

NOT FOR PUBLICATION

NO. 25427

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

EDWARD W.L. KAM, JR., Plaintiff-Appellant, v.
AMS RELOCATION, INC., Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 00-1-2159)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiff-Appellant Edward W.L. Kam, Jr. (Kam) appeals from the September 24, 2002 "Judgment" entered in the Circuit Court of the First Circuit, Judge Victoria S. Marks presiding, in favor of Defendant-Appellee AMS Relocation, Inc. (AMS), dismissing the claims asserted by Kam. The court orally based its judgment of dismissal on the following grounds: (1) lack of personal jurisdiction; (2) the two-year statute of limitations; and (3) *forum non conveniens*. Based on our agreement that the court lacked personal jurisdiction over AMS, we vacate the circuit court's September 24, 2002 "Judgment" of dismissal and remand for entry of an order of dismissal, effective September 24, 2002, for lack of personal jurisdiction over the defendant, AMS Relocation, Inc.

BACKGROUND

AMS is a California corporation engaged in the business of moving and storing goods. Kam wanted AMS to ship Kam's

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household goods and personal property (Kam's property) from California to Hawai'i but could not afford the \$2,000 cost of shipping. On February 15, 1992, Kam entered into a shipping/storage contract with AMS for AMS to ship Kam's property to, and store Kam's property at, a storage facility operated by AMS in Burlingame, California. The initial rate was \$120 per month. Over the course of time, AMS increased the rate.

On August 1, 1994, in Case No. 94-00909, Kam filed a Chapter 7 bankruptcy case in the United States Bankruptcy Court, District of Hawaii. On August 29, 1994, "AMS Relocation, Inc. AKA AMS BEKINS" filed a Proof of Claim in the bankruptcy proceedings for a \$3,012.06 secured claim. AMS was subsequently informed by the Trustee in Bankruptcy that "the goods in storage were exempted by [Kam] in the bankruptcy schedules and belong to [Kam]. The bankruptcy estate has nothing to do with them and have [sic] no interest in them."

In a letter dated March 27, 1996, AMS notified Kam, in relevant part, as follows:

[AMS], in accordance with the laws of the state of California, hereby gives notice that is [sic] has a lien upon property stored with it by you, . . . , amounting to the sum of \$6,542.06, which is now due.

. . . .

We hereby demand that the amount of the above stated claim, be paid . . . April 8, 1996. We notify you that unless said claim is paid within the time herein specified, the goods will be duly advertised for sale and sold at Public Auction at the Company's warehouse located at 1873 Rollins Road, Burlingame, CA on the 30th day of April 1996, sale beginning at 10:00 a.m. and also to be held thereafter on such subsequent dates as may be announced

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orally at the said time and place.

. . . .

The proceeds of such sale shall be applied to the payment of the lien, which includes reasonable charges of notice, advertisement, and sale. In case any deficiency shall arise from said sale, you shall be held liable therefor, and judgment may be entered against you.

In a letter dated May 21, 1996, AMS advised Kam as

follows:

As you know, your goods were sold at Auction on April 30, 1996. Because there were no bids, the company took possession of your shipment for the charges that were due.¹ This means your account is closed and there will be no further collection activity.

Subsequently, your belongings have been sold, donated to charity or otherwise disposed. We are sorry that we were forced to take these drastic measures. Best of luck to you in the future.

(Footnote added.)

On July 11, 2000, Kam commenced this case by filing a complaint alleging, in relevant part, that AMS

did take all [Kam's] stored property in excess of the amount due, because [its] claim for storage charges was inflated, [it] didn't properly value [Kam's] property, and [it] avoided going to court to collect.

. . . .

The 20 month storage period for the time commencing after [Kam] filed for Chapter 7 bankruptcy would amount to \$2,548.45, which seems a fairer raise than [AMS's] \$6,542.06, 3/27/96 storage charges and is \$3,993.61 less. AMS was classified in Schedule F, Exhibit 6, supra, as "Creditors Holding Unsecured Nonpriority Claims;" unsecured, because they had no court judgment nor mortgage note (recorded) on their debt claim.

. . . .

