

NOT FOR PUBLICATION

NO. 27484

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

DONNA THOMAS and JACK THOMAS, Plaintiffs-Appellants,
v.
LESLIE S. FUKUMOTO, Defendant-Appellee
and
DOES 1-100, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 05-1-0272)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Plaintiffs-Appellants Donna Thomas and Jack Thomas (Donna and Jack) appeal from the August 9, 2005 Order Granting Defendant Leslie S. Fukumoto's Motion to Stay Proceedings and Compel Arbitration entered in the Circuit Court of the First Circuit.¹

In 1996, Donna and Jack commenced Third Circuit Court Civil No. 96-87K, Thomas v. Creative Computing of Maui, Inc. The August 4, 1999 Attorney's Retainer Agreement between Donna and Jack and Defendant-Appellee Leslie S. Fukumoto (Fukumoto) states that "Client retains or hires Attorney to pursue Client's case regarding damages sustained due to computer keyboard and printer use (C. Itoh Corp./Creative Computing of Maui, Inc./Leading Edge)[.]" It also states as follows:

Any and all disputes surrounding the interpretation or performance of this Agreement shall be submitted to Hawaii State

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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District Court if the amount in controversy is less than FIVE THOUSAND DOLLARS (\$5,000.00); and if in excess of this amount, submitted to one (1) person binding arbitration before an arbitrator or arbitration service as the parties may agree to in writing, or if the parties cannot so in writing agree, utilizing the services of the American Arbitration Association, commercial rules.

Donna and Jack commenced the instant case on February 18, 2005 by filing a complaint alleging that "[d]uring [Fukumoto's] representation of [Donna and Jack], [Fukumoto's] conduct was below the standard of care and proximately caused [Donna and Jack] to sustain damages."

On April 7, 2005, Fukumoto filed a motion "for an Order dismissing this action as the parties have a written agreement that provides for mandatory arbitration of the disputes in this matter[.]" This motion was denied without prejudice on July 1, 2005.

On July 7, 2005, Fukumoto filed a motion to stay proceedings and compel arbitration. Hawaii Revised Statutes § 658A-6 (Supp. 2005) states as follows:

Validity of agreement to arbitrate. (a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

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The August 9, 2005 order granted the July 7, 2005 motion and ordered that the "proceedings in this matter are stayed pending arbitration between the parties."

Donna and Jack filed a notice of appeal on September 2, 2005. This case was assigned to this court on May 9, 2006.

Donna and Jack contend that "the main issue on appeal concerns the scope of the arbitration provision and whether it applies only to fees and costs or whether it also applies to actions for legal malpractice."

Upon careful review of the record and the briefs and having given due consideration to the issues raised and arguments advanced, we hold:

1. Assuming, as alleged by Donna and Jack, that at some unspecified time, "Mr. Fukumoto specifically told them that the arbitration provision related only to disputes concerning fees[,] " that fact does not excuse them from performing their written arbitration agreement;

2. The language in the arbitration paragraph is sufficient to put Donna and Jack on notice that the paragraph applied to legal malpractice cases;

3. There are no ambiguities in the arbitration paragraph;

4. Fukumoto did not act inconsistently with arbitration when he sought to have the case dismissed; and

5. The arbitration agreement is not unconscionable.

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Therefore, IT IS HEREBY ORDERED that the August 9, 2005 Order Granting Defendant Leslie S. Fukumoto's Motion to Stay Proceedings and Compel Arbitration is affirmed.

DATED: Honolulu, Hawai'i, July 5, 2006.

On the briefs:

Charles J. Ferrera
for Plaintiffs-Appellants.

James A. Burns
Chief Judge

Keith M. Kiuchi and
Leslie S. Fukumoto
for Defendant-Appellee.

Corinne K. A. Watanabe
Associate Judge

Craig W. Nakamura
Associate Judge