2005 SEP 29 AM 9:53
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STATE OF HAWAII

NO. 26591

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

JAYME WOODALL, Plaintiff-Appellant, v.
LUISA SACHAROV, et al., Defendants-Appellees, and
LUISA SACHAROV, et al., Third Party Plaintiffs, v.
DONNA L. HERBST, et al., Third Party Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 03-1-0214)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Plaintiff-Appellant Jayme Woodall (Plaintiff or Woodall) appeals from the May 20, 2004 Final Judgment confirming the April 4, 2004 Binding Arbitration Decision and Award issued by Arbitrator Brian J. De Lima (Arbitrator De Lima).[1]

Woodall contends that (1) Arbitrator De Lima exceeded his powers when, without first deciding whether either or both parties had breached the contract, he decided that "[t]here was no prevailing party in the binding arbitration proceeding"; and (2) the court reversibly erred in failing to correct Arbitrator De Lima's acts in excess of his powers. We disagree and affirm.

BACKGROUND

Defendants-Appellees Luisa Sacharov and Luisa Enterprises Unlimited, Inc. (Defendant, Defendants, or Sacharov) agreed to sell a Hilo restaurant to Woodall. Alleging cause to do so, Sacharov cancelled the contract. After Woodall sued Sacharov and Sacharov filed a third-party claim against the

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[1] Judge Greg K. Nakamura presided.

realtor, Sacharov and Woodall settled by renegotiating the sale. The terms of the renegotiated sale were placed on the record at a December 19, 2003 hearing. Counsel for Sacharov stated those terms as follows:

> The agreement in essence is that my client [Sacharov] will sell her restaurant known as the Hawaiian Jungle Mexican South American Cuisine, to [Woodall] for the price of $76,500. That sale does not include the name of the business. She is specifically retaining that.
>
> It also does not include a puppet show item that is in the restaurant currently, a counter where the cash register sits. There was a religious altar I believe in there as well.
>
> And she will be leaving the signs there but they're going to be covered. And the new name that [Woodall] chooses to operate under will be placed there. All other items will remain . . . .
>
> . . . .
>
> And she's also retaining one computer . . . that was possibly going to be a part of the original transaction.
>
> In exchange for the payment of that . . . the Parties have agreed that there are other contingencies. Namely, a final walk-through by [Woodall] on or before December 30th of this year to make sure that other contingencies that the Parties have previously agreed upon are taken care of. In other words, the inventory of food and other items. And any other matters that need to be resolved between the Parties can be done at that final walk-through.

Alleging cause to do so, Woodall refused to close the sale. Woodall and Sacharov then agreed to complete the renegotiated sale but to resolve their breach-of-renegotiated-sale dispute by binding arbitration.

On January 27, 2004, Woodall assigned his rights and obligations in the lawsuit to Joseph Hamodey (Hamodey) effective December 19, 2003. The record does not disclose why Hamodey did not substitute himself in place of Woodall as the plaintiff in this case or how Woodall remained a party-in-interest.

In the "Agreement for the Purchase and Sale of Business Assets and for Dispute Resolution; Exhibit A", effective January 23, 2004, Sacharov, as Seller, and Hamodey, as Buyer, agreed in relevant part as follows:

> D. A dispute has arisen between Seller and Buyer concerning their respective performances under the settlement agreement reached December 19, 2003 . . . . Seller claims damages against Buyer and Buyer claims damages against Seller for respective alleged breaches of the settlement agreement reached December 19, 2003 . . . .
>
> NOW THEREFORE, in consideration of the above recitals and mutual promises herein, and other good and valuable consideration, receipt of which is hereby acknowledged, Buyer and Seller agree as follows:
>
> 1. Seller and Buyer agree that the December 19, 2003 settlement between the parties and placed on the record in the lawsuit is valid and enforceable.
>
> 2. The parties agree to resolve the dispute concerning their respective performances under the settlement agreement reached December 19, 2003 . . . by binding Arbitration. . . . The Arbitrator's Decision and Award, if any, will be incorporated in the form of a judgment from which no appeal may be taken.
>
> 3. Fees. . . . The Master's and Arbitrator's fees, however, will be paid one half by Seller and one half by Buyer unless one party is determined by the Arbitrator to be a prevailing party. Upon issuance of the Arbitrator's decision and Award, if any, the prevailing party is entitled to receive payment from the non-prevailing party in reimbursement of the prevailing party's share of the Master's fees and Arbitrator's fees. Upon issuance of the Arbitrator's decision and Award, if any, the prevailing party is entitled to receive payment from the non-prevailing party in reimbursement of the prevailing party's reasonable attorney's fees incurred from December 31, 2003 forward in the prevailing party's effort to enforce the settlement agreement and recover damages for breach thereof. The Arbitrator is authorized to determine the fees and costs of the prevailing party pursuant to declarations that are to be submitted, which is also to be included in the decision, award, and judgment.
>
> "Prevailing party" means a party who obtains a Decision from the Arbitrator that such party proved: (1) such party was not in breach of the December 19, 2003 settlement agreement; and (2) an opposing party did breach the December 19, 2003 settlement agreement.