[Kam's] seized property as of the date it was auctioned off at [AMS's] bankrupt sale, 4/30/96, may be valued at replacement costs through ordinary channels of trade, such as a refinished coffee table, sold at an average furniture store, at retail price, in following the foregoing rule. This may be about two-thirds of

¹ This second sentence of the paragraph shows that the first sentence of the paragraph is not true. The goods were not "sold at Auction". They were offered for sale at auction.

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its estimated insured value, or be about \$12,500 (2/3 of \$20,000), which would exceed his inflated total claim by \$2,686.91 (\$12,500 minus \$9,813.09).

Because [AMS's] storage claim was not court approved, nor was the value of [Kam's] property seized in 1996, [AMS] may have an unfair advantage if permitted to keep all in [its] nonjudicial (out of court) action. In McAfee v. Chandler, [7 S.W.2d 623 (1928)], this would be "wrongful distress", and an action for damages exists for court; that is the reason for this lawsuit.

.

[Kam] has asked [AMS] to settle this dispute, and to return his seized property, since this is not the recommended way to collect storage charges in arrears, or to pay the monies owed that may exceed [its] fair claim, . . . , or a combination of both, but [AMS] has failed, neglected or refused to do such.

WHEREFORE, [Kam] prays:

.

2. That the Court award [Kam] Judgement for either return of his seized property, pay \$9,951.55,² or a combination of both, plus costs of court.

(Footnote added.)

On August 10, 2000, Kam filed an Affidavit of Service stating that he served AMS by registered mail, return receipt requested, to

MR. GARY WOLFE, PRESIDENT
AMS RELOCATION, INC.
1873 ROLLINS ROAD
BURLINGAME, CA 94010

and that Gary Wolfe received this mail on July 17, 2000.

On November 17, 2000, AMS filed its answer to Kam's complaint in which it asserted the following defenses:³

² The amount of \$12,500 minus \$2,548.45 equals \$9,951.55.

³ AMS, in its answering brief, for the first time in the case, contends that Kam's complaint was properly dismissed because the February 15, 1992 shipping/storage contract states, in relevant part, as follows:

7. Any dispute or claim arising out of or for the breach of this agreement or in connection with the property stored hereunder

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1. Failure to state a claim upon which relief can be granted.

2. Denial of the allegations in the complaint.

3. Lack of personal jurisdiction.

4. Improper venue.⁴

5. Kam's negligence caused or contributed to any injuries Kam may have received as a result of the occurrences referred to in the complaint.

6. Kam's failure to mitigate damages.

7. Failure of condition precedent.

8. Equitable doctrine of laches, waiver and/or estoppel.

9. Independent intervening forces may have been the legal and proximate causes of Kam's injuries.

10. Failure to name indispensable parties.

On January 5, 2001, Kam filed a Motion for Summary

whether founded in tort or contract, shall be settled by arbitration under the Arbitration law of the State of California and under the rules of the American Arbitration Association, provided, however, that upon any such arbitration, the arbitrator may not vary, modify or disregard the provisions contained herein, including those respecting the declared or agreed valuation of the goods and the limitations of liability of the Company. The award may be entered as a judgment of a Court of record in the County where the award is made. The Customer and the Company shall share equally the cost of arbitration. Court costs shall be borne by the losing party.

⁴ "The doctrine of *forum non conveniens* has been described as dealing with 'the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere.'" Territory v. Gay, 32 Haw. 404, 415-16 (1932) (citation omitted).

Judgment. AMS filed the affidavit of its president and opposed the motion on the merits. This motion was denied by an order entered on February 13, 2001.

On March 28, 2001, Kam filed a "Motion for Reconsideration of Summary Judgment". AMS filed documents opposing the motion. On May 3, 2001, the court entered its order denying this motion.

On October 3, 2001, Kam filed a "Second Motion for Reconsideration of the Order Denying his Motion for Reconsideration of Summary Judgment Filed May 3, 2001". AMS filed documents opposing the motion. On November 1, 2001, the court entered its order denying this motion.

On December 19, 2001, Kam filed a "Third Motion for Reconsideration of the Order Denying his Motion for Reconsideration of Summary Judgment Filed May 3, 2001". AMS filed documents opposing the motion. On January 16, 2002, the court entered its order denying this motion.

On August 2, 2002, AMS filed its motion seeking summary judgment on the following grounds: (1) a lack of personal jurisdiction over AMS; (2) *forum non conveniens*; (3) Kam's complaint failed to state a claim against AMS upon which relief could be granted; and (4) Kam's complaint was barred by the two-year "damage or injury to persons or property" statute of limitations stated in Hawai'i Revised Statutes (HRS) § 657-7

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(1993). At the August 28, 2002 hearing on the motion, the court stated, in relevant part, as follows:

THE COURT: I've reviewed everything submitted. I'll tell you my inclination. My inclination is to grant the motion on really the three main grounds that the defense raised, lack of personal jurisdiction, there being a lack of sufficient contacts with the State, the two-year Statute of Limitations to persons or property and for non conveniens.

. . . .

THE COURT: Okay. Okay. The Court's inclination stands. The motion is granted. Plainly stated, Mr. Kam, that means [AMS] wins.

On September 6, 2002, the court entered its "Order Granting Defendant AMS Relocation, Inc.'s Motion for Summary Judgement". This order stated that the motion "is hereby granted and [Kam's] Complaint is dismissed." The "Judgment" entered on September 24, 2002 stated that "Judgment is hereby entered in favor of [AMS] and against [Kam]. [Kam's] claims against [AMS] are hereby dismissed."

Kam filed a notice of appeal on October 24, 2002, and the appeal was assigned to this court on July 2, 2003.

POINTS ON APPEAL

In his opening brief, Kam asserts the following points on appeal:

1. The Court was wrong in finding that there was no personal jurisdiction over AMS;
2. The court was wrong in finding that the Circuit Court, State of Hawai'i was not the proper venue for this case; and
3. The court was wrong in finding that the claim was barred by a two-year statute of limitations contained in H.R.S. § 657-7.

APPLICABLE RULE

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Hawai'i Rules of Civil Procedure (HRCP) Rule 12 (2004)

states, in relevant part, as follows:

Defenses and objections - When and how presented - By pleading or motion - Motion for judgment on the pleadings.

(a) When Presented.

(1) A defendant shall serve an answer within 20 days after being served with the summons and complaint, except when service is made under Rule 4(c) and a different time is prescribed in an order of court under a statute or rule of court.

(2)

(3)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. . . .

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. . . .

(f) Motion to Strike. . . .

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(g) **Consolidation of Defenses in Motion.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h) (2) hereof on any of the grounds there stated.

(h) **Waiver or Preservation of Certain Defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

DISCUSSION

As noted in Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b), "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." As noted in HRCP Rule 12(h) (1), "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a

matter of course." Therefore, the answer filed by AMS and the time and energy AMS spent defending against Kam's motions for summary judgment did not waive AMS's defense of the court's lack of personal jurisdiction over it. Romero v. Star Markets, Ltd., 82 Hawai'i 405, 416, 922 P.2d 1018, 1029 (App. 1996).

"[J]urisdiction should be determined before consideration of the merits of any claim or defense[.]" Norris v. Six Flags Theme Parks, Inc., 102 Haw. 203, 207, 74 P.3d 26, 30 (2002). Upon determining that it lacks jurisdiction, a court "shall not require anything other than a dismissal of the appeal or action. Without jurisdiction, a court is not in a position to consider the case further." Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 69 n.10, 881 P.2d 1210, 1215 n.10 (1994). A court's decision that it lacks personal jurisdiction over the defendant is a conclusion of law, not a finding of fact.

AMS was served by mail in California. A Hawai'i court may assert personal jurisdiction over a nonresident defendant when (1) the defendant's activities fall within Hawai'i's long-arm statute and (2) the application of Hawai'i's long-arm statute complies with due process. Shaw v. North American Title, Co., 76 Hawai'i 323, 327, 876 P.2d 1291, 1295 (1994) (citations omitted).

Hawai'i's long-arm statute, HRS § 634-35 (1993), states, in relevant part, as follows:

Acts submitting to jurisdiction. (a) Any person, whether or not a citizen or resident of this State, who in person or through

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an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, the person's personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of the acts:

(1) The transaction of any business within this State;

. . . .

