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NO. 25596

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CATALINO M. PASCUA, SR.; JANET B. PASCUA; and CATALINO M. PASCUA, Plaintiffs-Appellants, v. U.S. BANK NATIONAL ASSOCIATION, fka FIRST BANK NATIONAL ASSOCIATION, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF DECEMBER 1, 1997, NEW CENTURY HOME EQUITY LOAN TRUST, SERIES 1997 NC6GCM; RUSSELL KWAI SUN LUI; and LESLIE TENN SUNG WONG, Defendants-Appellees, and JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; AND DOE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIV. NO. 02-1-1340)

SUMMARY DISPOSITION ORDER

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

In this foreclosure case, Plaintiffs Catalino M. Pascua, Sr., Janet B. Pascua and Catalino M. Pascua, Jr. (collectively, the Pascuas) appeal the following orders and certified judgments of the circuit court of the first circuit,<sup>1</sup> entered upon two summary judgments against the Pascuas in favor of Defendants-Appellees and movants U.S. Bank National Association (USB), and Russell Kwai Sun Lui and Leslie Tenn Sung Wong (collectively, the Lui Defendants), respectively:

(1) "Findings of Fact and Conclusions of Law and Order," entered January 8, 2003;

(2) "Judgment on Findings of Fact and Conclusions of Law and Order," entered January 7, 2003;

(3) "Order Granting Defendants Russell Kwai Sun Lui and Leslie Tenn Sung Wong's Motion for Sanctions," entered January 7, 2003;

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<sup>1</sup> The Honorable Dexter D. Del Rosario, judge presiding.

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(4) "Order Granting Defendants Russell Kwai Sun Lui and Leslie Tenn Sung Wong's Motion to Require Plaintiffs to Deposit Dispute[d] Sums Into Court," entered January 7, 2003;

(5) "Order Granting Defendants Russell Kwai Sun Lui and Leslie Tenn Sung Wong's Motion for Summary Judgment Against Plaintiffs," entered January 8, 2003;

(6) "Findings of Fact and Conclusions of Law," entered January 8, 2003; and

(7) "Judgment," entered January 14, 2003.

(Capitalization and parenthetical references omitted.)

After a methodical review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve the Pascuas' points of error on appeal as follows:

1. The Pascuas argue that summary judgment was precluded because the power of sale clause contained in the subject mortgage was a contract of adhesion clause, therefore unenforceable -- and unconscionable, necessitating an evidentiary hearing. We disagree. "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[,]" Miller v. Manuel, 9 Haw. App. 56, 65, 828 P.2d 286, 292 (1991) (citation omitted), "as would be admissible in evidence[.]" Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e) (2002). The Pascuas failed to carry their burden. As a matter of law, HRCP Rule 56(c) (2002); Pancakes of Hawaii, Inc. v. Pomare Props. Corp., 85 Hawai'i 286,

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291, 944 P.2d 83, 88 (App. 1997), the power of sale clause did not render the transaction a contract of adhesion. Considering the overall process of contract formation in this case -- without restricting our focus to the formal signing ceremony alone -- it is abundantly clear that the Pascuas were "not forced to apply for [a mortgage loan] from [USB,]" Nacino v. Chandler, 101 Hawai'i 473, 483, 71 P.3d 424, 434 (App. 2002), *aff'd sub nom. Nacino v. Koller*, 101 Hawai'i 466, 71 P.3d 417 (2003), amidst the myriad mortgage lenders we notice were available to them. See also Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 247, 921 P.2d 146, 167 (1996). It is equally obvious that the mortgage does not "unconscionably limit the obligations and liability of the drafting party." Leong v. Kaiser Found. Hosps., 71 Haw. 240, 247, 788 P.2d 164, 168 (1990) (citation and block quote format omitted). Nor is it a document which "unfairly limits the obligations and liabilities of, or otherwise unfairly advantages, the stronger party[,]" Brown, 82 Hawai'i at 247, 921 P.2d at 167 (citation omitted), whichever party that might be in this particular case -- a point upon which the Pascuas did not deign to cognizably enlighten, either here or below. The Pascuas cannot rest on their declaration that they did not understand what the power of sale clause meant. "The general rule of contract law is that one who assents to a contract is bound by it and cannot complain that he has not read it or did not know what it contained." Leong, 71 Haw. at 245, 788 P.2d at 168 (citations

omitted). In light of the foregoing, we also reject the Pascuas' insistence that they were entitled to an evidentiary hearing on whether the power of sale clause was unconscionable. See City and County of Honolulu v. Midkiff, 62 Haw. 411, 418, 616 P.2d 213, 218 (1980).

2. The Pascuas aver that the court erred in granting the summary judgments because USB's exercise of the power of sale constituted, (a) a breach of the implied covenant of good faith and fair dealing, and/or (b) an unfair and deceptive trade practice, and was therefore untenable. Again, we disagree.

(a) USB's full compliance with the terms of the non-judicial foreclosure sale was not a breach of the implied covenant of good faith and fair dealing. The terms of the auction, including the requirement of a 100% cash payment, were provided by the notice of sale. The terms of auction and sale were fully authorized by the mortgage and by Hawaii Revised Statutes § 667-5 (1993). Moreover, the Pascuas presented no cognizable evidence below to support their assertion that the resulting sale price was inadequate. See Nakato v. MacHarg, 89 Hawai'i 79, 89, 969 P.2d 824, 834 (App. 1998) ("the mere fact that counsel received the documents from a non-party in response to a request does not establish the authenticity of the documents" (citation and internal quotation marks omitted)).

(b) The Pascuas did not, by way of affidavit or other means cognizable on a motion for summary judgment, "set

forth specific facts showing that there is a genuine issue for trial" on their claim of unfair and deceptive trade practice. HRCP Rule 56(e). See also Miller, 9 Haw. App. at 65, 828 P.2d at 292. Furthermore, the Pascuas cannot "rest upon the mere allegations or denials of [their] pleading," HRCP Rule 56(e), nor rely upon broad and conclusory statements and allegations, Chuck Jones and MacLaren v. Williams, 101 Hawai'i 486, 501, 71 P.3d 437, 452 (App. 2003), as they do here.

3. The Pascuas argue that the court erred in granting the summary judgments because the loan general ledger was not submitted into evidence, pursuant to GE Capital Hawai'i, Inc. v. Yonenaka, 96 Hawai'i 32, 25 P.3d 807 (App. 2001). This point of error lacks merit, because there is no general requirement that the loan general ledger be placed in evidence to prove a default. Id. at 39-40, 25 P.3d at 814-15. See also Ocwen Fed. Bank, FSB v. Russell, 99 Hawai'i 173, 184, 53 P.3d 312, 323 (App. 2002).

4. For their final point of error on appeal, the Pascuas argue that the court erred in granting the summary judgments because USB's assignor, New Century Mortgage Corporation (NCMC), "was not licensed in the State of Hawaii as a mortgage broker when it made the Pascuas' mortgage loan." Opening Brief at 22. We disagree on this point as well. The Pascuas did not specifically allege that NCMC acted as a mortgage broker in this case, much less cognizably raise a genuine issue of material fact with respect thereto. Miller, 9 Haw. App. at

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65, 828 P.2d at 292; HRCF Rule 56(e).

Therefore,

IT IS HEREBY ORDERED that the orders and certified judgments of the court, listed at the outset, are affirmed.

DATED: Honolulu, Hawai'i, September 29, 2004.

On the briefs:

Gary Victor Dubin  
(Dubin Law Offices),  
for Plaintiffs-Appellants.

Acting Chief Judge

Robert E. Chapman and Mary Martin  
(Stanton Clay Chapman Crumpton & Iwamura),  
for Defendant-Appellee U.S. Bank  
National Association, fka First Bank  
National Association, as Trustee Under  
the Pooling and Service Agreement  
Dated as of December 1, 1997,  
New Century Home Equity Loan Trust,  
Series 1997 NC6GCM.

Associate Judge

Associate Judge

Lyle S. Hosoda,  
Raina P.B. Mead and  
Shelley M. Tamekazu  
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for Defendants-Appellees  
Russell Kwai Sun Lui and  
Leslie Tenn Sung Wong.