

Electronically Filed
Supreme Court
SCWC-15-0000529
18-JUN-2020
10:20 AM

IN THE SUPREME COURT OF THE STATE OF HAWAII

---o0o---

CHRISTIAN SAKAL, Petitioner/Plaintiff-Appellant,

vs.

ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH; JONAH SCOTT
KOGEN; and K&F 1984 LLC, Respondents/Defendants-Appellees.

SCWC-15-0000529

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000145; CAAP-15-0000573; CIV. NO. 14-1-1118)

JUNE 18, 2020

OPINION CONCURRING IN PART AND DISSENTING IN PART,
BY RECKTENWALD, C.J., WITH WHOM NAKAYAMA, J., JOINS

The majority's holding as to Hawai'i Revised Statutes (HRS) § 667-60(c) (2016) is built on the incorrect premise that the Association of Apartment Owners of Hawaiian Monarch (AOAO) needed a power of sale in its bylaws in order to foreclose on its lien pursuant to HRS Chapter 667 Part II. This was the conclusion of the Intermediate Court of Appeals (ICA). See Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143

Hawai'i 219, 226, 426 P.3d 443, 450 (App. 2018).¹ This court adopted the ICA's analysis in Malabe v. Ass'n of Apartment Owners of Executive Centre, SCWC-17-0000145 (Haw. June 17, 2020). I dissented from the majority in Malabe and write separately in this case for the same reasons. Id. (Recktenwald, C.J., dissenting).

As I explained in Malabe, an AOA does not need a power of sale in its bylaws or in another written document to utilize power of sale foreclosure under HRS § 667-21 et seq. because a law, HRS § 514B-146(a) (2006),² supplies the authority for the AOA to do so. See HRS § 667-40 (2016) ("A power of sale foreclosure under [Part II] may be used in certain non-mortgage situations where a law or a written document contains, authorizes, permits, or provides for a power of sale, a power of

¹ I dissented from the order rejecting the AOA's application for writ of certiorari. See Order Rejecting Application for Writ of Certiorari, Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch (SCWC-15-0000529), 2018 WL 6818901, at *1 (Haw. December 28, 2018) (Recktenwald, C.J., dissenting).

² Before 2012, HRS § 514B-146(a) provided in relevant part:

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property.

In 2012, the language "in like manner as a mortgage of real property" was removed from this statute. 2012 Haw. Sess. Laws Act 182, § 10 at 655. In 2019, Act 282 changed the language of this provision to read: "The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents." 2019 Haw. Sess. Laws Act 282, § 3 at 782.

sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure. These laws or written documents are limited to those involving . . . condominium property regimes[.]” (emphases added)). HRS § 514B-146(a) “permit[ted]” the AOA to proceed under Chapter 667 Part II. Thus, if the AOA foreclosed under Part II, it could do so regardless of whether the AOA’s bylaws provided for a power of sale.

The majority’s analysis of HRS § 667-60(c) therefore rests on an incorrect premise, and I would hold that HRS § 667-60(c) may bar Sakal’s claim if the AOA employed Part II.³ For these reasons, and the reasons I explained in my dissenting opinion in Malabe, I respectfully dissent as to Part IV.B.⁴

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama



³ As I explained in Malabe, I also disagree with the majority’s description of the “three means by which condominium associations may foreclose their liens” under Act 282 of 2019. Majority at 21 n.13. This reading ignores the statutory (and general) definitions of power of sale foreclosure and nonjudicial foreclosure, which mean the same thing. Act 282 made clear that an AOA could foreclose under Part II or Part VI “regardless of the presence or absence of power of sale language in an association’s governing documents.” HRS § 514B-146(a) (as amended by Act 282).

⁴ I concur with the majority’s interpretation of HRS § 667-102 in Part IV.A. Majority at 11.