(c) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over the defendant is based upon this section.

Determining whether a nonresident defendant has transacted business within the scope of HRS § 634-35(a)(1) "demands an examination of all of the defendant's activities within the forum related to the present cause of action." Cowan v. First Insurance Co. of Hawaii, Ltd., 61 Haw. 644, 652, 608 P.2d 394, 400 (1980).

In Cowan, a dispute arose out of a brokerage contract to list plaintiff's sailboat for sale. The Hawai'i Supreme Court noted that "contracting in the State unquestionably constitutes transacting business under HRS § 634-35." Id., 61 Haw. at 649, 608 P.2d at 399. The court also held that the physical presence of the defendant or the defendant's agent in the forum is not necessary for a finding of transacting business. See id., 61 Haw. at 651, 608 P.2d at 400. Despite the fact that the precise time when, and location where, the contract became binding was unclear, the court concluded that, in light of the following facts, the defendant had transacted business in Hawai'i within the meaning of HRS § 634-35(a)(1):

Here, the defendants entered into a contractual relationship with the plaintiff, a resident of Hawaii; the listing agreement and

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specification form were mailed by the defendants to the State for the plaintiff's signature. The duties and obligations arising from the contract involved the sale of the plaintiff's boat which initially and for a significant part of the contractual period was located in Hawaii. While the boat was so located, the parties entered into a second contract, this time to advertise "Chutzpah." Again, the necessary documents were mailed to Hawaii by the defendants and signed by the plaintiff in the State. Lastly, in response to defendant [Frank] Cottle's urging, the plaintiff agreed to and did ship his boat from Hawaii to the west coast. Thus, through interstate communications, the defendants engaged in significant business activity in Hawaii relating to the execution and performance of the listing contract.

In addition, the defendants' contacts with the State include advertising and solicitation that gave rise to the instant cause of action. For at least two years prior to the filing of the plaintiff's complaint, [defendant-appellee] Ardell [Marina, Inc. (Ardell)] regularly advertised the sale of yachts and ships in national magazines distributed throughout Hawaii. It was, in fact, such an advertisement which initially led the plaintiff to contact Ardell concerning the brokerage of his sailboat.

61 Haw. at 650-53, 608 P.2d at 399-01.

In Shaw, a dispute arose between the plaintiff, a Hawai'i resident, and the defendant, a California corporation, over alleged mishandling of an escrow transaction to refinance the plaintiff's California property. See Shaw, 76 Hawai'i at 325-26, 876 P.2d at 1293-94. The defendant argued that it had not transacted business in Hawai'i because (1) the escrow contract was between it and a California bank, rather than with the plaintiff; (2) its contacts with Hawai'i were "administrative in nature," involving check mailings to the plaintiff and "related communications; (3) it was not registered to do business in Hawai'i, nor did it own any property in Hawai'i; and (4) it had not solicited business in Hawai'i. See id., 76 Hawai'i at 328, 876 P.2d at 1296. The Hawai'i Supreme Court concluded that "[the defendant's] dealings, based on a California contract, were

merely incidental to the escrow transaction conducted in California. Moreover, the subject property was located in California, and the escrow contract was between California residents." Id. As such, the court held that the plaintiff had failed to show that the defendant had transacted business in Hawai'i. See id.

The facts of the instant case are closer to Shaw than they are to Cowan. AMS is a California corporation that neither owns property in Hawai'i, nor is licensed to conduct business in Hawai'i. AMS does not solicit business or advertise in Hawai'i. The contract between Kam and AMS was executed in California, while Kam was a resident of California. Further, the subject property of the contract has, at all times, remained located in California. While it is true that AMS has had some contact with Kam in Hawai'i over the years, such contact appears to consist only of its correspondence with Kam regarding the rate of, and Kam's failure to pay, the storage fees, and its assertion of a claim in Kam's bankruptcy case in Hawai'i. The dealings AMS has had with Hawai'i appear to be "merely incidental" to a transaction that occurred in California and do not support a conclusion that AMS has transacted business in Hawai'i.

In his opening brief, for the first time in the case, Kam asserts that "[t]he original contract was made with AMS as the agent for Bekins, which does business in Hawaii as a moving

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company." (Emphasis in original.) The relevant facts in the record are the following:

1. The February 15, 1992 shipping/storage contract is on a form that states at its top:

**BEKINS
AMS RELOCATION, INC. • BEKINS VAN LINE AGENT
1873 ROLLINS RD. • BURLINGAME, CALIFORNIA 94010 • (415) 697-3530**

2. The February 18, 1992 packing/shipping charge invoice is on a form that states at the top left:

**BEKINS
1873 ROLLINS ROAD
BURLINGAME, CA 94010-2209
(415) 697-3530**

3. The November 22, 1993 letter, the April 14, 1994 letter, the March 7, 1996 letter, the March 27, 1996 letters, the May 21, 1996 letter, and the June 12, 2000 letter from AMS in California to Kam in Hawai'i are on form stationery that states at the top right:

**BEKINS
AMS Relocation Inc.
1873 Rollins Road
Burlingame, CA 94010
(415) 697-3530
(415) 697-7810 (fax)**

Kam does not cite anything in the record supporting his assertions that the "**BEKINS**" referred to above does business in Hawai'i. Moreover, Bekins is not a defendant in this case. Assuming that AMS was acting as the agent of Bekins when it was dealing with Kam, the fact that the actions of AMS, as agent, in

California would allow the Hawai'i court to assert personal jurisdiction over Bekins, as principal, does not allow the Hawai'i court to assert actual personal jurisdiction over AMS, as agent.

We conclude that the activities of AMS did not fall within the ambit of HRS § 634-35 (Hawai'i's long-arm statute), and as a result, the circuit court did not have personal jurisdiction over AMS. We do not address the merits of any other points on appeal.⁵

⁵ Hawai'i Rules of Civil Procedure Rule 8 (2004) states as follows:

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Thus, we do not reach the question whether the failure of Defendant-Appellee AMS Relocation, Inc. to assert a statute of limitation (SOL) defense in its November 17, 2000 answer to the complaint filed by Plaintiff-Appellant Edward W.L. Kam, Jr. barred it from asserting a SOL defense in its August 2, 2002 motion seeking summary judgment.

It should be noted that, even if personal jurisdiction over AMS did exist, summary judgment in favor of AMS would still have been proper under the doctrine of *forum non conveniens*. *Forum non conveniens* is "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Territory v. Gay, 32 Haw. 404, 415-16 (1932). Even if the circuit court did have personal jurisdiction over AMS, it would still be more appropriate to try the case in California, since the contract was executed in California, the subject property was stored in California, AMS is a California corporation, California law would have to be interpreted, and all witnesses, with the exception of Kam, are in California. Thus, it would have been a proper exercise of the circuit court's discretion to decline jurisdiction.

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The Hawai'i Supreme Court has stated that "every court . . . must determine as a threshold matter whether it has jurisdiction to decide the issue presented." Pele Defense Fund, at 67, 881 P.2d at 1213. If such jurisdiction is lacking, then any judgment rendered would be invalid. See Bush v. Hawaiian Homes Com'n, 76 Hawai'i 128, 133, 870 P.2d 1272, 1277 (1994). Thus, upon determining that it lacks jurisdiction, a court "shall not require anything other than a dismissal of the appeal or action. Without jurisdiction, a court is not in a position to consider the case further." Pele Defense Fund, 77 Hawai'i at 69 n.10, 881 P.2d at 1215 n.10. In other words, the circuit court cannot enter a "judgment" pursuant to Hawai'i Rules of Civil Procedure Rule 58 (2004).

CONCLUSION

Accordingly, we vacate the circuit court's September 24, 2002 "Judgment" of dismissal and remand for entry of an order of dismissal, effective September 24, 2002, for lack of personal jurisdiction over the defendant, AMS Relocation, Inc.

DATED: Honolulu, Hawai'i, April 21, 2004.

On the briefs:

Charles H. Brower
for Plaintiff-Appellant.

Chief Judge

Gary W. K. Au Young
for Defendant-Appellee.

Associate Judge

Associate Judge