

NO. CAAP-14-0001073

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

BANK OF HAWAII, Plaintiff-Appellee, v. HOSSAIN
MOSTOUFI, MITRA MOSTOUFI, Defendants-Appellants;
BRASHER'S SACRAMENTO AUTO AUCTION, INC.; DIRECTOR
OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF
HONOLULU, Defendants-Appellees; and JOHN DOES 1-
50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE
CORPORATIONS 1-50; DOE "NON-PROFIT" CORPORATIONS
1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1366)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise and Ginoza, JJ.)

Defendants-Appellants Hossain Mostoufi and Mitra
Mostoufi (the Mostoufis) appeal from the July 24, 2014 Circuit
Court of the First Circuit's (Circuit Court)¹ "Order Denying
[Mostoufis'] [Hawaii Rules of Civil Procedure (HRCP)]
Rule 13(f)² Motion for Leave to File Omitted Counterclaim"
(Order).

On appeal, the Mostoufis assert as their point of error
that "[t]he Circuit Court committed reversible error in denying

¹ The Honorable Bert I. Ayabe presided.

² HRCP Rule 13(f) provides:

Omitted Counterclaim. When a pleader fails to set up a
counterclaim through oversight, inadvertence, or excusable
neglect, or when justice requires, the pleader may by leave
of court set up the counterclaim by amendment.

the Mostoufis['] request to file a counterclaim."³ In support, the Mostoufis argue that (1) res judicata does not bar them from bringing forth their proposed counterclaim and (2) they are not estopped from bringing their proposed counterclaim because it is not compulsory.

After careful review of the record on appeal, the point raised, the parties' arguments, and the applicable legal authority, we resolve the Mostoufis' arguments on appeal as follows and affirm:

In their briefs filed with this court, the Mostoufis make no argument at all as to how the Circuit Court abused its discretion in denying their Motion. We presume, based on the arguments made in their briefs, that the Mostoufis' claim is the Circuit Court abused its discretion in denying them leave to file their counterclaim because res judicata did not bar their claims and because the proposed counterclaim was not compulsory. We address each argument in turn.

1. Res judicata limits "a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy." Eastern Savings Bank, FSB v. Eseteban, 129 Hawai'i 154, 158, 296 P.3d 1062, 1066 (2013). Hence, the purpose of the bar is to prevent a party from relitigating a claim that it already had a full and fair opportunity to litigate. See Kauhane v. Acutron Co., 71 Haw. 458, 463-64, 795 P.2d 276, 278-79 (1990). Here, the Mostoufis are not bringing an independent suit but moved for leave to file an omitted counterclaim for damages within the original suit.

Plaintiff-Appellee Bank of Hawaii (BOH) relies on Eastern Savings, 129 Hawai'i at 160 n.10, 296 P.3d. at 1068 n.10, for the proposition that "[a] foreclosure judgment constitutes a

³ The Mostoufis' "Statement of Point of Error" section of their opening brief does not comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) which is a basis for disregarding their point. O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994). However, as the appellate courts in this jurisdiction observe a policy of addressing the merits of an appeal where possible, we will consider the Mostoufis' point to the extent possible. O'Connor, 77 Hawai'i at 386, 885 P.2d at 364. Counsel is warned that future violations of the rules may result in sanctions.

final judgment" and consequently, that the Mostoufis' attempt to add their counterclaim was an effort to bring that claim in an separate suit. However, in Eastern Savings, the borrowers did not appeal the foreclosure judgment entered against them, thereby allowing the judgment to become final. Eastern Savings, 129 Hawai'i at 155-56, 296 P.3d at 1063-64. Here, the Mostoufis' appeal of the February 25, 2013 Judgment entered on the decree of foreclosure and order of sale is still pending. Therefore, res judicata does not apply.

2. The widely accepted standard to determine whether a claim is compulsory states:

A claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim either because the same aggregate operating facts serves as a basis of both claims or the core of facts upon which the original claim rests activates additional legal rights in party defendant that otherwise would remain dormant.

Booth v. Lewis, 8 Haw. App. 249, 253, 798 P.2d 447, 449 (1990) (citation omitted) (quoting Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970)). The purpose of HRCP Rule 13(a)⁴ is to resolve multiple issues in a single suit and "is in the nature of an estoppel arising from the culpable conduct of a litigant in failing to assert a proper counterclaim." Bailey v. State, 57 Haw. 144, 148, 552 P.2d 365, 368 (1976) (quoting House v. Hanson, 72 N.W.2d 874, 877 (Minn. 1955)).

