NO. 26257

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ASSOCIATION OF APARTMENT OWNERS OF WAILUNA, Plaintiff-Appellee, v. JAMES HARDIE BUILDING PRODUCTS COMPANY, a Nevada corporation, Defendant-Appellant, and JOHN DOES 1-50, DOE CORPORATIONS 1-50, DOE PARTNERSHIPS 1-50, DOE JOINT VENTURES 1-50, GOVERNMENTAL ENTITIES 1-10, AND ELEEMOSYNARY ORGANIZATIONS 1-5, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-0382)

MEMORANDUM OPINION
(By: Foley, Presiding Judge, and Fujise, J.
with Nakamura, J., concurring separately)

Defendant-Appellant James Hardie Building Products Company (Hardie) appeals from the Order Granting Plaintiff Association of Apartment Owners of Wailuna's Motion (1) to Compel Binding Arbitration and (2) to Stay the Current Proceedings,[1] filed on November 3, 2003 in the Circuit Court of the First Circuit (circuit court).[2] We vacate this order and remand for further proceedings because we conclude the parties did not agree to arbitration.

I.

Plaintiff-Appellee Association of Apartment Owners of Wailuna (Wailuna) agreed to use Hardie's product, "HardiShake,"

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[1] An order granting a stay of proceedings pending arbitration or compelling arbitration of claims is immediately appealable. Douglass v. Pflueger Hawaii, Inc., 110 Hawai'i 520, 522 n.1, 135 P.3d 129, 131 n.1 (2006) (citations omitted).

[2] The Honorable Eden Elizabeth Hifo presided.

in its re-roofing project of all 82 of its buildings. To memorialize this agreement, Wailuna and Hardie entered into the "Material Agreement" at issue here. The Material Agreement's provisions covered, amongst other things, the subjects of interpretation, arbitration and attorneys fees incurred in the enforcement of the Material Agreement, as follows:

> 4. **Entire Agreement**. The parties understand and acknowledge that this Agreement is a final, complete, and exclusive statement, pursuant to State of Hawaii's [sic] Revised Statutes, of the parties' obligations, and supersedes all prior agreements and understandings, whether written or oral, relating to the subject matter of this Agreement. This Agreement may be amended, or its provisions waived, only by a written instrument signed by the party against whom such amendment or waiver is sought to be enforced. In the event of an ambiguity with respect to a term of this Agreement, such ambiguity shall be resolved fairly and in accordance with the overall intent of the Agreement.
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> . . . .
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> 8. **Arbitration**. Upon mutual written agreement by all parties concerned, all claims or disputes between Hardie and the Owner arising out or relating to this Agreement, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.
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> 9. **Attorney's Fees**. If any party hereto incurs costs, expenses, or attorneys' fees for the purpose of judicially enforcing, defending, or preventing breach of this Agreement, and if said party prevails in said judicial proceeding, said party shall be entitled to recover all such costs, expenses, and attorneys' fees incurred therein. In the event Owner shall be made a party to any judicial proceedings involving the Contractor and Hardie, then Owner shall be paid by Hardie as appropriate, all costs and expenses incurred by the Owner, including court costs and reasonable attorney's [sic] fees, in connection with such judicial proceedings.

Hardishake was installed and Hardie issued a "50-Year Transferable Limited Product Warranty" to Wailuna. Five years after installation, Wailuna discovered problems with the roofing. Approximately two years after this discovery, Wailuna filed this lawsuit.

In its suit, Wailuna alleged breach of warranty, violation of Hawaii Revised Statutes (HRS) §§ 490:2-314 and -315, negligence and negligent manufacture, unfair and deceptive trade practices and claimed punitive damages. Two years later, all but the breach of express warranty claims were foreclosed by the circuit court when it granted three motions for partial summary judgment brought by Hardie.

Hardie filed a fourth motion for partial summary judgment on Wailuna's express warranty claims, but before the postponed hearing on this motion could be held, Wailuna moved to compel arbitration on "all remaining claims." This motion to compel was based solely on the Material Agreement. At the hearing on Wailuna's motion to compel, Wailuna argued that the language of the Material Agreement constituted an agreement to arbitrate. Hardie responded that (1) the language "[u]pon mutual written agreement by the parties" showed that the agreement to arbitrate had yet to be reached at the time the Material Agreement was consummated and (2) by bringing and prosecuting its lawsuit in court for two and a half years before demanding an arbitration, Wailuna had waived any right to arbitration.

The circuit court granted the motion and ruled that the arbitration provision in the Material Agreement constituted an agreement by Hardie and Wailuna to arbitrate. The court construed the prefatory language in that provision, "[u]pon mutual written agreement by all parties concerned," to apply only if parties other than those who were signatories to the Material Agreement were involved in the dispute. The circuit court appeared to reject Hardie's argument that Wailuna waived arbitration. The court then entered an order granting Wailuna's motion to compel and stayed proceedings in the circuit court while the arbitration was pending.[3]

This appeal ensued.

II.

"[W]hen presented with a motion to compel arbitration, the court is limited to answering two questions: 1) whether an arbitration agreement exists between the parties; and 2) if so, whether the subject matter of the dispute is arbitrable under such agreement." Koolau Radiology, Inc. v. Queen's Medical Ctr., 73 Haw. 433, 445, 834 P.2d 1294, 1300 (1992); Douglass v. Pflueger Hawaii, Inc., 110 Hawai'i 520, 135 P.3d 129 (2006).

