NO. 24412

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MATRIX FINANCIAL SERVICES, INC., Plaintiff-Appellee, v.
BRUCE BAILEY KEKOALII CAMPBELL and
FRANCEEN LEILEHUA CAMPBELL, Defendants-Appellants;
JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS,
DOE CORPORATIONS, DOE ENTITIES, and DOE
GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 98-1356)

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

In this case of a judicial foreclosure of a mortgage, the mortgagees, namely Defendants-Appellants Bruce Bailey Kekoalii Campbell (Bruce) and Franceen Leilehua Campbell (together, the Campbells), appeal from (1) the "Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment and Interlocutory Decree of Foreclosure" filed on April 5, 2001, (2) the Judgment filed on April 5, 2001, in favor of Plaintiff-Appellee Matrix Financial Services, Inc. (Matrix) and against the Campbells, and (3) the "Order Denying Campbell Defendants' Motion for Reconsideration" filed on June 12, 2001. We affirm.

In their reply brief, the Campbells most clearly state the issues on appeal as follows:

> The issue on appeal is relatively simple:
>
> > (1) whether the Campbells received the contractually required notice of default as required in their mortgage, which was and is a *contractual condition precedent* to their lender's contractual right (a) to declare a default, (b) to accelerate the remaining loan balance, (c) to sue for foreclosure, and (d) to purchase the property at a subsequent judicially-ordered foreclosure sale, and
> >
> > (2) whether their lender prevented them from curing the default by interfering with their cure right (a) by not only sending them a vague and confusing demand, and (b) then not answering their inquiries, but (c) knowing of their confusion, nevertheless waited until the cure period had expired before informing them of the actual amount needed to cure the alleged default, in violation of the lender's implied covenant of good faith and fair dealing.

(Emphasis in original.) Regarding issue (1), the Campbells contend that the lender was required to state in its "default notice precisely how much was then due[,]" that "it is textbook law that a default notice 'must give the amount to be tendered to cure a default, and it must be communicated to the mortgagor how the precise amount of the default claimed was calculated[,]'" and allege the "'practical fact' that lenders in their default notices do always set forth the exact projected amount to a date certain that is needed to cure the default within the next 30 days[.]" We disagree.

I.

BACKGROUND

On September 22, 1994, the Campbells borrowed $284,850.00 from ComUnity Lending, Inc. (ComUnity), to purchase a residence located at 169 Kihapai Street, Kailua, Hawai‘i, Tax Map

Key No. (1) 4-3-059-076. To secure the loan, they signed a Note and a Mortgage.

The Note charged "interest at a yearly rate of 8.750%[,]" required the Campbells to make a payment of $2,240.92 per month, and stated, in relevant part, as follows:

> **6. BORROWER'S FAILURE TO PAY AS REQUIRED**
>
> **(A) Late Charge for Overdue Payments**
>
> If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.00% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.
>
> **(B) Default**
>
> If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.
>
> **(C) Notice of Default**
>
> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. The date must be at least 30 days after the date on which the notice is delivered or mailed to me.
>
> . . . .
>
> **(E) Payment of Note Holder's Costs and Expenses**
>
> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

The Mortgage stated, in relevant part, as follows:

> **18. Borrower's Right to Reinstate.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender

> all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. . . .
>
> . . . .
>
> 21. **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law.

From September 22, 1994, to June 30, 1996, ComUnity performed its own servicing of the loan. Commencing July 1, 1996, ComUnity sold its servicing rights to Dovenmuehle Mortgage, Inc. (Dovenmuehle).

By letter dated November 6, 1997, Dovenmuehle sent the Campbells a two-page "NOTICE OF DEFAULT" (the Default Letter). The Default Letter stated as follows:

> In accordance with the specific terms of your loan documents, notice is hereby given that:
>
> 1. You have breached the contractual obligation of the Deed of Trust/Mortgage in that you failed to make your monthly payments required by the note. Your loan is now in default.

2. In order to cure this default, you must contact this office to [o]btain the amount necessary to cover the delinquent installments and any other fees and costs incurred.

3. Payment of that amount must be received no later than thirty-five (35) days after the date of this letter. Payment of said amount will cure this breach. Payment must be made by certified funds which may be in the form of either a money order or a cashier's check.

4. Failure to cure such breach on or before the date specified in item 3 may result in the immediate acceleration of the principal balance secured by the Deed of Trust/Mortgage and the sale of the property covered therein. There is a possibility that a foreclosure deficiency judgment might be pursued if the foreclosure proceedings are undertaken.

5. You have the right to reinstate your loan after acceleration and the right to assert in any foreclosure proceeding the non-existence of a default or any other defense of the borrower to acceleration and foreclosure.

The Default Letter was printed on Dovenmuehle's pre-printed stationery. The bottom of each page stated: "**Dovenmuehle Mortgage, Inc.** 1501 Woodfield Road Schaumburg, IL 60173-4982 (847)619-5535." (Emphasis in original.) At its conclusion, at the middle of its second page, the Default Letter stated as follows: "CALL TOLL FREE . . . 1-800-669-0340."

A March 20, 1998 letter from ComUnity's attorney informed the Campbells that he had been retained to "commence foreclosure proceedings" against them and that all further communications regarding the property were to go through his office. The letter stated that the principal balance owed as of October 1, 1997, was $277,723.66 and provided counsel's office address and telephone and telefax numbers.

The Declaration of Bruce Campbell in support of his motion for reconsideration filed on April 16, 2001, states, in relevant part, as follows:

> 4. It always has been difficult for us to understand how our mortgage worked as we had deposited with ComUnity Lending, Inc., at loan closing over $14,000.00 which was called by them and was supposed to be a "temporary buydown fund" with amounts from the fund credited at various times and in various amounts against our required monthly mortgage payments.
>
> 5. Additionally, from time to time I had sent in payments in excess of what I understood was required, yet ComUnity Lending, Inc., when I asked, would never follow-up and provide me with an accounting on our mortgage loan.
>
> 6. Our mortgage contains a reference to what I am told is standard mortgage language giving my wife and me the right to a "cure period" in which we are supposed to have the benefit of being advised by our lender if we are behind in our payments, and exactly how much we are required to send them in order to bring the loan current before they can declare the entire principal balance due and foreclosure [sic] on our home.
>
> . . . .
>
> 8. In late November of 1997, my wife and I received a "Notice of Default" dated "November 06, 1997," from Dovenmuehle Mortgage, Inc., located in Schaumberg, Illinois, who we earlier had been notified was our newest mortgage loan serving agent, ...
>
> . . . .
>
> 10. I telephoned the number on the bottom of the Dovenmuehle letter at least four times that week, but had to wait on line after a recording answered, but no one came on the line every time I called.
>
> 11. . . . I decided to stop wasting my time on the line waiting for assistance and waiting for an accounting, and instead on December 1, 1997, I mailed my check for $2,096.50 to Dovenmuehle, requesting a copy of my loan payment history from it so that I could determine whether I was behind in payments and what would be needed to cure any default.
>
> 12. I heard nothing further from Dovenmuehle until after the thirty-day period stated in its letter had expired, when it returned the check to me, informing me that it was not enough.
>
> 13. I immediately tried telephoning Dovenmuehle, but again was unable to get through on the line.
>
> . . . .

> 15. Dovenmuehle forwarded our file to its attorneys, and this foreclosure action was filed against us without our receiving a default notice containing the information that is contractually required in Paragraph 21 of our mortgage.
>
> 16. It was not until less than one year ago that I finally was given a copy of my loan general ledger, and that was almost one year after Judge Kevin Chang had "directed" that it be immediately released to me, *per* his September 7, 1999, Order in this case.

Dovenmuehle continued as ComUnity's mortgage loan servicing agent and maintained contact with the Campbells regarding their mortgage until in or around May 1998 when Matrix was assigned the servicing rights.

II.

PROCEDURAL HISTORY

On March 20, 1998, ComUnity filed a notice of pendency of action and a complaint to foreclose mortgage against the Campbells alleging that the Campbells were in default, that ComUnity was electing to accelerate the mortgage payments, and that ComUnity was "entitled to a foreclosure of its Mortgage and to a sale of the property in accordance with the terms of the Mortgage." On April 15, 1998, the Campbells, *pro se*, filed an answer to the complaint, denying most of ComUnity's allegations and raising several affirmative defenses.

