

DISSENTING OPINION BY GINOZA, J.

I respectfully dissent because, unlike in Bank of America v. Reyes-Toledo, 139 Hawai'i 361, 390 P.3d 1248 (2017), this case was initiated after legislation was adopted in 2012 and 2014 setting forth specific procedures for the commencement of judicial foreclosure actions, and in following those procedures and given the allegations in the Complaint, the original plaintiff, Ocwen Loan Servicing, LLC (Ocwen), established standing to initiate this foreclosure action.

Ocwen filed the Complaint in this case on December 10, 2014, against Defendants Helen Tolentino Busto (Busto) and the Association of Apartment Owners of Ko'olani, Inc. (AOAO). Hawaii Revised Statutes (HRS) § 667-17 (2016)¹ was adopted in 2012 (effective June 28, 2012) and amended in 2014 (effective April 23, 2014).² At the time the Complaint was filed herein, HRS § 667-17 provided in pertinent part:

Any 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 be in substantially the following form: . . .

The remainder of HRS § 667-17 then sets forth the form of the attorney affirmation that should be substantially followed, including:

¹ HRS § 667-17 is contained in HRS Chapter 667, Part IA, which is entitled "Foreclosure By Action."

² The 2014 amendment to HRS § 667-17 added the following underlined language: "The affirmation shall be filed with the court at the time that the action is commenced and shall be in substantially the following form: . . . " 2014 Haw. Sess. Laws Act 37, § 1 at 87.

1. I am an attorney at law duly licensed to practice in the State of Hawaii and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.
2. On [date], I communicated with the following representative or representatives of Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.
3. Based upon my communication with [persons specified in item 2], 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 Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law and that plaintiff 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.
4. I am aware of my obligations under Hawaii Rules of Professional Conduct.

(Emphasis added.)

In this case, the subject note, which is endorsed in blank, is attached as an exhibit to Ocwen's Complaint and the Complaint expressly states that Ocwen "is now the holder" of the note. The Complaint states in pertinent part:

5. For value received, Defendant HELEN TOLENTINO BUSTO, as maker, made, executed and delivered to INDYMAC BANK, F.S.B. a certain promissory note dated August 24, 2007, for the principal sum of Six Hundred Twenty Thousand and 00/100 Dollars (\$620,000.00). A true and correct redacted copy of the Note is attached hereto as Exhibit 1. As indicated on Exhibit 1, INDYMAC BANK, F.S.B. endorsed the Note in blank thereby converting it to "bearer" paper as defined in HRS § 490:3-109. Plaintiff is now the holder of the Note and is entitled to enforce it pursuant to HRS § 490:3-301.

(Emphasis added.)

Further, Ocwen complied with the requirements of HRS

§ 667-17 by filing its attorney's affirmation with the Complaint.

The Attorney Affirmation states:

1. I am an attorney at law duly licensed to practice in the state of Hawaii and am affiliated with the Law Firm of Clay Chapman Iwamura Pulice & Nervell, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.

2. On December 5, 2014, I received a written communication from Ryan P. Floyd, Contract Management Coordinator, Ocwen Loan Servicing, LLC servicer for Plaintiff, OCWEN LOAN SERVICING, LLC, which informed me that he personally reviewed Plaintiff's documents and records relating to this loan file, including but not limited to the Note and Mortgage, Note endorsements/Allonge(s), Assignment, Demand Letter sent to the borrower's mailing address, Limited Power of Attorney, and the Complaint and Summons with the attached Exhibits. Based on that examination he confirmed the factual accuracy of the allegations set forth in these Court filings and the accuracy of the notarizations contained in the documents executed by Plaintiff.

3. Based upon the communication from the person identified in paragraph 2 above, 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 Summons and Complaint in this matter contain no false statements of fact or law and that Plaintiff 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.

4. To the best of Declarant's knowledge, information, and belief the allegations contained in the Complaint are warranted by existing law and have evidentiary support.

5. I am aware of my obligations under Hawaii Rules of Professional Conduct.

(Emphasis added.)

This case is thus unlike Reyes-Toledo, in which the complaint was filed prior to the adoption of HRS § 667-17. That is, the complaint in Reyes-Toledo was filed on March 12, 2012, see 139 Hawai'i at 364, 390 P.3d at 1251, and the effective date of HRS § 667-17 was June 28, 2012. Thus, Reyes-Toledo does not address the effect of compliance with HRS § 667-17 in establishing standing to bring a judicial foreclosure action.

Given that this case was initiated after the adoption of HRS § 667-17, that the Complaint specifically alleges that Ocwen is the holder of the blank endorsed note, and that Ocwen complied with HRS § 667-17 by filing a proper attorney affirmation at the time the Complaint was filed, I would hold that Ocwen established standing to initiate this judicial foreclosure action.

For these reasons, I respectfully dissent and would not vacate the summary judgment ruling and the Foreclosure Judgment based on Reyes-Toledo. Rather, I would proceed to address Busto's other points of error on appeal.

Jim M. King