NO. CAAP-16-0000128

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP,
Plaintiff-Appellee,
v.
JOHN YEH, Defendant-Appellant,
and
LAY MENH YEH; BILLY YEH; GARY CHAN; ASSOCIATION OF APARTMENT OWNER, Defendants-Appellees,
and
UNITED STATES OF AMERICA; BANK OF HAWAII,
Defendants-Appellees,
and
JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 12-1-3074)

SUMMARY DISPOSITION ORDER
(By: Fujise and Ginoza, JJ.;
with Nakamura, C.J., concurring and dissenting separately)

Defendant-Appellant John Yeh (**Yeh**) appeals from the (1) "Findings of Fact and Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against All Parties and For Interlocutory Decree of Foreclosure"; and (2) Judgment, both

entered on February 2, 2016, in the Circuit Court of the First Circuit (**circuit court**).[1]

On appeal, Yeh contends that the circuit court erred when it granted summary judgment in favor of Plaintiff-Appellee Bank of America, N.A., Successor By Merger to BAC Home Loans Servicing, LP FKA Country Wide Home Loans Servicing, LP (**BANA**) because genuine issues of material fact exist as to whether (1) Yeh's loan was in default; and (2) foreclosure was precluded under the doctrines of promissory estoppel, unclean hands, breach of implied duty of good faith and fair dealing, and unfair and deceptive acts and practices.

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, as well as the relevant legal authorities, we resolve Yeh's points of error as follows and we vacate and remand.

(1) Yeh's Alleged Loan Modification

Yeh contends that the circuit court erred in granting summary judgment because genuine issues of material fact exist as to whether BANA was entitled to foreclose on the property, given BANA's representations to Yeh that it would allow Yeh to modify his loan. Yeh essentially argues that BANA did not act in good faith during the process of potentially modifying his loan and therefore should be estopped from foreclosing on his property.

> [A] plaintiff-movant is not required to disprove affirmative defenses asserted by a defendant in order to prevail on a motion for summary judgment. The plaintiff is only obligated to disprove an affirmative defense on a motion for summary judgment when the defense produces material in support of an affirmative defense. Generally, the defendant has the burden of proof on all affirmative defenses, which includes the burden of proving facts which are essential to the asserted defense.

U.S. Bank Nat'l Ass'n v. Castro, 131 Hawai'i 28, 41, 313 P.3d 717, 730 (2013) (citations, quotation marks, and footnote omitted).

[1] The Honorable Virginia L. Crandall presided.

Here, Yeh attached a declaration to his memorandum in opposition to BANA's summary judgment motion, dated October 21, 2014, in which Yeh attested that: (1) after he received a Notice of Intent to Accelerate, he contacted BANA and was directed to stop making monthly payments in order to qualify for a loan modification; (2) in June 2010, Yeh successfully completed a four-month trial payment plan with BANA; (3) Yeh was advised several times between June 2010 and November 2011, by BANA representatives Roslum Collins, Michael Guerrero, John Hayden, and Maria Ashkar, that a permanent loan modification offer would be mailed to him; and (4) Yeh never received any loan modification offer in the mail. Yeh further attested that:

> 17. Despite my diligence in making the monthly payments pursuant to the trial payment plan, Plaintiff failed to follow through with its promise to roll my trial plan into a permanent modification and has in bad faith induced me to stop payment on my mortgage loan.
>
> 18. I reasonably relied on Plaintiff's promise, to my detriment, and yet Plaintiff breached its promise to permanently modify the loan as agreed upon in the trial period payment plan, and initiated the instant foreclosure action.

On October 29, 2014, Yeh filed a supplemental declaration in which he attested that he had received a phone call that morning from "Madeline," a representative from BANA's Home Retention Department, stating that she discovered that Yeh's mortgage loan was previously approved for permanent loan modification and that his loan should currently be in a permanent loan modification. Yeh further attested that Madeline advised him that a permanent loan modification offer was approved on September 27, 2011.

