

NOT FOR PUBLICATION

NO. 25617

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

JERRY MICHAEL HIATT, ATTORNEY AT LAW, A LAW CORPORATION,
dba LAW OFFICE OF JERRY M. HIATT, Petitioner-Appellee,
v. LOIS BUSINESS DEVELOPMENT CORPORATION, PACIFIC RIM
BUSINESS DEVELOPMENT CORPORATION, and SCOTT C. WALLACE,
Respondents-Appellants

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P. No. 01-1-0403)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Foley, and Fujise, JJ.)

This appeal arises from a special proceeding initiated by Petitioner-Appellee Jerry Michael Hiatt (Hiatt) in the Circuit Court of the First Circuit (the circuit court), seeking to compel arbitration of a fee dispute with Respondents-Appellants Lois Business Development Corporation (LBDC), Pacific Rim Business Development Corporation (PRBDC), and Scott C. Wallace (Wallace) (collectively, Respondents), pursuant to a mandatory arbitration clause¹ contained in a May 12, 2000 contingency fee agreement

¹ The mandatory arbitration clause provided:

Any controversy or claim for malpractice or professional negligence and any controversy or claim arising out of or relating to the fees, costs or charges for our services rendered, shall be settled by a confidential binding arbitration in Honolulu, Hawaii by a single neutral arbitrator to be appointed by the Dispute Prevention & Resolution, Inc. ("DPR"), in accordance with the Arbitration Rules, Procedures & Protocols of [DPR] then in effect. In the even [sic] DPR is unable, for any reason, to administer or conduct said arbitration, the parties will submit such controversy or claim to the American Arbitration Association, and said arbitration shall be conducted in

(continued...)

(the Agreement) for Hiatt's services with the law firm of Bays, Deaver, Hiatt, Lung & Rose (Bays Deaver). We affirm.²

A.

The record reveals that at the time the Agreement was executed, Respondents had pending before the Tax Appeal Court,³ three appeals that challenged adverse tax rulings by the State of Hawai'i, Department of Taxation (the State). Two of these appeals had trial dates set for October 23, 2000 and October 30, 2000, respectively. Another law firm had been representing Respondents during the tax appeal proceedings, but with trial dates fast approaching, Wallace, individually and as chief executive officer of LBDC and PRBDC, sought out Hiatt to serve as lead trial counsel for the tax appeals. Apparently, Wallace had been a party in several cases in which Hiatt served as opposing counsel and had admired Hiatt's work.

¹(...continued)

Honolulu, Hawaii by a single neutral arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. Judgment upon the award rendered by that arbitration may be entered in any court having jurisdiction. By agreeing to arbitrate, you relinquish any right to have a jury trial or to litigate in court for any controversy subject to arbitration. If you do not understand this arbitration provision, please contact our firm or independent counsel for a further explanation of it.

² Our review of this appeal was made far more difficult by the opening brief's failure to comply with Hawai'i Rules of Appellate Procedure Rule 28(b)(4). Counsel for Respondents-Appellants are reminded that future violations of the rule may be sanctioned.

³ Appeals to the Tax Appeal Court are *de novo*, and the court has "the power and authority in the manner provided in section 232-13, to decide all questions of fact and all questions of law, including constitutional questions, involved in any such matters, without the intervention of a jury." Hawaii Revised Statutes (HRS) § 232-11 (2001). See also HRS §§ 232-13 (2001) and 232-16 (2001).

NOT FOR PUBLICATION

The Agreement, which did not include a "no-assignment" clause, specifically required that "[Hiatt] will be lead trial counsel for the trial. [Hiatt] will handle oral arguments and witness examinations and cross-examinations at the trial. [Hiatt] will also be allowed to decide on the order of proof and who to call as witnesses and experts and what to introduce as exhibits[.]" Under the Agreement, Bays Deaver was to "receive, as a fee for [its] services, one fifth (20%) of the gross recovery obtained in the case whenever it is resolved (i.e., prior to or after commencement of trial, or thereafter during any appeal[])." "

After the Agreement was signed by Wallace and Hiatt on behalf of Bays Deaver, Hiatt obtained a continuance of the trial dates and a stipulation from the State that the result of the first case to be tried, involving LBDC's tax appeal, would establish the rule of law applicable to all three cases. Hiatt also engaged in extensive discovery and settlement negotiations on Respondents' behalf.

On January 1, 2001, Hiatt withdrew from Bays Deaver to open up his own practice on the island of Hawai'i (the Big Island) under the name "Law Offices of Jerry M. Hiatt." He was joined in the practice by a former Bays Deaver Big Island associate and former Bays Deaver Big Island staff. Bays Deaver assigned its rights under the Agreement to Hiatt, effective upon Hiatt's withdrawal from Bays Deaver on January 1, 2001. Wallace

NOT FOR PUBLICATION

was aware of the withdrawal and on January 2, 2001, sent a letter to Hiatt at the Kamuela, Hawai'i address of the "Law Offices of Jerry Hiatt" that stated, in relevant part, as follows:

Per our discussion earlier today, enclosed please find a check for \$15,000.

