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NO. 24167

IN THE SUPREME COURT OF THE STATE OF HAWAII

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AMERICAN SAVINGS BANK, F.S.B., a federal  
savings bank, Plaintiff-Appellee,

vs.

SAMUEL A. FERNANDEZ, Defendant-Appellant,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;  
DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; DOE  
GOVERNMENTAL UNITS 1-10, Defendants.

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APPEAL FROM THE FIFTH CIRCUIT COURT  
(CIV. NO. 00-01-0003)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Samuel Fernandez, pro se, appeals from the December 14, 2000 judgment of the Circuit Court of the Fifth Circuit, the Honorable George M. Masuoka presiding, entered pursuant to the order granting summary judgment in favor of plaintiff-appellee American Savings Bank (ASB) with respect to all claims asserted by ASB in its complaint to foreclose on Fernandez's mortgage. On appeal, Fernandez argues that the circuit court erred in granting summary judgment because ASB's motion was unsupported by admissible evidence sufficient to establish either a defaulted loan or a past due amount. For the reasons discussed below, we hold that the evidence submitted by

ASB constituted inadmissible hearsay and that, therefore, ASB was not entitled to summary judgment. Consequently, we vacate the circuit court's judgment and remand this case for further proceedings.

I. BACKGROUND

On November 23, 1994, Fernandez executed and delivered to ASB a promissory note for \$168,000 that was secured by a mortgage for property Fernandez owned at 4001 Hoolepe Street, Hanamaulu, Hawai'i, 96715. Fernandez subsequently defaulted under the terms of the promissory note and the mortgage.

ASB filed a complaint on January 10, 2000 against Fernandez and other parties holding an interest in the property, seeking: judgment on the note, foreclosure of the mortgage, an order of sale, permission to bid at the foreclosure sale, and, if applicable, a deficiency judgment. At the time of the complaint, Fernandez's loan had been delinquent since June 1999. The complaint was served upon Fernandez on January 12, 2000.

On August 10, 2000, ASB filed its motion for summary judgment, which was scheduled for a September 12, 2000 hearing.<sup>1</sup> In support of its motion, ASB attached the affidavit of Mary Antonio (Antonio), manager of the Collection and Recovery

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<sup>1</sup> ASB had previously filed a motion for summary judgment on February 28, 2000. On the same day, Fernandez filed a petition for relief pursuant to 11 U.S.C. § 301 in the United States Bankruptcy Court for the District of Hawai'i, and a notice of automatic stay was issued. See In re: Samuel Amarles Fernandez, dba Kars II, dba Kauai Auto Refinishing Supplies, Case No. 00-00701. On July 26, 2000, Fernandez's Chapter 13 bankruptcy case was dismissed.

Services Department of ASB, who averred that she "has personal knowledge" of the Fernandez matter. Antonio declared that:

(1) ASB had made a loan to Fernandez in the principal amount of \$168,000, as evidenced by the note dated November 23, 1994; (2) a true and correct copy of the note was attached to her affidavit; (3) as security for the repayment of the loan and the performance of his obligations under the loan, Fernandez executed and delivered to ASB a mortgage, dated November 23, 1994, which was recorded and granted ASB a first mortgage lien and security interest in property situated at 4001 Hoolepe Street, Hanamaulu, Hawai'i, 96715, Tax Map Key No. (4) 3-7-005-057; (4) a true and correct copy of the mortgage was attached to her affidavit; and (5) Fernandez was in default under the terms of the note and mortgage.

To support ASB's contention that Fernandez was in default, Antonio declared as true and accurate, as well as attached, a copy of ASB's current customer account activity statement (account statement). The account statement reflected payments made by Fernandez up to May 1999 and demonstrated Fernandez's failure to make timely payments on his loan from June 1999 to July 2000. According to Antonio's affidavit and the account statement, Fernandez, as of July 31, 2000, was indebted to ASB as follows:

Principal:	\$163,219.68
Interest to 07/31/00:	20,383.77
Escrow/Impound balance:	942.21
Late charges due:	<u>1,474.20</u>
Total:	\$186,019.86

Fernandez did not file a written opposition to the motion and made no objection to the motion at the hearing on September 12, 2000.<sup>2</sup> The court orally granted summary judgment in favor of ASB, and a written order was subsequently filed on December 14, 2000, which included a decree of foreclosure and an order of sale, authorization for ASB to be a purchaser, and a determination that ASB was entitled to a deficiency judgment, if the sale proceeds were insufficient to pay all amounts due. On the same day, the foreclosure decree was entered as a final judgment pursuant to Hawai'i Rules of Civil Procedure (HRCP) 54(b) (2000).<sup>3</sup>

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<sup>2</sup> Although Fernandez, appearing pro se, argued there were genuine issues of material fact, he offered no evidence in support of his contention. He also asked the court for additional time to seek out an attorney. The court, however, apparently denied his request, indicating that Fernandez could retain counsel to help him with a motion for reconsideration.

<sup>3</sup> HRCP Rule 54(b) states:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

On December 26, 2000, Fernandez filed an HRCP Rule 59(b) (2000)<sup>4</sup> motion to "reconsider and to set aside and vacate" the judgment. In his motion, Fernandez argued that ASB did not meet its burden of establishing default because "a complete history of the loan general ledger that is sworn to or certified to is a mandatory requirement" to support a summary judgment motion in a foreclosure action. The circuit court entered an order denying Fernandez's motion for reconsideration on February 20, 2001. Fernandez's timely notice of appeal was filed on March 21, 2001.

## II. STANDARD OF REVIEW

We review a circuit court's award of summary judgment de novo under the same standard applied by the circuit court. Hawai'i Cmty. Fed. Credit Union v. Keka (Keka), 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). As we have often articulated,

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.

A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. (brackets, citations, internal margins, and quotation marks omitted); see also HRCP Rule 56(c) (2000).

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<sup>4</sup> HRCP Rule 59(b) states that "[a] motion for a new trial shall be filed no later than 10 days after entry of the judgment."

III. DISCUSSION

Fernandez contends that the circuit court erred in granting summary judgment because (1) the account statement attached to Antonio's affidavit constituted inadmissible hearsay and (2) ASB was required to submit a complete general ledger to prove default. We first address the admissibility of Antonio's affidavit and its attachments.

The form of affidavits supporting a motion for summary judgment is governed by HRCP 56(e) (2000),<sup>5</sup> which requires, inter alia, that affidavits "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits consisting of inadmissible hearsay cannot support the grant or denial of summary judgment. See Keka, 94 Hawai'i at 221, 11 P.3d at 9. Thus, "[a]ffidavits in support of a summary

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<sup>5</sup> HRCP Rule 56(e) states:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(Emphasis added.)

judgment motion are scrutinized to determine whether the facts they aver are admissible at trial and are made on the personal knowledge of the affiant." Miller v. Manuel, 9 Haw. App. 56, 66, 828 P.2d 286, 292 (1991).

In Pacific Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980), this court noted that the standard for admitting evidence in support of summary judgment is the same as the standard for admitting evidence presented at trial. Id. at 337 n.5, 614 P.2d at 938n.5 (citing 6 Moore's Federal Practice § 56.22 at 56-1321 (2d ed.)) Therefore, the affiant must establish that the declarations made in the affidavit and the evidence in support of those declarations meet the foundational requirements established by the Hawai'i Rules of Evidence (HRE).

Relying on GE Capital Hawai'i, Inc. v. Yonenaka (Yonenaka), 96 Hawai'i 32, 25 P.3d 807 (App. 2001), ASB argues that Antonio's affidavit was sufficient to establish that no genuine issues of material fact existed and that ASB was entitled to summary judgment as a matter of law. In Yonenaka, the Intermediate Court of Appeals held, inter alia, that summary judgment was inappropriate because (1) GE Capital had failed to attach copies of the bank records evidencing default and (2) the bank officer's statements, recounting what he had learned from his review of those records, were inadmissible hearsay. 96 Hawai'i at 35, 40, 25 P.3d at 810, 815. ASB maintains that, "[u]nlike in Yonenaka, where no general ledger was provided as

evidence of default, [ASB] provided the [account statement] with Ms. Antonio's declaration." Therefore, ASB maintains that summary judgment was appropriate here. ASB's argument, however, misses the mark.

Pursuant to HRE Rules 801 (1985) and 802 (1980),<sup>6</sup> the account statement constitutes hearsay because (1) it was not made by Antonio and (2) was offered to prove the truth of the matter asserted, i.e., that Fernandez was in default on the loan. In order for the account statement to be admissible as evidence at the summary judgment level, the declarations contained in Antonio's affidavit regarding the account statement must satisfy the same foundational requirements for its admission at trial. It does not. The Antonio affidavit merely attests to the fact that the attached copy of the account statement was a true and accurate copy. It does not expressly set forth facts, based on personal knowledge, that would have rendered Antonio's testimony admissible at trial, such as pursuant to the business record exception to the hearsay rule. See HRE Rule 803(b)(6) (2002).<sup>7</sup>

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<sup>6</sup> HRE Rule 801 defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is not admissible except as provided by [the HRE], or by other rules prescribed by the Hawai'i supreme court, or by statute." HRE Rule 802.

<sup>7</sup> Although hearsay statements are ordinarily not admissible as evidence, HRE Rule 803 provides exceptions to the hearsay rule, even though the declarant is available as a witness. One such rule, HRE Rule 803(b)(6), provides:

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the  
(continued...)



Thus, the account statement and Antonio's declarations relating to the account statement constitute inadmissible hearsay. In the absence of admissible evidence, Fernandez's default on the loan cannot be established and, consequently, ASB is not entitled to summary judgment.

Having determined that Antonio's affidavit was insufficient to support summary judgment, we need not address Fernandez's remaining contention on appeal, that is, that summary judgment was inappropriate because a "complete general ledger" was required to establish default. However, in light of our remand of this case for further proceedings, we note that the Intermediate Court of Appeals has previously addressed the complete general ledger argument that Fernandez raises here. See Ocwen Fed. Bank, FSB v. Russell, 99 Hawai'i 173, 184, 53 P.3d 312, 323 (App. 2002) (holding that the bank's documentation in support of summary judgment, including, inter alia, an "Automated Affidavit of Debt Screen" reflecting defendant's delinquency on twenty-eight payments, was "clearly sufficient" to satisfy the bank's initial showing that defendant was in default on the note).

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<sup>7</sup>(...continued)

time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, . . . unless the sources of information or other circumstances indicate lack of trustworthiness.

IV. CONCLUSION

Based on the foregoing discussion, we vacate the December 14, 2000 judgment and remand this case for further proceedings.

DATED: Honolulu, Hawai'i, September 23, 2003.

On the briefs:

Samuel A. Fernandez,  
defendant-appellant,  
appearing pro se

Wayne K. T. Mau and  
Jonathan W. Y. Lai,  
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