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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

HEE K. CHO and MIN S. CHO,
Plaintiffs-Appellees,

v.

ALUPANG BEACH CLUB, INC. and STEVEN KASPERBAUER,
Defendants-Appellants.

Supreme Court Case No.: CVA18-024
Superior Court Case No.: CV1059-17

OPINION

Cite as: 2020 Guam 10

Appeal from the Superior Court of Guam
Argued and submitted on December 19, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.[1]

CARBULLIDO, J.:

[1] Defendants-Appellants Alupang Beach Club, Inc. and Steven Kasperbauer (collectively, "ABC") appeal the trial court's denial of their motion for summary judgment. ABC argues that the trial court erred in finding that Plaintiffs-Appellees Hee K. Cho and Min S. Cho (collectively, "the Chos") had met their burden of producing clear and convincing evidence that ABC's petitioning activity was not immunized from liability by the Citizen Participation in Government Act. ABC contends that the trial court's finding was in error because ABC had not waived its right to protest certain changes to the Alupang Beach Tower condominium project under a Settlement Agreement and Mutual Release. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The Chos are majority owners of Alupang Beach Tower ("the Tower"). ABC holds a lease on the Tower property. In the early 2000s, the Chos sought certain changes to the Tower project, which required the Guam Land Use Commission ("Land Use Commission") to approve a Replacement Horizontal Property Regime ("Replacement HPR"). ABC opposed these efforts, and the parties ultimately executed a Settlement Agreement and Mutual Release ("Settlement Agreement") whereby ABC agreed, among other things, to not oppose the Chos' Replacement HPR or object to the type of business operations conducted by the Chos at Alupang Beach Tower. ABC acknowledged that the Tower project is a mixed-use commercial, residential and hotel condominium and that market or other economic conditions may warrant modifications to the project. The Land Use Commission approved the Replacement HPR.

[1] The signatures in this opinion reflect the titles of the justices at the time this matter was argued and submitted.

[3] In 2016, the Chos again sought to alter the ratio of hotel units to residential units in the Tower and filed an amended HPR ("Amended HPR") with the Land Use Commission. ABC objected to the Amended HPR with the Land Use Commission. The Chos then sued, alleging certain breaches of the Settlement Agreement and unjust enrichment. ABC brought an anti-SLAPP motion seeking dismissal of the Chos' claims under the Citizen Participation in Government Act ("CPGA"), 7 GCA §§ 17101-17109 (2005). The trial court denied ABC's motion on the basis that ABC had waived its right to petition in the Settlement Agreement and any changes between the Replacement HPR and Amended HPR were not as material as claimed by ABC. ABC timely appealed the trial court's denial of its motion.

II. JURISDICTION

[4] "This court has jurisdiction to hear an expedited appeal of a trial court order denying a motion for summary judgment in cases involving an anti-strategic lawsuit against public participation as outlined in 7 GCA § 17105." *Melwani v. Hemlani*, 2015 Guam 17 ¶ 15 (citing 7 GCA § 17106(a)(2)); *see also* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-140 (2020)); 7 GCA § 3107 (2005).

III. STANDARD OF REVIEW

[5] "Any motion seeking immunity under the CPGA is treated as a motion for summary judgment." *Enriquez v. Smith*, 2015 Guam 29 ¶ 9 (citing 7 GCA § 17106(a)). As relevant to this appeal, this court reviews *de novo* a trial court's denial of a motion for summary judgment and issues of statutory interpretation involving the CPGA. *See id.*

IV. ANALYSIS

[6] The First Amendment protects the right to petition the government for redress of grievances. U.S. Const. amend. I; 48 U.S.C.A. § 1421b(a) (Westlaw through Pub. L. 116-140

(2020)). Strategic lawsuits against public participation, commonly known as "SLAPPs," act to discourage "citizens, businesses and organizations based on their valid exercise of their right to petition." 7 GCA § 17102(a)(3); *see also id.* § 17102(a)(4)-(6). "SLAPPs are an abuse of the judicial process; they are used to censor, chill, intimidate, or punish citizens, businesses and organizations for involving themselves in public affairs . . . ." *Id.* § 17102(a)(6). The CPGA was intended to combat SLAPPs, *see id.* § 17102(b)(4), and to create a more equitable balance between the rights of persons to file lawsuits and the rights of others to petition, *id.* § 17102(b)(2). The CPGA "applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to or is in response to any act of the moving party in furtherance of the moving party's rights [to petition]." *Id.* § 17105.

