

2011 APR -4 AM 8:08

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

HO'OMAU I MUA LLC, a Hawaii limited liability company,

Plaintiff,

vs.

MARK VAN PERNIS; GARY W. VANCIL; VAN PERNIS-VANCIL, Attorneys at Law, a law corporation; THE ERIC JOHNS PECK TRUST dated July 6, 2006 and its Trustee ERIC JOHNS PECK; ERIC JOHNS PECK, also known as ERIC J. PECK; PUAITA GUY PULOTU and MARCY DEANA PULOTU, husband and wife; ETHAN CHARLES SHARKEY and KAREN MARIE MORGAN, husband and wife; ETHAN SHARKEY and KAREN SHARKEY, Trustees of the 2009 Sharkey Family Trust dated April 3, 2009; GEORGE ROBERT TOTH; DONALD S. RULLO, DON RULLO LLC and RED TIME REALTY LLC, related Hawaii limited liability companies; and DOES 1 THROUGH 100,

Defendants.

DECLARATION OF DEAN R GILPIN

Date: February 10, 2011
Time: 8:30 a.m.
Judge: Honorable Ronald Ibarra

DECLARATION OF DEAN R GILPIN

I, DEAN R GILPIN, hereby declare:

1. I am the Managing Member of Plaintiff HO'OMAU I MUA LLC, the Plaintiff in this case and I make the following statements based upon my own firsthand knowledge.
2. I currently reside in Phoenix, Arizona

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3. On December 31, 2006 I personally executed the DROA for Ho'omau I Mua Project TM (3) 8-7-13:6 with defendant Rullo.
4. On February 27, 2007 I assigned that DROA purchase agreement to a newly formed Ho'omau I Mua LLC a Hawaii limited liability company that I had created with assistance from legal council for the sole purpose of holding and developing the subject property.
5. The Planned Unit Development Approval that was represented to me personally by Rullo in the form of a booklet named Planned Unit development Application Ho'omau I Mua and a letter from Hawaii County Planning Department indicating preliminary approval based on that application is and was at all times important in both the decision to purchase the property and in arriving at a fair market value of \$6,500,000.
6. The reservations for Lots in that Planned Unit Development represented to me by Donald Rullo and Cindy Cary both agents and at various times brokers for Red Tired Realty LLC in various spreadsheet formats showing the lot numbers, reservation price and names of reservation holders is and was at all times important in both the decision to purchase the property and in arriving at a fair market value of \$6,500,000.
7. I was depending on those reservations to assist me in negotiating better terms to showing potential lenders less risk in obtaining an acquisition and development loan to refinance the project to pay off the Agreement of Sale, obtain a loan of an amount sufficient to fund the development including infrastructure design and construction and at least 18 months of interest reserves.

8. My intention was to have Rullo and Red Time Realty LLC convert the reservations to hard contracts, open escrows, and close the escrows with the promise of delivering the infrastructure in 18 months secured by a performance bond on the project.
9. Rullo never guaranteed any of the reservations, however I asked him on several occasions to "wash out" any reservation holders he believed were not serious as I wanted to have an accurate account of what we believed was our chances of conversion as a total dollar volume for my own cash flow planning and so we could reasonably predict and represent to our lenders and investors realistic obtainable estimate numbers.
10. I knew all reservations were refundable and cancellable at any time as indicated in the Marketing Agreement.
11. I asked Rullo in the due diligence period prior to closing what form he was using for these reservations and he replied to me that he was using a standard Hawaii DROA with addendums.
12. I never personally saw any reservations prior to closing or prior to the March 27th, 2008 delivery by Rullo of the reservations included as exhibits to this reply.
13. These are the only copies I have ever received from Rullo or Red Time Realty of any reservations associated with this transaction.

14. I requested multiple times in multiple ways both orally and in written form for copies of the new or missing reservations but Rullo never delivered. Instead he continued his pattern of different excuses.
15. On January 15, 2007 I and Rullo modified the DROA to add the single family residence and what was referred to by Rullo as Lot 1 of the PUD and adjusted the purchase price up \$700,000 to \$7,200,000.
16. On March 7, 2007 I executed the Agreement of Sale for the subject property on behalf of Ho'omau I Mua LLC.
17. At that point in time I executed the agreement of sale believing Rullo's representation that there were approximately \$5,800,000 of valid, in place reservations with deposits for lots in the Ho'omau I Mua Planned Unit Development.
18. I also executed this same agreement of sale believing that the Planned Unit Development had been approved based on true representations by Rullo and that the archaeological conditions for the subject property were as described in the document named Planned Unit Development application dated December 1, 2004 by Petitioner landowner Donald s Rullo.
19. Prior to the modification on January 15, 2007 I believed I was purchasing a parcel of land and not a residential property therefore no Sellers Real Property Disclosure for Land would be required as it was not required by law at that time.

20. I believed that Rullo as the selling agent and owner would prepare some disclosure other than just the PUD application.
21. Once we modified the DROA on January 15, 2007 to include the single family residence and lot number 1, I believed Rullo would deliver a Seller's Real Property Disclosure Statement Single Family Residence as was customary and required by law.
22. My office manager commented that it was missing for our file on the First American Title worksheet she customarily prepared to track all transactions as per our office policy.
23. I asked Rullo for a Sellers Disclosure. He never delivered and I never received one nor did I sign the customary receipt for disclosure as was our and many other brokerage policy.
24. The disclosure Rullo delivered to the court was my first time viewing it or even having knowledge of its existence because my files do not include it. I believe Rullo had prepared this to in some way show he intended to do so, however it lacks any of the signatures, initials, or acknowledgments.
25. Rullo delivered to me during the period after opening of escrow but prior to close the SCS Inc. Archaeological Survey of a Portion of TMK (3) 8-7-13.6 5/1996 Reprinted 12/2003 and represented it was the archaeological survey for the subject property.
26. It is not relevant to the property but instead is the survey for the 7 lots above the subject property. I did not discover this until early 2009. I believe I am within my 6 years statute of limitations for contract law in the state of Hawaii.

27. It is not the survey for the property. It is instead a copy of the survey for the 35 acre parcel above the property used by Create 21 Chuo to subdivide the 205.43+/- parcel with the same TMK number (3)-8-7-13.6 into the 7 upper 5 acres lots of and the subject property lot 8 of the Opihihale Sunset View Estates subdivision number 7235.
28. During the due diligence period, before and after closing, and up until we performed an extensive forensic accounting and document investigation in conjunction with this lawsuit I believed that this was the survey for the property I purchased on March 7th, 2007.
29. During the due diligence period, before and after closing, and up until we performed an extensive forensic accounting and document investigation in conjunction with this lawsuit I believed that the Planned Unit Development as approved was valid and had been presented in good faith to the County of Hawaii.
30. During the due diligence period, before and after closing, and up until we performed an extensive forensic accounting and document investigation in conjunction with this lawsuit I believed that the subject property has only 33 archaeological sites, 8 that require preservation, 16 that required data recovery to determine if they were to be preserved or no longer significant.
31. Only in early 2008 after getting two conflicting bids for archaeological work to be performed on the subject property did I find out that the upper 7 lots had never been completed. It was not until 2009 that I also determined the survey was for the other property.

32. Even at that time I never believed that the archaeology that had been presented to me was not for the subject property or the same had been presented to the County of Hawaii to obtain the PUD approval.

33. From about the first week of January 2007 through and after closing in March of 2007 I conducted many site visits to the subject property, some alone, some with Rullo and some with friends and family.

34. Prior to the offer presented by me to Rullo on 12/31/2006, Rullo and I took a site visit. We did a through tour of the property because I was seriously considering purchasing it. This visit was on or about the last week of December 2006. On this visit Rullo and I drove down the road to the lower soon to be 44 acre parcel to be designated as undeveloped open space as described in the PUD application.

35. I believe this was the second time that I had gone all the way down to the ocean as the road was not easily accessible in my vehicle or any vehicle other than a four wheel drive vehicle, mostly because the last curve before you descend onto the 44 acre parcel from atop the cliff had a serious wash out spot right on the road that was full of loose gravel and even a four wheel drive vehicle in low would lose traction and spin at that location.

