

NOT FOR PUBLICATION

NO. 25700

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

WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FOR AMRESKO
RESIDENTIAL SECURITIES CORPORATION MORTGAGE LOAN TRUST
1998-3, UNDER THE POOLING & SERVICING AGREEMENT DATED
AS OF SEPTEMBER 1, 1998, Plaintiff-Appellee, v. JULIANO
MARCELINO, SR., MARTINA MARCELINO, JULIAN MARCELINO,
JR., and JOHN and MARY DOES 1-10, Defendants-Appellants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 01-1-394)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe, and Nakamura, JJ.)

This appeal stems from an ejectment action brought by Plaintiff-Appellee Wells Fargo Bank¹ (Wells Fargo) against Defendants-Appellants Juliano Marcelino, Sr., Martina Marcelino, and Julian Marcelino, Jr. (collectively, the Marcelinos). In an earlier nonjudicial foreclosure proceeding that was never appealed, Wells Fargo foreclosed on and acquired title to the Marcelinos' residential property in Pa'auilo, Hawai'i. However, the Marcelinos refused to vacate the property, prompting Wells Fargo to file this ejectment action. When the Marcelinos failed to plead or otherwise defend the ejectment action, the Circuit

¹According to the record on appeal, the full name of Plaintiff-Appellee Wells Fargo Bank is "Wells Fargo Bank Minnesota, NA, as Trustee for Amresco Residential Securities Corporation Loan Trust 1998-3, Under the Pooling & Servicing Agreement Dated as of September 1, 1998."

Court of the Third Circuit (the circuit court)² entered default against the Marcelinos.

On November 19, 2001, the circuit court entered an order, certified as a final judgment pursuant to Hawai'i Rules of Civil Procedure Rule 54(b), granting Wells Fargo's motion for summary judgment and for writ of ejectment against the Marcelinos and entering a writ of ejectment against the Marcelinos. The Marcelinos did not appeal this order.

On May 30, 2002, more than six months later, the Marcelinos filed a motion to set aside: (1) the entry of default; (2) the November 19, 2001 order granting Wells Fargo's motion for summary judgment against the Marcelinos; and (3) the writ of ejectment (the motion to set aside). The circuit court denied the motion to set aside, orally on July 19, 2002, and by written order entered on September 20, 2002.

On September 4, 2002, the Marcelinos filed a motion for reconsideration of the motion to set aside, which the circuit court denied on December 27, 2002. On February 18, 2003, the circuit court entered final judgment in favor of Wells Fargo and against the Marcelinos. The Marcelinos timely appealed on March 17, 2003, and on November 24, 2003, their appeal was assigned to this court.

The Marcelinos raise the following points of error:

²Judge Greg K. Nakamura was the presiding judge for all the proceedings below.

(1) The circuit court "committed reversible error by denying [the Marcelinos'] Motion to Set Aside Entry of Default and Default Judgment"³ where Wells Fargo Bank "conducted an illegal and void Power of Sale foreclosure, and where a void transaction cannot be enforced by a subsequent judgment";

(2) The circuit court "committed reversible error by refusing to apply *Silva v. Lopez*, [5 Haw. 262 (1884)]" because pursuant to this case, Wells Fargo's power of sale foreclosure is void;

(3) The circuit court "committed reversible error when it refused to apply the judicial maxim of 'clean hands' to set aside the Writ of Ejectment";

(4) The circuit court "committed reversible error in concluding that the judicial maxim of 'clean hands' must be raised as a defense before judgment is entered"; and

(5) The circuit court's "determination that [the Marcelinos'] payment of more than \$3,000 for advice and representation by lay persons to protect their interest in their home was not excusable neglect was reversible error because it clearly exceed the bounds of reason, disregarded rules or principles of law or practice to the substantial detriment of [the Marcelinos]."

These arguments, which collaterally attack the merits of the nonjudicial foreclosure proceeding and the order granting

^{3/}The record indicates that no default judgment was ever entered in this case.

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Wells Fargo a writ of ejectment against the Marcelinos, neither of which the Marcelinos appealed, are unavailing. Based upon our review of the record, the briefs submitted by the parties, and the applicable law, we cannot conclude that the circuit court erred in denying the Marcelinos' motion to set aside and the Marcelinos' motion for reconsideration of the order denying the motion to set aside.

The judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, August 13, 2004.

On the briefs:

Andrew S. Iwashita and
George J. Zweibel for
defendants-appellants
Juliano Marcelino, Sr.,
Martina Marcelino, and
Julian Marcelino, Jr.

Paul A. Schraff and
David A. Sagan (Dwyer
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