FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2015 APR 10 AM 11:05

N. ANAYA
CLERK

CHRISTOPHER SHEA GOODWIN, AAL LLLC
CHRISTOPHER SHEA GOODWIN 5925
Pacific Guardian Center, Mauka Tower
737 Bishop Street, Suite 1640
Honolulu, Hawaii 96813

CASE LOMBARDI & PETTIT
JOHN D. ZALEWSKI 4718
JANA M. NARUSE 8966
Pacific Guardian Center, Mauka Tower
737 Bishop Street, Suite 2600
Honolulu, Hawaii 96813

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) PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DETERMINATION AND ISSUANCE OF A STAY FILED 3/24/15; DECLARATION OF COUNSEL; EXHIBITS G-H; CERTIFICATE OF SERVICE HEARING: Date: April 15, 2015 Time: 9:00 a.m. Judge: The Honorable Karen T. Nakasone No Trial Date

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DETERMINATION AND ISSUANCE OF A STAY FILED 3/24/15

Plaintiff ASSOCIATION OF OWNERS OF KALELE KAI ("ASSOCIATION") hereby submits its Reply in support of its Motion for Determination and Issuance of a Stay filed herein on March 24, 2015 ("Motion"), and in response to Defendant HITOSHI YOSHIKAWA's ("YOSHIKAWA") Opposition to the Motion filed March 24, 2015.

For the following reasons, and those set forth in the Motion, insofar as the Opposition lacks merit and the Motion should be GRANTED.

A. No Dispute That Judgment Has Not Been Entered

The Motion's basic premise remains uncontroverted by YOSHIKAWA: "At no time has judgment been entered in connection with this dispute, pursuant to HRS §636-4 or otherwise." Mem. in Support of Motion at 2.

As YOSHIKAWA's Opposition fails to dispute or even address this dispositive issue, granting of the Motion is clearly warranted on this basis alone.

B. No Dispute That Judgment Cannot Be Entered

The Motion states in part:

> Only a non-binding arbitration award has been issued, which has been timely appealed by filing of the present trial de novo action before in this Court.
>
> Nor can judgment be issued under HRS §514B-162(f) where, as here, trial de novo has been timely demanded, and this action for trial de novo timely ensued.

Mem. in Support of Motion at 2-3.

YOSHIKAWA's Opposition fails to dispute each of the following points:

1. Only a *non-binding* arbitration award has been issued;

2. The non-binding award has been timely appealed by filing of the present trial de novo action before in this Court; **and**

3. No judgment can be entered pursuant to HRS §514B-162(f) where, as here, trial de novo has been timely demanded, and this action for trial de novo timely ensued.[1]

The Motion should be granted for these reasons.

C. The Opposition Fails to Address HRS § 514B-163(a)

The Motion further states that "The submission of any dispute to an arbitration under section 514B-162 **shall in no way limit or abridge the right of any party to a trial de novo.**" HRS § 514B-163(a) (emphasis added). Mem. in Support of Motion at 3.

YOSHIKAWA's Opposition fails to address HRS §514B-163(a).[2]

D. The Opposition Fails to Address HRS § 636-4

The Motion quotes and discusses HRS § 636-4 which recites post-judgment procedures as an example of statutory requirements or justification to invoke or satisfy to engage in collections measures such as the garnishment threatened by YOSHIKAWA. Mem. in Support of Motion at 4.

YOSHIKAWA's Opposition fails to cite or address HRS § 636-4.

E. No Authority Cited in Support of the Threat to Garnish Account

YOSHIKAWA's Opposition cites no authority to support his counsel's threats "to initiate garnishment proceedings of the Association's account" (quoting Exhibit C to the Motion).

---

[1] "**Trial de novo**" means, "A new trial on the entire case - that is, on both questions of fact and issues of law - conducted as if there had been no trial in the first instance." Black's Law Dictionary 528 (10th ed. 2014).

[2] The Opposition does make a passing reference to "HRS 514-163" in a footnote, but only with respect to fees that may be awarded prospectively incident to the trial de novo. See Opp. at 4, footnote 1. That contention has no relevance to YOSHIKAWA's threat to garnish.

Indeed, the terms "garnish" or "garnishment" do not appear in the Opposition.

Given that YOSHIKAWA does not attempt to justify his threat to garnish, the ASSOCIATION submits that for this reason alone the Motion, filed to provide protection from the threats, should be granted.[3]

F. HRS § 514B-162(e) Does Not Justify Garnishment, Collection, or a Judgment

"Our primary duty in interpreting and applying statutes is to ascertain the intention of the legislature and to implement that intention to the fullest degree." Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 420-21 (1982) (citations, brackets, quotation marks omitted). "Statutory provisions must be read in the context of the entire statute and interpreted in a manner consistent with the purposes of the statute." Keaulii v. Simpson, 74 Haw. 417, 421 (1993) (citation omitted). "A court is not obligated to construe statutes literally if to do so would bring about absurd results." Id.

HRS §514B-162 provides in its entirety (emphasis added):

> (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and of chapter 658A; provided that the rules of the arbitration service conducting the arbitration shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658A, chapter 658A shall prevail; and provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall

[3] In one of many instances of misstatements throughout the Opposition, opposing counsel's threat to garnish (Exhibit C) is characterized as "**simply and politely**" making a request for payment. Opp. at 6. More recently, in a letter dated March 19, 2014, opposing counsel stated in part (bold font in letter), "we will be asserting counterclaims not only against the Association, but against individual board members." [...] **If this letter is ignored by the Board majority, we again respectfully urge all dissenting Board members to please let us know of their opposition so they are not sued for a decision they did not make or agree with.**" Declaration of Counsel, ¶4.

permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.

(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:

(1) The real estate commission;

(2) The mortgagee of a mortgage of record;

(3) The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person in those capacities, shall be subject to the provisions of subsection (a);

(4) Actions seeking equitable relief involving threatened property damage or the health or safety of unit owners or any other person;

(5) Actions to collect assessments which are liens or subject to foreclosure; provided that a unit owner who pays the full amount of an assessment and fulfills the requirements of section 514B-146 shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment;

(6) Personal injury claims;

(7) Actions for amounts in excess of $2,500 against an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board would be unavailable because action by arbitration was pursued; or

(8) Any other cases which are determined, as provided in subsection (c), to be unsuitable for disposition by arbitration.

(c) At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration.

In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider:

(1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;

(2) Problems referred to the court where court regulated discovery is necessary;

(3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;

(4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under this section; and

(5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed $200.

(d) In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under subsection (b)(7), any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.

(e) **Notwithstanding any provision in this chapter to the contrary, the declaration, or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses, and legal fees shall be binding upon all parties.**

(f) The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. **The court shall grant the order confirming the award** pursuant to section 658A-22, **unless** the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or **a trial de novo is demanded under subsection (h),**[4] or the award is successfully appealed under subsection (h). The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.

(g) Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.

(h) Any party to an arbitration under this section may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658A. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.

There is no provision under this or any other statute, including HRS § 514B-162(e), which justifies garnishment, collection, or an entry of judgment based upon a non-binding award which is the subject of a timely-demanded and timely-filed complaint for trial de novo.

---

[4] The reference to HRS §514B-162 "subsection (h)" is an obvious drafting error intended to mean the statute that immediately follows, HRS §514B-163. HRS §514B-162(h) does not contain any trial de novo provisions. Rather the de novo provisions are in the succeeding statute, HRS §514B-163. In any event, the Association acted in accordance with the de novo provisions, did so timely, and the Opposition does not dispute otherwise.

While HRS § 514B-162(e) uses the terms "sole discretion" and "binding," at most this can be read as a ruling to be considered after the de novo action is concluded, and judgment is entered.

The legislative history makes this even more apparent.[5] The HRS Chapter 514B arbitration provisions originated from predecessor statutes under HRS Chapter 514A, specifically, HRS §§ 514A-121-127[6] which were promulgated by Act 107. 1984 Haw. Sess. Laws Act 107, § 2 at 199-203 (S.B. No. 1815-84). In review of the Standing Committee Reports relating to Act 107 it states:

> The purpose of this bill is to amend Chapter 514A by adding a section which would permit arbitration of any dispute relating to the interpretation, application or enforcement of Chapter 514A.
>
> Your Committee amended the bill by adding new sections to Chapter 514A, Hawaii Revised Statutes, which provide procedures for the proposed arbitration process.
>
> It is the intent of the bill, as amended to expedite the disposition of certain disputes and, at the same time, **protect the constitutional right of any party to due process** and trial by a jury.
>
> **Specifically, the bill, as amended, includes sections which:**
>
> 1. Allow for review to determine whether a dispute is suitable for arbitration.
> 2. Define those disputes which were not suitable for disposition by arbitration.
> 3. Provide general criteria as to what disputes are suitable for disposition by arbitration.
> 4. Allow declaratory relief against the insurer for the association of apartment owners to determine whether insurance coverage is available for arbitration.

---

[5] Regarding legislative intent, the Supreme Court of the Hawaii has stated:

> Although the intention of the legislature is to be obtained primarily from the language of the statute itself, we have rejected an approach to statutory construction which limits us to the words of a statute, for when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination. Thus, the plain language rule of statutory construction ... does not preclude an examination of sources other than the language of the statute itself even when the language appears clear upon perfunctory review. Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

Keliipuleole v. Wilson, 85 Hawaii 217, 221 (1997) (citations and brackets omitted).

[6] In 2004, the Legislature enacted HRS Chapter 514B to recodify the Condominium Property Regime chapter, HRS Chapter 514A. 2004 Haw. Sess. Laws Act 164, at 755.

5. **Allow for the award of costs and fees by the arbitrator.**
6. Provide procedures by which arbitration awards are made and by which such award can be confirmed.
7. Allow a party, at his own expense, to obtain findings of fact and conclusions of law by the arbitrator.
8. **Allow for appeal of the arbitration award.**

Exhibit G (S. Stand. Comm. S.B. No. 1815-84, 1984 Senate Journal, at 1093-4) (emphasis added).

This legislative history expresses an intent to only provide authority for an arbitrator to make an award of attorneys' fees and costs. Id. Such authority, when read in the full context of the arbitration statutes, contemplates the reviewable nature of the arbitrator's award by providing for a de novo process and give deference to a party's due process rights by virtue of the trial de novo.[7]

It would be improper for a prevailing party in a non-binding arbitration to enforce an award of attorneys' fees and costs while the award itself is the subject of a de novo proceeding.

---

[7] In State v. Nakanelua, 2015 WL 260712, at *24, n. 19 (Haw. 2015), attached hereto as Exhibit H, the Hawaii Supreme Court noted:

Cases in other jurisdictions have remarked on the significant difference between voluntary agreements to arbitrate and statutorily mandated arbitration. For example, in Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell, 118 N.M. 470, 882 P.2d 511, 516 (1994), the New Mexico Supreme Court stated, "Normally, arbitration is a process in which parties voluntarily contract to select an impartial third person—an arbitrator—to whom they refer their dispute for a decision based on evidence and arguments before the arbitration tribunal, in order to obtain a speedy and inexpensive final resolution of the dispute.... When arbitration is statutorily mandated as the sole method for resolution of a particular dispute, the arbitration is not consensual even if a provision for such arbitration is incorporated into a contract. Arbitration required by statute is compulsory; arbitration freely entered into by contract is voluntary." *Id.* at 517. As the New York Court of Appeals has observed,

> the essence of arbitration, as traditionally used and understood, is that it be voluntary and on consent. The introduction of compulsion to submit to this informal tribunal is to change its essence. It is very easy to transfer, quite fallaciously, notions and principles applicable to voluntary arbitration to "compulsory" arbitration, because, by doubtful logic but irresistible usage, both systems carry the descriptive noun "arbitration" in their names. The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions or deprivations, if compelled by government, must accord with procedural and substantive due process.

Mount St. Mary's Hosp. of Niagara Falls v. Catherwood, 26 N.Y.2d 493, 311 N.Y.S.2d 863, 260 N.E.2d 508, 511 (1970) (citation omitted); see Harrell, 882 P.2d 511, 517 (holding that "[defendant's] putative agreement to arbitrate was in reality a nonconsensual submission to a statutorily imposed requirement of mandatory arbitration").

The intent of the provision provided only a means in which an award of attorneys' fees and costs would be binding upon the parties. Where an appeal or trial de novo is not made, the award for fees and costs would become binding upon the parties. That is not the case here. Here, pursuant to HRS §514B-163, and its legislative intent, the ASSOCIATION timely executed its rights to this de novo action. Threats of seeking collection of any portion of an unconfirmed and non-binding arbitration award are unwarranted and should be stayed pursuant to the Court's inherent and statutory powers.

G. It Would Be Improper to Confirm an Award Resulting from a Non-Binding Proceeding Where the Award Is the Subject of a Valid and Timely-Filed De Novo Proceeding

"[N]o award can be considered final, despite the intentions of the parties, until court confirmation of the award has been obtained." In re Arbitration of Bd. of Directors of Assoc. of Apartment Owners of Tropicana Manor, 73 Haw. 201, 209 (1992).

Here, YOSHIKAWA and his counsel threaten immediate collection activity yet have not and cannot obtain confirmation of the non-binding arbitration award pursuant to HRS §514B-162, because confirmation became unavailable upon the ASSOCIATION's timely demand for trial de novo and timely filed Complaint for Trial De Novo and First Amended Complaint for Trial De Novo. Such threats lack merit, should be ruled improper, and be stayed by this Court.

H. Conclusion

The Association respectfully renews its request that the Motion be GRANTED..