

NO. 27953

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CITY BANK, Plaintiff/Counterclaim-Defendant/Appellee,
v. ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS
TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST;
GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF
THE GLORIA P. ABAD REVOCABLE TRUST; JENNIFER ABAD,
Defendants/Cross-Claim Defendants/Appellants, and
FINANCE FACTORS, LIMITED, Defendant/Cross-
claimant/Counterclaimant/Appellee; DIRECTOR OF
BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF
HONOLULU, Defendants/Cross-Claim
Defendants/Appellees; and FELIX PASCUA; JOHN DOES
1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE
CORPORATIONS, DOE "NON-PROFIT" CORPORATIONS 1-10,
and DOE GOVERNMENTAL UNITS 1-50, Defendants; and
FINANCE FACTORS, LIMITED, Third-Party Plaintiff-
Appellee, v. AMERICAN GENERAL FINANCE, INC.,
Third-Party Defendant-Appellee, and ERLINDA
GONZALES and WILSON U. PASCUA, individually and
doing business as HONLAND REALTY, Third-Party
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-0995)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

In this appeal from a post-judgment proceeding in a
foreclosure lawsuit, Defendants/Cross-Claim Defendants/Appellants
Artemio Marcos Abad, Gloria Pascua Abad and Jennifer Abad (the
Abad Defendants) appeal from the April 25, 2006 "Order Denying
the Abad Defendants' Rule 60(b)(4) Motion to Set Aside: (1)
Findings of Fact, Conclusions of Law and Order Granting Defendant
and Third-Party Plaintiff Finance Factors, Limited's Motion for
Default Judgment Against Defendants Artemio Marcos Abad,
Individually and as Trustee of the Artemio M. Abad Revocable
Trust, Gloria P. Abad, Individually and as Trustee of the Gloria
Pascua Abad Revocable Trust, Jennifer Abad and Felix Pascua and
Summary Judgment as to All Other Parties and for Interlocutory

Decree of Foreclosure as to All Claims and All Parties Filed on May 24, 2001, Filed on March 4, 2002,^[1] [] (2) Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against All Parties, Interlocutory Decree of Foreclosure and Order of Sale, Filed February 6, 2002,^[2] and (3) All Subsequent Orders, Judgments, Commissioner's Deeds, Title Transfers, and Writs in this Action Entered Pursuant Thereto" (the April 25, 2006 Post-Judgment Order) entered by the Circuit Court of the First Circuit (circuit court).³

The Abad Defendants argue on appeal that the circuit court erred

in denying [Hawaii Rules of Civil Procedure (HRCP)] Rule 60(b)(4) relief as it originally lacked jurisdiction, pursuant [to] the automatic stay provisions of Section 362 of Title [sic] 11 of the United States Code and the decision of the Intermediate Court of Appeals held in Island Insurance Co., Inc. v. Santos, 86 [Hawaii] 363, 949 P.2d 203 (App. 1997), to auction the subject properties and to confirm the subject foreclosure sales.

BACKGROUND

In order to purchase real estate in Pearl City⁴ (the Pearl City Property) and Salt Lake⁵ (the Salt Lake Property), the Abad Defendants obtained loans from City Bank, Defendant/Cross-claimant/Counterclaimant/Third-Party Plaintiff/Appellee Finance Factors, Limited (Finance Factors), and Third-Party Defendant/Appellee American General Finance, Inc. (American General). The Abad Defendants mortgaged the Pearl City Property and the Salt Lake Property to Finance Factors. The Abad

¹ Hereinafter referred to as the "March 4, 2002 Foreclosure Order."

² This order was filed on June 20, 2002 and is hereinafter referred to as "the June 20, 2002 Foreclosure Order."

³ The Honorable Karen N. Blondin presided.

⁴ This property is located at 98-1457 Ho'omāhie Loop, Pearl City, Hawaii'i.

⁵ This property is located at 3345 'Āla Akulikuli Street, Honolulu, Hawaii'i.

Defendants additionally mortgaged the Salt Lake Property to City Bank. The Abad Defendants additionally mortgaged the Pearl City Property to American General. The Abad Defendants eventually defaulted on some of the loans.

City Bank filed a complaint to foreclose on the Salt Lake Property against the Abad Defendants, Finance Factors, Defendants/Cross-Claim Defendants/Appellees the Director of Budget and Fiscal Services of the City and County of Honolulu (the City) and Felix Pascua.

Finance Factors asserted a counterclaim for foreclosure against City Bank and a cross-claim for foreclosure against the Abad Defendants, the City, and Felix Pascua. Finance Factors also asserted a third-party complaint for foreclosure against American General, and Third-Party Defendants Erlinda Gonzales (Gonzales) and Wilson U. Pascua doing business as Honland Realty (Wilson Pascua).

Thereafter, the following events occurred:

- The circuit court entered the March 4, 2002 Foreclosure Order, granting Finance Factors's motion for default judgment against the Abad Defendants and Felix Pascua, and summary judgment against all other parties on Finance Factors's counterclaim, Finance Factors's cross-claims, and Finance Factors's third-party claims.
- On March 4, 2002, the circuit court entered an HRCF Rule 54(b) certified judgment of foreclosure in favor of Finance Factors and (a) against City Bank on Finance Factors's counterclaim, (b) against the Abad Defendants, the City, and Felix Pascua on Finance Factors's cross-claim, and (c) against American General, Gonzales, and Felix Pascua on Finance Factors's third-party complaint.
- The circuit court entered the June 20, 2002 Foreclosure Order granting City Bank's motion for summary judgment against the Abad Defendants, Finance Factors, the City and Felix Pascua on City Bank's complaint for foreclosure.
- On June 20, 2002, the circuit court entered an HRCF 54(b) certified judgment of foreclosure in favor of City Bank and against the Abad Defendants, Finance

Factors, the City, and Felix Pascua as to City Bank's complaint for foreclosure.

- On August 8, 2002, the United States Bankruptcy Court for the District of Hawai'i (Bankruptcy Court) granted Finance Factors's unopposed motion for relief from the automatic stay caused by the filing of Gloria Abad's bankruptcy petition. This relief from the stay was granted "'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts As used herein, 'in rem' relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property."⁶ Notice of this order was served on the Abad Defendants' attorney on August 19, 2002.
- After a motion and hearing, the Bankruptcy Court granted City Bank relief from the automatic stay created by Gloria Abad's petition for bankruptcy. This September 9, 2002 order was also granted "in rem" but applied to the Salt Lake Property only. Notice of this order was served on the Abad Defendants' attorney on September 13, 2002.
- On October 8, 2002, the foreclosure auction for the Salt Lake Property and the Pearl City Property occurred.
- On November 14, 2002, Gloria Pascua Abad filed a notice of appeal from the June 20, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25474.
- On November 14, 2002, the Abad Defendants moved the circuit court to set aside the March 4, 2002 Foreclosure Order pursuant to HRCF 60(b), arguing that the circuit court lacked subject matter jurisdiction based on their claim that the mortgage loan was void as it was made with an unlicensed mortgage broker.
- On December 24, 2002, the circuit court denied the Abad Defendants' HRCF 60(b) motion to set aside the March 4, 2002 Foreclosure Order.
- On January 15, 2003, the Abad Defendants filed a notice of appeal from the December 24, 2002 order denying the Abad Defendants' HRCF 60(b) motion to set aside the

⁶ The "subject property" included both the Pearl City Property and the Salt Lake Property.

March 4, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25587.

- On February 12, 2003, the circuit court entered an order and HRCP Rule 52(b)-certified judgment confirming the sales of the Salt Lake Property⁷ and the Pearl City Property⁸ to third-party purchasers and directing the distribution of the sales proceeds.
- On March 14, 2003, the Abad Defendants filed a notice of appeal from the February 12, 2003 order and the February 12, 2003 HRCP 54(b) judgment, which the supreme court clerk docketed as supreme court case number 25693.
- On January 12, 2005, we issued a published opinion on the consolidated appeals of supreme court case numbers 25474, 25587, and 25693 that dismissed parts of the appeal and affirmed the orders that were the subject of the remaining parts of the appeal. City Bank v. Abad, 106 Hawai'i 406, 105 P.3d 1212 (App. 2005) (Abad I). In this opinion, we
 - Dismissed the appeal in number 25474 as untimely,
 - Dismissed the appeal in number 25693 as untimely in part and premature in part, and
 - In number 25587, dismissed the appeal from the circuit court's November 14, 2002 oral confirmation of the foreclosure sales and affirmed the December 24, 2002 order denying the Abad Defendants' November 14, 2002 HRCP Rule 60(b) motion.
 - In so doing, we ruled that the Abad Defendants had not shown the Bankruptcy Court's "in rem" orders lifting the automatic bankruptcy stay as to Finance Factors and City Bank were invalid, either because the Bankruptcy Court "lacked jurisdiction of the parties or otherwise acted in a manner

⁷ On May 9, 2003, the circuit court extended the time to close the sale of the Salt Lake Property for one day, or March 20, 2003, to conform with the actual date of closing on the Salt Lake Property.

⁸ On April 11, 2003, the circuit court extended the time to close the sale of the Pearl City Property to ten days after the date of the order, or April 21, 2003. A writ of possession for the Pearl City Property was issued by the circuit court on May 6, 2003.

inconsistent with due process of law." Abad I, 106 Hawai'i at 411, P.3d at 1217.

- Central Pacific Bank became City Bank's successor-in-interest in this case as the result of a corporate merger between Central Pacific Bank and City Bank.

On February 21, 2006, the Abad Defendants again moved the circuit court pursuant to HRCF Rule 60(b) to set aside (1) the March 4, 2002 Foreclosure Order, (2) the June 20, 2002 Foreclosure Order, and (3) all subsequent orders and judgments that the circuit court entered pursuant thereto. The circuit court denied this motion by way of its April 25, 2006 Post-Judgment Order. On May 24, 2006, the Abad Defendants filed a notice of appeal from the April 25, 2006 Post-Judgment order.

JURISDICTION

Before we consider the merits of this appeal, we must decide whether we have jurisdiction to consider this matter. "An appellate court has . . . an independent obligation to ensure jurisdiction over each case and to dismiss the appeal *sua sponte* if a jurisdictional defect exists." State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000).

This is an appeal from a post-judgment order. Hawaii Revised Statutes (HRS) § 641-1(a) (Supp. 2005) authorizes appeals from final judgments, orders or decrees. "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order ends the proceedings, leaving nothing further to be accomplished." Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003). Although, for the purpose of appealability, a separate judgment is usually necessary under HRCF Rule 58 and the holding in Jenkins v. Cades Scutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994), "the separate judgment requirement articulated in Jenkins is inapposite in the post-judgment context." Ditto, 103 Hawai'i at 158, 80 P.3d at 979.

Accordingly, we initially appear to have jurisdiction over this appeal pursuant to HRS § 641-1(a).

However,

A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance founded in concern about the proper--and properly limited--role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar Simply put, a case is moot if the reviewing court can no longer grant effective relief.

Kaho'ohanohano v. State, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007) (emphasis removed, citations, internal quotation marks, and brackets omitted, and format altered).

Thus, for example, in an appeal from a foreclosure case, the defendants' failure to stay the effect of an order confirming a foreclosure sale of property to a third-party, which apparently was a good faith purchaser, rendered moot the defendants' appeal from the order confirming the sale. City Bank v. Saje Ventures II, 7 Haw. App. 130, 132, 748 P.2d 812, 814 (1988). In support of the decision, we relied on the general rule that "the right of a good faith purchaser to receive property acquired at a judicial sale cannot be affected by the reversal of an order ratifying the sale where a supersedeas bond has not been filed." Id. at 133, 748 P.2d at 814 (internal quotation marks and citation omitted).

Since the Saje Defendants did not stay the effect of the confirmation order and since there has been a closing of the sale of the Property to Outrigger which cannot be undone under the facts and the law, we cannot grant the relief sought by the Saje Defendants. Therefore, the appeal is moot and must be dismissed.

Id. at 132, 748 P.2d at 814.

In the instant case, the Abad Defendants did not file a supersedeas bond and obtain a court order staying the February 12, 2003 judgment confirming the foreclosure sales. Like the debtor in City Bank v. Saje Ventures II, the Abad Defendants ask this court to reverse the April 25, 2006 Post-

Judgment Order, although they did not file a supersedeas bond and obtain a court order staying the February 6, 2003 order and judgment confirming the foreclosure sale.

Granted, "[a]n exception to the rule is where the reversal is based on jurisdictional grounds[,] and the Abad Defendants are arguing that the circuit court lacked jurisdiction to enter the February 12, 2003 order and judgment confirming the foreclosure sale. Nevertheless, an examination of the Abad Defendant's prior appeal and our decision in Abad I, shows that the Abad Defendants were raising the same jurisdiction argument that was rejected by this court in Abad I. In Abad I, this court held that the Abad Defendants failed to carry their burden on appeal, that is to say, did not show that the Bankruptcy Court's order lifting its stay over the properties in question was invalid and thus rejected the Abad Defendants' argument that the circuit court lacked jurisdiction to confirm the sales of the properties in this case.

It is true that the Supreme Court of Hawai'i has explicitly recognized three exceptions to the mootness doctrine:

- (1) the "capable of repetition, yet evading review" exception (the CRER exception);
- (2) the public interest exception; and
- (3) the collateral consequences exception.

Hamilton Ex Rel Lethem v. Lethem, 119 Hawai'i 1, 5-10, 193 P.3d 839, 843-48 (2008). However, none of these three exceptions applies to the instant case.

With regard to the CRER exception,

[t]he phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

Lethem, 119 Hawai'i at 5, 193 P.3d at 843 (citation and some internal quotation marks omitted). The CRER exception to the mootness doctrine does not appear to apply to the instant case

because the instant case would not evade review but for the fact that the Abad Defendants chose not to file a supersedeas bond. Therefore, the CRER exception to the mootness doctrine does not apply to the instant case.

With regard to the public interest exception, the Supreme Court of Hawai'i has explained that, "[w]hen analyzing the public interest exception, this court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." Lethem, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (citation, internal quotation marks, and brackets omitted). The public interest exception to the mootness doctrine does not appear to apply to the instant case because (1) a foreclosure case arises out of a private contract between parties that does not involve the government, and, thus, a foreclosure is more of a dispute of a private nature rather than a public nature, (2) an authoritative determination for future guidance already exists within the holding in Saje Ventures II, 7 Haw. App. at 132, 748 P.2d at 814, and (3) the questions within the instant case will recur only when parties choose not to file a supersedeas bond to stay the circuit court's ruling pending appeal. Therefore, the public interest exception to the mootness doctrine does not appear to apply to the instant case.

With regard to the collateral consequences exception, the Supreme Court of Hawai'i has "adopted the collateral consequences exception to the mootness doctrine in cases involving domestic violence TROs where there is a reasonable possibility that prejudicial collateral consequences will occur as a result of the entry of the TRO." Lethem, 119 Hawai'i at 9-10, 193 P.3d at 847-48 (internal quotation marks omitted). The collateral consequences exception to the mootness doctrine does not apply to the instant case because the instant case does not involve domestic violence or a temporary restraining order. Furthermore, the Abad Defendants could have avoided any

prejudicial collateral consequences if they filed a supersedeas bond to stay the circuit court's ruling pending this appeal. Therefore, the collateral consequences exception to the mootness doctrine does not apply to the instant case.

Our disposition makes it unnecessary to reach the Abad Defendants' other arguments on appeal.

CONCLUSION

Therefore, this appeal from the April 25, 2006 Post-Judgment Order of the Circuit Court of the First Circuit is hereby dismissed.

DATED: Honolulu, Hawai'i, December 28, 2009.

On the briefs:

Gary V. Dubin,
for Defendants/Cross-Claim
Defendants/Appellants.

Presiding Judge

Donald K.O. Wong
Paul B.K. Wong
Kara M.L. Young
(McCorriston Miller Mukai
MacKinnon),
for Defendant/Cross-
claimant/Counterclaimant/
Third-Party Plaintiff/Appellee
Finance Factors, Limited.

Associate Judge

Associate Judge

Mitzi A. Lee
(Ching & Lee),
for Plaintiff/Counterclaim-
Defendant/Appellee Central
Pacific Bank, Successor by
Merger to City Bank.