36. Rullo and I drove to the ocean shack or Pali as Rullo called it and we got out to look around. This was the first time I actually took notice of the Caterpillar D4 Bulldozer parked in this area. We had to drive past it to get to the Pali but it was very close. It was sitting about even with the outhouse located to the north of the Pali and back from the ocean cliff. I asked Rullo whose it was and he said it was his. I asked him what it was for and what he was doing and he replied "I am leveling the area here so I can plant palm

trees". I noticed that he had plumbed a catchment system to catch rain from the Pali road to a cattle watering tank and had also rigged a kind of drip watering system using black poly pipe running from the catchment tank to what looked like paper cones. I laughed and asked him where the palm trees were and he said that the goats had eaten all of them even after trying to wrap them in the kind of tar paper to stop them. He also had put a kind of wire fence around a couple also. He also had a large aluminum frame tent set up that eventually blew over into a twisted mess later.

37. I did not actually see Rullo operating the D4 dozer on the Kings Trail however it was apparent that he had been dozing in this general area. The dozer had to have a purpose other than planting trees as all that would be needed would be a shovel or at most a pickaxe. Since he owned the quad runners I am sure the bulldozer was not being used for recreational purposes. It was not until reading the letters from the archeologists in 2007 over a year later where they stated that the trail was intact and contiguous through the property that I became suspect. Since the 1991 and 1996 studies both claim that they had taken 35MM camera photographs it should be easy to see if the trail has in fact changed.

38. On one of these site visits with my friend Marcel Keana'aina in early January 2007, we drove the quad runners down to the open shack on the ocean to show him the property. This was the second time I noticed the Caterpillar D4 bulldozer and so did Marcel. He asked me what it was for and I told him Rullo's explanation. Marcel has said that he will also sign a declaration if requested or needed but I most likely will not be able to get it from him and finished before the hearing date of 2/10/2011.

39. On another visit I drove down the road to the Pali and passed the D4 sitting on the road about halfway between the house and the ocean. I asked Rullo and he told me it had flooded and stalled for some reason and that he was trying to get it up the hill as he had sold it.
40. On another visit with Rullo he took me to see the views of what he believed to be the best lots in the subdivision. He took me to the left of the road to the center of the property to the edge of the cliff overlooking the 44 acre parcel from atop the cliff. This indeed the best views as perched on the cliff you can see both up and down the coastline. While we crossed over to the cliff I noticed another area that looked like recent dozing had been done. I asked Rullo if he had done it and he replied yes that he had. He told me that he had almost fallen into a lava tube while on the dozer and to make sure he or anyone else did not do the same in the future, he had decided to fill in the whole area. The area was really sunken and I told him that to fill it up he would need yards of fill and a much larger dozer than the D4, more like a D9 or 11. I also did not make the connection until as part of the forensic investigation while pouring over all the hundreds of pages of documents for this lawsuit, did I come across the reference to the burials located near the edge of the cliff face at site T-82 of the map. The location description on page 23 of the 1991 Archaeological Investigations done by Allan Schilz and Kanale Shun in May of 1991 is I believe almost exactly where they describe it to be. The survey describes a lava tube 6.5m long x 3.5m wide and a maximum height of 1.35m. The cave contains two human burials, one at each end and are incomplete. Both individuals were mature adults and poorly preserved. Again I did not personally see Rullo bury the burials or collapse the lava tube but it seems to be a distinct possibility. Since the remains of two adults were there in 1991 it would be easy to check by simply finding the location of

the description and map and if this is the site where Rullo collapsed the lava tube ar
filled in the whole. Simply removing the rocks by hand should reveal the answer.

I declare under penalty of law that the foregoing is true and correct to the best of m
knowledge and belief.

EXECUTED: January 28, 2011



DEAN R GILPIN
For Dean R Gilpin &
For Ho'omau I Mua LLC by
Dean R Gilpin Managing Member

State of Arizona)

Attached document
Declaration for court case

County of Marcopa)

On this 28 day of January, 2011, before me personally
appeared Dean R. Gulpin (name of signer), whom I
know personally, and acknowledged that he/she executed the same.



TRAN GUTIERREZ
Notary Public—Arizona
Marcopa County
Expires on 07/15/2014

[Handwritten signature]

Notary Public