CAAP-14-0001284

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

FEDERAL HOME LOAN MORTGAGE CORPORATION, Plaintiff-Appellee, v. KURT EDWARD MOORE and RYAN EDWARD MOORE, Defendants-Appellants, and LARRY ALPHA SHAVER; JOHN DOE OR JANE DOE; ALL PERSONS RESIDING WITH AND ANY PERSONS CLAIMING BY AND THROUGH OR UNDER THEM, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 12-1-3125 KTN)

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

Defendants-Appellants Kurt Moore and Ryan Moore (the **Moores**) appeal from the Judgment on Plaintiff-Appellee Federal Home Loan Mortgage Corporation's (**FHLMC's**) Motion for Summary Judgment filed October 29, 2014 (**Judgment**) and challenge the Order Granting Plaintiff's Motion for Summary Judgment (**Summary Judgment Order**) filed on May 1, 2014, both of which were entered by the Circuit Court of the First Circuit (**Circuit Court**).[1]

The Moores raise the following points of error on appeal:

[1] The Honorable Karen T. Nakasone presided.

(1) The Circuit Court erred when it denied the Moores – who held title to the subject property jointly with the deceased mortgagor, Larry Shaver (**Shaver**) – the ability to contest FHLMC's quiet title claim and to introduce evidence that the non-judicial foreclosure was invalid under Hawaii Revised Statutes (**HRS**) § 667-5 (Supp. 2011) (repealed), on the grounds the Moores did not have standing to contest the nonjudicial foreclosure because they were not parties to the note and mortgage;

(2) The Circuit Court erred by disregarding the Declaration of Barbara Miller (**Miller**), who was the executor of Shaver's estate, on the basis that Miller was not a party to the action;

(3) The Circuit Court erred by applying contract law to the quiet title and ejectment claims in conjunction with its ruling that the Moores could not present evidence concerning the purported non-compliance with HRS § 667-5; and

(4) The Circuit Court erred when it held that the letter from Aurora Loan Services (**Aurora**), dated April 23, 2010, proved that Aurora complied with HRS § 667-5.

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 Moores' points of error as follows:

In paragraphs 17 and 18 of the Summary Judgment Order, the Circuit Court stated:

> 17. Because the Moore Defendants were not parties to the contract herein, i.e. the Mortgage, they cannot raise

> contractual defenses. As non-parties to the Mortgage, the Moore Defendants may not challenge the validity of the Mortgage or the foreclosure sale conducted thereto.
>
> 18. The only individual who could contest the foreclosure sale was Executor Miller, the personal representative of Defendant Shaver's estate. Executor Miller, however, is not a party to this lawsuit, and was not made a party to this lawsuit by either Plaintiff or Moore Defendants.[2]

(Emphasis added).[3]

While non-parties to the subject note and mortgage may not be contractually entitled to directly "cure the default and reinstate the loan," property owners whose interests are affected by a nonjudicial foreclosure can defend a subsequent quiet title/ejectment action by asserting that the foreclosure failed to comply with the law, in this case, HRS § 667-5. See, e.g., Montenegro v. Ocwen Loan Servicing, LLC, 419 S.W.3d 561, 567 (Tex. App. 2013); Kiper v. BAC Home Loans Servicing, LP, 884 F. Supp. 2d 561, 576 (S.D. Texas 2012) ("'Modern cases have expanded the class of parties with standing to dispute the validity of the foreclosure sale by adopting a more liberal attitude toward this privity requirement.' Now cases allow parties that at the time of foreclosure 'have an ownership interest in the property affected by the foreclosure.'") (citations omitted). Thus, the Circuit Court erred in concluding that Miller was the only individual who could contest the foreclosure sale.

The record is unclear as to whether, as the Moores contend, the Circuit Court disregarded Miller's Declaration, as

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[2] The issue of whether Miller was an indispensible party in FHLMC's quiet title/ejectment action is not before the court on this appeal.

[3] Also, in paragraph 14 of the Summary Judgment Order, the Circuit Court stated that "the only individual who could contest the non-judicial foreclosure was Executor Miller for Defendant Shaver's estate."

there is no specific ruling to that effect. However, at the February 25, 2014 hearing, the court said, "if the estate is not a party, and they're not going to be named a party, I don't understand on what basis I can consider Barbara Miller's declaration[.]" At the same hearing, in conjunction with an invitation for the parties to address the issue, the court stated:

> [L]et me just tell you folks what my preliminary thoughts are. . . .
>
> My concern is now there is a -- I see that there's a declaration by the estate representative filed. The estate is not a party. The challenge to the foreclosure that the defendants raised in the opposition to the summary judgment, to me it's a contract based challenge. It arises out of the mortgage.
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> The only parties to the contract, the mortgage, is the decedent. And any person who could properly assert any defense, claim or remedy arising out of that contract, I think can only be a party to that contract, or a named third party beneficiary to the contract. And the contract here is the mortgage document. So my thoughts are that only defendant Shaver himself, or his estate, are the parties that can raise any contract based challenge.
>
> And what I'm faced with here is that the defendant Moores, who are non-parties to the contract, are attempting to raise contract based challenges, which I think are improper. That while they may be on title, that doesn't give them any rights to challenge a contract that they were not parties to. And that the only entity, at this stage, that could raise the kind of challenge that the Moores are seeking to raise is the estate. But the estate is not a party here.