[7] "Generally, the anti-SLAPP movant has the burden of making a *prima facie* showing that the claims against them are based on protected petitioning activities." *Enriquez*, 2015 Guam 29 ¶ 12. This is referred to as the petitioning provision of section 17104. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 42; 7 GCA § 17102. Once the movant makes such a *prima facie* showing, the burden shifts to the "the opposing party [to] demonstrate by clear and convincing evidence that the movant's acts are not immunized by the CPGA." *Enriquez*, 2015 Guam 29 ¶ 12; *see also* 7 GCA § 17106(c), (e). This is referred to as the "sham exception" of section 17104. *Brizill*, 2008 Guam 13 ¶ 44.

[8] To establish a *prima facie* case consistent with the petitioning provision, the movant must show that the petitioning or protected activity "*itself* is the wrong complained of." *Mission Beverage Co. v. Pabst Brewing Co.*, 223 Cal. Rptr. 3d 547, 557 (Ct. App. 2017) (quoting *Park v. Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905, 907 (Cal. 2017)). While the speech or petitioning activity cannot provide the basis for liability, it can provide "evidence of liability." *Park*, 393 P.3d

at 909. The pleadings and affidavits must have "no substantial basis other than or in addition to the petitioning activities." *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998).

[9] Initially, we recognize that ABC has pointed to "petitioning activity" as a factual basis of the claim against it. The Chos are seeking both an injunction and monetary damages, in part, for ABC's objection and testimony before the Land Use Commission regarding the Amended HPR. However, to avail themselves of CPGA immunity and prevail on a summary judgment motion at this early stage, ABC must also show that this petitioning activity is immunized by the CPGA. The Chos argue, in part, that their claims against ABC do not fall within the scope of the CPGA immunity because the alleged breach of the Settlement Agreement is a substantial basis other than or in addition to the petitioning activity to support their suit. Appellee's Br. at 20-26 (Oct. 29, 2018). Essentially, the Chos argue that ABC has failed to establish a *prima facie* case under the "no other substantial basis" test.

[10] In *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935 (Mass. 1998), the Massachusetts Supreme Court ruled that an anti-SLAPP movant must "make a threshold showing through the pleadings and affidavits that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." 691 N.E.2d at 943. The court reasoned that requiring such a showing "should serve to distinguish meritless from meritorious claims, as was intended by the Legislature." *Id.* Applying this rule, the court found that the anti-SLAPP movant could not "avail himself of immunity derived from the anti-SLAPP statute" because the existence of a nondisclosure agreement constituted a substantial basis other than the defendant's petitioning activity to support the plaintiff's claims. *Id.* at 943-44.

[11] Similarly, the Illinois Supreme Court has construed the phrase "based on, relates to, or is in response to" in Illinois's anti-SLAPP statute "to mean *solely* based on, relating to, or in response to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.'" *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 45 (quoting 735 Ill. Comp. Stat. Ann. 110/15 (West 2008)).[2] The court construed the anti-SLAPP statute "[i]n light of the clear legislative intent expressed in the statute to subject only meritless, retaliatory SLAPP suits to dismissal." *Id.* The court also noted that its construction "accords with another express goal in [the statute]: 'to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government.'" *Id.* ¶ 49 (quoting 735 Ill. Comp. Stat. Ann. 110/15). The court emphasized that its interpretation of the anti-SLAPP statute would "ameliorate the 'particular danger inherent in anti-SLAPP statutes . . . that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs' own rights to seek redress from the courts for injuries suffered.'" *Id.* ¶ 48 (quoting Mark J. Sobczak, Comment, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. Ill. U. L. Rev. 559, 575 (2008)).

[12] The Guam Legislature intended to subject only "groundless"—i.e., meritless, retaliatory—SLAPP suits to dismissal. *See* 7 GCA § 17102(a)(7). Like in Illinois, the Guam Legislature adopted the CPGA, in part, "to create a more equitable balance between the rights of persons to file lawsuits and to trial by jury, and the rights of other persons to petition, speak out, associate and otherwise participate in their governments." *Id.* § 17102(b)(2). Therefore, we find the reasoning in *Duracraft* and *Sandholm* persuasive and construe the phrase "based on, relates to or

[2] "Illinois's version of the CPGA . . . is very similar to Guam's." *Enriquez v. Smith*, 2012 Guam 15 ¶ 15.

is in response to" in the CPGA to exclude motions brought against "claims with a substantial basis other than or in addition to the petitioning activities implicated." *Duracraft*, 691 N.E.2d at 943.

