

NO. 27798

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

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2007 APR -5 AM 10:38

FILED

LOGAN & MASSEY, INC., a Washington corporation
Plaintiff-Appellee,

v.

JERRY IVY, successor in interest to OMNI FINANCIAL, INC.,
Defendant-Appellant,

and

DOUGLAS A. BROWN, et al.,
Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(S.P. NO. 05-1-0046)

MEMORANDUM OPINION

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

Defendant-Appellant Jerry Ivy (Ivy) appeals from the February 3, 2006 "Order Granting Defendants Douglas A. Brown and Jane Doe [Diana] Brown's Motion to Dismiss and Set Aside Foreign Judgment Filed November 9, 2005 Filed December 13, 2005" (February 3, 2006 Order of Dismissal) entered in the Circuit Court of the Third Circuit.¹ We affirm.

BACKGROUND

In May of 1999, in case No. 98-2-06490-1 SEA, a court of the State of Washington entered a judgment (Omni/Browns Judgment) for \$502,687.58 in favor of Omni Financial, Inc. (Omni), and against "Douglas Brown and Jane Doe [Diana] Brown, and Douglas Brown trustee of the Brown Trust" (Browns).

¹ Judge Greg K. Nakamura presided.

In June of 2002, Gerald Fiorito (Fiorito) guaranteed the Browns' payment of the Omni/Browns Judgment and executed a confession of an Omni/Fiorito Judgment to be filed in the event the Browns failed to pay and Fiorito failed to perform his guarantee. The Browns failed to pay and Fiorito failed to perform his guarantee. On June 13, 2003, in case No. 03-2-27114-4 SEA, Omni filed the Omni/Fiorito Judgment for \$1,202,284.92 plus interest less payments received. Thereafter Fiorito made payments of approximately \$250,000 in partial satisfaction of the Omni/Fiorito Judgment.

In 2004, Fiorito filed a Chapter 11 proceeding in the United States Bankruptcy Court for the Western District of Washington. This Chapter 11 proceeding was subsequently converted to a Chapter 7 proceeding and a trustee was appointed.

In December of 2004, approximately \$575,000 was paid to Omni in partial satisfaction of the Omni/Fiorito Judgment.

On March 23, 2005, for \$747,940, Omni assigned to Ivy its interests in both the Omni/Browns Judgment and the Omni/Fiorito Judgment.

On July 8, 2005, for valuable consideration, Fiorito assigned to Ivy all of his rights "(including Mr. Fiorito's subrogation rights to collect on the Omni[/Browns] Judgment)."

In September of 2005, the Bankruptcy trustee sold Fiorito's property and paid Ivy \$740,660.65 in satisfaction of the Omni/Fiorito Judgment. On September 16, 2005, a satisfaction of the Omni/Fiorito Judgment was filed.

Ivy alleges that "[b]ecause Brown had no known assets that were not already encumbered and in light of the costs to pursue collection, the bankruptcy Trustee abandoned Mr. Fiorito's subrogation claims over and against Mr. Brown in case No. 98-2-06490-1 SEA back to Mr. Fiorito."

On November 9, 2005, Ivy commenced this Uniform Foreign Money-Judgments Recognition Act, Hawaii Revised Statutes (HRS) Chapter 658C (Supp. 2005)² case against the Browns by filing an

²

§ 658C-1 Short title. This chapter may be cited as the Uniform Foreign Money-Judgments Recognition Act.

§ 658C-2 Definitions. As used in this chapter:

"Foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

"Foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, or insular possession thereof.

§ 658C-3 Applicability. This chapter shall apply to any foreign judgment that is final, conclusive, and enforceable where rendered even though an appeal therefrom is pending or is subject to appeal.

§ 658C-4 Recognition and enforcement. (a) Except as provided in section 658C-5, a foreign judgment meeting the requirements of section 658C-3 shall be conclusive between the parties to the extent that it grants or denies recovery of a sum of money. A copy of any foreign judgment may be filed in the office of the clerk of an appropriate court of this State. The foreign judgment shall be enforceable in the same manner as the judgment of a sister-state that is entitled to full faith and credit.

