

NO. CAAP-14-0000585

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DB PRIVATE WEALTH MORTGAGE, LTD.,  
A NEW YORK CORPORATION, Plaintiff-Appellee, v.  
BRIAN J. BOULEY, INDIVIDUALLY AND AS TRUSTEE OF THE  
BRIAN J. BOULEY LIVING TRUST, DATED JANUARY 18, 2006;  
CORINNE BOULEY, INDIVIDUALLY AND AS TRUSTEE  
OF THE C. BOULEY LIVING TRUST, DATED JANUARY 18, 2006,  
Defendants-Appellants, and ONE PALAU'EA BAY COMMUNITY  
ASSOCIATION, INC.; DEPARTMENT OF TAXATION, STATE OF HAWAII;  
MAUI COLLECTION SERVICE, INC., Defendants-Appellees, and  
JOHN DOES 1-5; JANE DOES 1-5; DOE CORPORATIONS 1-5; DOE  
PARTNERSHIPS 1-5; DOE ASSOCIATIONS 1-5; DOE GOVERNMENTAL  
UNITS 1-5; AND DOE ENTITIES 1-5, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CIVIL NO. 11-1-0525(2))

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, Foley and Leonard, JJ.)

Defendants-Appellants Brian J. Bouley, Individually and  
as Trustee of the Brian J. Bouley Living Trust, Dated January 18,  
2006; and Corinne Bouley, Individually and as Trustee of the C.  
Bouley Living Trust, Dated January 18, 2006 (the **Bouleys**) seek  
relief on appeal from various orders and judgments of the Circuit  
Court of the Second Circuit (**Circuit Court**),<sup>1</sup> as well as certain

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The Honorable Peter T. Cahill presided.

conveyances, including the: (1) Stipulated Order Granting Plaintiff's Motion for (1) Confirmation of Sale, (2) Approval of Commissioner's Report, filed August 15, 2012, (3) Attorneys' Fees and Costs, and (4) A Deficiency Judgment (Filed August 31, 2012), filed on November 19, 2013 (**Stipulated Confirmation Order**); (2) Final Judgment, filed on November 19, 2013; (3) Order Granting Plaintiff DB Private Wealth Mortgage Ltd.'s [(DB's)] Motion for Instructions to Commissioner and Issuance of Judgment and Writ of Possession, Filed December 11, 2013, filed on February 18, 2014; (4) Order Denying Bouley Defendants' Motion for Reconsideration and to Set Aside the Entry of the November 19, 2013 Stipulated Order and the November 19, 2013 Final Judgment and for Reinstatement of the November 13, 2013 Hearing to be Rescheduled as soon as Possible, Filed November 29, 2013, filed on February 18, 2014; (5) Judgment for Possession, filed on February 24, 2014; (6) Writ of Possession, filed on February 24, 2014; (7) Commissioner's Deed, dated January 23, 2014; (8) Quitclaim Deed, dated January 23, 2014; (9) Brian and Corinne Bouley's HRCP Rule 62(b) Ex Parte Motion for Temporary Stay of Judgment for Possession and Writ of Possession Pending Disposition of Brian and Corrine Bouley's Motion to Set Supersedeas Bond for Stay Pending Appeal [Denied], filed on March 7, 2014; and (10) Order Denying Bouley Defendants' Emergency Motion (1) for Rehearing, (2) for Instructions, (3) for Rejection of Plaintiff's Pending Proposed Orders, (4) to Set Aside Fraudulently Recorded Property Transfers, (5) for Approval of Private Sale, or in the

Alternative (6) for Stay and (7) for Bond Pending Appeal, Filed February 6, 2014, filed on March 21, 2014.

The Bouleys did not appeal from the Circuit Court's March 21, 2012 Findings of Fact, Conclusions of Law and Order [(**FOF/COL and Order**)] Granting DB's Motion for Summary Judgment and Interlocutory Decree of Foreclosure, which ordered foreclosure of the subject property and a judicial sale and appointed a commissioner to conduct a foreclosure auction of the subject property, and Hawai'i Rules of Civil Procedure (**HRC**P) Rule 54(b) certified judgment on the FOF/COL and Order as to all claims set forth in DB's complaint. Rather, on this appeal, the Bouleys contend, *inter alia*, that the Circuit Court erred in approving and entering the parties' Stipulated Confirmation Order.

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, we resolve the Bouleys' appeal as follows:

We must first address DB's argument that the Bouleys' appeal is moot because no relief can be granted, as the Bouleys failed to obtain a stay, and the subject property has been sold to a good faith third-party purchaser. See, e.g., Doe v. Doe, 120 Hawai'i 149, 164-65, 202 P.3d 610, 625-26 (App. 2009) (stating that mootness is a matter of subject matter jurisdiction).

"[W]hen 'an event occurs which renders it impossible for an appellate court, if it should decide the case in favor of

the appellant, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.'" City Bank v. Saje Ventures II, 7 Haw. App. 130, 134, 748 P.2d 812, 815 (1988) (brackets omitted) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). The sale of a subject property to a good faith purchaser during the pendency of an appeal renders a challenge to the confirmation of a foreclosure sale moot as it prevents the appellate court from granting any effective relief. Lathrop v. Sakatani, 111 Hawai'i 307, 314-15, 141 P.3d 480, 487-88 (2006); see also Saje Ventures II, 7 Haw. App. at 133, 748 P.2d at 814 ("[T]he right of a good faith purchaser 'to receive property acquired at a judicial sale cannot be affected by the reversal of an order ratifying the sale where a supersedeas bond has not been filed.'" (brackets, citation, and internal quotation marks omitted). "[I]t is appellant's burden to seek a stay if post-appeal transactions could render the appeal moot." Sakatani, 111 Hawai'i at 313, 141 P.3d at 486. An "innocent" or good faith purchaser is "one who, by an honest contract or agreement, purchases property or acquires an interest therein, without knowledge, or means of knowledge sufficient to charge him in law with knowledge, of any infirmity in the title of the seller." Ka'u Agribusiness Co. v. Heirs or Assigns of Ahulau, 105 Hawai'i 182, 193, 95 P.3d 613, 624 (2004) (citation omitted).

Here, on January 23, 2014, the subject property was conveyed to DB by the Commissioner's Deed, which was registered in the Land Court under Transfer Certificate of Title (**TCT**)

1073415 on January 30, 2014. On January 30, 2014, DB conveyed the subject property to Zumirez Drive, LLC (**Zumirez**) by the Quitclaim Deed, which was registered in the Land Court under TCT 1073416. Thereafter, on September 26, 2014, the subject property was sold from Zumirez to the William C. Johnson and Donna K. Johnson [(the **Johnsons**)] as Trustees of the William C. and Donna K. Johnson Revocable Trust, with title transferring by Warranty Deed. The Bouleys do not challenge or deny that the Johnsons were good-faith third-party purchasers of the subject property. Accordingly, the Johnsons' right to receive the subject property cannot be affected by the reversal of an order ratifying the sale where a supersedeas bond has not been filed. Saje Ventures II, 7 Haw. App. at 133, 748 P.2d at 814. Here, the Bouleys failed to post a supersedeas bond in accordance with the Circuit Court's setting of the bond amount, and all of the Bouleys' attempts to otherwise obtain a stay were denied. Thus, absent any other exceptions to the rule, this court cannot grant relief to the Bouleys.

There are two exceptions to the rule set forth in Saje Ventures II: (1) where the reversal requested is based on jurisdictional grounds, or (2) where the purchaser is the mortgagee. 7 Haw. App. at 133, 748 P.2d at 814. However, neither exception applies here, as the Bouleys do not request reversal of the orders based on jurisdictional grounds, and the Johnsons were not the mortgagee.

The Hawai'i Supreme Court has also recognized two general exceptions to the mootness doctrine: (1) the capable of

repetition, yet evading review exception (**CRER**); and (2) the public interest exception. Hamilton ex rel. Lethem v. Lethem, 119 Hawai'i 1, 5, 193 P.3d 839, 843 (2008). As to the public interest exception, "this court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." Id. at 6-7, 193 P.3d at 844-45 (citation and brackets omitted). Here, the dispute is clearly of a private nature, and the Bouleys, who did not address the issue of mootness in their briefs, do not present this court with any basis to conclude that the circumstances require "an authoritative determination for future guidance of public officers" or that there is a "likelihood of future recurrence of the question." See id. at 6, 193 P.3d at 844. As to the CRER exception, this case only evades review because the Bouleys failed to post a bond and obtain a stay, rather than due to circumstances out of the Bouleys' control. Sakatani, 111 Hawai'i at 315, 141 P.3d at 488. Thus, "because [the appellants] did not avail themselves of the mechanisms that would have preserved the issue for review, we are compelled to hold that the issue is moot and the exceptions to the mootness doctrine do not apply." Id.

The Bouleys also contend that the Circuit Court abused its discretion by setting too high a bond amount. Under HRCF Rule 62(d), "a party taking an appeal from a judgment must file a supersedeas bond to stay its enforcement." MDG Supply, Inc. v.

Diversified Inv., Inc., 51 Haw. 375, 382, 463 P.2d 525, 529 (1969).

The determination of the amount of a supersedeas bond which will be sufficient to protect the rights of an appellee is committed to the sound discretion of the circuit court, but this discretion is not unlimited. Moreover, the bond requirement may not be used to discourage appeals.

Midkiff v. de Bisschop, 58 Haw. 546, 550, 574 P.2d 128, 131 (1978) (per curiam) (citation omitted). A trial court has "the inherent discretion and power to allow for flexibility on the determination of the nature and extent of the security required to stay execution of a judgment pending appeal and can allow an alternative to a supersedeas bond." U.S. Bank Nat'l Ass'n v. Salvacion, No. 30594, 2011 WL 1574585, at \*9 (Haw. App. Apr. 26, 2011) (mem.) citing Shanghai Inv. Co. v. Alteka Co., 92 Hawai'i 482, 503-04, 993 P.2d 516, 537-38 (2000), overruled on other grounds by Blair v. Ing, 96 Hawai'i 327, 31 P.3d 184 (2001). The burden to provide a secure alternative rests on the judgment debtor. Shanghai, 92 Hawai'i at 503, 993 P.2d at 537.

Here, the Bouleys requested an alternative to the posting of a supersedeas bond, suggesting instead a monthly rental installment payment or "installment bond," plus real property taxes and insurance, in order for them to retain possession pending the outcome of their appeal. The Bouleys' requested alternative, which was essentially a promise to pay monthly amounts in the future, was wholly inadequate to provide a secure alternative; therefore, the Bouleys failed to meet their burden. Shanghai, 92 Hawai'i at 503, 993 P.2d at 537.

For these reasons, the mootness doctrine applies in this case and, therefore, we are without jurisdiction to rule upon the merits of the Bouleys' challenge to, *inter alia*, the Stipulated Confirmation Order.

In addition, even if the Bouleys' challenge were not moot, it fails on the merits because the Bouleys provide no valid grounds for challenging the Confidential Settlement Agreement Regarding Sale of Property and the Stipulated Confirmation Order, which they failed to timely object to, pursuant to the terms of the settlement agreement.

Accordingly, we affirm the above-referenced orders and judgments of the Circuit Court.

DATED: Honolulu, Hawai'i, June 28, 2016.

On the briefs:

Gary Victor Dubin,  
Frederick J. Arensmeyer,  
Richard T. Forrester,  
for Defendants-Appellants.

Chief Judge

Associate Judge

Louise K.Y. Ing,  
Laura P. Moritz,  
(Alston Hunt Floyd & Ing),  
for Plaintiff-Appellee.

Associate Judge