

NO. 23942

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NORWEST MORTGAGE, INC., a California corporation,
Plaintiff-Appellee, v. GWENDOLYN K. DE REGO,
Defendant-Appellant, and JOSEPH A. DE REGO, ICI
FUNDING CORPORATION, and JOHN AND MARY DOES 1-20,
DOE PARTNERSHIPS, CORPORATIONS OR OTHER ENTITIES
1-20, Defendants

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 99-0175(1))

MEMORANDUM OPINION

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

Defendant-Appellant Gwendolyn K. De Rego (Gwendolyn) appeals from the October 4, 2000 Judgment of the Second Circuit Court, entered by Circuit Court Judge Artemio C. Baxa, stating that "summary judgment and an interlocutory decree of foreclosure are hereby entered in favor of [Plaintiff-Appellee Norwest Mortgage, Inc. (NMI)] . . . against all Defendants as there is no just reason for delay pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure."

Gwendolyn also appeals the order entered by Judge Baxa on December 1, 2000, entitled, "Order Denying Defendant Gwendolyn K. De Rego's Motion for Reconsideration and to Set Aside and Vacate 1. 'Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Joseph A. De Rego, Gwendolyn K. De Rego and All Other Defendants

and for Interlocutory Decree of Foreclosure,' Filed on October 4, 2000; 2. 'Judgment' Filed on October 4, 2000; Filed on October 16, 2000; Order" [sic].

We vacate and remand.

BACKGROUND

The relevant events occurred chronologically as follows:

April 22, 1997. Gwendolyn and Defendant Joseph A. De Rego (Joseph) (collectively the De Regos) borrowed \$296,250 from NMI and secured their obligation to pay it with a mortgage on their residence at RR 2 Box 86, Kula, Hawai'i 96790. Interest was at the rate of 7.875% per annum. Payments were at \$2,148.02 per month. Payments commenced on June 1, 1997. The final payment date was May 1, 2027.

April 23, 1977. The De Regos signed the Truth-in-Lending Disclosure document, which designated an annual percentage rate of 8.0929%. The document also noted the payment schedule as follows: twelve payments in the amount of \$1,946.15 to be paid monthly commencing June 1, 1997, 347 payments of \$2,148.02 commencing June 1, 1998, and a final payment of \$2,145.47 on May 1, 2027.

March 17, 1999. Alleging a failure to pay, NMI filed its Complaint to Foreclose Mortgage (complaint).

March 29, 1999. The De Regos informed NMI by letter that they cancelled the mortgage loan

under the authority granted to us by the Truth In Lending Act and its implementing Regulation Z. 15 U.S.C. § 1641(c).

[NMI] failed to provide the required Notice of Right To Cancel and Federal Disclosure Statement. Such violations allow us to cancel the transaction and receive back all payments paid on the loan plus have your client's security interest in our home voided. 15 U.S.C. § 1635 (a)(b).

April 12, 1999. The De Regos filed their answer to the complaint, in relevant part, as follows:

5. [The De Regos] admit some money is owed and affirmatively assert that they have tendered two cashiers check[s] totaling in the amount of \$2,341.24 (see exhibit "A") but [NMI] refused to accept the money.

DEFENSES

6. [The De Regos] intend to rely on the defenses of Unfair and Deceptive Acts and Practices committed by [NMI].

7. [The De Regos] intend to rely on the defense of the Truth in Lending Act to rescind the subject Mortgage.

Exhibit "A" is a letter dated March 8, 1999, from the attorney for NMI to the De Regos, which states, in relevant part, as follows:

Our client [NMI] has instructed us to return the enclosed . . . cashier's check . . . dated January 22, 1999 in the amount of \$1,300.00 and check No. 4966806 6 dated February 12, 1999 in the amount of \$1,041.24.

These checks are insufficient to bring your note and mortgage current. Should you wish to reinstate your mortgage, please contact us for the figures.

August 27, 1999. NMI filed "Plaintiff's Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties."

September 14, 1999. The De Regos filed their opposition to NMI's motion for summary judgment and stated, in relevant part, as follows:

1. [The De Regos] properly canceled the subject April 22, 1997 mortgage transaction by sending a letter of rescission to [NMI] . . . on March 30, 1999. This formal notice of rescission was made under the authority of the Truth In Lending Act and Regulation Z.

2. [The De Regos] used their home as security for the loan and was [sic] not provided with the required NOTICE OF RIGHT TO CANCEL or the FEDERAL DISCLOSURE STATEMENT. This is in violation of the disclosure requirements of the Truth In Lending Act. 15 U.S.C. § 1635(a)

The above document was accompanied by the Declaration of Gwendolyn K. De Rego wherein Gwendolyn declared, in relevant part, that "I did not receive any copies of the NOTICE OF RIGHT TO CANCEL or the FEDERAL DISCLOSURE STATEMENT that should have been provided to me with the necessary information concerning the finance charges for the subject mortgage loan."

October 4, 1999. NMI responded to the De Regos' September 14, 1999 document and stated, in relevant part, as follows:

[The De Regos] claim that they did not receive any copies of the NOTICE OF RIGHT TO CANCEL or the FEDERAL DISCLOSURE STATEMENT with respect to the subject mortgage.

However, as the attached exhibits demonstrate, [the De Regos] acknowledged receipt of both the Notice of Right to Cancel and the Truth in Lending disclosure statement.

At the bottom of one of the Notice of Right to Cancel is Joseph's signature under the statement, "I the undersigned acknowledge receiving 2 copies of this notice[.]" At the bottom of the other Notice of Right to Cancel is Gwendolyn's signature under an

identical statement. The Truth-in-Lending Disclosure is signed by both Joseph and Gwendolyn below the statement that "[b]y signing below, I/we acknowledge that I/we received a copy of this disclosure on 4-23-97."

October 7, 1999. Gwendolyn filed "Defendant Gwendolyn K. De Rego's Notice of Filing of Bankruptcy" stating that she had filed "a Chapter 13 Voluntary Petition in the United States Bankruptcy Court on October 6, 1999[.]"

January 14, 2000. NMI filed a "Notice of Bankruptcy Court's Order Dismissing Case." The order had been entered in Case Number 99-04249 on December 13, 1999.

February 14, 2000. NMI filed an "Amended Notice of Hearing of Plaintiff's Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties Filed 8/27/99" notifying the De Regos that the hearing was scheduled to commence at 8:30 a.m. on March 21, 2000, in Judge Baxa's courtroom.

March 20, 2000. Gwendolyn filed "Defendant Gwendolyn K. De Rego's Notice of Filing Bankruptcy" stating that she had filed "a Chapter 7 Voluntary Petition in the United States Bankruptcy Court on March 17, 2000[.]"

May 24, 2000. NMI filed a "Notice of Bankruptcy Court's Order Granting Motion for Relief from Automatic Stay" stating that on May 5, 2000, in Case No. 00-01014-LK, the

Bankruptcy Court had authorized NMI to proceed to foreclose "subject to not obtaining a deficiency judgment against [Gwendolyn] without further order of the Bankruptcy Court."

June 19, 2000. NMI filed an "Amended Notice of Hearing of Plaintiff's Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties Filed 8/27/99" notifying the De Regos that the hearing was scheduled to happen at 8:30 a.m. on July 18, 2000, in Judge Baxa's courtroom.

July 12, 2000. The De Regos filed a memorandum stating, in relevant part, as follows:

[NMI] . . . produced the NOTICE OF RIGHT TO CANCEL and the FEDERAL DISCLOSURE STATEMENT that contained the signatures of [the De Regos], however the fact that [NMI] had these signed copies in their possession does not imply that [the De Regos] received those documents.

[The De Regos] contend that they did not receive the required NOTICE OF RIGHT TO CANCEL and the required FEDERAL DISCLOSURE STATEMENT, [and] written acknowledgment of receipt of any disclosures required does no more than create a rebuttable presumption of delivery thereof, 15 U.S.C. § 1635 (c). Regulation Z § 226.15(b) states that "a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind." [The De Regos] should have received 4 copies.

[The De Regos] after reviewing the FEDERAL DISCLOSURE STATEMENT provided in [NMI's] EXHIBIT, in their reply memorandum, noticed that 12 payments were to be paid in the amount of \$1946.15, and one final payment in the amount of \$2,145.47 and different than the amount shown on the mortgage note, . . . although the amount \$2,148.02 shown, represents the greater amount of the balk [sic] of the payments, it does not show the two lessor [sic] payment amounts, 12 payments at \$1,946.15 and a final payment of \$2,145.47. Since [the De Regos] were contractually obligated to pay the amount disclosed on the mortgage note, the amount of \$2,148.02 for 360 payments does not equate to the "Total of Payments" on the Disclosure Statement provided by [NMI]. The "Total of Payments" disclosed is \$770,862.21, when contractually the amount should have been \$773,287.20 or a difference of \$2,424.99 more than is actually disclosed on the Federal Disclosure Statement and is an undisclosed finance charge.

In an accompanying declaration, Gwendolyn stated that she "did not receive any copies of the NOTICE OF RIGHT TO CANCEL or the FEDERAL DISCLOSURE STATEMENT that should have been provided to me with the necessary information concerning the mortgage cancellation process and finance charges for the subject mortgage loan."

July 26, 2000. NMI filed an "Amended Notice of Hearing of Plaintiff's Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties Filed 6/19/00" notifying the De Regos that the hearing was scheduled to happen at 8:30 a.m. on August 22, 2000, in Judge Baxa's courtroom.

August 22, 2000. After a hearing, the court scheduled the matter for further hearing on September 12, 2000 at 8:30 a.m.

September 5, 2000. In a memorandum, Gwendolyn noted, in relevant part, that "[NMI] did not provide to this Court any sworn statement of any one person to indicate that delivery of the required Truth in Lending Act Material Disclosures was properly delivered to [the De Regos]."

In an accompanying affidavit, Gwendolyn restated the relevant allegations asserted in her prior declarations.

September 12, 2000. NMI filed the September 11, 2000 Affidavit of Mark Tokunaga stating, in relevant part, as follows:

1. That I am an Account Executive of Norwest Mortgage, now known as Wells Fargo Home Mortgage¹ and have personal knowledge of the facts as set forth in this affidavit. . . .

2. That I personally handled and closed the mortgage loan to [the De Regos]

. . . .

4. That I delivered to [Joseph] and [Gwendolyn] copies of the two signed Notice of Right to Cancel and the Truth-in-Lending Disclosure as set forth in Exhibits "A", "B" and "C".

(Footnote added.)

September 12, 2000. The De Regos failed to appear at the further hearing.²

October 4, 2000. Judge Baxa entered the "Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Joseph A. De Rego, Gwendolyn K. De Rego and All Other Defendants and for Interlocutory Decree of Foreclosure." In this document it was decided that, as of May 12, 1999, a total of \$318,201.26 was owed and that Matthew S. Kohm, Esq., would be the Commissioner. This document was silent on the defenses asserted by the De Regos.

October 4, 2000. Judge Baxa entered a judgment stating that "summary judgment and an interlocutory decree of foreclosure are hereby entered in favor of [NMI] . . . against all

¹ If Plaintiff-Appellee Norwest Mortgage, Inc., has changed its name, the court should be properly informed and the record should be corrected.

² In the opening brief, it is alleged, in relevant part, that on "the September 12, 2000 hearing day, [Gwendolyn] while waiting her turn out side of the Court room did not hear her case being called up over the speaker."

Defendants as there is no just reason for delay pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure."

October 16, 2000. Gwendolyn filed a motion for reconsideration and to set aside and vacate the court's relevant orders and judgment stating, in relevant part, that "[o]n September 12, 2000, 8:30 a.m. [Gwendolyn] was patiently waiting her turn outside of the Court room for [NMI's motion for summary judgment] to be heard that morning, when [Gwendolyn] went to recheck her turn to be called before this Court, she had been informed that her case had already been called to order, and that [NMI's] Motion had been Granted because [Gwendolyn] was not present in Court." This motion was accompanied by Gwendolyn's declaration and by Joseph's affidavit.

December 1, 2000. After a hearing on November 21, 2000, Judge Baxa entered an order denying Gwendolyn's October 16, 2000 motion.

December 8, 2000. Gwendolyn's December 8, 2000 letter to the court was filed and construed to be a request for a stay pending appeal sans supersedeas bond.

January 12, 2001. NMI opposed the motion, citing Hawai'i Rules of Civil Procedure Rule 62(d).

January 22, 2001. Gwendolyn supported the motion with a memorandum.

It appears that the motion was heard on January 23 and 30, 2001, and denied for lack of supersedeas bond.

POINTS ON APPEAL

1. NMI's security interest became void when the De Regos notified NMI of their rescission of the transaction creating it.

2. The sworn statements submitted by the De Regos in opposition to NMI's motion for summary judgment that the De Regos were never provided with the Federally Mandated Truth in Lending Act material disclosure documents concerning the April 22, 1997 credit transaction establish a genuine issue of material fact and preclude the entry of summary judgment.

3. The De Regos

would have had a continuing right to rescind the April 22, 1997 credit transaction had the Truth in Lending Act Disclosure Statement and other required documents been provided to them, . . . in that the Mortgage Note monthly payment amount of \$2,148.02 when calculated for a 360 month payment plan totals up to \$773,287.20 and is higher than the disclosed Truth in Lending Act amount of \$770,862.21 . . . [and] presents an undisclosed finance charge of \$2,424.99.

DISCUSSION

Initially, we note that the October 4, 2000 Judgment is not a default judgment. It is a summary judgment. Therefore, the fact that the De Regos failed to appear at the September 12, 2000 further hearing is not relevant.

In Hawaii Community Federal Credit Union v. Keka, 94 Hawai'i 213, 11 P.3d 1 (2000), the Hawai'i Supreme Court stated, in relevant part, as follows:

TILA [the Truth In Lending Act] provides that "written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof." 15 U.S.C. § 1635(c). . . . We therefore hold that the Kekas' affidavits and declaration raised a genuine issue of material fact as to whether the Credit Union timely provided the Kekas with the disclosures required by TILA."

Id. at 224-25, 11 P.3d at 12-13.

In the instant case, we similarly conclude that the De Regos' affidavits and declarations raised a genuine issue of material fact as to whether NMI provided the De Regos with the disclosures required by TILA.

CONCLUSION

Accordingly, we vacate the circuit court's (1) October 4, 2000 Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Joseph A. De Rego, Gwendolyn K. De Rego and All Other Defendants and for Interlocutory Decree of Foreclosure, and (2) October 4, 2000 Judgment. We remand for the following action: (a) a decision as to whether the allegation "that the Mortgage Note monthly payment amount of \$2,148.02 when calculated for a 360 month payment plan totals up to \$773,287.20 and is higher than the disclosed Truth in Lending Act amount of \$770,287.20 . . . [and] presents an undisclosed finance charge of \$2,424.99" is a genuine issue of material fact; and (b) a trial wherein the

certain one and possibly two genuine issues of material fact presented in this case is adjudicated.

DATED: Honolulu, Hawai'i, January 25, 2002.

On the briefs:

Gary Victor Dubin
for Defendant-Appellant.

Chief Judge

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

Associate Judge

Associate Judge