(b) At the time of the filing of the foreign judgment, the judgment creditor or the judgment creditor's attorney shall:

- (1) Make and file with the clerk of the court an affidavit setting forth the name and last known post office address given;
- (2) Mail notice of the filing to the judgment debtor at the address given; and
- (3) Make note of the mailing in the docket.

The notice shall include the name and post office address of the judgment creditor and the judgment creditor's attorney, if any, in this State. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. The failure by the clerk to mail notice of filing shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

§ 658C-5 Grounds for non-recognition. (a) A foreign judgment shall not be conclusive if:

- (1) The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- (2) The foreign court did not have personal jurisdiction over the defendant; or

exemplified copy of the Omni/Browns Judgment.

On December 13, 2005, the Browns filed a motion to dismiss. Ivy's memorandum in opposition was filed on January 18, 2006. This motion was heard on January 26, 2006. At the

-
- (3) The foreign court did not have jurisdiction over the subject matter.
 - (b) A foreign judgment need not be recognized if:
 - (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the defendant to defend;
 - (2) The judgment was obtained by fraud;
 - (3) The cause of action on which the judgment is based is repugnant to the public policy of this State;
 - (4) The judgment conflicts with another final and conclusive judgment;
 - (5) The proceedings in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
 - (6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

§ 658C-6 Personal jurisdiction. (a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if:

- (1) The defendant was served personally in the foreign state;
- (2) The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant;
- (3) The defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
- (4) The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
- (5) The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or
- (6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of that operation.

(b) The courts of this State may recognize other [bases] of jurisdiction.

§ 658C-7 Stay in case of appeal. If the defendant satisfies the court either that an appeal is pending, or that the defendant is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

§ 658C-8 Severability. This chapter shall not prevent the recognition of a foreign judgment in situations not covered by this chapter.

§ 658C-9 Uniformity of interpretation. This chapter shall be construed to effectuate its general purpose, which is to make uniform the law of those states that enact it.

conclusion of the hearing, the court stated:

Okay, so the Court is going to grant the motion.

In this case, the exemplified judgment filed is the order and judgment on motion for partial summary judgment on promissory notes to Omni, paren, Brown, filed in Number 98-06490-1 SEA, in the Superior Court of the State of Washington for King County.

It is undisputed that the judgment itself has been satisfied.

What remains unsatisfied perhaps is the claim allegedly held by Jerry Ivy, which was allegedly assigned to him by Gerald Fiorito, which is as follows:

Defendant Douglas A. Brown and his marital property owed a debt to Omni Financial, Inc. Mr. Fiorito was a guarantor of that debt. Mr. Fiorito's assets were used to satisfy the debt. Therefore, Mr. Fiorito allegedly had a subrogation claim against defendant Brown and his marital property for the recovery of an amount equal to the value of Mr. Fiorito's assets used to satisfy the debt. This subrogation claim was allegedly assigned from Mr. Fiorito to Mr. Ivy.

However, this subrogation claim, if any, is not liquidated in a judgment. Until such a judgment is entered, it cannot be enforced in the State of Hawaii.

The February 3, 2006 Order of Dismissal and the February 27, 2006 notice of appeal followed.

SUMMARY OF IVY'S ARGUMENT

In the opening brief, Ivy contends that Omni obtained the Omni/Browns Judgment; Omni is the Omni/Browns Judgment creditor and the Browns are the Omni/Browns Judgment debtors; Fiorito guaranteed payment of the Omni/Browns Judgment; neither the Browns nor Fiorito paid the Omni/Browns Judgment; the Omni/Fiorito Judgment was entered; Fiorito partially paid the Omni/Fiorito Judgment; Fiorito filed a petition in bankruptcy; Omni sold its interests in the Omni/Browns Judgment and the Omni/Fiorito Judgment to Ivy; Fiorito assigned to Ivy all of

Fiorito's rights to Fiorito's bankruptcy estate and all of Fiorito's subrogation rights pertaining to the Omni/Browns Judgment which has never been paid; and via Fiorito's/Ivy's bankruptcy estate, Ivy was paid the balance due on the Omni/Fiorito Judgment.

Ivy also contends that the circuit court's February 3, 2006 Order of Dismissal "was contrary to the Washington superior court's three prior rulings on this same issue, and was entered in violation of Article IV, § 1 of the United States Constitution -- the full faith and credit clause." The following are the three prior rulings in case No. 98-2-06490-1 SEA, the Omni/Browns case:

1. On July 26, 2005, the Washington court entered an Order denying the Browns' Motion to Quash the Bench Warrant of Douglas Brown;

2. On November 9, 2005, the Washington court entered an Order denying the Browns' motion for summary judgment of dismissal; and

3. On December 29, 2005 the Washington court entered an Order stating that Brown's motion for summary judgment of dismissal is "stricken".

In summary, Ivy contends:

Thus, as of September 2005, the [Omni/]Fiorito Judgment had been paid in full and Fiorito had acquired the Omni[/Browns] Judgment by operation of Washington law; however, Mr. Fiorito's right of reimbursement (subrogation) against Mr. Brown, which had been assigned to Appellant Ivy, remained unsatisfied.

. . . .
. . . Brown has not satisfied the Brown debt. Under Washington state law, Mr. Fiorito's subrogation rights have been properly assigned to Mr. Ivy, and Mr. Ivy is permitted to pursue those rights and execute on the Omni[/Browns] Judgment. Appellant Ivy argued that the Washington superior court's rulings on this issue are entitled to full faith and credit, as a matter of law.

(Emphases omitted.)

SUMMARY OF THE BROWNS' ARGUMENT

In the answering brief, the Browns contend that Fiorito and Fiorito's bankruptcy estate paid in full the Omni/Browns Judgment and that "[t]his satisfied the Omni[/Browns] Judgment which is the Exemplified Foreign Judgment [Ivy] filed in the Court below, apparently seeking to be paid a second time." The Browns further contend:

As David J. Balint, Esq. [,] the attorney in proceedings in the State of Washington for [Ivy], argued in agreement with [the Browns], citing 38 Am.J[u]r.2d, Guarantee, §127, for the proposition that when a creditor has enforced a contract of guaranty against a guarantor to obtain payment of a debtor's obligation, the guarantor is substituted in place of a creditor and is entitled to make a claim for reimbursement from the debtor by way of a proceeding against him. Thus[, Ivy] himself appears to confirm that the law is that under such circumstances a claim can be made, by the guarantor, i.e. by Fiorito in this case. But no enforceable judgment is made in favor of a guarantor and against a debtor merely because the guarantor pays the creditor, thereby producing the possibility of a claim. . . .

With the attempted filing of that foreign [Omni/Browns] judgment in No. 98-64090-1, [Ivy] sought to be in [sic] enabled to collect the judgment a second time from [the Browns].

DISCUSSION

We conclude that the following are the issues and answers in this case.

1.

May a judgment creditor sell, and may a third-party purchase, a judgment creditor's interest in an unpaid judgment? We conclude that the answer is yes. See Mall v. Labow, 33 Conn. App. 359, 635 A.2d 871, 873 (Conn. App.1994) (clarifying that "[j]udgments are assignable"); Dunn v. Snell, 15 Mass. 481, 485 (1819) (holding that equitable assignment of judgment is effective because a "judgment is only evidence of the debt, and if the execution is delivered over, with intent to transfer the debt, upon a fair bargain [and] upon a valuable consideration" the transaction is binding); HRS § 636-3 (Supp. 2006) (specifying a special requirement for the assignment of a judgment that is a lien upon real property).

2.

After a guarantor guarantees payment of a judgment debt, the judgment is not paid, and the judgment creditor obtains a judgment against the guarantor, does that judgment against the guarantor satisfy the judgment against the judgment debtor? We conclude that the answer is no. The judgment creditor then has two judgments for one debt. Payment of one is payment of the other.

3.

When a guarantor pays the judgment creditor, is the judgment extinguished or does the guarantor thereupon become the

judgment creditor? We conclude that the judgment is extinguished. The payment of a guarantee is not a purchase of the judgment creditor's interest.

4.

On March 23, 2005, after a \$575,000 payment had been made on the two judgments but before the two judgments had been fully paid, Ivy purchased Omni's interest as judgment creditor of both judgments. In September of 2005, when the Bankruptcy trustee paid Ivy \$740,660.65 in satisfaction of the Omni/Fiorito Judgment and a satisfaction of the Omni/Fiorito Judgment was filed, was the Omni/Browns Judgment thereby also satisfied? We conclude that the answer is yes. Thus, Ivy may not seek to collect the Omni/Browns Judgment from the Browns and has no basis for this Uniform Foreign Money Judgments Recognition Act case against the Browns.

5.

The Omni/Browns Judgment having been paid by the guarantor, does the guarantor have a right to seek reimbursement from the original judgment debtor? We conclude that the answer is yes. "It is well settled that where one secondarily liable is called upon to make good on his obligation and pays the debt, he steps into the shoes of the former creditor." Allen v. See, 196 F.2d 608, 610 (Tenth Circuit, 1952).

In common law, this court found subrogation to be "the substitution of another person in the place of a creditor in relation to the debt." Id. (quoting Kapena v. Kaleleonalani, 6

Haw. 579, 583, 1885 WL 5066 (1885)). It was concluded that "[t]he substitute is put in all respects in the place of the party to whose rights he [or she] is subrogated." Id.

Nacino v. Koller, 101 Hawai'i 466, 470, 71 P.3d 417, 421 (2003)

Accordingly, this court has described the outer limits of the doctrine of equitable subrogation as follows:

Subrogation is a venerable creature of equity jurisprudence, "so administered as to secure real and essential justice without regard to form[.]" H. Sheldon, The Law of Subrogation § 1, at 2 (1882) (footnote omitted). "It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter[.]" Id. (footnote omitted). It "is defined by Sheldon to be 'the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.'" Kapena v. Kaleleonalani, 6 Haw. 579, 583 (1885). When subrogation occurs, "[t]he substitute is put in all respects in the place of the party to whose rights he is subrogated." Id. In effect, he "steps into the shoes" of the party. See Putnam v. Commissioner, 352 U.S. 82, 85, 77 S.Ct. 175, 176, 1 L.Ed.2d 144 (1956); A. Windt, Insurance Claims and Disputes § 10.05, at 409 (1982); Black's Law Dictionary 1279 (5th ed.1979).

Peters[v. Weatherwax], 69 Haw. [21]at 27, 731 P.2d [157]at 161-62 [(1987)](brackets in original).

Beneficial Hawaii, Inc. v. Kida, 96 Hawai'i 289, 313-14, 30 P.3d 895, 919-20 (2001).

6.

May the guarantor assign the guarantor's right to seek reimbursement from the original judgment debtor to a third-party? We conclude that the answer is yes. On July 8, 2005, for valuable consideration, Fiorito assigned to Ivy all of his rights "(including Mr. Fiorito's subrogation rights to collect on the Omni[/Browns] Judgment)[.]" Thus, Ivy has a right to seek reimbursement from the Browns. However, he cannot do it by way of this Uniform Foreign Money-Judgments Recognition Act case.

7.

Is the following conclusion by Ivy that "the Washington superior court's rulings on this issue are entitled to full faith and credit, as a matter of law," right or wrong? We conclude that it is wrong. Full faith and credit must be accorded to a final judgment of a court in a sister state. Henderson v. Pence, 50 Haw. 162, 434 P.2d 309 (1967). None of the Washington court's rulings are final judgments that "Mr. Fiorito's subrogation rights have been properly assigned to Mr. Ivy, and Mr. Ivy is permitted to pursue those rights and execute on the Omni[/Browns] Judgment." (Emphasis omitted.)

CONCLUSION

Accordingly, we affirm the February 3, 2006 Order Granting Defendants Douglas A. Brown and Jane Doe [Diana] Brown's Motion to Dismiss and Set Aside Foreign Judgment Filed November 9, 2005 Filed December 13, 2005.

DATED: Honolulu, Hawai'i, April 5, 2007.

On the briefs:

R. Laree McGuire and
S.V. (Bud) Quitiquit
(Brooks Tom Porter &
Quitiquit, LLP)
for Defendant-Appellant.


Chief Judge


Associate Judge

Mark Van Pernis
(Van Pernis - Vancil)
for Defendants-Appellees.


Associate Judge