⁴ HRCP Rule 13(a) provides:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Here, the original claim in the complaint is based on the facts underlying loan and mortgage transactions between the Mostoufis and their lender BOH. The Mostoufis' counterclaim is based on BOH reporting that the Mostoufis had fallen behind in their payments, resulting in a negative impact on their credit. The specific claims the Mostoufis wish to make include breach of contract, misrepresentation, and omissions involving the modification of the same loans. Their counterclaim would not have arisen but for the loan and mortgage transactions with BOH. Therefore, a logical relationship exists between the Mostoufis' proposed counterclaim and the original claim, making the Mostoufis' counterclaim compulsory.

Notwithstanding the compulsory nature of the Mostoufis' counterclaim, "Rule 13(f) empowers the court to authorize the filing of such counterclaim by amendment[.]" See Am. Motorists Ins. Co. v. City Wide Transp. Co., 308 F. Supp. 1080, 1083 (S.D.N.Y. 1969).⁵ A party may request leave to file an omitted compulsory counterclaim if they show "oversight, inadvertence, or excusable neglect, or [that] justice requires." Marks v. Marks, 51 Haw. 548, 560, 465 P.2d 996, 1002 (1970) (quoting HRCF Rule 13(f)). The Hawai'i Supreme Court has acknowledged that "when justice requires" is an independent and sufficient ground to grant leave for an omitted counterclaim. Marks, 51 Haw. at 563, 465 P.2d at 1004. A trial court's denial of a Rule 13(f) motion is reviewed for abuse of discretion. Ralston-Purina Co. v. Bertie, 541 F.2d 1363, 1367 (9th Cir. 1976). See Marks, 51 Haw. at 563-64, 465 P.2d at 1004 (In reviewing a trial court, "some discretion is vested in the trial court's hands, for both [HRCF] Rule 13(f) and 15(a) require leave of court.").

⁵ When adopted, HRCF Rule 13(f) contained the same basis for amendment as Federal Rules of Civil Procedure (FRCP) Rule 13(f).

Where we have patterned a rule of procedure after an equivalent rule within the FRCP, interpretations of the rule "by the federal courts are deemed to be highly persuasive in the reasoning of this court." Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968) (footnote omitted).

Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 251-52, 948 P.2d 1055, 1092-93 (1997), FRCP Rule 13(f) was deleted in 2009 in favor of FRCP Rule 15.

First, the Mostoufis did not argue below nor do they argue on appeal "oversight, inadvertence, or excusable neglect" for their omitted counterclaim. Therefore, this argument is deemed waived. HRAP Rule 28(b)(7).⁶

Second, in the Mostoufis' Motion, they argued justice required that they be allowed to bring their counterclaim because (1) their "business was harmed as a direct result of [BOH] reporting their loans as delinquent to credit agencies," and (2) "[i]t is in the interest of both parties as well as judicial economy to resolve all of the claims in this action." However, the Mostoufis have not provided any legal authority or support for their position that justice requires that they be granted leave to file their omitted counterclaim under these circumstances. See HRAP Rule 28(b)(7).

Further, notwithstanding that they were aware of the facts underlying their counterclaim because they were included in their answer to the complaint, they filed their Motion almost three years after their answer was filed, one-and-a-half years after oral argument on both parties' summary judgment motions had been heard, and fifteen months after the Circuit Court had granted BOH's motion for summary judgment. The Mostoufis provide no explanation for the delay. See Ralston-Purina, 541 F.2d at 1367 (no abuse of discretion where the motion was brought six months after filing the answer, two months after a pretrial conference and no reasonable explanation for the delay in the record) and Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio 1996).

Finally, the Mostoufis argue that the statute of limitations will prevent them from pursuing their counterclaim in a separate lawsuit. However, Rule 13(f) "does not give a party the privilege of totally neglecting its case and ignoring time limitations imposed by the Federal Rules of Civil Procedure even

⁶ HRAP Rule 28(b)(7). "The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived."

absent bad faith or dilatory motive on its part." Rohner, Gehrig & Co. v. Capital City Bank, 655 F.2d 571, 576 (5th Cir. 1981).

On this record, we conclude the Circuit Court did not abuse its discretion when it denied the Mostoufis' Motion.

Based on the foregoing, the July 24, 2014 "Order Denying Defendants Hossain Mostoufi and Mitra Mostoufi's HRCF Rule 13(f) Motion for Leave to File Omitted Counterclaim," entered by the Circuit Court of the First Circuit, is affirmed.

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

On the briefs:

Gary Victor Dubin,
Frederick J. Arensmeyer, &
Daniel J. O'Meara,
for Defendants-Appellants.

Presiding Judge

Mitzi A. Lee,
for Plaintiff-Appellee.

Associate Judge

Associate Judge