NO. CAAP-15-0000119

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ASSOCIATION OF APARTMENT OWNERS OF CENTURY CENTER, INC.,
BY AND THROUGH ITS BOARD OF DIRECTORS,
Plaintiff-Appellee,
v.
LILY NOMURA and RICHARD LEE,
Defendants-Appellants,
and
ALOHA RAINBOW INVESTMENTS, INC., TAI YAMATO, WALTER SHINN,
PATRICIA SHIPLEY, LISA DO, SEAN CHAMBERLAIN, MICHAEL LIGHT,
JAYSON PARK, ANTHONY WILLIAMS, JOHN PAUL PONDOC,
LANE RICHARD, and JUAN MANUAL GUTIERREZ ALVARADO,
Defendants-Appellees,
and
JOHN DOES 1-50 and JANE DOES 1-50,
Defendants

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 1RC14-1-9031)

MEMORANDUM OPINION
(By: Foley, Presiding J., Reifurth and Ginoza, JJ.)

Appellants-Defendants Lily Tai Nomura (**Nomura**) and Richard Lee (**Lee**) (together, **Appellants**) appeal from:

(1) the "Order Granting Plaintiff Association of Apartment Owners of Century Center, Inc.'s Motion for Summary Judgment, Filed January 2, 2015" entered on February 2, 2015;

(2) the "Writ of Possession" entered on February 3, 2015;

(3) the "Judgment for Possession" entered on February 3, 2015;

(4) the denial of "[Appellants'] Motion for Reconsideration of Court's Order (1) Denying [Appellants'] Corrected and Restated Motion to Set Supersedeas Bond for a Stay Pending Appeal, and (2) Granting Plaintiff's Motion for Reconsideration of 'Order Granting [Appellants'] Emergency Ex Parte Motion for Temporary Stay of Enforcement Pending Disposition of Motion to Set Supersedeas Bond for a Stay Pending Appeal' Entered February 4, 2015' After Hearing of February 17, 2015" entered on March 2, 2015; and

(5) the "Order Granting Plaintiff Association of Apartment Owners of Century Center, Inc.'s Motion for Reconsideration of 'Order Granting [Appellants'] Emergency Ex Parte Motion for Temporary Stay of Enforcement of the Court's Writ of Ejectment Pending Disposition of Motion to Set Supersedeas Bond for a Stay Pending Appeal,' Entered February 4, 2015" entered on March 31, 2015 in the District Court of the First Circuit[1] (**district court**).

Appellants' opening brief does not provide concise points of error on appeal,[2] but Appellants argue on appeal:

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[1] The Honorable Michael K. Tanigawa presided.

[2] Appellants' counsel, Daniel J. O'Meara formerly of Dubin Law Offices, has failed to provide points of error on appeal in violation of Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4), which requires:

> **Rule 28. BRIEFS.**
>
> . . . .
>
> **(b) Opening brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
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> . . . .
>
> (4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:
>
> (A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(continued...)

(1) Plaintiff-Appellee Association of Apartment Owners of Century Center, Inc. (**AOAO**) executed a writ of possession in violation of the Rules of the District Courts of the State of Hawaiʻi Rule 23;

(2) the district court erred by denying Appellants' motion to set supersedeas bond for a stay pending appeal;

(3) the district court erred by denying Appellants' motion to dismiss because it lacked subject matter jurisdiction; and

(4) "[t]he AOAO failed to conduct its alleged nonjudicial foreclosure in compliance with Hawaii Revised Statutes [(**HRS**)] Chapter 667, Chapter 514A and 514B, and its Declarations, rendering the foreclosure statutorily void."

I. BACKGROUND

On March 10, 2000, Lee purchased a condominium property (**Unit 108**). Lee owed monthly maintenance fees to the condominium's AOAO and in 2012 had fallen behind on the maintenance fee payments to the AOAO. The AOAO filed a lien against Unit 108 in September 2013 for unpaid amounts assessed by the AOAO totaling $30,584.55.