In the January 29, 2004 "Stipulation and Order for Submission of Settlement Dispute to Binding Arbitration, for Deposit of Funds with the Clerk of the Court, and for

Distribution of Funds by the Clerk", the court ordered, in relevant part, as follows:

> IT IS HEREBY ORDERED that the Stipulation is granted.
>
> [Woodall] and [Sacharov][2] shall submit their pending dispute regarding the settlement agreement December 19, 2003 and enforcement thereof to binding arbitration. . . .
>
> The parties further stipulate that the amount of $23,000.00 will be withheld from the purchase price of the sale of the restaurant assets described in the December 19, 2003 settlement. The withheld sum will be maintained by the Clerk of the Court and distributed as follows:
>
> 1. In an amount approved by counsel for the parties to Master Ernest Medeiros for his services in securing and performing an inventory of the premises at 110 Kalakaua Street;
>
> 2. The remaining balance shall be disbursed according to the Decision and Award of the Arbitrator; and,
>
> 3. The decision and award of the Arbitrator shall be reduced to the form of a final judgment for entry by the Court and from which no appeal may be taken.

The arbitration hearing occurred on March 24, 2004. On April 4, 2004, Arbitrator De Lima decided in writing, in relevant part, that

> [t]he parties have expended considerable resources and energy in fashioning an agreement. However, in this matter, both attorneys were not involved in the initial sale, and numerous matters required interpretation which resulted in some ambiguity and misunderstanding. Therefore, the arbitration decision FINDS THAT THERE IS NO PREVAILING PARTY.
>
> The following is awarded for those matters that the arbitrator finds need to be resolved:
>
> Plaintiff is entitled to recover the costs for replacing the True Refrigerator in the amount of $4,462. Plaintiff is entitled to recover costs of food and non-food inventory items in the amount of $3,000. Plaintiff is entitled to recover costs for all other claims in the amount of $2,538.

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[2] Attorney Steven D. Strauss (Attorney Strauss) represented both Plaintiff-Appellant Jayme Woodall (Woodall) and Joseph Hamodey (Hamodey). On January 27, 2004, effective December 19, 2003, Woodall assigned his rights and obligations in the lawsuit to Hamodey. The agreement effective January 23, 2004, was signed by Defendant-Appellee and Third-Party Plaintiff Luisa Sacharov (Sacharov), Hamodey, and their counsel. The January 29, 2004 stipulation was signed by counsel for Sacharov and Woodall. The January 29, 2004 order approving and ordering the stipulation states that the stipulation was between Sacharov and Woodall. The opening brief was signed by Attorney Strauss as attorney for Woodall.

> . . . .
>
> Plaintiff and Defendant are to divide the costs of Master and Arbitrator ($2,500) based on no prevailing party[.]

Hawaii Revised Statutes (HRS) § 658A-23 (a)(4) (Supp. 2004) states, "(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if . . . . (4) An arbitrator exceeded the arbitrator's powers[.]"

On April 14, 2004, counsel for Woodall/Hamodey wrote a letter to Arbitrator De Lima which stated, in relevant part:

> I consider that your decision exceeds your authority in that it does not follow the jurisdiction conferred upon you by the parties and the agreed definition of prevailing party. Based on your award, it is clear that the Defendants were found to be in breach and Plaintiff was not. Accordingly, consistent with the agreement of the parties to submit this dispute to arbitration, you must determine that Plaintiff Woodall is the prevailing party and award attorney's fees to Plaintiff Woodall and allocate sole responsibility for arbitrator's and Master's fees to Defendants.
>
> I look forward to receiving your amended decision[.]

On April 20, 2004, counsel for Sacharov wrote a letter to Arbitrator De Lima stating reasons why the request for an amended decision should be denied. On April 22, 2004, pursuant to HRS § 658-22, Sacharov moved for confirmation of the award.

On April 27, 2004, in a letter to counsel for both parties, Arbitrator De Lima stated, "I believe that the decision rendered complied with the agreement of the parties and Order of the Court and therefore, I stand by the previously rendered decision."

On May 4, 2004, pursuant to HRS § 658A-23, Woodall moved for an order vacating the award. At a May 4, 2004 court

hearing, counsel for Woodall stated, in relevant part:

> First of all, [counsel for Defendant] says the law does not allow a -- a[n] arbitration award to be vacated by the court. Well that's not the case. We have a statute that talks about vacation of arbitration awards.
>
> Second, this is not about the merits. The merits of the decision, sure, we're unhappy that the arbitrator said that's a junk-a-lunk piano that you -- you replaced there, Ms. Sacharov, you shouldn't have done that, but gave us no damages for that.
>
> . . . .
>
> So the heart of this, Judge, is that we hired [Arbitrator] De Lima to do a job and we gave him instructions how to do it and he didn't do it. . . .
>
> We hired him to do two things: To find out who breached the agreement and to award damages. And if he found that one party breached and the other party did not that party is the prevailing party. That's what we defined. That's what his instructions were. It's clear from . . . [Arbitrator] De Lima's decision that he didn't do that.
>
> First of all his decision doesn't even mention breach. There are four possible outcomes, according to the instructions that we gave [Arbitrator] De Lima that he could have reached. One is [Woodall] proved damages. That should be breached but let's substitute the word damages for breach because that's what [Arbitrator] De Lima did.
>
> Defendant proved damages and result. It's clear from his decision that the plaintiff proved damages. It's clear from his decision that the defendant did not prove damages.
>
> The other alternatives are that plaintiffs proves [sic] damages and the defendant proved damages. Neither party proves damages. Or the defendant proves damages and the plaintiff does not.
>
> This is the only outcome that allows for prevailing party in plaintiff. This is the only outcome that allows for a prevailing party in defendant. This is exactly what [Arbitrator] De Lima found. He awarded damages to plaintiff. He awarded none to defendant. If defendant had proved breach defendant would have been entitled to damages. Plaintiff proved damages so he proved breach. That's it. That's all there is.
>
> By taking a different tack, . . . , [Arbitrator] De Lima strayed from his job which was to find damages and breach under the December 19th settlement agreement. That was his only job. Instead he applied equitable factors I guess. We did not allow him to do that. We did not contract for him to do that. We dealt with contract principles only, breach, damages. This is what he was suppose[d] to do.
>
> Implicitly this is what he found . . . from the decision that he rendered. Plaintiff proved breach, defendant did not. He had to find us the prevailing party. It wasn't a mistake of law. It wasn't a mistake of fact. It was an error in instructions by exceeding his power to apply some other standard than what we told

> him to do. So . . . the law recognizes even under the new arbitration statute that . . . when a[n] arbitrator exceeds his power, exceeds his authority, which again according to the case law is determined by the agreement of the parties, particularly when it's in writing here, that award must be vacated.
>
> What do we do? We send it back to [Arbitrator] De Lima with instructions, find the prevailing party in plaintiff and determine what the amount of reasonable attorney's fees should be. That should be the order of the court.

On May 20, 2004, the court entered the "Order <u>Granting</u> Defendants' Motion for (1) Order Confirming Binding Arbitration Decision and Award, (2) Entry of Final, Non-appealable Judgment, (3) Immediate Release of Funds Currently Held by the Court, and (4) Assessment of Fees and Costs Against Plaintiff Filed April 22, 2004, <u>and</u> Order <u>Denying</u> Plaintiff Jayme Woodall's Motion to Vacate Arbitration Decision and Award Filed 5/4/04". (Emphases in original.)

On May 20, 2004, the court entered the Final Judgment stating, in relevant part, as follows:

> [T]he Court hereby issues this FINAL JUDGMENT as follows:
>
> 1. The April 4, 2004 Binding Arbitration Decision and Award issued by Arbitrator Brian J. De Lima is hereby adopted by the Court and incorporated in this Final Judgment . . . . Accordingly, the Court rules with respect to said binding arbitration as follows:
>
> A. There was no prevailing party in the binding arbitration proceeding:
>
> B. Plaintiff is entitled to recover the costs for replacing the True Refrigerator in the amount of $4,462.00, the costs of food and non-food inventory items in the amount of $3,000.00, and the costs for all other claims in the amount of $2,538, for a total of $10,000.00. Plaintiff shall be paid for these costs from the $10,000.00 funds retained by Plaintiff . . . .
>
> C. Plaintiff and Defendant shall bear their own attorneys fees and costs incurred in the arbitration process and shall divide the costs of the Master ($100.00) and the Arbitrator ($2,500.00) based upon the Arbitrator's finding that there was no prevailing party.

> . . . .
>
> 4. [sic] No appeal may be taken from the above confirmed Arbitration Decision and Award pursuant to the January 29, 2004 Stipulation and Order . . . .
>
> 5. Pursuant to HRS Section 658A-25(c), Defendants are awarded their attorneys fees and costs in pursuing confirmation of the Arbitration Decision and Award and in responding to Plaintiff's objections thereto and Motion to Vacate said award in the amount of $1,967.51, and Defendants are hereby awarded a money judgment for said amount against Plaintiff and his assignee Joseph Hamodey.

(Emphasis in original.)

On May 25, 2004, Woodall filed a notice of appeal. This appeal was assigned to this court on February 1, 2005.

POINT OF ERROR

In relevant part, Woodall states his point of error as follows:

> The Third Circuit Court erred in failing to correct the Arbitrator's acts in excess of his powers. Despite the parties' expressed intentions and instructions to the Arbitrator to determine whether breach of the contract occurred and by whom, the Arbitrator made no determination concerning breach of contract. This determination, however, was the sum and substance of what the Arbitrator was charged to do.

DISCUSSION

We conclude that the "Agreement for the Purchase and Sale of Business Assets and for Dispute Resolution; Exhibit A" did not instruct "the Arbitrator to determine whether breach of the contract occurred and by whom[.]" It said (1) that the dispute was that "Seller claims damages against Buyer and Buyer claims damages against Seller for respective alleged breaches of the settlement agreement" and (2) that "[t]he parties agree to resolve the dispute . . . by binding Arbitration[.]" It stated what would happen if the arbitrator decided that one party did

breach the December 19, 2003 settlement agreement and the other party did not. However, under the agreement, the Arbitrator was not required to make those decisions.

Assuming, as argued by Woodall, the arbitrator was hired "to do two things: To find out who breached the agreement and to award damages. And if he found that one party breached and the other party did not that party is the prevailing party[,]" the information in the record is insufficient for this court to conclude that the arbitrator found that Sacharov did, and Woodall did not, breach the agreement. The record does not inform us of the details of the dispute. We do not know what Sacharov or Woodall sought, did not seek, or refused. The fact that the net result was that Sacharov was required to pay "the costs for replacing the True Refrigerator in the amount of $4,462.00, the costs of food and non-food inventory items in the amount of $3,000.00, and the costs for all other claims in the amount of $2,538, for a total of $10,000.00" does not prove that Woodall did not breach the agreement. For example, it could be that both Sacharov and Woodall breached the agreement but the value of Sacharov's breach was financially greater than the value of Woodall's breach and the arbitrator awarded the amount of the difference to Woodall.

Even if we concluded that the arbitrator (1) found that Sacharov did, and Woodall did not, breach the agreement and (2) erroneously decided that there was no prevailing party, this conclusion would not authorize this court to conclude that the

arbitrator "exceeded the arbitrator's powers[.]" One does not exceed one's powers when one fails to do what one is supposed to do.

CONCLUSION

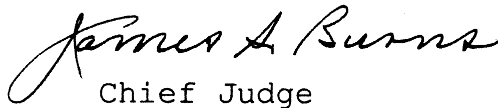
Accordingly, we affirm the May 20, 2004 Final Judgment confirming the April 4, 2004 Binding Arbitration Decision and Award issued by Arbitrator Brian J. De Lima.

DATED: Honolulu, Hawai'i, September 29, 2005.

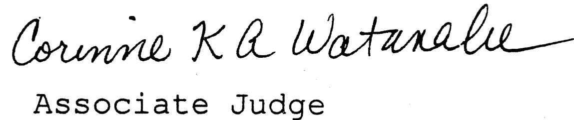
On the briefs:

Steven D. Strauss
for Plaintiff-Appellant.

Valta A. Cook and
Kris A. LaGuire
for Defendants-Appellees.



Chief Judge



Associate Judge

Associate Judge