

DISSENTING OPINION OF ACOBA, J.

I would (1) affirm the July 28, 2000 judgment granting the Balicanta's motion to extend time to appeal and vacate that part of the judgment denying vacation of the summary judgment orders and judgment and (2) vacate the court's May 30, 2000 orders and judgment and remand the case.

Defendant-Appellants Thelma Salabuban Balicanta, Faith Elsa Balicanta, Samuel Macario Balicanta, and Nemesia Hope Balicanta (collectively "Balicantas") appeal from the circuit court of the first circuit's (the court): (1) May 30, 2000 order granting Plaintiff-Appellee/Cross-Appellant, GE Capital Hawai'i, Inc.'s (GE Capital) motion for summary judgment and for writ of ejectment filed March 21, 2000; (2) May 30, 2000 judgment; and (3) May 30, 2000 writ of possession.

GE Capital cross-appeals from the July 28, 2000 Judgment denying in part and granting in part the said Balicantas' motion to vacate the May 30, 2000 orders and judgment; or in the alternative, for an order extending time to file notice of appeal.

I.

On January 3, 2000, GE Capital filed a complaint for

ejectment and damages¹ against the Balicantas. The complaint alleged that the Balicantas "continue to withhold possession of the subject Property" without right. In aid of its request for ejectment, GE Capital sought the issuance of a writ of possession.

GE Capital alleged in its complaint that the Balicantas had received a loan from GECC Financial Corporation² to finance the purchase of property located at 94-870 Awanei Street, Waipahu, Hawai'i 96797 (the property).

+3 The loan was secured by a mortgage on the property and the mortgage was recorded in the land court. It is alleged that the Balicantas defaulted under the terms of the loan in that they breached their covenant to pay the sums assessed.³

The Complaint indicated foreclosure proceedings took place under a private power of sale and the property was sold at a public auction at which GE Capital was the highest bidder. Thereafter, the property was conveyed to GE Capital by an

¹ GE Capital states that due to the unlawful withholding of the property it was "deprived of rents and profits thereof[.]"

² GECC financial corporation is a subsidiary of GE Capital.

³ The Balicantas, in answer to the complaint deny that they were in default and are in unlawful possession.

October 5, 1999 quitclaim deed.⁴ On January 3, 2000, GE Capital filed a complaint for damages and ejectment against the Balicantas. The Balicantas, in their answer to the complaint asserted the defenses of: (1) non-performance of a condition precedent; (2) mistake or mutual mistake resulting from acts and/or omissions by GE Capital or GE Capital's agents (alleged in the counter-claim);⁵ (3) misrepresentation and fraud resulting from acts and/or omissions by GE Capital or its agents; (4) ineffective service of process; and (5) defective title.

On March 21, 2000, GE Capital filed a motion for summary judgment and for a writ of ejectment. On May 30, 2000, the court entered an order granting GE Capital's motion. Concurrently, a judgment for possession was entered on May 30, 2000 along with a writ of possession. On July 14, 2000, the Balicantas filed a motion to vacate and in the alternative, requested an extension of time to file their notice of appeal. The Balicantas maintained that although they miscalendared the filing date for the notice of appeal, the miscalendaring was excusable neglect pursuant to Hawai'i Rules of Appellate

⁴ Balicantas do not raise the issue of the validity of the quitclaim deed.

⁵ The Balicantas assert in their answer that the defense of mistake or mutual mistake is alleged in their "attached counterclaim." However, no counterclaim was attached to the answer, nor is there evidence of a counterclaim in the record.

Procedure (HRAP) Rule 4(a)(4)(B) (2003).⁶ The court denied the motion to vacate, but granted the extension of time to file the notice of appeal in a July 28, 2000 order. On July 28, 2000, the Balicantas filed a notice of appeal. On August 11, 2000, GE Capital filed its notice of cross-appeal.

II.

On appeal, the Balicantas apparently argue⁷ that GE Capital failed on summary judgment to (1) attach a certified copy of the mortgage or promissory note, (2) state that either contained a power of sale, (3) provide competent evidence that the Balicantas breached the mortgage, and (4) offer competent evidence that the Balicantas granted GE Capital power to act as attorney-in-fact.

On cross-appeal, GE Capital argues that the court erred in granting the Balicantas' motion for an extension of time to file their notice of appeal.

III.

As to GE Capital's cross-appeal, the grant or denial of

⁶ HRAP Rule 4(a)(4)(B) pertains to requests for extensions of time. The rule states in relevant part that "[t]he court or agency appeal from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed[.]"

⁷ The basis for the points of error are not clearly stated in the opening brief, therefore, the points are set forth as best as can be ascertained.

a motion for extension of time to file a notice of appeal is reviewed for abuse of discretion. Hall v. Hall, 95 Hawai'i 318, 319, 22 P.3d 965, 965-66 (2001). "[A]n abuse of discretion occurs when the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." See Ek v. Boggs, 102 Hawai'i 289, 294, 75 P.3d 1180, 1185 (2003) (holding that the court did not abuse its discretion when it declared a party a vexatious litigant). Miscalendaring may be viewed as excusable neglect and the court did not abuse its discretion in granting the extension, See Northwest Truck & Trailer Sales, Inc. v. Dvorak, 877 P.2d 31 (Mont. 1994) (miscalendaring of appeal deadline constituted excusable neglect to support extension of appeal deadline). Under the foregoing, it cannot be said that the court abused its discretion. Therefore, it appears the court did not err in granting Balincantas' the extension of time to file the appeal.

IV.

With respect to the May 30, 2000 order granting GE Capital's summary judgment, "[w]e review a trial court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court." GE Capital Hawai'i, Inc. v.

Yonenaka, 96 Hawai'i 32, 37, 25 P.3d 807, 812 (App. 2001). "When reviewing a summary judgment, an appellate court's consideration of the record is limited to those materials that were considered by the trial court in ruling on the motion." AOAO Wailea Elua v. Wailea Resort, Co., 100 Hawai'i 97, 108 58 P.3d 608, 619 (2002). "[S]ummary 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. (quoting Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998)).

First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.

Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law.

GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995) (citations omitted), cert. granted, 79 Hawai'i

341, 902 P.2d 976 (1995), aff'd, 80 Hawai'i 118, 905 P.2d 624 (1995).

v.

It appears the court did err in granting GE Capital's motion for summary judgment. Generally, under common law, a plaintiff in an ejectment action is required to show: (1) "the right of [appellees] to possession of the real estate; and (2) "whether [appellants] detain such possession without right." See Leckrone v. Lawler, 118 N.E.2d 381, 385 (Ind. 1954); see also MacMillan Bloedell, Inc. v. Ezell, 475 So.2d 493, 496-97 (Ala. 1985) (explaining that statutory ejectment and common law ejectment are "possessory in nature," therefore plaintiff must prove "a right to possession at the time of the commencement of the action").

The Balicantas argue that the documents submitted by GE Capital in support of the motion for summary judgment were insufficient under Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e). HRCP Rule 56(e) (2003) requires that

[s]upporting 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.

(Emphasis added). GE Capital submitted for the court's review (1) the affidavit of Gordon Okumoto, loan adjustment specialist, attesting that GE Capital secured title insurance, (2) the title policy and attached the description of the subject property, (3) a copy of the October 5, 1999 certified quitclaim deed recorded in the bureau of conveyances, and (4) an affidavit of counsel (Allen I. Muratani) regarding foreclosure by the mortgagee under power of sale filed in the bureau.

In his affidavit, Okumoto attested that (1) the Balicantas as borrowers, made, executed and delivered to GECC, as payee, a promissory note dated July 31, 1995 which was secured by a mortgage dated July 31, 1995 made and excuted by the Balicantas in favor of GECC and filed with the Land Court, (2) the promissory note and mortgage were also assigned to GE Capital by a document dated November 22, 1995 and filed as document no. 2280213, (3) the Balicantas were in default under the terms of the promissory note and mortgage in that they breached their covenant to pay the sums, (4) due to the breach, GE Capital proceeded with mortgage foreclosure proceedings pursuant to HRS §§ 667-5 through 667-10, (5) a sale by public auction of the property was held on September 14, 1999, GE Capital as the highest bidder was conveyed the property by quitclaim deed dated October 5, 1999 and filed with the Land Court as document no.

2579447 and a transfer certificate of title was issued, (6) pursuant to HRS § 667-5, GE Capital caused to file on October 5, 1999 the affidavit of counsel on foreclosure by mortgagee under power of sale with the Land Court, (7) all statutory requirements under HRS § 667-5 through 667-10 have been met and GE Capital has been the owner of the property since October 5, 1999 and is therefore entitled to possession, (8) the Balicantas are in possession of the property and have withheld and continue to withhold possession of the property.

