

NO. CAAP-15-0000029

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

IN RE: MARN FAMILY LITIGATION

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(MASTER FILE NO. CIVIL 00-1-MFL)  
(CIVIL NOS. 98-4706-10 and 98-5371-12)

MEMORANDUM OPINION

(By: Foley, Presiding J., Leonard and Ginoza, JJ.)

Appellants Alexander Y. Marn (**Alexander**) and Eric Y. Marn (**Eric**) (together, **Appellants**)<sup>1</sup> appeal pro se from the December 17, 2014 "Order Granting Liquidating Receiver Thomas E. Hayes' Motion to Approve McCully Shopping Center and 608 N. Judd Street's Amended and Restated Holdback Escrow Agreement, Filed 12/8/14" (**December 17, 2014 Order Granting**) entered in the Circuit Court of the First Circuit<sup>2</sup> (**circuit court**).

On appeal, Appellants contend the circuit court erred in:

(1) "ruling that [Alexander's] offer to purchase the Marn family home was not viable";

(2) "confirming the sale of the Marn family home (to a lower bidder) when title to the property is in litigation";

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<sup>1</sup> We note that while both Alexander and Eric are named on the notice of appeal, only Alexander is listed on the opening and reply brief.

<sup>2</sup> The Honorable Rhonda A. Nishimura presided.

(3) confirming the sale of the Judd Street Property<sup>3</sup> because (a) the purchaser, Top Well Development, LLC, a Hawai'i limited liability company, (**Top Well**) was not a bona fide purchaser for value; (b) "the appeal of the instant Judgment is not moot"; (c) "Appellants have standing to contest the confirmation of the sale to Top Well"; and (d) "the violation of the purchase and sale agreement [(**PSA**)] of July 1, 2014 between the seller and the purchaser, by premature closing, prevented the need for a stay and bond";

(4) "allow[ing] post-judgment modification of McCully Associates' MSC Holdback Agreement to provide title insurance for Pumehana Associate's sale of Judd St. property (CAAP-15-000029)"; and

(5) "expunging the lis pendens filed with the Bureau of Conveyance [sic], when the PSA already provides purchaser with actual and constructive knowledge of the Marn litigation and pending appeals, and serve as a direct notice to Top Well."

We conclude Appellants' contentions are without merit.

## **I. BACKGROUND**

### **A. Partial Final Judgment and Charging Order**

This appeal stems from a prolonged dispute that began in 1998 between Appellants and other partners of McCully Associates, a limited partnership, (**McCully Associates**) regarding certain partnership interests, which resulted in at least eight consolidated civil lawsuits.<sup>4</sup> The nature of the underlying lawsuit is not at issue in the current appeal. Rather, the relevant history of this appeal begins with a Partial Final Judgment entered by the circuit court on October 25, 2010. In the Partial Final Judgment, the circuit court, *inter alia*, awarded damages in favor of McCully Associates and against

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<sup>3</sup> Appellants' opening brief titles this point of appeal as "Motion to Dismiss Issues", but does not indicate which motion to dismiss they are challenging or where the relevant circuit court order can be found in the record, as required under Hawai'i Rules of Civil Procedure Rule 28(b)(4). Based on this court's review of the Appellants' arguments in support of the point of appeal, we treat this point as a challenge to the circuit court's confirmation of the sale of the Judd Street Property.

<sup>4</sup> The current appeal involves two of the remaining consolidated cases, Civil Nos. 98-4706-10 and 98-5371-12.

Appellants.

On June 20, 2011, Thomas E. Hayes,<sup>5</sup> as McCully Associates' Liquidating Receiver (**Receiver Hayes**), filed a "Motion For Entry of Charging Order" against Appellants' transferable interest in Pumehana Associates, a Hawai'i general partnership (**Pumehana Associates**) that owned real property on Judd Street in Honolulu (**Judd Street Property**), to satisfy the monetary judgments against Alexander awarded in the Partial Final Judgment. The circuit court granted Receiver Hayes' motion and on August 18, 2011, the circuit court entered a charging order, ordering "that Judgment Debtor [Alexander's] transferable interest in [Pumehana Partners] be and is hereby charged with and shall be used for payment of the unsatisfied amounts of the . . . Partial Final Judgment entered in this case on October 25, 2010 (being \$8,313,896.74 as of August 1, 2011)[.]"<sup>6</sup> The circuit court also entered a charging order, ordering "that Judgment Debtor [Eric's] transferable interest in [Pumehana Partners] be and is hereby charged with and shall be used for payment of the unsatisfied amounts of the . . . Partial Final Judgment entered in this case on October 25, 2010 (being \$6,220,182.39 as of August 1, 2011)[.]"<sup>7</sup>

