

NO. 23942

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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))

ORDER DENYING MOTION FOR RECONSIDERATION
(By: Burns, C.J., Lim and Foley, JJ.)

In this appeal No. 23942, we filed a Memorandum Opinion on January 25, 2002, vacating the October 4, 2000 Judgment entering an interlocutory decree of foreclosure and remanding with instructions.

On February 4, 2002, Plaintiff-Appellee Norwest Mortgage, Inc., filed its motion for reconsideration, noting the following facts:

1. Defendant-Appellant did not obtain a stay of the October 4, 2000 interlocutory decree of foreclosure.

2. The circuit court's Order Confirming Sale, Distribution of Proceeds, and for Writ of Possession (a) was entered on November 13, 2001, (b) was finalized pursuant to Hawai'i Rules of Civil Procedure Rule 54(b), and (c) authorized

the payment of the proceeds of the sale to various individuals and entities.

In City Bank v. Saje Ventures II, 7 Haw. App. 130, 748 P.2d 812 (1988), the Saje defendants sought (1) a reversal of the circuit court's order confirming the commissioner's public auction sale and (2) a remand for a new sale. Since the Saje defendants did not obtain a stay of the confirmation order and since there had been a closing of the sale, this court decided that it could not grant the relief sought and dismissed the appeal because it was moot.

Based on City Bank, Plaintiff-Appellee alleges that this appeal is moot and requests this court to reconsider its January 25, 2002 Memorandum Opinion.

As noted above, there is more to the circuit court's October 4, 2000 Judgment than authorization for the sale. It may be that there has been a closing of the sale which cannot be undone. The circuit court can decide that question. However, the questions of whether the decree of foreclosure and everything that happened after it were authorized and, if not, what redress Defendant-Appellant is entitled to and from whom are not moot. On remand, the circuit court can decide those questions.

Therefore, IT IS HEREBY ORDERED that the February 4, 2002 motion for reconsideration is denied.

We note that "[t]he failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation." AIG Hawai'i Ins. Co. v. Bateman, 82 Hawai'i 453, 460, 923 P.2d 395, 402 (1996) (citation omitted). When the sale occurred and this court's holding in City Bank became relevant, it was the duty of Plaintiff-Appellee and its attorneys to inform this court of that fact. That duty was violated.

DATED: Honolulu, Hawai'i, February 14, 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