On November 10, 2014, BANA filed the Declaration of Scott Horowitz (**Horowitz**) in support of BANA's summary judgment motion in which he attested that "no representatives of BANA have ever advised [Yeh] of any approval for a loan modification in 2011." Horowitz attached several letters to his Declaration that were sent from BANA and addressed to Yeh. In the letters dated April 21, 2011, July 2, 2011, and July 23, 2011, BANA notified

Yeh that he was not eligible for the Home Affordable Modification Program. However, the letters dated July 2, 2011, and July 23, 2011, state that Yeh's loan

> may be eligible for a loan modification offered by Fannie Mae, which is a program for loans that are not eligible for the Home Affordable Modification Program. Under the Fannie Mae program, we will review your current financial situation to determine if we can help you modify your mortgage to give you an affordable mortgage payment.

A letter dated August 1, 2011, states that a workout plan could not be offered to Yeh due to his failure to return certain documents; however, the letter dated July 23, 2011, states that Yeh must return the needed documentation by August 2, 2011. A letter dated December 27, 2011, states that Yeh's loan was not eligible for a loan modification because BANA "service[s] your loan on behalf of an investor or group of investors that has not given [BANA] the contractual authority to modify your loan."

On November 2, 2015, after further discovery had taken place, Yeh filed a supplemental memorandum in opposition to BANA's summary judgment motion to which Yeh attached several documents that BANA produced in discovery. The documents included, *inter alia*, a document entitled HomeSaver-Workout Notes, which appears to be a record of communications between BANA and Yeh regarding his loan. An entry dated September 27, 2011 states: "***LOAN CLEARED FOR DECISION/ELIGIBILITY REVIEW*** Received all supporting documentation and required information to review loan for all workout options.[ ]Called homeowner to advise the loan qualifies for a modification[.] Submitted modification package to TML/MSSL for approval[.]" (Emphasis added.) Yeh also attached a copy of an email exchange between a representative of BANA (the loan servicer) and a representative of Fannie Mae REMIC Trust 2004-W4 (**Fannie Mae**) (the apparent owner of the loan). In an email dated December 27, 2011, which is after the Workout Notes reflect that Yeh was notified that he qualifies for loan modification, the representative of BANA stated:

> We have completed income verification and now we are at a stage where we can draft an analysis and determine mod terms. However, due to the delegation I will need to know if we can proceed with the mod or move the file to liquidation options.

The representative from Fannie Mae responded on the same day stating that Yeh's loan was not eligible for modification and to proceed to liquidation options.

Yeh presented evidence that BANA, through various representatives, communicated with him regarding loan modification, at one point advised him to stop making monthly payments to qualify for a loan modification, and subsequently represented that he qualified for permanent modification and that a permanent loan modification offer would be mailed to him. BANA, in turn, produced evidence that BANA notified Yeh that he did not qualify for loan modification, however, the final letter dated December 27, 2011 stating that BANA did not have contractual authority to modify Yeh's loan, is dated after Yeh attests that representations were made that he qualified for loan modification and after he claims to have been induced to stop payment on his loan.

Based on the evidence presented, and viewing the evidence in the light most favorable to Yeh, there are genuine issues of material fact as to whether BANA acted in good faith in its representations to Yeh regarding modification of his loan. See Bank of Hawaii v. Mostoufi, No. CAAP-13-0001679, 2016 WL 3615664, at *2 (Haw. App. June 30, 2016). Moreover, there appear to be genuine issues of material fact as to the amount Yeh properly owes under the subject Promissory Note (**Note**). In granting summary judgment, the circuit court determined that, as of January 3, 2014, Yeh owed BANA a total of $499,624.15 under the Note, which included interest in the amount of $114,279.19 accruing from November 1, 2008 through January 3, 2014. The interest amount apparently includes the period that Yeh attests he began the loan modification process.

Given the record, therefore, summary judgment was not warranted.

(2) Bank of America, N.A. v. Reyes-Toledo

The holding in Bank of America, N.A. v. Reyes-Toledo, 139 Hawai'i 361, 390 P.3d 1248 (2017), issued after the Judgment

in this case, also precludes summary judgment for BANA. In Reyes-Toledo, the Hawai'i Supreme Court held that to establish the right to foreclose, the foreclosing plaintiff must establish standing, or entitlement to enforce the subject Note, at the time the action was commenced. Id. at 367-70, 390 P.3d at 1254-57.

The supreme court stated that the "foreclosing plaintiff's burden to prove entitlement to enforce the note overlaps with the requirements of standing in foreclosure actions as '[s]tanding is concerned with whether the parties have the right to bring suit.'" Id. at 367, 390 P.3d at 1254. The supreme court further noted that "a foreclosing plaintiff does not have standing to foreclose on mortgaged property unless the plaintiff was entitled to enforce the note that has been defaulted on." Id. at 368, 390 P.3d at 1255. The supreme court concluded that the foreclosing plaintiff must prove its entitlement to enforce the note at the commencement of the proceedings because it "provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has the right to do so." Id. at 369, 390 P.3d at 1256 (citation omitted).

Here, BANA did not prove its entitlement to enforce the Note at the commencement of the proceeding. Similar to Reyes-Toledo, the circuit court granted BANA summary judgment and a decree of foreclosure. In support of its summary judgment motion, BANA attached, *inter alia*, two documents to demonstrate that it possessed the subject Note: (1) a Declaration of Indebtedness by Ashley Marie Roberts (**Roberts**), executed on February 24, 2014, stating that she is familiar with the type of records maintained by BANA and that BANA, directly or through an agent, "has possession" of the promissory Note; and (2) the Note, which is endorsed in blank.[2]

[2] On the same day BANA filed its summary judgment motion, BANA's attorney, Robin Miller, filed an Affirmation of Attorney, which relies on the Declaration of Indebtedness submitted by Roberts. Roberts's declaration fails to establish that BANA held the Note when it filed the Complaint. On October 20, 2015, BANA subsequently submitted a further declaration by one of its counsel attesting to having personally reviewed the original "wet-ink" Note indorsed in blank. However, again, this declaration does not establish that BANA held the Note when the Complaint was filed.

BANA did not present evidence to establish its entitlement to enforce the Note at the time the action commenced. On December 6, 2012, BANA filed a Complaint for Foreclosure, which states that BANA "is the holder of the Note and record assignee of the Mortgage." However, the Note is not attached to the Complaint and there is no evidence that BANA held the Note at the time the Complaint was filed.

Thus, viewing the evidence in the light most favorable to Yeh, there is a genuine issue of material fact as to whether BANA was entitled to enforce the subject Note at the time this foreclosure action was commenced. Pursuant to Reyes-Toledo, the circuit court erred in granting BANA's summary judgment motion. Reyes-Toledo, 139 Hawaiʻi at 370-71, 390 P.3d at 1257-58.

Therefore, IT IS HEREBY ORDERED that the (1) "Findings of Fact and Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against All Parties and For Interlocutory Decree of Foreclosure"; and (2) Judgment, both entered on February 2, 2016, in the Circuit Court of the First Circuit, are vacated. This case is remanded to the circuit court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawaiʻi, June 29, 2017.

On the briefs:

Gary V. Dubin,
Frederick J. Arensmeyer,
for Defendant-Appellant.

David B. Rosen,
David E. McAllister,
Justin S. Moyer,
Christina C. Macleod
(Aldridge Pite, LLP)
and
Patricia J. McHenry,
Allison Mizuo Lee
(Cades Schutte)
for Plaintiff-Appellee.

Associate Judge

Associate Judge

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

The circuit court granted summary judgment and a decree of foreclosure in favor of Plaintiff-Appellee Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP (BANA) and against Defendant-Appellant John Yeh (Yeh).

I agree with the majority that based on the Hawaiʻi Supreme Court's decision in Bank of America, N.A. v. Reyes-Toledo, 139 Hawaiʻi 361, 390 P.3d 1248 (2017), the circuit court erred in granting BANA's motion for summary judgment and for decree of foreclosure. However, I respectfully dissent to the extent that the majority concludes that the loan modification discussions between BANA and Yeh created genuine issues of material fact regarding whether Yeh was in default on the subject promissory note (Note). It is undisputed: (1) that BANA informed Yeh in December 2011 that his loan was not eligible for modification; (2) that there was no agreement establishing the terms of a loan modification; and (3) after July 2010, Yeh made no payments on the subject Note. Under these circumstances, I conclude that there was no genuine issue of material fact that Yeh was in default on the subject Note.

Craig H. Nakamura