

CONCURRING OPINION BY GINOZA, J.

I agree with the majority, but write separately to explain my position in light of the attorney affirmation that was filed in this case.

In U.S. Bank Trust, N.A. v. Busto, No. CAAP-16-0000334, 2017 WL 2579070 (Hawai'i App. Jun. 14, 2017), a judicial foreclosure action, the majority held that pursuant to Bank of America v. Reyes-Toledo, 139 Hawai'i 361, 390 P.3d 1248 (2017), the foreclosing plaintiff had failed to establish it had standing because it did not demonstrate that it held the subject blank-indorsed promissory note at the time it filed the foreclosure complaint. Id. at \*2. I dissented on grounds that: the case was initiated after legislation had been enacted in 2012 and 2014 setting forth specific procedures for the commencement of judicial foreclosure actions, in particular the filing of an attorney affirmation under Hawaii Revised Statutes (**HRS**) § 667-17 (2016);<sup>1</sup> the complaint expressly stated that the plaintiff "is now the holder" of the subject note; the subject note with the blank endorsement was attached as an exhibit to the complaint; and the plaintiff filed an attorney affirmation with the complaint that complied with the requirements of HRS § 667-17, and which stated that the complaint contained no false statements of fact and that the plaintiff had legal standing to bring the foreclosure action. Id. I thus concluded in my dissent that the circumstances in Busto were distinguishable from Reyes-Toledo,

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<sup>1</sup> HRS § 667-17, was initially adopted in 2012, and was amended in 2014 to add the following underlined language:

**[+]§667-17[+]** **Attorney affirmation in judicial foreclosure.** 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:

. . . .

and given the complaint's specific allegation that the plaintiff held the blank endorsed note, along with the attorney affirmation, the plaintiff in Busto had established standing to initiate the judicial foreclosure. Id.

Recently, in Wells Fargo Bank, N.A. v. Behrendt, SCAP-16-0000645, 2018 WL 1325153 (Haw. Mar. 15, 2018), the Hawai'i Supreme Court addressed a judicial foreclosure action with circumstances materially similar to Busto. In Behrendt, the circumstances included that: the judicial foreclosure complaint was filed on March 9, 2015, after the 2012 and 2014 legislation was enacted resulting in HRS § 667-17; the complaint asserted that the foreclosing plaintiff was the holder of the note and entitled to enforce it; and copies of the note and two allonges, the last endorsed in blank, were attached as exhibits to the complaint. Id. at \*1-2. Moreover, although not discussed in the Behrendt opinion, the record in that case establishes that the foreclosing plaintiff filed an attorney affirmation pursuant to HRS § 667-17 within minutes of filing the complaint, which stated in part that the complaint contained no false statements of fact and that the plaintiff had legal standing to bring the foreclosure action.<sup>2</sup>

The supreme court did not address the effect of the attorney affirmation in Behrendt, but in reviewing whether summary judgment was properly granted to the foreclosing plaintiff, the court conducted a *de novo* review. Id. at \*3. "[I]n reviewing summary judgment decisions an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied." Anastasi v. Fidelity Nat. Title Ins. Co., 137 Hawai'i 104, 112, 366 P.3d 160, 168

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<sup>2</sup> Pursuant to Hawai'i Rules of Evidence (**HRE**) Rule 201(b), I take judicial notice of the *existence* of the "HRS § 667-17 Affirmation" filed on March 9, 2015, which is part of the record in Behrendt. Courts may take judicial notice of facts that are, *inter alia*, "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned[,] and "[j]udicial notice may be taken at any stage of the proceeding." HRE Rule 201 (b) and (f); see also State v. Kotis, 91 Hawai'i 319, 341-342, 984 P.2d 78, 100-101 (1999).

(2016). For purposes of summary judgment and given the applicable *de novo* standard, the Hawai'i Supreme Court "review[s] the record *de novo*" and "examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." Yoneda v. Tom, 110 Hawai'i 367, 371, 133 P.3d 796, 800 (2006).

Given the applicable standard of review, it would appear that the supreme court in Behrendt considered the record *de novo*, and the record in that case included the attorney affirmation filed almost simultaneously with the complaint. Ultimately, the supreme court concluded that the foreclosing plaintiff "submitted no properly admitted evidence demonstrating that it was entitled to enforce the Note at the time the complaint was filed, as required by Reyes-Toledo[,] and thus summary judgment had been erroneously granted for the plaintiff. Behrendt at \*8.

In light of Behrendt, I conclude that my dissent in Busto cannot stand. Therefore, although the record and material facts in the instant case are similar to Busto,<sup>3</sup> I concur that we must vacate the summary judgment entered by the circuit court in favor of Plaintiff Wilmington.

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<sup>3</sup> In this case, the record reflects that: the Complaint was filed on September 29, 2015, after the effective dates of the 2012 and 2014 legislation which resulted in HRS § 667-17; the Complaint alleges that the subject note is endorsed in blank and "Plaintiff continues to be the holder of the Note and is entitled to enforce it"; the blank endorsed note is attached as an exhibit to the Complaint; and an attorney affirmation was filed with the Complaint and states in part that the Complaint contains no false statements of fact and that Plaintiff has legal standing to bring the foreclosure action.