

**NOT FOR PUBLICATION**

---

NO. 24137

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

AMERICAN SAVINGS BANK, F.S.B., Plaintiff-Appellee,  
v. VIC GARO MIGUEL and ESTRELLITA GARIN MIGUEL,  
Defendants-Appellants

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIVIL NO. 00-01-3415)

MEMORANDUM OPINION

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

Defendants-Appellants Vic Garo Miguel and Estrellita Garin Miguel (Miguels) appeal from the (a) February 7, 2001 "Order Granting Plaintiff's Motion for Summary Judgment Against Defendants Vic Garo Miguel and Estrellita Garin Miguel on Its Complaint Filed November 6, 2000, Filed December 11, 2000"; (b) February 7, 2001 "Plaintiff's Judgment Jointly and Severally Against Defendants Vic Garo Miguel and Estrellita Garin Miguel"; (c) February 7, 2001 Judgment; and (d) April 19, 2001 "Findings of Fact, Conclusions of Law and Order re Plaintiff's Motion for Summary Judgment Against Defendants Vic Garo Miguel and Estrellita Garin Miguel on Its Complaint Filed November 6, 2000, Filed December 11, 2000" -- all filed in the Circuit Court of the First Circuit (circuit court).<sup>1</sup> Summary judgment was granted against Miguels and in favor of Plaintiff-Appellee American

---

<sup>1</sup>The Honorable R. Mark Browning presided.

Savings Bank, F.S.B. (Bank) with respect to all claims raised in Bank's November 6, 2000 Complaint (Complaint), and the judgment was certified as final pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b).

Miguels allege the circuit court erred by granting summary judgment, over Miguels' objection, where (1) Bank had not submitted admissible documentation regarding the loan default, and (2) Miguels had alleged the affirmative defense of a "recoupment claim by way of offset" and had testified that they had not received disclosures required to comply with the Truth in Lending Act (TILA).

Upon careful review of the record, we disagree with Miguels' contentions and affirm.

## **I. BACKGROUND**

### **A. Factual History**

On April 25, 1995, Miguels entered into an agreement with Bank establishing a \$99,900.00 "Equity Powerline" with required minimum monthly payments; interest at an initial annual percentage rate of 7.99% for the period from April 25 to December 31, 1995 and a variable rate thereafter; and a maturity date of April 25, 2000 (April Note). On September 14, 1995, Miguels entered into a Note and Security Agreement to borrow \$40,000 from Bank, with required minimum monthly payments, interest at 12.25%, and a maturity date of September 20, 2010

(September Note). Each loan was secured by the property at 98-797 Ainanui Loop, Aiea, Hawai'i.<sup>2</sup> In its answering brief Bank notes that it "did not pursue its remedy of foreclosure," so foreclosure is not an issue here.

**B. Procedural History**

In its Complaint, Bank alleged that Miguels were "in default under the terms, covenants, and conditions of [the April Note and September Note] due to the failure to timely pay the sums due thereunder." The Complaint also stated that, due to Miguels' failure to timely cure the defaults, Bank would exercise its option to "declare the entire remaining principal balance and interest thereon due and payable, together with all other charges and indebtedness provided for in [the April Note and September

---

<sup>2</sup>The April Note stated in part:

MORTGAGE. In order to assure us [Bank] that you [Miguels] will keep all the promises you make in this Agreement, we will receive a mortgage (the "Mortgage") on the real estate located at the address shown on page one (1) and other rights and interests that go along with the parcel or parcels of real estate (the "Property"), as described in the Mortgage. . . . The Mortgage describes the rights we have with regard to the Property if you fail to keep all the promises you make in this Agreement and also contains additional promises that will be made to us regarding the Property.

The September Note stated in part:

To protect you [Bank] in case I [Miguels] don't repay my loan or don't keep some other promise I am making to you in this Note, I give you the following security: . . . By a mortgage dated September 14, 1995 I am giving you a Junior real estate mortgage lien on certain property at 98-797 Ainanui Loop[,] Aiea, HI 96701 which is more fully described in that mortgage.

If the mortgages were memorialized in additional documents, those documents are not in the record before this court.

Note]." Bank asked for judgment against Miguels for the amounts due under both Notes; for expenses, costs and reasonable attorneys' fees, and pre- and post-judgment interest; and for other just and equitable relief.

In their answer filed November 27, 2000, Miguels admitted the following:

2. DEFENDANTS MIGUEL agree that on April 25, 1995, they entered into a consumer credit transaction with Plaintiff for the loan amount of \$99,000 [sic] as described in paragraph 3.