[13] While ABC has pointed to petitioning activity as a factual basis for the claims against it, ABC fails to show that the Chos' claims have no substantial basis other than or in addition to ABC's petitioning activity. The Chos seek relief, both injunctive and monetary, for ABC's alleged breach of the Settlement Agreement, breach of the covenant of good faith and fair dealing, and unjust enrichment. Record on Appeal ("RA"), tab 1 at 3-7 (Compl., Oct. 9, 2017). Under *Duracraft*, we need not look in this early stage at the merits of the contract dispute or determine whether there was a breach. The preexisting legal relationship formed by the Settlement Agreement and the allegation that the agreement was breached constitute a basis other than or in addition to ABC's petitioning activity before the Land Use Commission. While the Superior Court engaged in a materiality analysis under the contract, it is premature for us to engage in a merits analysis of the breach claim. Under the CPGA, it is sufficient that a contract arguably covering the claims exists to provide a substantial basis other than or in addition to the petitioning activity.

[14] The dissent emphasizes that the Chos are seeking *an injunction* in addition to damages to argue that the suit is based only on ABC's petitioning activity. However, in determining whether a plaintiff's claims have no substantial basis other than or in addition to a defendant's petitioning activity, the focus is on the conduct complained of, not the remedies sought. *See Scioletti v. Thomas*, No. 346579 (HMG), 2008 WL 5115230, at *19 (Mass. Land Ct. Dec. 5, 2008) (finding plaintiffs' two prayers for relief, for damages and for an injunction, both "facially concern[ed] petitioning activity alone"). For instance, here, one of the Chos' claims is for unjust enrichment. RA, tab 1 at 7 (Compl.). The Chos do not claim that ABC was unjustly enriched as a result of ABC's petitioning activity—a claim that would make little sense—but rather that ABC was

unjustly enriched as a result of a benefit conferred upon ABC by the Chos through the Settlement Agreement, namely, the settlement payment. *See* RA, tab 1 at 7 (Compl.).

[15] Moreover, even though the dissent characterizes the Chos' main purpose as an attempt to restrain ABC from opposing the Amended HPR before the Land Use Commission, the Chos' request for injunctive relief is not limited to petitioning activity. For example, the Chos seek an injunction restraining ABC from potential other breaches of the Settlement Agreement, such as asserting claims against the Chos that oppose (1) any regulatory action the Chos may deem appropriate to the operation of the Tower project, as provided under section 3.8 of the Settlement Agreement, (2) the type of business operation of the Chos, as provided under section 3.10 of the Settlement Agreement, (3) arrangements between the Tower Owners Association and the Chos to permit, document or deal with the Chos' occupancy and use of the main lobby area, and common elements or portions of the Tower project that do not directly impact ABC's use of the property, as provided under section 3.12 of the Settlement Agreement, and (4) any provision of the Settlement Agreement as invalid or unenforceable under any other provision of law, as provided under section 5.4 of the Settlement Agreement. *Id.* at 5-6; *see also* RA, tab 1, Ex. 1 at 7-8, 11 (Settlement Agreement & Mutual Release). It is plausible that the Chos' main purpose may not have been to restrain ABC from opposing the Amended HPR before the Land Use Commission but to enforce the terms of the Settlement Agreement, which they allege prevent ABC from opposing the Amended HPR.

[16] Further, without deciding the issue, it is unclear whether section 3.1 of the Settlement Agreement—which provides that "ABC shall, without delay, sign a new Replacement HPR or amendment to the HPR, so long as such document is similar in material respects to the Replacement HPR previously submitted to the [Land Use Commission]," RA, tab 1, Ex. 1 at 6

(Settlement Agreement & Mutual Release)—even applies to the Amended HPR. It is debatable whether this provision was meant to cover future replacement or amended HPRs other than one that may have been needed in the event the Land Use Commission did not approve of the Replacement HPR submitted to the commission in 2004.[3] However, even if the materiality provision in section 3.1 does apply to the Amended HPR, it is arguable that other provisions of the Settlement Agreement are relevant to the Chos' claims, such as those listed in paragraph 15 above.

