

NOT FOR PUBLICATION

NO. 24000

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

EUGENE W.I. LAU, Successor Trustee of the
Eugene Kai Fai Lau Living Trust, Plaintiff-Appellee,
v.

DOMINADOR M. LOPEZ, Defendant-Appellant,
and

FRED M. LOPEZ, JOHN DOES 1-20, JANE DOES 1-20
DOE PARTNERSHIPS 1-20, DOE CORPORATIONS 1-20,
DOE ENTITIES 1-20, and DOE GOVERNMENTAL
UNITS 1-20, Defendants,

and

DOMINADOR M. LOPEZ, Third-Party Plaintiff,
v.

FRED M. & DOLORES T. LOPEZ, PRUDENTIAL LOCATION &
DOUG MARTIN, ATTORNEY ALEX M. SONSON, ATTORNEY EDWARD J.S.F.
SMITH, and GOVERNMENT ENTITIES 1-10, Third-Party Defendants,
and

MARCELO M. LOPEZ, JR.,
Third-Party Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 00-1-2652)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Dominador M. Lopez (Dominador)
appeals from the February 2, 2001 Judgment entered in the First
Circuit Court,¹ and certified as final pursuant to Hawai'i Rules
of Civil Procedure (HRCP) Rule 54(b), granting the request by
Plaintiff-Appellee Eugene W.I. Lau, Successor Trustee of the
Eugene Kai Fai Lau Living Trust (Trustee Lau), for summary
judgment on a complaint filed on August 29, 2000 seeking
foreclosure of the mortgage and sale of a property located at
87-112 Farrington Highway in Maili (the Subject Property).

¹ The Honorable Karen Blondin presided.

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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On November 3, 1997, Dominador and co-defendant Fred M. Lopez (Fred) purchased the Subject Property from Trustee Lau for \$90,000. Dominador and Fred paid nine thousand dollars (\$9,000) and executed a Promissory Note (PN) promising to pay Trustee Lau the remaining eighty-one thousand dollars (\$81,000). Under the PN, Dominador and Fred agreed to pay Trustee Lau "consecutive monthly payments of interest only" in the amount of five hundred forty dollars (\$540.00), and a final balloon payment of \$81,000 on or before December 1, 1999. On the same day, Dominador and Fred executed in favor of Trustee Lau a Mortgage of the Subject Property securing payment of the PN.

Although Dominado and Fred were able to pay the \$540.00 monthly interest payments, they were unable to pay the principal balance on the due date. Third-Party Defendant-Appellant Marcelo M. Lopez, Jr. (Marcelo), a mortgage broker and real estate agent acting on behalf of Dominador and Fred, sought an extension. In a letter agreement dated November 19, 1999, Dominador and Fred agreed with Trustee Lau's offer as follows:

According to the mortgage documents, you must pay the entire amount of \$81,000 plus interest of \$540 on December 1, 1999. The time for full payment will be extended to February 15, 2000, provided that you pay the interest of \$540 monthly due on the first day of each month. You may prepay without penalty.

In consideration of such extension, you will waive and release all claims based on the seller's lack of disclosure relating to the above mentioned property, including any claim based on the seller's lack of disclosure of the water problem as stated in Marcelo Lopez, Jr.'s letter of November 12, 1999. You acknowledge that you received notice of the water problem in the home inspection report.

Dominador and Fred ultimately defaulted on the PN and Mortgage, owing the principal balance of \$81,000, plus interest

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of \$540.00 due on December 1, 1999, plus unpaid interest that accrued after December 1, 1999. In a July 17, 2000 demand letter, Trustee Lau informed Dominador and Fred that they were in default of the PN and Mortgage and that a foreclosure action would proceed if payment in full was not received by July 27, 2000.

Trustee Lau filed his complaint for foreclosure on August 29, 2000.

On October 9, 2000, at the request of Trustee Lau, the clerk of the court entered a default against Fred for failure to answer, plead, or otherwise defend against the complaint.

Dominador answered the complaint and asserted sundry defenses and affirmative defenses. Dominador filed a counterclaim in which he asserted as counterclaims the sundry defenses and affirmative defenses he asserted in his answer to the complaint. Dominador filed a third-party complaint against various third-party defendants including Marcelo.

On October 6, 2000 Trustee Lau filed a motion for (1) summary judgment on the complaint, (2) an interlocutory decree of foreclosure, and (3) summary judgment on the counterclaim.

