

NO. 23930

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MELLON MORTGAGE COMPANY, a Colorado Corporation,
Plaintiff-Appellee, v. EDWARD BARGAS BUMANGLAG,
SR., Defendant-Appellant, and ROSALIND BUMANGLAG;
AMERICAN GENERAL FINANCE, INC.; JOHN AND MARY DOES
1-20; DOE PARTNERSHIPS, CORPORATIONS or OTHER
ENTITIES 1-20, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-4720)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Edward Bargas Bumanglag, Sr.,
(Edward) appeals from the November 14, 2000 "final judgment"
entered by Circuit Court Judge Kevin S. C. Chang in favor of
Plaintiff-Appellee Mellon Mortgage Company (Mellon). We vacate
and remand.

BACKGROUND

On November 17, 1997, Mellon filed a Complaint to
Foreclose Mortgage seeking to foreclose the mortgage (Mortgage)
given by Edward and Rosalind Bumanglag (Rosalind) on July 19,
1996, in favor of Citizens Mortgage Corporation, a New Jersey
corporation, to secure a similarly dated \$200,800 promissory note
(Note). The Complaint alleged that the Mortgage and the Note had
been assigned to Mellon.

The Complaint was not served on Edward until July 20, 1998.

On August 4, 1998, the clerk of the court entered a notice of proposed dismissal of the case on the ground "that no pretrial statement has been filed within eight months after the complaint has been filed[.]" On August 28, 1998, the clerk entered an Order of Dismissal.

On October 26, 1998, notwithstanding the fact that the case had been dismissed, Mellon filed a suggestion that Rosalind had died on March 18, 1998.

On January 13, 2000, Mellon moved, pursuant to Rule 60 of the Hawai'i Rules of Civil Procedure (HRCP), for an order setting aside the August 28, 1998 Order of Dismissal.

Rule 27 of the Rules of the Circuit Court of the State of Hawai'i states, in relevant part: "The court shall cause minutes to be prepared for its own use. Such minutes shall be appended chronologically at the bottom of the case folio." It follows that "[t]hough the substance of the court's decision is captured in the minutes of court proceedings kept by the clerk who attended the hearing, they do not substitute for the requisite written document; they are merely 'prepared for [the court's] own use.'" State v. English, 68 Haw. 46, 52, 705 P.2d 12, 16 (1985).

In this case, the circuit court clerk's minutes attached at the back of the court record contains the following language:

MINUTE ORDER: (03/01/00)

AFTER CONSIDERING THE WRITTEN SUBMISSIONS AND THE ARGUMENTS OF COUNSEL, PURSUANT TO HRCF RULE 60(B)), THE COURT FINDS THAT PLAINTIFF'S FAILURE OR LACK OF ACTIVITY WAS THE RESULT OF INADVERTENCE AND EXCUSABLE NEGLIGENCE, AND THEREFORE, GRANTS PLAINTIFF'S MOTION TO RECONSIDER AND SET ASIDE FINAL ORDER OF DISMISSAL FILED 8/28/98 FILED ON 1/13/00 AND SETS ASIDE THE FINAL ORDER OF DISMISSAL FILED ON 8/28/98 IN THIS CIVIL ACTION ON THE FOLLOWING TERMS AND CONDITIONS: FIRST, PLAINTIFF FILE A MOTION FOR SUMMARY JUDGMENT AND FOR INTERLOCUTORY DECREE OF FORECLOSURE OR OTHER DISPOSITIVE MOTION NO LATER THAN 3/24/00; AND SECOND, THAT PLAINTIFF IS BARRED FROM RECOVERING ANY ACCUMULATED INTEREST, LATE FEES, ATTORNEY'S FEES OR OTHER DAMAGES, IF ANY, WHICH MAY BE DUE AND OWING BY DEFENDANTS TO PLAINTIFF, WHICH ARISES FROM OR IS BASED UPON THE PERIOD 8/28/98 TO 2/29/00.

When the court's decision was made known to the parties, it was incumbent upon counsel for the prevailing party to prepare the order, present it to opposing counsel for "approval as to form" signature, and present it to the court. Counsel did not do so and no written order signed by the judge was entered.

On March 15, 2000, Mellon filed a motion for a summary judgment and an interlocutory decree of foreclosure.

On March 28, 2000, Edward filed a counterclaim alleging, in relevant part, that: (a) Edward and Rosalind received written notice that they were in arrears and a demand for them to immediately vacate their home; (b) Edward and Rosalind unsuccessfully sought clarification because "as far as they were aware, payments on the mortgage note were then current"; (c) Edward and Rosalind vacated their home in August

1997; (d) the conduct of Mellon "evidences a complete lack of good faith and fair dealing which is tantamount to bad faith" and liability "for a tortious breach of the" mortgage note; and (e) Mellon's negligence caused Edward "to experience severe emotional distress and mental anguish." Edward prayed for special and general damages and other relief.

On March 31, 2000, Edward filed his memorandum in opposition to Mellon's March 15, 2000 motion for summary judgment and alleged (a) Mellon's noncompliance with the "Minute Order," (b) genuine issues of material fact, (c) Mellon's not being a real party in interest and lack of standing to file and prosecute the motion, (d) Mellon's breach of its contract, and (e) Mellon's laches.

On November 14, 2000, the circuit court entered its Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Edward Bargas Bumanglag, Sr., and All Other Defendants, and For Interlocutory Decree of Foreclosure.

On November 14, 2000, the circuit court entered a judgment in favor of Mellon and finalized it pursuant to HRCF Rule 54(b).

Edward presents the following points on appeal:

1. The lack of a written order reinstating Mellon's case mandated a denial of the motion for summary judgment.

2. In light of the one year limitation on the giving of relief pursuant to HRCF Rules 60(b)(1), (2), and (3), Mellon's case should never have been reinstated.

3. The following were themselves, or were the basis of, genuine issues of material fact:

a. the facts that Mellon attached the wrong mortgage to its complaint and attached the right mortgage to its motion for summary judgment;

b. the fact that the amount sought by Mellon from Edward included amounts disallowed by the "Minute Order" for the period August 8, 1998, through February 29, 2000;

c. the questions whether Mellon (i) was a real party in interest or (ii) had standing;

d. the questions whether Mellon breached its contract when it (a) failed to adequately respond to Edward's inquiry and (b) never gave Edward the required pre-acceleration notice; and

e. the issues regarding Mellon's laches and the prejudice Edward thereby suffered.

DISCUSSION

Edward contends that the lack of a written order reinstating Mellon's case mandates denial of summary judgment. Mellon responds that "the lack of a written order reinstating the case, despite a prior minute order noticed to all parties, does

not preclude the Court from ruling on the summary judgment motion." We agree with Edward and disagree with Mellon.

As long as the August 28, 1998 Order of Dismissal has not been set aside, the case remains dismissed. The question is whether the record on appeal reflects that the August 28, 1998 Order of Dismissal was set aside. The answer is no. Hawai'i Rules of Appellate Procedure Rule 10(a) itemizes the items included in the record on appeal.¹ The minutes and other documents "attached" to the back of the circuit court record and not "filed" are not items included in the record on appeal. In the instant case, the April 10, 2000 "Minute Order" is neither an order of the court nor a part of the record on appeal.

¹ Hawai'i Rules of Appellate Procedure Rule 10(a) (2001) states as follows:

(a) *Composition of the record on appeal.* The record on appeal shall consist of the following:

(1) the original papers filed in the court or agency appealed from;

(2) written jury instructions given, or requested and refused or modified over objection;

(3) exhibits admitted into evidence or refused;

(4) the transcript of any proceedings prepared pursuant to the provisions of Rule 10(b);

(5) in a criminal case where the sentence is being appealed, a sealed copy of the presentence investigation report; and

(6) the indexes prepared by the clerk of the court appealed from.

CONCLUSION

Accordingly, we vacate the following:

1. The November 14, 2000 Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Edward Bargas Bumanglag, Sr., and All Other Defendants, and For Interlocutory Decree of Foreclosure.

2. The November 14, 2000 Judgment entering a summary judgment and an interlocutory decree of foreclosure.

We remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, January 24, 2002.

On the briefs:

Richard Lee and
Paul D. Hicks (Brian K.
Yomono, of counsel)
for Defendant-Appellant.

Chief Judge

Russell K. L. Leu,
Gary Y. Okuda, and
Lester K. M. Leu
for Plaintiff-Appellee.

Associate Judge

Associate Judge