

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26613

IN THE SUPREME COURT OF THE STATE OF HAWAII

SHANGHAI INVESTMENT COMPANY, INC., a Hawai'i corporation,
Plaintiff-Appellee,

vs.

ALTEKA CO., LTD., a Japan corporation, Defendant-Appellee.
(CIV. NO. 94-2683-07)

ALTEKA CO., LTD., a Japan corporation, Plaintiff-Appellee,

vs.

WINDWARD PARK, INC., a Hawai'i corporation, THOMAS ENOMOTO,
Defendants-Appellees,

and

JOHN DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10,
Defendants.
(CIV. NO. 95-3483-09)

RONALD G.S. AU, Petitioner-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NOS. 94-2683-07 and 95-3483-09)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.,
Circuit Judge Hara in place of Acoba, J., recused
and Circuit Judge Blondin, in place of Duffy, J., recused)

Petitioner-Appellant pro se Ronald G.S. Au ("Au")
appeals from the June 1, 2004 order of the Circuit Court of the
First Circuit ("circuit court")¹ denying his motion to enforce an
attorney's lien against his former client, Respondent-Appellee
Alteka Co., Ltd. ("Alteka"). On appeal, Au raises seven points
of error, which are that the circuit court (1) erred in declining

¹

The Honorable Eden Elizabeth Hifo presided.

2007 OCT 16 AM 10:51
KIMIKAWA
SERIES 1
COURTS

FILED

to enforce Au's retainer agreement with Alteka, which contained a contingency fee provision; (2) unjustly enriched Alteka by including Au's contingent fees within the judgment in favor of Alteka, but denying Au's motion to collect such fees; (3) committed clear error to the extent that it found that Au did not fully perform under his retainer agreement; (4) committed clear error to the extent that it found that Au was either terminated by Alteka or abandoned his representation in its case; (5) abused its discretion by derogating Hawai'i law recognizing the validity of attorney's liens; (6) erred by implicitly ruling that Alteka was not judicially estopped from contesting Au's attorney's lien; and (7) abused its discretion by deciding Au's motion without a hearing or trial on the merits.

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

(1) Au's first point of error has merit. Following this court's ruling in Shanghai Inv. Co. v. Alteka Co., Ltd., 92 Hawai'i 482, 487, 993 P.2d 516, 521 (2000) ("Alteka I"), Alteka, through present counsel, filed a January 10, 2001 amendment to its January 8, 2001 motion for attorneys' fees and costs against the adverse parties in that case, specifically seeking "an award of a 10% contingency fee on recovery of proceeds and interest on the promissory note between Alteka and [a non-party to the instant appeal], pursuant to the Agreement for Legal Services [{"retainer agreement"}] between Alteka . . . and [Au] dated March 11, 1995," attaching said agreement as the sole exhibit. Of the various items claimed by Alteka for attorneys' fees, the contingency fee provided by the Alteka/Au retainer agreement is

the only item based on a contingency fee arrangement. In its March 19, 2001, order the circuit court ultimately awarded Alteka attorneys' fees, portions of which were attributable to contingency fees. This order provided, inter alia, "8% of the principal [amount of the promissory note] (\$1,171.949.70) [sic], interest thereon, attorneys' fees and costs actually collected of received in connection of this action. . . [against the adverse parties in Alteka I]."

The Alteka/Au contingency fee was a component in the two April 25, 2001 judgments (one against Shanghai Investment Co. Inc. and the other, a Third Amended Judgment against Windward Park, Inc. And Thomas Enomoto) in favor of Alteka, awarding it attorneys' fees and costs. No appeal has been taken from these two judgments. The record on appeal indicates there has been partial satisfaction of the Third Amended Judgment by way of an execution on real property owned by Shanghai Investments Co. Inc. There is no indication that these two judgments are other than final judgments.

Although the contingency fee was awarded at 8% rather than the 10% provided for in the Au-Alteka retainer agreement, upon careful review of the record and in the absence of any other explanation by the circuit court or Alteka, we are inexorably drawn to the conclusion that the contingency portion of the circuit court's attorneys' fee awarded in the aforementioned April 25, 2001 judgments were derived directly from the contingency fee provision within the Au-Alteka retainer agreement. In other words, the circuit court impliedly upheld the validity and legal effect of the contingency fee provision in

the Au-Alteka retainer agreement.²

The circuit court erred in denying Au's request for a lien because Alteka's opposition to the imposition of the lien contradicted the basis on which it obtained the earlier judgments awarding attorneys' fees. Judicial estoppel applies here to foreclose Alteka's opposition to Au's motion for a lien after it successfully obtained a judgment from the circuit court based on the same contingent fee sought by Au.

Alteka correctly observes that Au did not raise the issue of judicial estoppel in the adjudication of the non-hearing motion for the charging lien. This court has, however, noted that it has the discretion to invoke, sua sponte, the construct of judicial estoppel upon a clear showing that inconsistencies and unfairness would result. Kahala Royal Corp. v. Goodwill Anderson Quinn & Stifel, 113 Hawai'i 251, 272 n. 21, 151 P.3d 732, 753 n. 21 (2007). Here Alteka's position in claiming the Alteka/Au contingency fee as a component of its award for attorneys' fees against Windward and Enomoto in the Third Amended Judgment is clearly inconsistent with Alteka's position in claiming that Au is not entitled to the contingency fee and a charging lien based thereon. It is obvious that an unfairness would result if Alteka is allowed to recover sums based on an award of the contingency fee and then be allowed to avoid liability on that same fee.

(2) Because this single point of error has merit and is determinative of the entire appeal, we need not address Au's remaining points of error.

² The validity of the award of attorneys' fees, including that portion thereof attributable to the Alteka-Au contingency fee, is not at issue in this appeal.

THEREFORE,

IT IS HEREBY ORDERED that the June 1, 2004 order of the circuit court is vacated. This case is remanded to the circuit court with instructions to (1) enter a attorney's lien in favor of Au as to the contingency fee portions of the April 25, 2001 circuit court judgments, and (2) conduct further proceedings to determine which portions of the amounts remitted to Alteka in satisfaction of the circuit court's April 25, 2001 attorneys' fees and costs judgments, if any, include contingency fees to be remitted to Au.³

DATED: Honolulu, Hawai'i, October 16, 2007.

On the briefs:

Ronald G.S. Au,
Petitioner-Appellant pro se

Paul Alston, David A.
Nakashima and Laura P. Couch
of Alston Hunt Floyd & Ing for
Respondent-Appellee
Alteka Co., Ltd.



³ Inasmuch as the contingency fees within the Au-Alteka retainer agreement were to be paid to "The Law Offices of Ronald G. S. Au[,]" the relevant constituents of which (other than Au) are unknown, we do not decide, inter alia, whether any other parties may have a valid lien.