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NO. CAAP-14-0001098

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

RODILLO M. TABUYO, SR. and MERLINA D. TABUYO,
Plaintiff-Appellants,

v.

ROBERT C. REISH and SUSAN N. REISH, INDIVIDUALLY AND
AS TRUSTEES FOR THE REISH 1995 FAMILY TRUST AS CREATED
BY DECLARATION OF TRUST DATED SEPTEMBER 18, 1995,
Defendants-Appellants, and DOES 1-30, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-2029)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Reifurth, J.,
with Ginoza, J., concurring separately)

This appeal arises out of the non-judicial foreclosure sale of a piece of real property ("Property"), which Defendants-Appellees Robert C. Reish and Susan N. Reish, individually and as Trustees for The Reish 1995 Family Trust as created by Declaration of Trust dated September 18, 1995 (collectively, the "Reishs") conducted on May 6, 2009. This foreclosure came about after Plaintiffs-Appellants Rodillo M. Tabuyo, Sr. and Merlina D. Tabuyo (collectively, the "Tabuyos") allegedly defaulted on a \$150,000 loan from the Reishs, which the parties secured with a second mortgage on the Property in late 2007 (the "Loan").^{1/}

The Tabuyos appeal from the "Order Granting Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on the Second Amended Complaint Filed on February 10, 2014 and Order to Expunge Notice of Pendency of Action" ("Second

^{1/} The Tabuyos do not dispute that they were in default under the terms of the Loan.

MTD/MSJ Order")^{2/}; "Judgment"; and "Notice of Entry of Judgment," all of which were filed in the Circuit Court of the First Circuit ("Circuit Court")^{3/} on August 5, 2014.^{4/}

On appeal, the Tabuyos allege that the Circuit Court "abused its discretion and incorrectly granted" the MTD/MSJ on the Second Amended Complaint because: (1) the Tabuyos' contention that the Reishs' non-judicial foreclosure was procured via mortgage fraud ("Count I") "was stated with sufficient particularity" under Hawai'i Rules of Civil Procedure ("HRCP") Rule 9(b); (2) the Tabuyos' contention that the Reishs' fraudulently-obtained title could not be assigned ("Count II") "was stated with sufficient particularity"; and (3) the Tabuyos' contention that the Reishs' mortgage fraud is a sufficient basis

^{2/} On July 12, 2013, the Reishs filed "Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on the First Amended Complaint filed September 24, 2009". On January 13, 2014, the Circuit Court entered an order granting the motion. Specifically, the Circuit Court granted the motion without prejudice as to the first, second, and seventh counts of the Tabuyos' first amended complaint, and granted with prejudice as to the third, fourth, fifth, and sixth counts. Prior to issuing the order, the Circuit Court issued a Minute Order on November 26, 2013, explaining that "[t]he court grants the motion as to counts one and two as these counts were not plead with sufficient specificity and particularity as required by HRCP Rule 9(b). The court grants the motion as to count seven as [the Tabuyos] have failed to submit evidence that [the Reishs] misrepresented the terms of the loan to [the Tabuyos]." On February 10, 2014, the Tabuyos filed "Plaintiff's Second Amended Complaint for Wrongful Foreclosure; for Declaratory and Injunctive Relief Restoring Possession and Title; and for Actual, Treble and Punitive Damages" ("Second Amended Complaint"), in which they re-asserted the three counts that were dismissed without prejudice on January 13, 2014, using nearly identical language as the first amended complaint.

^{3/} The Honorable Bert I. Ayabe presided.

^{4/} The Circuit Court did not specify whether it construed the February 18, 2014 "Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on the Second Amended Complaint Filed on February 10, 2014" ("MTD/MSJ on the Second Amended Complaint") as a motion to dismiss for "failure to state a claim upon which relief can be granted" under HRCP Rule 12(b)(6) or a motion for summary judgment under Rule 56. However, the Reishs appended several declarations and other exhibits, which the Circuit Court did not exclude, to their motion. Thus, we treat the MTD/MSJ on the Second Amended Complaint "as seeking summary judgment pursuant to HRCP Rule 56 and apply the standard of review relating to motions for summary judgment." *Foytik v. Chandler*, 88 Hawai'i 307, 313, 966 P.2d 619, 625 (1998); accord *Wong v. Cayetano*, 111 Hawai'i 462, 476, 143 P.3d 1, 15 (2006) ("[A] motion seeking dismissal of a complaint is transformed into a . . . motion for summary judgment when the circuit court considers matters outside the pleadings."); e.g., *Bureaus Inv. Grp., No. 2, LLC v. Harris*, No. 30699, 2013 WL 6231742, at *2 (Hawai'i App. Nov. 29, 2013) ("We note that as to his motion to dismiss, [Defendant-Appellant] attached thereto his declaration and exhibits and we will thus treat this motion as a motion for summary judgment." (citing *Wong*, 111 Hawai'i at 476, 143 P.3d at 15; Haw. R. Civ. P. 12(c))).

upon which to claim punitive damages ("Count III") was not baseless. Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments they advance and the issues they raise, we resolve the Tabuyos' points of error as follows, and affirm.

(1) The Tabuyos' first argument on appeal is that Count I of the Second Amended Complaint—that the Reishs' non-judicial foreclosure was procured via mortgage fraud—was stated with sufficient particularity under HRCF Rule 9(b). In support of their contention, the Tabuyos essentially argue that the Circuit Court erred because it (a) applied the wrong legal standard to evaluate the Tabuyos' pleadings, which the court allegedly derived from the dicta of an unpublished, factually distinguishable, federal case: *Enriquez v. J.P. Morgan Chase Bank, N.A.*, No. 2:08-cv-01422-RCJ-LRL, 2009 WL 160245 (D. Nev. Jan. 22, 2009); (b) misapplied HRCF Rule 9(b), which, the Tabuyos claim, is satisfied by Counts I and II of the Second Amended Complaint; and (c) "did not properly apply the [motion for summary judgment] standards to the facts of this case." We disagree.

(1) (a) The Tabuyos have failed to demonstrate that the Circuit Court did, in fact, apply the *Enriquez* standard to evaluate the Second Amended Complaint,^{5/} or that the standard it did apply was incorrect.

Because the Circuit Court did not state the rationale behind its decision to grant the MTD/MSJ on the Second Amended Complaint in the Second MTD/MSJ Order, the Judgment, or the Notice of Entry of Judgment, the Tabuyos "presume[] . . . that the [Circuit Court] adopted the REISHS' position on each issue where it dismissed a count in the TABUYOS' [Second Amended C]omplaint." A review of the record on appeal, however, suggests otherwise.

Counts I and II of the Second Amended Complaint are nearly identical to the first two counts of the Tabuyos'

^{5/} Although the Reishs' MTD/MSJ on the Second Amended Complaint provides a single citation to *Enriquez*, 2009 WL 160245, the motion advances no argument with respect to the *Enriquez* rule.

September 24, 2009 first amended complaint. Furthermore, the November 26, 2013 Minute Order, which addresses the court's rationale with regard to the first amended complaint, presages the court's thinking with regard to the substantially-similar Second Amended Complaint. In relevant part, the Minute Order explains that the first and second counts of the Tabuyos' first amended complaint "were not plead with sufficient specificity and particularity *as required by HRCP Rule 9(b)*," and with respect to count seven, that the Tabuyos "failed to submit evidence that defendants misrepresented the terms of the loan." (Emphasis added.)

The Tabuyos do not point to any other evidence to support their implied contention that the Circuit Court dismissed Counts I and II of the Second Amended Complaint for a different reason than it stated in the November 26, 2013 Minute Order with regard to the first amended complaint. As such, the Tabuyos have failed to demonstrate that the Circuit Court did, in fact, apply the *Enriquez* standard to evaluate the Second Amended Complaint, and therefore we need not determine whether the *Enriquez* standard is correct. Instead, we evaluate whether the fraud allegations in the Second Amended Complaint were stated with sufficient particularity to satisfy HRCP Rule 9(b).

(1)(b) We reject the Tabuyos' contention that the Circuit Court erred by dismissing the allegations in Count I pursuant to HRCP Rule 9(b), because in their Second Amended Complaint, the Tabuyos failed to articulate what specific (mis)representations, if any, the Reishs made about the Loan.^{5/}

In their May 13, 2014 memorandum opposing the Reishs' MTD/MSJ on the Second Amended Complaint, the Tabuyos asserted that "COUNTS I AND II, STANDING ALONE, ONLY ALLEGE FRAUD GENERALLY". Rule 9(b) of the HRCP states that "[i]n all

^{5/} Although the Tabuyos filed a "Supplemental Affidavit of Merlina D. Tabuyo in Opposition to Defendants' Motion to Dismiss or, in the Alternative Motion for Summary Judgment on the First Amended Complaint Filed on September 24, 2009" ("Supplemental Affidavit"), they did not include the affidavit or any information from the affidavit in any court filing associated with the Reishs' MTD/MSJ of the Second Amended Complaint. Irrespective of whether the Supplemental Affidavit was specific enough to satisfy HRCP Rule 9(b), that detail was not included in the Second Amended Complaint.

averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, plaintiffs suing for fraud in the State of Hawai'i "must . . . allege who made the false representations[] and specify the representations made." *Niau v. Quick Loan Funding*, No. CAAP-12-0000474, 2015 WL 1360823, at *5 (Hawai'i App. Mar. 25, 2015) (quoting *Agard v. Deutsche Bank Nat'l Trust Co.*, No. CAAP-13-0002872, 2015 WL 337254, at *2 (Hawai'i App. Jan. 26, 2015), *cert. denied*, No. SCWC-13-0002872, 2015 WL 3649493, at *1 (Hawai'i June 8, 2015)). Even though the Second Amended Complaint arguably identified the Reishs as the party who made false representations regarding the Loan, it was insufficient under HRCF Rule 9(b) for failing to specify what those representations were. *Id.*

Below, the Tabuyos argued that "the FACTS section (pages 3 - 5) [of the] Second Amended Complaint constitutes a statement of the *circumstances constituting* fraud as required by HRCF Rule 9(b)." While a single paragraph of the Second Amended Complaint eludes to possible (mis)representations, on which an action for fraud must be based, *Ex rel. Louie*, 133 Hawai'i at 407 n.33, 328 P.3d at 416 n.33 ("[In Hawai'i, a] claim for fraud involves 'a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.'" (quoting *Fisher v. Grove Farm Co.*, 123 Hawai'i 82, 116, 230 P.3d 382, 416 (App. 2009) (brackets omitted))), the Second Amended Complaint contains no allegations regarding the *content* of any representations the Tabuyos may have relied on to their detriment. *Cf.*, e.g., *Niau*, 2015 WL 1360823, at *6 (affirming summary judgment pursuant to HRCF Rule 9(b) where the plaintiffs-appellants "provided various documents related to the Note and Mortgage, [yet] they d[id] not point to any evidence to support their allegations or specify where in the included documents the [alleged] violations occurred").

On appeal, the Tabuyos also argue that, on a "general basis," the Reishs misrepresented themselves by "h[olding] themselves out to be law-abiding and otherwise reputable people." However, even if the Tabuyos had properly preserved the argument

below,^{2/} this contention is meritless. The Tabuyos did not allege that the Reishs *affirmatively represented* themselves to the Tabuyos or their agent, Sylvain Lacasse, as "law-abiding and otherwise reputable" in the Second Amended Complaint. See generally *Black's Law Dictionary*, 1494, 1152 (10th ed. 2014) (defining a "false representation," or "misrepresentation," as "[t]he act . . . of making a false or misleading assertion about something, usu[ally] with the intent to deceive"). Rather, the Second Amended Complaint merely states that the Reishs have been "doing business as unlicensed private lenders" in Hawai'i. However, the Tabuyos provide no authority, and we know of none, stating that a party's general act of entering into a loan agreement necessarily constitutes a "representation" by that party that he or she is "law-abiding and otherwise reputable." See, e.g., *Miyashiro v. Roehrig, Roehrig, Wilson & Hara*, 122 Hawai'i 461, 483, 228 P.3d 341, 363 (App. 2010) (affirming summary judgment where there was "no evidence of a representation or misrepresentation that [the plaintiff] relied upon to his detriment"). Thus, the Circuit Court did not err when it determined that Count I of the Second Amended Complaint does not comply with HRCF Rule 9(b).

(1)(c) In further support of its first point of error, the opening brief also states that the Circuit Court erred by failing to "properly apply the [Motion for Summary Judgment] standards to the facts of this case. . . ." Specifically, the Tabuyos allege that "[t]he inferences the lower court made were not done in the light most favorable to the Tabuyos," and that the Reishs, as movants, "produced insufficient evidence to meet [Hawai'i's] stringent burden of proof" for summary judgment. We disagree.

As noted above, we construe the Reishs' MTD/MSJ of the Second Amended Complaint as a motion for summary judgment, see *Foytik*, 88 Hawai'i at 313, 966 P.2d at 625; *Wong*, 111 Hawai'i at

^{2/} See generally *Lales v. Wholesale Motors, Co.*, 133 Hawai'i 332, 343 n.9, 328 P.3d 341, 352 n.9 (2014) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal." (quoting *Kau v. City & Cnty. of Honolulu*, 104 Hawai'i 468, 474 n.6, 92 P.3d 477, 483 n.6 (2004) (internal quotation marks omitted))).

