

DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

The Management Agreement between Respondent-Appellant Premier Resorts International, Inc. (Premier) and Applicant-Appellee Association of Apartment Owners of the Cliffs at Princeville (AOAO) provides in relevant part:

15. Attorney's Fees. In the event of any litigation regarding this Agreement, the prevailing party shall be entitled to receive from the other party all reasonable costs of enforcement or collection, including reasonable attorney's fees and court costs.

16. Arbitration. . . . [T]he prevailing party, as determined by the arbitrator, shall be entitled to recover all of its costs and expenses, including reasonable attorney's fees, incurred in such proceedings. . . . [1]

(Some emphases in original and some added.) The order of the first circuit court awarding Premier the attorneys' fees and costs it incurred in defending the arbitration award was reduced to judgment on November 9, 2004 and was not appealed and, thus,

¹ The provision on Arbitration states, in its entirety, as follows:

Except as otherwise provided herein, any and all issues, disagreements, disputes, questions, or matters arising under or related to this Agreement or any alleged breach thereof shall be settled by binding arbitration pursuant to Chapter 658, Hawai'i Revised Statutes [(HRS)], by a single arbitrator appointed by the parties or, if the parties are unable to agree within 30 days of the giving of notice by either party of its desire to arbitrate, by any judge of the Circuit Court of the Fifth Circuit, State of Hawai'i in accordance with Section 658-4, HRS. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") but shall not be administered by the AAA unless otherwise agreed by the parties. The arbitrator's fees and costs, including any initial deposit, shall be shared equally by the parties, provided that the prevailing party, as determined by the arbitrator, shall be entitled to recover all of its costs and expenses, including reasonable attorney's fees, incurred in such proceedings. Venue for all proceedings shall be in the Island of Kaua'i.

(Emphasis added.)

became final. The same issues regarding attorneys' fees and costs that were considered and resolved in the first circuit court were before the fifth circuit court on Premier's request for fees and costs.

As Premier argues, since "the [f]irst [c]ircuit [court's unappealed] judgment conclusively established that Premier is entitled to recover its fees and costs in . . . post-arbitration litigation[,]" under the principle of collateral estoppel, AOA "was precluded from relitigating issues related to whether the Management Agreement or HRS § 607-14 applied in post-arbitration proceedings or whether the [a]rbitrator's award of fees reduced the amount of fees Premier could recover in the post-arbitration litigation." In Dorrance v. Lee, 90 Hawai'i 143, 149, 976 P.2d 904, 910 (1999), this court held that the collateral estoppel doctrine bars relitigation of an issue where:

- (1) the issue decided in the prior adjudication is identical to the one presented in the action in question;
- (2) there is a final judgment on the merits;
- (3) the issue decided in the prior adjudication was essential to the final judgment; and
- (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication[.]

With respect to the first element, the issue decided in the first circuit court is the same issue presented in the action in question, which was whether Premier may recover attorneys' fees and costs incurred in post-arbitration litigation. Second, the final judgment of the first circuit court was based on the merits because it reasoned that the fee-shifting clause in the Management Agreement entitled Premier to attorneys' fees and

costs in post-arbitration litigation. Third, the question of whether post-arbitration litigation fees should be awarded Premier, decided by the first circuit court, was essential to the final judgment awarding attorney's fees and costs. The final element of the collateral estoppel test is satisfied because the same parties were involved in the first circuit court and fifth circuit court proceedings. Since all elements of the collateral estoppel test were satisfied, AOA should have been barred from relitigating the issue of whether Premier should recover attorneys' fees and costs incurred in the post-arbitration litigation.

Second, as Premier argues, even if the "[f]irst [c]ircuit [court's] judgment is insufficient to require reversal, the [f]ifth [c]ircuit [court] nevertheless erred in denying Premier's motion for fees and costs[.]" On appeal, Premier argues that it was entitled to recover its fees incurred in the fifth circuit proceedings based on the Management Agreement and HRS § 607-14.² However, although an arbitrator may award attorneys' fees in arbitration proceedings pursuant to the HRS § 607-14 fee cap, this does not mean that HRS § 604-17 provides the authority to award attorneys' fees in post-arbitration

² According to Premier, it is "entitled to recover the fees and costs incurred in the post-arbitration litigation in the [f]ifth [c]ircuit [court]" because "[t]he Management Agreement contains a fee-shifting clause that provides for the recovery of fees in 'any litigation regarding this agreement'" and "HRS § 607-14 applies in all courts and allows the recovery of fees whenever there is an action on an agreement that contains a fee-shifting clause." Premier is at least partially correct in that the Management Agreement authorizes the award of attorneys' fees.

litigation. It is a "well-accepted 'American rule' . . . that 'in the absence of contract or statute a litigant has no inherent right to have his or her attorney's fees paid by his or her opponent.'" Hamada v. Westcott, 102 Hawai'i 210, 217, 74 P.3d 33, 40 (2003) (quoting Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 51, 837 P.2d 1273, 1297 (1992) (citations omitted)) (brackets omitted).

HRS § 607-14 provides that "[i]n all the courts, in all actions in the nature of assumpsit . . . there shall be taxed . . . attorneys' fees" In the present case, Premier appeals the denial of its motion for attorneys' fees arising out of the post-arbitration litigation proceedings in the fifth circuit court. The proceedings in the fifth circuit court addressed the enforcement of the arbitration award, and not the recovery of damages for non-performance of a contract. Since Premier's request for attorneys' fees arose from proceedings that were not in the "nature of assumpsit," HRS § 607-14 cannot be applied as a basis for attorney's fees and costs in the present case.³

³ Lee v. Aiu, 85 Hawai'i 19, 936 P.2d 655 (1997), is illustrative. In Lee, this court stated that "[a] suit to enforce an agreement is a suit for specific performance and is not an action in the nature of assumpsit." Id. at 31, 936 P.2d at 667. The plaintiff in that case, "[i]n conjunction with her breach of settlement agreement claim[,] . . . requested an award of attorney's fees under HRS § 607-14[.]" Id. This court found that since "[a]ssumpsit is a common law form of action for the recovery of damages for non-performance of a contract[.]" and "Lee's claim for specific enforcement [was] not an action in assumpsit, . . . the trial court's denial of [Lee's] request for attorney's fees" should be affirmed. Id. at 31-32, 936 P.2d at 667-68.

The majority holds that "[t]he [f]ifth [c]ircuit [c]ourt did not abuse its discretion in denying Premier's motion for fees" because "[w]hen invoked in post-arbitration litigation, HRS § 607-14's twenty-five per cent cap on fee awards takes into account fees granted in the underlying arbitration." Majority opinion at 3. Under this view, it appears that if the arbitrator did not award Premier the "full twenty-five per cent" or the "maximum fees available on the sued-upon sum," then the fifth circuit court could award Premier additional attorney's fees in post-arbitration litigation, up to the HRS § 607-14 fee cap. Pursuant to this approach, HRS § 607-14 would provide the authority to award attorneys' fees incurred in post-arbitration litigation. However, this theory would authorize an award for attorneys' fees under HRS § 607-14 in cases that were not in the "nature of assumpsit."

In support of its argument, the majority cites Gadd v. Kelly, 66 Haw. 431, 667 P.2d 251 (1983) and DFS Group L.P. v. Paiea Props., 110 Hawai'i 217, 219, 131 P.3d 500, 502 (2006), for the proposition that appeals regarding an arbitration award are "expense[s] of the enforcement" of a contract. Majority opinion at 3 n.5. However, these cases do not provide support for the majority's contention that HRS § 607-14 is applicable to the issue of attorneys' fees sought by Premier.

Neither Gadd nor DFS involved the dual attorneys' fees arrangements relating to the arbitration proceedings on one hand,

as in article 16, and "any litigation" as in article 15, on the other hand, which are pivotal in determining the fees question in this case. Additionally, Gadd did not involve an award of attorneys' fees pursuant to HRS § 607-14. Thus, in contrast to the instant case, it was not contended by any party in Gadd, that HRS § 607-14 was applicable to attorneys' fees sought by one party in enforcing an arbitration award. Moreover, in Gadd the attorneys' fees incurred by the petitioners relating to enforcement of the arbitration award were "part of the expense of collecting the rent due them and enforcing the covenants of the lease," 66 Haw. at 444-45, 667 P.2d at 260 (emphasis added), because the rental amount in controversy was indeterminable without the arbitration proceedings. In contrast, here, the arbitration was not a necessary step in performance of the contract as it was in Gadd⁴ and, hence, was not for non-performance of the contract.

⁴ In Gadd, a real property lease agreement provided that in the event of the lessor and lessees' failure to agree upon the rent to be paid, the lessor and lessees would enter into arbitration to determine the amount of rent to be paid. 66 Haw. at 432-33, 667 P.2d at 253-54. The Gadd court confirmed the arbitration panel's final award in favor of the petitioners. Id. at 443, 667 P.2d at 259. The petitioners asserted a claim for attorneys' fees based upon a lease term authorizing attorneys' fees upon nonpayment of rent or breach of any lease covenants.

Gadd held that the "[r]espondents' obligation to pay petitioners reasonable attorneys' fees [was] triggered" because, inter alia, the respondents "breached their covenant to accept the appraisers' award as conclusive and binding . . . [and] failed to pay the full rental payments established by the arbitration panel[.]" Id. at 444, 667 P.2d at 260. Thus, Gadd held that the petitioners were "entitled to reasonable attorneys' fees as part of the expense of collecting the rent due them and enforcing the covenants of the lease." Id. at 444-45, 667 P.2d at 260.

Also, in DFS, the plaintiff was entitled to attorneys fees because the claim "ar[ose] out of [a] breach of the terms and conditions of the lease," 110 Hawai'i at 220, 131 P.3d at 503, when the defendant refused to accept the appraiser's determination of the rental amount as "final, conclusive, and binding," id. at 218, 131 P.3d at 501, which the defendant was obligated to do under the terms of the lease.⁵ One of the arguments by the defendant in DFS was that the statutory limitation in HRS § 607-14 limiting the plaintiff's award of costs and fees to "twenty-five per cent of the judgment" was applicable. Id. at 220, 131 P.3d at 503. The plaintiff "acknowledge[d] the foregoing statutory limitation, but contend[ed] that the limitation is inapplicable where, [as in that case], the party requesting fees did not seek a monetary judgment in the underlying appeal." Id. The DFS court "agree[d] with [the plaintiff's] initial contention that the statutory

⁵ DFS involved a dispute over a commercial lease of warehouse space. Pursuant to the terms of the lease, an appraiser, whose decision was to be "final, conclusive and binding" on the parties, was appointed to determine the rent. 110 Hawai'i at 218, 131 P.3d at 501. The plaintiff sought to enforce the appraiser's determination which was disputed by the defendant, and the trial court granted summary judgment in favor of the plaintiff. Id. at 218-19, 131 P.3d at 501-02. The plaintiff then sought attorneys' fees pursuant to a lease provision that authorized attorneys' fees to the prevailing party in any action or proceeding based upon, or any breach of, the lease terms. Id. at 219, 131 P.3d at 501.

This court held there that the plaintiff was entitled to attorneys' fees because "the genesis of the dispute was [the defendant's] rejection of [the appraiser's] determination of the 'prevailing rent'" and therefore, the subsequent action by the plaintiff was "clearly based upon or arising out of a breach of the terms and conditions of the lease[.]" Id. at 220, 131 P.3d at 520 (emphasis added).

limitation set forth in HRS § 607-14 does not apply" because "no monetary liability was in issue[.]" Id. at 221, 131 P.3d at 504.

In contrast to DFS, here as noted before, there are dual fees provisions in the instant case with respect to the arbitration proceedings and "any litigation." In addition, there was no breach of contractual terms as determined by the first circuit court. Rather, the action stemmed from alleged "accounting and computational errors in connection with pending loans" resulting in the AOA's request for damages. Thus, DFS does not stand for a blanket generalization that "an appeal seeking the vacation of an arbitration award is a claim 'based upon or arising out of any breach of the terms and conditions' of the lease." Majority opinion at 3 n.5 (quoting DFS, 110 Hawai'i at 219, 131 P.3d at 502) (emphasis added).

Hence in this case, the authority to award attorneys' fees in post-arbitration litigation must be based, if at all, on the Management Agreement. Premier argues that "because the Management Agreement provides the recovery of fees in any litigation" under Section 15, "and post-arbitration litigation is the only litigation that could arise between the parties, the parties necessarily intended for the recovery of fees in post-arbitration litigation." (Emphasis added.) Compared to section 15, section 16, entitled "Arbitration," indicates that "the prevailing party, as determined by the arbitrator, shall be entitled to recover . . . reasonable attorney's fees[] incurred

in such [arbitration] proceedings." On its face, section 16 pertains to awards "by the arbitrator" "incurred" in arbitration proceedings and, thus, cannot be a textual source for attorney's fees sought to be authorized by a court in court proceedings. Consequently, section 16 would apply to arbitration proceedings only, and not post-arbitration proceedings before a court.

In contrast, section 15 pertains to attorney's fees "in litigation." On its face section 15 refers to "any litigation regarding this Agreement," and dictates that "the prevailing party shall be entitled to receive . . . all reasonable costs of enforcement or collection, including reasonable attorney's fees and court costs." (Emphases added.) Therefore, section 15 would apply to post-arbitration proceedings before a court.

As opposed to the foregoing, AOA0 contends that "[s]ection 15 . . . awards to the prevailing party only attorney's fees or costs included in the 'reasonable costs of enforcement or collection.'" (Emphasis in original.) AOA0 argues that its application in the fifth circuit court was to vacate the arbitration award and "was not, in any sense, an action to 'enforce' [the] Management Agreement . . . or . . . an action to 'collect' any sum under the Management Agreement" that would invoke section 15. However, section 15 manifestly governs. A motion to vacate the award implicates the reciprocal and opposing act of enforcement as covered by section 15, inasmuch as vacation of the award would defeat "enforcement" of the

arbitration award by the court. Therefore, reasonable attorney's fees and costs must be awarded for the post-arbitration litigation proceedings before the fifth circuit court. The case, then, should be remanded to the court for entry of an order granting reasonable attorney's fees and court costs to Premier pursuant to section 15, and for the remaining determination of the reasonableness of the attorney's fees and costs claimed by Premier.⁶



⁶ The fifth circuit court's order denying Premier's Motion for Reconsideration stated that "[e]ach party shall bear its own fees and costs; all requests for attorneys' fees and costs made by the parties are hereby denied[,]" without indicating the basis for its denial.