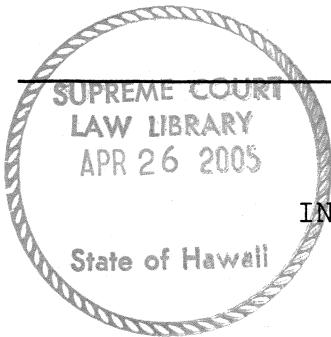


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NO. 25643

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

ASSOCIATES FINANCIAL SERVICES COMPANY OF HAWAII, INC., a Hawaii corporation, Plaintiff/Counterclaim Defendant-Appellee, Cross-Appellant v. RICHARD MEEK CRABBE, Defendant/Counterclaimant-Appellant, Cross-Appellee, and DIAL ELECTRIC COMPANY, INC.; MILILANI TOWN ASSOCIATION; CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF HAWAI'I; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants, and NOLAN LEE KELIINOHOPO NO CRABBE, Intervenor/Counterclaimant-Appellant, Cross-Appellee

(CIVIL NO. 97-3300)

AND

ASSOCIATES FINANCIAL SERVICES COMPANY OF HAWAII, INC., a Hawaii corporation, Plaintiff/Counterclaim Defendant-Appellee, Cross-Appellant v. RICHARD MEEK CRABBE, Defendant/Counterclaimant-Appellant, Cross-Appellee, and JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants, and NOLAN LEE KELIINOHOPO NO CRABBE, Intervenor/Counterclaimant-Appellant, Cross-Appellee

(CIVIL NO. 00-1-1332)

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

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

The final and appealable judgment being appealed from is the Amended Final Judgment entered on January 21, 2003 in the Circuit Court of the First Circuit by Judge Gary W. B. Chang (Judge Gary Chang). Defendant Richard Meek Crabbe (Richard) and Intervenor Nolan Lee Keliinohopono Crabbe (Nolan) are the

APPELLATE COURTS

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appellants. Plaintiff Associates Financial Services Company of Hawaii, Inc. (Associates) is the cross-appellant.

In 1996, in a foreclosure action commenced in 1994 against Nolan, Associates acquired a Mililani residential property (the Property) via a commissioner's deed. Then, with funds borrowed from Associates, Nolan's father, Richard, purchased the Property and executed a mortgage to secure the loan.

On August 12, 1997, Associates commenced Civil No. 97-3300 by filing a complaint against Richard and others seeking (1) a judgment for the amount due and owing pursuant to the loan agreement, including attorney fees, (2) a decree of foreclosure, (3) the appointment of a commissioner, (4) a foreclosure sale, and (5) a deficiency judgment. On May 5, 1998, Judge Kevin S. C. Chang (Judge Kevin Chang) entered findings of fact, conclusions of law, and an order granting Associates' motion for summary judgment and decree of foreclosure and appointing a commissioner to take possession of and sell the property. Also on May 5, 1998, Judge Kevin Chang entered a judgment against Richard that "expressly directs that said summary judgment, decree of foreclosure and order of sale are entered as final judgments as there is no just reason for delay, pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure." On June 4, 1998, Richard filed a notice of appeal commencing appeal no. 21618.

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While Richard's appeal was pending, Associates sought to sell the Property. At the first auction, Nolan was the high bidder at \$147,000. On November 27, 1998, Judge Kevin Chang entered an "Order Approving Report of Commissioner, Confirming Commissioner's Sale of Property at Public Auction, Directing Distribution of Proceeds and for a Writ of Possession" that decided that Richard owed Associates \$276,580.03 plus \$3,142.04 attorney fees and costs, approved the sale to Nolan for \$147,000, and stated that a deficiency judgment shall be entered. The judgment on the order confirming sale was entered on December 1, 1998. Nolan deposited \$14,700. When the sale did not close, Associates sought court authorization for a second auction. Over Nolan's objection, Judge Kevin Chang orally approved the request. Before Judge Kevin Chang entered the written order, the second auction was scheduled and held. At the second auction, Nolan was the high bidder at \$124,000. On June 10, 1999, Judge Kevin Chang entered the written order authorizing the second auction and authorizing credit bids. Richard commenced appeal no. 22618 that, on October 4, 1999, was dismissed. In the meantime, Nolan was unable to perform his obligations arising out of his bid at the second auction.

