

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29117

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CAROL A. BROWN, M.D. and CAROL A. BROWN, M.D., INC.,
Plaintiffs-Appellants,

v.

HAWAII MEDICAL SERVICE ASSOCIATION,
a mutual benefit society; and
ALAN VAN ETTEN, Arbitrator, Defendants-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 08-1-0288)

ORDER GRANTING JULY 22, 2008 MOTION TO DISMISS THIS APPEAL
(By: Recktenwald, C.J., Foley and Fujise, JJ.)

Upon review of (1) Defendant-Appellee Hawaii Medical Service Association's (Appellee HMSA) July 22, 2008 motion to dismiss Plaintiffs-Appellants Carol A. Brown, M.D., and Carol A. Brown, M.D., Inc.'s (the Brown Appellants), appeal from the Honorable Glenn J. Kim's April 3, 2008 "Order Granting Defendant Hawaii Medical Service Association's Motion to Compel arbitration and to Dismiss or Stay Complaint" (the April 3, 2008 order compelling arbitration), (2) Defendant-Appellee Alan Van Etten's (Appellee Van Etten) July 23, 2008 joinder in Appellee HMSA's July 22, 2008 motion to dismiss the appeal, (3) the Brown Appellants' July 30, 2008 memorandum in opposition to Appellee HMSA's July 22, 2008 motion to dismiss the appeal, and (4) the record, it appears that Appellee HMSA's July 22, 2008 motion to dismiss the appeal has merit, because, under the unique circumstances of this case, we lack appellate jurisdiction.

We initially note that the Brown Appellants have asserted an appeal from both the April 3, 2008 order compelling arbitration and a nearly identical April 11, 2008 amended order compelling arbitration. Under analogous circumstances,

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[t]he general rule is that where a judgment is amended in a material and substantial respect, the time within which an appeal from such determination may be taken begins to run from the date of the amendment, although where the amendment relates only to the correction of a clerical error, it does not affect the time allowed for appeal.

Poe v. Hawaii Labor Relations Bd., 98 Hawai'i 416, 418, 49 P.3d 382, 384 (2002) (citation, internal quotation marks, and ellipsis points omitted) (emphasis added).

If the amendment of a final judgment or decree for the purpose of correcting a clerical error either materially alters rights or obligations determined by the prior judgment or decree or creates a right of appeal where one did not exist before, the time for appeal should be measured from the entry of the amended judgment. If, however, the amendment has neither of these results, but instead makes changes in the prior judgment which have no adverse effect upon those rights or obligations or the parties' right to appeal, the entry of the amended judgment will not postpone the time within which an appeal must be taken from the original decree.

Id. (citations, internal quotation marks, and brackets omitted) (emphases added). In the instant case, the substantive content within the April 3, 2008 order compelling arbitration and the April 11, 2008 amended order compelling arbitration is essentially identical, and the only difference between the April 3, 2008 order compelling arbitration and the April 11, 2008 amended order compelling arbitration is that April 11, 2008 amended order compelling arbitration corrects a clerical error in the April 3, 2008 order compelling arbitration. Therefore, the order that the Brown Appellants are appealing is, in effect, the April 3, 2008 order compelling arbitration.

Hawaii Revised Statutes (HRS) § 658A-28(a)(1) (Supp. 2007) authorizes an appeal from an order denying a motion to compel arbitration, but HRS § 658A-28 (Supp. 2007) does not authorize an appeal from an order granting a motion to compel

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arbitration. Therefore, HRS § 658A-28 (Supp. 2007) does not authorize the Brown Appellants' appeal from the April 3, 2008 order compelling arbitration.

HRS § 641-1(a) (1993 & Supp. 2007) authorizes appeals to the intermediate court of appeals only from "final judgments, orders, or decrees[.]" HRS § 641-1(a) (1993 & Supp. 2007) (emphasis added). Appeals under HRS § 641-1 "shall be taken in the manner . . . provided by the rules of the court." HRS § 641-1(c) (1993 & Supp. 2007). Rule 58 of the Hawai'i Rules of Civil Procedure (HRCP) requires that "[e]very judgment shall be set forth on a separate document." HRCP Rule 58. Based on HRCP Rule 58, the Supreme Court of Hawai'i holds "[a]n appeal may be taken . . . only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCP [Rule] 58[.]" Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). "An appeal from an order that is not reduced to a judgment in favor or against the party by the time the record is filed in the supreme court will be dismissed." Id. at 120, 869 P.2d at 1339 (footnote omitted). The circuit court has not yet entered a final judgment that resolves all of the claims in this case. Therefore, absent an exception to the general rule requiring a final judgment for an appeal, the Brown Appellants' appeal is premature, and we lack appellate jurisdiction.

Although exceptions to the final judgment requirement exist under the Forgay v. Conrad, 47 U.S. 201 (1848), doctrine (the Forgay doctrine) and the collateral order doctrine, the April 3, 2008 order compelling arbitration does not satisfy all of the requirements for appealability under the Forgay doctrine and the collateral order doctrine. See Ciesla v. Reddish, 78 Hawai'i 18, 20, 889 P.2d 702, 704 (1995) (regarding the two requirements for appealability under the Forgay doctrine) and

Abrams v. Cades, Schutte, Fleming & Wright, 88 Hawai'i 319, 322, 966 P.2d 631, 634 (1998) (regarding the three requirements for appealability under the collateral order doctrine). We note that, under the collateral order doctrine, "[a]n order granting a motion to compel arbitration is final and appealable" under circumstances when such an order "is one of that small category of orders which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Sher v. Cella, 114 Hawai'i 263, 266-67, 160 P.3d 1250, 1253-54 (App. 2007) (citation and internal quotation marks omitted) (emphasis added). However, in contrast to the collateral order compelling arbitration in Sher v. Cella, the April 3, 2008 order compelling arbitration in the instant case is not separable from, and collateral to, the merits of the four counts that the Brown Appellants are asserting in their complaint, all of which relate directly to the validity of an ongoing arbitration proceeding. Therefore, the April 3, 2008 order compelling arbitration does not satisfy the second requirement for the collateral order doctrine, namely that the order must resolve an important issue completely separate from, and collateral to, the merits of the action. The April 3, 2008 order compelling arbitration relates directly to the substantive causes of action that the Brown Appellants have asserted in their complaint. Accordingly, under the unique circumstances of the instant case, the April 3, 2008 order compelling arbitration is not appealable under the collateral order doctrine.

Finally, the circuit court has not certified the April 3, 2008 order compelling arbitration for an interlocutory appeal pursuant to HRS § 641-1(b) (1993 & Supp. 2007). Therefore, the April 3, 2008 order compelling arbitration is not appealable pursuant to HRS § 641-1(b) (1993 & Supp. 2007).

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Absent an appealable final order or judgment, the Brown Appellants' appeal is premature and we lack appellate jurisdiction. Accordingly,

IT IS HEREBY ORDERED that Appellee HMSA's July 22, 2008 motion to dismiss this appeal is granted, and this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, August 1, 2008.



Chief Judge



Associate Judge



Associate Judge