*****NOT FOR PUBLICATION*****

NO. 23719

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STEPHEN G. GARCIA, dba LAW OFFICES OF STEPHEN G. GARCIA, a Hawaiʻi Sole Proprietorship, Plaintiff/Counterclaim Defendant-Appellant

vs.

GEORGE P. FERREIRA, JR.; ELEANOR L. FERREIRA, Defendants-Appellees

ARTHUR K. TRASK, JR., Defendant/Counterclaimant-Appellee

COUNTY OF MAUI, STATE OF HAWAIʻI; JOHN DOES 1-100; JANE DOES 1-100; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

and

HAROLD BRONSTEIN, Intervenor-Appellee
(CIV. NO. 93-0308)

COUNTY OF MAUI, by and through its Director of Finance, Plaintiff

vs.

GEORGE P. FERREIRA, JR.; ELEANOR L. FERREIRA; STEPHEN G. GARCIA, dba LAW OFFICES OF STEPHEN G. GARCIA, a Hawaiʻi Sole Proprietorship; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants
(CIV. NO. 98-0863)

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NOS. 93-0308 & 98-863)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, JJ., and Intermediate Court of Appeals Associate Judge Lim, in Place of Duffy, J., Recused)

Plaintiff-Appellant Stephen G. Garcia (Garcia) appeals from the August 3, 2000 judgment issued by the Circuit Court of the Second Circuit[1] (the court). As points of error, Garcia contends the court erred when it granted the (1) March 16, 1999 order granting the motion to enforce settlement agreements filed by Defendant-Appellee Arthur K. Trask, Jr. (Trask), (2) March 20, 2000 order granting the motion for judgment as a matter of law filed by Defendants-Appellees George P. Ferreira, Jr. and Eleanor L. Ferreira (collectively, the Ferreiras) and joinders by Trask and Intervenor-Appellee Harold Bronstein (Bronstein) [Trask, the Ferreiras, and Bronstein are collectively referred to herein as Appellees], (3) April 14, 2000 order granting Bronstein's motion for judgment on the pleadings and for entry of final judgment, and (4) May 19, 2000 procedural history and undisputed facts, conclusions of law, and order granting Trask's motion for judgment on the pleadings, and/or motion for summary judgment. Appellees maintain, inter alia, that this court lacks jurisdiction.[2]

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[1] The Honorable Shackely F. Raffetto presided.

[2] In his answering brief, Bronstein argues that (1) this court lacks jurisdiction to review the March 16, 1999 order granting Trask's motion as it is a collateral order which was immediately appealable and from which Garcia failed to file a timely appeal; (2) by accepting the benefits of the settlement agreements, Garcia has waived his right to appeal the August 3, 2000 judgment; (3) Garcia's appeal of the August 3, 2000 judgment is moot as a result of his acceptance of the settlement agreement benefits; (4) the court did not err as a matter of law in entering its March 16, 1999 order granting Trask's motion; and (5) the court did not err as a matter of law in entering the three orders filed March 20, 2000, April 14, 2000, and May 19, 2000.

In their answering brief, the Ferreiras, like Bronstein, argue

(continued...)

On appeal, Garcia argues that (1) "the court erred in exercising jurisdiction in entertaining the motions and issuing the erroneous orders and judgment" by "not returning the resolution of the case to retired Chief Justice Lum [(Justice Lum)] as called for under the settlement agreements"; (2) the court erred in "not applying the proper law in granting Trask's motion to enforce the settlement agreements and issuance of the order dated March 16, 1999"; (3) the "court erred in its decision to grant Trask's motion and issuance of the order dated March 16, 1999"; (4) the "court erred in its decision to grant the Ferreiras' motion and issue the order dated March 20, 2000"; and (5) certain "findings of fact that were made by the [court] in the orders and judgment are clearly erroneous and therefore, must be reversed." Garcia "request[s] that the orders and judgment be reversed, vacated and remanded with specific instructions for reference of the case to Justice Lum for completion of meetings commenced in 1997 as required by the Settlement Agreements." For the reasons set forth below, we hold that we have jurisdiction and that the court's judgment is affirmed.

Appellees challenge this court's jurisdiction on the ground that appellate review of the March 16, 1999 order

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[2](...continued)
that (1) this court lacks jurisdiction to entertain Garcia's untimely appeal of the March 16, 1999 order granting Trask's motion, a collateral order that should have been immediately appealed and (2) having accepted the full benefits of the settlement agreements, Garcia is now estopped and has waived his appellate rights to object to the court's enforcement of the settlement.

Trask filed a joinder in Bronstein's and the Ferreiras' answering briefs.

enforcing the settlement agreement has been waived because the order was a collateral order immediately appealable at the time of its entry. See Cook v. Surety Life Ins. Co., 79 Hawai‘i 403, 408, 903 P.2d 708, 713 (App. 1995) (holding that an order enforcing a settlement agreement is an immediately appealable collateral order). However, the failure to take an immediate appeal from a collateral order does not preclude review of the order on appeal from a final judgment. Kukui Nuts of Hawaii, Inc. v. Baird & Co., Inc., 7 Haw. App. 598, 617, 789 P.2d 501, 513-14 (1990) (holding that, "where relief can be afforded from the terms of a collateral order upon appeal from a final judgment, the collateral order may be reviewed at that time, and the right to appeal the collateral order is not forfeited because it was not appealed from when it was entered").

In the instant case, relief from the March 16, 1999 order enforcing the settlement agreement in terms of increasing the amount of attorney's fees owed to Garcia can be afforded on appeal from the final judgment. Accordingly, Garcia's failure to immediately appeal the order does not preclude him from seeking review of the order on his timely appeal from the final judgment.

As to item (1) of Garcia's appeal, the February 22, 1996 settlement agreement and the March 11, 1996 agreement both provide that any "dispute" concerning "the terms" of the agreements "shall be presented to [Justice Lum] for mediation." (Emphasis added.) The settlement was placed on the record with

the court on September 26, 1996. Garcia's dissatisfaction with the appraisal of the properties to be sold to pay attorney's fees because of a purported misrepresentation of the value of the properties was raised subsequent to placing the settlement on the record. Thereafter, the parties attempted on two occasions, once on September 17, 1997, and then again on October 24, 1997, to meet with the mediator, Justice Lum. Garcia and his attorney were unavailable on September 17, 1997, and, thus, no meeting was held. The parties eventually met with Justice Lum on October 24, 1997, but could not resolve the issue of the appraiser's report and Garcia's allegations that Appellees had made material misrepresentations in prior settlement negotiations. Hence, the dispute was "presented" to Justice Lum for mediation in accordance with the settlement agreements. The terms of the agreements do not suggest that the parties must come to a resolution via mediation by Justice Lum. Thus, the court was not required to refer the case back to the mediator when prior attempts at post-settlement mediation had failed.

Also, according to Garcia, "[t]he reference to [Justice] Lum in the settlement agreements and the actions of the parties are to be construed as an agreement by the parties to arbitrate any subsequent dispute before [Justice] Lum . . . in relation to the settlement agreements." (Emphasis in original.) However, the February 22, 1996 settlement agreement among the Ferreiras, Garcia, Trask, and Bronstein states that "[a]ny

disputes about the terms hereof shall be presented to Herman Lum for mediation." (Emphasis added.) Similarly, the March 11, 1996 settlement agreement among Garcia, Trask, and Bronstein states that "[all] disputes concerning the terms hereof shall be presented to Herman Lum for mediation[] [and t]hat all previous reference to a mediator in this agreement refers to Herman Lum." (Emphases added.) Both mediation clauses use the term "mediation," not "arbitration," and refer to Justice Lum as "mediator," not "arbitrator." Thus, contrary to Garcia's contention, the language of the settlement agreements does not lend "conclusive proof" of an arbitration agreement.[3]

As to item (2) of Garcia's appeal, Garcia challenges the court's March 16, 1999 order on the ground that the court did not apply "the proper law" in granting Trask's motion to enforce the settlement agreements. This argument is premised on the ground that "the files and information . . . indicated that there were numerous issues of genuine material fact remaining as well as claims remaining to be resolved." "A trial court's determination regarding the enforceability of a settlement is a conclusion of law reviewable de novo." Assoc. Fin. Servs. Co. of Hawaii v. Mijo, 87 Hawai'i 19, 28, 950 P.2d 1219, 1228 (1998)

[3] The only reference to "binding arbitration" is found in item No. 7 of the March 11, 1996 settlement agreement. In that paragraph, the parties agreed that if the properties held in trust (to satisfy the attorney's fees) were not sold within two years, the parties would "return to the mediator on the issue of the reduction of the interest rate on the promissory note to Trask for binding arbitration." Inasmuch as Garcia does not dispute the interest rate on the note in favor of Trask, item No. 7 does not apply.

(citing Sylvester v. Animal Emergency Clinic of Oahu, 72 Haw. 560, 565, 825 P.2d 1053, 1056 (1992)) (emphasis added and emphasis in original). Therefore, this court may review the record to determine if the settlement agreements were enforceable.

Garcia does not dispute that the parties entered into settlement agreements and placed "the settlement on the record" on September 26, 1996. The court's "Procedural History and Undisputed Facts" Nos. 3 and 4 indicated that the parties entered into settlement agreements. Undisputed fact No. 5 stated that "all of the parties . . . put the terms of the two (2) Settlement Agreements on the record." (Emphasis added.) Nor does Garcia challenge the court's mathematical calculations in accordance with the settlement agreements in undisputed facts Nos. 8-19. "Where the evidence in the record shows that all the essential elements of a contract are present, a compromise agreement among the parties in litigation may be approved by the court and cannot be set aside except on the grounds that would justify rescission." Mijo, 87 Hawai‘i at 28-29, 950 P.2d at 1228-29 (emphasis in original).

While he makes reference to "[t]he . . . court's failure to take into account the other affidavits and declarations of [Garcia] and exhibits that appeared as a part of the consolidated files[,]" and lists opposing memoranda, Garcia does not set forth what is in such memoranda. In the factual

background section of his brief, Garcia alludes to a misrepresentation concerning the value of the stable parcel.[4] However, in the argument section of his brief, Garcia does not present a discernible argument on the misrepresentation issue.[5] See Norton v. Admin. Dir. of the Court, 80 Hawai‘i 197, 200, 908 P.2d 545, 548 (1995) (recognizing that, pursuant to Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(7), the court may "disregard [a] particular contention" if the appellant "makes no discernible argument in support of that position"), recon. denied, 80 Hawai‘i 357, 910 P.2d 128 (1996). We are not obligated to search the record to crystallize his argument, see Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai‘i 296, 309 n.31, 97 P.3d 372, 385 n.31 (2004) (explaining that the appellate court need not "sift through the voluminous record to verify an

[4] Garcia states:

> Mr. Ferreira represented to Mr. Leong [(the appraiser)] that the costs of the improvements made by Seibu to a property known as the stable parcel was only slightly in excess of $100,000.00. This caused Mr. Leong to issue an appraisal which included as a part of the stable parcel with $100,000 in improvements by Seibu.
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> . . . [Garcia] would not have agreed to taking less than a full one-third share of attorneys fees if he had known that about the misrepresentations, omissions and misstatements made by or on behalf of Defendants Ferreira, Trask and Bronstein.

[5] We note that the March 11, 1996 settlement agreement states in part in No. 3 that "[n]o other attorney fees will be paid to Garcia on account of the other properties, i.e. the Stable parcel . . . ." (Emphasis added.) The February 22, 1996 agreement provided in part that "an appraisal made on all properties at present value, with Ferreira improvements excluded, appraisal will be binding[.]" (Emphasis added.) This agreement states that "after appraisal done, . . . the propert[ies] to be agreed upon to be placed in trust, **[sic]** to attorney's fees current, and when properties sold, attorney's fees to be paid[.]" It is not clear how Garcia's allegations as to misrepresentations are to be viewed in light of these provisions.

appellant's inadequately documented contentions") (citations omitted), and therefore, need not address the misrepresentation issue. Finally, the court order granting Trask's motion to enforce does not address Garcia's misrepresentation claim. Therefore, consideration of the February 17, 1999 hearing on the motion becomes necessary to a review of the court's disposition on this issue. However, Garcia's failure to request the February 17, 1999 transcript for the record prevents this court from addressing this issue. See State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) (holding that the appellant's failure to request an arraignment transcript for the record precluded the court from determining whether, as a matter of law, the prosecution's confession of error was justified); HRAP Rule 10(b)(1)(A) (requiring the appellant to file a request for transcripts if he or she "desires to raise any point on appeal that requires consideration of the oral proceedings").

As to item (3) of Garcia's appeal, Garcia's argument that "the circuit court erred in its decision to grant Trask's motion and issuance of the order dated March 16, 1999" is a restatement of the contentions in his argument (2).

As to item (4) of Garcia's appeal, he relies, again, upon the argument that the matters should have been referred back to Justice Lum and further declares that "the . . . court erred in refusing to take into account the existence of relevant declarations and exhibits contained in the record that were

incorporated into [Garcia's] opposition to the Ferreiras' [m]otion" for judgment as a matter of law.

At the February 16, 2000 hearing on the Ferreiras' motion for judgment as a matter of law, Garcia argued that he incorporated "certain other filings" and made "declarations and such" to show there was a dispute as to whether Appellees breached the settlement agreements. The Ferreiras' motion was, in effect, a motion for summary judgment.[6] In its March 20, 2000 order, the court applied the summary judgment standard, stating, "Plaintiff, having failed to make any showing of any factual issue by affidavit or declaration in opposition to the [Ferreiras' motion for judgment as a matter of law] . . . , the Court therefore determines that there is no genuine issue of fact remaining for adjudication, and accordingly grants the [Ferreiras' motion]."

In his memorandum in opposition to the Ferreiras' motion for judgment as a matter of law, Garcia incorporated by reference previous memoranda and accompanying exhibits for "purposes of brevity," but did not attach the papers to his memorandum. The court concluded that Garcia failed to make a "showing in the responding memoranda of any facts by way of affidavit or sworn statements" and refused to consider any of

[6] Although the Ferreiras titled their motion a motion for judgment as a matter of law, they apparently brought the motion, in part, pursuant to the summary judgment rule, Hawai'i Rules of Civil Procedure (HRCP) Rule 56. The motion stated that it was "brought pursuant to Rules 7, 11, 12(b)(6)(c), 41(b), 50 and 56 of the [HRCP]."

Garcia's referenced documents on the basis that "[i]ncorporation by reference is not in compliance with [HRCP] Rule 56."[7]

HRCP Rule 56 requires that opposing affidavits be certified, that is, (1) made on personal knowledge, (2) based on facts admissible in evidence, and (3) showing that the affiant is competent to testify. See Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 539, 543 P.2d 1356, 1367 (1975) (holding that "[t]o the extent that . . . affidavits [do] not comply with [Rule 56(e),] they should be disregarded" (citations omitted)). Although the rule requires papers referred to in such affidavits to be attached, the rule does not expressly preclude incorporation of the affidavits themselves. Moreover, courts may consider exhibits that are not supported by an appropriate affidavit or certification pursuant to Rule 56(e) if no objection is made and both parties refer to the exhibits in their memoranda. Kutcher v. Zimmerman, 87 Hawai'i 394, 398-99, 957 P.2d 1076, 1080-81 (App. 1998).

Garcia's incorporation by reference, therefore, did not violate Rule 56 and the court should not have disregarded his documents as such. Although it is not clear whether exhibits

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[7] HRCP Rule 56 requires that

> [s]upporting and opposing affidavits . . . be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

(Emphases added.)

accompanying the referenced memoranda were appropriately certified in accordance with Rule 56(e), because Appellees did not object to the incorporation, id., the court could have considered the exhibits.

Nonetheless, as noted previously in the discussion concerning his misrepresentation claim, Garcia's briefs do not clearly set out the basis for establishing a genuine issue of material fact. To reiterate, we may disregard a contention if the appellant makes no discernible argument to support it, Norton, 80 Hawai'i at 200, 908 P.2d at 548, and we are not obligated to search the record to crystallize arguments, Lanai Co., Inc., 105 Hawai'i at 309 n.31, 96 P.3d at 385 n.31. Therefore, we do not consider this argument.

Finally, in point (4), Garcia asserts that four of the court's "findings of fact" were clearly erroneous.[8] "A finding of fact is clearly erroneous when, despite the evidence to support the finding, the appellate court is left with a definite and firm conviction, in reviewing the entire record, that a mistake has been committed." Mijo, 87 Hawai'i at 28, 950 P.2d at 1228. "A finding of fact is also clearly erroneous when the record lacks substantial evidence to support the finding." Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004). Substantial evidence is defined as "credible evidence which is of

[8] The court did not specifically identify three of the challenged statements as "findings of fact." Rather, the statements appear under the heading, "ORDERED ADJUDGED AND DECREED."

sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Id.

As to the first "finding," Garcia argues that "[t]o the extent that the conclusions contained in the [o]rder dated [March 20, 2000] are considered findings of fact, then language that 'Defendants Ferreira, Defendant Trask and Intervenor Bronstein had fully performed under the Settlement Agreement' is clearly erroneous," because there were "matters still to be determined by [Justice] Lum . . . [hence Appellees] did not complete the performance of their obligations under the Settlement Agreements." According to Garcia, "the matters still to be determined" included "the false and misleading statements and representations, as well as the sums that were acknowledged to be owed between Trask and [Garcia]." Again, as to alleged false and misleading statements and representations, Garcia does not specify them, and as to further mediation, the record indicates efforts were unsuccessful. Further, the record indicates that, in accordance with the agreements, the parties hired an appraiser to determine the value of properties to be sold to pay the amount of attorney's fees owed by the Ferreiras, the Ferreiras closed the sale of TMK 2-21-011-27 to provide the funds necessary to pay their delinquent property taxes and to pay the attorney's fees owed to Garcia, Trask, and Bronstein, and the attorneys were paid. In light of these events, the court's "finding" was not clearly erroneous.

The second "finding" challenged "[t]o the extent that the conclusions contained in the [o]rder dated March 20, 2000 are considered findings of fact, . . . [is] . . . language that Appellant had failed to present an affidavit or declaration in opposing [Appellees m]otion . . . , as (a) there is evidence presented by Appellant in prior affidavits and declarations along with exhibits and evidence that was asserted in opposition to the Ferreiras' [m]otion, and (b) that . . . [the] court made such a clear mistake in making said finding." As mentioned previously, this argument is not considered inasmuch as Garcia failed to present a discernible argument specifying the genuine issue of material fact the documents were meant to support.

As to the third "finding" that "[t]o the extent that the conclusions contained in the [o]rder dated March 20, 2000 are considered findings . . . , [to the effect that] the only remaining issue for resolution was the amount owing and the distribution of proceeds between Appellant and Trask[,]" Garcia restates his argument that "numerous matters" remained for resolution before Justice Lum. As discussed previously, however, to the extent the parties attempted to mediate the matter further, the parties were not successful. Accordingly, the court's finding that the only issues for resolution under the settlement agreements were the amount owing and the distribution of proceeds between Garcia and Trask, was not clearly erroneous.

Finally, Garcia contends that "[t]o the extent that the language in the Judgment relates to that which is based on the prior erroneous orders . . . are considered findings of fact, such are erroneous and must be reversed." A judgment itself is not a finding of fact. See Black's Law Dictionary 632 (6th ed. 1990) (defining "finding of fact" as "[d]eterminations from the evidence of a case, either by court or an administrative agency, concerning facts averred by one party and denied by another" (emphasis added)). Therefore, it is not subject to the clearly erroneous standard of review. Nevertheless, insofar as the prior "findings" referred to supra do not require vacation or reversal, judgment was not wrong. Therefore,

In accordance with HRAP Rule 35, after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's August 3, 2000 judgment, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, November 24, 2004.

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