On August 28, 1998, ComUnity filed "Plaintiff's Motion for Summary Judgment as to All Defendants and for Interlocutory Decree of Foreclosure." On September 28, 1998, Bruce, *pro se*, filed a Chapter 13 petition in the U. S. Bankruptcy Court, District of Hawai‘i, and ComUnity's foreclosure action was

automatically stayed pending resolution of the bankruptcy proceedings. The bankruptcy case was dismissed on February 19, 1999. On May 12, 1999, attorney Gary V. Dubin filed a notice of appearance of counsel for the Campbells.

On September 7, 1999, Judge Kevin S. C. Chang entered the "Order Denying Plaintiff's Motion for Summary Judgment as to All Defendants and for Interlocutory Decree of Foreclosure Filed August 28, 1998," and directed ComUnity "to provide the Campbell Defendants with complete copies of ledgers covering the subject loan so that the Campbell Defendants may have an opportunity to conduct discovery and submit evidence in response to the motion for summary judgment, Rule 56(f), H.R.C.P." In the Order, Judge Chang also stated that ComUnity could refile its motion for summary judgment after the Campbells were allowed a reasonable opportunity for discovery.

On October 25, 2000, Judge Chang granted the "*Ex* Parte Motion to Substitute Party," substituting Matrix for ComUnity as the Real-Party-in-Interest.

In a document filed on November 16, 2000, counsel for Matrix advised the court, in relevant part, that Matrix "provided [the Campbells] with a complete account payment ledger as requested by [the Campbells]" and that "[o]n November 8, 2000, Defendant's counsel telephoned and advised that he did not

require the depositions that had been scheduled to take place on November 9, 2000."

On November 29, 2000, Matrix filed "Plaintiff's Motion for Summary Judgment as to All Defendants and for Interlocutory Decree of Foreclosure." Matrix advised the court, in relevant part, as follows:

> 22. . . . Beginning with the payment due on February 1997, [the Campbells] began regularly making late payments, and incurring late charges. The last monthly payment received from [the Campbells] on the Note was processed on September 29, 1997 (due September 1, 1997). [The Campbells] did not make any payment in October 1997, and have not made any payment on the Note since that time.
>
> . . . .
>
> 26. . . . As a result, and in accordance with the terms of the Note and Mortgage, the entire aggregate amount of the principal obligation of the Note then and as yet unpaid in the principal amount of TWO HUNDRED SEVENTY-SEVEN THOUSAND SEVEN HUNDRED TWENTY-THREE AND 66/100 DOLLARS ($277,723.66), together with interest, advances and charges thereon from October 1, 1997, became and is now due and payable.

On April 5, 2001, Judge Karen N. Blondin entered (1) "Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment and Interlocutory Decree of Foreclosure" and (2) a Judgment. On April 16, 2001, the Campbells filed a motion for reconsideration, and it was denied on June 12, 2001.[1]

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[1] In its memorandum in opposition to the motion for reconsideration filed by Defendants-Appellants Bruce Bailey Kekoalii Campbell (Bruce) and Franceen Leilehua Campbell, Plaintiff-Appellee Matrix Financial Services, Inc. (Matrix), cited *Sousaris v. Miller*, 92 Hawai‘i 505, 513 (2000), and *AMFAC, Inc. v. Waikiki Beachcomber Investment, Co.*, 74 Haw. 85, 114-15 (1992), and argued that the evidence/allegations in Bruce's declaration could have been but were not presented to the court before it ruled on Matrix's motion for summary judgment, and that the evidence/allegations were not new and should not "serve as the basis for reconsideration."

III.

GENERAL POINT ON APPEAL

Findings of Fact no. 13, which is really a conclusion of law, states that "[b]y the terms of the Mortgage, Matrix is entitled to the foreclosure of the Mortgage and to a sale of the Property." The Campbells challenge Findings of Fact no. 13.

IV.

STANDARD OF REVIEW

We review a circuit court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court. Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998)(citation omitted); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). As we have often articulated, "[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 a judgment as a matter of law." Id. (citations and internal quotation marks omitted). We recognize that "[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." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647

P.2d 713, 716 (1982) (citations omitted). When performing this review, "[w]e . . . view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai‘i 76, 80, 947 P.2d 944, 948 (1997) (quoting Maguire v. Hilton Hotels Corp., 79 Hawai‘i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted).

V.

DISCUSSION

A.

