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NO. CAAP-12-0000509

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK
NATIONAL ASSOCIATION, Plaintiff/Counterclaim Defendant/Appellee,
v.

WILMER GALIZA AND FLORDELIZA TAPAT,
Defendants/Plaintiff Counterclaimants/Appellants,
and
JOHN and MARY DOES 1-10, Defendants/Appellees

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 10-1-0629(2))

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, Fujise and Ginoza, JJ.)

Defendants-Appellants Wilmer Galiza and Flordeliza Tapat (Appellants) appeal from the Judgment filed on May 3, 2012 in the Circuit Court of the Second Circuit (circuit court).¹ The Judgment was entered based on a summary judgment ruling and a writ of ejectment was issued in favor of Plaintiff-Appellee First Horizon Home Loans, a Division of First Tennessee Bank National Association (FHHL) and against the Appellants.

On appeal, the Appellants contend that the circuit court erred when it granted summary judgment because FHHL did not

¹ The Honorable Kelsey T. Kawano signed the Judgment and the Honorable Shackley F. Raffetto presided over the hearing for summary judgment.

have standing to conduct a non-judicial foreclosure and to file an ejectment action.

For the reasons set forth below we vacate and remand.

I. Background

On November 23, 2005, the Appellants signed an Adjustable Rate Note (Note) in favor of First Horizon Home Loan Corporation (First Horizon) for a property located in Kahului, Maui, Hawai'i (the Property). On December 2, 2005, a Mortgage was recorded on the Property with the State of Hawai'i Bureau of Conveyances (Bureau of Conveyances).

In a letter dated April 2, 2009, Notice of Default was sent to the Appellants, stating, *inter alia*, the Appellants had thirty days to reinstate their loan and the total due was \$7,392,61.

On January 27, 2010, an Assignment of Mortgage and Note was recorded, which stated that Mortgage Electronic Registration Systems, Inc. (MERS) acting solely as nominee for First Horizon "does hereby, without recourse, sell, assign, transfer, set over and deliver unto [FHHL], its successors and assigns, the mortgage and note."²

On April 27, 2010, FHHL conducted a public auction sale of the Property and the Property was sold to the highest bidder, FHHL, for \$339,150. On May 5, 2010, FHHL's attorney filed the Mortgagee's Affidavit of Foreclosure Under Power of Sale (Affidavit of Foreclosure). The Affidavit of Foreclosure states, *inter alia*, that FHHL is the holder of the Promissory Note and Mortgage dated November 23, 2005, and that FHHL complied with the requirements of Hawaii Revised Statutes (HRS) § 667-5 to 667-10 (1993 and Supp. 2010) (repealed 2012).

On July 19, 2010, a Quitclaim Deed was filed with the Bureau of Conveyances, listing FHHL as both the Grantor and the

² The Mortgage states: "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS, with power of sale, the following property located in the County of Maui[.]"

Grantee.

On September 30, 2010, FHHL filed the Complaint for Ejectment in this case. On February 1, 2012, FHHL filed a motion for summary judgment, requesting summary judgment and a writ of ejectment. On May 3, 2012, the circuit court filed an "Order Granting Plaintiff's Motion for Summary Judgment, and for Writ of Ejectment Against Wilmer D. Galiza and Flordeliza Tapat." Also on May 3, 2012, the circuit court filed the Judgment and Writ of Ejectment. On May 23, 2012, the Appellants timely appealed.

II. Standing

A. Assignment of Mortgage and Note

The Appellants contend that FHHL did not have standing to conduct a non-judicial foreclosure and file an ejectment action because First Horizon had allegedly securitized the Mortgage and Note in 2005 and thus MERS did not have ownership rights on January 20, 2010, to assign the Mortgage and Note to FHHL. The Appellants also contend that even if MERS had the power to assign the Mortgage and Note, the assignment was ineffective because it did not comply with HRS chapter 490.

As this court has noted numerous times, "[t]ypically, borrowers do not have standing to challenge the validity of an assignment of its loans because they are not parties to the agreement" U.S. Bank Nat'l Ass'n v. Salvacion, 134 Hawai'i 170, 175, 338 P.3d 1185, 1190 (App. 2014).

Further, "[a] party who shows a direct chain of paper title that the party is the owner of land demonstrates prima facie evidence of their contents and that title is vested in that party." Id. (citation, quotation marks and brackets omitted). In this case, FHHL provided a direct chain of paper title. FHHL's motion for summary judgment included, *inter alia*, a certified copy of the Affidavit of Foreclosure recorded on May 5, 2010. Attached to the Affidavit of Foreclosure was the Note, Mortgage, and Assignment of the Mortgage and Note. The Affidavit of Foreclosure states that FHHL was the holder of the Note and Mortgage. The motion for summary judgment also included a

certified copy of the Quitclaim Deed. The Supreme Court of Hawai'i stated that "[t]hese documents established a direct chain of title from the original lender . . . to [the assignee], which became the holder of the Note and Mortgage on the Property." U.S. Bank Nat'l Ass'n v. Castro, 131 Hawai'i 28, 40, 313 P.3d 717, 729 (2013). Therefore, FHHL produced documents that constituted a prima facie showing that it had a right to foreclose on the Property.

The Appellants contend that MERS did not have authority to transfer the Note because it was not the holder of the Note, a negotiable instrument. Specifically, the Appellants contend that an affidavit by their counsel's paralegal related to her research regarding the subject loan and an attached document she printed from a Bank of New York Mellon website showed that First Horizon Alternative Mortgage Securities Trust 2005-AA12 owned the Appellants' loans as of February 2012 (the date of the attached document), thus allegedly showing that FHHL did not hold the note at that time and MERS could not have had authority to assign the Mortgage and Note to FHHL back in January 2010. However, the affidavit and document that the Appellants rely on do not appear to present admissible evidence. Moreover, even if the attached document and information in the affidavit were admissible, they do not establish that another party held the Note or that MERS had no authority to assign the Mortgage and Note to FHHL.

Appellants do not present any admissible evidence to refute FHHL's direct chain of title, or to show that FHHL was not the holder of the Note, and thus they did not raise a genuine issue of material fact on these issues.

B. Robo-signers

The Appellants contend the assignment of the Mortgage and Note to FHHL was ineffective because the documents were signed by robo-signers.

This court has rejected similar arguments that an assignment is invalid when it was signed by alleged robo-signers because the argument failed to assert facts or law explaining how

robo-signing caused the defendant any harm or damages. U.S. Bank Nat'l Ass'n v. Benoist, No. CAAP-14-0001176, 2015 WL 7260350, at *4 (Haw. App. Nov. 12, 2015) (SDO). Therefore, this court concluded "[w]e join other courts that have addressed similar issues and find that such conclusory assertions of 'robo-signing' fail to state a plausible claim." Id. (citation and some internal quotation marks omitted); Bank of N.Y. Mellon v. Rumbawa, No. CAAP-15-0000024, 2016 WL 482170, at *2 (Haw. App. Feb. 4, 2016) (SDO) ("The use of 'robo-signers' in the AOM and Corrective AOM did not affect BNYM's standing to foreclose on the mortgage property.").

Similarly, in this case, the Appellants did not assert any specific harm or damages caused by the robo-signing. Therefore, the Appellants did not present a genuine issue of material fact in this regard.

C. Notice of Default

The Appellants contend that the Notice of Default did not comply with paragraph 22 of the Mortgage because (1) the Notice of Default did not give the amount to be tendered to cure the default and how the amount was calculated; and (2) FHHL was not the holder of the Note at the time it sent the Notice of Default.

The Appellants, however, did not make this argument in their memorandum in opposition for summary judgment. Moreover, there is no transcript for the summary judgment hearing in the record, and the Appellants do not contend that they preserved this issue below. Therefore, the Appellants waived this argument for appeal. See Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 107, 58 P.3d 608, 619 (2002) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal.").

III. Kondaur Capital Corp. v. Matsuyoshi

Although FHHL had standing to pursue the non-judicial foreclosure and ejectment action, we must vacate the Judgment in this case under the recent Hawai'i Supreme Court decision,

Kondaur Capital Corp. v. Matsuyoshi, 136 Hawai'i 227, 361 P.3d 454 (2015); see also JPMorgan Chase Bank, Nat'l Ass'n v. Benner, 2016 WL 2928173, — Hawai'i —, — P.3d — (App. 2016).

In Kondaur, the supreme court held that "the duties set forth in [Ulrich v. Security Investment Co., 35 Haw. 158 (Haw. Terr. 1939)] remain viable law and are applicable to non-judicial foreclosures of real property mortgages." 136 Hawai'i at 229, 361 P.3d at 456. The supreme court stated:

Ulrich requires mortgagees to exercise their right to non-judicial foreclosure under a power of sale in a manner that is fair, reasonably diligent, and in good faith, and to demonstrate that an adequate price was procured for the property. In instances where the mortgagee assumes the role of a purchaser in a self-dealing transaction, the burden is on the mortgagee, or its quitclaim transferee or non-bona fide successor, to establish its compliance with these obligations. Its failure to do so would render the foreclosure sale voidable and could therefore be set aside at the timely election of the mortgagor.

Id. at 240, 361 P.3d at 467 (citations and footnotes omitted) (emphasis added). Thus, in a self-dealing transaction, where the mortgagee assumes the role of the purchaser in a non-judicial foreclosure sale, the mortgagee has the "burden to prove in the summary judgment proceeding that the foreclosure sale was regularly and fairly conducted in every particular." Id. at 241, 361 P.3d at 468 (citation and quotation marks omitted). "A prima facie case demonstrating compliance with the foregoing requirements [shifts] the burden [to the mortgagor] to raise a genuine issue of material fact." Id. at 242, 361 P.3d at 469.

In Kondaur, the mortgagee, Resmae Liquidation Properties LLC (RLP), conducted the non-judicial foreclosure on the subject property, was the highest bidder, and thereby obtained title to the property. Id. at 230, 361 P.3d at 457. RLP then executed a quitclaim deed conveying the property to Kondaur Capital Corporation (Kondaur) and Kondaur brought an ejectment action against the mortgagor. Id. at 230-31, 361 P.3d at 457-58. The supreme court held that Kondaur had "whatever rights RLP had on the Property," and that "the strength and validity of Kondaur's title is unavoidably intertwined with the

validity of the foreclosure sale." Id. at 241, 361 P.3d at 468. Kondaur thus needed "to demonstrate that the foreclosure sale was conducted in accordance with Ulrich" Id.

In discussing Kondaur's motion for summary judgment, the supreme court further stated that the "mortgagee's minimal adherence to the statutory requirements and terms of the mortgage under which the foreclosure sale is conducted ... does not establish that the foreclosure sale similarly satisfied the Ulrich requirements." Id. at 243, 361 P.3d at 470. Thus, although Kondaur attached to its motion for summary judgment RLP's Affidavit of Sale, which certified that RLP had complied with the mortgage and HRS §§ 667-5 through 667-10, Kondaur did not satisfy its burden of showing compliance with the Ulrich requirements because the "Affidavit of Sale fail[ed] to provide any averments as to the fairness and regularity of the foreclosure sale or as to whether RLP conducted the foreclosure sale in a diligent and reasonable manner[,]" the document did not speak to why the foreclosure sale was conducted on a different island than where the property was located, and, although the document identified the purchase price, it did not "make any declaration concerning the adequacy of this price." Id. at 242-43, 361 P.3d at 469-70.

Because Kondaur failed to satisfy its initial burden of showing that the foreclosure sale was conducted in a manner that was fair, reasonably diligent, in good faith, and would obtain an adequate price for the property, the burden never shifted to the mortgagor and the mortgagor did not have to raise any genuine issue of material fact. Id. at 243, 361 P.3d at 470. Thus, the supreme court vacated the summary judgment and remanded for further proceedings. Id. at 244, 361 P.3d at 471.

This case, like Kondaur, involved a self-dealing transaction because FHHL was the foreclosing mortgagee and the purchasing high bidder at the non-judicial foreclosure sale. In addition, like in Kondaur, the Affidavit of Foreclosure submitted by FHHL's attorney did not attest to anything concerning the

adequacy of the purchase price. Thus, FHHL did not satisfy its initial summary judgment burden of showing compliance with the Ulrich requirements.

Under Kondaur, summary judgment for FHHL was in error.

IV. Conclusion

Based on the foregoing, the Judgment filed on May 3, 2012, in the Circuit Court of the Second Circuit, is vacated. This case is remanded to the circuit court for further proceedings consistent with this order to address the issues related to Kondaur.


DATED: Honolulu, Hawai'i, June 30, 2016.

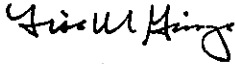
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Chief Judge


Associate Judge


Associate Judge