposes of summary judgment, the requirement that actual malice be proven by clear and convincing evidence was irrelevant. The Supreme Court reversed, holding that the higher burden of proof must be considered by the trial court in determining whether or not a case should go to the jury. As the Court stated: ". . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability" Id. at 254.

In Coca-Cola Co. v. Overland, Inc., supra, 692 F.2d at 1254, the defendant submitted several affidavits stating that the affiants believed that customers ordering "Coke" were using the term in the generic sense. The Ninth Circuit held that the affidavits were "clearly insufficient to rebut the presumption"

because they were too speculative and insubstantial and failed to set forth facts that would be admissible at trial. Id. at 1254-55.

II. GENERAL EQUAL PROTECTION CLAIM

When the County Defendants produced evidence that the Ordinance was a duly promulgated legislative act, the burden of proof shifted to Plaintiffs to present facts sufficient to prove that there is no reasonably conceivable state of facts that could provide a rational basis for the classification. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); Vance v. Bradley, 440 U.S. 93, 110 (1979).

In response to that burden, Plaintiffs merely assert that the Ordinance "irrationally targets medium or large scale residential developers, while not affecting, for example, commercial developers who create or attract jobs without adding to the supply of housing". Plaintiffs' Memorandum in Opposition to the County Defendants' Motion for Summary Judgment, filed May 15, 2008 at pp. 30-32. Plaintiffs did not offer any declaration to support the alleged "fact" that ". . . commercial developers create or attract jobs without adding to the supply of housing." In any case this type of classification is well within the constitutional powers of the County. "A statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." F.C.C. v. Beach Communications, Inc., supra, 508 U.S. at 313.

The Ordinance obviously does not apply to commercial developers because it requires that the developers of five or more residential units price a percentage of those residences to be affordable to designated groups in the population.

Although, the County has no burden to establish a rational basis for the decision to apply the Ordinance to developers of residential units, the rational basis for the Ordinance is set forth in the section entitled "Purpose":

"It is the intent of this chapter to encourage the provision and maintenance of residential workforce housing units, for both the purchase and rental, to meet the needs of income-qualified households for the workforce, students and special housing target groups." Exhibit A, CSOF in Support of County Defendants' Motion for Summary Judgment.

The Ninth Circuit has on numerous occasions instructed litigants that the government's decision to single out a particular group for regulation does not give rise to a constitutional violation where the group possesses distinguishing characteristics relevant to interests the government has the authority to implement. Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 505 F.3d 860, 871 (9th Cir. 2007), in which the court turned aside a claim that the Ordinance in question singled out mobile homeowners from property homeowners for all other types of housing.

III. SUBSTANTIVE DUE PROCESS CLAIM

In their Reply Memorandum, Plaintiffs state that the "shocks the conscience standard" is improper when a legislative act is the alleged source of a substantive due process claim. However, in

Matsuda v. City and County of Honolulu, 512 F.3d 1148 (2008), cert. denied, 128 S.Ct. 2964 (2008), the Ninth Circuit reviewed a case in which the Plaintiffs maintained that a legislative act of the Honolulu City Council violated their due process rights. The Honolulu City Council had repealed the leasehold conversion ordinance, leaving the Plaintiffs without a means of obtaining condemnation approval for the land underlying their condominium at Discovery Bay. The leasehold conversion ordinance was enacted with the goal of providing affordable housing and thereby strengthening the economy and the Honolulu City Council determined that its purpose had been satisfied and it was now unnecessary. The Ninth Circuit discussed the Plaintiffs' "exceedingly high burden" imposed by their substantive due process claims as follows:

"To prove that the City's enactment of Ordinance 05-001 violated their substantive due process rights, the Lessees must demonstrate first that their contracts were the type of property the Due Process Clause protects and, second, that the City deprived them of their rights under the contracts in a way that 'shocks the conscience' or interferes with rights implicit in the concept of ordered liberty." Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) (quoting Salerno, 481 U.S. at 746) (internal quotation marks omitted). Id. at 1156.

IV. CLASS OF ONE EQUAL PROTECTION CLAIM

Plaintiffs are the only developers to have requested a waiver from the requirement of the Ordinance and to have obtained a hearing at the Maui County Council on that matter. That fact

appears in the record herein but County Defendants did not make this argument in their Motion for Summary Judgment because they did not think that Plaintiffs were claiming a "class of one" equal protection violation with respect to the waiver process.

Plaintiffs' First Amended Complaint did not allege that they were treated differently from others who had sought a waiver from the Ordinance probably because Plaintiffs knew that, when they filed their lawsuit, no one else had participated in a hearing on a waiver request.

That fact appears in the record as Exhibit 5 appended to Plaintiffs' Concise Statement of Facts In Support of Its Motion For Partial Summary Judgment filed on February 28, 2008. Exhibit 5, The Policy Committee for the Maui County Council Minutes for July 24, 2007 includes the following statement made by Edward Kushi, the attorney advising the Committee:

"Yes, Chairman Mateo, Members, as we all sit here today this is the first request for an appeal, waiver, adjustment of the residential workforce housing requirement since the passage of the ordinance. As in any case, the initial one may reflect on future appeals." Minutes at p. 5.

Certainly, it is not the Court's responsibility to search the various documents looking for a reference to the fact that this was the first request for waiver. When it determined that there might be a viable "class of one" claim, the Court, obviously was not aware that Plaintiffs were the only developers whose request for a waiver had been heard by the Maui County Council. Whether it was the "fault" of the Plaintiffs or the County Defendants for failing

to direct the Court to this uncontested fact, the sensible thing to do at this point is to correct the error by granting summary judgment on the equal protection "class of one" claim as it relates to the waiver request brought before the Maui County Council.

V. CONCLUSION

The interests of justice and judicial economy would be best served if the remaining constitutional claims were dismissed given the fact that at trial the Plaintiffs would have the burden of proving that there was no rational basis for the enactment of the Ordinance.

DATED: Wailuku, Maui, Hawaii, August 6, 2008.

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By /s/ Madelyn S. D'Enbeau
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