Per our agreement, should we have a successful result--meaning that the State of Hawaii either pays me the money which they owe me or we settle the matter--you have agreed that in consideration of the enclosed \$15,000 payment to allow me to deduct \$25,000 from any monies owed to you pursuant to our existing fee agreement relating to the BDC matter.

(Emphases added.)

On January 4, 2001, the Tax Appeal Court entered an order granting a crucial summary judgment motion that Hiatt had filed on Respondents' behalf, which required the State to repay LBDC \$1,406,608.39 in taxes, penalties, and interest. On January 22, 2001, without objection from Respondents, Hiatt and Bays Deaver formalized the assignment of the Agreement to Hiatt by filing a withdrawal and substitution of counsel in the LBDC tax appeal. Hiatt thereafter continued to represent Respondents in the tax appeals.

The State appealed the adverse summary judgment ruling in favor of Respondents to the Hawai'i Supreme Court, and while the appeal was pending, Hiatt and Wallace engaged in intensive settlement negotiations with the State. By a letter to Hiatt dated May 9, 2001, Christopher J. Muzzi (Muzzi), a deputy attorney general representing the State, offered to settle the tax appeals with Respondents under specified terms and conditions, "subject to the review and approval of the Attorney

General[.]" On June 8, 2001, Hiatt accepted the settlement offer on behalf of Respondents, with the understanding that Hiatt would "continue to work to obtain the waiver of a maximum \$10,000 in interest claimed by the State in relation to [Wallace's] individual 1997 State tax return." On June 12, 2001, Muzzi acknowledged receipt of Hiatt's June 8, 2001 acceptance of the settlement offer and indicated that approval of the settlement was being sought from the Attorney General. Thereafter, by a letter dated June 25, 2001, Hugh R. Jones (Jones), another deputy attorney general representing the State, informed Hiatt that the Attorney General had approved the settlement, "conditioned upon the . . . production of any statement provided to your office or to the Taxpayer in this case by former Director of Taxation Ray K. Kamikawa [(Kamikawa)] (excluding his prior deposition testimony)."

On June 26, 2001, Jones forwarded a proposed settlement agreement to Hiatt for Hiatt's consideration. The same day, Wallace faxed a letter to Hiatt, expressing concern that the State's "conditional acceptance of our offer may create serious liability for me and the Wallace Companies based upon my discussions and correspondence with [Kamikawa]. I am also concerned about the [State's] request for me to provide them with additional materials relating to my discussions with [Kamikawa] and the impact these materials may have on the tax liability of both myself and the various [Respondents]."

NOT FOR PUBLICATION

On June 27, 2001, Hiatt faxed a letter to Jones, confirming that "no statement has been provided to [Hiatt's] office by [Kamikawa], except for his prior deposition testimony." Hiatt additionally faxed a letter to Wallace, estimating Hiatt's contingency fee under the settlement with the State. Also on June 27, 2001, Jones wrote a letter to Hiatt, informing Hiatt that Wallace had just telephoned, indicating that "he wanted to take some time to carefully review his records and files to determine whether [Kamikawa] sent him any letters, or provided him with any signed statements, during this case."

On June 29, 2001, Wallace notified Hiatt and Bays Deaver by letter that "effective immediately," Wallace was "terminating the relationships."⁴ Wallace further directed Hiatt and Bays Deaver to forward all of their case files to Wallace's new counsel. Hiatt complied with Wallace's direction, but on August 9, 2001, after learning that the State's appeal to the supreme court had been dismissed, and assuming that settlement had been reached between the State and Respondents, Hiatt filed a Notice of Lien for Attorneys' Fees in the Tax Appeal Court, asserting a lien "over any monies paid to LBDC as a result of a judgment or settlement" in the LBDC tax appeal case.

⁴ According to Respondent-Appellant Scott C. Wallace (Wallace), Petitioner-Appellee Jerry Michael Hiatt was terminated "as a result of his blatant disregard for [Wallace's] verbal and written instructions regarding settlement, and worse yet, authorizing settlement without his knowledge and consent."

On October 2, 2001, after Wallace refused to submit the dispute over Hiatt's attorneys' fees and costs to arbitration, Hiatt invoked the mandatory arbitration clause in the Agreement and filed the Motion to Compel Arbitration that underlies this appeal. On December 17, 2001, the circuit court⁵ entered an "Order Granting [Hiatt's] Motion to Compel Arbitration" (the Order Compelling Arbitration). Subsequently, on March 1, 2002, the circuit court entered an order granting in part and denying in part Respondents' motion for reconsideration of the Order Compelling Arbitration (the March 1, 2002 Order).

The March 1, 2002 Order found and concluded, in relevant part, as follows:

2. The record reveals and the [c]ourt finds that there was a written fee agreement which constitutes a contract (the "Contract") between LBDC, PRBDC, Wallace, and [Bays Deaver].

3. The Contract did contain an unambiguous arbitration provision and it was executed by each of the Respondents.

4. Bays Deaver did validly assign the Contract to the Petitioner Law Offices of [Hiatt].

5. [Hiatt] appeared as counsel for LBDC, PRBDC, and Wallace in the underlying tax appeal litigation and Bays Deaver withdrew. The Respondents, LBDC, PRBDC, and Wallace all acknowledged and acquiesced to the Assignment and ratified the Assignment by performing obligations under the Contract for the benefit of [Hiatt] and also by paying cost invoices from [Hiatt].

6. A dispute arose between [Hiatt] and Respondents regarding the payment of attorneys' fees and costs. [Hiatt] demanded arbitration pursuant to the assigned Contract. Respondents declined to arbitrate.

7. The [c]ourt concludes that the Contract is a valid and binding agreement between [Hiatt] and each of the Respondents to this action and that the Contract does

⁵ The Honorable Gary W. B. Chang was the circuit court judge who presided over all proceedings relevant to this appeal.

NOT FOR PUBLICATION

contain an enforceable arbitration provision. [Hiatt] is therefore entitled to arbitrate the attorneys' fees dispute.

8. The [c]ourt originally granted the motion to compel arbitration for the same reasons set forth herein and that order remains in effect. This order merely adds further written findings which are consistent with the [c]ourt's original decision and order compelling arbitration.

9. The [c]ourt denies the Respondents' Motion for Reconsideration in all other respects.

10. The [c]ourt denies [Hiatt's] request for attorneys' fees at this time, without prejudice to that request being raised in the arbitration, or in any other appropriate proceeding.

On January 10, 2003, the circuit court entered a Final Judgment Pursuant to Hawai'i Rules of Civil Procedure Rule 58. This appeal by Respondents followed on February 3, 2003.

B.

Respondents contend that the circuit court erred in entering the Order Compelling Arbitration for the following reasons. First, although an agreement to arbitrate may have existed between Respondents and Bays Deaver, no enforceable, valid, and irrevocable agreement to arbitrate attorneys' fees and costs disputes existed in writing between Respondents and Hiatt. Second, Hiatt lacked standing to invoke the mandatory arbitration clause of an agreement to which he was not a party. Third, the purported assignment of the Agreement by Bays Deaver to Hiatt "was invalid because service contracts are not assignable[.]" And fourth, the purported assignment of the Agreement to Hiatt was invalid because it was conducted without Respondents' consent. We disagree with Respondents.

We note, first of all, that Respondents have not challenged any of the circuit court's findings. Respondents are thus bound by the court's findings that "there was a written fee agreement which constitutes a contract (the "Contract") between [Respondents] and [Bays Deaver]"; the agreement contained "an unambiguous arbitration provision and it was executed by each of the Respondents"; and "Bays Deaver did validly assign the Contract to the . . . Law Offices of [Hiatt]."

Moreover, the record on appeal overwhelmingly indicates that: (1) Respondents entered into the Agreement with Bays Deaver specifically for Hiatt's services; (2) Hiatt signed the Agreement on Bays Deaver's behalf; (3) the Agreement included a mandatory arbitration provision; (4) when Hiatt left Bays Deaver, Respondents acquiesced in Bays Deaver's assignment of the Agreement to Hiatt and even gave Hiatt a \$15,000.00 advance on his contingency fee; and (5) after Hiatt left Bays Deaver to open his own office, Respondents continued to treat Hiatt as their attorney. Consequently, Respondents are estopped from now claiming that they had no agreement with Hiatt.

Accordingly, we affirm: (1) the December 17, 2001 Order Compelling Arbitration; (2) the March 1, 2002 "Order Granting in Part and Denying in Part [Respondents'] Motion for Reconsideration Regarding the Court's Order Granting [Hiatt's] Motion to Compel Arbitration Filed on October 2, 2001 [(]Filed on December 27, 2001[)]"; and (3) the January 10, 2003 Final

NOT FOR PUBLICATION

Judgment Pursuant to Hawai'i Rules of Civil Procedure Rule 58,
all entered by the circuit court.

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

On the briefs:

Margery S. Bronster and
John M. Kirimitsu (Bronster
Crabtree & Hoshibata, a law
corporation) for respondents-
appellants.

Michael K. Livingston (Davis
Levin Livingston Grande, of
counsel) and Jerry M. Hiatt
and David R. Harada-Stone (Law
Offices of Jerry M. Hiatt, of
counsel) for petitioner-appellee.