The affidavit of Allen I. Marutani which was attached to Okumoto's affidavit attested that the power of sale, pursuant to HRS § 657-5 was properly effectuated. Marutani stated that (1) he sent by certified mail the notice of foreclosure to the Balicantas as the property address, (2) he received the signed receipt of said notice of Thelma Balicanta but received the notices marked "refused" from Samuel Balicanta and Nemesia Balicanta, and the notice marked "unclaimed" by Faith Balicanta 3) he served Samuel, Faith and Nemesia again and they were signed and returned, (4) a deputy sheriff caused to post a copy of the notice of foreclosure by mortgagee under power of sale on the premises of the property, (5) the notice of foreclosure was published in the Honolulu Advertiser, and (6) the sale by public auction for the property was held on September 14, 1999 and GE

Capital purchased the property for \$180,000. The quitclaim deed conveying the property from the Balicantas and GE Capital to GE Capital as purchaser was also attached to Okumoto's affidavit.

However, Okumoto's reference to the mortgage⁸ and promissory note⁹ is hearsay. The subject mortgage and the promissory note were not attached to the summary judgment motion, therefore GE Capital failed to provide sufficient evidence that GE Capital had the purported right to sell the property pursuant to the mortgage and note or that GE Capital had a power of attorney to execute the quitclaim deed on the Balicantas' behalf under said mortgage. HRCF Rule 56(e); see Cane City Builders, Inc. v. City Bank of Honolulu, 50 Haw. 523, 443 P.2d 145 (1968) (holding that "documents referred to in a motion for summary judgment must be sworn or certified and attached to the affidavit if they are to be considered by the court"); see also GE Capital Hawai'i, Inc. v. Miguel, 92 Hawai'i 236, 243, 990 P.2d 134, 140 (1999) (holding that Okumoto's affidavit consisted of

⁸ Although a certified copy of the mortgage was attached to GE Capital's July 17, 2000 memorandum in opposition to the Balicantas' motion to vacate, this court must review the evidence considered by the trial court on the motion for summary judgment. AOAO Wailea Elua, 100 Hawai'i at 108, 58 P.3d at 619. As the certified copy of the mortgage was attached to the memorandum in opposition subsequent to the court's ruling on the motion for summary judgment, this court may not consider the certified copy of the mortgage.

⁹ The promissory note was attached to GE Capital's July 17, 2000 memorandum in opposition to the Balicantas' motion to vacate, however this court may not consider this evidence. See supra note 8.

inadmissible hearsay because the records and mortgages were not attached and the affidavit failed to state that the records were made at or near the time of the recorded events and that the records were made and not just kept in the ordinary course of business). "[A]n affidavit consisting of inadmissible hearsay cannot serve as a basis for awarding or denying summary judgment." Yonenaka, 96 Hawai'i at 42, 25 P.3d at 817 (brackets omitted) (quoting Nakato v. Macharg, 89 Hawai'i 79, 89, 969 P.2d 824, 834 (App. 1998)).

Although the Balicantas do not contest the admissibility of the quitclaim deed,¹⁰ the copy of the quitclaim deed attached to Okumoto's affidavit did not comply with HRCP Rule 56(e).¹¹ The quitclaim deed was not certified. In order for a document to be in compliance with HRCP Rule 56(e), the document must be sworn to or certified by its preparer or custodian. Pioneer Mill Co. v. Dow, 90 Hawai'i 289, 297, 978 P.2d 727, 735 (1999). Here, the quitclaim deed was only a copy of the certified quitclaim deed. Therefore, the quitclaim deed

¹⁰ The Balicantas' in their memorandum in opposition to the motion for summary judgment state that "[t]he only document which apparently complies with Rule 56, H.R.C.P., is the quitclaim deed attached as exhibit "B" to Mr. Okumoto's affidavit." (Emphasis added).

¹¹ A certified copy of the quitclaim deed was attached to GE Capital's July 17, 2000 memorandum in opposition to the Balicantas' motion to vacate, however, this court is unable to consider this evidence. See supra note 8.

could not be used as evidence in the motion for summary judgment.

Also, it was not sufficient for GE Capital to simply refer to the "loan documents" in evidencing default. The ICA in Miguel held that statements of Okumoto, also the loan adjustment specialist in that case, referring only to "records and files" was hearsay, and thus, insufficient to demonstrate evidence of default. Miguel, 92 Hawai'i at 242, 990 P.2d at 140.

Finally, Maurtani's affidavit filed with the Land Court, as to satisfaction of the statutory requirements for exercise of a power of sale was not certified.¹² It was therefore hearsay and did not meet the requirements for admissibility under HRCP 56(e). There was no evidence, therefore to support the court's issuance of summary judgment.

Consequently, there was insufficient evidence to establish GE Capital's right to possession.

VI.

In its answer to the Balicantas' opening brief, GE Capital argues that the Balicantas' notice of appeal fails to appeal from the judgment of possession, and "said judgment includes the court's judgment that [GE Capital] was entitled to

¹² A certified copy of Marutani's affidavit was attached to GE Capital's July 17, 2000 memorandum in opposition to the Balicantas' motion to vacate, however, this evidence is not considered by this court in its review of the motion for summary judgment. See supra note 8.

possession of the Waipahu property, and that it was also entitled to a writ of possession." GE Capital reasons that "[s]hould the [Balicantas] prevail on their appeal, the Judgment for Possession providing that the [Balicantas] are adjudged to be entitled to the possession of the Waipahu property and a writ of possession will still be effective."

Under HRAP 3(c)(1), the appellant "shall designate the judgment, order, or party thereof and the court or agency appealed from." However, "a mistake in designating the judgment, . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." City and County of Honolulu v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976); see also State v. Bohannon, 102 Hawai'i 228, 235, 74 P.3d 980, 987 (2003) (holding that prosecution's intent to appeal from court's order denying motion for reconsideration could be "reasonably inferred from its notice of appeal[,] inasmuch as . . . the order denying the motion . . . was merely an extension of its order granting [Defendant's] motion to suppress and to dismiss"); Ek, 102 Hawai'i at 294, 75 P.3d at 1185 (inferring that appellant intended to appeal from prefiling order based on court's reasoning in the order denying the motion to extend time to file notice of appeal which was

attached to the notice of appeal). Therefore, the Balicantas failure to state that they were appealing from the judgment of possession does not render their appeal ineffective. Inasmuch as their appeal from the writ of possession is a direct result of the judgment of possession, this court can infer that the Balicantas intended to appeal from the judgment of possession.

Additionally, GE Capital argues that because the Balicantas have not been in possession of the property as of August 1, 2000, the case is moot.¹³ However, the question regarding GE Capital's purported right to possession is still at issue; thus the case is not moot.

GE Capital, in its answering brief also argues that the "appeal should be dismissed for flagrant disregard of the Hawai'i Rules of Appellate Procedure."¹⁴ Namely, GE Capital states (1) no file-marked copy of the notice of appeal was ever served upon GE Capital, (2) none of the certificates of service required to be filed are present in the record, and (3) transcripts of the hearing were not ordered by the Balicantas.

¹³ On October 20, 2000, GE Capital filed a motion for an order dismissing appeal for mootness, and/or for lack of appellate jurisdiction and/or for flagrant disregard of the Hawai'i Rules of Civil Procedure. This court filed an order denying the motion "without prejudice to GE Capital presenting any arguments in its answering brief and without prejudice to the court considering the alleged points of error as presented in the corss-appeal opening brief."

¹⁴ See supra note 14.

The cases the GE Capital cites to do not stand for the proposition that procedural defects are a reasonable basis upon which the court may dismiss an appeal. Rather, both In re Estate of Matthewman, 43 Hawii 90 (1959) and Independence Mortgage Trust v. Dolphin, 57 Hawai'i 554, 560 P.2d 488 (1977), cited by GE Capital deal with the timeliness of the filing of a notice of appeal, and not procedural defects. GE Capital did not indicate that it was prejudiced by the failure to serve file-marked certificates of service or by the lack of such certificates in the record. Furthermore, transcripts were not necessary to decide the summary judgment issues raised by GE Capital. Therefore, GE Capital's arguments regarding procedural defects do not require this court to dismiss the appeal. Cf. State v. Knight, 80 Hawai'i 318, 324, 90 P.2d 1133, 1139 (1996) (refusing, in the interest of justice, to dismiss the appeal, but rather to address the merits).

VII.

In light of the foregoing, I would remand this case as aforesaid.