

NO. 29760

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

PACIFIC MORTGAGE INVESTORS, LLC,  
Plaintiff-Appellee,

v.

THOMAS MOSES JOHNSON, III, also known as Thomas M. Johnson, III,  
Defendant-Appellant,

and

FIRST HAWAIIAN BANK, BANK OF HAWAII, JOHN DOES 1-10,  
JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10;  
DOE ENTITIES 1-10 and DOE GOVERNMENTAL UNITS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 07-1-1893)

ORDER GRANTING AUGUST 28, 2009 MOTION TO DISMISS APPEAL  
(By: Foley, Presiding Judge, Fujise, J., and  
Circuit Judge Perkins, in place of Nakamura, Watanabe,  
and Leonard, JJ., Recused)

Upon review of (1) Third-Party Purchaser/Appellee Mark Gerber's (Appellee Gerber) August 28, 2009 motion to dismiss appellate court case number 29760 as moot, (2) Defendant/Counterclaim-Plaintiff/Cross-Claim Plaintiff/Appellee First Hawaiian Bank's (Appellee First Hawaiian Bank) September 3, 2009 joinder in Appellee Gerber's August 28, 2009 motion to dismiss appellate court case number 29760 as moot, (3) Defendant/Cross-Claim Defendant/Appellant Thomas Moses Johnson, III's (Appellant Johnson), September 11, 2009 memorandum in opposition to Appellee Gerber's August 28, 2009 motion to dismiss appellate court case number 29760 as moot, (4) Appellee Gerber's September 15, 2009

reply memorandum in support of Appellee Gerber's August 28, 2009 motion to dismiss appellate court case number 29760 as moot, (5) First Hawaiian Bank's September 16, 2009 reply memorandum in support of Appellee Gerber's August 28, 2009 motion to dismiss appellate court case number 29760 as moot, and (6) the record, it appears that Appellee Gerber's August 28, 2009 motion to dismiss appellate court case number 29760 as moot has merit.

Hawaii Revised Statutes (HRS) § 667-51(a)(2) (Supp. 2008) authorized Appellant Johnson's timely appeal from the Honorable Karen N. Blondin's March 10, 2009 "Judgment re Order Approving Reports of Commissioner, Confirming Foreclosure Sales, Directing Distributions of Proceeds, Granting Writs of Possession and Granting Deficiency Judgment" (the March 10, 2009 judgment confirming foreclosure sales). Nevertheless, as Appellee Gerber and Appellee First Hawaiian Bank argue,

[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) (citations and internal quotation marks omitted; emphasis added). Thus, for example, in an appeal from a foreclosure case, we held that the defendants' failure to stay the effect of an order confirming a foreclosure sale of property to a third-party, who 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). "The general rule is 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.

In the instant case, Appellant Johnson did not file a supersedeas bond, and, thus, Appellant Johnson did not obtain a court order staying the March 10, 2009 judgment confirming the foreclosure sales. In Appellant Johnson's August 14, 2009 opening brief for appellate court case number 29760, Appellant Johnson asserts essentially the same argument that he asserted in appellate court case number 29317, namely, that pursuant to 50 App. U.S.C. § 533 (Supp. 2008) of the Servicemembers Civil Relief Act, the circuit court lacked jurisdiction to enter the July 16, 2008 judgment and decree of foreclosure against Appellant Johnson because Appellant Johnson was on active duty with the military, and, thus, the circuit court likewise lacked jurisdiction to enter the subsequent March 10, 2009 judgment confirming the foreclosure sales. Appellant Johnson does not contest new issues, such as the specific amounts of the deficiency judgments to which the creditors are entitled. Similar to the debtor in City Bank, Appellant Johnson wants the intermediate court of appeals to enter an order in appellate court case number 29760 that reverses the March 10, 2009 judgment

confirming the foreclosure sales, even though Appellant Johnson did not file a supersedeas bond to stay the March 10, 2009 judgment confirming the foreclosure sales pending Appellant Johnson's appeal. Therefore, it appears that Appellant Johnson's appeal in appellate court case number 29760 is moot.

Granted, "[a]n exception to the rule is where the reversal is based on jurisdictional grounds[,]" (City Bank, 7 Haw. App. at 133, 748 P.2d at 814 (citation omitted)), and Appellant Johnson is arguing that the circuit court lacked jurisdiction to enter the March 10, 2009 judgment confirming the foreclosure sale. Nevertheless, an examination of Appellant Johnson's April 17, 2009 memorandum in response to the Supreme Court of Hawaii's April 7, 2009 order to show cause why Appellant Johnson's previous appeal in appellate court case number 29317 should not be dismissed as moot shows that Appellant Johnson was raising the same jurisdiction argument in appellate court case number 29317 that the Supreme Court of Hawai'i implicitly rejected when the Supreme Court of Hawai'i entered the June 8, 2009 order dismissing Appellant Johnson's appeal in appellate court case number 29317 as moot. In fact, in the June 8, 2009 order dismissing Appellant Johnson's appeal in appellate court case number 29317 as moot, the Supreme Court of Hawai'i cited Hurley v. Deutsche Bank Trust Co. Americas, 2009 WL 7010006 (W.D. Mich. 2009) for the principle that under 50 App. U.S.C. § 521(h), even if a court vacates, sets aside, or reverses a judgment against a servicemember because of a provision of the

Servicemembers Civil Relief Act, the action shall not impair a right or title acquired by a bona fide purchaser for value. See Hurley, 2009 WL 7010006 at \*4. Therefore, the intermediate court of appeals is unable to grant the relief for which Appellant Johnson prays, and this appeal appears to be moot.

The Supreme Court of Hawai'i has explicitly recognized three exceptions to the mootness doctrine:

- (1) the "capable of repetition, yet evading review" 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, it is noteworthy that the Supreme Court of Hawai'i did not find that any of these three exceptions to the mootness doctrine was applicable when the Supreme Court of Hawai'i entered the June 8, 2009 order dismissing Appellant Johnson's appeal in appellate court case number 29317 as moot. Similarly, we do not find that any of these three exceptions to the mootness doctrine is applicable to Appellant Johnson's appeal in appellate court case number 29760.

Appellant Johnson additionally argues that Appellee Gerber does not have standing to file a motion to dismiss this appeal, because Appellee Gerber is a third-party who never formally intervened in the circuit court proceedings by way of a court order. Nevertheless,

[a] successful bidder at a judicial sale becomes a so-called quasi party to the proceedings, but virtue of the bid, even though originally not a party to the action or

proceeding in which the sale was ordered, for some purposes, including the right to urge or to oppose confirmation. Purchasers subject themselves to the jurisdiction of the court in the original suit as to all matters connected with the sale and therefore have the right to interfere in the proceedings for their own benefit and protection and to claim equitable relief.

First Hawaiian Bank v. Timothy, 96 Hawai'i 348, 357, 31 P.3d 205, 214 (App. 2001) (citation and internal quotation marks omitted; emphases added). Therefore, it appears that Appellee Gerber, as the third-party purchaser, does have standing to file a motion to dismiss this appeal.

Even if Appellee Gerber lacked standing to file a motion to dismiss this appeal, "[m]ootness is an issue of subject matter jurisdiction[,]" Doe v. Doe, 120 Hawai'i 149, 164, 202 P.3d 610, 625 (App. 2009), and "[a]n 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) (citation omitted; emphases added). Therefore, if this case is moot, then we have an obligation to dismiss this appeal for mootness sua sponte regardless whether Appellee Gerber actually has standing to move for dismissal. Based on (1) the holding in City Bank, and (2) the Supreme Court of Hawaii's June 8, 2009 dismissal of Johnson's prior appeal in appellate court case number 29317, we conclude that Appellant Johnson's appeal in appellate court case number 29760 is moot. Therefore,

IT IS HEREBY ORDERED that Appellee Gerber's August 28, 2009 motion to dismiss appellate court case number 29760 as moot

is granted, and appellate court case number 29760 is dismissed as moot.

DATED: Honolulu, Hawai'i, November 18, 2009.

Presiding Judge

Associate Judge

Acting Associate Judge