* * * NOT FOR PUBLICATION * * *

NO. 26139

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

GILBERT M. MEYER and CAROL M. MEYER,
Plaintiffs-Appellees,

vs.

ROGER McGEE and ADELE, McGEE,
Defendants-Appellants.

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 01-1-0102K)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
Intermediate Court of Appeals Chief Judge Burns,
in place of Acoba, J., recused)

Respondents-appellants Roger McGee and Adele McGee [hereinafter, collectively, Appellants] appeal from the Circuit Court of the Third Circuit's September 30, 2003 order[1] granting petitioners-appellees Gilbert M. Meyer and Carol M. Meyer's [hereinafter, collectively, Appellees] motion to confirm the final arbitration award and denying Appellants' motion to vacate the final arbitration award. The final arbitration award, issued by the arbitrator, E. John McConnell (the arbitrator), granted Appellees damages arising from the purchase and sale of a residence containing defective slate flooring.

[1] The Honorable Ronald Ibarra presided over this matter.

On appeal, Appellants argue that the trial court erred in confirming the final arbitration award because: (1) the instant action was brought beyond the applicable statute of limitations; (2) the arbitrator refused to consider the material evidence of Appellees' imputed knowledge of a prior lawsuit involving Appellants; and (3) the arbitrator denied Appellants' due process rights when he refused to reopen the arbitration hearing and compel additional discovery regarding Appellees' actual knowledge of the prior lawsuit involving Appellants.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Appellants' contentions as follows.

(1) Appellants contend that the trial court should have vacated, rather than confirmed, the final arbitration award inasmuch as the arbitrator applied the incorrect statute of limitations to Appellees' intentional misrepresentation claim.

HRS § 658-9(4) states that vacation is proper where the arbitrators exceeded their powers or so imperfectly executed them. In Tatibouet v. Ellsworth, 99 Hawai'i 226, 54 P.3d 397 (2002), this court held that "[a] misinterpretation of law does not amount to exceeding enumerated powers, or imperfect execution of powers, to the extent that the arbitrators failed to issue a final award." Id. at 235, 54 P.3d at 406.

In the instant case, the arbitrator was faced with the legal issue of which statute of limitations applied to Appellees'

common law claims of misrepresentation. The arbitrator's written analysis of the statute of limitations issue in the partial arbitration award indicates that the arbitrator did not obviously disregard the applicable law. Moreover, other jurisdictions have held that the arbitrator's alleged mistakes in the application of statute of limitations is not a valid ground for vacating a final arbitration award. See Weimer v. Jones, 610 S.E.2d 850 (S.C. App. 2005); Garrity v. McCaskey, 612 A.2d 742, 748 (Conn. 1992).

Finally, by executing the DROA, both Appellees and Appellants voluntarily agreed to settle their disputes by binding arbitration. By agreeing to binding arbitration and waiving their rights to litigation, the parties thereby assumed all the hazards of the arbitration process, including the risk that the arbitrators may make mistakes in the application of law. Thus, based on the foregoing, we hold that the final arbitration award does not violate HRS § 658-9(4).

Appellants also argue that the arbitrator's "failure and/or refusal to apply the statute of limitations contained in HRS § 508D-17 constitutes a clear violation of public policy with respect to enforcing and applying statute[s] of limitations." This court recognizes an exception to confirmation of arbitration awards where the arbitration award clearly violates public policy. Gepaya v. State Farm Mut. Auto. Ins. Co., 94 Hawai'i 362, 365, 14 P.3d 1043, 1046 (2000) (citation omitted).

In the present case, Appellants fail to meet either prong of the public policy exception test articulated in

Inlandboatmen's Union of the Pacific v. Sause Bros., Inc., 77 Hawai'i 187, 881 P.2d 1255 (App. 1994). With respect to the first prong, the arbitrator's alleged misinterpretation of the applicable statute of limitations does not give rise to a violation of some explicit public policy that is well defined and dominant. And, with respect to the second prong, the arbitrator's "failure and/or refusal" to apply HRS § 508D-17 to bar Appellees' tort claims of misrepresentation does not exhibit a clear violation of public policy. Accordingly, we hold that the final arbitration award does not violate any explicit public policy that is well defined and dominant and that, therefore, the trial court did not err in confirming the final arbitration award with respect to the statute of limitations issue.

(2) Appellants argue that the trial court erred when it confirmed the final arbitration award inasmuch as the arbitrator "refused to consider evidence of [Appellees'] imputed knowledge of the 1994 Eurocal lawsuit."

HRS § 658-9(3) expressly authorizes this court to vacate an arbitration award if the "arbitrators were guilty of misconduct . . . in refusing to hear evidence, pertinent and material to the controversy[.]" Here, the record clearly shows that the arbitrator heard, considered, and implicitly rejected Appellants' imputed knowledge defense. Additionally, Appellants' arguments essentially posit that the arbitrator misinterpreted the law by rejecting Appellants' imputed knowledge defense. Accordingly, we hold that the trial court did not err in

confirming the final arbitration award with respect to Appellants' imputed knowledge defense. See Tatibouet, 99 Hawai'i at 236, 54 P.3d at 407 (noting that vacatur is not a proper remedy for an arbitrator's imperfect understanding of the law).

(3) Appellants argue that the trial court erred when it confirmed the final arbitration award inasmuch as the arbitrator refused to hear evidence and reopen the arbitration hearing to permit additional discovery.

HRS § 658-9(3) authorizes this court to vacate an arbitration award if the "arbitrators were guilty of misconduct . . . in refusing to hear evidence, pertinent and material to the controversy[.]" In the present case, the record clearly establishes that the arbitrator heard, considered, and rejected Appellants' actual knowledge defense. In the final arbitration award, the arbitrator expressly stated that he was "satisfied that the record contain[ed] clear and convincing evidence that [Appellees] lacked actual knowledge of prior litigation regarding the floor at the time of closing." (Emphasis added.)

Moreover, inasmuch as the governing arbitration rules provide that the arbitrator has discretion to reopen the arbitration hearing, the arbitrator was not mandated to reopen the arbitration hearing to hear additional evidence of Appellants' actual knowledge defense. The arbitrator acted within his discretion and, therefore, was not guilty of misconduct in refusing to reopen the arbitration hearing.

Finally, although the parties dispute the interpretation of Carol Meyer's testimony, Appellants essentially contend that the arbitrator made a factual and/or legal error in the interpretation of her testimony and, thus, failed to apply Appellants' actual knowledge defense to the instant case. Accordingly, we hold that the trial court did not err in confirming the final arbitration award with respect to Appellants' actual knowledge defense. See Tatibouet, 99 Hawai'i at 236, 54 P.3d at 407 (holding that an arbitration award may not be vacated even if the arbitrator commits a legal or factual error in reaching his final decision). Therefore,

IT IS HEREBY ORDERED that the trial court's September 30, 2003 order confirming the arbitration award in favor of Appellees is affirmed.

DATED: Honolulu, Hawai'i, January 20, 2006.

On the briefs:

Michael C. Bird, Robert Takamatsu and Brandon Davidson (of Watanabe Ing Kawashima & Komeiji); Francis L. Jung and Usha Kilpatrick Kotner (of Jung & Vassar); and Roy Anderson, for defendants-appellants

Derek R. Kobayashi, Carol A. Eblen, and Regan M. Iwao (of Goodsill Anderson Quinn & Stifel), for plaintiffs-appellees