> A petition to compel arbitration is reviewed de novo. Dines v. Pac[.] Ins. Co., Ltd., 78 Hawai'i 325, 326, 893 P.2d 176, 177, reconsideration denied, 78 Hawai'i 474, 896 P.2d 930 (1995). See also Shimote v. Vincent, 80 Hawai'i 96, 99, 905 P.2d 71, 74 (App.), cert. denied, 80 Hawai'i 187, 907 P.2d 773 (1995).

[3] James Hardie Building Products Company's (Hardie) motion for reconsideration was denied by an order entered on December 8, 2003. A stay of the arbitration proceedings was granted on January 14, 2004.

> The standard is the same as that which would be applicable to a motion for summary judgment, and the trial court's decision is reviewed "using the same standard employed by the trial court and based upon the same evidentiary materials as were before [it] in determination of the motion." Koolau Radiology, Inc. v. Queen's Med[. Ctr.], 73 Haw. 433, 439-40, 834 P.2d 1294, 1298 (1992) (citation and internal quotation marks omitted); see also Cuba v. Fernandez, 71 Haw. 627, 631, 801 P.2d 1208, 1211 (1990); First Hawaiian Bank v. Weeks, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989); Feliciano v. Waikiki Deep Water, Inc., 69 Haw. 605, 607, 752 P.2d 1076, 1078 (1988).
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> Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 231, 921 P.2d 146, 151 (1996) (brackets in original).

Douglass, 110 Hawai'i at 524-25, 135 P.3d at 133-34.

> "[e]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate. Without an agreement to arbitrate, a court may not force parties to engage in arbitration." Luke v. Gentry Realty, Ltd., 105 Hawai`i 241, 247, 96 P.3d 261, 267 (2004) (citations and internal quotation marks omitted); see also Moss v. Am. Int'l Adjustment Co., Inc., 86 Hawai`i 59, 63, 947 P.2d 371, 375 (1997) ("[A]rbitration must be agreed upon by the parties and evinced by a written agreement, despite the strong policy in its favor." (Citations omitted.)).
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> We held in [Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 231, 921 P.2d 146, 151 (1996)] that, in order to be valid and enforceable, an arbitration agreement must have the following three elements: (1) it must be in writing; (2) it must be unambiguous as to the intent to submit disputes or controversies to arbitration; and (3) there must be bilateral consideration. 82 Hawai'i at 238-40, 921 P.2d at 158-60.

Douglass, 110 Hawai'i at 531, 135 P.3d at 140 (intent to arbitrate not unambiguous as other provisions made terms non-binding, despite "the language used in the above arbitration provision 'on its face' . . . reflects . . . mutual assent to the arbitration of employment-related disputes" quoting Brown, 82 Hawai'i at 240, 921 P.2d at 160.

Of these three elements, the second is in dispute. The circuit court reasoned that the prefatory clause in the arbitration provision

> means that if the only parties in the dispute are Hardie and the person with whom the contract is, then you go to arbitration. But if in the dispute other parties have been brought in or are not part of the contact and from whom there isn't any arbitration clause, then Hardie and the party with whom there is a contract does not have to go to arbitration, because what it does is set up two layers of litigation: one, the arbitration; and, two, the court. And also sets up questions about collateral estoppel that arise out of such split litigation.
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> So what I think the meaning of this is -- that's reasonable is that there is no arbitration to be compelled if there are other parties and the other parties do not voluntarily wish to arbitrate the entire dispute. But where there are only two parties, there is an arbitration and -- clause which applies and is enforceable.

However, in our view, there is no need to give this language any special or additional gloss. The word "upon" in the phrase, "[u]pon mutual written agreement by all parties concerned," was sufficient to convey the idea that the mutual agreement had not yet been reached.[4] It follows that *when* that agreement was reached, the procedure set out in the language that followed, would be used. As the arbitration provision in the Material Agreement did not clearly establish a clear and unambiguous agreement by Wailuna and Hardie to submit their contractual disputes to arbitration, the circuit court should not have ordered the parties to arbitrate the current dispute.

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[4] *[U]pon* is quite justifiable when it introduces a condition or event-e.g.: "*Upon* a proper showing, a permanent or temporary injunction, decree, or restraining order shall be granted without bond."/ "*Upon* plaintiff's refusal to amend, his action was dismissed and he appealed." The sense "with little or no interval after" is often an important nuance. E.g., "The order of the commission was made *upon* petition and *upon* hearing after due notice to plaintiff in error.

Bryan A. Garner, A Dictionary of Modern Legal Usage, 904 (2d ed. 1995).

III.

Based on the foregoing, we vacate the Circuit Court of the First Circuit's November 3, 2003 Order Granting Plaintiff Association of Apartment Owners of Wailuna's Motion (1) to Compel Binding Arbitration and (2) to Stay the Current Proceedings and remand the case for further proceedings consistent herewith.

DATED: Honolulu, Hawai'i, August 30, 2006.

On the briefs:

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for Defendant-Appellant.

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Daniel R. Foley
Presiding Judge

Associate Judge