NO. CAAP-14-0000513

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LCP-MAUI, LLC, Plaintiff-Appellee, v.
AMANDA D. TUCKER AKA AMANDA DAWN TUCKER AKA
AMANDA D. TUCKER-MEUSE, Defendant-Appellant, and
UNITED STATES OF AMERICA; DIRECTOR OF TAXATION, STATE OF
HAWAII; VIC ZAPIEN; DUSTIN P. MEUSE; and
DOES 1 THROUGH 20, INCLUSIVE, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 12-1-0462(3))

SUMMARY DISPOSITION ORDER
(By: Nakamura, Chief Judge, Fujise and Leonard, JJ.)

Defendant-Appellant Amanda D. Tucker aka Amanda Dawn Tucker aka Amanda D. Tucker-Meuse (**Tucker**) appeals from the Findings of Fact, Conclusions of Law, and Order Granting LCP-Maui, LLC's (**LCP-Maui**) Renewed Motion for Summary Judgment and for Decree of Foreclosure Filed June 17, 2013, filed January 29, 2014 (**FOF, COL, and Order**) in the Circuit Court of the Second Circuit (**Circuit Court**).[1]

[1] The Honorable Joseph E. Cardoza presided.

We discern Tucker's points of error as follows:

(1) The Circuit Court erred in granting LCP-Maui's June 17, 2013 Renewed Motion for Summary Judgment and Interlocutory Decree of Foreclosure (**Renewed MSJ**) because the "material issue of loan payment default" remained in dispute;

(2) The Circuit Court erred in granting LCP-Maui's Renewed MSJ because the issue of "whether LCP-Maui in fact owned Dr. Tucker's mortgage loan and even had the right to foreclosure in the first place" remained in dispute;

(3) The Circuit Court erred when it did not strike LCP-Maui's Attorney Affirmation; and

(4) The Circuit Court abused its discretion when it denied Tucker's request for a continuance.

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 Tucker's points of error as follows:

(1) In order to obtain a foreclosure decree, a party seeking foreclosure must establish the following factors: (1) the existence of the agreement, (2) the terms of the agreement, (3) default under the terms of the agreement, and (4) notice of default was provided. Bank of Honolulu, N.A. v. Anderson, 3 Haw. App. 545, 551, 654 P.2d 1370, 1375 (1982).

In support of its Renewed MSJ, LCP-Maui attached copies of: (1) a promissory note (the **First Note**) by which Tucker promised to pay the Bank of Lincolnwood (**Lincolnwood**) $3,115,000.00 plus interest; (2) a revolving credit note (the

Second Note) by which Tucker promised to pay Lincolnwood $720,000.00 plus interest; (3) the mortgages that Tucker executed with Lincolnwood (**Subject Mortgages**); (4) the loan payment history; (5) the June 22, 2009 letters from the FDIC as Receiver for Lincolnwood that notified Tucker that she had defaulted on the First Note, Second Note, and Subject Mortgages; (6) the April 24, 2013 Settlement and Release Agreement (**Settlement Agreement**) entered into by LCP-Maui and the trustee appointed for Tucker's Chapter 7 bankruptcy estate (**Trustee**), in which, in exchange for monetary consideration paid to the Trustee, the parties stipulated that "[Tucker] is in default under the terms of the Loan Documents and [LCP-Maui] is entitled to foreclose on the security interest created by the Loan Documents" and the Trustee "waive[d] any defenses, affirmative claims and/or counterclaims, rights for reconsideration and/or rights of appeal from any findings of facts, conclusions of laws, orders and judgments determining matters which Trustee acknowledges, agrees and stipulates to" in the Settlement Agreement; and (7) a declaration of the manager of LCP-Maui, Jacob Mutz (**Mutz**), which included that "[Tucker] is in default from February 1, 2009, in payment of amounts owed under the First Note and Second Note and Mortgages."

