

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26160

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CLARENCE T. IZUO, CECELIA M. IZUO, GARY Y. NISHIOKU,
and RENEE NISHIOKU, Plaintiffs-Appellees, v.
JOSEPH DIAS, JR., Defendant-Appellant, and FIRST
MAGNUS FINANCIAL CORPORATION, dba CHARTER FUNDING,
an Arizona Corporation; JOHN DOES 1-10; JANE DOES
1-10; DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-
10; DOE ENTITIES 1-10, and DOE GOVERNMENTAL
ENTITIES, Defendants

and

JOSEPH DIAS, JR., Counterclaimant-Appellant v.
CLARENCE T. IZUO, CECELIA M. IZUO, GARY Y.
NISHIOKU, and RENEE NISHIOKU, Counterclaim
Defendants-Appellees, and LEROY BRILHANTE,
Additional Counterclaim Defendant-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 02-1-0556)

SUMMARY DISPOSITION ORDER

(By: Foley and Fujise, JJ.;
with Watanabe, Presiding Judge, dissenting)

In this consolidated appeal, Defendant-Appellant Joseph
Dias, Jr. (Dias)¹ appeals from² (1) the First Amended Judgment
entered on September 19, 2003 and (2) the Garnishee Order entered
on March 2, 2004 in the Circuit Court of the First Circuit³
(circuit court). After careful review of the issues raised,

¹ First Magnus Financial Corporation, dba Charter Funding, also named
as a defendant, is not a party to this appeal.

² Defendant-Appellant Joseph Dias, Jr.'s (Dias) October 20, 2003 notice
of appeal purports to appeal from a number of documents entered by the court.
However, the September 19, 2003 First Amended Judgment is the separate
judgment certified under Hawai'i Rules of Civil Procedure Rule 54(b).

Dias's April 1, 2004 notice of appeal from the March 2, 2004
Garnishee Order is a properly appealable post judgment order. Ditto v.
McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003). However, as Dias does
not challenge this order on appeal, it is affirmed. Hawai'i Rules of
Appellate Procedure (HRAP) Rule 28(b)(4).

³ The Honorable Gary W.B. Chang presided.

arguments made, the applicable law and the record in these consolidated cases, we resolve Dias's points on appeal as follows:

(1) *Cancellation of the Agreement of Sale (AOS) and Forfeiture of the Property.* Dias challenges the circuit court's action in cancelling the AOS and ordering the return of the property to Plaintiffs-Appellees Clarence T. Izuo (Izuo), Cecelia M. Izuo, Gary Y. Nishioku and Renee Nishioku (collectively, Sellers).⁴ The circuit court properly⁵ granted Sellers' motion for summary judgment as Sellers established⁶ that (1) Sellers and Dias executed the AOS, (2) the AOS provided, *inter alia*, that Dias purchased the property "as is" and would make monthly

⁴ Dias does not, in his points on appeal, challenge the other relief granted in the First Amended Judgment and does not challenge the First Amended Order granting Sellers' motion for summary judgment (First Amended Order) or the May 21, 2003 Writ of Possession or Judgment for Possession. Thus, Dias has not preserved any challenge to the First Amended Order or the writ and judgment of possession. HRAP Rule 28(b)(4).

Moreover, Dias has failed to provide record references for the alleged errors he raises in his points on appeal. HRAP Rule 28(b)(4)(ii). The use of appendices does not satisfy this requirement. Counsel is advised that future noncompliance with court rules may result in sanctions. HRAP Rule 51.

⁵ Review of the decision to grant a motion for summary judgment is *de novo*. Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc., 110 Hawaii'i 302, 311, 132 P.3d 1213, 1222 (2006).

⁶ Plaintiffs-Appellees Clarence T. Izuo (Izuo), Cecelia M. Izuo, Gary Y. Nishioku and Renee Nishioku (collectively, Sellers) submitted a copy of the executed Agreement of Sale (AOS), recorded with the Bureau of Conveyances, with their motion for summary judgment. Dias had submitted a copy of the unrecorded AOS, identical in all material aspects, with his counterclaim. Although Dias, in his declaration attached to his memorandum in opposition to the motion for summary judgment, generally denied the averments made in Clarence T. Izuo's affidavit in support of Sellers' motion for summary judgment, he did not specifically deny he signed the AOS or that he failed to make the required payments to the Sellers nor did he submit evidence placing these facts in dispute. Miller v. Manuel, 9 Haw. App. 56, 65, 828 P.2d 286, 292 (1991) ("Once the movant has satisfied the initial burden of showing that there is no genuine issue of material fact, the opposing party must come forward . . . with specific facts showing that there is a genuine issue of material fact.") Dias's memorandum in opposition to Sellers' motion for summary judgment contained an attack on the sufficiency of the evidence presented by Sellers, and an argument that he was entitled to damages under Hawaii Revised Statutes Chapter 508D.

payments over its three-year lifetime, but (3) that Dias had failed to make the fourth and subsequent payments to Sellers. As the AOS contained a "time is of the essence clause"⁷ and the circuit court gave Dias an additional opportunity to cure by ordering him to bring his payments current by July 27, 2002, but he did not, the circuit court did not abuse its discretion by ordering (1) the AOS cancelled, (2) the property forfeited as provided in the AOS⁸ and (3) the amount of \$29,066.42,

⁷ The clause provided,

14. Purchaser's Default. That time is of the essence of this Agreement, and the Purchaser shall be deemed to be in default if (a) he fails to observe and/or perform any term, covenant or condition herein set forth, which ought to be observed and/or performed by him, or (b) he fails or neglects to make any payment either of principal and/or interest or any other payment required to be made by the Purchaser according to the terms herein, or (c) he becomes or is declared bankrupt, or makes an assignment for the benefit of his creditors, or files any debtor's petition under any bankruptcy act, or (d) he permits the property or any part thereof or his interest therein to be attached or in any manner to be restrained or impounded by process of any court, or (e) he vacates and abandons the property herein described, or (f) he assigns or hypothecates this Agreement without the prior consent of the Seller.

⁸ The AOS provided, in pertinent part, the following remedies:

15. Seller's Remedy. That in the event the Purchaser shall default as hereinabove set forth and such default continues for ten (10) days or more, the Seller may immediately, at his election, take the following courses of action:

(a) Suit for Money. The Seller may declare the entire unpaid balance of said purchase price, including interest thereon, and all advances made by him to become forthwith due and payable without notice or demand, and may institute suit against the Purchaser to recover all amounts due hereunder, and all moneys theretofore advanced by the Seller on account of said property pursuant to the provisions of this Agreement and the costs of such suit, including a reasonable attorney's fees on account thereof; or

(b) Foreclosure by Repossession. The Seller may cancel this Agreement by giving written notice thereof to the Purchaser, at the last known address and instituting or taking any appropriate legal action to cancel this Agreement, including the filing or recording of any document noting such cancellation in the Land Court or in the Bureau of Conveyances of the
(continued...)

representing the past due monthly lease payments, interest, reimbursement of Sellers' advances attorney's fees and costs as of October 1, 2002, on September 15, 2003.

(2) *Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) Certification.* Dias also claims the circuit court abused its discretion by granting HRCP Rule 54(b) certification of finality, relying on Int'l Sav. & Loan Ass'n. v. Woods, 69 Haw. 11, 731 P.2d 151 (1987). Woods does not help Dias as it does not opine on the circumstances that would make a HRCP Rule 54(b) certification an abuse of discretion.

Nor does this record illustrate an abuse of discretion.

⁸(...continued)

State of Hawaii; PROVIDED, HOWEVER, that the cancellation by filing or recording such document shall have been determined to be legal. The Purchaser shall pay all costs, including reasonable attorney's fees incurred by Seller in enforcing the cancellation. Upon the cancellation of the Agreement the Seller may retain all payments made hereunder by the Purchaser as liquidated damages as and for an agreed rental for the use and possession of the property, but not as a penalty, and may immediately take possession of the property and summarily eject the Purchaser and any person or persons having possession of the said property by, through, or under the Purchaser, all without service of further notice or legal process, and without liability for damages therefor. In the event the Purchaser, or any person or persons claiming by, through or under him shall remain in possession of the property after such cancellation, the Purchaser, or such person or persons, shall be deemed a tenant or tenants-at-will of the Seller and the Seller shall be entitled to institute an action for summary possession thereof, and may recover from the Purchaser or such person or persons in any such proceedings the fair rental value of the property as and for the use thereof from and after the date of cancellation, plus costs, including a reasonable attorney's fee.

And the Purchaser hereby irrevocably appoints the Seller as his attorney-in-fact, with full power of substitution, to make, execute and deliver, for and in the name of the Purchaser and as his free act and deed, any and all instruments necessary or desirable for removing any cloud on the title of Seller in and to the said property caused by the recording or existence of this Agreement. The power thus given may be exercised only if the Purchaser shall be in default and this Agreement is canceled as hereinafter described.

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The requirements of HRCP Rule 54(b) certification were satisfied when the circuit court entered final judgment. First, the matter at hand involved multiple parties and multiple claims. Second, the circuit court expressly directed entry of final judgment. Finally, the circuit court expressly determined that there was no just reason for delay. This finding was correct as (1) Sellers' claim for cancellation of the AOS was separate and independent of Dias's counterclaim for violation of HRS Chapter 508D-Mandatory Seller Disclosures; (2) the questions reviewed on appeal pertain to Sellers' claim for rescission only and do not pertain to Dias's counterclaim; and (3) adjudication of the counterclaims at the trial court level will not make these appellate proceedings moot. Therefore, the circuit court did not abuse its discretion in entering final judgment pursuant to HRCP Rule 54(b).

(3) *Dias's Right to a Jury Trial.* Finally, Dias argues that by refusing to stay the judgment, the circuit court violated his right to a jury trial on his counterclaims.⁹ This argument is based, once again, on his contention that an adjudication of Sellers' claim of breach could not be had without consideration of his counterclaims that are all based on his contention that Sellers should be made to pay damages for their alleged non-

⁹ On April 1, 2002, Dias filed, along with his answer to the complaint, "Counterclaim Against All Plaintiffs and Additional Counterclaim Defendant Leroy Brilhante." The "counterclaim" was for (1) "Damages Against Sellers For Violation Of Chapter 508D," (2) "Damages Against Sellers for Breach Of Contract," (3) "Damages Against Sellers For Breach Of Good Faith and Fair Dealing," (4) Damages Against Sellers And Broker For Fraud And Deceit," (5) "Damages Against Sellers And Broker For Intentional Misrepresentation," (6) "Damages Against Sellers And Broker For Negligent Misrepresentation," (7) "Damages Against Sellers And Broker For Intentional Emotional Distress," (8) "Damages Against Sellers And Broker For Negligent Emotional Distress," (9) "Damages Against Broker For Breach Of Fiduciary Duty," (10) "Damages Against Broker For Unfair And Deceptive Business Practices," and (11) "Punitive Damages Against Sellers And Broker." As can be seen, Dias did not claim the AOS was void nor did he ask for rescission of the AOS. The circuit court has specifically retained jurisdiction over Dias's counterclaims.

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disclosure and/or active concealment of defects in the subject property. As previously discussed, Dias is mistaken in this belief. Moreover, Dias is free, when the circuit court proceeds to adjudication of his counterclaims, to pursue a trial by jury on those counterclaims.

Therefore,

IT IS HEREBY ORDERED that the Circuit Court of the First Circuit's September 19, 2003 First Amended Judgment and the March 2, 2004 Garnishee Order are affirmed.

DATED: Honolulu, Hawai'i, July 26, 2006.

On the briefs:

Gary Victor Dubin,
for Defendant-
Appellant/Counterclaimant-
Appellant.


Associate Judge

James P. Dandar,
Jay T. Suemori,
John Koa Holiona, and
Renee M. Furuta
(Dandar Suemori),
for Plaintiffs-
Appellees/Counterclaim
Defendants-Appellees.


Associate Judge