Lee conveyed Unit 108 to Nomura and himself as tenants by the entirety through a quitclaim deed dated January 17, 2014 and recorded in the Bureau of Conveyances. In addition to

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[2](...continued)

> (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;
>
> (C) when the point involves a finding or conclusion of the court or agency, either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions;
>
> (D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.
>
> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

Mr. O'Meara is warned that future failure to comply with HRAP Rule 28 may result in sanctions.

Appellants, Aloha Rainbow Investments, Inc., a Hawaiʻi corporation, held a 5% interest in Unit 108.

On February 18, 2014, the AOAO filed a "Notice of Default and Intention to Foreclose," recorded in the Bureau of Conveyances on February 19, 2014. The AOAO held a public auction on August 19, 2014 and purchased Unit 108 for one dollar. The AOAO recorded its "Quitclaim Assignment of Lease" on September 2, 2014.

On October 24, 2014, the AOAO filed a complaint for eviction in the district court. On January 2, 2015, the AOAO filed a motion for summary judgment (**MSJ**).

Appellants filed a motion to dismiss on January 21, 2015 (**Motion to Dismiss**), arguing the district court lacked subject matter jurisdiction "because this case is an action in which the title to real property is in dispute . . . ." On the same day, Appellants filed their opposition to the AOAO's MSJ, incorporating their arguments from their Motion to Dismiss on the district court's subject matter jurisdiction.

The AOAO filed their reply in support of their MSJ (**Reply**) on January 22, 2015.

On January 26, 2015, the district court held a hearing on Appellants' Motion to Dismiss and the AOAO's MSJ. At the hearing, the district court gave an oral ruling denying Appellants' Motion to Dismiss and granting the AOAO's MSJ. The district court entered its orders on February 2, 2015.

On February 3, 2015, the district court entered a judgment for possession and writ of possession. On February 4, 2015, Appellants filed "[Appellants'] Emergency Ex Parte Motion for Temporary Stay of Enforcement of the Court's Writ of Ejectment Pending Disposition of [Appellants'] Motion to Set Supersedeas Bond for a Stay Pending Appeal". Appellants filed a corrected version on February 5, 2015 (**Motion for Stay Pending Appeal**).

Appellants filed their notice of appeal on March 4, 2015.

The district court denied Appellants' Motion for Stay Pending Appeal on March 31, 2015.

II. STANDARD OF REVIEW

Subject Matter Jurisdiction

"The existence of subject matter jurisdiction is a question of law that is reviewable de novo under the right/wrong standard." U.S. Bank Nat'l Ass'n v. Castro, 131 Hawaiʻi 28, 34, 313 P.3d 717, 723 (2013) (internal quotation marks omitted) (quoting Aames Funding Corp. v. Mores, 107 Hawaiʻi 95, 98, 110 P.3d 1042, 1045 (2005)).

III. DISCUSSION

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Appellants argue that the district court erred by denying their Motion to Dismiss because Appellants met their burden under District Court Rules of Civil Procedure (**DCRCP**) Rule 12.1, which provides:

> **Rule 12.1. DEFENSE OF TITLE IN DISTRICT COURTS.**
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> **Pleadings.** Whenever, in the district court, in defense of an action in the nature of an action of trespass or for the summary possession of land, or any other action, the defendant shall seek to interpose a defense to the jurisdiction to the effect that the action is a real action, or one in which the title to real estate is involved, such defense shall be asserted by a written answer or written motion, which shall not be received by the court unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

Appellants argue that because they met their burden under DCRCP Rule 12.1, the district court lacked jurisdiction over the ejectment proceeding under HRS § 604-5(d) (1993),[3] and therefore should have granted Appellants' Motion to Dismiss.

DCRCP Rule 12.1 was adopted to prevent abuse of HRS § 604-5(d) by requiring a defendant challenging the district

[3] HRS § 604-5(d) provides:

> §604-5 Civil jurisdiction.
>
> . . . .
>
> (d) The district courts shall not have cognizance of real actions, nor actions in which the title to real estate comes in question, nor actions for libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction; nor shall they have power to appoint referees in any cause.

court's jurisdiction to file an affidavit describing the defendant's claim to title with specificity. Deutsche Bank Nat'l Tr. Co. v. Peelua, 126 Hawaiʻi 32, 36, 265 P.3d 1128, 1132 (2011). In Peelua, the Hawaiʻi Supreme Court explained:

> [T]he source, nature, and extent of title claimed by the defendant, must be described to the court with some detail and specificity. In addition to particularly describing the source, nature, and extent of title, the defendant may also include in the affidavit any other particulars, the objective being to apprise the court fully of the nature of the defendant's claim. This, in turn, would obviate the risk of dishonest and reckless pleas[.]

Id. at 37, 265 P.3d at 1133.

In support of their Motion to Dismiss, Appellants attached a joint declaration stating:

> 3. In 2000, [Lee] purchased Unit 108 and [Lee's] interest was later conveyed with a 95% interest to [Appellants] with 5% to Aloha Rainbow Investments, Inc., a Hawaii corporation by Quitclaim Deed recorded in the Office of the Assistant Registrar, Land Court on January 17, 2014 as Doc. No. T8782263 on Certificate No. 1053288, 182404, a true and correct copy of which is attached as Exhibit "A" hereto (the "Defendants' Quitclaim").
>
> 4. After the purchase of Unit 108, [Lee] experienced continuous harassment by the [AOAO] regarding [his] use of units 108 and 4000. In particular, the AOAO prevented me from advertising unit 108, which resulted in a loss of clients, business, and tenants.
>
> . . . .
>
> 6. Over the next four years, the maintenance fees continued to increase as a result of improper management by the AOAO. Indeed, from 2003 through 2011 the maintenance fees for units 4000 and 108 increased from $5,500 per year to $13,500 per year. . . . .
>
> . . . .
>
> 10. . . . [T]he fee situation created uncertainty for the owners, contributed to decreased unit sale prices, and fostered delinquencies in maintenance fees and mortgage payments. In 2012, as a consequence of the increased maintenance fees due to poor management and [an] erroneous special assessment, [Appellants] fell behind on payment of their maintenance fee.
>
> 11. A lien was filed by the AOAO against Unit 108 in September 2013. A copy of the Notice of Lien dated September 9, 2013 and recorded September 11, 2013 as Doc. No. 8654402, affecting Certificate of Title Nos. 1053288 and 182404 is attached as Exhibit "B" hereto.
>
> 12. Subsequently the AOAO filed a Notice of Default and Intention to Foreclose & Exhibits "A"-"C" dated February 18, 2014 and recorded on February 19, 2014 as Doc. No. 8815270, affecting Certificate of Title Nos. 1053288 and 182404 (the "Notice of Intent to Foreclose"), attached as Exhibit "C" hereto.

