

NO. 27154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

A&B PROPERTIES, INC., a Hawai'i corporation
Petitioner-Appellee,

vs.

DICK PACIFIC CONSTRUCTION CO., LTD., a Hawai'i corporation,
Respondent-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P. NO. 04-1-0302)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

In this construction contract case, respondent-appellant Dick Pacific Construction Co., Ltd. (Pacific) appeals from the first circuit court's August 2, 2004 order¹ granting petitioner-appellee A&B Properties, Inc.'s (A&B) Application to Compel Arbitration. Pacific contends that the circuit court erred when it: (1) granted the Application to Compel Arbitration because A&B did not introduce any evidence to establish that A&B held a valid assignment of the construction contract or its arbitration clause; (2) ruled that the right to compel arbitration under the arbitration clause of the contract could be assigned even though the contract prohibits assignment without the consent of the other party; (3) failed to determine whether A&B's claim was barred by the statute of limitations and instead

¹ The Honorable Eden Elizabeth Hifo presided over this matter.

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left that to the arbitrator's determination; and (4) did not dismiss the Application to Compel Arbitration on the grounds that the claim sought to be arbitrated was barred under the applicable statute of limitations as a matter of law.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows:

(1) The circuit court did not err when it granted the Application to Compel Arbitration. See Luke v. Gentry Realty, 105 Hawai'i 241, 246, 96 P.3d 261, 266 (2004) ("A petition to compel arbitration is reviewed de novo, which is the same standard applicable to a motion for summary judgment." (Internal quotations and citation omitted.)). A&B provided sufficient evidence to establish a valid assignment of the contract and Pacific failed to submit any evidence to the contrary. See French v. Hawai'i Pizza Hut, Inc., 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004) (holding that after the party moving for summary judgment satisfies its initial burden of production, the non-moving party must "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial") (citation omitted). Pacific's unverified claims of the invalidity of the assignment agreement do not satisfy this burden. See Au v. Au, 63 Haw. 210, 213, 626 P.2d 173, 177 (1981)

("Unverified statements of fact in counsel's memorandum or representations made in oral argument cannot be considered in determining a motion for summary judgment." (Citations omitted.)). Therefore, A&B satisfied its burden of proof;

(2) The circuit court did not err in ruling that the arbitration clause under the contract was assignable without Pacific's consent because allowing A&B, instead of its predecessor in interest, KY Planning Co., Ltd., formerly known as Tosei Shoji Co., Ltd., to arbitrate claims for damages against Pacific will not prejudice Pacific. See, e.g., Elzinga & Volkers v. LSSC Corp., 838 F.Supp. 1306, 1314 (D. Ind. 1993) (holding that "the assignment of a contract where the only right remaining is to sue for damages will not prejudice [the signatory party] in this case and should be enforced, notwithstanding the nonassignment provision"); Trubowitch v. Riverbank Canning, 182 P.2d 182, 188, 30 Cal. 2d 335, 344 (1947) (holding that "a provision against assignment does not govern claims for money due or claims for money damages for nonperformance," and that the assignee could therefore compel the signatory to arbitrate) (citation omitted); Crown Oil & Wax Company, Inc. v. Glen Constr. Co., Inc., 578 A.2d 1184, 1193-95 (Md. 1990) (ruling that an assignment was valid, notwithstanding a no-assignment clause, and therefore the non-signatory could compel arbitration, because there was no detriment to the signatory); and

(3) The circuit court did not err when it reserved for the arbitrator the issue of whether the claim sought to be arbitrated was barred by the applicable statute of limitations. See Lee v. Heftel, 81 Hawai'i 1, 4, 911 P.2d 721, 724 (1996) (holding that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") (citation omitted). Given the breadth of the arbitration clause in section 7.9.1 of the contract, leaving the issue of Pacific's statute of limitations defense to the arbitrator to decide is consistent with the Hawai'i and federal policy favoring arbitration.² See United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (holding that an order to arbitrate should only be denied when "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); Koolau Radiology, Inc. v. Queen's Medical Center, 73 Haw. 433, 444, 834 P.2d 1294, 1300 (1992) (stating that Hawaii's arbitration statute contains language "virtually identical to the language of the federal arbitration statute," and therefore, this court "look[s] to federal authority for guidance" when faced with a motion to compel arbitration). Therefore,

² Pacific's fourth point of error need not be addressed because the issue of the statute of limitations defense is for the arbitrator.

IT IS HEREBY ORDERED that the circuit court's August 2, 2004 order is affirmed.

DATED: Honolulu, Hawai'i, August 24, 2006.

On the briefs:

Erik D. Eike
for respondent-appellant

David Schulmeister
and W. Keoni Shultz
for petitioner-appellee

