

**Electronically Filed
Intermediate Court of Appeals
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NO. CAAP-14-0000439
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CITI PROPERTY HOLDINGS, INC., Plaintiff-Appellee,
v.
MICHAEL K. TANIGUCHI; PATRICIA-ANN U. MOORE,
Defendants-Appellants,
and
JOHN AND MARY DOES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 13-1-386)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise and Ginoza, JJ.)

Defendants-Appellants Michael K. Taniguchi (Taniguchi) and Patricia-Ann U. Moore (Moore) (collectively Appellants) appeal from a Judgment, filed on January 24, 2014 in the Circuit Court of the Third Circuit (circuit court)¹ and entered pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b).

Appellants contend that the circuit court erred when it (1) granted Plaintiff-Appellee Citi Property Holdings, Inc.'s (Citi) motion for summary judgment and for writ of ejectment; and (2) granted Citi's motion to dismiss Appellants' counterclaims.

¹ The Honorable Greg K. Nakamura presided.

For the reasons set forth below, we vacate and remand.

I. Brief Background

On February 8, 2007, Appellants Taniguchi and Moore signed an Adjustable Rate Note in favor of Accredited Home Lenders, Inc. for a property located in Keaau, Hawai'i (the Property). On March 30, 2007, a Mortgage was recorded on the Property with the State of Hawai'i Bureau of Conveyances (Bureau of Conveyances).

On March 2, 2010, an Assignment of Mortgage was recorded with the Bureau of Conveyances in which Mortgage Electronic Registration Systems Inc. (MERS) granted, assigned, and transferred the mortgage on the Property to Citigroup Global Markets Realty Corp. (Citigroup). On July 21, 2010, an Assignment of Mortgage was recorded with the Bureau of Conveyances in which Citigroup granted, assigned, and transferred the mortgage on the Property to Citi.

On January 6, 2011, Citi conducted a non-judicial foreclosure sale on the Property. On January 11, 2011, Citi's attorney filed a "Mortgagee's Affidavit of Foreclosure Under Power of Sale."² The Affidavit states, *inter alia*, that the Property was sold to Citi for \$159,200.00, which was the highest bid at the sale. On January 28, 2011, a Quit Claim Deed was recorded with the Bureau of Conveyances, which conveyed the Property from Citi, as the foreclosing mortgagee, to Citi, as the purchaser at the non-judicial foreclosure auction.

On May 31, 2013, Citi filed a Complaint for Ejectment in this case against Taniguchi and Moore. On July 10, 2013, Taniguchi and Moore filed counterclaims against Citi. On August 1, 2013, Citi filed "Plaintiff's Motion to Dismiss Counterclaim

² On February 25, 2011, Citi's attorney filed an "Amended Mortgagee's Affidavit of Foreclosure Under Power of Sale." [JROA doc. 20 at 87] The amended affidavit corrected a clerical error. The original affidavit stated that a public auction sale was conducted on December 10, 2010 when in fact the public auction was conducted on January 6, 2011.

Filed July 10, 2013" (motion to dismiss).³

On November 7, 2013, Citi filed a motion for summary judgment and writ of ejectment.

On November 15, 2013, the circuit court filed an "Order Granting Plaintiff's Motion to Dismiss Counterclaim Filed July 10, 2013" (Order Dismissing Counterclaims).

On January 24, 2014, the circuit court filed an "Order Granting Plaintiff's Motion for Summary Judgment, And for Writ of Ejectment Filed November 7, 2013." On January 24, 2014, the circuit court also filed the HRCF Rule 54(b) Judgment and a Writ of Ejectment.

II. Discussion

A. Summary Judgment

Appellants Taniguchi and Moore contend that the circuit court erred when it granted summary judgment because Citi did not have standing to bring a non-judicial foreclosure and ejectment action. Taniguchi and Moore also contend that the circuit court considered inadmissible evidence when it granted summary judgment.

We review the circuit court's grant or denial of summary judgment *de novo*. Kondaur Capital Corp. v. Matsuyoshi, 136 Hawai'i 227, 240, 361 P.3d 454, 467 (2015). "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 judgment as a matter of law." *Id.* (citations and brackets omitted). "The moving party has the initial burden of 'demonstrating the absence of a genuine issue of material fact.'" (citation omitted). "Only with the satisfaction of this initial showing does the burden shift to the nonmoving party to respond 'by affidavits or as

³ Citi moved to dismiss Taniguchi and Moore's counterclaims based on the principles of *res judicata* because prior to this action, a Complaint filed by Taniguchi and Moore against Citi was dismissed with prejudice by the United States District Court for the District of Hawai'i.

otherwise provided in [Hawai'i Rules of Civil Procedure (HRCP)] Rule 56[,] ... setting forth specific facts showing that there is a genuine issue for trial." Id. at 240-41, 361 P.3d at 467-68 (citation, emphasis, and brackets omitted, ellipses in original).

To maintain an ejectment action, the plaintiff must (1) "prove that he or she owns the parcel in issue, meaning that he or she must have the title to and right of possession of such parcel" and (2) "establish that possession is unlawfully withheld by another." Id. at 241, 361 P.3d at 468 (citation, internal quotation marks, and brackets omitted). When a party receives title to a property through a non-judicial foreclosure sale, the strength and validity of the title "is unavoidably intertwined with the validity of the foreclosure sale." Id.

In Kondaur, the Hawai'i Supreme Court recently clarified that "the duties set forth in [Ulrich v. Security Inv. Co., 35 Haw. 158 (Haw. Terr. 1939)] remain viable law and are applicable to non-judicial foreclosures of real property mortgages." Id. at 229, 361 P.3d at 456. As stated in Kondaur:

Ulrich requires mortgagees to exercise their right to non-judicial foreclosure under a power of sale in a manner that is fair, reasonably diligent, and in good faith, and to demonstrate that an adequate price was procured for the property. In instances where the mortgagee assumes the role of a purchaser in a self-dealing transaction, the burden is on the mortgagee, or its quitclaim transferee or non-bona fide successor, to establish its compliance with these obligations. Its failure to do so would render the foreclosure sale voidable and could therefore be set aside at the timely election of the mortgagor.

Id. at 240, 361 P.3d at 467 (citations and footnotes omitted). Therefore, where the mortgagee is also the purchaser in a non-judicial foreclosure sale, the mortgagee has the "burden to prove in the summary judgment proceeding that the foreclosure 'sale was regularly and fairly conducted in every particular.'" Id. at 241, 361 P.3d at 469 (citation omitted). "A prima facie case demonstrating compliance with the foregoing requirements [shifts] the burden [to the mortgagor] to raise a genuine issue of material fact." Id. at 242, 361 P.3d at 469.

In Kondaur, the supreme court vacated summary judgment and writ of possession in favor of plaintiff Kondaur Capital Corp. (Kondaur) because the duties in Ulrich were not met. In addressing Kondaur's summary judgment motion, the supreme court stated that the Affidavit of Sale regarding the non-judicial foreclosure in that case failed to "provide any averments as to the fairness and regularity of the foreclosure sale or as to whether [the mortgagee] conducted the foreclosure sale in a diligent and reasonable manner[,]" the document did not speak to why the foreclosure sale was conducted on a different island than where the property was located, and, although the document identified the purchase price, it did not "make any declaration concerning the adequacy of this price." Id. at 242-43, 361 P.3d at 469-70. The court further stated that the "mortgagee's minimal adherence to the statutory requirements and terms of the mortgage under which the foreclosure sale is conducted ... does not establish that the foreclosure sale similarly satisfied the Ulrich requirements." Id. at 243, 361 P.3d at 470.

As a result, because Kondaur never met its initial burden of showing that the foreclosure sale was conducted in a manner that was fair, reasonably diligent, in good faith, and would obtain an adequate price for the property, the summary judgment burden never shifted to the mortgagor to raise any genuine issue of material fact. Id. Thus, the supreme court vacated the summary judgment and remanded for further proceedings. Id. at 244, 361 P.3d at 471.

Kondaur is dispositive in the instant case. Here, Citi was the foreclosing mortgagee and the purchasing highest bidder at the non-judicial foreclosure sale. Thus, pursuant to Kondaur and Ulrich, Citi had the initial burden to establish that the non-judicial foreclosure sale was conducted in a manner that was fair, reasonably diligent, and in good faith, and to demonstrate that an adequate price was procured for the property. See also JPMorgan Chase Bank, Nat'l Ass'n v. Benner, 2016 WL 1092490, -- Hawai'i --, -- P.3d -- (App. 2016).

Like in Kondaur, the Mortgagee's Affidavit of Foreclosure Under Power of Sale (Affidavit of Foreclosure) in this case, prepared by Citi's attorney, was the only document submitted to show the manner in which the sale was conducted. First, as Appellants argue, there is no affidavit or declaration supporting the admissibility of the Affidavit of Foreclosure (and some other exhibits) submitted by Citi with its summary judgment motion. Thus, for this reason alone, it appears that Citi failed to meet the requirements of HRCP Rule 56, and summary judgment was not warranted. Second, similar to the affidavit in Kondaur, the Affidavit of Foreclosure does not attest to anything concerning the adequacy of the purchase price. Thus, even if the Affidavit of Sale was admissible, Citi would not have satisfied its initial burden of showing that the foreclosure sale was conducted in a manner that was fair, reasonably diligent, in good faith, and would obtain an adequate price for the property.

Because Citi did not satisfy its initial burden for summary judgment, the burden never shifted to Taniguchi and Moore to raise a genuine issue of material fact. The grant of summary judgment for Citi was in error.

B. Motion to Dismiss

Appellants also contend on appeal that the circuit court erred when it dismissed their counterclaims. However, in their Notice of Appeal, Appellants did not appeal from the Order Dismissing Counterclaims. Rather, they only appealed from the Order Granting Summary Judgment, which was made final by the HRCP Rule 54(b) Judgment filed on January 24, 2014.

The HRCP Rule 54(b) Judgment did not resolve or address in any way the dismissal of Appellants' counterclaims.

Moreover, the record on appeal for this case does not contain a final judgment on the Order Dismissing Counterclaims. Therefore, under Jenkins v. Cades Schutte Flemming & Wright, 76 Hawai'i 115, 869 P.2d 1334, (1994), there is no final judgment in the record from which Appellants Taniguchi and Moore could have properly appealed the dismissal of their counterclaims.

In sum, we lack appellate jurisdiction to review the circuit court's Order Dismissing Counterclaims.

III. Conclusion

Based on the foregoing, the Judgment filed on January 24, 2014 in the Circuit Court of the Third Circuit is vacated. This case is remanded to the circuit court for further proceedings consistent with this order.

DATED: Honolulu, Hawai'i, June 2, 2016.

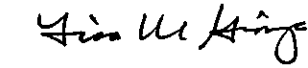
On the briefs:

Melodie Aduja,
for Defendants-Appellants.

Karyn A. Doi,
(Leu Okuda & Doi),
for Plaintiff-Appellee.


Presiding Judge


Associate Judge


Associate Judge