

MICHAEL P. VICTORINO
Mayor

MOANA M. LUTEY
Corporation Counsel

RICHELLE M. THOMSON
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

FACSIMILE: (808) 270-7152

May 4, 2020

MEMO TO: Mike Molina, Chair
Governance, Ethics, and Transparency Committee

FROM: Brian A. Bilberry, Deputy Corporation Counsel

SUBJECT: Litigation Matter – Case Status GET-11(10)
County of Maui v. Rick Markham, et al.; Civil No. 17-1-0393(2)

Our Department is requesting to update the Committee on this concluded litigation, and the entry of Final Judgment against Defendant Rick Markham. We would like this matter heard at the currently scheduled May 19, 2020 committee meeting.

It is not anticipated that an executive session will be requested, although that is left to the discretion of the Committee.

Should you have any questions or concerns, please do not hesitate to contact us.

cc: Rowena Dagdag-Andaya, Director, Department of Public Works

MOANA M. LUTEY 6385

Corporation Counsel

BRIAN A. BILBERRY 7260

Deputy Corporation Counsel

County of Maui

200 South High Street

Wailuku, Hawaii 96793

Telephone No.: 270-7740

Facsimile No.: 270-7152

Electronically Filed
SECOND CIRCUIT
2CC171000393
16-APR-2020
02:20 PM

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

COUNTY OF MAUI,

Plaintiff,

vs.

RICK MARKHAM; JOHN DOES 1-10;
JANE DOES 1-10; DOE COMPANIES 1-
10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; AND/OR
OTHER DOE ENTITIES 1-10.

Defendants.

CIVIL NO. 17-1-0393 (2)
(Other Civil Action)

ORDER GRANTING PLAINTIFF
COUNTY OF MAUI'S AMENDED
MOTION FOR SUMMARY JUDGMENT
AS TO ALL CLAIMS AGAINST
DEFENDANT RICK MARKHAM FILED
JANUARY 23, 2019

Hearing Date: May 1, 2019

Hearing Time: 8:15 a.m.

The Honorable Judge Peter T. Cahill

**ORDER GRANTING PLAINTIFF COUNTY OF
MAUI'S AMENDED MOTION FOR SUMMARY JUDGMENT
AS TO ALL CLAIMS AGAINST DEFENDANT RICK
RICK MARKHAM FILED JANUARY 23, 2019**

Plaintiff County of Maui's Amended Motion for Summary Judgment as to All
Claims Against Rick Markham ("Motion"), filed January 23, 2019 was heard before
the Honorable Peter T. Cahill on May 1, 2019 at 8:15 a.m. Peter Horovitz appeared

on behalf of Defendant Rick Markham. Deputy Corporation Counsel Brian A. Bilberry appeared on behalf of the Plaintiff County of Maui.

Having reviewed all of the memoranda filed by counsel, and following the argument by both counsel for Plaintiff and Defendant at the hearing, the Court FINDS the following UNDISPUTED FACTS on the Motion:

1. Defendant RICK MARKHAM ("MARKHAM") is owner of record of real property identified as Tax Map Key (2) 2-6-008:001, located at 343 Hana Highway, Paia, Hawai'i, hereafter referred to as the "Property."

2. MARKHAM states that in or around 2007, he placed a 200 square foot structure on the Property for use as a construction shed. *See* JEFS Dkt. 16, Declaration of Rick Markham.

3. MARKHAM states that he was told by an unidentified county inspector that he could place the structure on the property, and either remove it or get permits for it in the future. *Id.* MARKHAM also states he was told the structure could simply remain without any permit if it was not habitable due to its minimal square footage. *Id.*

4. On or about December 1, 2010, a County inspector conducted an inspection of the Property, and noted a violation of the 1997 Uniform Building Code (UBC), as amended. *See*, JEFS Dkt. 12, **Exhibit A** and *Exhibit 1*, attached there.

5. The inspection revealed that a dwelling and deck were placed and/or constructed on the Property without a permit. *See Id.*, **Exhibit A** and *Exhibit 1*.

6. On December 9, 2010, MARKHAM was sent by certified mail a letter warning that the violation needed to be corrected by June 7, 2011, by obtaining an after-the-fact permit which included payment of penalties, and/or by removing the unpermitted structure(s). *Id.*, **Exhibit A** and *Exhibit 1*.

7. MARKHAM was warned that failure to comply would result in an initial fine of \$500 and daily fines of \$100 per day that would double every 30 days. *Id.*

8. On February 23, 2011, MARKHAM was again sent by certified mail a letter warning that the violation needed to be corrected by June 7, 2011, by obtaining an after-the-fact permit which included payment of penalties, and/or by removing the unpermitted structure(s). Id., **Exhibit A** and *Exhibit 2*.