Therefore, LCP-Maui established the existence and terms of the First Note, Second Note and Subject Mortgages, that Tucker had defaulted under the terms of the First Note, Second Note and Subject Mortgages, and that Lincolnwood provided Tucker with notice of her default. As such, LCP-Maui has met its initial burden of production because it has satisfied the four

Anderson factors. Thus, the burden shifted to Tucker to "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." GECC Financial Corp. v. Jaffarian, 79 Hawaiʻi 516, 521, 904 P.2d 530, 535 (1995) (citation omitted).

Tucker argues that the Circuit Court erred in granting LCP-Maui's Renewed MSJ because the "material issue of loan payment default" remained in dispute, pointing to the deposition of Lincolnwood's President, Clyde Engle (**Engle**). It appears, however, that Engle's deposition was telephonic, Engle was not properly sworn as a witness, LCP-Maui timely objected, and Engle did not sign the witness certification at the end of the deposition transcript. The supreme court has recognized that "[d]ocuments that are plainly inadmissible in evidence and are unsworn, not properly sworn to, and/or uncertified cannot be considered upon a summary judgment motion." Pioneer Mill Co., Ltd v. Dow, 90 Hawaiʻi 289, 297, 978 P.2d 727, 735 (1999); see also Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 56(e). Thus, Tucker failed to provide admissible evidence in support of her argument that there was no default. We note that Tucker's fraud and unfair or deceptive acts or practices (**UDAP**) allegations were also based on unsworn statements made by Engle.

Moreover, it is undisputed that, when Bank of Lincolnwood failed, the FDIC took over the failed bank. Thus, the federal common law doctrine of D'Oench Duhme, which arises from D'Oench Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. § 1823(e), prohibit the

assertion of a claim or defense against the FDIC and its successors-in-interest based on an alleged side agreement that is not, *inter alia*, in writing, approved by the bank's board of directors or loan committee, and reflected in the official books and records of the failed bank or thrift. See, e.g., Langley v. FDIC, 484 U.S. 86, 91-92 (1987). Here, Tucker's claims of fraud and UDAP, which are based on an alleged unwritten agreement between Tucker and Engle, are not reflected in the records of the Bank of Lincolnwood and therefore are barred by this doctrine.

Accordingly, we conclude that Tucker's first point of error is without merit.

(2) Tucker argues that the Circuit Court erred in granting the Renewed MSJ because the issue of "whether LCP-Maui in fact owned Dr. Tucker's mortgage loan and even had the right to foreclosure in the first place" remained in dispute.

"A mortgagee must establish that it was assigned the mortgage and corresponding promissory note before it has the ability to foreclose." Bank of America N.A. v. Hill, No. CAAP-13-0000035, 2015 WL 6739087 at *3 (Haw. App. Oct. 30, 2015) (mem.) (citing Citicorp Mortg., Inc., v. Bartolome, 94 Hawaiʻi 422, 434, 16 P.3d 827, 839 (App. 2000)). "In order to enforce a note and mortgage under Hawaii law, a creditor must be 'a person entitled to enforce' the note. One person entitled to enforce an instrument is a 'holder' of the instrument. A 'holder' is the 'person in possession of a negotiable instrument.'" U.S. Bank N.A. v. Mattos, 137 Hawaiʻi 209, 211, 367 P.3d 703, 705 (App. 2016) (citing In re Tyrell, 528 B.R. 790, 794 (Bankr. D. Haw.

2015); see also HRS § 490:3-301 (2008)[2] and HRS § 490:1-201(b) (2008).[3]

In the instant case, LCP-Maui was required to produce evidence that it was entitled to enforce the First Note and Second Note. In support of its Renewed MSJ, LCP-Maui attached the declaration of Mutz, in which Mutz averred, *inter alia*, that "LCP is the current holder of a Promissory Note and a Revolving Credit Note, both dated December 14, 2006, evidencing debts owed by Borrower in the respective original principal amounts of $3,115,000.00 . . . and $720,000.00." Mutz further declared:

