

**Electronically Filed
Intermediate Court of Appeals
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NO. CAAP-15-0000425

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CENTRAL PACIFIC BANK,
Plaintiff-Appellee,
v.
WILLIAM HALEMANO FREDERICK, MARY KATHERINE FREDERICK,
Defendants-Appellants
and
SEA COUNTRY COMMUNITY ASSOCIATION,
Defendant-Appellee,
and
JOHN DOES 1-50, JANE DOES 1-50, DOE PARTNERSHIPS 1-50,
DOE CORPORATIONS 1-50, DOE "NON-PROFIT" CORPORATIONS 1-50,
AND DOE GOVERNMENTAL UNITS 1-50,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 14-1-2199-10)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding J., Fujise and Reifurth, JJ.)

Defendants-Appellants William Halemano Frederick and Mary Katherine Frederick (together, the **Fredericks**) appeal from the "Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against Defendants (1) William Halemano Frederick, (2) Mary Katherine Frederick, and (3) Sea Country Community Association; Interlocutory Decree of Foreclosure and Order of Sale Filed January 9, 2015" entered on April 30, 2015 in the Circuit Court of the First Circuit¹ (**circuit court**).

¹ The Honorable Bert I. Ayabe presided.

On appeal, the Fredericks contend the circuit court erred in granting summary judgment for Plaintiff-Appellee Central Pacific Bank (CPB) because there were genuine issues of material fact to be resolved and the declaration submitted in support of CPB was inadmissible under Hawaii Rules of Evidence (HRE) Rules 602 (1993) and 803(b)(6) (Supp. 2015).²

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

² The Fredericks' opening brief fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), which provides:

Rule 28. BRIEFS.

. . . .

(b) **Opening brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .

(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in a summary fashion, with appropriate record references. Record references shall include page citations and the volume number, if applicable. References to transcripts shall include the date of the transcript, the specific page or pages referred to, and the volume number, if applicable. Lengthy quotations from the record may be reproduced in the appendix. There shall be appended to the brief a copy of the judgment, decree, findings of fact and conclusions of law, order, opinion or decision relevant to any point on appeal, unless otherwise ordered by the court.

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency.

. . . .

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

(Emphases added.) The Fredericks' counsel is warned that future violations of HRAP Rule 28 may result in sanctions.

the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we conclude the Fredericks' appeal is without merit.

I. CPB's Standing to Foreclose on the Note

The Fredericks argue that the circuit court erred in granting summary judgment in favor of CPB because there was evidence that the Note was not owned by CPB, precluding CPB from establishing it had standing to foreclose on the property. In support of their Opposition to CPB's motion for summary judgment, the Fredericks rely on the Affidavit submitted by Michael Carrigan, a "Certified Mortgage Securitization Auditor/Bloomberg Specialist," which states:

7. The loan was not identified in any publically reporting trust. Freddie Mac currently claims ownership of the loan. Federal Home Loan Mortgage Corporation (a/k/a Freddie Mac) is stated on the Mortgage Electronic Registration Systems, Inc. web site as "Investor", and is an indication of past or current purported ownership interest by Freddie Mac. A qualifying trust formed shortly after the execution of the loan on January 28, 2008 is the FREDDIE MAC MULTICLASS CERTIFICATES, SERIES 3423 with a closing date of March 28, 2008. The underwriter is Bear Stearns & Co. Inc. and the Sponsor and Trustee is Freddie Mac.

"In order to enforce a note and mortgage under Hawaii law, a creditor must be 'a person entitled to enforce' the note. One person entitled to enforce an instrument is a 'holder' of the instrument. A 'holder' is the 'person in possession of a negotiable instrument.'" U.S. Bank N.A. v. Mattos, 137 Hawai'i 209, 211, 367 P.3d 703, 705 (App. 2016) (quoting In re Tyrell, 528 B.R. 790, 794 (Bankr. D. Haw. 2015) (citing Hawaii Revised Statutes (HRS) § 490:3-301 (2008)³ and HRS § 490:1-201(b)

³ HRS § 490:3-301 provides:

§490:3-301 Person entitled to enforce instrument.
"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 490:3-309 or 490:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

(2008)⁴)).

The Note states that the lender, Central Pacific Homeloans, Inc. (**Central Pacific**), "may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" The Note authorizes the Note Holder the same rights under the Mortgage. The Mortgage allows the lender, Central Pacific, upon a default by the borrower, the Fredericks, to invoke the power of sale and other remedies upon notice to the borrower. The affidavit of Damon Stanford (**Stanford Affidavit**), the "Assistant Vice President and Manager of Investor Mortgage Servicing of [CPB]," states, "CPB is the holder of the Note and is the record mortgagee of the Mortgage[.]" As the Note Holder, CPB is therefore authorized to invoke the power of sale under the terms of the Note and Mortgage.

The Fredericks have not pointed to evidence that calls into question whether CPB was the holder of the Note. See HRS § 490:1-201 ("'Holder' means . . . [t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]"). The Fredericks have failed to demonstrate that there was a genuine

⁴ HRS § 490:1-201 provides, in pertinent part:

§490:1-201 General definitions

. . . .

(b) Subject to definitions contained in other articles of this chapter that apply to particular articles or parts thereof:

. . . .

"Holder" means:

- (1) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
- (2) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
- (3) The person in control of a negotiable electronic document of title.

issue of material fact warranting reversal. See Bank of America N.A. v. Hill, No. CAAP-13-0000035 at *5 (App. Oct. 30, 2015) (mem.) ("Hill failed to present evidence to contradict Bank of America's showing that it was holder of the note and, therefore, did not raise a genuine issue of material fact.").

II. Admissibility of Stanford Affidavit

The Fredericks contend the Stanford Affidavit submitted in support of CPB's motion for summary judgment is based on inadmissible hearsay and is not based on his personal knowledge. The Fredericks argue, "Everything [in the Stanford Affidavit] is based on a review of records, and there is no indication that [Stanford] had any part in the making or keeping of the records, knows or took part in how they are made and or knows how they are produced."

Hawai'i Rules of Civil Procedure Rule 56(e) states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The Fredericks contend the Stanford Affidavit is inadmissible under HRE Rule 602⁵ and Rule 803(b)(6)⁶.

⁵ HRE Rule 602 provides:

Rule 602 Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

⁶ HRE Rule 803 provides, in pertinent part:

Rule 803 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(b) Other exceptions.

. . . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation,

(continued...)

In his declaration, Stanford states:

1. I am an Assistant Vice President and Manager of Investor Mortgage Servicing of [CPB]; I am authorized to make this declaration in support of [CPB's] Motion for Summary Judgment . . . and I have personal knowledge of the matters stated herein.

2. I am one of the custodians of records made and kept in the normal course of the business of [CPB] regarding [the Fredericks].

The Stanford Affidavit explicitly states it is based on personal knowledge, and the Fredericks' argument that it lacks personal knowledge under HRE Rule 602 is without merit.

We construe the Fredericks' HRE Rule 803(b)(6) argument to be that the Stanford Affidavit is based on inadmissible hearsay under HRE Rule 802 (1993),⁷ which bars the admission of hearsay, and that the Stanford Affidavit does not otherwise fit within the exception provided under HRE Rule 803(b)(6) for "[r]ecords of regularly conducted activity." We also presume that the Fredericks argue that "the sources of information or other circumstances indicate lack of trustworthiness" because they have bolded that portion of HRE Rule 803(b)(6) in their opening brief. The Fredericks' argument that the documents attached to the affidavit lack trustworthiness is not supported by any citation to the record that would support their claim, and is also without merit.

Therefore,

IT IS HEREBY ORDERED that the "Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against Defendants (1) William

⁶(...continued)

in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(1) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

⁷ HRE Rule 802 provides:

Rule 802 Hearsay rule. Hearsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute.

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

Halemano Frederick, (2) Mary Katherine Frederick, and (3) Sea Country Community Association; Interlocutory Decree of Foreclosure and Order of Sale Filed January 9, 2015" entered on April 30, 2015 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 9, 2016.

On the briefs:

Andrea L. Heckler
for Defendants-Appellants.

Mitzi A. Lee
for Plaintiff-Appellee.


Presiding Judge


Associate Judge


Associate Judge