On November 17, 2000, Dominador and Marcelo signed and filed a Stipulation stating, in relevant part, as follows:

1. Pursuant to Rules 13(h), 17(a), and 20(a), [Marcelo], who never pleads or responds to third party plaintiff's complaint but has permission extended by the third party plaintiff to respond to said complaint if still necessary, while as joinder and one of the real parties in interest, joins in with [Dominador's] claims and defenses against all other parties including the Plaintiff in this case at bar. Thus, [Marcelo] needs not answer the third party complaint and will be joined in one action as defendants [sic] as there appears the series of transactions or

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occurrences that are asserted against the defendants jointly and severally; and the right to relief in respect of or arising out of the same transaction, occurrences, or series of transactions and as question of law and of fact, are common to both [Marcelo] and [Dominador], who agree with one another to be held jointly and severally responsible for receiving the detriments and/or benefits in this case.

2. Effective immediately, [Marcelo] and [Dominador], by virtue of this Stipulation and by order of this Honorable Court, is, was [under 15(c) H.R.C.P.], and will be joined and named as defendants, counterplaintiffs, and/or third party plaintiffs, when appropriate, in each pleading, court filing, and/or appearance in court until conclusion of this case.

The circuit court neither approved nor ordered this stipulation but Dominador and Marcelo proceeded thereafter as if it had.

On December 15, 2000, Marcelo joined Dominador's answer to the complaint and counterclaim.

On December 21, 2000, Marcelo and Dominador filed a document in which they stated, in relevant part, as follows:

COME NOW DEFENDANTS [MARCELO] AND [DOMINADOR] . . . , and hereby add to oppose all Plaintiff's Motions for Summary Judgments [sic] and Interlocutory Decree of foreclosure against all parties. **This additional opposition is made pursuant to Rule 56 HRCF likewise with a claim for declaratory judgment for rescission against Plaintiff and for issues for damages triable by order of this Honorable Court, or in the alternative, to supplement pleadings or to conform to the evidence[.]**

(Emphasis in the original.)

On December 27, 2000, the court announced its decision granting (1) summary judgment on the complaint and (2) an interlocutory decree of foreclosure, but denying (3) summary judgment on the counterclaim without prejudice. On February 2, 2001, the court entered its Judgment. The court finalized the February 2, 2001 Judgment pursuant to HRCF Rule 54(b). Dominador and Marcelo filed notices of appeal on January 5, 2001, February 1, 2001, and February 7, 2001. The appeal was assigned to this court on October 8, 2001.

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On May 15, 2001, Dominador, as "Defendant-Appellant", and Marcelo, as "Party-In-Interest Appellant", filed an Opening Brief. On June 29, 2001, they filed an Amended Opening Brief.

On November 13, 2001, Dominador filed Case No. 01-03383 in the United States Bankruptcy Court, District of Hawaii. On October 3, 2005, the Bankruptcy Court entered a "Discharge of Debtor(s) After Completion of Chapter 13 Plan" which states, in relevant part, that "a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case."

Does Marcelo have standing to appeal the February 2, 2001 Judgment? Standing depends on "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf." Sierra Club v. Hawai'i Tourism Auth., 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002) (citation omitted). Thus, to establish standing, the injured party must show that: (1) he or she has suffered an actual or threatened injury as a result of the opposing party's wrongful conduct, (2) the injury is fairly traceable to the opposing party's actions, and (3) a favorable decision would likely provide relief for the injury. Bush v. Watson, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996). The February 2, 2001 Judgment is not against Marcelo, Marcelo is not aggrieved by the February 2, 2001 Judgment, and Marcelo lacks standing to appeal it. Therefore, Marcelo's appeal is dismissed.

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In this foreclosure case, Trustee Lau satisfied his initial burden of showing that there was no genuine issue of material fact as to the allegations in the Complaint. Dominador failed to come forward, through affidavit or other evidence, with specific facts showing that there was a genuine issue of material fact. Therefore, Trustee Lau was entitled to summary judgment on the complaint and an interlocutory decree of foreclosure as a matter of law.

Dominador argues that summary judgment was in error because he had raised the affirmative defense that Trustee Lau fraudulently concealed the water collection problem on the Subject Property. While it is true that Trustee Lau did not fill out a disclosure statement before the sale of the property, the prevailing statute at the time, Hawaii Revised Statutes (HRS) § 508D-10 (Supp. 1996)², did not require him to do so because he did not live in the Subject Property prior to its sale. The record shows that Dominador was provided with a home inspection report on August 2, 1997 as allowed under HRS § 508D-10(1). This report specifically stated that "water from the rear (heavy rains) will run under the house and collect as there is no way for water to exit. Many signs of standing water under the house." Since the report was made three months prior to the sale of the Subject Property, it cannot be said that any water condition affecting the house was concealed from Dominador.

² Hawaii Revised Statutes § 508D-10 (Supp. 1996) was repealed in 2001.

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Furthermore, in the November 19, 1999 letter agreement, Dominador waived and released "all claims based on the seller's lack of disclosure" relating to the Subject Property in exchange for receiving an extension on the due date of the principal balance from Trustee Lau.

Dominador further argues on appeal that his due process rights were violated because he did not receive proper notice of his default. Dominador asserts that he should have been given thirty days notice, as opposed to the ten days of notice he received in the July 17, 2000 demand letter. However, as Trustee Lau points out, this issue was not raised in Lopez's opposition to the motion for summary judgment, and therefore cannot be raised for the first time on appeal. "The general rule is that an issue which was not raised in the lower court will not be considered on appeal. An appellate court will deviate from this rule only when justice so requires." Kernan v. Tanaka, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993) (citation omitted).

In this case, we conclude that justice does not so require. The Mortgage states, in relevant part:

Lender may require Immediate Payment in Full . . . only if all of the following conditions are satisfied:

(A) I fail to keep any promise or agreement made in this Mortgage, including the promise to pay when due the amounts that I owe Lender under the Note and under this Mortgage; and

(B) Lender sends to me, . . . a notice that states:

(i) The promise or agreement that I failed to keep;

(ii) The action that I must take to correct that failure;

(iii) A date by which I must correct the failure (if my default is a failure to make a payment due under the Note, that date must be at least 10 days from the date on which the notice is mailed to me, . . . ; if I am in default for another reason, the time period shall be at least 30 days); and

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(iv) That if I do not correct the failure by the date stated in the notice, I will be in default and Lender may require Immediate Payment in Full, and Lender or another person may acquire the Property by means of foreclosure and sale; and

(C) I do not correct the failure stated in the notice from Lender by the date stated in that notice.

Dominador argues that payments were made on the mortgage up to November 1, 1999. Trustee Lau asserts that no further payments were made on the mortgage, such as the December 1, 1999 interest payment of \$540.00, the balloon payment due on December 1, 1999 and any other interest payments as agreed per the November 19, 1999 letter agreement. Lopez does not contest this assertion. Since the default was due to a "failure to make a payment due under the Note," the correct minimum required notice was ten days.

Dominador's argument that the trial court erred in granting summary judgment because Lopez had not completed discovery is also without merit.

A trial court's decision to deny a request for a continuance pursuant to HRCF Rule 56(f) will not be reversed absent an abuse of discretion. Additionally, the request must demonstrate how postponement of a ruling on the motion will enable him or her, by discovery or other means, to rebut the movants' showing of absence of a genuine issue of fact. An abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Josue v. Isuzu Motors Am., Inc., 87 Hawai'i 413, 416, 958 P.2d 535, 538 (1998) (internal quotation marks, brackets, and citations omitted). Here, the record on appeal lacks any indication of how postponing the summary judgment ruling would allow Dominador to rebut Trustee Lau's showing of an absence of a genuine issue of material fact.

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Dominador's final argument is that the trial court's certified judgment should be set aside because his affirmative defenses and counterclaims presented "one inseparable controversy", and it was illogical to decide the case at different times.

As noted above, on October 6, 2000 Trustee Lau filed a motion for (1) summary judgment on the complaint, (2) an interlocutory decree of foreclosure, and (3) summary judgment on the counterclaim. On December 27, 2000, the court announced its decision granting (1) and (2), but denying (3) without prejudice. The court finalized the February 2, 2001 Judgment pursuant to HRCF Rule 54(b).

"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). Dominador failed to satisfy this burden. The summary judgment and the interlocutory decree of foreclosure expressly decided, as a matter of law, that the defenses and the affirmative defenses were without merit. All counterclaims also having been asserted as defenses and affirmative defenses, the summary judgment and the interlocutory decree of foreclosure implicitly decided that the counterclaims asserted by Dominador were without merit. Therefore, the court should have granted summary judgment in favor of Trustee Lau on the counterclaim.

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Dominador's third-party complaint sought special, general, and punitive damages and costs from third parties. It was separable from the complaint and the counterclaim.

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 the February 2, 2001 Judgment granting Trustee Lau's motion for summary judgment as to his August 29, 2000 complaint seeking foreclosure of the mortgage and sale of the Subject Property located at 87-112 Farrington Highway in Maile is affirmed. This case is remanded to the circuit court for (1) entry of a summary judgment in favor of Trustee Lau on the counterclaim and (2) appropriate proceedings resulting in a decision on the Third-Party Complaint.

DATED: Honolulu, Hawai'i, March 14, 2006.

On the briefs:

Marcelo M. Lopez, Jr.,
Third-Party Defendant-Appellant,
pro se, and Dominador M. Lopez,
Defendant-Appellant, *pro se*.

Eugene W.I. Lau,
Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge