

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29320

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CLEVER CONSTRUCTION, INC., a Hawai'i Corporation
Petitioner-Appellee,

v.

MATTHEW R. ALCONE and HOPE ALCONE, Trustee of the
Matthew and Hope Alcone Revocable Trust under
Declaration of Trust dated June 5, 1991; GOLD
COAST ROOFING, INC., a Hawai'i Corporation;
MICHAEL BERG, doing business as HAWAII SHAKE &
SHINGLE; GORDON SHEET METAL, INC., a Hawai'i
Corporation, Respondents-Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(S.P. NO. 08-1-0009K)

ORDER GRANTING NOVEMBER 7, 2008 MOTION TO DISMISS THIS APPEAL
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of (1) Respondents-Appellees Matthew R. Alcone and Hope Alcone, Trustees of the Matthew and Hope Alcone Revocable Trust under Declaration of Trust Dated June 5, 1991's (the Alcone Appellees), November 7, 2008 motion to dismiss Respondent Michael Berg Doing Business as Hawaii Shake & Shingle's (Appellant Berg) appeal from the Honorable Elizabeth A. Strance's July 21, 2008 "Amended Order Granting Petition for Application for Order Compelling Arbitration, Filed March 6, 2008" (the July 21, 2008 amended order compelling arbitration), (2) Appellant Berg's November 13, 2008 memorandum in opposition to the Alcone Appellees' motion to dismiss this appeal, and (3) the record, it appears that we lack appellate jurisdiction.

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 does not authorize an appeal from an order granting a motion to compel arbitration. Therefore, HRS § 658A-28 does not authorize Appellant Berg's appeal from the July 21, 2008 amended order compelling arbitration.

HRS § 641-1(a) (1993 & Supp. 2007) authorizes appeals

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to the intermediate court of appeals only from "final judgments, orders, or decrees[.]" 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." 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 separate, 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, Appellant Berg's appeal is premature.

Although exceptions to the final judgment requirement exist under Forgay v. Conrad, 47 U.S. 201 (1848) (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 or 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

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1250, 1253-54 (App. 2007) (citation and internal quotation marks omitted) (emphasis added). The July 21, 2008 amended order compelling arbitration relates directly to Petitioner-Appellee Clever Construction Inc.'s claim for relief. Therefore, the July 21, 2008 amended 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. Accordingly, the July 21, 2008 amended order compelling arbitration is not appealable under the collateral order doctrine.

Finally, the circuit court has not certified the July 21, 2008 amended order compelling arbitration for an interlocutory appeal pursuant to HRS § 641-1(b) (1993 & Supp. 2007). Therefore, the July 21, 2008 amended order compelling arbitration is not appealable pursuant to HRS § 641-1(b).

Absent an appealable final order or judgment, Appellant Berg's appeal is premature and we lack appellate jurisdiction.

Accordingly, IT IS HEREBY ORDERED that the Alcone Appellees' November 7, 2008 motion to dismiss this appeal is granted, and this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, November 21, 2008.


Presiding Judge


Associate Judge


Associate Judge