9. MARKHAM was again warned that failure to comply would result in an initial fine of \$500 and daily fines of \$100 per day that would double every 30 days. Id.

10. On April 13, 2011, MARKHAM was again sent by certified mail a letter warning that the violation needed to be corrected by June 7, 2011, by obtaining an after-the-fact permit which included payment of penalties, and/or by removing the unpermitted structure(s). Id., **Exhibit A** and *Exhibit 3*.

11. MARKHAM was again warned that failure to comply would result in an initial fine of \$500 and daily fines of \$100 per day that would double every 30 days. Id.

12. Despite being warned by certified correspondence on December 9, 2010, February 23, 2011, and April 13, 2011 that failure to comply and correct the violation would result in a Notice of Violation being issued, MARKHAM did not correct the violation.

13. On June 22, 2011, MARKHAM did submit a Special Management Area (SMA) Permit Application, that was a necessary pre-condition to obtain a building permit and correct the violation noticed. *See* JEFS Dkt. 16, Declaration of Rick Markam.

14. On August 9, 2011, the Notice of Violation and Order (NOV 2011-0082) issued for Defendant's unpermitted structure(s) on the Property, and was sent to Defendant via certified mail. *See* JEFS Dkt. 12, **Exhibit A** and *Exhibit 4*, attached there.

15. Defendant signed for and received the Notice of Violation on August 11, 2011. Id. The Notice of Violation ordered Defendant to “cease and desist immediately from the violation(s),” and to correct the violation(s) by either obtaining a building permit or remove the unpermitted work by September 8, 2011. Id.

16. The Notice of Violation ordered Defendant to pay an initial fine in the amount of \$500.00 by September 8, 2011 to the County’s Development Services Administration. Id.

17. The Notice of Violation ordered Defendant to pay a daily fine of 100.00 per day beginning September 8, 2011 if corrective action for the violation was not completed by the same date. Id.

18. The Notice of Violation warned Defendant that daily civil fines would double every 30 days up to a maximum of \$1,000 per day until the violation(s) are corrected. Id.

19. The Notice of Violation warned Defendant that he had thirty (30) days to appeal the Notice of Violation and Order. Id.

20. Defendant did not appeal the Notice of Violation and Order. Id., **Exhibit A**, and *Declaration of Chalsey Kwon*.

21. On September 14, 2011 and February 9, 2012, respectively, MARKHAM was advised in a series of two (2) letters that the SMA permit application submitted on his behalf on June 22, 2011, could not be processed following its receipt by the Planning Department for several reasons, which included:

- a. Failure of the applicant to pay the application fee;
- b. Failure to provide ownership documentation for the property which was the subject of the permit application; and
- c. Insufficiency of the project plans to show all existing structures on the property; and
- d. Failure to provide setback dimensions for the structures on the property.

See, Supplemental Reply Memorandum in Support of Plaintiff County of Maui's Motion for Summary Judgment as to All Claims Against Rick Markham Filed January 22, 2019, filed April 25, 2019, Declaration of Michele McLean, and *Exhibits B and C*.

22. On June 28, 2012, MARKHAM was advised his file would be forwarded to Maui County's legal office due to inactivity and lack of response to the deficiencies in his permitting application. *Id.*, *Exhibit D*.

23. There is no record reflecting that MARKHAM or anyone on his behalf responded to these correspondences, or that MARKHAM took any further action to correct the violation.

24. On August 17, 2015 the COUNTY'S Supervising Building Inspector stated to MARKHAM by certified mail that daily fines for the Notice of Violation had accrued to \$1,241,000, since September 9, 2011. *See* JEFS Dkt.12, **Exhibit A** and *Exhibit 5*.

25. On September 30, 2016, County of Maui Corporation Counsel sent a letter via certified mail to MARKHAM, stating that the daily fines had accrued to \$1,769,500.00, including the initial fine of \$500.00. *Id.*, **Exhibit A** and *Exhibit 6*.

26. MARKHAM was warned that legal action may be commenced to collect all unpaid fines. *Id.*

27. On September 15, 2017, the Verified Complaint for Injunctive Relief and Damages was filed. *See* JEFS Dkt. 1.

28. On April 2, 2019, MARKHAM obtained an after-the-fact building permit for the dwelling structure on the Property. *See* JEFS Dkt. 16, *Declaration of Mikal Torgerson*.

29. According to the Declaration of Rick Markham filed with Defendant Rick Markham's Memorandum in Opposition to Plaintiff County of Maui's Amended Motion for Summary Judgment as to All Claims Against Rick Markham Filed Herein

on January 23, 2019, filed April 8, 2019, the daily accrual of fines up to April 2, 2019, when the violation was corrected, is \$2,563,000.00. *See* JEFS Dkt. 16, Declaration of Rick Markham and *Exhibit 3*.

Based on these undisputed facts of record on the Motion, the Court makes the following CONCLUSIONS AS MATTER OF LAW:

1. MARKHAM was not entitled to rely on statements made by an unidentified county inspector that he would not have to get any permits for the structure placed on the Property. *See Maui Vacation Rental Association v. County of Maui*, 2007 WL 44440962 *14 (U.S Dist. Haw. 2007) (“It is well accepted that a public employee not vested with decision making authority may not bind the [county] in its exercise of the police power”). “Estoppel ‘cannot be applied to actions for which the agency or agent of the government has no authority.’” *Id.* (quoting *Brescia v. North Shore Ohana*, 115 Hawai’i 477, 499, 168 P.3d 929, 952 (2007) (quoting *Turner v. Chandler*, 87 Hawai’i. 330, 334, 955 P.2d 1062, 1066 (Haw. App. 1998)); *see also Maui Vacation Rental Association v. County of Maui*, 303 Fed. Appx. 416 (9th Cir. 2008) (“government agents ‘must act within the bounds of their authority,’ and ‘one who deals with [government agents] assumes the risk that [the agents] are so acting[.]’”).

2. MARKHAM was aware that the structure he placed and/or constructed on the Property as a temporary construction shed, would either have to be removed or permitted if it was to remain on the Property.

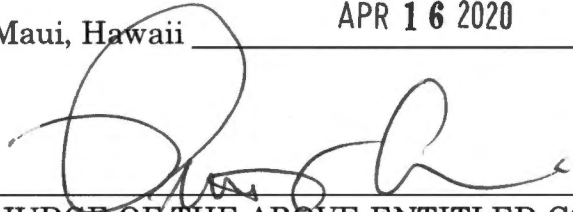
3. Maui County Code § 16.26.106.1 [*Permits Required*] required MARKHAM to obtain a building permit for the structure if it was to remain on the Property.

4. MARKHAM’S failure to have obtained a building permit for the structure on the Property when it was inspected on December 1, 2010, three (3) years after the structure was placed on the Property, was in violation of Maui County Code § 16.26.106.1.

5. MARKHAM'S failure to have timely appealed NOV 2011-0082 precludes Defendant now invoking this court's jurisdiction to contest the violation found.

Accordingly, the court HEREBY ORDERS that Plaintiff County of Maui's Motion for Summary Judgment as to All Claims Against Rick Markham, LLC is GRANTED as to RICK MARKHAM'S liability for fines and penalties of Maui County Code § 16.26.106.1.

DATED: Wailuku, Maui, Hawaii _____ APR 16 2020



JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

TERRY REVERE
MAGDALENA BAJON

DEPARTMENT OF THE
CORPORATION COUNSEL 205

MOANA M. LUTEY 6385

Corporation Counsel

BRIAN A. BILBERRY 7260

Deputy Corporation Counsel

County of Maui

200 South High Street

Wailuku, Hawaii 96793

Telephone No.: 270-7740

Facsimile No.: 270-7152

Electronically Filed
SECOND CIRCUIT
2CC171000393
16-APR-2020
02:24 PM

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

COUNTY OF MAUI,

Plaintiff,

vs.

RICK MARKHAM; JOHN DOES 1-10;
JANE DOES 1-10; DOE COMPANIES 1-
10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; AND/OR
OTHER DOE ENTITIES 1-10,

Defendants.

CIVIL NO. 17-1-0393(2)

FINAL JUDGMENT

FINAL JUDGMENT

In accordance with Rule 58 of the Hawai'i Rules of Civil Procedure, and pursuant to the Order Granting Plaintiff County of Maui's Amended Motion for Summary Judgment as to All Claims Against Defendant Rick Markham [JEFS Dkt. 132], filed APR 16 2020, and by the court's and parties' agreement when this matter came on for trial for entry of Final Judgment to expedite appeal [Transcript of Proceedings, Volume II, dated December 19, 2019, p. 4, ll. 20-25 through p. 5, ll. 1-19];

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, having ruled in Plaintiff COUNTY OF MAUI'S favor and against Defendant RICK MARKHAM on summary judgment as to all claims in the Verified Complaint for Injunctive Relief and Damages, Final Judgment is entered in favor of Plaintiff COUNTY OF MAUI and against Defendant RICK MARKHAM in the amount of \$2,563,000.00. There are no remaining claims. *Any that remain in this case are dismissed*

DATED: Wailuku, Maui, Hawai'i APR 16 2020



JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

TERRY REVERE
MAGDALENA BAJON

FINAL JUDGMENT; *County of Maui v. Rick Markham*, Civil No. 17-1-0393(2),
Second Circuit Court, State of Hawai'i