> The Notes were originally payable to the Bank of Lincolnwood. The First Note and Second Note have affixed to them an Allonge made by the Federal Deposit Insurance Corporation as Receiver for Bank of Lincolnwood ("FDIC as Receiver") indorsing the Notes to SFR, and an Allonge made by SFR indorsing the Notes to LCP.
>
> . . . .
>
> The Mortgages were originally executed in favor of the Bank of Lincolnwood, and were subsequently assigned by FDIC,

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[2] HRS § 490:3-301 provides:

> **§490:3-301 Person entitled to enforce instrument.** "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 490:3-309 or 490:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

[3] HRS § 490:1-201(b) states in relevant part:

> "Holder" means:
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> (1) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
>
> (2) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
>
> (3) The person in control of a negotiable electronic document of title.

> as Receiver, to SFR by eight separate Corporate Assignment of Mortgage documents, all dated October 14, 2011, and recorded in the State of Hawaii Bureau of Conveyances on November 4, 2011.
>
> The Mortgages thereafter were assigned by SFR to LCP by eight separate Corporate Assignment of Mortgage documents, all dated October 31, 2012, and recorded in the State of Hawaii Bureau of Conveyances on January 18, 2013.

LCP-Maui also submitted SFR Venture's Corporate Assignment of Mortgages and allonges with its Renewed MSJ. SFR Venture's Corporate Assignment of Mortgages were recorded on November 4, 2011, and reflected that FDIC as Receiver for Lincolnwood transferred its interest in the Subject Mortgages to SFR Venture. The allonges effected the transfers of the First and Second Note from Lincolnwood to SFR Venture. The allonges instructed "Pay to the Order of: 2010-2 SFR Venture, LLC, without recourse." As the allonges indicated that the First Note and Second Note were payable to SFR Venture, SFR Venture was the "holder" of the First and Second Note at the time the Complaint was filed. Mattos, 137 Hawaiʻi at 212, 367 P.3d at 706.

LCP-Maui also submitted the Corporate Assignment of Mortgages and allonges in which SFR Venture transferred its interest in the Subject Mortgages to LCP-Maui. The allonges transferred the First and Second Note from SFR Venture to LCP-Maui. The allonges instructed "PAY TO THE ORDER OF LCP-MAUI, LLC WITHOUT RECOURSE[.]" As the allonges indicated that the First Note and Second Note were payable to LCP-Maui, LCP-Maui was the "holder" of the First and Second Note at the time the Circuit Court granted the Renewed MSJ on December 18, 2013. Id.

Accordingly, we conclude that LCP-Maui met its burden to demonstrate that it was the holder of the First Note and

Second Note, and thus was entitled to enforce the Notes. Tucker's reliance on an email from an FDIC official, which was corrected a few days later, was insufficient to create a genuine issue of material fact.

(3) Tucker argues that LCP-Maui's Attorney Affirmation was defective, specifically that "[a]lthough LCP-Maui's counsel belatedly filed an 'Affirmation of Attorney,' it merely provided hearsay that that is what they were told by their client's representative, Jacob Mutz."

Pursuant to HRS § 667-17 (Supp. 2015), "[a]ny attorney who files on behalf of a mortgagee seeking to foreclose on a residential property under this part shall sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted, under penalty of perjury and subject to applicable rules of professional conduct." The affirmation "shall be filed with the court at the time that the action is commenced[,]" and shall substantially follow the form provided in the statute. Id.

In Bank of America, N.A. v. Lanzi, the appellant challenged an attorney affirmation because it omitted the prefatory language of HRS § 667-17. No. CAAP-13-0002550, 2014 WL 4648169 at *1 (Haw. App. Sept. 17, 2014) (SDO). This court determined that, "despite the absence of the prefatory language[,]" the Circuit Court did not err in finding that the attorney affirmation substantially conformed with the requirements of HRS § 667-17. Id.

In the instant case, Tucker presumably challenges LCP-Maui's Attorney Affirmation filed June 14, 2013, which reads:

> STEPHANIE E.W. THOMPSON, pursuant to Hawaii Revised Statutes § 667-17, and under the penalties of perjury, affirms as follows:
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> 1. I am an attorney at law duly licensed to practice in the State of Hawaii and am a senior associate attorney at Starn O'Toole Marcus & Fisher, the attorneys of record for LCP-MAUI, LLC (***"LCP Maui"***) in the above-captioned mortgage foreclosure action (***"Action"***). As such, I am fully aware of the underlying action, as well as the proceedings maintained herein.
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> 2. On June 13, 2013, I communicated with the following representative of LCP-Maui, who informed me that he: (a) personally has personally reviewed the files and records in this Action, including but not limited to, the Notes, the Mortgages (as those terms are defined in LCP-Maui's Motion for Summary Judgment and for Interlocutory Decree of Foreclosure (***"MSJ"***)), and all the documents submitted in support of LCP-Maui's MSJ for, among other things, factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the MSJ and any supporting affidavits or declarations filed in support of the MSJ, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.
>
> | Name | Title |
> | --- | --- |
> | Jacob Mutz | Manager, AGFLEP Lending LLC, manager of LCP-Maui, LLC |
>
> 3. Based upon my communication with Mr. Mutz, as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the MSJ and other documents and papers filed or submitted to the Court in connection with the MSJ contain no false statements of fact or law and that LCP-Maui has legal standing to bring this foreclosure action. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.
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> 4. I am aware of my obligations under Hawaii Rules of Professional Conduct.

(Footnote omitted.)

Tucker provides no authority for her contention that LCP-Maui "belatedly" filed its Attorney Affirmation, which was filed on June 14, 2013, four days after LCP-Maui informed the Circuit Court that the bankruptcy stay had been terminated. The Renewed MSJ referenced in the Attorney Affirmation was filed on

June 17, 2013. Under these circumstances, we cannot conclude that the Attorney Affirmation was untimely.

Tucker next argues that the Attorney Affirmation "merely provided hearsay that that is what they were told by their client's representative, Jacob Mutz." However, the Attorney Affirmation "affirmed that, to the best of the attorney's knowledge, information, and belief, the allegations found in the [Renewed MSJ] were warranted by existing law and had evidentiary support in the form of confirmed affidavits and notarized documents." JP Morgan Chase Bank, N.A. v. Young, No. CAAP 14-0000510, 2015 WL 5011193 at *4 (Haw. App. Aug. 24, 2015) (SDO). In support of its Renewed MSJ, LCP-Maui attached copies of Mutz's declaration, the First Note, the Second Note, allonges, the Subject Mortgages, SFR Venture's Corporate Assignment of Mortgages, LCP-Maui's Corporate Assignment of Mortgages, the Settlement Agreement, the Bankruptcy Court's Approval Order, and the Bankruptcy Court's Order Terminating Stay. Thus, we conclude that the Attorney Affirmation substantially conformed with the form provided in HRS § 667-17.

(4) Tucker argues that the Circuit Court erred in denying her request for a continuance because "[m]ore discovery was obviously needed on standing issues, specifically oral depositions[.]" The record on appeal shows multiple continuances of the Renewed MSJ were granted to allow discovery. However, Tucker failed to conduct the requested discovery and failed to meet the requirements under HRCP Rule 56(f) to warrant a further postponement. Under the circumstances of this case, we cannot

conclude that the Circuit Court abused its discretion when it denied Tucker's request for another continuance.

For these reasons, we affirm the Circuit Court's January 29, 2014 FOF, COL, and Order.

DATED: Honolulu, Hawaiʻi, June 30, 2016.

On the briefs:

Gary Victor Dubin,
Frederick J. Arensmeyer,
Dan J. O'Meara,
for Defendant-Appellant.

Sharon V. Lovejoy,
Stephanie E.W. Thompson,
(Starn O'Toole Marcus & Fisher),
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge