RICHARD T. BISSEN, JR.
Mayor

VICTORIA J. TAKAYESU
Acting Corporation Counsel

SONYA H. TOMA
First Deputy

LYDIA A. TODA
Risk Management Officer

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808)270-7740

February 14, 2023

Via email only at county.clerk@mauicounty.us
Honorable Alice L. Lee, Chair
and Members of the Council
County of Maui
Wailuku, Hawaii 96793

SUBJECT: Litigation Matter: *Ono Gelato of Paia, LLC, a Hawai'i limited liability company v. County of Maui*; Civil 2CCV-22-0000258

Chair Lee and Council Members:

Please find attached a proposed resolution entitled "Authorizing Settlement of *Ono Gelato of Paia, LLC, a Hawai'i limited liability company v. County of Maui*; Civil 2CCV-22-0000258." The purpose of the proposed resolution is to obtain authority to settle this matter.

We are requesting the proposed resolution be scheduled for discussion and action, or referral to the appropriate standing committee at your earliest convenience. The Complaint filed in this matter is also attached.

We anticipate an executive session will be necessary to discuss questions and issues pertaining to the underlying facts and legal issues raised in this case.

Thank you for your anticipated assistance in this matter

Sincerely,

/s/ Brian A. Bilberry
Deputy Corporation Counsel

cc: Kathleen Aoki, Director, Department of Planning

Attachments

PAUL ALSTON 1126
PAMELA W. BUNN 6460

DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, HI 96813
Telephone: 808 524 1800
Facsimile: 808 524 4591
Email: paul.alston@dentons.com
pam.bunn@dentons.com

Attorneys for Plaintiff
ONO GELATO OF PAIA, LLC

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI‘I

ONO GELATO OF PAIA, LLC, a Hawai‘i limited liability company,

Plaintiff,

v.

COUNTY OF MAUI,

Defendant.

Civil No. _____

COMPLAINT FOR DAMAGES; SUMMONS

COMPLAINT FOR DAMAGES

This is an action for damages to Plaintiff's frozen dessert business caused by Defendant's arbitrary refusal to grant Plaintiff a Certificate of Occupancy ("CO"), on grounds it promised would make it impossible for any competing business to obtain a CO, only to turn around and grant a competing frozen dessert business a CO for the same space after Plaintiff, threatened by Defendant's threats of litigation to collect crushing fines, was forced to move its business to an inferior location.

THE PARTIES

1. Plaintiff ONO GELATO OF PAIA, LLC, dba Ono Gelato and dba Paia Gelato ("Gelato") is a Hawai‘i limited liability company, with its principal place of business in Paia, Maui, Hawai‘i.

2. Defendant COUNTY OF MAUI (the "County") is a municipal corporation and a subdivision of the State of Hawai‘i, with its principal place of business in Wailuku, Maui, Hawai‘i.

JURISDICTION & VENUE

3. This Court has jurisdiction pursuant to HRS §§ 603-21.5 and 603-21.9.

4. Pursuant to HRS § 603-36(5), venue is proper in the Second Circuit because the claim for relief arose in the County of Maui, State of Hawai‘i.

5. The amount in controversy exceeds $40,000.00

FACTUAL ALLEGATIONS

6. In mid-2009, Wilford W. Kirton, III, as the sole member and manager, formed Gelato to purchase a turn-key gelato business that had operated for several years at premises located at 115 Hana Highway, Unit D (the "Premises").

7. The location of the Premises was ideal for a gelato parlor—the pedestrian cross-walk at the intersection of Hana Highway and Baldwin Avenue literally funneled customers into the front doors, and the traffic light at that intersection "stranded" pedestrians on both sides of Hana Highway directly in front of the Premises for long enough to make impulse decisions to stop, or to come back later, to eat gelato.

8. The sellers assured Mr. Kirton that the business was in good standing with all government agencies. They did not inform Mr. Kirton (and may not have known themselves

given the apparent absence of any enforcement activity) that in 2007, a now-retired building inspector had made a Request for Service ("RFS") complaint that the business had built improvements without permits and was operating without a Certificate of Occupancy ("CO").

9. Mr. Kirton, who was then unfamiliar with the County's KIVA website, first learned of the 4-year old RFS# 07-0002883 when a building inspector with the County Department of Public Words ("DPW") came to Gelato in June, 2011 and hand delivered a Notice of Warning ("NOW") dated May 26, 2011 (that Gelato had not received by certified mail despite a certified mail number on the letter) referring to that RFS.

10. According to the May 25, 2011 NOW, "[b]ased on a site inspection conducted on May 17, 2011, you are doing a retail business at Ono Gelato, without a Certificate of Occupancy." Gelato was given until June 27, 2011 to obtain a CO, or a Notice of Violation would issue with an initial fine of $500 and daily fines of $100/day until the CO was obtained or the business operation ceased.

11. Mr. Kirton subsequently received a second NOW dated June 6, 2011, which he mistakenly assumed was the threatened Notice of Violation ("NOV"). Upon receiving the correspondence from DPW, Mr. Kirton engaged in discussions with the DPW and its Development Services Administration ("DSA"), which advised him that Gelato was liable for any fines, notwithstanding it had done no construction work.

12. The DSA provided a long list of the departments that would need to sign off on a CO, and assured Mr. Kirton that Gelato would get a CO if it could "check all the boxes." David Goode, then the Director of the DPW, seemed sympathetic; he said at one point that issuing an NOV was the only way to bring Rick Markham to heel, referring to the principal of Gelato's lessor.

13. Gelato, at great expense, then set about getting after-the-fact permits for work that had been done by its predecessor(s). The task involved opening walls and going underneath the building to obtain enough information for the preparation of as-built plans. Once the as-built plans were submitted to the various departments/divisions, Gelato's contractors followed the directions they received from the County to make sure the work was to code and would pass inspection. It was a laborious, time-consuming and expensive process, but Gelato pressed forward in the good faith belief that when all the work was done, it would receive a CO.

14. Gelato did not approach the County Department of Planning ("MPD") until the other departments had signed off, which took several years. Then-Planning Director William Spence, to his credit, recused himself from considering Gelato's CO because he was in a dispute with Mr. Kirton over a grading project on the Kirtons' property, which was adjacent to his own. The MPD's approval of Gelato's CO was instead handled by then-Deputy Director (now Director) Michele McLean.

15. According to the first planner Mr. Kirton spoke with, MPD was waiting for a parking plan and landscaping plan before it could sign off on Gelato's CO. Mr. Kirton pointed out that he was one of many tenants on the property, and had neither the ability nor authority to submit parking and landscaping plans for the property. Ms. McLean told Mr. Kirton that Gelato could not get a CO without providing parking because the Premises, which had been in restaurant use since before parking requirements went into effect, had lost its grandfathered "no parking."

16. After having invested several years and substantial sums checking all the other boxes for a CO, Gelato hired a consultant and an attorney to assist in locating parking and negotiating with the County. Both indicated their belief that Gelato's position was made

difficult, or perhaps impossible, by the fact that the County considered Mr. Markham to be an intransigent scofflaw, and MPD was unlikely to grant a CO in his building.

17. After many meetings with then-Mayor Arakawa, Ms. McLean (MPD), and Mr. Goode (DPW), there was no solution to the parking issue that satisfied the MPD, and the MPD made clear that Gelato would not be able to get a variance because, among other reasons, the MPD would oppose it. The MPD believed that there was on-site parking on the property and/or space that could be made available for parking, but that Mr. Markham "chooses not to use either of these options."

18. By letter dated May 13, 2015 (which referred to an NOV that, on information and belief, Gelato did not actually receive), Gelato was: (1) informed that the daily fines then totaled ***$1,291,000.00*** and continued to accrue; and (2) threatened with legal action if it did not did not obtain a CO or cease operating its business by June 5, 2015.

19. In 2016, Mr. Markham tried to assist; he sent a lengthy email to Ms. McLean explaining that none of the four street-front spaces in the building was required to provide parking because two of the spaces had been in restaurant use, and the other two in retail use, since before parking requirements were established, so their use without providing parking was grandfathered. Mr. Markham was originally going to lease one of the grandfathered retail spaces to Gelato's predecessor, but before he did, he consulted a now-retired planner in MPD regarding the best space to use for a gelato parlor to avoid inadvertently changing the use and thereby losing the grandfathered no parking. Based on the advice of the MPD Planner, Mr. Markham moved Gelato's predecessor to Unit D, a grandfathered restaurant space with a CO for restaurant use, even though it meant rewriting the lease and constructing new tenant improvements.

20. After that email and a conversation with Ms. McLean, Mr. Markham indicated to Mr. Kirton his belief that going forward should not be too much of a problem now that Ms. McLean "clearly understands the history." When Mr. Kirton discussed Mr. Markham's email with her, Ms. McLean's reaction was that Mr. Markham "was not grounded in reality." According to Ms. McLean, if Gelato had applied for a CO as a restaurant, the CO would have been denied because, as she and Mr. Kirton agreed, Gelato was not a "sit down" restaurant—there were no greeters/seaters, no table numbers, no waitpersons to bring food to the tables, etc.

21. Gelato did not specify either retail or restaurant use when applying for a CO. The DPW had clearly determined that Gelato was a "retail" use before May 26, 2011, when it issued the NOW warning Mr. Kirton that Gelato was "doing a retail business" without a CO, and DPW unilaterally inserted language in KIVA indicating that the use was changed from restaurant to retail.

