

NO. 26889

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

THE BANK OF NEW YORK, AS TRUSTEE OF AMRESCO
RESIDENTIAL SECURITIES CORPORATION MORTGAGE
LOAN TRUST 1997-3 UNDER THE POOLING & SERVICING
AGREEMENT DATED AS OF SEPTEMBER 1, 1997,
Plaintiff-Appellee,

v.

FLORA BELARDO CADIZ, Defendant-Appellant,
and
RAFAEL TURCATO BELARDO; EVARISTA TURCATO BELARDO;
ARSENIO QUEJA CADIZ, FE LEONORA TURCATO BELARDO;
FIRST TRUST NATIONAL ASSOCIATION, AS TRUSTEE;
and SEARS, Defendants-Appellees,
and
JOHN AND MARY DOES 1-20, DOE PARTNERSHIPS,
CORPORATIONS OR OTHER ENTITIES 2-20, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 98-4570)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Flora Belardo Cadiz (Cadiz) appeals from the (1) Order Approving Report of Commissioner, Confirming Commissioner's Sale of Property at Public Auction, and Directing Distribution of Proceeds (Order Confirming Sale), and (2) Judgment Based on Order Approving Report of Commissioner, Confirming Commissioner's Sale of Property at Public Auction, and Directing Distribution of Proceeds, entered by the Circuit Court of the First Circuit (circuit court) on September 13, 2004.¹

¹ The Honorable Karen N. Blondin presided.

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

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FILED

The Order Confirming Sale was the culmination of foreclosure proceedings involving real property located at 94-276 Pupukoae Street, Waipahu, Hawaii, which was owned by Cadiz and several other individuals who are not parties to this appeal. Cadiz and the other individuals borrowed funds from AMRESKO Residential Mortgage Corporation (AMRESKO), and executed a note and mortgage in favor of AMRESKO to secure repayment. AMRESKO assigned the mortgage and note to Plaintiff-Appellee The Bank of New York (BONY).

On July 8, 2003, the circuit court entered an Order Granting Plaintiff's Motion For Summary Judgment And For Interlocutory Decree Of Foreclosure Against All Parties (Summary Judgment Order). The circuit court also entered a judgment certifying the Summary Judgment Order as final pursuant to Hawai'i Rules of Civil Procedure Rule 54(b) and 58. Cadiz did not appeal from that judgment or from the Summary Judgment Order.

Cadiz raises the following points of error on appeal:

(1) "The Bank of New York had no standing to foreclose on Cadiz and to thereafter have the sale of her property confirmed by the lower court, since it acquired through assignment no right, title, or interest in the subject note and mortgage, having received its purported assignment from her lender before her lender had any right, title, or interest in her property to assign."

(2) "The Bank of New York had no right to an award, upon confirmation of sale, of its requested fees and costs in the amount of \$21,443.22, since the vast majority of that amount, nonetheless awarded by the lower court, consisted mainly of fees and costs attributable to work admittedly performed before the United States Bankruptcy Court for the District of [Hawai'i], the United States Bankruptcy Appellate Panel of the Ninth Circuit, and the United States Court of Appeals for the Ninth Circuit, in each of which independent jurisdictions it never once applied for any such fee and cost award, and in which courts none were ever awarded to it, and as for its work before the Court of Appeals, that appeal has not yet even been decided, and could well be decided in Cadiz'[s] favor."

(3) "The lower court had no jurisdiction to confirm a sale based upon a foreclosure summary judgment hearing that took place while a federal automatic bankruptcy stay was in place, since the United States Bankruptcy Court for the District of [Hawai'i] did not have jurisdiction . . . to reopen her Bankruptcy Case, previously dismissed at its inception the year before, for the sole purpose of annulling the automatic stay, and if it did have such power, it was in any event an abuse of discretion in her case for it to have retroactively annulled her automatic stay without an evidentiary hearing and based merely upon the number and circumstances of her extended family's past

bankruptcy filings."²

After a careful review of the record and briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we resolve Cadiz's points of error as follows:

(1) Cadiz cannot now challenge BONY's standing to foreclose on the mortgage, because she failed to timely appeal from the Summary Judgment Order that was certified as final for appeal purposes. This court's jurisdiction is limited to reviewing "errors unique to" the Order Confirming Sale, and BONY's standing to foreclose is not an issue unique to that order. Independence Mortgage Trust v. Glenn Constr. Corp., 57 Haw. 554, 556, 560 P.2d 488, 489-90 (1977); see MDG Supply, Inc. v. Diversified Invs., Inc., 51 Haw. 375, 380, 463 P.2d 525, 528 (1969) (judgment of foreclosure on a mortgage "finally determines the merits of the controversy, and all subsequent proceedings are simply incidents to its enforcement"); Sec. Pac. Mortgage Corp. v. Miller, 71 Haw. 65, 71, 783 P.2d 855, 858 (1989) (where mortgagors did not appeal from an order granting summary judgment in a mortgage foreclosure proceeding, mortgagors could not

² Cadiz also raises several Truth-in-Lending Act issues in arguing that the circuit court lacked jurisdiction to confirm the sale of the property located at 94-276 Pupukoa Street. However, as these issues were not raised in Cadiz's "points of error" section, this court will disregard them pursuant to Hawai'i Rules of Appellate Procedure Rule 28(b)(4). See Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 235, 948 P.2d 1055, 1076 (1997).

challenge mortgagee's right to a deficiency judgment, but could challenge errors "unique to" the deficiency judgment). The circuit court found in the Summary Judgment Order that "[t]he Mortgage Note and Mortgage were assigned to THE BANK OF NEW YORK by a document dated July 1, 1997, and filed in the Office of the Assistant Registrar of the Land Court of the State of [Hawai'i] as Document No. 2501862." Because Cadiz failed to timely appeal from that order, she cannot raise the standing issue on this appeal.

(2) The circuit court did not abuse its discretion in awarding BONY attorneys' fees that were incurred in defending Cadiz's appeal to the Bankruptcy Appellate Panel and related proceedings. Cadiz was obligated to pay the fees by the terms of the mortgage, and the fees were "necessary to prosecute the foreclosure action." Mortgage Mint Corp. v. Morgan, 708 P.2d 1177, 1180 (Or. Ct. App. 1985); see also San Miguel Basin State Bank v. Oliver, 748 P.2d 1342, 1345 (Colo. Ct. App. 1987). Moreover, Cadiz has failed to establish that the Circuit Court abused its discretion in determining that the amount of fees and costs was reasonable.

(3) Cadiz's argument that the circuit court lacked jurisdiction is without merit, since that argument is premised on an impermissible collateral attack on the bankruptcy court's determination that it had jurisdiction to reopen Cadiz's case and

retroactively annul the automatic stay. See Abdallah v. United Sav. Bank, 51 Cal. Rptr. 2d 286, 292 (Cal. Ct. App. 1996); see also Gonzales v. Parks, 830 F.2d 1033, 1035-36 (9th Cir. 1987).

Therefore,

IT IS HEREBY ORDERED that the September 13, 2004 Order Approving Report of Commissioner, Confirming Commissioner's Sale of Property at Public Auction, and Directing Distribution of Proceeds, and the September 13, 2004 Judgment Based on Order Approving Report of Commissioner, Confirming Commissioner's Sale of Property at Public Auction, and Directing Distribution of Proceeds, entered by the Circuit Court of the First Circuit are hereby affirmed.

DATED: Honolulu, Hawai'i, January 11, 2008.

On the briefs:

Gary Victor Dubin
for Defendant-Appellant.

Steven T. Iwamura,
Derek W.C. Wong, and
Robert M. Ehrhorn, Jr.
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge