NO. 24005

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE AMRESCO RESIDENTIAL SECURITIES MORTGAGE LOAN TRUST 1998-2, UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF JUNE 1, 1998, Plaintiff-Appellee, v. DOMINADOR MAGNO LOPEZ, Defendant-Appellant; ELIXIR TANILON LOPEZ, JOVITO GOMOS CASINTAHAN, JR., DAVID MARTIN KOSONEN, PAMELA KAREN KOSONEN, MADONNA FONDA CABAHIT, CHILD SUPPORT ENFORCEMENT AGENCY, JOHN AND MARY DOES 1-20, DOE PARTNERSHIPS, CORPORATIONS or OTHER ENTITIES 1-20, Defendants; and MARCELO M. LOPEZ, JR., Party-In-Interest-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 00-01-1495)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Dominador M. Lopez (Dominador) and Party-In-Interest-Appellant Marcelo M. Lopez, Jr. (Marcelo) (collectively, "Appellants"), *pro se*, appeal from the Judgment entered on March 14, 2001, in the Circuit Court of the First Circuit (the circuit court).

Appellants challenge the circuit court's (1) March 14, 2001 "Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Dominador Magno Lopez, Elixir Tanilon Lopez, Jovito Gomos Casintahan, Jr., and All Other Defendants, and for Interlocutory Decree of Foreclosure" (Order Granting Summary Judgment) and (2) the February 8, 2001

"Order Denying Defendant's First Amended Motion for Reconsideration with a Claim Under the Rule 36(a) [Hawai‘i Rule of Civil Procedure (HRCP)], or in the Alternative, for Amendments to Conform to the Evidence and/or to Supplement Pleadings Filed on December 13, 2000." We affirm.

BACKGROUND

On May 11, 1998, Dominador and Defendants Elixir Tanilon Lopez (Elixir) and Jovito Gomos Casintahan, Jr. (Jovito) (collectively, the Three Mortgagors), signed a Note and a Real Property Mortgage and Financing Statement (Mortgage) to finance the purchase of 92-632 Akaula Street, Kapolei, Hawai‘i 96707, Tax Map Key (TMK) No. 9-2-012-094(1) (the Property).

In a memorandum filed on December 13, 2000, Appellants stated, in relevant part, as follows:

> After we closed [the purchase], we took possession and improved the 3 bedroom, 1.5 baths, and no lanai to a 6 bedrooms, 2.5 baths with 2 lanais overseeing gorgeous views of the ocean and city, with entire new roof and new entire paint job. Now subject property is at a market value of about $248,000.00 . . . with an existing mortgage (with arrears) of about $143,000.00 leaving an equity to us of about $105,000.00, which is not much of a difference between Plaintiff and our monies of hard works and life savings spent into subject property. Following after the major repair or improvement, we marketed subject property[.]

The mortgagee was AMRESCO Residential Mortgage Corporation, 16800 Aston Street, Irvine, California 92606 (AMRESCO). On May 10, 2000, Plaintiff-Appellee Norwest Bank Minnesota (NBM or Plaintiff), trustee for AMRESCO pursuant to a servicing agreement, filed a complaint for foreclosure (Complaint), Civil No. 00-01-1495, against the Three Mortgagors, Defendants

David M. Kosonen (David), Pamela K. Kosonen (Pamela), Madonna F. Cabahit (Madonna), Child Support Enforcement Agency (CSEA), and John and Mary Does 1-20, Doe Partnerships, Corporations or Other Entities 1-20. The Complaint states, in relevant part, the following:

> 2. [The Three Mortgagors] at all times relevant were and are the owners of the subject property located at 92-632 Akaula Street, Kapolei, Hawaii 96707, TMK: 9-2-012-094(1) (hereafter "the Property"). The Property, including all improvements and fixtures, are the subject matter of this foreclosure action. . . .
>
> 3. [DAVID] and [PAMELA] may claim an interest in the Property by virtue of a Mortgage dated May 11, 1998, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2457336. This interest is subordinate and inferior to Plaintiff's first mortgage and note.
>
> 4. [MADONNA] may claim an interest in the Property by virtue of a Third Mortgage dated September 17, 1998, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2483517. This interest is subordinate and inferior to Plaintiff's first mortgage and note.
>
> 5. [CSEA] may claim an interest in the Property by virtue of a Judgment against Mercedes Naomi Laquihon and [Dominador], dated August 23, 1991, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 98-108445. This interest is subordinate and inferior to Plaintiff's first mortgage and note.
>
> . . . .
>
> 7. On or about May 7, 1998, for value received, [the Three Mortgagors] executed and delivered to [AMRESCO], a Delaware corporation that certain mortgage note of like date for ONE HUNDRED THIRTY-FOUR THOUSAND EIGHTY-SEVEN AND NO/100 DOLLARS ($134,087.00). . . .
>
> 8. The mortgage note was secured by that certain mortgage of the Property dated May 7, 1998, (hereafter "the Mortgage"), executed by [the Three Mortgagors] in favor of [AMRESCO], a Delaware corporation, as Mortgagee. The Mortgage was filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 2457335. . . .
>
> 9. The Mortgage and Mortgage Note were further assigned to Plaintiff.
>
> 10. [The Three Mortgagors] are in default in the payment of the principal and interest mentioned in the mortgage note. As a result of such default and in accordance with the terms of the mortgage note and mortgage, the entire aggregate amount of the principal obligation of the mortgage note presently unpaid, namely, $132,986.13 together with interest, advances and charges, has become

> and is now due and payable. Although demand has been made by Plaintiff with respect to the principal and interest due and payable to Plaintiff, the Defendants have failed, refused and neglected to pay the same.
>
> 11. As a result of the above facts, Plaintiff is entitled to a foreclosure of its mortgage and to a sale of the Property in accordance with the terms of the mortgage.

On June 14, 2000, attorney Terry G. Oppermann (Oppermann) filed a document in which he purported to represent all "Defendants." A subsequent event showed that he did not represent the CSEA. Hereafter, we will refer to the named parties represented by Oppermann as the Oppermann Defendants. The document, filed June 14, 2000, by Oppermann, was "Defendants' Offer of Settlement Pursuant to Rule 68 of the Hawaii Rules of Civil Procedure" offering

> to pay all Mortgage Payments, Late Charges, Bad Check Fees, Net Other Fees and Corporate Advances, accrued prior to the date of this offer and necessary to reinstate the mortgage on the property which is the subject matter of the above-entitled complaint, plus One Thousand Dollars and No Cents ($1,000.00) in Plaintiffs' attorneys fees.

On June 19, 2000, the Oppermann Defendants filed an answer asserting several affirmative defenses and a third-party complaint against Wendover Financial Services Corporation (WFS) alleging:

> 3. [The Oppermann Defendants were] supposed to make all payments to [WFS] under the mortgage agreement that is the subject matter of the above-entitled law suit.
>
> 4. [The Oppermann Defendants] were in the process of selling the property which was covered by the subject mortgage in this case and that, at all times, they kept [WFS] informed of the status of the proceedings.
>
> 5. When the proposed sale fell through, [the Oppermann Defendants] informed [WFS] and, by way of a letter dated 4/24/00 and received by [the Oppermann Defendants] on 4/28/00 (a copy of which is included herein), [WFS] demanded that [the Oppermann Defendants] pay $8,324,82 with the sole condition that [the Oppermann Defendants] call 1-888-934-1081 prior to sending any funds.

> 6. Upon receipt of this demand, [the Oppermann Defendants] immediately complied by calling the indicated number but they were told to call back to yet another number.
>
> 7. From the period from 4/28/00 to 5/8/00, [the Oppermann Defendants] made several calls to various numbers and people as directed by [WFS] but no one at [WFS] was able to inform [the Oppermann Defendants] of the amount that was needed to be paid by [the Oppermann Defendants] to reinstate the mortgage and bring it current.
>
> 8. On 5/8/00, for the first time, a receptionist at [WFS] directed [the Oppermann Defendants] to contact the office of Attorney Lester Leu.
>
> 9. [The Oppermann Defendants] contacted that office on the same day and spoke to Merriam who informed [the Oppermann Defendants] that she could not obtain current figures for the file until 5/17 (5/13 and 5/14 were weekend days).
>
> 10. On 5/15/00, [the Oppermann Defendants] sent to [WFS] the $8,324.82, demanded in the letter received 4/28/00, by way of Western Union Money Transfer.
>
> 11. From the date of the demand letter to the date that [the Oppermann Defendants] sent in the payment . . . [the Oppermann Defendants] had not been told to send any amount other than $8,324.82.
>
> 12. Nonetheless, it is my understanding that [WFS] refused to accept the payment tendered by [the Oppermann Defendants] because the payment did not include an amount for attorneys fees.
>
> 13. The complaint in this case was not filed until May 10, 2000, a date well past the date that [the Oppermann Defendants] had been taking all steps demanded by [WFS] in compliance with [WFS'] demand letter and past the date that [the Oppermann Defendants] sent in the amount demanded in [WFS'] demand letter.
>
> 14. [WFS] improperly rejected the payment and improperly demanded additional and excessive attorney's fees.

The Oppermann Defendants asserted causes of action for breach of promise, unfair and deceptive trade practices in violation of Hawaii Revised Statutes (HRS) § 480-2 (1993),[1] and

---

[1/] Hawaii Revised Statutes (HRS) § 480-2 (1993 & Supp. 2002) provides, in relevant part, the following:

(continued...)

abuse of process. They also sought reimbursement for attorney fees for having to defend against a frivolous complaint.

On June 29, 2000, CSEA, represented by the Attorney General of Hawai‘i, filed "Defendant [CSEA's] Statement of No Interest to Plaintiff's Complaint Filed May 10, 2000."

On November 1, 2000, NBM filed "Plaintiff's Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties." A Declaration of Indebtedness by Kim Adkins (Adkins), foreclosure specialist for WFS, was attached. Adkins declared, in relevant part, the following:

> 2. I am one of the custodians of records made and kept in the normal course of the business of Plaintiff or its servicing agent regarding [the Three Mortgagors].
>
> 3. That according to these records, [the Three Mortgagors] are the owners of the subject property of this foreclosure. . . .
>
> . . . .
>
> 6. [The Three Mortgagors] have failed to pay the installments, principal and interest as required by the mortgage note and mortgage and is in default in respect thereof.

[1/](...continued)

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.
>
> (b) In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.
>
> (c) No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.
>
> (d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

> 7. That proper demands for payment of all delinquent amounts due and owing to Plaintiff herein under the mortgage note and mortgage have been made against [the Three Mortgagers] herein.
>
> . . . .
>
> 9. [The Three Mortgagors] defaulted on the subject mortgage note and mortgage on 10-01-99.
>
> 10. The last mortgage payment was made by [the Three Mortgagors] on 10-30-99.

In the memorandum in support of its motion, NBM argued that

> [a]ccording to the mortgage note and mortgage, [the Three Mortgagors] are required to make certain monthly payments. Nevertheless, [the Three Mortgagors] have failed to make the required payments.
>
> The Mortgage specifically allows Plaintiff to demand payment in full of the unpaid balance, principal and interest, and to foreclose on the mortgage if payment is not made.
>
> . . . .
>
> [The Oppermann Defendants] cannot present any evidence that they have in fact made all the payments due and owing under the mortgage and mortgage note.

In "Defendants' Memorandum in Opposition to Summary Judgment" filed November 22, 2000 (November 22, 2000 Memorandum), the Oppermann Defendants argued that they "tendered the full amount of the money demanded by [WFS]. Despite this tender, [WFS] rejected the payment, demanded additional and unspecified amounts and proceeded with foreclosure and demands that Plaintiffs also be liable for still additional attorneys fees and costs incurred well subsequent to their offer to pay in full."[2] The Oppermann

---

[2/] Hawai‘i Rules of Civil Procedure (HRCP) Rule 68 provides, in relevant part, as follows:

> At any time more than 10 days before the trial begins, any party may serve upon any adverse party an offer of settlement or an

(continued...)

Defendants also argued that NBM did not give them "timely notice of their Right to Cancel" as required by 15 U.S.C. § 1601 (2000) (Truth in Lending Act or TILA)[3] and that its affidavit failed to comply with Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e)[4] when it failed "to state that it is based on records or acts "'(a) made in the course of as of [sic] a regularly conducted activity . . . (b) made at or near the time of the acts.'"

In his declaration attached to the November 22, 2000 Memorandum, Dominador states, in relevant part, as follows:

> 3. I did not, and have not, received any Notice of My Right To Cancel [the financing] agreement.
>
> . . . .
>
> 5. The other borrowers and myself authorized my brother, Marcelo Lopez, to contact [WFS] and to conduct negotiations with

---

[2/] (...continued)
offer to allow judgment to be taken against either party for the money or property or to the effect specified in the offer, with costs then accrued.

[3/] 15 U.S.C. § 1601(a) (2000) provides, in relevant part, the following:

> It is the purpose of this . . . to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

[4/] HRCP Rule 56(e) provides, in relevant part, as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

them concerning amounts that were claimed by them to be owed pursuant to Exhibit "A" [the April 24, 2000 notice of foreclosure].

In his declaration attached to the November 22, 2000 Memorandum, Marcelo states, in relevant part, as follows:

> 1. My younger brother, Dominador Lopez, and the other defendnats [sic] in this case were borrowers on a loan secured by property at 92-632 Akaula St.; Kapolei, HI 96707.
>
> 2. Payments on that loan were being sent to [WFS]. . . .
>
> 3. The borrowers made substantial improvements to the property and were in the process of selling the property for an amount well in excess of the amount of the loan and all other indebtedness but the proposed sale fell through and the borrowers had to look for a new buyer.
>
> 4. When the proposed sale fell through, the borrowers informed [WFS] and, by way of a letter dated 4/24/00 and received by the borrowers on 4/28/00 . . . [WFS] demanded that [the Oppermann Defendants] pay $8,324.82 with the sole condition that [the Oppermann Defendants] call 1-888-934-1081 prior to sending any funds.
>
> 5. My younger brother, Dominador Lopez, and the other borrowers authorized me to discuss and negotiate with [WFS] concerning the amount demanded in [WFS'] letter.
>
> 6. I immediately called the indicated number but I was told to call back to yet another number.
>
> 7. From the period from 4/28/00 to 5/8/00, I made several calls to various numbers and people as directed by [WFS] but no one at [WFS] was able to inform me of the amount that was needed to be paid by the borrowers to reinstate the mortgage and bring it current.
>
> 8. On 5/8/00, for the first time, a receptionist at [WFS] directed me to contact the office of Attorney Lester Leu.
>
> 9. I contacted that office on the same day and spoke to Merriam who informed me that she could not obtain current figures for the file until 5/17 (5/13 and 5/14 were weekend days).
>
> 10. On 5/15/00, the borrowers sent to [WFS] the $8,324.82, demanded in the letter received 4/28/00, by way of two payments via Western Union Money Transfer[.]
>
> 11. From the date of the demand letter to the date that I sent in the payment by way of Western Union, neither the borrowers not I had been told to send any amount other than $8,324.82.
>
> 12. Nonetheless, [WFS] refused to accept the payment tendered [to] borrowers because the payment did not include an amount for attorneys fees.

On November 27, 2000, at 1:41 p.m., the Oppermann

Defendants filed "Defendants' First Amended Answer," "Defendants' Counterclaim," and "First Amended Third Party Complaint," which argued various affirmative defenses and set forth several causes of action for their Counterclaim against NBM and AMRESCO, including breach of promise, unfair and deceptive trade practices in violation of HRS § 480-2, abuse of process, misrepresentation, deceit, violation of 15 U.S.C. § 1601, and filing a frivolous complaint. The Oppermann Defendants' "First Amended Third Party Complaint" alleged the same causes of action as the Counterclaim, but against WFS and AMRESCO.

On November 27, 2000, Dominador telefaxed and mailed AMRESCO a "Notice of Cancellation" in which he stated the following:

> PLEASE TAKE NOTICE HEREBY that I am exercising my right to cancel my mortgage loan with [AMRESCO] pursuant to the 1995 amendments to the Truth In Lending Act and regulation Z. By operation of Federal Law, the security interest and mortgage is void automatically upon your receiving of this notice of recission by way of recoupment.
>
> The violation committed by your company is the failure to provide the required notice of right to cancel.

On November 27, 2000, at or around 9:00 a.m., a hearing was held before Judge Kevin S. C. Chang on NBM's motion for summary judgment (November 27, 2000 hearing). Although Appellants did not provide a transcript of the hearing, subsequently filed documents indicate that Judge Chang granted the motion. On December 5, 2000, Appellants filed a "Memorandum in Support of Motions for

Reconsideration With a Claim Under Rule 56(a) H.R.C.P., or in the Alternative, for Amendments to Conform to the Evidence and/or to Supplement Pleadings." On December 13, 2000, Appellants filed their "First Amended Motion for Reconsideration With a Claim Under Rule 56(a) H.R.C.P., or in the Alternative, for Amendments to Conform to the Evidence and/or to Supplement Pleadings" (First Amended Motion).

In the memorandum filed in support of their First Amended Motion, Appellants argued that AMRESCO had knowledge of the Deposit Receipt Offer and Acceptance form which named Worldwide One Stop Enterprises, LLC[5] (Worldwide), as the buyer of the Property, that AMRESCO received all payments from Worldwide, and that, because Marcelo is one of the members of Worldwide, Marcelo is a "real part[y] in interest[.]"[6] Appellants also stated that:

---

[5]/ Uniform Limited Liability Company Act, HRS Chapter 428 (Supp. 2002).

[6]/ Defendant-Appellant Dominador M. Lopez and Defendants Elixir Tanilon Lopez and Jovito Gomos Casintahan, Jr. (the Three Mortgagors), admitted in their June 19, 2000 Answer and Third Party Complaint, and the circuit court determined in its March 14, 2001 Findings of Fact, that the Three Mortgagors were the owners of the parcel of real property located at 92-632 Akaula Street, Kapolei, Hawai‘i 96707, Tax Map Key No. 9-2-012-094(1) (the Property), not Worldwide One Stop Enterprises, LLC (Worldwide). AMRESCO Residential Mortgage Corporation's (AMRESCO) knowledge of a Deposit Receipt Offer and Acceptance form and acceptance of payments from Worldwide do not alter that fact.

Pursuant to HRCP Rule 20, Party-In-Interest-Appellant Marcelo M. Lopez (Marcelo) could not join the foreclosure action because he was not a defendant in any suit by Plaintiff-Appellee Northwest Bank Minnesota (NBM or Plaintiff) arising out of the alleged default. HRCP Rule 20(a) provides, in relevant part, the following:

> All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences

(continued...)

(1) although they did not receive notice of the assignment of servicing rights to WFS by AMRESCO, when WFS sent the April 24, 2000 notice about the loan, they tried to make a good faith attempt to pay; (2) NBM delayed providing them with the necessary information required to cure in order to file for foreclosure; and (3) Elixir, Jovito, and Madonna were not properly served with the Complaint and summons.

On December 26, 2000, after a hearing, Judge Karen Blondin orally denied Appellants' First Amended Motion.

On January 4, 2001, Appellants filed a Notice of Appeal. A First Amended Notice of Appeal was filed February 1, 2001, and a Second Amended Notice of Appeal was filed February 7, 2001.

Judge Blondin's order denying Appellants' First Amended Motion was filed on February 8, 2001.

[6/] (...continued)
and if any question of law or fact common to all defendants will arise in the action.

Marcelo's ownership interest in Worldwide would have given him standing to intervene as permitted by HRCP Rule 24, if Worldwide had an interest in the Property, but Worldwide did not have an interest in the Property. HRCP Rule 24(a) provides, in relevant part, the following:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Marcelo could not join or intervene as a party to the foreclosure action. The Three Mortgagors could and did authorize Marcelo to act as their agent to negotiate with Wendover Financial Services Corporation (WFS), AMRESCO's servicing agent, but Marcelo is not a licensed attorney in the State Of Hawai‘i and cannot speak on their behalf in the circuit court or on appeal.

Judge Chang's "Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against [the Three Mortgagors], and All Other Defendants, and for Interlocutory Decree of Foreclosure" was filed on March 14, 2001.

On March 22, 2001, Appellants filed their "Third Amended or Supplemented Joint Notice of Appeal to the Hawaii Supreme Court and to the Intermediate Court of Appeals[.]"

POINTS ON APPEAL

After a careful and thorough examination of Appellants' discursive opening brief, we interpret it to argue the following points on appeal:

1. The court erred in granting summary judgment for NBM because NBM "failed to support its motion for summary judgment with any admissible or reliable evidence in violation of Rule 56(e), HRCP, and Evidence Code Rules [sic] 801(3) and Rule 802, . . . payment in full was made according to [the] financing agreement/mortgage agreement to Plaintiff's agents who lied in the[ir] declaration . . . in support of [Plaintiff's] motion for summary judgment . . . [Plaintiff's] attorney who had knowledge the whole time[,] [made] no mention of Appellants' payment whatsoever anywhere in [Plaintiff's] pleadings nor oral arguments, successfully keeping the lie . . . uncorrected[.]"

2. The court erred in granting summary judgment because there "remain[ed] in the case several material issues of fact in

genuine dispute as to liability with respect to Appellants' affirmative defenses and counterclaims not ruled upon below." Specifically, Appellants' argue that the Three Mortgagors were denied due process because NBM failed to give thirty days' notice as required by the Fair Debt Collection Act, 15 U.S.C. § 1692g(a) (2000).[7] Appellants allege that AMRESCO used "bait and switch" tactics in violation of HRS § 480-2 (2002) by promising the Three Mortgagors that the mortgage was assumable while failing to disclose that the document they signed did not allow for the assumption of the mortgage. Appellants also allege that NBM failed to provide a timely Notice of Right to Cancel pursuant to 15 U.S.C. § 1601 et seq.

[7/] 15 U.S.C. § 1692g(a) (2000) provides, in relevant part, as follows:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

3. The court erred because "there remain[ed] . . . several undecided material issues of fact in genuine dispute as to liability with respect to Appellants' affirmative defenses and counterclaims not addressed by the lower court's . . . findings of fact, conclusion[s] of law, and order granting summary judgment . . . [as] to whether there had been any reliable loan default[,] as to any reliable amount of principal and/or interest allegedly . . . past due[.]"

4. The court erred by refusing "to grant a continuance to allow Appellants, pursuant to Rule 56(f), HRCP, to conduct necessary discovery after Plaintiff's and its People's fraudulent [conduct] and deceitful practices were discovered for the first time by the Appellants prior to the entry of the order granting summary judgment[.]" Appellants allege that NBM's "evidence was copied well reduced making it very hard to read did Appellants for the first time knew the shocking knowledge of the mortgage agreement was violated in order for [NBM] and its attorney to hide some crucial and material facts[.]"

5. The circuit court lacked subject matter jurisdiction "because it cannot entertain or enforce fraud, deceit, or misrepresentation because . . . the Hawaii Supreme Court has recognized that where execution of a contract is obtained by *Fr*aud, *de*ceit, or *mis*representation, the contract may be *avoid*ed by the party who was misled." (Citation omitted, emphases in original.)

6. NBM failed to provide proper service of the complaint and summons.

7. The court erred by directing the entry of final judgment of the order granting summary judgment because Appellants' affirmative defenses and counterclaims were not fully adjudicated pursuant to HRCP Rule 54(b).[8]

8. Judge Blondin denied Appellants' First Amended Motion "without ruling on Appellants' affirmative defenses and counterclaims."

9. Judge Blondin was biased because she presided over another case in which they were involved, "in which case our image was formed in [Judge Blondin's] mind resulting to which similar situation in the making of decision was carried over to this case because of sympathy rather than in evidence[.]"

---

[8] HRCP Rule 54(b) provides, in relevant part, the following:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STANDARD OF REVIEW

Motion for Summary Judgment

We review a circuit court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court. Roxas v. Marcos, 89 Hawai‘i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). As the Hawai‘i Supreme Court has often articulated: "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (citations and internal quotation marks omitted). This court recognizes that "[a] fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).

When performing this review, "[w]e . . . view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai‘i 76, 80, 947 P.2d 944, 948 (1997) (quoting Maguire v. Hilton

Hotels Corp., 79 Hawai‘i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted).

HRCP Rule 56(e) provides, in relevant part, as follows:

> When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations of denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor can the hope of producing the required evidence entitle the party to trial. Henderson v. Professional Coatings Corp., 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (quoting 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed. 1983)).

Motion for Reconsideration

The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments, not to re-litigate old matters or raise arguments or evidence that could and should have been brought during the earlier proceeding. Association of Apt. Owners of Wailea Ulea v. Wailea Resort Co., Ltd., 100 Hawai‘i 97, 110, 58 P.3d 608, 621 (2002) (citations, internal quotations, and brackets omitted). We review "[a] trial court's ruling on a motion for reconsideration . . . under the abuse of dis0cretion standard." Id. An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the

substantial detriment of a party litigant." Amfac, 74 Haw. at 114, 839 P.2d at 26 (citation omitted).

Judicial Bias

The Hawai‘i Supreme Court has stated that

> [i]n the administration of justice by a court of law, no principle is better recognized as absolutely essential than that [in] every case, be it criminal or civil, . . . the parties involved therein are entitled to the cold neutrality of an impartial judge. The right of litigants to a fair trial must be scrupulously guarded.

Aga v. Hundahi, 78 Hawai‘i 230, 242, 891 P.2d 1022, 1034 (1995) (quoting Peters v. Jamieson, 48 Haw. 247, 262, 397 P.2d 575, 585 (1964)). The Hawai‘i Supreme Court has also said, however, that

> the general ruled that, standing alone, "mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice[.]" . . . [R]eversal on the grounds of judicial bias or misconduct is warranted only upon a showing that the trial was unfair. Unfairness, in turn, requires a clear and precise demonstration of prejudice.

Aga, 78 Hawai‘i at 242, 891 P.2d at 1034 (citations and quotation marks omitted).

HRS § 601-7(b) provides that "a judge shall be disqualified whenever a party files a legally sufficient affidavit showing bias or prejudice but [also] contains the critical requirement that the affidavit be timely filed before the hearing or the action or proceeding and, if not, that good cause shall be shown." Yorita v. Okumoto, 3 Haw. App. 148, 152, 643 P.2d 820, 824 (1982).

DISCUSSION

In their opening brief, Appellants, filing *pro se*, frequently engage in lengthy, labyrinthine arguments which fail to comply with the Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b).[9] For example, in their "Statement of the Case,"

[9/] Hawai‘i Rules of Appellate Procedure Rule 28(b) provides, in relevant part, as follows:

> Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
>
> . . . .
>
> (3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. Record references shall include page citations and the volume number, if applicable. References to transcripts shall include the date of the transcript, the specific page or pages referred to, and the volume number, if applicable. Lengthy quotations from the record may be reproduced in the appendix. There shall be appended to the brief a copy of the judgment, decree, findings of fact and conclusions of law, order, opinion or decision relevant to any point on appeal, unless otherwise ordered by the court.
>
> (4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following :
>
> (A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(continued...)

Appellants argue as follows:

> Appellants wondered mainly about why payment, although was tendered, was never reflected anywhere in Plaintiff's pleadings and argument as received or returned and why Plaintiff and/or its people evidence was copied well reduced making it very hard to read did Appellants for the first time knew the shocking knowledge of the mortgage agreement was violated in order for Appellee and its attorney to hide some crucial and material facts in court [Footnote 10] and that the summary judgment via minute order was granted for the Plaintiff.

(Footnote omitted.)

"Footnote 10" in the above paragraph provides Appellants' references to the record. It reads as follows:

> No record what so ever from the following pages, R, at 131-33, 120-135; 430-33, 298-477; 01-24; 83-119; 1-4 vol. 2; 5-12 vol. 2; TR, 12-26-00 proceedings by Official court reporter Florencia L. Fines (all lines pgs. 1-7); plus record of hardly unreadable mortgage at 100-106. 83-119.

In the "Argument" section of their opening brief, on the issue of the Oppermann Defendants' affirmative defenses and counterclaim, Appellants assert that

> [i]n the instant case, not only did Plaintiff and its people disregarded [sic] the legal and ethical responsibilities as well as the law by fraud upon the court by clear and convincing, documented evidence, argued supra and infra and reargued all applicable paragraphs supra and infra and incorporated herein by reference again, but also by Common Law Fraud[.]

[9/] (...continued)

> (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;
>
> (C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;
>
> . . . .
>
> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.

On the issue of Judge Blondin's alleged bias, Appellants state as follows:

> In the instant case, the court never voluntarily recuse [sic] herself while two different cases were upon her with experience of the first one in [Eugene] W. I. Lau vs. Dominador M. Lopez, et al to have placed Defendants below in an extreme emotional and mental distress to feel and witness the presence of partiality casted upon Appellants because of sympathy rather than in evidence was rendered for a summary judgment, granted for the Plaintiff absent admissible hearsay and reliable evidence as full payment was made by the Defendants below yet resulting to the detriment of the Defendants.

The Hawai‘i Supreme Court has held that an appeal may be dismissed for an appellant's failure to conform an opening brief to HRAP Rule 28. "[Appellant's] failure to conform his brief to the requirements of HRAP Rule 28(b) burdens both the parties compelled to respond to the brief and the appellate court attempting to render an informed judgment. As we have previously stated, such noncompliance offers sufficient grounds for the dismissal of the appeal." Housing Fin. and Dev. Corp. v. Ferguson, 91 Hawai‘i 81, 85, 979 P.2d 1107, 1111 (1999) (citation omitted). HRAP Rule 30 provides, in relevant part, that "[w]hen the brief of an appellant is . . . not in conformity with these rules, the appeal may be dismissed or the brief stricken[.]"

Non-conforming briefs make review more difficult, but Hawai‘i appellate courts have "consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible," Schefke v. Reliable Collection Agency, Ltd., 96 Hawai‘i 408, 420, 32 P.3d 52, 64 (2001), and have often addressed the merits of an appeal, regardless of the nonconformity

of the briefs. *See, e.g.*, Housing Fin. and Dev. Corp., 91 Hawai‘i at 85, 979 P.2d at 1111-12; O'Connor v. Diocese of Honolulu, 77 Hawai‘i 383, 385, 885 P.2d 361, 363 (1994). This policy is particularly important when the appellants are *pro se*, as they are here.

In this case, however, Appellants also failed to provide a transcript of the proceedings which led to the entry of Judge Chang's March 14, 2001 Order Granting Summary Judgment. This court, in Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 799 P.2d 60 (1990), disregarded the defendant's arguments that the lower court erred as to various motions and instructions because the defendant failed to provide a transcript of the proceedings below or satisfy the requirements of HRAP Rule 28. Id. at 266, 799 P.2d at 66-67. The Hawai‘i Supreme Court, in State v. Goers, 61 Haw. 198, 600 P.2d 1142 (1979), left a trial court's findings undisturbed because the appellant failed to provide a transcript of the proceedings. Id. at 198, 600 P.2d at 1142. In Marn v. Reynolds, 44 Haw. 655, 361 P.2d 383 (1961), the Hawai‘i Supreme Court dismissed an appeal because the record failed to include a trial transcript. Id. at 664, 361 P.2d at 388. The Marn court said, however, that although the findings of a trial court "cannot be passed upon in review, in the absence of the evidence upon which the findings were based[,]" an appellate court may review an appeal "where [the] evidence is not necessary for the disposition of [the]

appeal on its merits." Id. at 663, 361 P.2d at 388 (citation omitted).

Although Appellants' failure to include a transcript of the November 27, 2000 hearing or to comply with Rule 28 make review more arduous and time-consuming, it is still possible to address the merits of their appeal.[10]

(1)

Appellants argue that the court erred in granting summary judgment because NBM "failed to support its motion for summary judgment with any admissible or reliable evidence in violation of Rule 56(e), HRCP, and Evidence Code Rules [sic] 801(3) and Rule 802, . . . payment in full was made according to [the] financing agreement/mortgage agreement to Plaintiff's agents who lied in the[ir] declaration . . . in support of [Plaintiff's] motion for summary judgment . . . [Plaintiff's] attorney who had knowledge the whole time[,] [made] no mention of Appellants' payment whatsoever

---

[10]/ Because Appellants failed to include a transcript of the November 27, 2000 hearing in the record on appeal, the circuit court's findings of fact are left undisturbed. The circuit court's disputed findings of fact are as follows:

> 7. The first mortgage currently held by Plaintiff is a valid first lien upon the Property. . . .
>
> 8. [The Three Mortgagors] are in default in respect of the payment and performance of the promises and undertakings under the mortgage note and the first mortgage. Pursuant to the terms of the mortgage note and the first mortgage, the entire remaining principal and interest thereon are due and payable together with costs, expenses, attorneys' fees and late fees. All of these amounts are secured by the first mortgage. As of May 23, 2000, there was due and owing to Plaintiff . . . $142,515.44[.]

anywhere in [Plaintiff's] pleadings nor oral arguments, successfully keeping the lie . . . uncorrected[.]"

The argument by the Three Mortgagors that they offered full payment is without merit. The April 24, 2000 foreclosure letter stated, in relevant part, as follows:

Presently you owe 7 payments totaling	7,721.70
plus late charges	386.12
plus NSF fees	15.00
plus delinquency related fees of	202.00
YOUR APPROXIMATE AMOUNT DUE**	8,324.82

**THIS AMOUNT DOES NOT INCLUDE ATTORNEY FEES WHICH MUST BE PAID AS PART OF ANY REINSTATEMENT FROM FORECLOSURE.

If you are interested in retaining ownership of your property and reducing the amount of foreclosure fees/costs you will have to pay, you should immediately call our loss mitigation department at 1-888-934-1081. DO NOT SEND FUNDS WITHOUT FIRST CALLING OUR OFFICE.

On May 8, 2000, the Three Mortgagors contacted WFS and were referred to attorney Lester Leu's office. That same day, they allegedly contacted attorney Leu's office and were told by someone in that office that current figures would not be available until May 17, 2000. Ignoring the warnings on the April 24, 2000 foreclosure letter and knowing that $8,324.82 was not the current amount due, on May 15, 2000, Dominador sent two Western Union Money Transfers, one for $5,000.00 and the other for $3,324.82, to WFS. Pursuant to the Note and the Mortgage, WFS had the right to reject a partial payment.

Appellants argue that Adkins' declaration did not comply with HRCP Rule 56(e) because it did not include certified copies of the documents purporting to establish the Three Mortgagors' default. Adkins' declaration was made on personal knowledge as

required by HRCP 56(e) and "set forth such facts as would be admissible in evidence," including certifying various attachments as "true and accurate" copies of relevant documents. Adkins was not required to mention the attempt to cure and her declaration that the October 30, 1999 payment was the last payment received was admissible as evidence of the default.

(2)

Appellants argue: (a) that evidence supports their claim that AMRESCO fraudulently induced the Three Mortgagors to sign the Mortgage by using "bait and switch" tactics in violation of HRS § 480-2 (1993 & Supp. 2002) and (b) that the Three Mortgagors were denied due process because NBM failed to give thirty days' notice as required by the Fair Debt Collection Act, 15 U.S.C. § 1692g(a) (2000).

Appellants also argue that the: (c) "lower court's granting of summary judgment . . . was a drastic and improper decision which, as objected to by Appellants . . . should be set aside . . . on the grounds that there remain in the case several material issues of fact in genuine dispute as to liability with respect to Appellants' affirmative defenses and counterclaims not ruled upon below." (Record citations omitted.)

(a)

Appellants did not provide a reference to where in the record the alleged "bait and switch" tactics and/or violation of

HRS § 480-2 occurred or was brought to the attention of the court. However, the record includes a copy of the Mortgage and paragraph 17 of the Mortgage states that a transfer of interest in the Property by the borrower requires the lender's prior consent or allows the lender, at its option, to demand immediate payment in full of all sums secured by the Mortgage. The Three Mortgagors signed the Mortgage and initialed the pages where the text of paragraph 17 was typed.

Besides owning the Property as individuals, the Three Mortgagors are owner/members of Worldwide, a company created to facilitate the purchase of properties as business investments, and were advised and represented by Marcelo, an owner/member of Worldwide who is also a professional real estate agent. As informed investors, the Three Mortgagors should be expected to exercise reasonable business caution and read and understand any agreement they sign.[11] Appellants did not point to any evidence in the record that AMRESCO fraudulently induced them to sign, consequently, the Three Mortgagors cannot avoid the effect of their signatures. *See* Island Directory Co., Inc. v. Iva's Kinimaka Enterprises, Inc., 10 Haw. App. 15, 26, 859 P.2d 935, 941 (1993); Cummins v. Cummins, 24 Haw. 116, 121 (1917).

[11]/ Appellants' argument that the Mortgage is "unreadable" is without merit.

(b)

Appellants allege that NBM failed to give thirty days' notice as required by the Fair Debt Collection Act, 15 U.S.C. § 1692g(a) (2000). Appellants raised this issue for the first time in their motion for reconsideration filed December 5, 2000, which they later amended with their First Amended Motion filed December 13, 2000. As noted, the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments, not to re-litigate old matters or raise arguments or evidence that could and should have been brought during the earlier proceeding. Association of Apt. Owners of Wailea Ulea, 100 Hawai‘i at 110, 58 P.3d at 621. The Three Mortgagors could and should have raised this defense in an earlier proceeding. As to this issue, Judge Blondin did not abuse her discretion in denying the First Amended Motion.

(c)

Although Appellants argue that the circuit court's grant of summary judgment was a "drastic and improper decision," all but one of Appellants' references to the record point to arguments or events that occurred after summary judgment was granted. The remaining reference, however, points to the November 22, 2000 Memorandum filed in opposition to summary judgment in which the Three Mortgagors argued they did not receive notice of their right to cancel pursuant to 15 U.S.C. § 1601 et seq. (the "Truth in

Lending Act"). The applicable statute, 15 U.S.C. § 1635(a) (2000), provides, in relevant part, as follows:

> [I]n the case of any consumer credit transaction . . . in which a security interest, . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and recission forms required under this section together with a statement containing the material disclosures required under this title . . . whichever is later, by notifying the creditor, in accordance with regulations of the [xx] Board, of his intention to do so. The creditor shall also provide, . . . to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, . . . appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

In Hawai'i Community Fed. Credit Union, 94 Hawai'i 213, 11 P.3d 1 (2000), the Hawai'i Supreme Court held that the defendants' declarations can raise genuine issues of material fact as to whether a TILA notice of a right to cancel was provided as required. Id. at 225, 11 P.3d at 13. The court observed "[t]he caselaw of other jurisdictions is well settled that a debtor's affidavit averring non-delivery [of TILA disclosures] is sufficient to create a genuine issue of material fact as to whether the statutory presumption has been rebutted, thereby precluding summary judgment with respect to a claim based upon a debtor's claim of non-delivery." Id. at 224, 11 P.3d at 12 (citations omitted).

In Ocwen Federal Bank, FSB v. Russell, 99 Hawai'i 173, 53 P.3d 312 (App. 2002), this court noted that a federal district court in Michigan had held "the assignee of a negotiable promissory note could not rely on the HDC ["holder in due course"] doctrine to avoid the application of a TILA recission by the obligor on the

note." Id. at 187, 53 P.3d at 326 (citation omitted). A relevant part of the district court's opinion stated that "15 U.S.C. § 1635(b) clearly contemplates a return to the status quo ante and thus the extinguishment of the underlying obligation. The HDC doctrine is inconsistent with this remedial purpose." Id. (citing Stone v. Mehlberg, 728 F. Supp. 1341, 1348 (W.D Mich. 1989 & Supp. Op. 1990).

AMRESCO is required by 15 U.S.C. § 1635(a) to provide the notice of the right to cancel and the appropriate forms when "a security interest, . . . is or will be retained in any property which is used as the principal dwelling of the person to whom credit is extended," however, it is not required to provide notice of the right to rescind when the transaction is a "residential mortgage transaction" as defined by 15 U.S.C. § 1602(w) (2000). 15 U.S.C. § 1635(e)(1) (2000)

> specifically exempts a residential mortgage transaction as defined in Section 103(w) of the Truth in Lending Act, 15 U.S.C. § 1602(w). That section defines a residential mortgage as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling."
>
> Accordingly, it is apparent that there is no right of rescission under Section 125 of the Truth in Lending Act, 15 U.S.C. § 1635, when the transaction at issue is a purchase money mortgage.

In re Tomasevic, 275 B.R. 86, 101 (M.D. Fla. 2001); *see* Van Pier v. Long Island Sav. Bank, 20 F. Supp. 2d 535, 537 (1998) (right of rescission does not apply to residential mortgage transactions).

The Three Mortgagors signed the Note dated May 7, 1998, and the Real Property Mortgage and Financing Statement dated May 7, 1998, and acquired the Property by warranty deed on May 11, 1998. Clearly, the Mortgage was obtained to acquire the Property. Paragraph 40 of the Mortgage provides that at least one of the Three Mortgagors will occupy the Property "within sixty (60) days following recordation of the Security Instrument and during the twelve (12) month period immediately following recordation of the Security Instrument as Borrower's primary residence." This was a "purchase money mortgage" and a "residential mortgage transaction." The Three Mortgagors did not have a right to rescind.

(3)

Appellants argue that "there remain[ed] . . . several undecided material issues of fact in genuine dispute . . . [as] to whether there had been any reliable loan default[,] as to any reliable amount of principal and/or interest allegedly lawful[ly] past due[.]" We disagree.

As noted above, Adkin's declaration and attached documents provided an amount past due as of May 23, 2000, and were admissible as evidence of the default. In addition, Dominador's attempt to pay the amount specified by the April 24, 2000 letter acknowledges the default by seeking to pay the amount in arrears.

(4)

Appellants argue the court erred by refusing "to grant a continuance to allow Appellants, pursuant to Rule 56(f), HRCP, to conduct necessary discovery after Plaintiff's and its People's fraudulent [conduct] and deceitful practices were discovered for the first time by the Appellants prior to the entry of the order granting summary judgment[.]" Appellants' general references to the record failed to show that a continuance was requested.[12]

(5)

Citing Cummins as authority, Appellants contend that the circuit court lacked subject matter jurisdiction and its judgment was void "because [the circuit court] cannot entertain or enforce fraud, deceit, or misrepresentation[;] . . . where execution of a contract is obtained by *Fr*aud, *d*eceit, or *mis*representation, the contract may be *avoid*ed by the party who was misled." *See* Cummins, 24 Haw. at 120-23.

Appellants misinterpret Cummins. Voiding a contract is not the same as overturning a decision for lack of subject matter jurisdiction. As noted above, Appellants did not provide specific facts showing that NBM committed fraud or misrepresented provisions of the Mortgage. HRS § 603-21.5 (Supp. 2003) states that circuit

[12/] Appellants refer to "(R, at 308-12, 298-477)" as the locations in the record where the alleged error occurred. The pages cited contained the text of the Three Mortgagors' First Amended Motion, the Declaration of Marcelo M. Lopez, Jr., a Second Amended Answer and Second Amended Counterclaim, and attachments thereto, but no motion for a continuance.

courts have jurisdiction over civil actions and proceedings and foreclosures are civil actions.

(6)

In their First Amended Motion, for the first time in this case, Appellants raised the issue of the insufficiency of the service of the Complaint and summons. HRCP Rule 12 governs when and how defenses and objections are made. HRCP Rule 12(b) requires, in relevant part, the following:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process. . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

HRCP Rule 12(h)(1)(A) provides that a defense of insufficiency of service of process is waived "if omitted from a motion in the circumstances described in subdivision (g)[.]"[13] Appellants failed to raise this issue in their original counterclaim and third-party claim or in their first amended counterclaim and first amended third-party complaint which they filed after the circuit court's order granted summary judgment in favor of NBM.

[13/] HRCP Rule 12(g) provides, in relevant part, as follows:

> A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted[.]

(7)

Appellants' point of error no. 7 alleges that, pursuant to HRCP Rule 54(b), the circuit court erred when it entered final judgment in favor of NBM because Appellants' affirmative defenses and counterclaims were "not addressed by the . . . entered findings of fact, conclusion of law, and order granting summary judgment[.]"

HRCP Rule 56(c) requires a party moving for summary judgment to prove that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[14] HRCP Rule 56(e) requires an adverse party

---

[14/] Along with its Motion for Summary Judgment and Interlocutory Decree of Foreclosure, NBM submitted the following documentation:

(1) A copy of the Note signed by the Three Mortgagors;

(2) A copy of the Mortgage signed by the Three Mortgagors;

(3) A Declaration of Indebtedness, signed by Kim Adkins (Adkins), in which she declared that (a) she was personally familiar with the payment history of the Three Mortgagors, (b) the Three Mortgagors failed to pay the installments, principal and interest as required by their mortgage note and mortgage, (c) proper demands for payment of all delinquent amounts due and owing to AMRESCO were made to the Three Mortgagors, and (d) the records showing the amounts were set forth in an attached exhibit[.]

(4) A statement within Adkins' declaration and a computer-generated delinquency printout attached thereto indicating the last mortgage payment made by the Three Mortgagors occurred in October 1999, and that as of May 23, 2000, they were seven payments delinquent and owed NBM $132,986.13 in principal, $8,931.03 in accrued interest, $441.28 in late charges, $100.00 attorney fees, $27.00 property inspector fees, a $15.00 bad check fee, and a $15.00 fax fee for a total of $142,515.44; and

(continued...)

to respond to a motion for summary judgment with specific facts that show there is a genuine issue for trial. The Three Mortgagors responded to NBM's motion for summary judgment by arguing that: (1) full payment was tendered, (2) NBM failed to comply with 15 U.S.C. § 1601 et seq., and (3) the declaration submitted by Adkins in support of the motion for summary judgment did not comply with HRCP Rule 56(e). As discussed above, (1), (2), and (3) were not sufficient to create a genuine issue for trial.

Even if Appellants, in their response, had included the affirmative defenses listed in the Oppermann Defendants' original "Answer" and the issues raised by their "Third Party Complaint," these defenses and issues were addressed by the circuit court in its Order Granting Summary Judgment, which we must leave undisturbed because of Appellants' failure to provide a transcript of the November 27, 2000 hearing. Appellants cannot maintain that the court erred by not considering the affirmative defenses listed in the "First Amended Answer," the "Counterclaim" and "First

---

[14/](...continued)

> (5) A copy of an Assignment of Mortgage and Note, recorded at the Hawai'i Bureau of Conveyances on October 25, 2000, indicating AMRESCO assigned the Mortgage and Note executed by the Three Mortgagors to Plaintiff.
>
> The aforementioned documents were sufficient to satisfy NBM's initial burden of establishing that the Three Mortgagors defaulted on their note and that NBM was entitled to foreclose on the mortgage. *See* Ocwen Federal Bank, FSB v. Russell, 99 Hawai'i 173, 53 P.3d 312 (2002). The burden then shifted to the Three Mortgagors to produce evidence to counter NBM's *prima facie* case and thereby obligate NBM to disprove their counterclaim and affirmative defenses.

Amended Third Party Complaint," because these were filed after summary judgment was granted.

(8)

Point of error no. 8 alleges that Judge Blondin denied the First Amended Motion "without ruling on Appellants' affirmative defenses and counterclaims." The Oppermann Defendants' First Amended Motion attempted to re-litigate matters argued prior to the court's grant of summary judgment or raised arguments that could and should have been brought during the earlier proceeding. *See* Association of Apt. Owners of Wailea Ulea, 100 Hawai‘i at 110, 58 P.3d at 621. The First Amended Motion stated, for example, that "DEFENDANTS REARGUE ALL THE DEFENDANT'S [sic] ALREADY SUBMITTED CLAIMS AND DEFENSES RAISED BY ATTORNEY TERRY OPPERMANN[.]" The First Amended Motion also argued that Adkins' declaration was inadmissible as hearsay, AMRESCO failed to provide notice of the change in loan servicing arrangements and failed to notify the Three Mortgagors of their right to cancel, AMRESCO engaged in unfair and deceptive business practices, some Defendants were improperly served, records were falsified, a lack of privity between AMRESCO and NBM, NBM filed a frivolous complaint, and AMRESCO breached the mortgage contract. These claims were either brought before the circuit court for its consideration prior to granting summary judgment or should have been. Judge Blondin did not abuse her discretion by denying the First Amended Motion.

(9)

Appellants also argue that Judge Blondin was required to recuse herself from the case because of what she knew as the judge presiding in the case of Eugene W. I. Lau vs. Dominador M. Lopez, et al. The record does not reveal what Judge Blondin knew from that case.

Canon 3(E)(1)(a) of the Hawai‘i Code of Judicial Conduct provides, in pertinent part, that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party[.]" Hawai‘i Code of Jud. Conduct, Canon 3(E)(1)(a) (Michie 2003).

HRS § 601-7(b) (1993)[15] provides that a party may file an affidavit to disqualify a judge from presiding over a proceeding for reasons of personal bias or prejudice. Pursuant to HRS § 601-7(b), the burden is on the aggrieved party to move for recusal, but the party's failure to do so at trial does not

---

15/ HRS § 601-7(b) (1993) reads, in relevant part, as follows:

> Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time.

preclude the party's raising the issue on appeal. State v. Gomes, 93 Hawai‘i 13, 17, 995 P.2d 314, 318 (2000). While "points of error not raised before the trial court will ordinarily be disregarded on appeal, we may notice plain error." Id. at 17, 995 P.2d at 318 (citing State v. Pulse, 83 Hawai‘i 229, 238-39, 925 P.2d 797, 806-07 (1996) (citations omitted)). "[T]his court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998) (citing State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988)).

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (quoting Fox, 70 Haw. at 55-56, 760 P.2d at 675-76).

Whether a party may claim judicial bias because the judge presided over a prior proceeding involving that party is an issue of first impression for Hawai‘i. The Court of Appeals for Utah has said that for a party to "support a claim of bias based on a judge's presiding over prior proceedings, 'it [must] appear that, apart from [the judge's] analysis of the issues of fact or law [in those prior proceedings], he had such a bias in favor of one party

or prejudice against the other that he could not fairly and impartially determine the issues.'" State in Interest of M.L., 965 P.2d 551, 556 (Utah Ct. App. 1998) (brackets in the original) (quoting Poulsen v. Frear, 946 P.2d 738, 742 (Utah Ct. App. 1997) (quoting Orderville Irrig. Co. v. Glendale Irrig. Co., 17 Utah 2d 282, 288, 409 P.2d 616, 621 (1965))). We agree and note the similarity to the following statements by the Hawai‘i Supreme Court with respect to review of issues of judicial bias. "[R]eversal on the grounds of judicial bias or misconduct is warranted only upon a showing that the trial was unfair." Aga, 78 Hawai‘i at 242, 891 P.2d at 1034. "Unfairness, in turn, requires a clear and precise demonstration of prejudice." Id. at 242, 891 P.2d at 1034.

Appellants did not point to anything in the record to support their allegation of bias. In addition, an extensive and careful review of the record uncovered no "clear and precise demonstration of prejudice." Judge Blondin was not required to recuse herself simply because she presided over another case in which Appellants were parties.

CONCLUSION

Accordingly, we affirm the circuit court's March 14, 2001 Judgment and "Order Granting Plaintiff's Motion for Summary Judgment Against Dominador, Elixir, and Jovito, and All Other Defendants, and for Interlocutory Decree of Foreclosure" and the February 8, 2001 "Order Denying Defendant's First Amended Motion."

DATED: Honolulu, Hawai‘i, August 4, 2003,

On the briefs:

Dominador Magno Lopez,
Defendant-Appellant, *pro se*.

Marcelo M. Lopez, Jr.,
Party-In-Interest-Appellant.

Lester K. M. Leu and
Gary Y. Okuda
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge

No. 24005
Norwest Bank Minnesota v. Lopez
MEMORANDUM OPINION