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NO. CAAP-13-0005109

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

SAMUELA HAFOKAMEE, Plaintiff-Appellee,
v.
MELEANA SAAFI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 12-1-0440)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Defendant-Appellant Meleana Saafi (Wife) appeals from the First Amended Judgment and Decree Granting Divorce (Amended Divorce Decree), filed on November 1, 2013 in the Family Court of the Second Circuit (family court). Wife also appeals from the "Order on Defendant's Motion for Reconsideration or a New Trial," filed on November 1, 2013.¹

Wife contends the family court: (1) entered Findings of Fact (FOFs) that were clearly erroneous; (2) entered Conclusions of Law (COLs) that were wrong; (3) abused its discretion when it awarded the marital residence to Plaintiff-Appellee Samuela Hafokamee (Husband); and (4) abused its discretion when it denied "Defendant's Motion for Reconsideration for New Trial Or in the

¹ The Honorable Barclay E. MacDonald entered the Amended Divorce Decree and the "Order on Defendant's Motion for Reconsideration or a New Trial," however, the Honorable Michelle L. Drewyer presided over the divorce trial held on May 10, 2013 and the hearing for "Defendant's Motion for Reconsideration for New Trial or in the Alternative to Set Aside Judgment" held on October 28, 2013.

Alternative to Set Aside Judgment" (motion for reconsideration).

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Wife's points of error as follows and affirm.

The issues on appeal all revolve around a house that Husband and Wife purchased sometime in 2000, located in Lahaina, Maui, Hawai'i (marital residence). Although both parties are on title, only Husband's name is on the mortgage for the marital residence. The total debt still owed for the house is approximately \$580,000. The mortgage payment is \$2,815.99. The parties do not dispute that the value of the house is less than the amount of the mortgage and that there are significant arrears owed on the property such that it is in danger of foreclosure. On appeal, Wife challenges the family court's award of the house to Husband. Wife would like to remain in the marital residence, and have the opportunity to save it from foreclosure, because she can easily maneuver her wheel chair and comfortably get around in the marital residence.

1. Protective Order

Wife contends the family court's FOF 16 is clearly erroneous because the finding is not supported by any facts at trial or in the record and it is not relevant to the issues in the case.

FOF 16 states: "[Wife] did not seek to modify or dismiss the Protective Order at any time."

On December 14, 2011, the family court filed an Order for Protection (Protective Order) finding that Wife placed Husband in fear of harm constituting family violence under Hawaii Revised Statutes (HRS) § 571-2 (2006). The Protective Order stated that Wife could not enter the marital residence for a period of one year.

It does not appear that there is evidence in the record whether Wife challenged the Protective Order. However, in Wright v. Wright, 1 Haw. App. 581, 623 P.2d 97 (1981), this court stated

that "[e]rroneous findings of fact that are unnecessary to support the decision and judgment of the trial court are not grounds for reversal. Id. at 584, 623 P.2d at 100 (citation omitted). Further, this court concluded that because the specific finding at issue in Wright was "of marginal relevance only and is clearly not necessary to support the family court's decision[,] the "Appellant was not so prejudiced by its inclusion as to require reversal." Id.

In this case, the family court's finding that Wife did not seek to modify the Protective Order was not necessary to support the Amended Divorce Decree. The family court awarded the house to Husband because it believed that Husband and his family were in a better position to bring the mortgage current and avoid foreclosure, stating in COL 10: "[Husband's] family members are more financially stable and most likely to be able to preserve the home for [Husband]." Thus, the award of the marital residence to Husband was not related to the Protective Order and instead related to which party would be in a better position to keep the marital residence and prevent foreclosure on the property. Therefore, although FOF 16 appears to be clearly erroneous, Wife was not prejudiced by its inclusion so as to require reversal.

Similarly, Wife contends that COL 4 is wrong because it is irrelevant. COL 4 states: "[Wife] was absented from the property because of her own abusive actions, leading to the entry of a Protective Order against her."

Wife does not challenge the family court's findings that (1) Husband filed for a Temporary Restraining Order against Wife, alleging that she threatened Husband with a knife; (2) the court granted Husband a Protective Order against Wife for one (1) year; and (3) the Protective Order prevented Wife from entering the residence.

Thus, even if COL 4 was not directly relevant to the award of the marital residence, it did not prejudice Wife because it is not wrong.

2. Mortgage Payments

Wife contends that FOFs 20 and 24 are clearly erroneous because there is no credible evidence to support the findings.

FOFs 20 and 24 are included in a series of findings related to the Savou family and their rental history in the marital residence and how it affected Husband's ability to pay the mortgage on the marital residence. Laumana Savou testified that Wife is her aunt. With regard to the Savous, the court found:

18. After Ana Saafi and her family moved out, Laumana Savou and her family moved into the residence.

19. Laumana Savou and her family said that they could pay One Thousand Dollars (\$1,000.00) per month in rent.

20. However, they paid One Thousand Dollars (\$1,000.00) only two (2) times and did not pay any other rent for the property.

21. The lack of rental income caused [Husband] to fall behind in the monthly mortgage payments.

22. In August, 2012, the parties and their families met with the Bishop of their church to discuss the situation related to the house.

23. At the meeting, [Husband] made a comment that they should just "let the house go" because it was causing so much strife within the family.

24. [Husband] did not give the Savou family permission to live in the residence rent free.

25. The Savou family was asked to move in by [Wife's] daughter.

26. Laumana Savou and her family remained in the residence without paying any more rent until December, at which time the Protective Order expired and [Wife] moved back into the residence.

(Emphasis added.)

Wife contends that the findings support a "negative implication that the Savous, who are related to [Wife], were somehow responsible for the mortgage going into foreclosure and thus [Wife] was responsible by relation." Wife also contends that Laumana Savou's testimony at trial, that Laumana Savou attended the family meeting with the Bishop of the church and at that meeting it was agreed that the Savous no longer needed to pay rent because Husband was going to let the house go into foreclosure, was the more credible evidence.

Essentially Wife is challenging the credibility of the testimony that the family court relied upon to make its findings. On the one hand, Laumana Savou testified that she was told not to continue paying rent. On the other hand, Husband testified that

he did not give the Savous permission to live at the marital residence rent free.

"It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of evidence; this is the province of the trier of fact." Fisher, 111 Hawai'i at 47, 137 P.3d at 361 (citation omitted). Determining witness credibility was the province of the family court. Therefore, we will not disturb the family court's FOFs 20 and 24.

3. Award of the marital residence

Wife contends the family court abused its discretion when it awarded the marital residence to Husband. Wife also challenges FOFs 39, 41, 43, 44, 48, 53, and 61 as clearly erroneous and COL 9, 10, and 11 as wrong, all regarding the family court's findings associated with each party's ability to pay the mortgage on the marital residence and keep it from going into foreclosure and ultimately awarding the property to Husband.

The family court found:

36. Tausinga Hafoka is [Husband's] nephew.
37. Tausinga Hafoka owns a successful masonry business called Tau Masonry.
38. Tausinga Hafoka resides in a home that he owns on Kaanapali Golf Course.
39. Tausinga Hafoka is able and willing to help [Husband] bring the mortgage current. He would pay one-half of the current mortgage arrears.
40. Tausinga Hafoka has helped [Husband] financially by paying his legal fees.
41. Tausinga Hafoka has not paid the mortgage arrears to date because he was uncertain of who would be awarded the property in the final divorce.
42. Malini Lauvaka [sic] is [Husband's] niece and duly appointed attorney-in-fact pursuant to a Power of Attorney executed by [Husband].
43. Malini Lauvaka [sic] and her husband own a successful tiki carving business called All Island Tikis. The business has gross revenues of over One Hundred Sixty Thousand Dollars (\$160,000.00) annually.
44. Malini Lauvaka [sic] is able and willing to help [Husband] bring the existing mortgage current by paying one-half of the mortgage arrears.
45. Malini Lauvaka [sic] has spoken to [Husband's]² bank regarding a refinance but has not taken any other steps with respect to refinancing the mortgage because of the

² The family court in FOF 45 found that Malini Lavaka had spoken to "Wife's" bank. However, because Husband is the only one on the mortgage and Malini Lavaka is Husband's niece, it appears that the family court meant Malini Lavaka has spoken to Husband's bank rather than Wife's bank.

uncertainty over who would be awarded the residence.

46. Malini Lauvaka [sic] was in touch with the bank most recently one (1) month ago, and two (2) months prior to that.

47. Koli Hafoka is [Husband's] nephew. He resides in Wailuku with his parents.

48. If [Husband] is awarded the marital residence, Koli Hafoka and his family would move into the residence and pay rent in the amount of Two Thousand Eight Hundred Dollars (\$2,800.00) per month, which is the amount of the monthly mortgage.

49. [Wife] also has family members who are willing to try to save the property.

50. [Wife] would try to save the property by attempting to obtain a loan modification.

51. [Wife] would need to be added to the mortgage loan in order to be able to even apply for a loan modification.

52. [Wife] would apply for a loan modification with the assistance of family members, including her daughter Melaia Tuakoi.

53. There is no guarantee that [Wife] and her family members would prevail in their attempt to modify the loan.

54. Melaia Tuakoi resides a[t] [the marital residence].

55. She has lived there since approximately May 6, 2013.

56. Immediately prior to moving into [the marital residence] Melaia Tuakoi and her family were evicted from their previous residence for non-payment of rent.

57. In 2010, Melaia Tuakoi assisted the parties in getting the house out of foreclosure.

58. Melaia Tuakoi is self-employed and makes approximately Twenty Thousand Dollars (\$20,000.00) each year. Her husband makes an additional Two Thousand Four Hundred (\$2,400.00) each month.

59. If [Wife] is awarded the real property, Melaia Tuakoi and her cousin Laumana Savou as well as Ilaisanne Tuakoi would help make the monthly payments on the mortgage.

60. Laumana Savou did not contribute to the mortgage when she lived in the property previously.

61. No one from [Wife's] family has contributed to the mortgage or attempted to assist the parties in bringing it current.

(Emphasis added.)

Wife's challenges to the above FOFs, again, concentrate mainly on the credibility of testimony and the weight of the evidence to support the findings. It was within the province of the family court to assess the credibility of the witnesses and to weigh the evidence presented by both Husband and Wife as to their ability to bring the mortgage current and continue to make the mortgage payments. Both parties acknowledge that they do not have the means on their own to keep the house and would have to rely on family.

Husband's nephew, Tausinga Hafoka, testified that he would be willing to pay \$20,000 or \$30,000 of the current

mortgage arrears. Husband's niece, Malini Lavaka, also testified that she was willing to pay half of the mortgage arrears. In addition, Husband's nephew, Koliniasi Hafoka, testified that he and his family would move into the marital residence, if Husband was awarded the house, and pay the full amount of the mortgage.

Wife's daughter, Melaia Tuakoi (Tuakoi), testified that Wife's name is not currently on the mortgage note. Tuakoi testified that she would assist Wife in doing a modification on the loan to save it from foreclosure, if Wife could put her name on the loan. Tukoi also testified that if the house was awarded to Wife, she would help make mortgage payments. Laumana Savou, Wife's niece, testified that she would help pay the mortgage. Finally, Wife's granddaughter, Ilaisanne Tuakoi, testified that if Wife was awarded the marital residence, she would live in the house and pay rent.

Based on our review of the record, FOFs 39, 41, 43, 44, 48, 53, 61 are not clearly erroneous.

Wife further contends that credible evidence does not support COLs 9 and 10. COLs 9 and 10 conclude: "9. [Husband's] family members are more likely to be able to bring the existing mortgage current without needing to rely on a mortgage modification. 10. [Husband's] family members are more financially stable and most likely to be able to preserve the home for [Husband]."

As stated above, both parties presented evidence of the steps they would take to keep the marital residence out of foreclosure and to pay the monthly mortgage. Husband, who is currently on the mortgage, has family who testified that they are likely able to bring the mortgage out of arrears and also pay the monthly mortgage payments.

Wife's family acknowledged that the first step would entail putting Wife on the mortgage before Wife could do anything to prevent foreclosure. In addition, Wife's family did not testify they had the means to bring the mortgage up to date but would instead try to modify the loan.

Wife also contends that COL 11 was wrong because the family court did not consider the factors set forth in HRS § 580-47 (2006)³ in making its conclusion. COL 11 provides: "[a]s there is no equity in the property, it is fair and equitable to award the real property to [Husband] with no equalization payment to [Wife]."

Wife misinterprets this conclusion when she contends the fact that the house does not have equity is not a proper basis for awarding the marital residence to Husband and not to Wife. In COL 11, the family court was not using the lack of equity as the basis for awarding the marital residence to Husband. Rather, the family court was concluding that because the marital residence does not have equity, it is fair that Husband does not have to pay an equalization amount to Wife based on being awarded the marital residence.

The family court's COLs 9, 10, and 11 were not wrong.

Therefore, in considering the case as a whole, the family court did not abuse its discretion when it awarded the marital residence to Husband.

4. Motion for reconsideration or for new trial

Wife contends that the family court abused its discretion when it denied Wife's motion to reconsider or for new

³ HRS § 580-47 provides in pertinent part:

§580-47 Support orders; division of property. (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable (1) compelling the parties or either of them to provide for the support, maintenance, and education of the children of the parties; (2) compelling either party to provide for the support and maintenance of the other party; (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate; and (4) allocating, as between the parties, the responsibility for the payment of the debts of the parties whether community, joint, or separate, and the attorney's fees, costs, and expenses incurred by each party by reason of the divorce. In making these further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce[.]

trial, because Wife presented new information to the court that, after being awarded the marital residence, Husband and his family had failed to make the payments to bring the mortgage current.

A motion for reconsideration and a motion for a new trial are reviewed for an abuse of discretion. Doe v. Doe, 98 Hawai'i 144, 150, 44 P.3d 1085, 1091 (2002).

Wife brought her motion for reconsideration pursuant to Hawai'i Family Court Rules (HFCR) 59(a), 59(e),⁴ and 60(b). In her motion to reconsider, Wife contended that "[b]ecause the mortgage on the property is still delinquent, this court should reconsider its Judgment and should give [Wife] and her family the opportunity to save the property from foreclosure."

HFCR Rule 59(a) provides:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for good cause shown. On a motion for a new trial, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.

Further, this court clarified that under Hawai'i Rules of Civil Procedure (HRCP) Rule 59(a), which has substantially similar language to that of HFCR Rule 59(a),

[a] new trial based on newly discovered evidence can be granted provided the evidence meets the following requirements: (1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness.

Matsumoto v. Asamura, 5 Haw. App. 628, 630, 706 P.2d 1311, 1313 (1985) (emphasis added).

HFCR Rule 59(e) provides:

(e) *Motion to Reconsider, alter or amend a judgment or order.* Except as otherwise provided by HRS section 571-54 regarding motions for reconsideration in proceedings based upon HRS sections 571-11(1), (2), or (6), a motion to reconsider, alter or amend a judgment or order is not required but may be filed no later than 10 days after entry of the judgment or order and shall be a non-hearing motion, except that the court in its discretion may set any matter

⁴ The family court filed a "Judgment and Decree Granting Divorce" on October 10, 2013. Wife filed her motion for reconsideration on October 21, 2013, which was a timely filing under HFCR Rule 59(e).

for hearing. Responsive pleadings to a motion for reconsideration shall be filed no later than 10 days after service of the motion to reconsider, alter or amend the judgment or order.

"The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion."

Tagupa v. Tagupa, 108 Hawai'i 459, 465, 121 P.3d 924, 930 (App. 2005).

At the hearing on the motion for reconsideration or for new trial, Wife argued that the new information warranting reconsideration or a new trial was that Husband and his family had not brought the mortgage current in the three months since the July 9, 2013, Findings of Fact, Conclusions of Law, and Order, and also that one of Husband's family members told Wife that they were not going to pay the mortgage. Wife thus asserted that: (1) Husband and his family misrepresented to the family court their ability to prevent foreclosure on the marital residence or (2) they never had the intention to prevent foreclosure.

Although Wife presented new information, Husband contested Wife's claim that he had not taken steps to prevent foreclosure on the marital residence. Importantly, Husband asserted, and Wife did not deny, that Wife and her family were still living in the house and Husband was in the process of obtaining an eviction order. Further, Husband had witnesses present the day of the hearing on the motion for reconsideration who he represented were willing to testify consistently with what they testified to at the divorce trial. Husband asserted family members had been in touch with the bank to determine what was necessary to prevent the bank from foreclosing on the house.

Based on the record in this case, the family court did not abuse its discretion in denying a new trial. The new evidence Wife presented was not of such a material and controlling nature as would likely change the outcome of this case, and instead merely tended to impeach or contradict Husband's witnesses that they would help to bring the mortgage current and help make the payments in the future. Moreover, Wife

admitted she was still residing in the marital residence, and did not dispute that Husband was actively working to evict Wife from the marital residence. At the May 10, 2013 divorce trial, some of Husband's family members testified that they had not acted on preventing foreclosure of the marital residence because they were uncertain that Husband would be awarded the marital residence. Given that Wife was still living at the marital residence, uncertainty remained about having access to the house and the ability to rent at least part of it to help pay the mortgage.

For similar reasons as stated above, the family court did not abuse its discretion in denying Wife's motion for reconsideration.

Therefore,



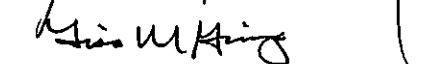
IT IS HEREBY ORDERED that the "First Amended Judgment and Decree Granting Divorce" and the "Order on Defendant's Motion for Reconsideration or a New Trial," filed on November 1, 2013, in the Family Court of the Second Circuit, are affirmed.

DATED: Honolulu, Hawai'i, May 26, 2016.

On the briefs:

Elizabeth C. Melehan,
for Defendant-Appellant.

Anne K. Leete,
for Plaintiff-Appellee.


Presiding Judge

Associate Judge

Associate Judge