On February 13, 2012, the circuit court found that Receiver Hayes had attempted to satisfy the Partial Final Judgment with no success and appointed Ronald Kotoshirodo as Pumehana Associates' receiver pendente lite (**Receiver Kotoshirodo**) to serve "as a custodian of the transferable partnership interests of [Appellants] in [Pumehana Associates], individually and through their respective Revocable Living Trusts." The circuit court based its authority to appoint a receiver for Pumehana Associates on the following findings:

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<sup>5</sup> On October 5, 2015, S. Steven Sofos was substituted for Receiver Hayes as Liquidating Receiver for McCully Associates and Ala Wai Investment, Inc.

<sup>6</sup> On December 22, 2011, Appellants purported to transfer their partnership interests in Pumehana Associates to Richard Yee Marn, Catherine Marn Oberholzer, Ryan Duck Quon Yee Marn.

<sup>7</sup> We refer to the two charging orders, entered against Alexander and Eric separately on August 18, 2011, as "Charging Orders."

3. [Appellants] are the sole partners of Pumehana Associates, a Hawai'i General Partnership, through their respective Revocable Trusts.

4. [Appellants] are the sole Settlers and sole Beneficiaries of their respective Revocable Trusts.

5. As the sole Settlers of their Revocable Trusts, the income, accounts, property and other assets held and owned in the name of Pumehana Associates, including the [Judd Street Property], are controlled and used personally by [Appellants], and they are the actual owners of Pumehana Associates and its assets.

6. On August 18, 2011, this Court entered Charging Orders Granting Receiver [Hayes'] Motion For Entry Of Charging Orders filed June 20, 2011 declaring the income, accounts, property and other assets held by and in the name of Pumehana Associates are subject to Receiver [Hayes'] Partial Judgment against [Appellants].

7. [Appellants], as the owners and controllers of the assets of Pumehana Associates, have failed to use those assets to satisfy the Partial Judgment of Receiver Hayes, and it is necessary for this Court to appoint a Receiver to secure and take custodial control of Pumehana [Associates'] assets and enforce this Court's Charging Orders filed herein August 18, 2011.

Receiver Kotoshirodo was given the power, duty, and authority to "operate and manage the interests of [Appellants] in Pumehana Associates and the business of Pumehana Associates[,]" to accomplish enumerated outcomes.

**B. Sale of McCully Shopping Center and Original Holdback Agreement**

The October 25, 2010 Partial Final Judgment also required Receiver Hayes to sell the McCully Shopping Center, which was owned by McCully Associates. On February 21, 2012, Receiver Hayes filed a motion seeking confirmation of the sale of the McCully Shopping Center to M Pocket Corporation, a Hawai'i corporation (**M Pocket**). On March 28, 2012, the circuit court granted Receiver Hayes' motion (**Order Confirming Sale of McCully Shopping Center**).<sup>8</sup>

On September 19, 2012, McCully Associates, by Receiver Hayes; First American Title Company, Inc., a Hawai'i corporation (**First American**), as escrow agent; and M Pocket entered into the "McCully Shopping Center Holdback Escrow Agreement" (**Original Holdback Agreement**) to facilitate the sale of McCully Shopping

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<sup>8</sup> On June 12, 2012, Alexander appealed from the circuit court's Order Confirming Sale of McCully Shopping Center in case no. CAAP-12-0000574.

Center to M Pocket. The Original Holdback Agreement required that \$3 million of the purchase price be deposited into an escrow account from which First American could withdraw funds to cover certain costs arising from ongoing and future litigation.

**C. Sale of Judd Street Property and Amended Holdback Agreement**

On March 11, 2014, Receiver Kotoshirodo filed a motion requesting the circuit court to authorize the marketing of Pumehana Associates' real property, including the Judd Street Property. On May 7, 2014, the circuit court granted Receiver Kotoshirodo's motion.

On July 1, 2014, Receiver Kotoshirodo entered into a PSA with Top Well. In the PSA, Receiver Kotoshirodo agreed to sell the Judd Street Property to Top Well for \$4 million. The PSA provided for a thirty-one day closing after entry of the order confirming the sale, with closing to occur no later than December 31, 2014. The PSA also included provisions for Top Well's indemnification in the event of further litigation relating to the Judd Street Property and for a \$250,000 holdback from the proceeds of the sale, which was to be held in escrow, to secure Pumehana Associates' obligation to indemnify Top Well.

On July 14, 2014, Receiver Kotoshirodo filed a motion to confirm the sale of the Judd Street Property to Top Well (**Motion to Confirm**). Two weeks later, in a letter to Receiver Kotoshirodo's counsel dated July 31, 2014, Appellants offered to purchase the Judd Street Property for \$4.2 million. Citing contractual restrictions in the PSA, Receiver Kotoshirodo rejected the Appellants' offer in a letter dated August 4, 2014. Receiver Kotoshirodo's letter also informed Appellants that the circuit court was going to hold a hearing on the Motion to Confirm on September 3, 2014 and that "the Judge may, in her discretion, decide whether over-bidding might be considered with regard to the proposed sale of the [Judd Street] Property."

The circuit court granted Receiver Kotoshirodo's Motion to Confirm after the September 3, 2014 hearing.<sup>9</sup> In an order entered on September 30, 2014 (**Order Confirming Sale of Judd**

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<sup>9</sup> The transcript of the September 3, 2014 hearing is not included in the record on appeal.

**Street Property**), the circuit court determined that "[t]he 'offer' or over bid in the purported amount of \$4.2 million presented by [Alexander] at the hearing is rejected by the Court because such 'offer' or overbid is not viable."<sup>10</sup>

Anticipating the December 31, 2014 deadline to close the sale of the Judd Street Property, McCully Associates, through Receiver Hayes, and First American proposed an amendment to the Original Holdback Agreement in "McCully Shopping Center Amended and Restated Holdback Escrow Agreement" (**Amended Holdback Agreement**).<sup>11</sup> In the proposed Amended Holdback Agreement, Receiver Hayes agreed that the \$1.75 million leftover from the Original Holdback Agreement's \$3 million holdback funds, which were funds originally intended to be used in litigation defense pertaining to the sale of the McCully Shopping Center, could be used by the title insurer "as a holdback for reasonable costs of defending title claims on the Judd Street Property . . . [.]". The proposed agreement also included an additional \$250,000 holdback from the proceeds of the sale of the Judd Street Property for the title insurer to use if necessary.

On December 8, 2014, the "[Receiver Hayes'] Motion to Approve McCully Shopping Center and Judd Street's Amended and Restated Holdback Escrow Agreement" (**Motion to Approve**) was filed. The Motion to Approve requested "expedited approval" of the proposed Amended Holdback Agreement to facilitate the sale of the Judd Property on or before the December 31, 2014 deadline.<sup>12</sup>

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<sup>10</sup> On October 29, 2014, Appellants appealed the circuit court's Order Confirming Sale of Judd Street Property in case no. CAAP-14-0001232.

<sup>11</sup> Receiver Hayes was prepared to agree to the proposed Amended Holdback Agreement "if and when court approval [was] obtained."

<sup>12</sup> Receiver Hayes' declaration, filed in support of his Motion to Approve, stated:

3. The balance of the held-back funds is currently about \$1,750,000. In order to facilitate the sale of [the Judd Street Property] by or before December 31, 2014, which was complicated by the recent appeal filed by [Alexander], I am willing to agree with First American and the Pumehana Associates Receiver to permit the balance of the McCully Shopping Center holdback to be combined with \$250,000 in funds to be held back in escrow from the Judd Street [Property] sale for a total of \$2 million in holdback funds. First American has required that amount of a holdback in

(continued...)

Alexander filed an opposition to the Motion to Approve on December 11, 2014.

The circuit court held a hearing on the Motion to Approve on December 12, 2014, and followed with the entry of the December 17, 2014 Order Granting.

On January 14, 2015, Appellants filed a notice of appeal from the December 17, 2014 Order Granting.

## **II. STANDARD OF REVIEW**

"[A] circuit court's decisions involving its supervision of an equitable receivership are viewed for abuse of discretion." Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawai'i 438, 456, 164 P.3d 696, 714 (2007).

[T]he circuit court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the circuit court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Id. (brackets omitted) (quoting Office of Hawaiian Affairs v. State, 110 Hawai'i 338, 351, 133 P.3d 767, 780 (2006)).

## **III. DISCUSSION**

On appeal, Appellants characterize the circuit court's December 17, 2014 Order Granting as an amendment to its Order Confirming Sale of the McCully Shopping Center, which Appellants argue, constitutes an impermissible "reopening of an Order which has been granted rule 54(b) certification." Appellants provide no argument for how the December 17, 2014 Order Granting, which approved the proposed Amended Holdback Agreement, amends or alters the circuit court's March 28, 2012 Order Confirming the Sale of McCully Shopping Center. The proposed Amended Holdback Agreement provided holdback funds for the Judd Street Property's

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<sup>12</sup>(...continued)

order to issue title insurance to the Judd Street [Property] buyer while [Alexander's] appeal is pending.

4. McCully Associates has a charging order against the partnership interests of [Appellants] in Pumehana Associates. Therefore, McCully Associates will benefit from a sale of the Judd Street [Property], and agreeing to a modification of the existing holdback agreement in order to facilitate the sale of the Judd Street [Property] makes business sense.

litigation defense. The Order Confirming the Sale of McCully Shopping Center, on the other hand, approved the sale of the shopping center to M Pocket and provided basic details about the nature of the sale, none of which include determinations as to holdback funds.

Appellants argue that Receiver Hayes' decision to use McCully Associates' holdback funds to facilitate the sale of the Judd Street Property was "legally unjustified". Appellants further argue that the circuit court's approval of Receiver Hayes' decision was "well beyond any reasonable exercise of judicial discretion[.]"

"A receivership is equitable in nature and the court's extraordinary broad remedial powers and wide discretion to appoint receivers derive from its inherent powers of equity to fashion relief." Hawaii Ventures, 114 Hawai'i at 456, 164 P.3d at 714. "[C]ourts of equity have the power to mold their decrees to conserve the equities of the parties under the circumstances of the case." Id. (quoting Honolulu, Ltd. v. Blackwell, 7 Haw. App. 210, 219, 750 P.2d 942, 948 (1988)). Therefore, "whether and to what extent relief should be granted rests within the sound discretion of the circuit court and will not be disturbed absent an abuse of such discretion." Id. (citation, internal quotation marks, and brackets omitted).

Receiver Hayes was appointed as McCully Associates' Liquidating Receiver. Receiver Hayes had the authority to wind-down McCully Associates' businesses, which included the responsibility of selling McCully Shopping Center and "tak[ing] such action as is necessary to gather and collect the assets and property of [McCully Associates], including any judgment to enter in favor of [McCully Associates.]"

The circuit court's Charging Orders provided that Receiver Hayes could satisfy McCully Associates' judgments against Appellants through Appellants' interests in Pumehana Associates' Judd Street Property. Receiver Hayes' declaration in support of the proposed Amended Holdback Agreement stated that, given McCully Associates' interest in the proceeds from the pending sale of the Judd Street Property, modifying the Original



Holdback Agreement to facilitate the sale of the Judd Street Property made "business sense." Given the discretionary powers of the circuit court presiding over the receivership and the authority conferred upon Receiver Hayes as Liquidating Receiver of the McCully Associates, we conclude that the circuit court did not abuse its discretion in entering the December 17, 2014 Order Granting approving Receiver Hayes' Motion to Approve the proposed Amended Holdback Agreement.<sup>13</sup>

**IV. CONCLUSION**

Therefore, the "Order Granting Liquidating Receiver Thomas E. Hayes' Motion to Approve McCully Shopping Center and 608 N. Judd Street's Amended and Restated Holdback Escrow Agreement, Filed 12/8/14" entered on December 17, 2014 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 20, 2016.

On the briefs:

Alexander Y. Marn  
Appellant pro se.

Presiding Judge

Louise K.Y. Ing  
Zachary M. DiIionno  
Laura P. Moritz  
(Alston Hunt Floyd & Ing)  
for Liquidating Receiver S.  
Steven Sofos, successor to  
Liquidating Receiver Thomas E.  
Hayes.

Associate Judge

Associate Judge

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<sup>13</sup> Appellants' opening brief raises several other issues on appeal challenging other circuit court orders that are not included in the appeal before us. Because we only have jurisdiction to consider arguments challenging the circuit court's December 17, 2014 Order Granting, we decline to address Appellants' remaining points on appeal.