In the Summary Judgment Order, the Circuit Court concluded that: (1) FHLMC was entitled to summary judgment because the Moores were not parties to the note and mortgage and therefore not entitled to raise defenses related to those agreements; and (2) even if the Moores were entitled to challenge the validity of the foreclosure, the Moores' challenge nevertheless fails. The Circuit Court did not specifically address Miller's Declaration, but concluded, *inter alia*, that:

> 23. Under HRS § 667-8, "[i]f it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed."
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> 24. Based on the record before this Court, including the affidavit recorded on January 26, 2011 with the Assistant Registrar of the Land Court, State of Hawaiʻi, Plaintiff has shown the non-judicial foreclosure was conducted in compliance with the power of sale in the Mortgage and HRS § 667-1, et seq., and has demonstrated entitlement to judgment as a matter of law.

Thus, it appears that the Circuit Court either (1) disregarded Miller's Declaration, presumably for the reasons articulated at the February 25, 2014 hearing as preliminary thoughts, or (2) concluded that Miller's Declaration failed to raise a genuine issue of material fact. We have rejected the former proposition and therefore turn to the latter one.

The Moores contend on appeal that they raised a genuine issue of material fact concerning whether the nonjudicial foreclosure complied with HRS § 667-5, citing HRS § 667-5(c)(1) and Miller's Declaration.

HRS § 667-5(c)(1) provided:

> (c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:
>
> (1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request[.]

Miller's Declaration states, in relevant part:

> 11. After Mr. Shaver's death, I contacted Aurora Loan Services as the representative of Mr. Shaver's Estate for the purpose of having Kurt Moore take over the payments on the subject mortgage.

> 12. Although I contacted Aurora Loan Services many times, Aurora Loan Services was nearly impossible to communicate with.
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> 13. On at least one occasion, I requested information on the subject account and Aurora Loan Services refused to talk with me, even though I had documentation proving that I was the representative of my father's estate.
>
> 14. After a period of over one month of trying to get a hold of a representative from Aurora Loan Services, I finally started a dialogue with a woman named "Sarah."
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> 15. I called and talked with Sarah at least two times about allowing Kurt Moore to continue to make the payments on the subject mortgage[] and supplied all of the requested documentation.
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> 16. At one point, reinstatement figures from Aurora Loan Services were requested and that request was ignored.
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> 17. Aurora Loan Services eventually admitted to me, around June of 2009, that it was supposed to send some paperwork to me for the purpose of allowing Kurt Moore to take over the account, but that it didn't.
>
> 18. Aurora Loan Services kept giving me a different story every time I talked with them.

In the Summary Judgment Order, the Circuit Court addressed the issue of compliance with HRS § 667-5 as follows:

> 22. On April 23, 2010, Aurora Loan Services mailed a letter to the Estate of Larry Shaver containing, inter alia, the amount necessary to cure the default. See Defendant's Opposition to Plaintiff Federal Home Loan Mortgage Corporation's Motion for Summary Judgment (filed 9/3/13), Exhibit H. Therefore, the Moore Defendants' argument that they were deprived of any and all opportunity to cure the default prior to the auction fails. The entity legally entitled to notice, the Estate of Larry Shaver, was given such notice.

Viewing Miller's Declaration in a light most favorable to the Moores, Miller contacted Aurora *multiple times* between Shaver's death and when Aurora eventually admitted to her that it was supposed to send "some paperwork" but it did not. There is nothing in the record to indicate that Aurora complied with its obligations to disclose:

> The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred

> by the foreclosing mortgagee related to the default prior to the auction within five business days of the request[.]

HRS § 667-5(c)(1).

The April 23, 2010 letter referenced by the Circuit Court was addressed to Shaver, apparently at Miller's address, many months later and does not appear to state, *inter alia*, "the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction[.]" Accordingly, we conclude that the Moores raised a genuine issue of material fact as to whether Aurora complied with HRS § 667-5.

On this basis, we conclude that the Circuit Court erred in entering summary judgment in favor of FHLMC and against the Moores. The Circuit Court's October 29, 2014 Judgment and May 1, 2014 Summary Judgment Order are vacated; this case is remanded to the Circuit Court for further proceedings.

DATED: Honolulu, Hawaiʻi, November 30, 2016.

On the briefs:

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

Chief Judge

Robert E. Chapman,
Mary Martin,
(Clay Chapman Iwamura Pulice & Nervell)
for Plaintiff-Appellee.

Associate Judge

Associate Judge