> 13. Such Notice of Intent to Foreclose was for a non-judicial foreclosure that the AOAO was attempting based on a power of sale purportedly contained in the Second Restated Declaration of Condominium Property Regime of Century Center executed January 31, 2014 (the "Declarations") attached [as] Exhibit "D" hereto. The Declarations do not in fact contain a contractual power of sale and the AOAO had no power to conduct a non-judicial sale on Unit 108. Section H, page 11 of the Declarations provides:
>
> > ...the unpaid amount of such assessments against any apartment shall constitute a lien against such apartment which may be foreclosed by the Board or Managing Agent as provided said [sic] Condominium Property Act.....
>
> 14. Such language in the Declarations does not constitute a contractual grant of a power of sale. As a result the non-judicial foreclosure was invalid and the AOAO's claim to title is in void [sic].
>
> 15. The non-judicial foreclosure on Unit 108 was further effected by Affidavit of Non-Judicial Foreclosure Under Power of Sale recorded on September 2, 2014 as Doc. No. 9010254 on [Transfer Certificate of Title (**TCT**)] 1053288 (the "Affidavit"), a copy of which is attached as Exhibit "E" hereto.
>
> 16. Under paragraphs 2, 3 and 5 of the Affidavit, the AOAO purports to have foreclosed under a power of sale in the Declarations and under Chapter 667 of the Hawaii Revised Statutes. As noted, the purported contractual power of sale contained in the Declarations is not sufficient to provide authority for the AOAO to have conducted the non-judicial foreclosure.
>
> 17. After the AOAO allegedly held a public auction on August 19, 2014, the AOAO purports to have acquired title under the Quitclaim Assignment of Lease recorded on September 2, 2014 as Doc. No. 9010255 on TCT 1053288 a copy of which is attached hereto as Exhibit "F" (the "AOAO Quitclam"). The AOAO Quitclaim is in direct conflict with the Defendants' Quitclaim and we dispute title to Unit 108[.]
>
> 18. Now, the AOAO seeks to eject [Appellants] from Unit 108.

In sum, Appellants' position was that the non-judicial foreclosure under which the AOAO assumed title was void because the AOAO did not have a contractual power of sale right.

In its Reply, the AOAO stated, "[Appellants'] opposition [to the AOAO's MSJ] is based entirely on the faulty assumption that the [AOAO] does not have the power to conduct nonjudicial foreclosure actions. The Land Court has already adjudicated this specific issue and "determined that the [AOAO] has the contractual right to conduct nonjudicial foreclosures." Jennifer M. Porter (**Porter**), counsel for the AOAO, submitted a

declaration in support of the Reply. According to the declaration, the Land Court gave an oral ruling granting the AOAO's motion for summary judgment.[4] Attached to the declaration was an unsigned and unstamped version of the Land Court's "Order Granting Respondent [AOAO's] Motion for Summary Judgment," which was purportedly pending the Land Court's review and approval.

At the hearing on the Motion to Dismiss, the district court ruled, "Based upon the representations in the reply to [the AOAO's MSJ], . . . it's my understanding that Land Court has -- took jurisdiction over that matter and has resolved it. Therefore, based upon that resolution, I'm going to deny the motion to dismiss. I find that we do have jurisdiction over this matter."

Appellants have sufficiently set forth the scope, nature, and extent of their claim to title to the land in question. See Fed. Nat. Mortg. Ass'n v. Brown, No. CAAP-11-0000572 at *5 (App. May 19, 2014) (mem.) (holding that defendant provided sufficient information for a court to discern the source, nature, and extent of title claimed where "[t]he Mortgage reflects that [defendant] held title as Tenant In Severalty, and the Quitclaim Apartment Deed reflects that [defendant] then conveyed his interest in the Property to himself and his wife as Tenants by the Entirety"). Appellants' claim to title arises from the quitclaim deed recorded in January 2014 conveying a 95% interest in Unit 108 to Appellants as tenants by the entirety.

Appellants have also set forth with particularity the basis for their challenge to the AOAO's claim to superior title sufficient to apprise the district court as to how their allegation bears on the question of title. See Peelua, 126 Hawaiʻi at 38-39, 265 P.3d at 1134-35. Appellants' declaration raised the specific contention that the AOAO's September 2014 quitclaim deed is void because the AOAO did not have the contractual right to foreclose on Unit 108 when Appellants fell

[4] At the hearing on Appellants' Motion to Dismiss, Appellants noted that they were planning to appeal the Land Court's final decision. We take judicial notice of the fact that Appellants filed their notice of appeal from the Land Court's "Order Granting [the AOAO's] Motion for Summary Judgment" in related case no. CAAP-15-0000442 on June 2, 2015.

behind on their payments to the AOAO. The facts elucidated in the declaration are not speculative, but clearly state the grounds upon which Appellants challenge the AOAO's claim to superior title. Cf. Castro, 131 Hawaiʻi at 38, 313 P.3d at 727 (holding that assertions in a declaration challenging the validity of a non-judicial foreclosure did not establish how the assertions affected the defendant's claim to title).[5] Therefore, the district court was without jurisdiction under HRS § 604-5(d) because title to the land in question was at issue.

In their Reply, the AOAO argued that the Land Court ruled on the issue of whether the AOAO had the contractual right to foreclose on Unit 108. Although the AOAO did not submit an opposition to Appellants' Motion to Dismiss, the district court treated the AOAO's Reply as an opposition. Porter's declaration was effectively a counter-affidavit, which a district court may not consider in ruling on its jurisdiction. See Monette v. Benjamin, 52 Haw. 246, 249, 473 P.2d 864, 866 (1970) ("If a district court should consider such counter-affidavit, it in effect would be ruling on a question of title."); see also Peelua, 126 Hawaiʻi at 39, 265 P.3d at 1135. The district court erred in basing its denial of Appellants' Motion to Dismiss on the evidence provided by the AOAO's Reply to their MSJ.

Because we hold that the district court did not have jurisdiction over the AOAO's complaint for eviction, we need not address Appellants' remaining points on appeal.

IV. CONCLUSION

Therefore, the following all entered in the District Court of the First Circuit are vacated and this case is remanded to the district court for proceedings consistent with this Memorandum Opinion:

[5] We also note that unlike the property in Aames, in which a TCT was deemed "conclusive and unimpeachable" evidence as to title, Aames, 107 Hawaiʻi at 102-03, 110 P.3d at 1049-50, this case does not involve a TCT that resolves the issue of title. Here, the applicable TCTs are TCT Nos. 1053288 and 182404 for a term commencing November 30, 1976 and terminated on September 14, 2043 were entered before the Appellants' defenses were raised. The TCT therefore does not preclude Appellants from challenging title to the Unit 108. See Aames, 107 Hawaiʻi at 102-03, 110 P.3d at 1049-50.

(1) the "Order Granting Plaintiff Association of Apartment Owners of Century Center, Inc.'s Motion for Summary Judgment, Filed January 2, 2015" entered on February 2, 2015;

(2) the "Writ of Possession" entered on February 3, 2015;

(3) the "Judgment for Possession" entered on February 3, 2015;

(4) the denial of "Defendants Lily Nomura and Richard Lee's Motion for Reconsideration of Court's Order (1) Denying Defendants' Corrected and Restated Motion to Set Supersedeas Bond for a Stay Pending Appeal, and (2) Granting Plaintiff's Motion for Reconsideration of 'Order Granting Defendants Lily Nomura and Richard Lee's Emergency Ex Parte Motion for Temporary Stay of Enforcement Pending Disposition of Motion to Set Supersedeas Bond for a Stay Pending Appeal' Entered February 4, 2015' After Hearing of February 17, 2015" entered on March 2, 2015; and

(5) the "Order Granting Plaintiff Association of Apartment Owners of Century Center, Inc.'s Motion for Reconsideration of 'Order Granting Defendants Lily Nomura and Richard Lee's Emergency Ex Parte Motion for Temporary Stay of Enforcement of the Court's Writ of Ejectment Pending Disposition of Motion to Set Supersedeas Bond for a Stay Pending Appeal,' Entered February 3, 2015" entered on March 31, 2015.

DATED: Honolulu, Hawaiʻi, May 11, 2016.

On the briefs:

Gary Victor Dubin
Frederick J. Arensmeyer
Daniel J. O'Meara
(Dubin Law Offices)
for Defendants-Appellants.

Presiding Judge

R. Laree McGuire
Jennifer M. Porter
(Porter McGuire Kiakona & Chow)
for Plaintiff-Appellee.

Associate Judge

Associate Judge