

NO. 29824

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

JOHN PICARDY and ELLEN PICARDY, Plaintiffs-Appellants,

v.

SKY RIVER MANAGEMENT, LLC; PIERRE and PAMELA OMIDYAR;
ELAHE MIR DJALALI OMIDYAR; ANNA CHRISTIAN; KEVIN MAHONEY;
DOUGLAS COOMBS, Defendants-Appellees,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL ENTITIES 1-10,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-0290)

ORDER DENYING OCTOBER 20, 2009 MOTION TO DISMISS
APPEAL AND STRIKING NOVEMBER 5, 2009 REPLY MEMORANDUM
(By: Nakamura, Chief Judge, Watanabe and Foley, JJ.)

Upon review of (1) Defendants-Appellees Sky River Management, LLC, Pierre Omidyar, Pamela Omidyar, Elahe Mir Djalali Omidyar, Anna Christian and Kevin Mahoney's (the Appellees) October 20, 2009 motion to dismiss appellate court case number 29824 for lack of jurisdiction, (2) Plaintiffs-Appellants John Picardy and Ellen Picardy's (the Picardy Appellants) November 2, 2009 memorandum in opposition to the Appellees' October 20, 2009 motion to dismiss appellate court case number 29824, (3) the Appellees' November 5, 2009 reply memorandum in support of the Appellees' October 20, 2009 motion to dismiss appellate court case number 29824, and (4) the record, we initially note that Rule 27 of the Hawai'i Rules of Appellate

Procedure (HRAP) does not authorize a movant to file a reply memorandum in support of a motion, and, thus, we hereby strike the Appellees' November 5, 2009 reply memorandum in support of the Appellees' October 20, 2009 motion to dismiss appellate court case number 29824 as unauthorized. Furthermore, it appears that the Appellees' October 20, 2009 motion to dismiss appellate court case number 29824 lacks merit, because we have jurisdiction over the Picardy Appellants' appeal from the Honorable Victoria S. Marks's April 14, 2009 "Order Granting Defendants' Motion to Stay Proceedings and Compel Arbitration" (the April 14, 2009 order staying proceedings and compelling arbitration) pursuant to Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2008) and the collateral order doctrine.

HRS § 658A-28(a)(1) (Supp. 2008) authorizes an appeal from an order denying a motion to compel arbitration:

§ 658A-28. Appeals.

(a) An appeal may be taken from:

- (1) An order denying a motion to compel arbitration;
- (2) An order granting a motion to stay arbitration;
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A final judgment entered pursuant to this chapter.

(b) An appeal under this section shall be taken as from an order or a judgment in a civil action.

HRS § 658A-28 (Supp. 2008) (emphasis added). However, HRS § 658A-28(a)(1) does not authorize an appeal from an order granting a motion to compel arbitration. Therefore, HRS § 658A-28 does not authorize the Picardy Appellants' appeal from the April 14, 2009 order staying proceedings and compelling

arbitration. But HRS § 658A-28 is not the sole authority for appeals under the circumstances of this case.

HRS § 641-1(a) provides additional authority for appeals, authorizing appeals to the intermediate court of appeals 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." HRCP Rule 58. Based on HRCP Rule 58, 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 final judgment in this case. Nevertheless, as an exception to the general rule requiring a final judgment for appealability under HRS § 641-1(a), the Supreme Court of Hawai'i "ha[s], in rare situations, considered an interlocutory order so effectively 'final' that [it] ha[s] exercised appellate jurisdiction over an appeal that is neither a final judgment nor has been allowed by the circuit court under HRS § 641-1(b)."

Abrams v. Cades, Schutte, Fleming & Wright, 88 Hawai'i 319, 321, 966 P.2d 631, 633 (1998).

Appellate jurisdiction in these cases is exercised under the collateral order doctrine. These interlocutory appeals are limited to orders falling in that small class 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.

Id. (citations and internal quotation marks omitted). In order to be appealable under the collateral order doctrine, an appealed order must satisfy all three of the following requirements: "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Id. at 322, 966 P.2d at 634 (citations and internal quotation marks omitted) (brackets in original). The Supreme Court of Hawai'i has observed that it "must construe the collateral order doctrine narrowly and be parsimonious in its application." Siangco v. Kasadate, 77 Hawai'i 157, 162, 883 P.2d 78, 83 (1994). Otherwise, "[a]llowing widespread appeals from collateral orders would frustrate the policy against piecemeal appeals embodied in HRS § 641-1." Id.