22. MPD also concluded that Gelato's use was not a restaurant, apparently based on Ms. McLean's personal definition of a restaurant.

23. Ms. McLean knew or should have known, but did not disclose, that restaurant use is not limited to what she called "sit-down" restaurants, and there is no definition of "restaurant" in the Maui County Code or the Planning Commission's Rules that defines a "restaurant" by reference to any of the attributes she cited. Ms. McLean also knew or should have known that Mr. Kirton would reasonably rely on her representation, given that her position was one in which she would be expected to have familiarity with and experience in applying the Maui County Code.

24. Ms. McLean knew or should have known, but did not disclose, that "retail" and "restaurant" are not mutually exclusive, and that the definition of "restaurant" in the Maui

County Code, which is in a section prohibiting smoking in certain places, is "*any retail eating establishment*, where food is served or provided for on-site consumption by seated patrons, that is authorized by the State Department of Health to operate as a food establishment." MCC § 8.20.020 (emphasis added). Gelato fell squarely within that definition.

25. In reliance on the MPD's repeatedly stated position that Gelato could not get a CO without providing parking, and the rapidly escalating fines for operating without a CO, Mr. Kirton believed he had no other choice and made plans to relocate Gelato to a fully-permitted, albeit inferiorly located, property a few doors away on Hana Highway in order to abate the violation and get out from under the threat of litigation and crippling fines.

26. Mr. Kirton and his wife were concerned, and repeatedly expressed their concern to Ms. McLean and Mayor Arakawa, that once Gelato vacated the Premises, Mr. Markham would lease the Premises to a similar business that would then compete with Gelato.

27. Ms. McLean repeatedly reassured the Kirtons that could not happen, because even if a restaurant moved in, it could not get a CO without parking because the grandfathered restaurant use was lost when Gelato operated a retail business at the Premises. Ms. McLean and Mayor Arakawa promised that any business that opened in the Premises would be treated just as Gelato was—given an NOW, followed by an NOV with daily fines until parking was provided and a CO was obtained, or until the business ceased to operate in that location.

28. With no other alternative given the MPD's insistence that no one, including Gelato, could get a CO for the Premises, Gelato relocated in March 2017, at great expense, to a location that did not get as much pedestrian traffic and was not as visible to pedestrians or drivers as the Premises; the move abated the violation and the County waived most of the daily fines.

29. The impacts on Gelato were severe, began immediately, and were entirely foreseeable. In addition to the cost of the move, sales revenue dropped 15% in the first full year of operation at 98 Hana Highway, and then things got worse.

30. In March 2018, Ululani's Hawaiian Shave Ice ("Ululani's") opened in the Premises, even after Mr. Kirton informed its principal, David Yamashiro, that, based on Gelato's experience, he believed it would be impossible for Ululani's to get a CO. As promised, the County issued an NOW, followed by an NOV, but Ululani's continued to operate at the Premises. Gelato's sales revenue in its second year at its new location, March 2018 to March 2019, which coincided with Ululani's first year operating at the Premises, was down 25% from what it had been in the last year at the Premises before the County forced Ono/Paia Gelato to vacate.

31. At the urging of then-former Mayor Arakawa, Mr. Kirton filed a claim with the County's insurance adjuster in August 2019. The claim was denied by letter dated November 4, 2019, based on an "investigation" in which employees of the County "stated you purchased Ono Gelato from a business that was classified as a restaurant" and that "If you had not changed the classification then you would have been grandfathered in and would not have been required to have off-street parking." Those statements were false. Mr. Kirton did not change the "classification" of Gelato, and did not change its operation in any way when he purchased the business in 2009.

32. The other reason given for the denial, with respect to the allegation of unequal enforcement, was that "[Ululani's] has been issued warnings and fines by the County. Their current status with the County is pending at this time."

33. Although they remained in regular communication with Director McLean and Mayor Arakawa throughout the period from 2018 to 2021, and repeatedly pressed them on what was being done with respect to Ululani's continued operation in the Premises, the Kirtons were never told that, in a mediation between Ululani's and the County that concluded on June 13, 2018, the MPD had agreed to sign off on a final CO to Ululani's, without requiring it to provide parking, based on its grandfathered restaurant status.

34. The term sheet, which was not executed by the parties until June, 2019, provided that "The Planning Department will agree that Ululani's meets applicable parking requirements based on grandfathered 'no parking' for restaurant use, and will therefore rescind the NOV and the fines.… In addition, the Planning Department will sign-off on the above-referenced final CO, as to compliance with zoning, including parking."

35. The Settlement Agreement was not executed until July 2021. Consistent with the term sheet, the Settlement Agreement provides that Ululani's has "been determined to be in compliance with all applicable county code provisions, regulations, and approvals for a final Certificate of Occupancy," and that "[t]he Planning Department will agree that Ululani's meets applicable parking requirements based on grandfathered 'no parking' for restaurant use."

36. Ululani's operation is identical to Gelato's in all material respects. Patrons line up at a counter to order and receive their shave ice, and either take it to a bench to eat it seated, or take it out to eat it off site. Like Gelato, Ululani's does not have the characteristics that Ms. McLean represented to Mr. Kirton were requirements to be treated as a restaurant use, such as greeters/seaters, table numbers, or waitpersons to take orders at and bring food to tables.

37. Shortly after learning that the MPD had approved a CO for Ululani's on June 4, 2021, Mr. Kirton refiled his insurance claim, again at the urging of former Mayor Arakawa, on

June 27, 2021. Although Gelato's claim that it was damaged by the County's unequal enforcement of law had only ripened weeks earlier, the County's insurance claims adjuster denied the claim four months later based solely on the two-year statute of limitations for damage to persons or property.

38. In late March, 2022, Mr. Kirton received a phone call from the deputy corporation counsel who had represented the County in its mediation with Ululani's about initiating a mediation between Gelato and the County. Mr. Kirton agreed. A demand letter was sent, a mediator was selected, mediation agreements were signed, deposits were made with Dispute Prevention & Resolution, and the mediation was ultimately scheduled for August 17, 2022. However, shortly before the scheduled mediation, the same deputy corporation counsel disclosed that he had no settlement authority and would not be seeking any, so the mediation was cancelled.

39. Gelato did everything the County asked of it and expected to be treated fairly. Instead, as a result of the County's arbitrary decision-making, which was based on ad hoc, made-up rules and appears to have been heavily influenced by hostility towards Gelato's lessor, Gelato was forced to vacate Premises—the premier location in Paia for a frozen dessert business—and to compete with a competitor who now occupies the Premises with the County's blessing.

40. As a direct and proximate result of the wrongful acts described above, Gelato lost the ability to continue operating its business from the Premises, lost the amounts it invested in the Premises in expectation of receiving a CO and then in moving its business, lost the business relationship it had with its lessor and the good will built up in that relationship, lost the relationships it had with customers who were uncertain the relocated Gelato was the same business, and lost, and will continue to lose, substantial income from having to operate in an

inferior location and compete with a frozen dessert business installed in the Premises by the County. The combined sum of those damages exceeds any minimum jurisdictional limit of this Court, and will be proven at trial.

41. By virtue of the foregoing, the County is liable to Gelato. Gelato is entitled under any and all applicable tort or recovery theories, including negligent misrepresentation and/or nondisclosure, tortious interference with business relations, violation of due process and equal protection, and unequal enforcement of law, to recover its above-described economic losses sustained as a result of the above-described wrongful and/or unlawful conduct in amounts to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, Gelato prays that judgment be entered in its favor and against the County, as follows:

A. For damages in favor of Gelato and against the County in amounts to be determined at trial;

B. For reasonable attorneys' fees and costs;

C. For prejudgment interest; and

D. For such other relief as this Court deems is just and equitable under the circumstances.

DATED: Honolulu, Hawai`i, November 4, 2022

/s/ Pamela W. Bunn
PAUL ALSTON
PAMELA W. BUNN

Attorneys for Plaintiff
ONO GELATO OF PAIA, LLC

STATE OF HAWAI'I CIRCUIT COURT OF THE FIRST CIRCUIT	**SUMMONS** TO ANSWER CIVIL COMPLAINT	CASE NUMBER

PLAINTIFF	VS.	DEFENDANT(S)
ONO GELATO PAIA, LLC, a Hawaii limited liability company,		COUNTY OF MAUI

PLAINTIFF'S NAME & ADDRESS, TEL. NO.

PAUL ALSTON 1126 / PAMELA W. BUNN 6460
Dentons US LLP
1001 Bishop Street, Suite 1800, Honolulu, HI 96813
Tel: 808-524-1800; Fax: 808-524-4591
Email: pam.bunn@dentons.com

TO THE ABOVE-NAMED DEFENDANT(S)

You are hereby summoned and required to file with the court and serve upon

PAMELA W. BUNN, ESQ.
DENTONS US LLP, 1001 BISHOP STREET, SUITE 1800, HONOLULU, HI 96813
TEL: 808-524-1800 FAX: 808-524-4591 EMAIL: PAM.BUNN@DENTONS.COM ,

plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.

A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.

The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kokua at: http:/www.courts.state.hi.us

Effective Date of 28-Oct-2019
Signed by: /s/ Patsy Nakamoto
Clerk, 1st Circuit, State of Hawai'i

In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date.