[17] We disagree with the dissent that the practical effect of our opinion today "is to deprive a defendant of CPGA immunity and protection any time the plaintiff alleges a breach of contract, irrespective of the scope or applicability of the contract in question." The questions regarding the scope and applicability of the Settlement Agreement at issue in this case are the precise reason we determine that summary judgment under the CPGA is not appropriate. Because the scope and applicability of the Settlement Agreement to the Amended HPR are unclear, the parties should have an opportunity to flesh out those issues on the merits. Were the Settlement Agreement's scope and applicability to the Amended HPR not subject to interpretation, we would find that CPGA immunity applies.

[18] Given the provisions of the Settlement Agreement being open to interpretation, we disagree with the dissent that there is an adequate record to determine this case based on a waiver theory. We also disagree that our opinion relegates the CPGA to a hollow promise. If in a merits hearing ABC were to prevail in showing that the Settlement Agreement does not apply to its objections to the Amended HPR, presumably ABC would be entitled to attorney's fees under section 5.6 of the

[3] The dissent also raises the fact that the Chos never sought ABC's approval prior to filing the Amended HPR with the Land Use Commission as demonstrative of how our opinion deprives ABC of CPGA protection. However, it is arguable whether the Settlement Agreement even requires ABC to approve amendments to the HPR. Section 3.1 provides that "[i]f requested by [the Chos], ABC shall, without delay, sign a new Replacement HPR or amendment to the HPR," RA, tab 1, Ex. 1 at 6 (Settlement Agreement & Mutual Release); it does not say that the Chos are required to seek such signature or approval from ABC.

Settlement Agreement. *See* RA, tab 1, Ex. 1 at 13 (Settlement Agreement & Mutual Release). A grant of summary judgment on ABC's CPGA motion would foreclose the Chos from pursuing its claims under the Settlement Agreement even if a merits hearing would have resulted in a determination that the Settlement Agreement did apply to ABC's objections to the Amended HPR. At this stage, we cannot say the Chos' claims are groundless and subject to dismissal under the CPGA.

[19] We hold the Settlement Agreement constitutes a substantial basis other than or in addition to ABC's petitioning activity to support the Chos' claims, and ABC cannot avail itself of immunity derived from the CPGA. *See Duracraft*, 691 N.E.2d at 943. Accordingly, we affirm the trial court's denial of ABC's motion for summary judgment, even though the trial court based its denial on a different ground—i.e., the materiality of the changes between the Replacement HPR and the Amended HPR. *See Hart v. Hart*, 2008 Guam 11 ¶ 15 ("[T]his court 'may affirm the judgment of a lower court on any ground supported by the record.'" (quoting *Ceasar v. QBE Ins. (Int'l), Ltd.*, 2001 Guam 6 ¶ 8)). The alleged breach of contract is an issue to be fully resolved on remand.

V. CONCLUSION

[20] We find ABC failed to meet its burden of showing that the claims against it were substantially based on protected petitioning activities because the Settlement Agreement constituted a substantial basis other than ABC's petitioning activity to support the Chos' claims. We **AFFIRM** the denial of ABC's motion for summary judgment under the CPGA and **REMAND** the case to the Superior Court for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

MARAMAN, C.J., dissenting:

[21] The majority holds that ABC cannot avail itself of CPGA immunity because the Settlement Agreement constitutes a substantial basis other than ABC's petitioning activity to support the Chos' claims. I disagree with this holding, and I respectfully dissent.

[22] In finding common ground, I read our prior jurisprudence as consistent with the *Duracraft* test. *See, e.g.*, *Brizill*, 2008 Guam 13 ¶¶ 33-40. I agree with the majority's construction of the phrase "based on, relates to or is in response to" in the CPGA to exclude motions brought against "claims with a substantial basis other than or in addition to the petitioning activities implicated." *Duracraft*, 691 N.E.2d at 943. I also agree that the Superior Court prematurely analyzed whether the Replacement HPR and Amended HPR were materially different. I depart from the majority when it comes to applying the test to the facts alleged here. I fear the majority's application of the "no other substantial basis" test will mean that the CPGA effectively does not apply where a plaintiff seeks to restrain a defendant's free speech and petitioning rights through the use of a contract. The practical effect of the majority opinion is to deprive a defendant of CPGA immunity and protection any time the plaintiff alleges a breach of contract, irrespective of the scope or applicability of the contract in question. The immunity-depriving impact of the majority opinion can be highlighted in this case in two ways.

[23] First, the majority concludes that ABC failed to establish that the Chos' claims have no substantial basis other than or in addition to ABC's petitioning activity because the Chos sought not only an injunction but also money damages in their complaint. Had the Chos sought *only* money damages, I may have agreed with the majority. However, the Chos' main purpose in pursuing this lawsuit is to restrain ABC from opposing the Amended HPR before the Land Use Commission—which, as the trial court correctly found, is protected petitioning activity. The Chos

seek money damages for breach of contract only in the alternative. *See* RA, tab 1 at 6 (Compl.). The fact that the Chos are seeking an injunction to restrain ABC from opposing the Amended HPR before the Land Use Commission distinguishes this case from *Sandholm* and *Duracraft*, as explained in the majority opinion.

[24] In *Sandholm*, the plaintiff did not seek an injunction restraining the defendants' speech, and the court found that "the true goal of plaintiff's claims is not to interfere with and burden defendants' free speech and petition rights, but to seek damages for the personal harm to his reputation from defendants' alleged defamatory and tortious acts." 2012 IL 111443, ¶ 57. Similarly, in *Duracraft*, the plaintiff sought damages for an alleged breach of a nondisclosure agreement, and its request for an injunction preventing the defendant from using the allegedly problematic deposition testimony was rendered moot when the Trademark Trial and Appeal Board ruled that the defendant could not rely on said deposition. *See* 691 N.E.2d at 938 n.4. Therefore, an injunction was not at issue. In other words, in neither of the cases on which the majority relies did a plaintiff seek to prevent a defendant from exercising his free speech and petitioning rights. The Chos, however, are seeking to directly restrain ABC's right to petition the Land Use Commission. While the *Duracraft* framework is good law, the facts of this case are distinguishable and demand a different result.

[25] Moreover, in *Duracraft*, the court rejected the Massachusetts Attorney General's suggestion for the court to decide the case based on a waiver theory, in part because the record did not establish an adequate basis on which the court could conclude that there was an effective waiver. 691 N.E.2d at 942 n.17. In this case, the trial court held a hearing on the motion for summary judgment, which included arguments about waiver, *see, e.g.*, Transcripts ("Tr.") at 6 (Hr'g, May 8, 2018), and it ultimately decided the motion based on waiver, *see* RA, tab 40 at 9-10

(Dec. & Order, Aug. 2, 2018). Therefore, there is an adequate record before us to determine this case based on a waiver theory, and I believe that is the more appropriate approach.

[26] Second, in conducting a waiver analysis, we must examine the language of the Settlement Agreement to determine whether the Amended HPR is even a document to which ABC agreed to not object, even if only in a general sense. In the majority opinion, this court does not even deal with ABC's arguments that it never agreed in the Settlement Agreement to not object to the Amended HPR.

[27] While I agree that the *Duracraft* framework prevents a court from engaging in fact-intensive inquiries, such as the materiality of the changes to the HPR, ABC argues that it only specifically agreed to not object to the Replacement HPR. While ABC agreed to execute non-material amendments to the Replacement HPR, the Chos never sought ABC's approval prior to filing the Amended HPR with the Land Use Commission. I observe this deficiency to show how the majority approach deprives ABC of CPGA protection. If ABC's interpretation is correct and the Settlement Agreement language clearly does not cover objections to the Amended HPR, then the CPGA is but a hollow promise any time a plaintiff alleges a breach of contract claim—irrespective of the scope of the contract. The majority's analysis leaves that *legal* question to the case's merits to be decided after the CPGA summary judgment motion. On the other hand, if ABC's interpretation is wrong, then the Settlement Agreement would constitute a waiver and would be clear and convincing evidence that ABC's acts are not immunized by the CPGA. The waiver approach better allows courts to distinguish between SLAPPs and legitimate claims.

[28] In sum, I would find that ABC met its burden and demonstrated that the claims against it were based on protected petitioning activities and reach the merits of the issue of whether the Chos met their burden of demonstrating by clear and convincing evidence that ABC's acts were not

immunized by the CPGA. Because I see ABC's arguments as ultimately meritorious, I would reverse the denial of ABC's CPGA motion.

/s/
KATHERINE A. MARAMAN
Chief Justice