

NO. 25782

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CHASE MORTGAGE COMPANY-WEST, Plaintiff-Appellee, v.
JAMES C. BUFALINI, JR., and MARY ANN BUFALINI,
also known as MARY ANN V. BUFALINI, also known as
MARYANNE V. BUFALINI, Defendants-Appellants,
and
CITY BANK, UNITED STATES OF AMERICA, RELIABLE
COLLECTION AGENCY, LTD., MARINER'S VALLEY TWO
MAINTENANCE ASSOCIATION, and DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, Defendants-Appellees,
and
BANK OF HAWAII, JOHN DOES 1-50, JANE DOES 1-50,
DOE PARTNERSHIPS 1-50, DOE CORPORATIONS 1-50,
DOE ENTITIES 1-50 and DOE GOVERNMENTAL
UNITS 1-50, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIVIL NO. 02-1-2786)

SUMMARY DISPOSITION ORDER

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

Defendants-Appellants James C. Bufalini, Jr., and Mary Ann Bufalini, also known as Mary Ann V. Bufalini, also known as Maryanne V. Bufalini, (the Bufalinis) appeal from the Judgment filed on March 24, 2003 in the Circuit Court of the First Circuit (circuit court).¹

The Bufalinis contend (1) the circuit court lacked jurisdiction to enforce the Bufalinis' mortgage loan through foreclosure because their mortgage was void and unenforceable

¹ The Honorable Karen N. Blondin presided.

under Hawaii Revised Statutes (HRS) § 454-8 (1993) and the Hawai'i Supreme Court decision in Beneficial Hawaii, Inc. v. Kida, 96 Hawai'i 289, 30 P.3d 895 (2001); and (2) the circuit court erred in permitting Plaintiff-Appellee Chase Mortgage Company-West (Chase Mortgage) to prosecute a judicial foreclosure suit because Chase Mortgage failed to file that claim as a compulsory counterclaim in a prior action as required by Hawai'i Rules of Civil Procedure (HRCP) Rule 13(a).

Upon careful review of the record and the briefs submitted by the parties, we hold:

(1) The Bufalinis contend the circuit court lacked jurisdiction, pursuant to HRS § 454-8 and the Hawai'i Supreme Court decision in Kida, to enforce their mortgage loan through foreclosure. The Bufalinis argue that their mortgage was void and unenforceable because an unlicensed mortgage broker participated in the making of the loan.

Hawaii Revised Statutes § 454-8 states that "[a]ny contract entered into by any person with any unlicensed mortgage broker or solicitor shall be void and unenforceable." The Hawai'i Supreme Court in Kida held that

[t]he broad language of HRS § 454-8, which expressly invalidates "any contract entered into by any person with any unlicensed mortgage broker," read *in pari materia* with the definition of "mortgage broker" as set forth in HRS § 454-1, compels the conclusion that a note and mortgage designating the broker as the creditor as a result of the broker's brokering activities falls within the proscription of HRS ch. 454. When a statute requiring a license declares void contracts "made" by an unlicensed person, the violation

of the statute is a defense to enforcement of the instrument even against a holder in due course.

96 Hawai'i at 311-12, 30 P.3d at 917-18. In Kida, the borrower signed a promissory note and mortgage in favor of The Mortgage Warehouse. Id. at 297, 30 P.3d at 903. The Mortgage Warehouse was unlicensed and was both the lender and broker in the transaction. Id. at 306 & 311, 30 P.3d at 912 & 917.

Unlike Kida, in this case the lender and broker were two different entities. Here, the promissory note and mortgage were signed in favor of U.S. Bancorp Mortgage Company, as the lender, by the Bufalinis. The Bufalinis' broker was Mortgages Etc. The Bufalinis argue that only Mortgages Etc., and not U.S. Bancorp Mortgage Company, was an unlicensed mortgage broker.

Additionally, the note and mortgage (the contracts in question) were entered into between the Bufalinis and U.S. Bancorp Mortgage Company, not between the Bufalinis and Mortgages Etc. This court concludes that Kida and the proscription of HRS § 454-8 do not apply to this case. Therefore, the Bufalinis' contention that the circuit court lacked jurisdiction to enforce the mortgage loan through foreclosure is without merit.

(2) The Bufalinis contend the circuit court erred in permitting Chase Mortgage to prosecute a judicial foreclosure suit after Chase Mortgage failed to file the claim as a compulsory counterclaim in a prior, ongoing action involving the same identical subject matter in the same court. Under the

compulsory counterclaim tests set forth in Booth v. Lewis, 8 Haw. App. 249, 798 P.2d 447 (1990), Chase Mortgage's claim was not a compulsory counterclaim.

Therefore,

The Judgment filed on March 24, 2003 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, December 14, 2004.

On the briefs:

Gary Victor Dubin
for defendants-appellants
James C. Bufalini, Jr.
and Mary Ann Bufalini.

Chief Judge

Walter Beh, II and
Cheryl A. Nakamura
(Rush Moore Craven Sutton
Morry & Beh)
for plaintiff-appellee
Chase Mortgage Company-West.

Associate Judge

Associate Judge