NO. 26534

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

THE BANK OF NEW YORK, AS TRUSTEE OF AMRESCO RESIDENTIAL SECURITIES CORPORATION LOAN TRUST 1997-3, Plaintiff-Appellee v. ROSA E. DEJOS, JOHN S. ESPANOL, AND JUDITH D. ESPANOL, Defendants-Appellants

ROSA E. DEJOS, JOHN S. ESPANOL, AND JUDITH D. ESPANOL, Counterclaimants, v. BANK OF NEW YORK, AS TRUSTEE FOR AMRESCO RESIDENTIAL SECURITIES CORPORATION LOAN TRUST 1997-3, Counterclaim-Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(Civ. No. 03-1-0114)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Nakamura and Fujise, JJ.)

Defendants-Appellants Rosa E. Dejos, John S. Espanol, and Judith D. Espanol (collectively Appellants) appeal from the final judgment entered on April 20, 2004, in the Circuit Court of the Fifth Circuit (circuit court).[1] Final judgment was entered pursuant to the circuit court's April 20, 2004 order granting the motion for summary judgment on all claims filed by Plaintiff-Appellee Bank of New York, as Trustee of Amresco Residential Securities Corporation Loan and Trust 1997-3 (Bank of New York). After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we hold that the circuit court did not err. Consequently, we affirm.

1. Appellants' argument that genuine issues of material fact existed regarding whether the power of sale clause

[1] The Honorable George M. Masuoka presided.

found in the mortgage agreement was an adhesion clause is not supported by the record. There is nothing to indicate that Appellants were forced to enter into a mortgage agreement, or that they were forced to do so with Bank of New York. Nacino v. Chandler, 101 Hawai'i 473, 483, 71 P.3d 424, 434 (2002), aff'd sub nom. Nacino v. Koller, 101 Hawai'i 466, 71 P.3d 417 (2003). Further, the record contains no evidence indicating that Bank of New York was in a better bargaining position, or that the power of sale term unfairly advantaged Bank of New York.

Appellants' argument that genuine issues of material fact regarding bad faith and unfair and deceptive trade practices is also not borne out by the record. Hawaii Leasing v. Klein, 5 Haw. App. 450, 456, 698 P.2d 309, 313 (1985). The terms of the foreclosure auction and sale were fully authorized by the mortgage and by Hawaii Revised Statutes § 667-5 (1993).

Appellants assert that foreclosing mortgagees are required to provide admissible evidence of default to establish a possessory interest in the land. Assuming, arguendo, that this assertion is correct, there is nothing in the record to establish that what was provided by Bank of New York did not meet this requirement.

Finally, Appellants did not raise inadequate advertisement of the non-judicial foreclosure auction below, and, as such, cannot now raise it on appeal for the first time. Hawai'i Rules of Appellate Procedure Rule 28(4). As such, Appellants have not demonstrated any genuine issues of material

fact, and consequently, the circuit court did not err in granting the motion for summary judgment.

2. With respect to Appellants' final argument, we do not agree with Appellants' contention that the findings of fact and conclusions of law were inadequate. The circuit court was not required to enter findings of fact in ruling on Bank of New York's motion for summary judgment. Hawai'i Rules of Civil Procedure Rule 52(b) (2000); see Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 216 n.3, 11 P.3d 1, 4 n.3 (2000).

Therefore,

The Circuit Court of the Fifth Circuit's April 20, 2004 final judgment is affirmed.

DATED: Honolulu, Hawai'i, January 31, 2007.

On the briefs:

Gary V. Dubin,
for Defendants-Appellants.

James S. Burns
Chief Judge

Robert E. Chapman, and
Mary Martin,
(Stanton Clay Chapman Crumpton & Iwamura)
for Plaintiff-Appellee.

Craig H. Nakamura
Associate Judge

Associate Judge