On July 21, 1999, in appeal no. 21618, this court filed an opinion that vacated the May 5, 1998 decree of foreclosure and remanded for further proceedings on Richard's fraudulent

inducement allegation. This opinion caused the cancellation of the third public auction which had been scheduled to occur on August 10, 1999.

On August 24, 1999, in Civil No. 99-3214, Nolan filed a complaint against Associates and others alleging various acts of misconduct by them, pertaining to, or during, the first and second auctions. On November 26, 1999, after a hearing on November 10, 1999, Judge Gail C. Nakatani entered the Order Granting Motion to Dismiss Complaint. Nolan then commenced appeal no. 23463.

In Civil No. 97-3300, on March 17, 2000, after a February 2, 2000 bench trial, Judge Allene R. Suemori entered the Findings of Fact, Conclusions of Law, Order deciding that Richard signed the mortgage on January 30, 1997, Associates did not acquire the property until January 31, 1997, and:

FINDINGS OF FACT

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9. There is no language in the mortgage which provides that "after-acquired real property" shall become subject to the Mortgage.

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11. At the time of signing the mortgage document, [Richard Crabbe] did not have any interest in the property.

CONCLUSIONS OF LAW

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4. That being the case, the mortgage had no force or effect and is invalid.

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

[Richard's] Motion to Dismiss [Associate's] Foreclosure Proceeding is Granted.¹ A separate judgment conforming with these Findings of Fact and Conclusions of Law shall issue within 20 days of the filing of these Findings of Fact and Conclusions of Law by [counsel for Richard]."

(Footnote added.)

On April 25, 2000, Associates commenced Civil No. 00-1-1332 by filing an eight-count complaint against Richard and unidentified defendants seeking in:

- Count I rescission of the deed to, and promissory note from, Richard for his having "acted inconsistently as to the existence of the Deed" and "abandoned the subject property";
- Count II rescission for mutual mistake regarding sale and purchase;
- Count III rescission for lack of consideration;
- Count IV rescission for unjust enrichment;
- Count V damages for fraud - "[Richard] caused [Associates] to invest him with title in a property pursuant to a mortgage document which he would later seek to be declared null and void";
- Count VI breach of warranty - "In the Mortgage instrument, [Richard] warranted that he held valid title to the subject property";

¹ Assuming the validity of the court's March 17, 2000 decision that the purchase money mortgage had no force and effect and is invalid, that decision did not authorize the court to order the dismissal of the parts of the case seeking a judgment for the amount due and owing pursuant to the loan agreement, including attorney fees, and a deficiency judgment. This is especially true in light of the court's statement at the April 18, 2000 hearing "that [Plaintiff-Appellee-Cross-Appellant Associates Financial Services Company of Hawaii, Inc.] has a promissory note that it can execute on against [Defendant-Appellant-Cross-Appellee Richard Meek Crabbe and Intervenor-Appellant-Cross-Appellee Nolan Lee Keliinohopono Crabbe][.]"

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Count VII equitable lien on the subject property - "[Richard] is vested with title in the subject property, with no concurrent obligation or collateral securing the Note"; and

Count VIII breach of contract - failure to pay the Note.

On May 30, 2000, in Civil No. 00-1-1332, Richard filed a motion to dismiss or for summary judgment on the alternate grounds that (1) the complaint is an impermissible attempt to amend the pleadings in Civil No. 97-3300, or (2) the court's actions in Civil No. 97-3300 caused the alleged claims to be res judicata. On July 10, 2000, Judge Gary Chang entered an order denying Richard's motion. On July 20, 2000, Richard counterclaimed seeking (1) rescission, (2) damages for fraud in the inducement, and (3) damages, including treble damages and attorney fees, for unfair and deceptive business practices.

On September 29, 2000, in appeal no. 21618, the judgment on appeal was filed. On October 30, 2000, Judge Kevin Chang entered an order granting the September 21, 2000 motion by Associates for a consolidation of Civil No. 97-3300 and Civil No. 00-1-1332.

On September 28, 2001, in appeal no. 23463, this court filed an opinion denying Nolan's appeal in Civil No. 99-3214 and affirming Judge Nakatani's May 4, 2000 judgment. The May 4, 2000 judgment was based upon: (1) the November 26, 1999 Order Granting Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion to Dismiss Complaint Filed on August 24,

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1999; and (2) the April 4, 2000 Order Denying Plaintiff's Nolan Keliinohopono Crabbe's Motion to Set Aside Order Granting Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion to Dismiss Complaint Filed on August 24, 1999, Filed on November 26, 1999, Filed on December 6, 1999.

On December 7, 2001, Judge Gary Chang entered an order allowing Nolan to intervene in Civil No. 97-3300 "to the extent provided in" this court's opinion in appeal no. 23463.

On March 6, 2002, Judge Gary Chang orally (1) granted Associates' motion for a decision that certain evidence was not relevant, and (2) denied Associates' motion for a judgment as a matter of law regarding Richard's claims for fraud in the inducement and for unfair and deceptive practices and ordering that those issues shall be decided by the jury.

On March 7, 2002, in a Special Verdict, a jury answered the following special verdict questions as follows:

QUESTION NO. 1: Did Richard Crabbe prove, by clear and convincing evidence, that Associates Financial fraudulently induced him into signing the Loan Agreement?

Answer: Yes: _____ No: X

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QUESTION NO. 6: Do you find that Associates Financial committed either unfair or deceptive acts in obtaining Richard Crabbe's signature on the Loan Agreement justifying an award of damages?

Answer: Yes: _____ No: X

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QUESTION NO. 9: Richard Crabbe has admitted that he did not make any payments under the Loan Agreement. Is Richard Crabbe obligated to pay Associates Financial all of the sums due pursuant to the terms of the Loan Agreement?

Answer: Yes: X No: _____

On May 10, 2002, Judge Gary Chang entered (1) a judgment on the jury's answers to special verdict questions numbered 1 and 6, and (2) an Order Granting Plaintiff/Counterclaim Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion for Summary Judgment as to All Claims of Intervenor Nolan Crabbe Filed January 10, 2002 (May 10, 2002 Order Granting Motion for Summary Judgment), confirming his March 6, 2002 oral order.

On July 16, 2002, Judge Gary Chang entered (1) a \$499,659.56 (\$433,719.53 in principal and interest through March 7, 2002, plus \$60,702.25 for attorney fees and \$5,237.78 for costs) judgment in favor of Associates and against Richard,² (2) a Writ of Execution, (3) an order discharging the commissioner upon disposition of Nolan's deposit, and (4) a Final Judgment. On August 15, 2002, Richard and Nolan filed a joint appeal. On August 27, 2002, Associates filed a cross-appeal.

On January 21, 2003, Judge Gary Chang entered an Amended Final Judgment.³ On February 20, 2003, Richard and Nolan filed a joint appeal. On March 6, 2003, Associates filed a cross-appeal. These appeals were assigned to this court on January 6, 2004.

² This judgment did not identify the claim for which the \$499,659.56 was awarded.

³ The amended judgment identifies the claim for which the \$499,659.56 was awarded.

Richard contends that the court erred:

(1) when its July 10, 2000 order did not dismiss Associate's complaint (on the grounds that (a) Associates, in Civil No. 97-3300, could have, but did not, seek rescission, (b) Civil No. 00-1-1332 was an impermissible attempt to amend pleadings, contrary to the requirements of Hawai'i Rules of Civil Procedure (HRCP) Rule 15(a)⁴, and (c) the court's judgment in Civil No. 97-3300 caused the claims asserted in Civil No. 00-1-1332 to be res judicata);

(2) when it entered its May 10, 2002 Order Granting Motion for Summary Judgment;

(3) when it entered its May 10, 2002 order deciding that certain evidence was not relevant;⁵

(4) when, during trial, it sustained objections to his counsel's questions to Jeff Hamilton and to questions posed to Nolan regarding statements made by Calvin Au; and

⁴ Hawai'i Rules of Civil Procedure Rule 15(a) (2004) states as follows:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

⁵ In his opening brief, Richard also appears to challenge this order by contending that his presentation at trial "was severely and detrimentally restricted by the operation of the [circuit] court's granting of ASSOCIATES's oral motion for summary judgment with respect to [Richard's] 'claims for fraud in the inducement, and for unfair and deceptive practices[.]'" However, a review of the trial transcript and the May 10, 2002 order clearly indicates that the circuit court, in fact, denied Associate's motion for summary judgment on this issue.

(5) when it entered its July 16, 2002 order discharging the Commissioner (arguing, "It was error, under the state of the record, for the lower court not to hold the Commissioner accountable for her lack of production of any rental income from the property from 1998 through 2002 and for her allowance of the physical deterioration of the subject property.").

Nolan contends that the court erred when it entered its May 10, 2002 Order Granting Motion for Summary Judgment.

Associates contends that the court erred: (1) when it entered its March 17, 2000 Findings of Fact, Conclusions of Law, Order deciding that "the mortgage had no force or effect and is invalid";⁶ (2) when it entered its July 16, 2002 order regarding fees; and (3) when it did not, on June 10, 1999, or subsequently, order forfeiture of Nolan's \$14,700 deposit.

Upon a review of the record and the briefs submitted by the parties, we (A) question Judge Suemori's March 17, 2000 conclusion that the purchase money mortgage had no force and effect and is invalid,⁷ (B) note that this conclusion was never

⁶ In its appeal, Associates notes that Hawaii Revised Statutes § 501-116 (1993) applies in this case and it states that "[t]he mortgage . . . shall take effect upon the title of the mortgaged property only from the time of registration[,] and the Deed was recorded prior to the mortgage. Associates argues that "[t]herefore, the date the mortgage is signed has nothing to do with its validity[.]"

⁷ The record shows that post-March 17, 2000, the parties proceeded consistent with the March 17, 2000 decision that "the mortgage had no force or effect and is invalid." We disagree with the suggestion that this court's Memorandum Opinion in appeal no. 21618 finally decided that the Mortgage was valid and, pursuant to the doctrines of res judicata and collateral estoppel, barred a subsequent decision that the Mortgage was invalid.

finalized by a judgment, and (C) conclude that the March 17, 2000 order is void because the appellate court's jurisdiction in the case continued until the judgment on appeal was filed in appeal no. 21618 on September 29, 2000. See State v. Ortiz, 91 Hawai'i 181, 197, 981 P.2d 1127, 1143 (1999) (jurisdiction in the appellate court does not terminate until the judgment on appeal is filed). Consequently, the March 17, 2000 order did not have any collateral estoppel or res judicata effect, and the October 30, 2000 order consolidating Civil No. 97-3300 and Civil No. 00-1-1332 was, in essence, an amendment of the pleadings in Civil No. 97-3300 pursuant to HRCF Rule 15(a).

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that

1. The March 17, 2000 Findings of Fact, Conclusions of Law, Order is void.

2. The following are affirmed: (a) the May 10, 2002 "Order Granting Plaintiff/Counterclaim Defendant Associates Financial Services Company of Hawaii, Inc.'s Motion for Summary Judgment as to All Claims of Intervenor Nolan Crabbe Filed January 10, 2002", (b) the challenged evidentiary rulings during the trial, (c) the July 16, 2002 "Order Granting in Part and

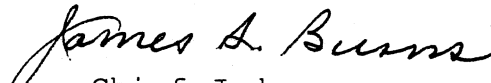
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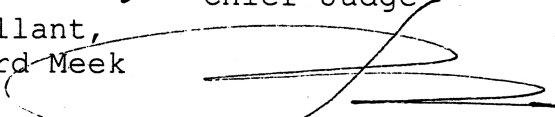
Denying in Part Plaintiff/Counterclaim Defendant Associates Financial Services Company of Hawaii, Inc's Motion to: (1) Finalize Judgment, (2) Issue Writ of Execution, (3) Discharge Commissioner, and (4) Award Attorneys' Fees and Costs to Plaintiff", and (d) the January 21, 2003 Amended Final Judgment.

DATED: Honolulu, Hawai'i, April 22, 2005.


On the briefs:

James M. Sattler
for, Defendant/
Counterclaimant-Appellant,
Cross-Appellee Richard Meek
Crabbe


Chief Judge


Associate Judge

Nolan Lee Keliinohopono Crabbe,
Pro Se Intervenor/
Counterclaimant-Appellant,
Cross-Appellee


Associate Judge

Robert E. Chapman and
Mary Martin
for Plaintiff/Counterclaim
Defendant-Appellee, Cross-
Appellant Associates
Financial Services Company
of Hawaii, Inc.