

DISSENTING OPINION BY GINOZA, J.

In this case, Defendant-Appellee Association of Apartment Owners of Ilikai Apartment Building (AOAO) foreclosed on the subject property, which was then owned by Plaintiff-Appellant Wells Fargo Bank, N.A. As Trustee For Option One Mortgage Loan Trust 2007-4 Asset Backed Certificates, Series 2007-4 (Wells Fargo). In the AOAO's non-judicial foreclosure auction, Defendant-Appellee Daniel Tsukasa Omiya (Omiya) was the high bidder, with a bid of \$15,000. Wells Fargo brought this action to challenge the non-judicial foreclosure. The Circuit Court of the First Circuit (circuit court) granted summary judgment for Omiya.

In my view, there is evidence in the record regarding (1) the Transfer Certificate of Title (TCT) and (2) the adequacy of the bid price at non-judicial foreclosure, such that there are genuine issues of material fact precluding summary judgment in favor of Omiya. Therefore, I respectfully dissent.

With regard to the TCT, Wells Fargo contends the circuit court erred in ruling that Wells Fargo could not challenge the foreclosure sale because the issuance of a certificate of title number, without the actual certificate, is sufficient to trigger the protections under Aames Funding Corp. v. Mores, 107 Hawai'i 95, 110 P.3d 1042 (2005) and Hawaii Revised Statutes (HRS) § 501-118 (2006).<sup>1</sup> Under Aames and HRS § 501-118, "defenses to mortgages foreclosed upon by exercise of the mortgagees's power of sale must be raised 'prior to the entry of a new certificate of title.'" 107 Hawai'i at 102, 110 P.3d at 1049 (quoting HRS § 501-118) (emphasis added).<sup>2</sup>

Here, with regard to the TCT, Omiya submitted a Quitclaim Deed in support of his summary judgment motion which

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<sup>1</sup> To the extent Omiya also asserts that Wells Fargo made an admission in its Complaint that issuance of the TCT number "register[ed] title in the name of Defendant Omiya[,]" I do not view the statement in the Complaint as dispositive. Rather, the pertinent question under HRS § 501-118 is whether there has been "entry of a new certificate of title."

<sup>2</sup> As to non-judicial foreclosures, HRS § 501-118 provides in pertinent part: "Nothing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title."

conveyed the property involved in this case from the AOA to Omiya. The Quitclaim Deed contained a notation that stated "Issuance of Cert(s) 996,234," and the parties apparently agree this indicates the issuance of a TCT number associated with the property in the Land Court system.

Wells Fargo filed a memorandum in opposition to Omiya's summary judgment motion to which it attached a Declaration of Anya M. Perez (**Perez**). Perez attested, *inter alia*, that on January 11, 2012 (after this case was initiated), she went to the Office of Assistant Registrar of the Land Court, retrieved Certificate of Title No. 996,234 on a computer screen, and was "able to see that the Certificate of Title was partially prepared, but not complete and not certified, as the legal description was missing."

In support of his summary judgment motion, and apparently in response to Perez's declaration, Omiya presented the declaration of Sandra Furukawa (**Furukawa**), who previously served as the Registrar of the Bureau of Conveyances and Assistant Registrar of the Land Court, and who attested that the "Office of the Assistant Registrar of the Land Court is now nearly four years behind in physically producing and certifying new transfer certificates of title for properties registered in the Land Court system."

Given the evidence noted above, there is a genuine issue of material fact as to whether the transfer to Omiya has been certified by the Land Court process, such that Wells Fargo should be precluded from challenging the non-judicial foreclosure sale under Aames and HRS § 501-118.<sup>3</sup>

Because in my view there is a question whether Aames applies to preclude a challenge to the non-judicial foreclosure, I also address whether Omiya's winning bid of \$15,000 was grossly

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<sup>3</sup> Omiya relies in part on American Home Mortgage Servicing, Inc. v. Yeung, No. 30057, 2011 WL 661794 (Haw. App. February 23, 2011) (SDO) to support his contention that the issuance of a TCT number alone is sufficient under Aames and HRS § 501-118. However, the arguments and record in Yeung were different than in this case. In this case, unlike in Yeung, there is evidence challenging whether a Transfer Certificate of Title was actually issued.

inadequate. Wells Fargo raised its challenge to the bid in its opposition to Omiya's summary judgment motion, where it asserted, *inter alia*, that the sale price of \$15,000 was grossly inadequate.

In the context of a judicial foreclosure, this court has stated that "[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm." Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983) (citing Wodehouse v. Hawaiian Tr. Co., 32 Haw. 835, 852 (1933)). In the context of a non-judicial foreclosure, the Hawai'i Supreme Court has expressed that mortgagees must "exercise their right to non-judicial foreclosure under a power of sale in a manner that is fair, reasonably diligent, and in good faith, and to demonstrate that an adequate price was procured for the property." Kondaur Capital Corp. v. Matsuyoshi, 136 Hawai'i 227, 240, 361 P.3d 454, 467 (2015) (citation and footnote omitted). Here, the Quitclaim Deed submitted by Omiya includes an attachment indicating that in 2010 (the year the non-judicial foreclosure took place), the assessed net value of the property was \$281,100. Viewing the evidence in this case in the light most favorable to the non-movant, I conclude there is a genuine issue of material fact as to whether the \$15,000 bid price was grossly inadequate.

For these reasons, I respectfully dissent. I would vacate the Judgment in favor of Omiya and remand the case to the circuit court for further proceedings.

*Fritz W. King*