

NO. 23463

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

NOLAN LEE KELIINOHOPO NO CRABBE, Plaintiff-Appellant, v.  
ASSOCIATES FINANCIAL SERVICES COMPANY OF HAWAII,  
INC.; DONNA DAVIS GREEN, in her capacity as  
Commissioner and individually; STEVEN T. IWAMURA;  
Defendants-Appellees, and JOHN DOES 1-10; JANE  
DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS  
1-10; DOE ASSOCIATIONS 1-10; DOE ENTITIES 1-10;  
AND DOE GOVERNMENTAL AGENCIES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 99-3214)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiff-Appellant Nolan Lee Keliinohopono Crabbe  
(Nolan) appeals the May 4, 2000 Judgment (Judgment) of the First  
Circuit Court, entered by Circuit Court Judge Gail C. Nakatani,  
in favor of Defendant-Appellees Associates Financial Services  
Company of Hawaii, Inc. (Associates), Donna Davis Green (Green),  
and attorney Steven T. Iwamura (Iwamura). The Judgment is based  
upon: (1) the November 26, 1999 Order Granting Defendant  
Associates Financial Services Company of Hawaii, Inc.'s Motion to  
Dismiss Complaint Filed on August 24, 1999 (Order Granting Motion  
to Dismiss Complaint); and (2) the April 4, 2000 Order Denying  
Plaintiff's Nolan Keliinohopono Crabbe's Motion to Set Aside

Order Granting Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion to Dismiss Complaint Filed on August 24, 1999, Filed on November 26, 1999, Filed on December 6, 1999 (Order Denying Motion to Set Aside Order).

We affirm.

#### ALLEGED FACTS

The following facts are alleged in the detailed Complaint for Specific Performance and/or Damages and/or Return of Deposit filed by Nolan in this case on August 24, 1999 (the Complaint).

In 1996, in a foreclosure action commenced in 1994 against Nolan, Associates acquired the Mililani residential property (the Property) via a commissioner's deed.

Nolan's father, Richard Crabbe (Richard), purchased the Property via a loan from Associates. In 1997, in Civil No. 97-3300-08, Associates commenced its foreclosure action against Richard. Iwamura represented Associates. In 1998, Associates prevailed and Richard appealed in appeal No. 21618.

While Richard's appeal was pending, Associates sought to sell the Property. The court appointed Green as the Commissioner. At the first auction, Nolan was the high bidder at \$147,000. The order confirming sale was entered on December 2, 1998. Nolan deposited \$14,700. When the sale did not close,

Associates sought court permission for a second auction. Over Nolan's objection,<sup>1</sup> Judge Kevin S. C. Chang orally approved the request. Regarding Nolan's \$14,700 deposit, Judge Chang stated, in relevant part, as follows: "With regards to the deposit of [Nolan], the Court makes no ruling. It does not have before it sufficient information to determine how much, if any, of that deposit should be retained to pay for additional commissioner and/or attorney's fees involved."

Before Judge Chang entered the written order, the second auction was scheduled and held. The notice of the second auction required that "[b]idders must provide proof of 10% requirement before bidding." At the second auction on April 1, 1999, Nolan objected to allowing "credit" bids by an unidentified woman who "did **not** present any cash, money order, certified check, cashier's check to qualify her to bid prior to the commencement of the bidding process." (Emphasis in the original.) At the second auction, Nolan was the high bidder at \$124,000.

It appeared that the unidentified woman represented Associates. Paragraph 101 of the Complaint states as follows:

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<sup>1</sup> It appears that Plaintiff-Appellant Nolan Lee Keliinohopono Crabbe (Nolan) wanted more time to arrange the necessary financing.

On page 6 of EXHIBIT A to the NOTICE OF SUBMISSION UNDER CIRCUIT COURT RULE 23, which is the proposed ORDER GRANTING PLAINTIFF'S MOTION TO REOPEN BIDDING, ASSOCIATES requested that the First Circuit Court authorize ASSOCIATES ". . . to submit a credit bid up to the amount of the secured indebtedness for the Mililani Property at the public auction."

On June 10, 1999, Judge Chang entered the written order authorizing the second auction and authorizing credit bids.

Richard appealed.

It appears that Nolan was unable to perform his obligations arising out of his bid at the second auction.<sup>2</sup> On July 2, 1999, notice was published that the third public auction would be held on August 10, 1999.

On July 21, 1999, in Richard's appeal No. 21618, this court filed its opinion vacating the foreclosure and remanding for further proceedings on the fraudulent inducement allegation. This opinion caused the third public auction, which was scheduled to occur on August 10, 1999, to be cancelled.

On August 24, 1999, in the instant case, Nolan filed the Complaint against Associates, Green, Iwamura, and the unidentified woman alleging various acts of misconduct by them pertaining to or during the first and second auctions.

In Count I, Nolan seeks specific performance of his right to purchase the Property "[b]y virtue of his qualified bids

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<sup>2</sup> When a sale has been cancelled because the high bidder was unable to do what he or she was required to do to close the sale and a new sale is being ordered, the court should consider barring the nonperformer from bidding at the new sale.

at either or both of the First Public Auction and the Second Public Auction[.]"<sup>3</sup>

In Count II, Nolan seeks damages from Associates for breach of the implied covenant of good faith and fair dealing "implied in the contract for the sale and purchase of [the Property] which arose out of the First Public Auction [and] the Second Public Auction."

In Count III, Nolan seeks damages against Associates, Green, Iwamura, and the unidentified woman "[b]y virtue of the[ir] acts and conduct . . . as alleged[.]" These "acts and conduct . . . as alleged" relate to (a) the proposed written order leading to the entry of the June 10, 1999 order, (b) allowing the unidentified woman to bid without being identified and without proof of 10% requirement before bidding, (c) cancellation of the third public auction, and (d) the fact that his \$14,700 has not been returned to him.

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<sup>3</sup> In the Complaint for Specific Performance and/or Damages and/or Return of Deposit filed on August 24, 1999, one of the prayers of Nolan was for:

A. An order of specific performance requiring ASSOCIATES to convey title to the Mililani Property to CRABBE upon CRABBE's payment of the amount of one of the following:

- i. the amount of \$147,000.00 at the First Public Auction;
- ii. the amount of CRABBE's initial bid of \$1,000.00 at the Second Public Auction; or
- iii. the amount of \$124,000.00 at the Second Public Auction[.]

In Count IV, Nolan seeks punitive or exemplary damages against Associates, Green, Iwamura, and the unidentified woman "[b]y virtue of the[ir] acts and conduct . . . as alleged[.]"

In Count V, Nolan contends that "[i]f, for any reason, [Nolan] is not entitled to specific performance and/or damages, [Nolan] is entitled to a return of his cash deposit of \$14,700.00, together with any interest thereon, which is under the control of Commissioner GREEN in Civil No. 97-3300."

On October 5, 1999, Associates filed Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion to Dismiss Complaint Filed on August 24, 1999 (Motion to Dismiss Complaint). One of the asserted grounds was that Nolan "seeks in this action to collaterally attack the orders and proceedings in other action. This is not permissible."

On November 4, 1999, Nolan filed his memorandum in opposition contending that the Motion to Dismiss Complaint must be treated as a Hawai'i Rules of Civil Procedure (HRCP) Rule 56 motion for summary judgment and asserting that "[n]one of these claims are based upon any order made by the court in Civil No. 97-3300-08[,]" the foreclosure case.

