IN THE SUPREME COURT OF GUAM

GUAM HOUSING AND URBAN RENEWAL AUTHORITY,
a public body corporate and politic,
Plaintiff,

vs.

PACIFIC SUPERIOR ENTERPRISES CORPORATION,
Defendant-Appellant,

and MANU MELWANI,
Defendant-Appellee.

Supreme Court Case No.: CVA03-002
Superior Court Case No.: CV0887-96

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on November 5, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; RICHARD H. BENSON, *Justice Pro Tempore*.

CARBULLIDO, C.J.:

[1] This is a partial appeal stemming from an interpleader action filed by Guam Housing and Urban Renewal Authority ("GHURA") against Defendant-Appellant Pacific Superior Enterprises Corporation ("PSEC") and Defendant-Appellee Manu Melwani, to determine the ownership rights to $411,978.15 owed by GHURA for the renovation and repair of GHURA's residential housing units. Melwani cross-claimed against PSEC for breach of contract. The interpleader action was resolved by summary judgment on November 19, 1999, but was appealed pursuant to Guam Rules of Civil Procedure Rule 54(b) certification and reversed by this court. While the issue of who was entitled to the interpled funds was on appeal, Melwani sought summary judgment on his cross-claim against PSEC for breach of contract. The trial court granted summary judgment in favor of Melwani and granted a second Rule 54(b) certification. This appeal followed.

[2] For the reasons set forth below, we hold that the trial court correctly granted Rule 54(b) certification, and further, we hold that at the time of entry of judgment, the trial court was not subject to a stay by the District Court of Guam ("the District Court").[1] However, we hold that the trial court erred in its interpretation of the June 10, 1994 Agreement between the parties with respect to the issue of arbitrability, and therefore, we reverse. Finally, we hold that the issue of whether PSEC waived its right to enforce arbitration is an issue to be considered by the arbitrator.

[1] In accordance with section 1424 of the Organic Act of Guam (48 U.S.C. § 1424) , the jurisdiction of the "District Court of Guam" ("the District Court") shall include "that of a bankruptcy court of the United States." The role of the District Court in the case at bar was through its jurisdiction, and while sitting as, a bankruptcy court pursuant to this provision. Therefore, future references to the District Court in this opinion is specifically to the court's jurisdiction as a bankruptcy court.

I.

[3] PSEC, a local contractor, successfully bid on four contracts with GHURA to repair and renovate several of GHURA's housing units. The approximate contract price for all four contracts was $1,517,804.00. PSEC was required to provide a performance or cash bond to guarantee the completion of the projects, or in the alternative, provide a cash escrow in the amount of 20% of the contract price. PSEC entered into an agreement with Melwani, who agreed to provide the sum of $303,564.00 (20% of the contract price) for the performance or cash bond, and in return, Melwani would receive $257,266.00 or 16.94% of the gross aggregate amount of the contracts.

[4] PSEC failed to complete each of the construction projects on the dates specified in the contracts. GHURA informed Melwani in October of 1994 that PSEC had abandoned the projects and was in default on the contracts, and further informed Melwani that if the construction was not completed, Melwani's bond would be forfeited. Melwani thereafter completed the construction projects.

[5] On various occasions between March 14, 1995 and May 12, 1995, both PSEC and Melwani independently claimed that they were entitled to all payments from GHURA due on the contracts. Each of the defendants thus demanded payment from GHURA.

[6] On June 16, 1996, GHURA filed a Complaint in Interpleader in the Superior Court of Guam against PSEC and Melwani, to determine the ownership rights to $411,978.15, the amount due on the construction contracts.

[7] On July 1, 1996, Melwani filed his Answer to the Complaint in Interpleader, claiming entitlement to the funds, and cross-claimed against PSEC for $257,266.00, alleging that he entered into a bonding agreement with PSEC for the subject contracts and that he was owed $257,266.00 as a premium for such services.

[8] On August 8, 1996, PSEC filed its Reply to Melwani's cross-claim and its Answer, Counter-claim

and Third Party Claim to the Complaint in Interpleader, alleging, *inter alia*, that Melwani was not its surety and claiming entitlement to all amounts alleged in the Complaint.

[9] On May 15, 1997, pursuant to an Order Granting Interpleader and Discharging the Plaintiff, GHURA deposited into the registry of the Superior Court the amount of $411,978.15. The order provided that Melwani and PSEC would litigate, between themselves, their respective claims to the deposited funds, and further that Melwani and PSEC were enjoined from instituting or maintaining any claim or action against GHURA for the interpleaded funds.

[10] On June 18, 1999, PSEC filed a motion for summary judgment in the interpleader action, which was granted by the trial court. After securing Rule 54(b) certification, the court's decision and order was appealed by Melwani. We reversed and remanded in *GHURA v. Pacific Superior*, 2001 Guam 8. The interpleader action is currently pending in the trial court.

[11] On December 15, 1999, Melwani filed the instant motion for summary judgment on his cross-claim for breach of contract. The trial court ruled in favor of Melwani on August 14, 2000. On December 12, 2000, the trial court also granted Melwani's motion for entry of final judgment as to his cross-claim, pursuant to Rule 54(b).

[12] On December 28, 2000, PSEC filed for bankruptcy in the District Court Bankruptcy Division. This bankruptcy case was dismissed on April 11, 2001.

[13] On April 23, 2001, Melwani filed certified copies of an Order and Judgment from the District Court, dismissing PSEC's bankruptcy case. Subsequently, on May 8, 2001, the trial court entered its Final Judgment on the cross-claim, pursuant to Rule 54(b). A motion for reconsideration was filed by PSEC on June 13, 2001. The motion was denied by the trial court on January 7, 2003. This appeal followed.

II.

[14] This court has jurisdiction over this appeal from a final judgment. Title 7 GCA § 3107 (1994), *as amended by* Guam Pub. L. 27-31 (Oct. 31, 2003); Title 7 GCA § 3108(a) (1994); 48 U.S.C. § 1424-1(a)(2). PSEC appeals from a grant of summary judgment. We review the grant of summary judgment *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶ 7.

III.

[15] PSEC appeals from the trial court's grant of summary judgment in favor of Melwani. Under Rule 56 of the Guam Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." A genuine issue of material fact exists if there is sufficient evidence establishing a factual dispute that requires resolution by a fact-finder. *Iizuka*, 1997 Guam 10 at ¶ 7. A fact is material when it "is relevant to an element of a claim or defense and [its] existence might affect the outcome of the suit." *Id.* (quoting *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors, Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)). "[T]he court must view the evidence and draw inferences in the light most favorable to the non movant." *Iizuka*, 1997 Guam 10 at ¶ 8. If the record shows no genuine dispute of material fact, then summary judgment is properly granted. *See Kim v. Hong*, 1997 Guam 11, ¶ 8.

[16] PSEC raises several points of error on appeal. First, PSEC argues that the trial court erred in granting Rule 54(b) certification as to Melwani's cross-claim. Second, PSEC asserts that the trial court erred in entering judgment while the proceedings were subject to a stay issued by the District Court in PSEC's bankruptcy action. Third, PSEC argues that the trial court erred in interpreting the arbitration provision in the June 10, 1994 contract and concluding that the instant dispute is not arbitrable. Fourth, PSEC argues that the trial court erred in finding that the June 10, 1994 contract was not unconscionable. Fifth, PSEC asserts that the trial court erred in granting summary judgment in Melwani's favor because the

contract fails for lack of consideration. Finally, PSEC argues that the trial court erred in granting summary judgment in Melwani's favor because he does not possess the appropriate surety business license and is barred from requesting judicial relief.

[17] Melwani opposes each of PSEC's contentions. He argues, first, that the trial court correctly held that Rule 54(b) certification is proper in this case because the interpleader action is not based on the contract between the parties, which was on appeal at the time of the 54(b) motion, in December of 2000. Second, he argues that the bankruptcy case was dismissed and therefore, the trial court properly entered final judgment in this case. Third, Melwani contends that the trial court properly interpreted the arbitration provision to exclude this dispute from arbitration and further, PSEC has waived its right to enforce his right to arbitrate. Fourth, Melwani argues that the money put at risk to secure PSEC's bids was consideration for the contract. Fifth, Melwani asserts that PSEC waived the affirmative defense with respect to the business license issue, or alternatively, Melwani claims that he has the appropriate business licenses for entering into the contract with PSEC. Melwani does not respond to PSEC's argument with respect to unconscionability.

A. Rule 54(b) Certification

[18] The first issue we address is whether the trial court erred in entering final judgment as to Melwani's cross-claim, pursuant to Rule 54(b) of the Guam Rules of Civil Procedure, while the interpleader action is pending. Specifically, PSEC argues that the trial court erred in entering final judgment as to Melwani's cross-claim, pursuant to Rule 54(b), because the interpleader status is based upon the contract between Melwani and PSEC and the interpleader action is pending in the trial court. Melwani asserts that because the interpleader action is not based on the contract between PSEC and Melwani, the court properly entered final judgment on his cross-claim. We agree.

[19] A trial court's Rule 54(b) certification as to one or more but fewer than all claims is to be upheld

absent abuse of discretion. *Davis v. Fendler*, 650 F.2d 1154 (9th Cir. 1981). The "issuance of a 54(b) order is a fairly routine act that is reversed only in the rarest instances." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir. 2002). Rule 54(b) states in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one ore more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay, and upon express direction for the entry of judgment.

Guam R. Civ. P. 54 (b).

[20] The above rule finds its source in Rule 54 of the Federal Rules of Civil Procedure. "To satisfy the requirements of Rule 54(b) . . . the claim adjudicated must be a 'claim for relief' separable from and independent of the remaining claims in the case." *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2nd Cir. 1978). Entry of final judgment pursuant to Rule 54(b) in a case involving multiple parties and multiple claims is reserved for cases where the costs and risks of multiple proceedings and the policy with respect to judicial efficiency are outweighed by the need for an "early and separate judgment as to some claims or parties." *See Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981).

[21] The claim which has been certified by the trial court as final is Melwani's cross-claim against PSEC for breach of contract. This court previously held that Melwani's claim for the $257,000.00 is not related to the issue of entitlement to the interpled funds. *Pacific Superior*, 2001 Guam 8 at ¶ 19. Faced with a second 54(b) request, the trial court stated its reasons for directing entry of final judgment as to Melwani's cross-claim:

> The Court finds that the contract claim for two hundred and fifty-seven thousand dollars ($257,000) and whether Melwani was entitled to recover that amount is not inextricably intertwined with the [remaining] claims in this case. The contract claim under which the Court granted summary judgment in favor of Melwani has no bearing on whether PSEC received any credit for the encroachment bond, any deception and/or conversion. Moreover, PSEC's claim involving its inability to make payments on its own taxes sound in tort, and likewise, has no bearing on whether Melwani is entitled to recover under its contract. Therefore, the Court finds that the determination of the remaining issues will not moot or duplicate the determinations already made in this case. Albeit that the policy disfavoring piecemeal litigations is a major concern of this Court, the particular issues in this case are unique and are not as inter-related as they first appear. Moreover, the Court finds that the appellate Court will not have to address similar factual or legal issues in the judgments entered by this Court. The issue of interpleader and the interpretation of contract are two legally distinct issues, and have no bearing on whether a party will be liable for conversion, fraud and the like. The Court also finds that there is a concern of whether PSEC would be able to pay the judgment if the Court delays the entry of judgment until all issues in this case have been resolved. Therefore, the Court finds that there is no just reason for delay and grants Melwani's motion for entry of judgment.

Defendant-Appellant's Excerpts of Record ("ER"), tab 9 (Decision and Order, Dec. 12, 2000). The trial court therefore properly considered the costs and risks of multiple proceedings and the policy with respect to judicial efficiency and further determined that they were outweighed by the need for an early and separate judgment as to Melwani's cross-claims, particularly in light of the fact that the entitlement to interpled funds was still on appeal at the time that the 54(b) certification was granted on December 12, 2000. *See Morrison-Knudsen Co.*, 655 F.2d at 965. Further, the trial court appropriately found that Melwani's cross-claim based on breach of contract is separate from, and independent of, the issues of fraud, conversion, and similar issues raised in the interpleader action.

[22] This court in a prior appeal involving the main interpleader action noted that "Melwani's cross-claim against PSEC for the payment of a premium for the bonding agreement does not implicate the interpleaded funds." *GHURA v. Pacific Superior*, 2001 Guam 8 at ¶ 31. Because Melwani's cross-claim for breach of contract is separable from and independent of the issues raised in the interpleader action, we hold that the trial court properly exercised its discretion in finding that there was no just reason for delay and in directing entry of final judgment as to Melwani's cross-claim against PSEC. *See Brunswick Corp.*, 582

F.2d at 182 (recognizing that a Rule 54(b) certification requires that "the claim adjudicated must be a claim for relief separable from and independent of remaining claims in the case").

[23] Accordingly, we find no abuse of discretion with respect to the trial court's entry of judgment pursuant to Rule 54(b).

B. The Bankruptcy Action

[24] The next issue we consider is whether the trial court was subject to a stay issued by the District Court action when it entered final judgment with respect to Melwani's cross-claim.

[25] On April 11, 2001, the District Court dismissed PSEC's bankruptcy case. *See* ER, tab 11 (Order Dismissing Case and Barring Refiling for 180 Days). On April 12, 2001, a Judgment was entered "in accordance with Order filed April 11, 2001." ER, tab 11 (Judgment). The caption for the Judgment contained captions for both the bankruptcy case (Bankruptcy Case No. 00-00156) and the adversary case (Adversary Case No. 01-00003). ER, tab 11 (Judgment).

[26] On May 8, 2001, subsequent to the District Court's entry of judgment, the trial court entered final judgment with respect to Melwani's cross-claim for breach of contract.

[27] We reject PSEC's argument that the trial court erred in entering final judgment with respect to Melwani's cross-claim. The bankruptcy case was dismissed by the District Court prior to the trial court's entry of judgment in the instant case, and therefore, was no longer subject to a stay. We find no error in this respect.

C. Arbitration

[28] We next address whether the trial court erred in interpreting the arbitration provision in the June 10, 1994 contract between PSEC and Melwani. PSEC argues that the trial court erred in finding that the instant dispute is not subject to arbitration provision found in the June 10, 1994 contract. Melwani disagrees and argues that the trial court properly interpreted the arbitration provision to exclude the instant

dispute from arbitration.

[29] We review issues of contract interpretation *de novo. See Apana v. Rosario,* 2000 Guam 7, ¶ 9. Similarly, a trial court's decision regarding the scope of an arbitration clause is also reviewed *de novo. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218 (2nd Cir. 2001).

[30] "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Gov't of Guam v. Pacificare Health Ins. Co.*, 2004 Guam 17, ¶ 26 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995)). In interpreting a written contract, "the intent of the parties is ascertained from the writing alone." *Ronquillo v. Korea Auto., Fire & Marine Ins. Co.*, 2001 Guam 25, ¶ 10; *see also Camacho v. Camacho,* 1997 Guam 5, ¶ 33 ("[I]n interpreting a clause of a contract to determine the intent of the contracting parties, whenever possible, the express language of the contract should control."); Title 18 GCA § 87105 (1994) ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ."); Title 18 GCA § 87104 (1994) ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").

[31] We recently recognized in *Government of Guam v. Pacificare Health Insurance Co.*, 2004 Guam 17, that "several presumptions apply when interpreting a contract containing an agreement to arbitrate." *Id.* at ¶ 26. The first of these presumptions underscores the strong policy favoring arbitration, and states that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (quoting *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7th Cir. 1999)); *see also Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 14 ("[A]ny doubt as to the arbitrator's jurisdiction is resolved in favor of arbitration."). In other words, "ambiguities regarding the question of '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration

agreement' are construed in favor of arbitration." *Pacificare*, 2004 Guam 17 at ¶ 26 (quoting *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924 (determining that before concluding that the parties intended that an issue not be arbitrated, the intent to exclude such issues from arbitration must be clear)). For this reason, "a court may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Kiefer Specialty Flooring, Inc.*, 174 F.3d at 909 (quoting *United States Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1353 (1960)).

[32] In contrast to the first presumption, the second presumption, which must be applied in interpreting a contract's arbitration provision, favors judicial determination with respect to the forum for determining the issue of arbitrability. In particular, "[t]he question of whether a claim or dispute is arbitrable is generally considered one for the courts, and not the arbitrators, unless the parties clearly and unmistakably reserved the question for the arbitrators." *Pacificare*, 2004 Guam 17 at ¶ 27. Accordingly, "[c]ourts may conduct an independent determination of the question of arbitrability if the parties have not clearly agreed that the question of arbitrability is to be determined by the arbitrator." *Id.*

[33] In this case, the relevant arbitration provisions are found in sections 2 and 8 of the June 10, 1994 contract between the parties, which state:

> 2. Construction Projects/Profits. With the support of bond money put up by MPM, PSEC has won bids for five construction projects as set forth at column one of Exhibit "A" attached hereto and incorporated herein by reference. Set forth at columns one and two are the minimum and maximum profits for each of the five construction projects that *PSEC agrees to pay to MPM immediately following receipt of payment for completion of said projects*. "Immediately" shall mean on or before the close of the following work day, and work days exclude Saturdays and Sundays. Prior to PSEC making payment to MPM for his share of profits he shall first consult with MPM to make sure both parties agree. If there is a disagreement on the mathematical computation, then both parties agree that the Ernst & Young accounting firm shall prepare calculations which both parties agree shall be final and binding on them. Any fees incurred with retaining the services of Ernst & Young shall be borne solely by MPM. *If there are any types of disagreement, independent of mathematical computation, both parties agree to submit their disputes to arbitration as set forth at Section 8 below*.
>
> . . . .
>
> 8. Arbitration. Arbitration, if called for pursuant to Section 2 above, shall be made in accordance with the rules and regulations of the American Arbitration Association ("AAA") pertaining to arbitration, which laws, rules, procedures and regulations are incorporated in this Agreement by reference, and the parties expressly agree to such manner of arbitration, and to abide by each and every provision of an award rendered pursuant to such arbitration.

ER, tab 3 (Decl. of Manu Melwani) (emphases added).

[34] The trial court, interpreting the above contract provisions, concluded that "the parties only intended to submit questions of profit to arbitration, and nothing else." ER, tab 8 (Decision and Order, August 14, 2000). Specifically, the trial court found: "Because the minimum profit claimed by PSEC is a profit issue, the Court finds that it is not subject to arbitration." ER, tab 8 (Decision and Order, August 14, 2000). Our conclusion differs. Resolution of a profit issue would have proceeded to Ernst & Young, while the resolution of any other issue would have proceeded to arbitration, under section 2 of the June 10, 1994 contract.

[35] With the view that contracts containing an arbitration provision must be construed in favor of arbitration, we find that the plain language of the contract indicates that the only dispute which is expressly *excluded* from arbitration is a dispute as to mathematical computations. According to the contract, "any types of disagreement" outside of this exclusion for mathematical computation must proceed to arbitration.

Although the arbitration clause appears within section 2, which is headed "Construction Projects/Profits," this same section delineates PSEC's obligations with respect to Melwani's payment of profits. The dispute brought forth by Melwani's cross-claim is whether Melwani is entitled to his minimum profit as damages for a breach of contract action. Such dispute is not merely a question of mathematical computation, and therefore, under the contract provisions, must proceed to arbitration.

[36] Accordingly, because a court may not deny PSEC's request to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," we hold that the trial court erred in its determination of arbitrability. *Kiefer Specialty Flooring, Inc.*, 174 F.3d at 909 (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83, 80 S. Ct. at 1353).

[37] Our holding with respect to the issue of arbitrability precludes our need to reach the other issues raised by Melwani on appeal regarding consideration, unconscionability, and the business license affirmative defense.

D. Waiver

[38] Melwani argues that even if the parties were obligated to proceed to arbitration pursuant to the terms of the June 10, 1994 contract, PSEC's delay in asserting its right to arbitrate this dispute amounted to a waiver of the right to compel arbitration.

[39] In *Pacificare*, we observed that "procedural 'questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Pacificare*, 2004 Guam 17 at ¶ 29 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 592 (2002)). In particular, "the presumption is that the arbitrator should decide 'allegation[s] of *waiver*, delay, or a like defense to arbitrability." *Howsam*, 537 U.S. at 83, 123 S. Ct. at 592 (emphasis added) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.

Ct. 927, 942 (1983)).

[40] We therefore hold that the issue of waiver, which is a procedural question and a defense to arbitrability, must also proceed to arbitration. *Howsam*, 537 U.S. at 84, 123 S. Ct. at 592; *see also Pacificare*, 2004 Guam 17 at ¶ 29 (stating that "issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.").

IV.

[41] We hold that the trial court properly entered a final judgment with respect to Melwani's cross-claim, pursuant to Rule 54(b) of the Guam Rules of Civil Procedure and further hold that the trial court, at the time of entry of judgment, was not subject to a stay by the District Court of Guam.

[42] With respect to the substantive issues on appeal, we hold that the trial court erred in its interpretation of the June 10, 1994 contract between the parties, and for this reason, we **REVERSE**. Relatedly, we hold that the issue of whether a party waived its right to enforce arbitration is a determination which must be made by the arbitrator. Our holding on the issue of arbitrability precludes our need to reach the remaining issues raised on appeal.

[43] Accordingly, we **REVERSE** and **REMAND** to the trial court for entry of judgment consistent with this opinion.