

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29754

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

WANDA SHELTON, Petitioner-Appellant, v.
KAISER FOUNDATION HEALTH PLAN, INC. Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P. NO. 09-1-0025)

ORDER GRANTING MAY 5, 2009 MOTION TO DISMISS APPEAL
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of (1) Respondent-Appellee Kaiser Foundation Health Plan, Inc.'s (Appellee Kaiser Foundation Health Plan), May 5, 2009 motion to dismiss this appeal for lack of appellate jurisdiction, (2) Petitioner-Appellant Wanda Shelton's (Appellant Shelton) May 14, 2009 memorandum in opposition to Appellee Kaiser Foundation Health Plan's May 5, 2009 motion to dismiss this appeal, and (3) the record on appeal, it appears that we do not have jurisdiction over Appellant Shelton's appeal from the Honorable Bert I. Ayabe's March 16, 2009 "Order Denying Motion for Order Declaring Respondent's Arbitration Claim for Reimbursement of HRS § 432E-6(e) Award Not Referable to Arbitration or Striking Said Claim" (the March 16, 2009 order compelling arbitration) because, under the circumstances of this case, the March 16, 2009 order compelling arbitration is not an appealable order.

We initially note that, even if the March 16, 2009 order compelling arbitration were an appealable order, the intermediate court of appeals would lack jurisdiction over this appeal, because the record on appeal does not contain the original copy of the March 16, 2009 order compelling arbitration. Rule 11 of the Hawai'i Rules of Appellate Procedure (HRAP) imposed upon Appellant Shelton, as the appellant, the responsibility to "take any other action necessary to enable the clerk of the court to assemble and transmit the record." HRAP Rule 11(a). Appellant Shelton did not satisfy her

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responsibility. An "oral decision is not an appealable order." KNG Corp. v. Kim, 107 Hawai'i 73, 77, 110 P.3d 397, 401 (2005); see HRAP Rule 4(a)(1) ("[T]he notice of appeal shall be filed within 30 days after entry of the judgment or appealable order."); HRAP Rule 4(a)(5) ("A judgment or order is entered when it is filed in the office of the clerk of the court.").

Nevertheless, the March 16, 2009 order compelling arbitration is not an appealable order. Hawaii Revised Statutes (HRS) § 658A-28(a)(1) (Supp. 2008) 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 Shelton's appeal from the March 16, 2009 order compelling arbitration.

HRS § 641-1(a) (1993 & Supp. 2008) authorizes appeals 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). 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 Shelton's 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 March 16, 2009 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 1250, 1253-54 (App. 2007) (citation and internal quotation marks omitted) (emphasis added). However, in contrast to the collateral order compelling arbitration in Sher, the March 16, 2009 order compelling arbitration in the instant case is not separable from, and collateral to, the merits of the claim for relief that Appellant Shelton sought in S.P. No. 09-1-0025 (BIA). On the contrary, the March 16, 2009 order compelling arbitration relates directly to Appellant Shelton's claim for relief in S.P. No. 09-1-0025 (BIA), a special proceeding initiated for the propose of compelling arbitration. Therefore, the March 16, 2009 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, under the circumstances of the instant case, the March 16, 2009 order compelling arbitration is not appealable under the collateral order doctrine.

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Finally, the circuit court has not certified the March 16, 2009 order compelling arbitration for an interlocutory appeal pursuant to HRS § 641-1(b) (1993 & Supp. 2008). Therefore, the March 16, 2009 order compelling arbitration is not appealable pursuant to HRS § 641-1(b).

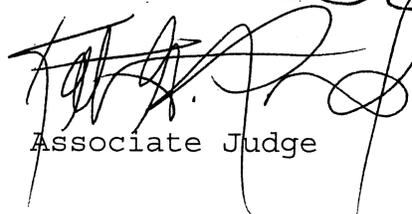
Absent an appealable final order or judgment, Appellant Shelton's appeal is premature and we lack appellate jurisdiction.

Accordingly, IT IS HEREBY ORDERED that Appellee Kaiser Foundation Health Plan's May 5, 2009 motion to dismiss this appeal is granted, and this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, June 23, 2009.


Daniel R. Foley
Presiding Judge


Associate Judge


Associate Judge