

**Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000584
29-SEP-2015
11:57 AM**

NO. CAAP-15-0000584

IN THE INTERMEDIATE COURT OF APPEALS

THE STATE OF HAWAII

HITOSHI YOSHIKAWA,
Defendant-Appellant

vs.

ASSOCIATION OF OWNERS OF KALELE
KAI,

Plaintiff-Appellee.

CIVIL NO. 12-1-1019-04 KTN

IN THE APPEAL OF

(1) FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
FILED 3/17/15 AND INJUNCTION
AGAINST HITOSHI YOSHIKAWA;
NOTICE OF ENTRY, filed on August 14,
2015

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII

JUDGE: The Honorable Karen T. Nakasone

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
APPEAL FOR LACK OF APPELLATE JURISDICTION FILED 9/10/15

DECLARATION OF COUNSEL

EXHIBIT D

CERTIFICATE OF SERVICE

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Attorneys for Plaintiff-Appellee

ASSOCIATION OF OWNERS OF

KALELE KAI

**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
APPEAL FOR LACK OF APPELLATE JURISDICTION FILED 9/10/15**

Plaintiff-Appellee ASSOCIATION OF OWNERS OF KALELE KAI (“Appellee”) hereby submits its REPLY in support of its Motion to Dismiss Appeal for Lack of Appellate Jurisdiction filed September 10, 2015 (“Motion”), and in response to Defendant-Appellant HITOSHI YOSHIKAWA’s (“Appellant”) Memorandum in Opposition filed September 17, 2015 (“Opposition”), in accordance with the Court’s order granting leave to file this Reply entered September 23, 2015.

I. MATERIAL OMISSIONS

The Opposition fails to cite or address the holdings in Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 869 P.2d 1334 (1994) and Wong v. Takeuchi, 83 Haw. 94, 924 P.2d 588 (Haw. App. 1996), cited and discussed in the Motion.

In its seminal Jenkins decision, the Hawaii Supreme Court has held that,

[W]e hold: (1) An appeal may be taken from circuit court orders resolving claims against parties 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 HRCF 58; (2) if a judgment purports to be the final judgment in a case involving multiple claims or multiple parties, the judgment (a) must specifically identify the party or parties for and against whom the judgment is entered, and (b) must (i) identify the claims for which it is entered, and (ii) dismiss any claims not specifically identified; (3) if the judgment resolves fewer than all claims against all parties, or reserves any claim for later action by the court, an appeal may be taken only if the judgment contains the language necessary for certification under HRCF 54(b); and (4) an appeal from any judgment will be dismissed as premature if the judgment does not, *on its face*, either resolve all claims against all parties or contain the finding necessary for certification under HRCF 54(b).

Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 119, 869 P.2d 1334, 1338 (1994) (emphasis in original).

Under Jenkins and HRCF Rule 58, “an order is not appealable, even if it resolves all claims against the parties, until it has been reduced to a separate judgment.” Carlisle v. One (1)

Boat, 119 Haw. 245, 254, 195 P.3d 1177, 1186 (2008). Consequently, “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.” Jenkins, 76 Haw. at 120.

In Wong v. Takeuchi, this Court observed:

A judgment is final when all claims of the parties to the case have been terminated. Absent the entry of final judgment as to all claims, an appeal may generally be taken from a nonfinal order or decree if (1) leave to take an interlocutory appeal has been granted by the circuit court pursuant to HRS § 641–1(b); (2) the order or decree has been certified as final for appeal purposes pursuant to Hawai‘i Rules of Civil Procedure (HRCP) Rule 54(b); (3) the order or decree being appealed is an “appealable order” under the collateral order doctrine; (4) the order or decree being appealed is an “appealable order” under the *Forgay* or immediate execution/irreparable injury doctrine; or (5) the order or decree is immediately appealable pursuant to a statutory provision.

Wong v. Takeuchi, 83 Haw. at 98-99, 924 P.2d at 592-93 (citations and footnotes omitted).

II. UNDISPUTED MATTERS

No judgment has been entered in the Circuit Court.

No leave to take an interlocutory appeal has been granted by the Circuit Court.

