

NO. 26267

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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STATE OF HAWAII
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2006 OCT -6 AM 7:54

FILED

WELLS FARGO BANK MINNESOTA NATIONAL ASSOCIATION AS
INDENTURE TRUSTEE FOR GRP/AG REAL ESTATE ASSET
TRUST 2000-1,¹ Plaintiff-Appellee, v. GARY KAMA,
JOELYN J. KAMA, also known as Joelyn Kama, JOHN D.
KAUPIKO, also known as John Kaupiko, MAY M.
KAUPIKO, also known as May Kaupiko, Defendants-
Appellants, and JOHN DOES 1-50, JANE DOES 1-50,
DOE PARTNERSHIPS 1-50, DOE CORPORATIONS 1-50, DOE
ENTITIES 1-50 and DOE GOVERNMENTAL UNITS 1-50,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 99-1503)

SUMMARY DISPOSITION ORDER

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

Defendants-Appellants Gary Kama (Gary) and Joelyn J.
Kama (Joelyn), also known as Joelyn Kama, John D. Kaupiko (John)
also known as John Kaupiko and May M. Kaupiko (May) also known as
May Kaupiko (collectively, Defendants) appeal from the
November 4, 2003 "Plaintiff's Joint and Several Deficiency
Judgment Against Defendants Gary Kama, Joelyn J. Kama, also known
as Joelyn Kama, John D. Kaupiko, also known as John Kaupiko, and
May M. Kaupiko, also known as May Kaupiko," (Deficiency Judgment)

¹ Ameriquest Mortgage Company (Ameriquest) filed the complaint in this
action. On May 30, 2002 the circuit court granted Ameriquest's motion to
substitute Wells Fargo Bank Minnesota National Association as Indenture
Trustee for GRP/AG Real Estate Asset Trust 2000-1 (Wells Fargo) for itself as
plaintiff. Notwithstanding the captions contained in the parties' documents
filed after this date and the Index to the Record on Appeal, Wells Fargo
remains the sole plaintiff in this action.

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

in favor of Plaintiff-Appellee Wells Fargo Bank Minnesota National Association as Indenture Trustee for GRP/AG Real Estate Asset Trust 2000-1" (Wells Fargo) in the Circuit Court of the First Circuit (circuit court).²

After careful review of the issues raised and the arguments made by the parties, as well as the record of the proceedings before the circuit court and the relevant case law, we resolve Defendants' points on appeal as follows:

(1) The circuit court³ did not abuse its discretion when it denied "Kama and Kaupiko Defendants' Rule 60(b) Motion to Set Aside and Vacate All Prior Orders, Decrees, and Judgments Filed in this Action, or, in the Alternative, for Stay Pending Appeal or Federal Court Adjudication" (Motion to Set Aside) for the following reasons:

(a) Defendants' argument under Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b)(4), that the service of the complaint and summons upon John and May⁴ was defective, fails as the record supports the circuit court's finding that it was proper. On June 10, 1998, John and May signed an Occupancy Agreement to live at 59-762B Kamehameha Highway for at least 12 months after the closing of the loan, as a material condition of

² The Honorable Karen N. Blondin presided.

³ The Honorable Sabrina S. McKenna issued the April 12, 2000 order denying this motion.

⁴ Gary Kama and Joelyn J. Kama, also known as Joelyn Kama do not challenge service upon them.

the loan. Consistent with the substitute service provision of HRCF Rule 4(d)(1),⁵ on May 14, 1999, a deputy sheriff served Gary personally at "59-762 Kamehameha Highway," Gary told him that John and May "were living there at 59-762 Kamehameha Highway, Haleiwa, Hawaii 96712" and that John was Gary's uncle. The sheriff left copies of the complaint and summons for Joelyn, John and May, with Gary. John and May filed a "Joint Declaration" denying that they had ever "resided at the property which is the subject of this suit, 59-762B Kamehameha Highway." The circuit court found, at the hearing on the Motion to Set Aside, that "this house at which they were served in which they said that they were going to be living there to get an owner/occupant loan is also a dwelling house under Rule 4(d)(1)." This finding was supported by substantial evidence. Bhakta v. County of Maui, 109 Hawai'i 198, 208, 124 P.3d 943, 953 (2005).

Federal court interpretation of parallel federal rules is "highly persuasive." Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 431, 16 P.3d 827, 836 (2000). See, National Development Co. v. Triad Holding Corp., 930 F.2d 253,

⁵ Hawai'i Rules of Civil Procedure Rule 4(d)(1) provides,

(d) [Summons]: Personal service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, (A) by delivering a copy of the summons and of the complaint to the individual personally or in case the individual cannot be found by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .

257-58 (2d Cir. 1999) cert. denied, 502 U.S. 968 (1991) (recognizing service at one of multiple dwelling houses). See also, Sheldon v. Fettig, 77 Wash. App. 775, 781, 893 P.2d 1136, 1139 (1995) (in a multiple residence situation, considered whether substitute service was made at the place "reasonably calculated to provide notice to the defendant"). Given the state of this record, we are satisfied that John and May were properly served.

(b) Defendants' alternative basis for relief under HRCP Rule 60(b)(4) "because the underlying note and mortgage had been rescinded" under the federal Truth in Lending Act, 15 United States Code (USC) §§ 1601 et seq, is also unsupported by the record.

A motion under HRCP Rule 60(b)(4) is to challenge the judgment on the basis that it "is void." A judgment is void "only if the court that rendered it lacked jurisdiction of either the subject matter or the parties or otherwise acted in a manner inconsistent with due process of law." In re Hana Ranch Co. Ltd., 3 Haw. App. 141, 146, 642 P.2d 938, 941 (1982). "'In the sound interest of finality, the concept of void judgment must be narrowly restricted.'" Dillingham Inv. Corp. v. Kunio Yokoyama Trust, 8 Haw. App. 226, 233, 797 P.2d 1316, 1320 (1990) (quoting 7 J. Moore & J. Lucas, Moore's Federal Practice, ¶ 60.25[2], at

60-225 (2d ed. 1990)). A Truth in Lending challenge does not qualify as a basis to challenge a judgment under HRCF Rule 60(b)(4), as even if sustained, it "would not oust personal or subject matter jurisdiction." Citicorp Mortgage, 94 Hawai'i at 434, 16 P.3d at 839.

(2) There was no error in the circuit court's failure to dismiss for want of standing. Defendants did not preserve this issue for appeal as they failed to move to dismiss on this basis. Furthermore, the first time Defendants brought this argument to the circuit court's attention was in their June 12, 2002 opposition memorandum to Wells Fargo's motion for second writ of possession. By this time Wells Fargo was substituted for Ameriquest as plaintiff. Finally, assuming without deciding whether Ameriquest lacked standing, HRCF Rule 17 states that an action shall not be dismissed until a reasonable time has been given to cure. Here, the cure was effected.

(3) Appellants were not denied due process for the following reasons:

(a) The discrepancy in the address of the subject property did not harm Defendants. Assuming arguendo, that the street address used in all the documents pertaining to the loan and in the foreclosure proceedings was incorrect, Defendants do not establish how their due process rights were implicated. In any event, the record reveals they were not harmed thereby. The

fact sheets and newspaper advertising for the foreclosure sale also contained both the tax map key number and a description of the property, neither of which Defendants claim was inaccurate.

Defendants' argument that "anyone interested in the property would have come to the site and observed the wrong house and the wrong lot" and that this caused a lower sales price or reduced the number of bidders, is speculation. To the extent that the public might have been confused about the property being offered for sale, the potential for negatively affecting the outcome of the sale pales by comparison to that caused by Defendants' own action in refusing to allow access to the property for a public inspection. This, at a minimum, would have cleared up the confusion.

Finally, as Defendants presumably were aware of their own address, yet made no attempt to correct this alleged mistake, they cannot be heard to complain of the error.

(b) Defendants' other due process arguments have been abandoned. In their points on appeal, Defendants claim that the length of time allowed for closing the foreclosure sale and the approval of the amount of the deficiency without a hearing also violated their due process rights. However, Defendants have failed to present any discernable argument regarding either of these matters and they are deemed abandoned. HRAP Rule 28(b)(7); Citicorp Mortgage, 94 Hawai'i at 433, 16 P.3d at 838.

Therefore,

IT IS HEREBY ORDERED that the Deficiency Judgment filed on November 4, 2003 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 6, 2006.

On the briefs:

Gary Victor Dubin,
for Defendants-Appellants.


Chief Judge

Walter Beh, II and
Cheryl A. Nakamura,
(Rush Moore Craven Sutton
Morry & Beh),
for Plaintiff-Appellee.


Associate Judge


Associate Judge