476, 143 P.3d at 15, and we therefore review the Second MTD/MSJ Order *de novo*. *Querubin v. Thronas*, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (quoting *Durette v. Aloha Plastic Recycling, Inc.*, 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)). Here, there is no indication that the result hinged on the existence or nonexistence of some material fact. See generally *Thomas v. Kidani*, 126 Hawai'i 125, 129, 267 P.3d 1230, 1234 (2011) ("A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by [one of] the parties." (quoting *Fujimoto v. Au*, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001))). Rather, as explained above, the record implies that, like the first amended complaint, the court dismissed the Second Amended Complaint because its claims were not pled with sufficient particularity. And, indeed, "[w]here, as here, the moving party is the defendant and does not bear the burden of proof at trial, he may prevail on a motion for summary judgment by demonstrating that the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* at 130, 267 P.3d at 1235 (quoting *Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co.*, 116 Hawai'i 277, 302, 172 P.3d 1021, 1046 (2007)).

Thus, we need not evaluate the sufficiency of evidence that the Reishs, as movants, produced in support of their motion. *Id.*; see *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (affirming an award of summary judgment without considering the sufficiency of the movant's evidence where "the complaint d[id] not include the necessary factual allegations to state a [specific] claim") (citing, *inter alia*, *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("'Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'" (quoting another source)), *cert. denied*, 556 U.S. 1281 (2009). See also, e.g., *Miyashiro*, 122 Hawai'i at 483, 228 P.3d at 363 (affirming summary judgment where plaintiff-appellant's "vague allegations of fraud and conspiracy [were] not legally sufficient" because he "failed to

adduce evidence supporting each of the elements" of those claims).

Furthermore, the Reishs presented evidence in their MTD/MSJ of the Second Amended Complaint that the Tabuyos did not rely on any specific representations made by the Reishs in entering into the Loan, and the Tabuyos did not present any contrary evidence to raise a genuine issue of material fact. See *id.* (discussing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that the defendant summary judgment movant is entitled to summary judgment if it shows that the plaintiff/non-moving party cannot establish all essential elements on which he or she bears the burden the proof at trial))).

Therefore, we hold that the Tabuyos' first point of error fails.

(2) Regarding Count II of the Second Amended Complaint, the Tabuyos asked the Circuit Court to render the Loan transaction "void and unenforceable as procured by deceit, misrepresentation, illegality and criminality" As noted above, this contention is nearly identical to the second count of the Tabuyos' first amended complaint, which the Circuit Court dismissed for failure to comply with HRCP Rule 9(b). The Tabuyos "do[] not add any new factual allegations" to their claim in Count II, nor do they advance any new legal argument on the subject. *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1233 (D. Haw. 2010). Accordingly, we find that Count II fails to comply with HRCP Rule 9(b) for the same reasons as Count I, and the Circuit Court therefore did not err by disposing of that claim. *Id.*

(3) The Tabuyos' final argument is that there was a sufficient basis for their request for punitive damages against the Reishs in Count III of the Second Amended Complaint. "A claim for punitive damages is[, however,] . . . purely incidental to a separate cause of action." *Fisher*, 123 Hawai'i at 119, 230 P.3d at 419 (original brackets omitted) (quoting *Ross v. Stouffer Hotel Co. (Hawai'i)*, 76 Hawai'i 454, 466, 879 P.2d 1037, 1049 (1994)). As such, "[p]unitive damages . . . cannot form an independent claim" on which the Tabuyos may sue, *Smallwood*, 730

F. Supp. 2d at 1236 (citing *Ross*, 76 Hawai'i at 466, 879 P.2d at 1049; *Television Events & Mktg., Inc. v. AMCON Distrib. Co.*, 488 F. Supp. 2d 1071, 1083 (D. Haw. 2006)), so we affirm the Circuit Court's disposition of Count III of the Second Amended Complaint.

Therefore,

IT IS HEREBY ORDERED that the "Order Granting Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on the Second Amended Complaint Filed on February 10, 2014 and Order to Expunge Notice of Pendency of Action," "Judgment," and the "Notice of Entry of Judgment," all of which were filed in the Circuit Court of the First Circuit on August 5, 2014, are affirmed.

DATED: Honolulu, Hawai'i, June 29, 2016.

On the briefs:

Melodie Aduja
(Aduja & Aduja)
for Plaintiffs-Appellants.

Mitzi A. Lee
for Defendants-Appellees.


Chief Judge


Associate Judge