3. DEFENDANTS MIGUEL also agree that on September 14, 1995, they entered into another consumer credit transaction with Plaintiff for a loan amount of \$40,000 as described in paragraph 4.

Miguels denied the remaining allegations and stated their intent to rely on the defenses of unfair and deceptive practices by Bank and rescission by way of recoupment.

On December 11, 2000, Bank filed a motion for summary judgment (SJ Motion) against Miguels. Bank sought judgment in the amount of \$144,082.02 as of November 15, 2000 and immediate execution thereon. Bank attached to the SJ Motion a declaration made by Mary Antonio (Antonio Declaration), in which she averred that she served as Manager of the Collections and Recovery Services Department at Bank and in which she attested to other facts related to the loans made by Bank to Miguels and to the four attached exhibits as true and correct copies.

On January 3, 2001, Miguels filed Defendants' Opposition to Plaintiff's Motion for Summary Judgment. Miguels

asserted that the "subject loans has [sic] been cancelled" by Miguels, mentioned a "counterclaim<sup>3</sup> alleging violations of the Truth in Lending Act," and asserted that "[f]ailure by [Bank] to provide the required 2 copies of the NOTICE OF THE RIGHT TO CANCEL and the date the 3 day rescission period expires are grounds to cancel the contract and void the security interest held by the creditor." Miguels attached as exhibits two letters, one for each loan, both dated December 31, 2000 and both notifying Bank that they wished to rescind the respective loans. The letter referring to the September 14, 1995 loan stated, "Your company failed to provide to each of us the required 2 copies of the NOTICE OF THE RIGHT TO CANCEL. Plus there are no expiration date of the 3 day rescission period on the one copy of the NOTICE OF THE RIGHT TO CANCEL that your [sic] gave to us."

On January 4, 2001, Miguels submitted a Memorandum in Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment, in which they stated that they were given only one copy of the Notice of Right to Cancel on each loan, each notice did not set forth a date when the three-day rescission period expired, and this failure precluded summary judgment. Miguels attached a declaration, signed by each of the Miguels, in

---

<sup>3</sup>On January 3, 2001, Miguels filed a Counterclaim against Bank to rescind the loans due to Truth In Lending Act (TILA) violations and asserted recoupment. Miguels' counterclaim is not before this court and is not addressed herein.

which they asserted that the copies of the Notice of Right to Cancel given to them as part of the two loan transactions did not contain the dates when the rescission periods expired. Miguels attached two copies (one for each loan) of the "Notice of Right to Cancel (When Opening An Account)." Miguels did not attach to their memorandum any affidavits setting forth specific facts to counter Antonio's Declaration as to the amounts owed by Miguels under the two loans.

On January 8, 2001, Bank filed Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment, in which Bank stated that the case involved an "action in assumpsit" rather than the "foreclosure of real property." Bank asserted, among the many grounds on which it was due summary judgment, that the right to rescind the loans under TILA expired three years after the date of loan consummation. Attached to the reply memorandum was a supplemental declaration of one of Bank's attorneys setting forth additional attorneys' fees.

On January 11, 2001, the circuit court held a hearing on the SJ Motion. At the hearing, Estrellita Miguel argued that Bank failed to provide admissible evidence to substantiate the amounts owed by Miguels under either loan because Bank failed to provide the ledgers documenting both loans' payment histories and that TILA violations by Bank would allow for rescission of the loans, precluding summary judgment.

On February 7, 2001, the circuit court filed its "Order Granting Plaintiff's Motion for Summary Judgment Against Defendants Vic Garo Miguel and Estrellita Garin Miguel on Its Complaint Filed November 6, 2000, Filed December 11, 2000." The circuit court entered judgment against Miguels in the amount of \$147,199.59 (\$107,365.74 on the April Note; \$37,352.01 on the September Note; and \$2,481.84 in attorneys' fees and costs). Pursuant to HRCF Rule 54(b), the order was entered as a final judgment in favor of Bank and against Miguels. On February 7, 2001, two separate Judgments were filed.

On March 8, 2001, Miguels filed their Notice of Appeal.

On April 19, 2001, the circuit court entered its "Findings of Fact, Conclusions of Law and Order Re Plaintiff's Motion for Summary Judgment Against Defendants Vic Garo Miguel and Estrellita Garin Miguel on Its Complaint Filed November 6, 2000, Filed December 11, 2000."

## **II. STANDARDS OF REVIEW**

We review de novo a circuit court's grant or denial of a motion for summary judgment. Hawaii Cmty. Fed. Credit Union v. Keka (Keka), 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000).

Accordingly,

[o]n appeal, an order of summary judgment is reviewed under the same standard applied by the circuit courts. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law. In other words, 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 of material fact and the moving party is entitled to a judgment as a matter of law.

Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawai'i 286, 291, 944 P.2d 83, 88 (App. 1997) (quoting Higa v. Lino, 82 Hawai'i 535, 537, 923 P.2d 952, 954 (App. 1996)); see also HRCP Rule 56(c).<sup>4</sup>

On a motion for summary judgment, 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." Crichfield v. Grand Wailea Co., 93 Hawai'i 477, 482-83, 6 P.3d 349, 354-55 (2000) (internal quotation marks omitted). "[A] 'genuine issue as to any material fact' . . . under a conflict in the affidavits as to a particular matter must be of such a nature that it would affect the result." Richards v. Midkiff, 48 Haw. 32, 39, 396 P.2d 49, 54 (1964).

In reviewing a circuit court's grant or denial of a motion for summary judgment, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion," Crichfield, 93 Hawai'i at 483, 6

---

<sup>4</sup>HRCP Rule 56(c) provides, in pertinent part:

**Rule 56. Summary judgment.**

. . . .  
(c) *Motion and proceedings thereon.* . . . The judgment sought shall be rendered forthwith 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount damages.



P.3d at 355 (internal quotation marks and brackets omitted), and "any doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving party." GECC Fin. Corp. v. Jaffarian (Jaffarian), 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995), aff'd and modified, 80 Hawai'i 118, 905 P.2d 624 (1995).

Similarly,

[c]ourts will treat the documents submitted in support of a motion for summary judgment differently from those in opposition. Although they carefully scrutinize the materials submitted by the moving party to ensure compliance with the requirements of Rule 56(e), HRCP (1990), the courts are more indulgent towards the materials submitted by the non-moving party. 10A C. Wright, A. Miller and M. Kane, Federal Practice and Procedure: Civil § 2738 (1983) (Wright and Miller). This is because of the drastic nature of summary judgment proceedings, which should not become a substitute for existing methods of determining factual issues. Snider v. Snider, 200 Cal. App. 2d 741, 19 Cal. Rptr. 709 (1962).

Affidavits in support of a summary 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. Also, ultimate or conclusory facts or conclusions of law are not to be utilized in a summary judgment affidavit. Wright and Miller, supra.

Miller v. Manuel, 9 Haw. App. 56, 66, 828 P.2d 286, 292 (1991).

"Once the movant has satisfied the initial burden of showing that there is no genuine issue of material fact, the opposing party must come forward, through affidavit or other evidence, with specific facts showing that there is a genuine issue of material fact." Id. at 65, 828 P.2d at 292. If the non-moving party fails to meet this burden, the moving party is entitled to summary judgment as a matter of law. Hawaii

Broadcasting Co., Inc. v. Hawaii Radio, Inc., 82 Hawai'i 106, 112, 919 P.2d 1018, 1024 (App. 1996); Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988); see also HRCF Rule 56(e).

In deciding a motion for summary judgment, a circuit court must keep in mind an important distinction:

A judge ruling on a motion for summary judgment cannot summarily try the facts; his role is limited to applying the law to the facts that have been established by the litigants' papers. Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition or because it appears that the adversary is unlikely to prevail at trial. This is true even though both parties move for summary judgment. Therefore, if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper.

Kajiya v. Dep't of Water Supply, 2 Haw. App. 221, 224, 629 P.2d 635, 638-39 (1981) (quoting 10 Wright and Miller, Federal Practice and Procedure: Civil § 2725 (1973)).

In general, "summary judgment must be used with due regard for its purpose and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues." Miller, 9 Haw. App. at 65-66, 828 P.2d at 292 (internal quotation marks and brackets omitted).

### **III. DISCUSSION**

This court has stated that, in the context of the review of a grant or denial of summary judgment, we apply a three-step analysis:

First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond.

Secondly, we determine whether the moving party's showing has established the material facts which justify a judgment in movant's favor. The motion must stand self-sufficient and cannot succeed because the opposition is weak.

Where a plaintiff is the moving party, this involves examining whether the plaintiff has established prima facie the material facts necessary to establish the essential elements of the claim or claims for which summary judgment in the plaintiff's favor is being sought.

When a plaintiff's summary judgment motion prima facie justifies a judgment on the plaintiff's claims, the third and final step is to determine (1) whether the opposition has demonstrated the existence of a triable, material factual issue on the plaintiff's claims, or (2) if the opposition has adduced evidence of material facts which demonstrate the existence of affirmative defenses that would defeat the plaintiff's claim, whether the plaintiff has demonstrated conclusively the non-existence of such facts. Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue.

Ocwen Fed. Bank, FSB, v. Russell (Russell), 99 Hawai'i 173, 183, 53 P.3d 312, 322 (App. 2002) (quoting Mednick v. Davey, 87 Hawai'i 450, 457, 959 P.2d 439, 446 (App. 1998)). We examine the order granting summary judgment under this analytical framework.

#### **A. Issues Framed by the Pleadings**

In its Complaint, Bank alleged that Miguels defaulted on the April and September Notes by their failure to timely pay the amounts due under the Notes and that Bank was entitled to reimbursement for sums advanced, in addition to any costs resulting from the default. Bank, therefore, sought relief in *assumpsit*.<sup>5</sup>

---

<sup>5</sup>This is an action for recovery of sums due under a contract. "Assumpsit" is defined as a "common-law action for breach of such a promise or for breach of a contract." Black's Law Dictionary 120 (7th ed. 1999).

In their answer, Miguels denied the default claims and declared their intent to rely on the defenses of "unfair and deceptive practices" committed by Bank and to raise a TILA "rescission by way of recoupment" claim.

**B. Facts Established in Bank's Summary Judgment Motion**

This court has recently reemphasized that:

In demonstrating the absence of genuine issues of material facts, the party moving for summary judgment

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.

Associates Fin. Serv. Co. of Hawaii, Inc., v. Richardson, 99 Hawai'i 446, 458, 56 P.3d 748, 760 (App. 2002) (quoting Jaffarian, 79 Hawai'i at 521, 904 P.2d at 535).

To obtain a judgment on a note, the lender must prove that the borrower defaulted on the note and the lender was entitled to relief under the terms of the note. See Russell, 99 Hawai'i at 184, 53 P.3d at 323 (in a foreclosure action, this court held that genuine issues of material fact regarding validity of note, assignee's right to foreclose, and lack of compliance with TILA precluded summary judgment).

On December 11, 2000, Bank moved for summary judgment on the grounds that there "is no genuine issue as to any material fact" and that Bank was entitled to judgment "as a matter of

law". Bank supported its SJ Motion by appending the Antonio Declaration. Copies of the April Note, September Note, and the computerized account statements for both loans were attached as exhibits.

**1. Admissibility of Antonio Declaration and Exhibits**

Miguels contend that the Antonio Declaration and the attached exhibits, particularly the computer printouts depicting Miguels' account status, are inadmissible under the standards required for summary judgment.

Regarding the form of affidavits submitted in a motion for summary judgment, HRCF Rule 56(e) provides:

**Rule 56. Summary judgment.**

. . .

(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.

Antonio stated that her Declaration was based on "personal knowledge". She stated she was Manager of Collections and Recovery Services at Bank and "custodian of the records and files for the loan [sic] described herein, which records and

files are kept by [Bank] in a routine manner in the ordinary course of its business in a filing and computer system that is maintained under my custody and control." The Antonio Declaration referred to four attached exhibits: copies of the April Note, September Note, and two computer printouts indicating the payment status of each Note. Antonio swore and attested to the authenticity of each of the four attached exhibits. The alleged delinquent amounts set forth in the Antonio Declaration correlated to the figures found in the computer printout for each Note. The Declaration did not refer to other documents.

Hawai'i Rules of Evidence (HRE) Rule 802 states the general rule that "[h]earsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute." Hearsay is defined, in HRE Rule 801 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."

The Hawai'i Supreme Court in Keka, stated that "[t]he rule in Hawaii is that an affidavit consisting of inadmissible hearsay cannot serve as a basis for awarding or denying summary judgment." 94 Hawai'i at 221, 11 P.3d at 9 (internal quotation marks and brackets omitted). In Keka, the borrowers appealed from a grant of summary judgment in favor of lender. The supreme court, in part, agreed with the borrowers that the lender failed

to support its motion for summary judgment with admissible evidence because the lender's officer's

bald allegation that he was "familiar" with the [borrowers'] payment history does not satisfy the foregoing foundational requirement. Obviously, an affiant does not comply with the imperative of HRCP Rule 56(e) to produce and authenticate the records upon which he or she is relying merely by omitting any reference to them in the affidavit.

Id. at 222, 11 P.3d at 10. The supreme court partially vacated and remanded on these and other grounds. This court in Miller v. Manuel, supra, noted that "[a]ffidavits in support of a summary 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." 9 Haw. App. at 66, 828 P.2d at 292.

Exhibits attached to a motion for summary judgment, including computer printouts, are hearsay statements that require an exception to render them admissible. HRE Rule 801; see also GE Capital Hawaii, Inc. v. Yonenaka (Yonenaka), 96 Hawai'i 32, 40, 25 P.3d 807, 815 (App. 2001) (In appeal of grant of summary judgment in favor of lender who sought foreclosure, this court held, in part, that affidavit of loan officer was inadmissible hearsay where it was "based upon" statements contained in records not submitted below and vacated the judgment); HRCP Rule 56(e).

Bank contends the printouts were admissible under HRE Rule 803(b)(6) (1993),<sup>6</sup> which states that the following are not

---

<sup>6</sup>Bank mistakenly refers to HRE Rule 803(a)(6), which does not exist.

excluded by the hearsay rule, even though the declarant is available as a witness:

- (6) 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 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.

The Antonio Declaration contains all of the requirements for the business records exception to apply. See GE Capital Hawaii, Inc. v. Miguel (Miguel), 92 Hawai'i 236, 242, 990 P.2d 134, 140 (App. 1999) (a foreclosure action in which this court reversed grant of summary judgment in favor of lender because lender had not carried its burden of production where it had not introduced the records and files on which the loan officer's affidavit was based). Antonio stated that the exhibits were records and files "kept by [Bank] in a routine manner in the ordinary course of its business"; entries into the records were "made at or near the time of any event recorded" therein; entries were made by persons "having personal knowledge" of such events; entries were reviewed periodically by Antonio to ensure accuracy and completeness; and entries were relied upon by Bank in the "conduct of its business." Here, the record does not reveal any circumstances that indicate lack of trustworthiness.

The instant case is distinguishable from Keka (in which the lender's affidavit avoided mention of the documents relied



upon) and Yonenaka (in which the records referred to in the affidavit remained unsubmitted and in the lender's possession) because the Notes and payment history referred to in the Antonio Declaration were attested to and attached. Compare Keka, 94 Hawai'i at 222, 11 P.3d at 10, and Yonenaka, 96 Hawai'i at 40, 25 P.3d at 815.

Unlike the lender in Miguel, Bank satisfied its initial burden of production by submitting the documents referred to in the Antonio Declaration and rendering them admissible. Miguel, 92 Hawai'i at 241, 990 P.2d at 139. When Miguels failed to submit an opposing affidavit and supporting documents to counter the material facts set forth in the Antonio Declaration relative to the amount of their debt, Miguels failed to demonstrate specific facts that presented a genuine issue worthy of trial.

Thus, Bank satisfied its burden as movant for summary judgment because the Antonio Declaration was admissible as a hearsay exception under HRE Rule 803(b)(6) and served as the basis for granting summary judgment. Keka, 94 Hawai'i at 221-23, 11 P.2d at 9-11.

**C. Facts Established Regarding Miguels' Affirmative Defenses**

Following Bank's satisfaction of its burden of proof as movant for summary judgment, the burden shifted to Miguels to respond to the motion and "demonstrate specific facts, as opposed

to general allegations, that present a genuine issue worthy of trial." Jaffarian, 79 Hawai'i at 521, 904 P.2d at 535.

### **1. Truth in Lending Act Claims**

Miguels contend the circuit court erred in granting summary judgment where they alleged TILA violations.<sup>7</sup> In Russell, this court explained TILA as it applies to a borrower's remedies:

In Hawaii Community Fed. Credit Union v. Keka, 94 Hawai'i 213, 223, 11 P.3d 1, 11 (2000), the Hawai'i Supreme Court, quoting from the United States Supreme Court's decision in Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412-13, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998), explained that

the declared purpose of the federal Truth in Lending Act (TILA) is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him or her and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices. Accordingly, TILA requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights. See 15 U.S.C. §§ 1631, 1632, 1635, 1638. Failure to satisfy TILA subjects a lender to criminal penalties for noncompliance, see § 1611, as well as to statutory and actual damages traceable to a lender's failure to make the requisite disclosures, see § 1640. Section 1640(e) provides that an action for such damages may be brought within one year after a violation of TILA, but that a borrower may assert the right to damages as a matter of defense by recoupment or set-off in a collection action brought by the lender even after the one year is up.

Going beyond these rights to damages, TILA also authorizes a borrower whose loan is secured with his principal dwelling, and who has been denied the requisite disclosures, to rescind the loan transaction entirely until midnight of the third business day

---

<sup>7</sup>Miguels sent in a purported rescission for each loan on December 31, 2000. However, in their opening brief (at n.9) Miguels concede that rescission is barred by the three-year statutory limitation established under TILA. See Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415-19, 118 S. Ct. 1408, 1411-13 (1998). Therefore, we address only recoupment herein.

following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later. § 1635(a). TILA provides, however, that the borrower's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, even if the required disclosures have never been made. § 1635(f). TILA gives a borrower no express permission to assert the right of rescission as an affirmative defense after the expiration of the 3-year period.

99 Hawai'i at 175 n.4, 53 P.3d at 314 n.4 (internal quotation marks and brackets omitted).

**a. Recoupment**

The recoupment claim is controlled by common law.<sup>8</sup> In Pacific Concrete Federal Credit Union v. Kauanoë, 62 Haw. 334, 614 P.2d 936 (1980), an action on a loan, the Hawai'i Supreme Court found that the borrower's counterclaims alleging that the lender violated TILA's disclosure requirements were in the nature of recoupment because the counterclaims arose out of the same loan transactions that were the subject of the suit. The court

---

<sup>8</sup>The distinction between recoupment and set-off and counterclaim was described in Erickson v. Volcano Stables and Transp. Co. Ltd., 13 Haw. 428 (Hawai'i Terr. 1901):

Set-off and counter claim are purely statutory defenses while recoupment is a common law defense. The Supreme Court of Michigan distinguishes between set-off and recoupment as follows: "This defense" (recoupment) "is contradistinguishable from set-off in three essential particulars: 1st. In being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought. 2nd. In having no regard to whether or not such matters be liquidated or unliquidated. Wheat[] v. Dotson, [12] Ark. 699 [1852]. And 3rd that the judgment is not the subject of statutory regulations, but controlled by the rule of the common law." Ward v. Fellers, 3 Mich. [281,] 288 [1854].

13 Haw. at 430-31.

also found that the lower court had erred in granting summary judgment where loan ledgers had not been attached to lender's affidavit. The Hawai'i Supreme Court stated that "statutes of limitations are primarily designed to prevent stale claims and assure fairness to defendants and do not bar defenses such as recoupment." 62 Haw. at 343, 614 P.2d at 942. Under Kauano, a party can bring a recoupment claim at any time via counterclaim and ask to deduct any amounts from the debts owed. 62 Haw. at 337-38, 614 P.2d at 938-39. However, Miguels never submitted evidence contesting the amounts due under each note, evidence indicating that they had paid down either of the loans, or any other evidence establishing a genuine issue of material fact that recoupment was due to them. Miguels did not seek any other form of relief under TILA nor did they controvert any other material facts submitted at the SJ motion hearing.

Viewed in the light most favorable to Miguels, Bank submitted admissible evidence in support of its claims and Miguels failed to allege specific facts controverting this evidence. Therefore, the circuit court did not err in granting summary judgment. See Crichfield, 93 Hawai'i at 483, 6 P.3d at 355; see also Pancakes of Hawaii, 85 Hawai'i at 291, 944 P.2d at 88.

**IV. CONCLUSION**

For the aforementioned reasons, the "Order Granting Plaintiff's Motion for Summary Judgment Against Defendants Vic Garo Miguel and Estrellita Garin Miguel on Its Complaint Filed November 6, 2000, Filed December 11, 2000," filed February 7, 2001; "Plaintiff's Judgment Jointly and Severally Against Defendants Vic Garo Miguel and Estrellita Garin Miguel," filed February 7, 2001; the Judgment, filed February 7, 2001; and the "Findings of Fact, Conclusions of Law and Order re Plaintiff's Motion for Summary Judgment Against Defendants Vic Garo Miguel and Estrellita Garin Miguel on Its Complaint Filed November 6, 2000, Filed December 11, 2000," filed April 19, 2001, in the Circuit Court of the First Circuit are hereby affirmed.

DATED: Honolulu, Hawai'i, July 18, 2003.

On the briefs:

Gary Victor Dubin  
for defendants-appellants.

Acting Chief Judge

Adelbert Green  
for plaintiff-appellee.

Associate Judge

Associate Judge