On November 26, 1999, after a hearing on November 10, 1999, Judge Nakatani entered the Order Granting Motion to Dismiss Complaint stating as follows:

The Court hereby finds and concludes that Plaintiff's Memorandum in Opposition to Associates' Motion to Dismiss Complaint, which was filed on November 4, 1999, was not timely filed pursuant to Haw. R. Civ. P. 6(d) (which required that any opposition be filed and served on or before November 2, 1999) and that no courtesy copy of Plaintiff's Memorandum in Opposition was delivered to the Court's chambers. For these reasons, the Court finds and concludes that Associates' Motion to Dismiss Complaint should be and is summarily granted.

Additionally and alternatively, the Court hereby finds and concludes that there are good grounds set forth in Associates' moving papers which warrant dismissal of this action and that Plaintiff's remedies, if any, lie in seeking relief in the foreclosure proceedings in which the alleged error or irregularity arose (Civil No. 97-3300 in the First Circuit Court, State of Hawaii), not in bringing this separate suit.

On December 6, 1999, Nolan filed a motion to set aside the Order Granting Motion to Dismiss Complaint. Although Nolan cited HRCF Rule 60(b) as the basis for this motion, we conclude that it is more accurately categorized as a nonhearing motion for reconsideration of the court's order prior to entry of the final separate judgment on a separate document as required by HRCF Rule 58. In his declaration in support of his motion, Nolan stated, in relevant part, as follows:

5. . . . I filed PLAINTIFF'S OPPOSITION MEMORANDUM on November 4, 1999 at 9:16 a.m.

6. In filing PLAINTIFF'S OPPOSITION MEMORANDUM . . . , I had read Rule 7(b) of the Hawai'i Rules of the Circuit Courts . . . (1996) . . . . Rule 7(b) in that Volume indicated that a memorandum in opposition to a motion had to be served and filed not later than 48 hours preceding the time set for hearing. . . .

7. In the Volume . . . was a copy of an amendment to Rule 7(b) which was "Effective January 1, 1997" which indicated that the time for serving and filing an opposition memorandum had been amended from 48 hours to 6 days.

. . . .

10. . . . [A]fter the hearing on ASSOCIATES' MOTION TO DISMISS I learned, for the first time, that there was a further, subsequent amendment to Rule 7(b) which further amended the time for serving and filing an opposition from 6 days to 8 days.

11. When I personally filed PLAINTIFF'S OPPOSITION MEMORANDUM, . . . I did not know, . . . , of any rule or requirement that a copy or copies of PLAINTIFF'S OPPOSITION MEMORANDUM had to be, or should be, taken directly to the judge's chambers who was to hear the pending motion. . . .

On April 4, 2000, the circuit court filed the Order Denying Motion to Set Aside Order. On May 4, 2000, the circuit court filed the Judgment.

#### DISCUSSION

The following numbered paragraphs of the Complaint provide a clearer understanding of the basis of Nolan's claims:

74. [Nolan] then asked Commissioner GREEN to produce any document which authorized the unidentified woman to bid by way of "credit" at the auction. Commissioner GREEN told [Nolan] that she did not have to do so.

75. [Nolan] then told everybody present at the Second Public Auction that [Nolan] intended to sue IWAMURA, the unidentified woman standing next to IWAMURA, and Commissioner Green for the apparent fraud that the three of them appeared to be committing against [Nolan] in concert and collusion with each other.

76. [Nolan] then told IWAMURA that IWAMURA was acting in bad faith on behalf of ASSOCIATES because IWAMURA knew, or should have known, that no authorization had been granted by the First Circuit Court which allowed **anybody** to bid at the auction by way of a "credit" bid.

77. IWAMURA then stated to [Nolan] that "if that is your position [Nolan], then take it up with the court."

78. ASSOCIATES, by and through IWAMURA, had, by the collusion of IWAMURA, the unidentified woman, and Commissioner GREEN, improperly increased the amount of [Nolan's] initial bid by allowing the unidentified woman to make bids that would otherwise not have been made because no other qualified bidder was present at the auction.

79. At that point, attorney James M. Sattler ("Sattler") informed IWAMURA that Sattler would represent [Nolan] in any further proceedings in connection with Civil No. 97-3300.

. . . .



136. By virtue of the improper and duplicitous acts taken by IWAMURA, on behalf of ASSOCIATES, and also by virtue of Commissioner GREEN's *de facto* abdication of her duties and responsibilities to the First Circuit Court and to a qualified bidder, such as [Nolan], on the [Property], [Nolan] has suffered, and will continue to suffer, damages in an amount which will be proved at the trial.

(Emphases in the original.)

We conclude that, in the instant case, the circuit court is not authorized to do what the Complaint asks it to do.

Count I of the Complaint seeks specific performance of his bid in the first auction or his bid in the second auction. If granted, this specific performance would be contrary to the court's orders in the foreclosure case.

Counts II, III, and IV of the Complaint seek damages from a corporate party in the foreclosure case and persons participating in the foreclosure case for their words, actions and nonactions in the foreclosure case. These counts assume either that (a) the orders in the foreclosure case were erroneously entered, or (b) the orders entered in the foreclosure case were materially influenced by the wrongful conduct of one or more of the defendants in the instant case.

Count V seeks a decision on an issue that remains to be decided in the foreclosure case. That issue pertains to a monetary deposit that is subject to the jurisdiction of the court in the foreclosure case.

It has been held that "[w]here a judgment has been set aside for fraud in its procurement, and the plaintiff can prove damage suffered on account of the obtaining of such judgment by fraud, an action may then be maintain[ed] for such damages." 37 Am. Jur. 2d, Fraud and Deceit § 41 (2001). Assuming Hawai'i agrees with this precedent, such an action may not be maintained until (1) the judgment has been entered, (2) plaintiff became aware of the fraud reasonably too late to challenge the entry of the judgment on that basis prior to its entry, and (3) the judgment subsequently was set aside for fraud in its procurement. In the foreclosure case, no judgment has been entered, Nolan has discovered the fraud he alleges, and, in the foreclosure case, Nolan is able to challenge the court's orders.

With respect to Counts I, II, III, and IV, if Nolan believes that the circuit court orders in the foreclosure case have been procured by fraud or other unlawful means, or if he believes that they are erroneous, he may challenge those orders in the foreclosure case or on appeal of the foreclosure case. He may not collaterally attack them in the instant case. "As a general rule, a collateral attack may not be made upon a judgment or order rendered by a court of competent jurisdiction. If it is only a question of error or irregularity and not of jurisdiction, it cannot be raised on collateral attack." First Hawaiian Bank

v. Weeks, 70 Haw. 392, 398, 772 P.2d 1187, 1191 (1989)

(citations, quotation marks, and brackets omitted).

With respect to Count V, the court in the foreclosure case has exclusive jurisdiction over the \$14,700 and the issues of whether and when it shall be returned to Nolan.

We do not reach the question whether the circuit court's alternative grounds for dismissing the Complaint was an abuse of its discretion.

#### CONCLUSION

Accordingly, we affirm the following orders of the circuit court:

(1) The November 26, 1999 Order Granting Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion to Dismiss Complaint Filed on August 24, 1999.

(2) The April 4, 2000 Order Denying Plaintiff's Nolan Keliinohopono Crabbe's Motion to Set Aside Order Granting Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion to Dismiss Complaint Filed on August 24, 1999, Filed on November 26, 1999, Filed on December 6, 1999.

(3) The May 4, 2000 Judgment.

DATED: Honolulu, Hawai'i, September 28, 2001.

On the briefs:

Nolan L. K. Crabbe,  
Plaintiff-Appellant, *pro se*.

Chief Judge

Katherine G. Leonard  
(of counsel, Carlsmith Ball  
LLP) for Defendant-Appellee  
Associates Financial  
Services Company of Hawaii,  
Inc.

Associate Judge

John P. Delleria,  
Deputy Attorney General,  
for Defendant-Appellee  
Donna Davis Green.

Associate Judge

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Steven T. Iwamura.