Notice of Default

The Campbells argue that the law required ComUnity to provide them a notice of default that included the precise amount required to cure. They cite authority that "a foreclosure notice must give the amount to be tendered to cure a default, and it must be communicated to the mortgagor how the precise amount of the default claimed was calculated." 59 C.J.S. Mortgages, § 543 (1998); *see* Bank-Fund Staff Federal Credit Union v. Milko Cuellar, 639 A.2d 561, 568 (D.C. Cir. 1994) (failing to provide a statement of the amount needed to cure the default rendered the notice fatally defective; statement of the amount needed to cure was required by statute); *see also* 55 Am. Jur. §§ 515, 536

(1996)(discussing provisions of the Uniform Land Security Interest Act[2]).

We agree that, in a power of sale foreclosure, the notice of default must include the amount needed to cure. In relevant part, Hawai‘i Revised Statutes (HRS) § 667-22(a) (Supp. 2001) states that

> [w]hen the mortgagor or the borrower has breached the mortgage agreement, and when the foreclosing mortgagee intends to conduct a power of sale foreclosure under this part, the foreclosing mortgagee shall prepare a written notice of default addressed to the mortgagor, the borrower, and any guarantor. The notice of default shall state:
>
> . . . .
>
> (4) The description of the default, and if the default is a monetary default, an itemization of the delinquent amount shall be given; [and]
>
> (5) The action that must be taken to cure the default, including the amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default by the deadline date[.]

This case, however, involves a "judicial foreclosure" rather than a "power of sale foreclosure."

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[2] The Uniform Land Security Interest Act was promulgated after the ABA Section of Real Property, Probate and Trust Law endorsed it in 1985, but it has not been adopted by any state. *See* Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. Rev. 405, 484 (2002); Georgina W. Kwan, *Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai‘i*, 24 U. Haw. L. Rev. 245 (2001).

Some state courts have extended the notice requirements for a power of sale foreclosure to a judicial foreclosure. California Civil Code § 2924c,[3] for example, provides notice

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[3] California Civil Code § 2924c states, in relevant part, as follows:

> Cure of default; payment of arrearages, costs and fees; effect on acceleration; notice of default; trustee's or attorney's fees; reinstatement period
>
> . . . .
>
> (b)(1) The notice, of any default described in this section, recorded pursuant to Section 2924, and mailed to any person pursuant to Section 2924b, shall begin with the following statement, printed or typed thereon:
>
> "IMPORTANT NOTICE [14-point boldface type if printed or in capital letters if typed]
>
> IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, [14-point boldface type if printed or in capital letters if typed] and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until three months from the date this notice of default may be recorded (which date of recordation appears on this notice).
>
> This amount is _____ as of _____
> (Date)
> and will increase until your account becomes current.
>
> While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.
>
> Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all
> (continued...)

requirements for a power of sale foreclosure similar to those of HRS § 667-22. California Civil Code § 2924c(b)(1) (West 2001) requires the mortgagee to provide notice that includes the amount needed to cure the default at the date of notice and, upon written request, the mortgagee must provide the debtor with a written itemization of the entire amount due. In Bruntz v. Alfaro, the California Court of Appeals held that California Civil Code § 2924c "does in fact apply in cases of judicial foreclosure." Bruntz v. Alfaro, 212 Cal. App. 3d 411, 419, 260 Cal. Rptr. 488, 492 (1989).

Other state courts distinguish between a power of sale foreclosure and a judicial foreclosure. Alaska, for example, requires a notice of default for power of sale foreclosures that includes the amount needed to cure, but it does not require any notice of default for judicial foreclosures. The Alaska Supreme Court, in Conrad v. Counsellors Inv. Co., in addressing the lower

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[3](...continued)

> amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than the end of the three-month period stated above) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).
>
> Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

Cal. Civ. Code § 2924c (West 2001).

court's concern that plaintiffs had filed suit without providing defendants a notice of default, said that the deed of trust required the plaintiffs to record a notice of default and provide specific information pursuant to Alaska Statutes § 34.20.070,[4] including the amount required to cure, as one of the steps leading to the non-judicial foreclosure, but no notice was

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[4] Alaska Statutes § 34.20.070 (1993), provides, in relevant part, the following:

> (a) If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken, the trustee, in addition to the right of foreclosure and sale, may execute the trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court, if the trustee has complied with the notice requirements of (b) of this section. If the deed of trust is foreclosed judicially or the note secured by the deed of trust is sued on and a judgment is obtained by the beneficiary, the beneficiary may not exercise the nonjudicial remedies described in this section.
>
> (b) Not less than 30 days after the default and not less than three months before the sale the trustee shall record in the office of the recorder of the recording district in which the trust property is located a notice of default setting out (1) the name of the trustor, (2) the book and page where the trust deed is recorded, (3) a description of the trust property, including the property's street address if there is a street address for the property, (4) a statement that a breach of the obligation for which the deed of trust is security has occurred, (5) the nature of the breach, (6) the sum owing on the obligation, (7) the election by the trustee to sell the property to satisfy the obligation, and (8) the date, time, and place of the sale. . . . At any time before the sale, if the default has arisen by failure to make payments required by the trust deed, the default may be cured by payment of the sum in default other than the principal which would not then be due if no default had occurred, plus attorney fees or court costs actually incurred by the trustee due to the default. . . .
>
> (c) Within 10 days after recording the notice of default, the trustee shall mail a copy of the notice by certified mail to the last known address of each of the following persons or their legal representatives: (1) the grantor in the trust deed.

required if the plaintiffs pursued other remedies available to them, including the right to sue on the note or foreclose judicially. Conrad v. Counsellors Inv. Co., 751 P.2d 10, 12-13 and n.4-5 (1988).

HRS § 667-1 governs judicial foreclosures and it does not impose the specific notice requirements imposed by HRS § 667-22.

Judicial foreclosure cases are divided in two parts for appeal purposes. "The foreclosure decree is the first part. All other orders are included in the second part." City Bank v. Saje Ventures II, 7 Haw. App. 130, 132 n.4, 748 P.2d 812, 814 n.4 (1988) (quoting Hoge v. Kane, 4 Haw. App. 246, 247, 663 P.2d 645, 647 (1983)). To obtain a foreclosure decree, a lender must prove that: (1) the borrower defaulted on a note and (2) the lender was entitled to foreclose on the mortgage securing the note. Ocwen Federal Bank, FSB, v. Russell, 99 Hawai‘i 173, 184, 53 P.3d 312, 323 (2002). In Ocwen Federal Bank, this court decided that the following documents were sufficient to satisfy the lender's initial burden of producing the documentation necessary to establish that the borrower had defaulted and that the lender was entitled to foreclose: (1) a copy of the mortgage note signed by the borrower; (2) a copy of the mortgage signed by the borrower; (3) a declaration signed by the "authorized servicing agent for the lender" stating that (a) he or she was "personally familiar

with the payment history of [the borrower,]" (b) the borrower "[f]ailed to pay the installments, principal and interest as required by [the] mortgage note and . . . [m]ortgage," (c) proper demands for payment of all delinquent amounts due and owing to the lender were made, and (d) records showing the amounts were set forth in an attached exhibit; (4) an attached record which indicated that the borrower was delinquent and owed the lender; and (5) a document indicating the current assignment/ownership rights of the mortgage. Id.

In the documents submitted by Matrix, there are: (1) a copy of the note signed by the Campbells; (2) a copy of the mortgage signed by the Campbells; (3) a declaration signed by Sharon M. Coleman, the "authorized servicing agent for [Matrix]," declaring that: (a) she was "personally familiar with the payment history" of the Campbells, (b) the Campbells "ha[d] failed to pay the installments, principal and interest as required by [the] mortgage note and . . . [m]ortgage[,]" (c) proper demands for payment of all delinquent amounts due and owing to the lender were made, and (d) records showing the amounts were set forth in an attached exhibit; (4) an attached payment record indicating that the Campbells were delinquent and owed the lender; and (5) documents indicating that Matrix was assigned rights of the mortgage. Clearly, Matrix satisfied its burden of producing the documentation necessary to establish that

the Campbells had defaulted and that it was entitled to foreclose.

Prior to 1998, HRS Chapter 667, entitled "Mortgage Foreclosures," contained ten statutory sections setting forth "very general procedures for instituting a mortgage foreclosure action in the circuit court." *See* First Hawaiian Bank v. Timothy, 96 Hawai‘i 348, 356 n.8, 31 P.3d 205, 213 n.8 (App. 2001). Chapter 667 was amended by Act 122, 1998 Haw. Sess. L. § 2, at 447 and the ten sections were designated "Part I. FORECLOSURE BY ACTION OR FORECLOSURE BY POWER OF SALE." A "Part II" was added to Chapter 667 and is entitled, "ALTERNATE POWER OF SALE FORECLOSURE PROCESS." The legislature explained that the purpose of Part II was "to establish an alternate non-judicial foreclosure process." Hse. Conf. Comm. Rep. No. 75, in 1998 House Journal, at 979. This court noted in Timothy that Part II established a "much more detailed process" for foreclosure than Part I. Timothy, 98 Hawai‘i at 356, 31 P.3d at 213. Compare HRS § 667-1 with HRS § 667-22.

In a judicial foreclosure, i.e., a foreclosure by court action under HRS § 667-1 (1993), "[t]he circuit court may assess the amount due upon a mortgage, whether of real or personal property, without the intervention of a jury, and shall render judgment for the amount awarded, and the foreclosure of the mortgage. Execution may be issued on the judgment, as ordered by

the court." HRS § 667-1 ((1993). HRS § 667-1 does not mention notice, and Hawai'i case law is silent as to any notice requirements for § 667-1 other than for civil actions in general.

Foreclosure by action under HRS § 667-1, like all civil actions, requires the filing of a complaint governed by the Hawai'i Rules of Civil Procedure (HRCP).[5] HRCP Rule 8(a), in particular, provides for "notice pleading."[6] In re Genesys Data Technologies, Inc., 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001). This court has said that the judicial foreclosure system pursuant to HRS § 667-1 affords defendants "the two basic elements of procedural due process--notice and the opportunity to be heard." Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 436, 16 P.3d 827, 841 (App. 2000). When the Campbells received their copies of the complaint, summons, and notice of pendency of action filed March 20, 1998, they received the notice as was required by HRCP Rule 8 for an action pursuant to HRS § 667-1.

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[5] Hawai'i Rules of Civil Procedure (HRCP) provide that "[a] civil action is commenced by filing a complaint with the court." HRCP Rule 3.

[6] HRCP Rule 8, provides for "notice" pleading and, in relevant part, requires

> a pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.

B.

The Notice Requirements of the Note and the Mortgage

In its answering brief at page 2, Matrix notes the following: "The Campbells do not contest the fact that they made no mortgage payments in October and November, 1997 . . . . They do not contest the fact that they have made no mortgage payments since . . . , and that all the while they have remained in possession of the Kailua Property."

As noted above, paragraph 6(C) of the Note states that

> [i]f I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. The date must be at least 30 days after the date on which the notice is delivered or mailed to me.

As noted above, Paragraph 21 of the Mortgage requires that the

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

The Campbells construe the phrase, "the notice shall specify . . . the default" as requiring the lender to provide the specific amount needed to cure. They contend that the Mortgage requires the same specificity that HRS § 667-22 requires for power of sale foreclosures, i.e., it must state (a) the amount

needed to cure and (b) how the amount was calculated. We disagree.

The Mortgage required ComUnity or its successor to provide notice specifying: (1) the default, (2) the action the Campbells needed to take to cure the default, and (3) a deadline, not less than 30 days after notice was given. The Default Letter stated, in relevant part, as follows:

> In accordance with the specific terms of your loan documents, notice is hereby given that:
>
> 1. You have breached the contractual obligation of the Deed of Trust/Mortgage in that you failed to make your monthly payments required by the note. Your loan is now in default.
>
> 2. In order to cure this default, you must contact this office to [o]btain the amount necessary to cover the delinquent installments and any other fees and costs incurred.
>
> 3. Payment of that amount must be received no later than thirty-five (35) days after the date of this letter. Payment of said amount will cure this breach. Payment must be made by certified funds which may be in the form of either a money order or a cashier's check.
>
> 4. Failure to cure such breach on or before the date specified in item 3 may result in the immediate acceleration of the principal balance secured by the Deed of Trust/Mortgage and the sale of the property covered therein.

1. Specify the Default

Paragraph 1 of the Default Letter tells the Campbells that "you failed to make your monthly payments required by the note. Your loan is now in default." Although "default" is not defined in the Mortgage, Paragraph 6(B) of the Note states that "if I do not pay the full amount of each monthly payment on the date it is due, I will be in default." The Default Letter

provided notice to the Campbells of their default in failing to pay the required monthly payments.

The Campbells argue that the language of the Mortgage is ambiguous and that "[i]t is a fundamental rule that any ambiguity in a mortgage instrument should be construed against the party drawing the documents." State Savings and Loan Association v. Kauaian Development Co., Inc., 62 Haw. 188, 198, 613 P.2d 1315, 1322 (1980). Specifically, the Campbells argue that the phrase "[t]he notice shall specify . . . the default" must be construed as requiring a statement which included the amount needed to cure. We disagree. That phrase is not ambiguous. The notice to them that "you failed to make your monthly payments required by the note" specified the default.

2. Action Required to Cure and Deadline for Payment

Paragraph 2 of the Default Letter clearly stated a toll-free phone number, 1-800-669-0340, for the Campbells to call "to [obtain] the amount necessary to cover the delinquent installments and any other fees and costs incurred." In his declaration attached to his motion for reconsideration, Bruce states that he called the number listed at the bottom of the letter, 1-847-619-5535, but was unable to speak with anyone at Dovenmuehle. There is nothing in the record about any attempt by the Campbells to call the toll-free number or why no such attempt

was made. In other words, the Campbells failed to take the action specified in the Default Letter.

Paragraph 3 of the Default Letter allowed 35 days from the date of the letter for the Campbells to send their payment by either money order or cashier's check. This 35 days is not an issue because Bruce did not, at any time, make any attempt to cure the default. The personal check in the amount of $2,096.50 that Bruce says he mailed to Dovenmuehle on December 1, 1997, and that he says was returned by Dovenmuehle because it was not enough to cure the default, was clearly insufficient to pay his monthly payments due on October 1, 1997, November 1, 1997, and December 1, 1997.

Bruce further alleges that along with the check, he included a letter requesting a copy of his loan payment history so that he could determine whether he was behind in payments and if so, by how much. Although the record has a copy of the check, it does not have a copy of Bruce's letter or the returned envelope. To explain his confusion, Bruce states that at closing in 1994, he did not understand how his deposit worked as a "temporary buydown fund" and, thus, because he was unable to determine how his deposit was credited, he was unable to determine if a monthly payment had been made. This argument is not relevant. The "temporary buydown fund" Bruce refers to was created by the "Temporary Buydown Agreement" (Agreement) signed

by the Campbells on September 23, 1994. Paragraph (2) of the Agreement clearly itemizes a 36-month payment schedule commencing November 1, 1994, by which ComUnity agreed to "pay from the Buydown Subsidy account on behalf of the Borrower, the sums of money set forth in the schedule to be applied to the interest portion of the payments called for by the Note." Paragraph 4 states that "[n]o portion of the Buydown Subsidy shall be disbursed to pay any delinquency of whatsoever kind and nature under the Note and Mortgage." During its first twelve months, the Buydown Subsidy was $578.61 per month. During its second twelve months the Buydown Subsidy was $393.39 per month. During its final twelve months, the Buydown Subsidy was $200.22 per month. The Buydown Subsidy expressly expired on October 31, 1997. The Campbells knew or should have known the buydown payment schedule. Moreover, the record is clear that the last payment made by the Campbells was made on September 29, 1997.

3. Ability to Cure

The Campbells also argue that the lender frustrated their ability to make an adequate payment during the cure period by "(a) [s]ending a vague and confusing demand, and (b) then not answering their inquiries, but (c) knowing of their confusion, nevertheless waited until the cure period had expired before informing them of the actual amount needed to cure." We disagree.

We conclude that the Default Letter was not vague and confusing. It specified the default as required by Paragraph 6(B) of the Note, stated the action required to cure by supplying a toll-free contact number and specifying payment in certified funds, and allowed more than thirty days from the date of the Default Letter in which to cure.

Moreover, although he had not made a payment since September 29, 1997, for the payment due on September 1, 1997, Bruce allegedly attempted to make a payment by personal check in the amount of $2,096.50 on December 1, 1997, when the monthly payment was $2,240.92, and the Default Letter required payment via "a money order or a cashier's check[.]" Although Bruce did not explain his basis for that amount, it is clear that his basis for not sending a sufficient amount was not his "confusion."

V.

CONCLUSION

Accordingly, we affirm the "Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment and Interlocutory Decree of Foreclosure" filed on April 5, 2001, the Judgment filed on April 5, 2001, and the "Order Denying Campbell Defendants' Motion for Reconsideration" filed on June 12, 2001.

DATED: Honolulu, Hawai‘i, January 15, 2003.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge