

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26745

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NATIVIDAD LUCERO NAVARRO, Plaintiff-Appellant, v.
MIDFIRST BANK, Defendant-Appellee, and DOE DEFENDANTS 1-100,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 03-1-2228-11)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe and Fujise, JJ.)

Plaintiff-Appellant Natividad Lucero Navarro (Nararro) appeals from the final judgment entered July 7, 2004, in the Circuit Court of the First Circuit (circuit court).¹ Final judgment was entered pursuant to an order granting a motion for summary judgment filed by Defendant-Appellee Midfirst Bank (Midfirst). After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we conclude that the circuit court did not err. Consequently, we affirm.

Navarro challenges the circuit court's granting of Midfirst's motion for summary judgment. In support of this single point, Navarro forwards three arguments. First, when analyzing the non-judicial foreclosure procedure, the circuit court erred in utilizing the power of sale procedures outlined in Hawaii Revised Statutes (HRS) §§ 667-5 through 667-10 (1993) instead of HRS §§ 667-21 through 667-42 (Supp. 1998). Second, the circuit court erred when it relied on unsworn testimony in the form of argument from Midfirst's counsel, in violation of Hawai'i Rules of Civil Procedure (HRCP) Rule 56. Finally, the circuit court erred when it failed to conclude that the power of sale procedure detailed in HRS §§ 667-5 through 667-10 was unconstitutional.

¹ The Honorable Victoria S. Marks presided.

K. HAYAKAWA
CLERK
INTERMEDIATE COURTS
STATE OF HAWAII

2007 DEC 13 AM 7:46

FILED

1. Both powers of sale described in HRS §§ 667-5 through 667-10, and HRS §§ 667-21 through 667-42 clearly state that the right to exercise a power of sale derives from a contractual, and not a statutory basis. Moreover, it is clear from the statutes themselves that HRS §§ 667-21 through 667-42 are an alternative power of sale to the one set forth in HRS §§ 667-5 through 667-10. According to the valid terms of the agreement executed between the parties, the lender was given the right to elect the power of sale to be applied during the foreclosure proceedings. The lender validly exercised its rights by proceeding under HRS §§ 667-5 through 667-10.

2. The statements by Midfirst's counsel did not amount to an assertion of fact. It is true that unverified statements of fact made by counsel at a hearing of a summary judgment motion cannot form a part of the circuit court's basis for granting the motion. See Au v. Au, 63 Haw. 210, 213, 626 P.2d 173, 176-77 (1981); see also Guaschino v. Eucalyptus, Inc., 3 Haw. App. 632, 637, 658 P.2d 888, 893 (1983). However, Midfirst's counsel asserted only what he understood was the legislative history and its effect upon the interpretation of the statute. As such, counsel's statements were not assertions of fact under HRCF Rule 56. In any event, there is no indication that the court relied on statements made by Midfirst's counsel in reaching its decision.

3. While federal appellate court decisions are not a binding precedent for this jurisdiction, given that the federal approach to addressing procedural due process claims has been adopted in this State, the holding in Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003), is highly persuasive. Ek v. Boggs, 102 Hawai'i 289, 297, 75 P.3d 1180, 1188 (2003) (citing State v. Bani, 97 Hawai'i 285, 293, 36 P.3d 1255, 1263 (2001)). As explained in Apao, for state action to be implicated in this area, there must be some "'overt official involvement' in the enforcement of creditors' remedies." Apao, 324 F.3d at 1095.

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

As discussed above, HRS §§ 667-5 through 667-10 merely recognizes the circumstances under which a self-help remedy is valid. The statutes effectively limit the types of enforceable 'power of sale' clauses that can be contained within a mortgage agreement. The provisions of HRS §§ 667-5 through 667-10 neither encourage nor compel the inclusion of power-of-sale terms in a mortgage agreement, and do not compel the exercise of the power of sale. Apao 324 F.3d at 1094 (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166, 98 S.Ct. 1729, 1738 (1978)). Thus, state involvement in the exercise of the power of sale was insufficient to implicate due process guarantees as found in both the Hawai'i Constitution, under Article I, Section 5, and the Federal Constitution, under the Fourteenth Amendment.

Therefore,

The Circuit Court of the First Circuit's July 7, 2004, final judgment is affirmed.

DATED: Honolulu, Hawai'i, December 13, 2007.

On the briefs:

Marshall D. Chinen,
for Plaintiff-Appellant.



Chief Judge

Steven T. Iwamura,
Derek W.C. Wong, and
Robert M. Ehrhorn, Jr.
(Stanton Clay Chapman Crumpton
& Iwamura),
for Defendant-Appellee.



Associate Judge



Associate Judge