

NO. 24686

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

THE BANK OF NEW YORK, AS TRUSTEE OF AMRESKO RESIDENTIAL
SECURITIES CORPORATION MORTGAGE LOAN TRUST 1997-2 UNDER
THE POOLING AND SERVICE AGREEMENT DATED AS OF JUNE 1,
1997, Plaintiff-Appellee, v. MELVIN TOSHIHIKO YAMAMOTO,
ELAINE SHIGEMOTO YAMAMOTO, MAXINE HARUKO TAMPON,
ASSOCIATES FINANCIAL SERVICES COMPANY OF HAWAII, INC.,
and JOHN and MARY DOES 1-20, Defendants-Appellants

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(Civ. No. 98-0206)

ORDER DENYING MOTION FOR RECONSIDERATION
OF SUMMARY DISPOSITION ORDER FILED JUNE 20, 2003
(By: Burns, C.J. Watanabe, and Lim, JJ.)

On June 30, 2003, Defendants-Appellants Melvin
Toshihiko Yamamoto, Elaine Shigemoto Yamamoto, and Maxine Haruko
Tampon (collectively, Appellants) filed a Motion for
Reconsideration of the Summary Disposition Order (SDO) entered by
this court on June 20, 2003.

In the SDO, we affirmed the October 12, 2001 Judgment
of the Circuit Court of the Fifth Circuit, Judge George M.
Masuoka presiding, granting the August 23, 2001 motion of
Plaintiff-Appellee The Bank of New York, as Trustee of Amresco
Residential Securities Corporation Mortgage Loan Trust 1997-2
Under the Pooling and Service Agreement Dated as of June 1, 1997
(Bank), for summary judgment and interlocutory decree of
foreclosure on a piece of property owned by Appellants. In doing
so, we rejected Appellants' sole argument on appeal--that summary

judgment should not have been granted in Bank's favor because Appellants canceled the mortgage loan being foreclosed upon due to violations of the federal Truth in Lending Act (TILA) by Bank's predecessor in interest. We noted that Appellants had brought a lawsuit against Bank in the United States District Court for the District of Hawai'i (the federal district court), seeking rescission of their mortgage and statutory damages under TILA. Upon Appellants' failure to show that they could repay the amount of their loan to Bank, a condition of a TILA rescission, as well as Appellants' failure to substitute the trustee in Appellants' bankruptcy proceeding as the proper plaintiff in the federal lawsuit, the lawsuit was dismissed by the federal district court, Judge Samuel P. King (Judge King) presiding. The dismissal was thereafter affirmed by the Ninth Circuit Court of Appeals. Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. Hawai'i).

Appellants now contend, for the following reasons, that the SDO should be withdrawn:

(1) "This [c]ourt is not bound by either the decision of the [federal district court] or the decision of the Ninth Circuit Court of Appeals in Yamamoto [v. Bank of New York] because they were not adjudications on the merits of [Appellants'] rescission claim" but instead were "expressly based on a lack of standing to assert the [TILA] claim";

(2) "Even if [Appellants] had no standing by themselves in [federal district court] to affirmatively sue on

their rescission claim, [they] nevertheless have standing to assert their rescission claim in state court as a recoupment defense without their bankruptcy trustee"; and

(3) "Even if this [c]ourt were bound by the decision of the [federal district court] and the decision of the Ninth Circuit Court of Appeals in [Yamamoto] because they were considered adjudications on the merits of [Appellants'] rescission claim, and even if [Appellants] had no standing to assert their rescission claim in state court as a recoupment defense without their bankruptcy trustee, nevertheless summary disposition at this time in favor of [Bank] is still not warranted as the decision of the Ninth Circuit Court of Appeals is not yet final" since Appellants' "petition for rehearing *en banc*" is "being timely filed this week."

For the following reasons, we are not persuaded by Appellants' arguments.

First, the assertion by Appellants that the federal district court dismissed their rescission claim because they lacked standing is somewhat disingenuous. In a February 12, 2001 Order Granting in Part and Denying in Part [Bank's and Appellants'] Cross-Motions for Summary Judgment, Judge King granted summary judgment in Bank's favor as to Appellants' claims for damages under TILA and Hawaii's unfair and deceptive trade practices act, Hawaii Revised Statutes (HRS) chapter 480, and dismissed such claims. As to Appellants' remaining claim for

rescission of the loan for TILA violations, Judge King's order stated, in relevant part:

TILA's right of rescission is conditioned upon the debtor returning the money. This is what Judge [Alan C.] Kay held in Rowland [v. Novus Financial Corporation], 949 F. Supp. 1447, 1459 (D. Haw. 1996)]. At their depositions, each [Appellant] indicated they could not return the amount financed. Thus, Defendants argue that rescission is impossible.

. . . .

[Appellants] also respond by contending that they should be given time to tender back the loan proceeds (less the finance charges set forth in 15 U.S.C. § 1635(b)). [Appellants] point to a recent order by Chief Judge [David Alan] Ezra in McLaren v. Norwest, Civ. No. 99-00356DAE, wherein Judge Ezra gave [Appellants] 120 days to tender the loan proceeds back to the lender.

Here, however, it is disputed whether [Appellants] can fulfill the necessary tender. [Appellants] have indicated they cannot, although they ask for time to fulfill the condition. Given this dispute, as Judge Kay reasoned in Rowland, "at this time the [c]ourt cannot categorically dismiss or grant summary judgment on all [Appellants'] claims for rescission." 949 F. Supp. at 1460. This is even more so since [Appellants] also ask for time to substitute the Bankruptcy Trustee as the appropriate Plaintiff. Thus, even assuming that the disclosure regarding the appraisal fee entitles [Appellants] to rescission, the [c]ourt DENIES both [Appellants'] and [Bank's] motions regarding the rescission claim.

[Appellants], however, are given 60 days to substitute the Bankruptcy Trustee as a proper plaintiff in this action. If they are successful in doing so, then [Appellants] can proceed to attempt to tender the necessary proceeds. If they do not, and if within that 60-day period Maxine Tampon Yamamoto cannot individually tender the loan proceeds, then the [c]ourt will dismiss the rescission claim.

. . . .

If [Appellants] are unable to comply with the conditions stated above within 60 days of the entry of this Order, then the [c]ourt will DISMISS the remaining claims and enter judgment in this action.

When Appellants failed to comply with the foregoing conditions, Judge King entered an order, dated June 15, 2001, dismissing the action and ordering the federal district court clerk to enter judgment in favor of Bank and against Appellants.

The dismissal of Appellants' TILA rescission claim was thus clearly "on the merits" and precludes our revisiting the issue in this case.

We need not address Appellants' second argument because Appellants never raised the affirmative defense of recoupment during the proceedings below.

Finally, we decline Appellants' invitation to withdraw our SDO until the Ninth Circuit Court of Appeals has a chance to consider a petition for rehearing *en banc* filed by Appellants. Therefore,

IT IS HEREBY ORDERED that Appellants' Motion for Reconsideration of Summary Disposition Order Filed June 20, 2003 is denied.

DATED: Honolulu, Hawai'i, July 8, 2003.

Gary Victor Dubin on
the motion for
defendants-appellants.

Chief Judge

Associate Judge

Associate Judge