*****NOT FOR PUBLICATION*****

NO. 25462

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

JAS. W. GLOVER, LTD.,
Petitioner-Appellant/Cross-Appellee

vs.

DERRICK CONCRETE CUTTING & CONSTRUCTION, LTD.,
Respondent-Appellee/Cross-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P. NO. 02-1-0402)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, JJ.,
and Circuit Judge Simms, Assigned by Reason of Vacancy)

Petitioner-Appellant/Cross-Appellee Jas. W. Glover, Ltd. (Glover) appeals (1) the October 8, 2002 order of the circuit court of the first circuit (the court)[1] denying its application for an order quashing an arbitrator's August 1, 2002 subpoena or, alternatively, modifying the subpoena to allow discovery only upon certain conditions, and (2) the October 8, 2002 order granting in part and denying in part the September 11, 2002 motion of Respondent-Appellee/Cross-Appellant Derrick Concrete Cutting & Construction, Ltd. (Derrick) to compel compliance with the arbitrator's orders and for an order to show cause why Glover should not be held in contempt of court and for sanctions.

[1] The Honorable Sabrina S. McKenna presided over this matter.

On appeal, Glover argues that (1) the fact that the documents were produced to Derrick does not cause the issue to be moot, because Glover has a cognizable interest in obtaining a determination of the arbitrator's authority to issue the subpoena, (2) the court erroneously enforced the subpoena duces tecum based on two grounds as indicated infra, and (3) the court erred in refusing to modify the subpoena duces tecum to provide for reimbursement. On appeal, Derrick contends that the appeal is moot and should be dismissed.

As to Derrick's contention, we agree with Glover's first argument that the appeal is not moot. Despite the fact that Glover has produced the documents in question, Glover still has a cognizable interest in obtaining resolution of the issues in this appeal because Glover may be compelled to produce further items pursuant to Hawai'i Revised Statutes (HRS) § 658-7 (1993). See Powell v. McCormack, 395 U.S. 486, 496 (1969) (explaining that an appeal is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome").

Glover argues first, as to its second contention, that "the phrase 'before them' [in HRS § 658-7[2]] refers to not just any proceeding before the arbitrator, but specifically, a hearing on the merits of the arbitration case." In case law interpreting the analogous provision of section 7 of the Federal Arbitration

[2] HRS § 658-7 states that "[t]he arbitrators selected either as prescribed in this chapter, or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with them a book or paper."

Act (FAA),[3] however, courts have permitted pre-hearing discovery of documents in the possession of non-parties. See Stanton v. Pain Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D.Fla. 1988) (holding that federal case law may be consulted in interpreting § 7 of the Arbitration Act and § 7 permits the arbitrators to compel pre-hearing discovery); In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000) (holding "that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing"); Am. Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 (6th Cir. 1999) (stating that "the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing"). We hold, thus, that an arbitrator may compel production of documents from third parties before a hearing on the merits. A constrictive reading of the statute "would limit the ability of the arbitration panel[s] to deal effectively with . . . large and complex case[s] . . . and

[3] The language of HRS § 658-7 is nearly identical to Section 7 of the Federal Arbitration Act. Section 7 (codified at 9 U.S.C. § 7) provides that

> [t]he arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him any book, record, document or paper which may be deemed material as evidence in the case.

[would] generally hamper the use of arbitration as a forum for dispute resolution." Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. 1994).

Glover also maintains as to its second contention that HRS § 658-7 requires a finding by the arbitrator that the arbitration proceeding is a "proper case" for compelling the production of documents from non-parties. Case law does support the contention that a subpoena duces tecum is only appropriate in a "proper case." See In re Application of Sun-Ray Cloak Co., 11 N.Y.S.2d 202, 206-07 (App. Div. 1939) (holding that the subpoena duces tecum is permitted when the documents to be produced are material and relevant to the issue and where they have been described with reasonable precision), and In re Arbitration between Mineral & Chems. Philip Corp. and Panamerican Commodities, 224 N.Y.S.2d 763, 765 (N.Y. App. Div. 1962) (holding that a proper case is dependent upon the relevancy and materiality of the documents sought). However, the cases do not hold that an express determination that the case is proper be made by the arbitrator. Instead, they hold that if a party has established the relevancy of the documents requested, then the case is "proper" and a third party may be compelled to produce documents.[4] The documents and materials requested by Derrick

[4] The Uniform Arbitration Act which became effective in Hawai'i on July 1, 2002, deleted the phrase "proper case" from the arbitration statute. HRS § 658A-17, which now controls discovery during arbitration allows for very broad discovery, stating that "an arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing." HRS § 658A-17 further provides that "an arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances." The statute leaves discovery to the discretion of the
(continued...)

concern the construction projects and agreements between Glover and Alaska Road Boring Company dba Hawaii Trenchless and Frawner Corporation (Trenchless). As Glover was the general contractor on the project which is the subject of the dispute, agreements and evidence concerning the work performed by Trenchless would be relevant to establishing facts regarding the construction work agreed to and performed by Trenchless.

The arbitrator precluded privileged documents from being given to Derrick. At the hearing herein, Glover did not argue that the arbitrator should have made a "proper case" finding, but only that the burden placed upon Glover to produce the documents requested was too great. In any event, on appeal, Glover does not identify any items produced that should not have been subpoenaed, or raise any specific objection to the production of any particular item. Under the circumstances, there was no reversible error.

As to its third contention, Glover argues that the court erred in refusing to modify the subpoena to permit discovery only upon the condition that Glover be advanced or be reimbursed the costs of complying with the second subpoena. HRS § 658-7 states that "[t]he summons . . . shall be served in the same manner as subpoenas to testify before a court of record." Hawai'i Rules of Civil Procedure (HRCP) Rule 45 governs subpoenas

[4](...continued)
arbitrator with the only limitation being that the discovery is "appropriate."

in civil cases, and is therefore the rule that governs third party subpoenas in arbitration proceedings.[5] The use of the term may in HRCP Rule 45 vests discretion in the court as to the advancement or reimbursement of costs. Therefore, the allowance of costs is not mandated before a subpoena issues. In any event, the arbitrator did grant Glover reimbursement for some of the costs requested for producing the documents based on evidence he received from Glover. On appeal, Glover does not cite any evidence or present any argument with respect to any error in the arbitrator's reimbursement award. Accordingly, there was no reversible error. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and 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 October 8, 2002 orders (1) denying Glover's application to quash the arbitrator's August 1, 2002 subpoena or, alternatively, modifying the subpoena to allow discovery only upon certain conditions, and (2) granting

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[5] HRCP Rule 45 states in relevant part as follows:

> (b) For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(Emphasis added.)

in part and denying in part the September 11, 2002 motion to compel compliance with arbitrator's orders and for an order to show cause why Glover should not be held in contempt of court and for sanctions, from which the appeal is taken, are affirmed.

DATED: Honolulu, Hawai'i, December 18, 2003.

On the briefs:

C. Michael Heihre,
Dennis W. Chong Kee, and
Elijah Yip (Cades
Schutte) for petitioner-
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William S. Hunt and
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