Based on the collateral order doctrine, we have held that "[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). In Sher v. Cella, the parties were litigating a "complaint [that] contained six counts: (1) misrepresentation and non-disclosure, (2) breach of contract, (3) breach of duty of good faith and fair dealing, (4) negligence, (5) deceptive trade practices, and (6) unjust enrichment." Id. at 266, 160 P.3d at 1253. Thus, when the circuit court entered an order granting a motion to compel arbitration of these causes of action, we held that, under the collateral order doctrine, the "order granting [the] motion to compel arbitration is final and appealable[.]" Id. at 266-67, 160 P.3d at 1253. In so holding, we followed the Supreme Court of Hawaii's well established holding that, under the collateral order doctrine, "orders granting stays and compelling arbitration are appealable [final orders.]" Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 107, 705 P.2d 28, 35 (1985); Douglass v. Pflueger Hawaii, Inc., 110 Hawai'i 520, 522 n.1, 135 P.3d 129, 131 n.1 (2006); Luke v. Gentry Realty, Ltd., 105 Hawai'i 241, 246 n.10, 96 P.3d 261, 266 n.10 (2004).

In the instant case, the April 14, 2009 order staying proceedings and compelling arbitration does not resolve the merits of the Picardy Appellants' three causes of action for (I) wrongful termination, (II) fraud in the inducement, and (III) intentional infliction of emotional distress. Instead, the

April 14, 2009 order staying proceedings and compelling arbitration (1) conclusively determines the disputed question whether arbitration of the Picardy Appellants' three causes of action is mandatory, and, thus, (2) resolves this important arbitration issue that is completely separate from and collateral to the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. Therefore, the April 14, 2009 order staying proceedings and compelling arbitration is an appealable final order pursuant to HRS § 641-1(a) and the collateral order doctrine. All of the Appellees' arguments to the contrary lack merit.¹ Accordingly,

IT IS HEREBY ORDERED that the Appellees' November 5, 2009 reply memorandum in support of the Appellees' October 20, 2009 motion to dismiss appellate court case number 29824 is stricken as unauthorized under HRAP Rule 27, and the Appellees'

¹ We note that the Appellees cite, among other things, the following unpublished dismissal orders from five appellate cases in support of the Appellees' October 20, 2009 motion to dismiss appellate court case number 29824: Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Hawaii Health Systems Corporation, No. 29661, 2009 WL 1879223 (Haw. Ct. App. June 29, 2009); Shelton v. Kaiser Foundation Health Plan, Inc., No. 29754, 2009 WL 1805047 (Haw. Ct. App. June 23, 2009); Clever Construction, Inc., v. Alcone, No. 29320, 2008 WL 5049906 (Haw. Ct. App. Nov. 21, 2008); Williams v. State of Hawai'i, No. 29209, 2008 WL 4649397 (Haw. Ct. App. Oct. 17, 2008); Brown v. Hawaii Medical Service Association, No. 29117, 2008 WL 3148577 (Haw. Ct. App. Aug. 1, 2008). These five appellate cases involved appeals from orders compelling arbitration in special circuit court civil proceedings that parties had initiated for the primary purpose of adjudicating whether the parties' claims were subject to mandatory arbitration. We dismissed these five appellate cases because the circuit courts had not entered final judgments, the appealed orders compelling arbitration resolved issues that were directly related to the merits of each action, and, thus, the orders did not qualify as collateral orders. The instant case is distinguishable from these five appellate cases because, in the instant case, the April 14, 2009 order staying proceedings and compelling arbitration resolves an important issue that is collateral to the merits of the Picardy Appellants' three causes of action for (I) wrongful termination, (II) fraud in the inducement, and (III) intentional infliction of emotional distress.

October 20, 2009 motion to dismiss appellate court case number 29824 is denied.

DATED: Honolulu, Hawai'i, December 21, 2009.

Chief Judge

Associate Judge

Associate Judge