The Circuit Court’s Findings of Fact, Conclusions of Law and Order Granting Motion for Summary Judgment Filed 3/17/15 and Injunction Against Hitoshi Yoshikawa (the “Order”) (Exhibit A to the Motion) has not been certified under HRCP Rule 54(b).

Appellant presently seeks to expand the scope of the Circuit Court action, and admits that “the exception to finality under HRS §641-1(b) does not apply [...]” Exhibit C to Motion (Appellant’s Motion for Leave to File Amended Counterclaim/Cross-Claim); Opposition at 11.

III. THE ORDER ADJUDICATED THE MERITS OF APPELLEE’S CLAIMS AND WILL BE REVIEWABLE AFTER ENTRY OF JUDGMENT, THUS THE COLLATERAL ORDER DOCTRINE CANNOT JUSTIFY APPELLANT’S PREMATURE APPEAL

The collateral order doctrine is a narrow exception to the final judgment rule, which

applies 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.” Hawaii State Teachers Association v. Abercrombie, 126 Haw. 13, 21, 265 P.3d 482, 490 (Haw. App. 2011) (citations omitted).

“Allowing widespread appeals from collateral orders would frustrate the policy against piecemeal appeals embodied in HRS § 641-1. Thus, we must construe the collateral order doctrine narrowly and be parsimonious in its application.” Siangco v. Kasadate, 77 Haw. 157, 162, 883 P.2d 78, 83 (1994). “Allowing interlocutory appeals before a final judgment on the merits erodes the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment.” Abrams v. Cades, Schutte, Fleming & Wright, 88 Haw. 319, 322, 966 P.2d 631, 634 (1998); see also, Stanley v. Chappell, 764 F.3d 990, 993 (9th Cir. 2014) (the doctrine “must never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered”).

Three factors must be shown to fall within “the narrow ambit of the collateral order doctrine;” 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. Ueoka v. Szymanski, 107 Haw. 386, 396, 114 P.3d 892, 902 (2005).

Here, under factor (2), the Order on its face decided “the merits of the action.” Appellant asserts that requirement (2) has been met because, purportedly, the Circuit Court did not consider genuine issues of material fact. Opposition at 10. Even if that were true, the Circuit Court ruled on the merits of the First Amended Complaint. Exhibit A to Motion at 16, ¶2 (summary

judgment granted on “All claims in [Appellee’s] First Amended Complaint have hereby been adjudicated in favor of [Appellee] and against [Appellant]”). In any event, that assertion is false. The Circuit Court recognized that the restrictive covenant which Appellant intentionally violated is unambiguous, and based the Order upon undisputed evidence, and noted that Appellant failed to come forward with admissible facts to create a genuine issue of material fact. *Id.* at 8-10, 13 (Findings of Fact nos. 26-32, Conclusions of Law nos. 5-6, 13).¹

Further, under factor (3), the Order will be reviewable on appeal after entry of a judgment or a final judgment. Appellant’s own conduct is precluding full adjudication in Circuit Court and hence a judgment from being entered. See Exhibit C to Motion (Appellant’s Motion for Leave to File Counterclaim/Cross-Claim).

IV. APPELLANT HAVING TO MOVE HIS BOAT DOES NOT CONSTITUTE A CHANGE IN TITLE OR POSSESSION OF PROPERTY, IMMEDIATE OR OTHERWISE, TO JUSTIFY AN APPEAL UNDER THE FORGAY DOCTRINE

Appellant asserts that his “appeal is final under the Forgay doctrine.” Opposition at 7.

The Forgay doctrine, also referred to as the hardship and irreparable injury exception to the final judgment requirement, was established in Forgay v. Conrad, 47 U.S. 201, 6 How. 201, 12 L.Ed. 404 (1848). Lambert v. Teisina, 131 Haw. 457, 461, 319 P.3d 376, 380 (2014).

Narrow in scope and limited in use, the Forgay doctrine may permit a direct appeal from a non-final, interlocutory order or decree that commands the immediate transfer of property, where the losing party will be subjected to undue hardship and irreparable injury if appellate review must wait until the litigation’s final outcome. *Id.* at 461, 319 P.3d at 380.

¹ Appellant’s “Background” section contains inadmissible, irrelevant and slanted assertions of fact and procedure. Opposition at 2-5. **Appellant’s and his counsel’s assertions therein about non-binding arbitration matters and rulings may violate the Circuit Court’s Order Granting Motion to Strike and Seal Defendant’s Motion for an Order Confirming the Award [Etc.]** Filed 3/11/15 (Filed 3/31/15), entered 5/21/15, attached hereto as Exhibit D.

Appellant tries to extend the doctrine to this action by asserting, “This is expressly a disposition of property akin to that found in Forgay which results in the identical irreparable harm described in Forgay.” Opposition at 8. That contention does not withstand scrutiny.

Under the doctrine, the property rights at issue must **immediately** affect **title** to property **or possession** of property. Lambert, 131 Haw. at 461, 319 P.3d at 380 (must affect “an immediate change in the ownership or possession of real property”); Ciesla v. Reddish, 78 Haw. 18, 20, 889 P.2d 702, 704 (1995) (allows a party to immediate appeal “a judgment for execution upon property”); Wong v. Takeuchi, 83 Haw. at 99, n. 5, 924 P.2d at 593 n. 5 (“The Forgay doctrine allows appeals from orders or decrees that authorize immediate execution of a command that property be delivered to another [...]”);

This action bears no resemblance to the circumstances under which the Forgay doctrine may justify an appeal. While Appellant characterizes his boat as a “disposition of property akin to that found in Forgay” (Opposition at 8), no change in title to or possession of Appellant’s property is required, immediate or otherwise. While the Injunction requires Appellant to remove his 49-foot boat from the Kalele Kai Marina, the Injunction does not require Appellant to divest ownership, control or possession. Exhibit A to Motion at 16-17 (Injunction terms).²

Appellee respectfully requests that the Motion be GRANTED, and the appeal DISMISSED.

DATED: Honolulu, Hawaii, September 29, 2015.

/s/ John D. Zalewski
JOHN D. ZALEWSKI
JANA M. NARUSE
CHRISTOPHER SHEA GOODWIN
Attorneys for Plaintiff-Appellee
ASSOCIATION OF OWNERS OF KALELE KAI

² Appellant’s boat is more than double that of the 23-foot maximum length under the express – and unambiguous – restriction. Exhibit A to Motion at 5-8 (Findings of Fact nos. 11, 14-29).

NO. CAAP-15-0000445

IN THE INTERMEDIATE COURT OF APPEALS

THE STATE OF HAWAII

Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000584
29-SEP-2015
11:57 AM

HITOSHI YOSHIKAWA,
Defendant-Appellant

vs.

ASSOCIATION OF OWNERS OF KALELE
KAI,

Plaintiff-Appellee.

CIVIL NO. 15-0104 KTN

IN THE APPEAL OF

(1) FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
FILED 3/17/15 AND INJUNCTION
AGAINST HITOSHI YOSHIKAWA;
NOTICE OF ENTRY, filed on August 14,
2015

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII

JUDGE: Honorable Karen T. Nakasone

DECLARATION OF COUNSEL

I do hereby declare under penalty of law that the following is true and correct:

1. I am an attorney with the law firm of Case Lombardi & Pettit and a counsel of record for Defendant-Appellee ASSOCIATION OF OWNERS OF KALELE KAI (“Appellee”).

I have personal knowledge of the matters set forth herein.

2. Attached hereto as Exhibit D is a true and correct copy of the Circuit Court’s Order Granting Motion to Strike and Seal Defendant’s Motion for an Order Confirming the Award [Etc.] Filed 3/11/15 (Filed 3/31/15), entered on 5/21/15.

DATED: Honolulu, Hawaii, September 29, 2015.

/s/ John D. Zalewski
John D. Zalewski

CHRISTOPHER SHEA GOODWIN, AAL LLLC
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Attorneys for Plaintiff
ASSOCIATION OF OWNERS OF KALELE KAI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ASSOCIATION OF OWNERS
OF KALELE KAI,

Plaintiff,

vs.

HITOSHI YOSHIKAWA;
DOE DEFENDANTS 1-10,

Defendants.

CIVIL NO. 15-1-0102-01 KTN
(Declaratory Judgment)

**ORDER GRANTING MOTION TO
STRIKE AND SEAL DEFENDANT'S
'MOTION FOR AN ORDER
CONFIRMING THE AWARD [ETC.]'
FILED 3/11/15 (FILED 3/31/15)**

HEARING:

Date: April 28, 2015

Time: 10:00 a.m.

Judge: The Honorable Karen T. Nakasone

No Trial Date

**ORDER GRANTING "MOTION TO STRIKE AND SEAL DEFENDANT'S 'MOTION
FOR AN ORDER CONFIRMING THE AWARD [ETC.]' FILED 3/11/15" (FILED 3/31/15)**

1ST CIRCUIT COURT
STATE OF HAWAII
Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000584
29-SEP-2015
11:57 AM N. MIYATA
CLERK

On March 31, 2015, Plaintiff ASSOCIATION OF OWNERS OF KALELE KAI (“Plaintiff”) filed its Motion To Strike And Seal Defendant’s “Motion For An Order Confirming the Award [Etc.]” Filed 3/11/15 (the “Motion”).

On April 20, 2015, Defendant HITOSHI YOSHIKAWA (“Defendant”) filed his Opposition to the Motion (“Opposition”).

On April 23, 2015, Plaintiff filed its Reply in support of the Motion (“Reply”).

On April 28, 2015, the Motion came on for hearing before The Honorable Karen T. Nakasone. John D. Zalewski and Christopher S. Goodwin appeared on behalf of Plaintiff. Terrance M. Revere appeared on behalf of Defendant.

The Court having carefully considered the Motion, the Opposition, the Reply, the oral argument of counsel, and the record and files of this action, and for good cause appearing,

HEREBY:

- A. FINDS and CONCLUDES that Defendant, by having publicly-filed the submissions which are the subject of the Motion, did directly violate HRS §514B-163(c);
- B. DISCLOSES that, consistent with HRS §514B-163(c), the Court has not reviewed “Arbitrator’s Partial Final Award” and has no intention of doing so prospectively;
- C. GRANTS the Motion; and
- D. STRIKES and SEALS the following submissions from the public record:
 - 1. “DEFENDANT HITOSHI YOSHIKAWA’S MOTION TO DISMISS COMPLAINT FOR TRIAL DE NOVO, filed herein on January 21, 2015,” filed herein on February 18, 2015 (**2 pages in length**), inclusive of the following attached thereto:
 - i. “MEMORANDUM IN SUPPORT OF MOTION” (**14 pages**); and
 - ii. “Exhibit 2” entitled, “Arbitrator’s Partial Final Award” (**25 pages**).

2. “DEFENDANT HITOSHI YOSHIKAWA’S MOTION FOR AN ORDER CONFIRMING THE AWARD OF ATTORNEYS’ FEES AND COSTS CONTAINED IN THE FINAL AWARD OF THE ARBITRATOR, DATED FEBRUARY 12, 2015, INCORPORATING THE ARBITRATOR’S PARTIAL FINAL AWARD, DATED DECEMBER 12, 2014, IN DPR NO. 13-0496-A AND FOR JUDGMENT IN CONFORMITY THEREWITH,” filed herein on March 11, 2015 (**2 pages in length**), inclusive of the following attached thereto:
 - i. “MEMORANDUM IN SUPPORT OF MOTION” (**4 pages**); and
 - ii. “Exhibit 1” entitled, “Final Award of Arbitrator” with attached “Arbitrator’s Partial Final Award” (**28 total pages**).

3. DEFENDANT HITOSHI YOSHIKAWA’S OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT, filed herein on March 11, 2015 (**20 pages in length**), inclusive of the following attached thereto:
 - i. “Exhibit 36” entitled, “Final Award of Arbitrator” with attached “Arbitrator’s Partial Final Award” (**28 total pages**).

MAY 21 2015

KAREN T. NAKACONE



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

TERRANCE M. REVERE
LAUREN C. McDOWELL
Attorneys for Defendant
HITOSHI YOSHIKAWA

Association of Owners of Kalele Kai vs. Yoshikawa, Civil. No. 15-1-0102-01 (KTN); ORDER GRANTING MOTION TO STRIKE AND SEAL DEFENDANT’S “MOTION FOR AN ORDER CONFIRMING THE AWARD [ETC.]” FILED 3/11/15 (FILED 3/31/15)

CHRISTOPHER SHEA GOODWIN, AAL LLLC
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1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2015 MAY 22 PM 2:56

CASE LOMBARDI & PENTT
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CLERK

Attorneys for Plaintiff
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ASSOCIATION OF OWNERS
OF KALELE KAI,

Plaintiff,

vs.

HITOSHI YOSHIKAWA;
DOE DEFENDANTS 1-10,

Defendants.

CIVIL NO. 15-1-0102-01 KTN
(Declaratory Judgment)

CERTIFICATE OF SERVICE

RE: ORDER GRANTING MOTION TO
STRIKE AND SEAL DEFENDANT'S
"MOTION FOR AN ORDER CONFIRMING
THE AWARD [ETC.]" FILED 3/11/15 (FILED
3/31/15), FILED MAY 21, 2015

CERTIFICATE OF SERVICE

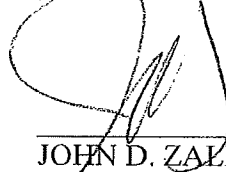
I certify that a copy of the ORDER GRANTING MOTION TO STRIKE AND SEAL
DEFENDANT'S "MOTION FOR AN ORDER CONFIRMING THE AWARD [ETC.]" FILED
3/11/15 (FILED 3/31/15), filed May 21, 2015 was served on the following persons by the
following means on the following date:

TERRANCE M. REVERE, ESQ.
LAUREN C. McDOWELL, ESQ.
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970 North Kalaheo Ave., Suite A301
Kailua, HI 96734

Email Attachment and
First Class United States Mail

Attorneys for Defendant HITOSHI YOSHIKAWA

DATED: Honolulu, Hawaii, May 22, 2015.



JOHN D. ZALEWSKI

JANA M. NARUSE

Attorneys for Plaintiff

ASSOCIATION OF OWNERS OF KALELE KAI

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via JEFIS and e-mail attachment on the persons and on the date as follows:

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CAAP-15-0000584
29-SEP-2015
11:57 AM

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Kailua, Hawaii 96734

Attorneys for Defendant-Appellant
HITOSHI YOSHIKAWA

DATED: Honolulu, Hawaii, September 29, 2015.

/s/ John D. Zalewski
JOHN D. ZALEWSKI
JANA M. NARUSE
CHRISTOPHER SHEA GOODWIN
Attorneys for Plaintiff-Appellee
ASSOCIATION OF OWNERS OF KALELE KAI

NOTICE OF ELECTRONIC FILING

**Electronically Filed
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CAAP-15-0000584
29-SEP-2015
11:57 AM**

An electronic filing was submitted in Case Number CAAP-15-0000584. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: CAAP-15-0000584

Title: Association of Owners of Kalele Kai, Plaintiff/Counterclaim/Cross-Claim Defendant-Appellee, vs. Hitoshi Yoshikawa, Defendant/Counterclaimant/Cross-Claimant-Appellant, and Association of Owners of Kalele Kai, Bradford Oakes, Darla Sabry, Doe Defendants-1-10, Counterclaim/Cross-Claim Defendants-Appellees.

Filing Date / Time: TUESDAY, SEPTEMBER 29, 2015 11:57:23 AM

Filing Parties: Association of Owners of Kalele Kai

Case Type: Appeal

Lead Document(s):

Supporting Document(s): Memorandum in Reply to _____

Declaration

Exhibit

Certificate of Service

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

This notification is being electronically mailed to:

Robert Scott Alcorn (robert@christophersheagoodwin.com)

Christopher Shea Goodwin (chris@christophersheagoodwin.com)

Jana Masami Naruse (jnaruse@caselombardi.com)

John D. Zalewski (jzalewski@caselombardi.com)

Lauren Cameron McDowell (lauren@revereandassociates.com)

Terrance M. Revere (terry@revereandassociates.com)

The following parties need to be conventionally served:

Darla Sabry

Bradford Oakes

