

CONCURRING OPINION BY GINOZA, J.

I respectfully concur. I agree with the majority that we must review the "Order Granting Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on the Second Amended Complaint" under the summary judgment standard because matters outside the pleadings were presented to, and not excluded by, the Circuit Court of the First Circuit (circuit court).

Foytik v. Chandler, 88 Hawai'i 307, 313, 966 P.2d 619, 625 (1998). Considering the evidence submitted by the moving parties, Defendants Robert C. Reish (Robert Reish) and Susan N. Reish (Susan Reish), individually and as Trustees for The Reish 1995 Family Trust as created by Declaration of Trust dated September 18, 1995 (collectively Reish Defendants), and the lack of evidence submitted by Plaintiffs-Appellants Rodillo M. Tabuyo, Sr. and Merlina D. Tabuyo (the Tabuyos), there is no genuine issue of material fact and summary judgment was properly granted as to the three counts in the Tabuyos' Second Amended Complaint.

In their Second Amended Complaint, the Tabuyos assert three counts¹ against the Reish Defendants based on allegations that the foreclosure of their property was procured by mortgage fraud, deceit, and misrepresentation. See Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawai'i 300, 312, 944 P.2d 97, 109 (App. 1997) (providing the elements of a fraud claim). The Second Amended Complaint does not allege any interaction between the Tabuyos and either Robert Reish or Susan Reish, or any alleged representations made by either Robert Reish or Susan Reish. In their motion seeking dismissal and/or summary judgment on the Second Amended Complaint, the Reish Defendants attached relevant parts of the Tabuyos' deposition testimony, in which the Tabuyos testify to not having talked to or interacted with Robert Reish or Susan Reish prior to signing the loan documents, other than being told by Robert Reish the location of the escrow

¹ Count I - "Declaratory Judgment re: Wrongful Nonjudicial Foreclosure Restoring Possession and Titles Against Reishs"; Count II - "Declaratory Judgment re: Fraud and Rescission and Common Law Damages Against Reishs"; Count III - "Punitive Damages Against Reishs."

office. The Reish Defendants further submitted the declarations of Robert Reish and Sylvain Lacasse (Lacasse), in which both attest that Lacasse served as the Tabuyos' mortgage broker and agent, and that Lacasse approached Robert Reish on behalf of the Tabuyos to make the loan to the Tabuyos. In opposition to the Reish Defendants' motion, the Tabuyos did not submit any evidence and instead only argued that they had plead the claims with sufficient particularity to meet the requirements of Hawai'i Rules of Civil Procedure (HRCP) Rule 9(b).² Given this record, the circuit court did not err in granting the Reish Defendants' motion as to the Second Amended Complaint.

For these reasons, I concur.

² The Tabuyos submitted an untimely affidavit of Rodillo Tabuyo in response to a prior motion, and did not rely on it with regard to the motion as to the Second Amended Complaint.