

NOT FOR PUBLICATION

NO. 26518

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

GARY KANESHIRO, Plaintiff-Appellee,
v.

ELIZABETH RAPOZO, Successor Trustee under the unrecorded
Ernest S. Texeira Revocable Living Trust Agreement dated
July 22, 1987, Defendant and Third-Party Plaintiff-Appellant,
and

JOHN DOES 1-50, DOE ENTITIES 1-50, Defendants,
v.

SCOTT MASANAO SAKATA, Third-Party Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 00-1-196K)

SUMMARY DISPOSITION ORDER

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

Defendant and Third-Party Plaintiff-Appellant Elizabeth Rapozo, Successor Trustee under the unrecorded Ernest S. Texeira Revocable Living Trust Agreement dated July 22, 1987 (Trustee Rapozo) appeals from (1) the April 19, 2004 "Judgment in Favor of Plaintiff Gary Kaneshiro and Against Defendant/Third-Party Plaintiff Elizabeth Rapozo, Trustee, Certified as Final Pursuant to HRCF Rule 54(b)" and (2) the February 12, 2004 "Order Granting Third-Party Defendant Scott Masanao Sakata's Motion for Summary Judgment".

We do not have appellate jurisdiction over (2), above, because that order was not reduced to a separate judgment by the time the record on appeal was filed with the clerk of the Hawai'i Supreme Court on June 18, 2004. Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119-20, 869 P.2d 1334, 1338-39 (1994).

NORMA T. YARA
CLERK APPELLATE COURTS
STATE OF HAWAII

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The following are the undisputed facts. Ernest Souza Texeira (Texeira) was born on March 20, 1924. On July 22, 1987, Texeira executed the Ernest S. Texeira Revocable Living Trust Agreement. Texeira was the trustee. Texeira's wife and their four children, including Trustee Rapozo, were named Beneficiaries. Bishop Trust Company, Limited was the named Successor Trustee. Trustee Rapozo became the Successor Trustee on March 23, 1990, replacing Bishop Trust Company, Limited, by amendment to the Trust Agreement.

In 1992, Texeira was the proprietor of "Tex Drive Inn" in Honoka'a and the owner of other assets and he wanted life insurance to cover his estate liabilities. Attorney Lynne Kushi was Texeira's attorney. Lynne Kushi's father, Masanori Kushi, was Texeira's estate planner.

On February 25, 1993, Texeira executed the Ernest S. Texeira Irrevocable Insurance Trust Agreement (ESTIIT). Its "Trustee" was "Elizabeth Lolita Texeira"¹ and she signed it as such. Texeira's four children, including Trustee Rapozo, were the beneficiaries. In 1993, through Third-Party Defendant-Appellee Scott Masanao Sakata (Sakata), Texeira purchased a \$400,000 life insurance policy.² The quarterly premium was

¹ It appears that "Elizabeth Lolita Texeira" was the former name of "Elizabeth Lolita Rapozo".

² The application for the insurance indicates that two insurance agents were involved. The first was Masaaki Sakata with a 40 percent share. The second was Third-Party Defendant-Appellee Scott M. Sakata with a 60 percent share. The application further states that \$9,225.00 cash was submitted with the application and that the owner of the policy was "ELIZABETH LOLITA TEXEIRA, as Trust[ee] of the Irrevocable Insurance Trust Agreement dated February 25, 1993." The application was signed by "Elizabeth Lolita Texeira" as "Applicant (Owner)."

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\$9,225. The annual premium was \$36,900. Texeira named his ESTIIT as the beneficiary.

Texeira needed to acquire the money to pay his insurance premium. On March 1, 1993, Sakata loaned Texeira \$18,450 at nine percent per annum interest in return for a promissory note secured by a recorded mortgage of "Lots 33 and 34 of the Lono Kona Subdivision in the County of Hawaii, State of Hawaii, comprising approximately 9,646 square feet and 8,828 square feet, respectively." On September 13, 1993, Sakata loaned Texeira \$18,450 at nine percent per annum interest. On March 30, 1994, Sakata loaned Texeira \$18,450 at nine percent per annum interest. The March 1, 1993 promissory note was due on August 31, 1994. The September 13, 1993 promissory note was due on August 31, 1994. The March 30, 1994 promissory note was a demand note. On November 1, 1994, a Mortgage Amendment caused the three promissory notes to be secured by Lots 33 and 34. At that time, the principal due was \$55,350.

As noted by the circuit court in the March 23, 2004 "Findings of Fact, Conclusions of Law, and Order Granting Motion for Summary Judgment and Interlocutory Decree of Foreclosure Against Defendant Elizabeth Rapozo, Successor Trustee Under the Unrecorded Ernest S. Texeira Revocable Living Trust Agreement Dated July 22, 1987" (March 23, 2004 Findings of Fact),

8. All three Promissory Notes, the Mortgage, and Mortgage Amendment were drafted by Mr. Texeira's counsel at the request of Mr. Texeira.

9. The monies reflected in the Promissory Notes were, in fact, paid into the checking account of the Ernest S. Texeira Irrevocable Insurance Trust (the "Insurance Trust") by SAKATA.

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10. [Trustee Rapozo] was the Trustee of the Insurance Trust.

11. Using the funds paid into the Insurance Trust by SAKATA, [Trustee Rapozo] wrote checks to Guarantee Mutual Life Insurance Company totaling \$55,350.00³ for the premiums on the life insurance policy sold to Mr. Texeira by SAKATA.

12. Mr. Texeira died in February of 1998.⁴

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17. No payments were made on the principal or interest due under the Promissory Notes prior to their assignment.

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19. [Trustee Rapozo] has failed and refused to repay the indebtedness of the Trust as reflected in the Promissory Notes.

(Footnotes added.)

As of February 24, 2004, the amount owed was \$55,350 principal, plus \$51,307.22 interest. Interest after that date is \$13.65 per day.

The money for the loans was not Sakata's money. Sakata was a financial planner for Plaintiff-Appellee Gary Kaneshiro (Kaneshiro) and the money for the loans came through Sakata from Kaneshiro, the owner of T. Kaneshiro Supermarket in Honoka'a. At Kaneshiro's request, Texeira was not told where the money was coming from because Kaneshiro's Honoka'a Stop N' Shop

³	March 5, 1993	\$ 9,225	due August 31, 1994
	May 10, 1993	\$ 9,225	due August 31, 1994
	September 13, 1993	\$ 9,225	demand note
	November 30, 1993	\$ 9,225	
	March 30, 1994	\$ 9,225	
	June 1994	\$ 0	
	September 2, 1994	<u>\$ 9,225</u>	
	TOTAL:	\$55,350	

After the above payments, there were no further payments and the policy lapsed.

⁴ The death certificate indicates that Ernest Souza Texeira died on February 22, 1998 of respiratory failure due to lung cancer.

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business was Texeira's tenant.

It is further noted, in nos. 15 and 16 of the March 23, 2004 Findings of Fact, that "[o]n or about October 24, 2000, SAKATA executed an Assignment of Notes and Mortgage, assigning the Promissory Notes and Mortgage, as amended by the Mortgage Amendment, to KANESHIRO[,]" and "[t]he Assignment of Notes and Mortgage was recorded[.]"

On October 31, 2000, Kaneshiro sued Trustee Rapozo to foreclose the mortgage. On August 23, 2001, Trustee Rapozo filed a Motion for Partial Summary Judgment. This motion was denied on October 9, 2001.

On May 22, 2002, Trustee Rapozo filed a third-party claim against Sakata that (1) argued that Sakata's loans to Texeira were unlawful because the loans were used to fund Texeira's payment of premiums for a life insurance policy that Sakata sold to Texeira, and (2) sought (a) a ruling that the notes and mortgage were void, and (b) an award of damages for unfair insurance practices, unfair and deceptive trade practices, breach of implied covenant of good faith and fair dealing, and breach of contract.

On December 22, 2003, Kaneshiro filed a motion for summary judgment. On December 23, 2003, Sakata filed a motion for summary judgment.

On February 12, 2004, after a hearing on February 4, 2004, the court entered the Order Granting Third-Party Defendant Scott Masanao Sakata's Motion for Summary Judgment.

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On March 23, 2004, the court entered the findings of fact, conclusions of law, and order granting Kaneshiro's motion for summary judgment and interlocutory decree of foreclosure.

On April 19, 2004, the court entered a Judgment in Favor of Plaintiff Gary Kaneshiro and Against Defendant/Third-Party Plaintiff Elizabeth Rapozo, Trustee, Certified as Final Pursuant to HRCF Rule 54(b).

On May 3, 2004, the court entered an Order Granting Third-Party Defendant Scott Masanao Sakata's Motion for Rule 54(b) Certification. Sakata's motion had requested "an order determining that there is no just reason for delay and directing entry of a final judgment as to [Trustee Rapozo's] Complaint against [Sakata]."

This appeal was assigned to this court on December 20, 2004.

Most of Trustee Rapozo's points of error are directed at the February 12, 2004 Order Granting Third-Party Defendant Scott Masanao Sakata's Motion for Summary Judgment. As noted previously, we do not have appellate jurisdiction regarding this order. The only point of error that is directed at Kaneshiro is the one contending that the notes and mortgage are void or unenforceable because Sakata, while acting as an undisclosed agent for Kaneshiro, was self-dealing, misrepresented, and did not disclose and concealed relevant facts.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and upon carefully reviewing the record and the briefs

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submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

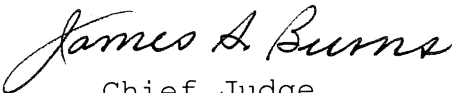
IT IS HEREBY ORDERED that the April 19, 2004 Judgment in Favor of Plaintiff Gary Kaneshiro and Against Defendant/Third-Party Plaintiff Elizabeth Rapozo, Trustee, Certified as Final Pursuant to HRCF Rule 54(b), is affirmed.

IT IS FURTHER ORDERED that the appeal from the February 12, 2004 Order Granting Third-Party Defendant Scott Masanao Sakata's Motion for Summary Judgment is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, September 12, 2005.

On the briefs:

Christopher J. Roehrig
(Roehrig, Roehrig & Wilson)
for Defendant and Third-Party
Plaintiff-Appellant


Chief Judge


Associate Judge

Jerry M. Hiatt and
David R. Harada-Stone
for Plaintiff-Appellee


Associate Judge

Darolyn Hatsuko Lendio,
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Lisa W. Cataldo
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Appellee