*****NOT FOR PUBLICATION*****

NO. 25060

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OHANA SANCTUARY, LLC, Plaintiff-Appellee

vs.

OLD STANDARD LIFE INSURANCE COMPANY; SUMMIT SECURITIES, INC., and METROPOLITAN MORTGAGE & SECURITIES, INC., Defendants-Appellants

and

HAWAII FOREST PRESERVATION, LLC; KOA TIMBER INC.; K & K INVESTMENTS, LTD., dba "PACIFIC ISLE WOODS"; INCENTIVE DESIGN BUILDERS, INC.; KYLE DONG; LANZ M. YAMAMOTO; MICHAEL H. NEKOBA; and DARYL S. NEKOBA, Defendants-Appellees

and

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 FIRST CIRCUIT COURT
(CIV. NO. 01-1-3164)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendants-Appellants Old Standard Life Insurance Company (Old Standard), Summit Securities, Inc. (Summit), and Metropolitan Mortgage & Securities, Inc. (Metropolitan Mortgage)[1] (collectively, Lenders) appeal from the March 20, 2002 judgment

[1] Metropolitan Mortgage & Securities, Inc., is the parent company of Defendants-Appellants Old Standard and Summit.

of the circuit court of the first circuit (the court)[2] in favor of Plaintiff-Appellee Ohana Sanctuary, LLC (Ohana). Lenders also challenge the court's January 24, 2002 order granting summary judgment.

Based on the reasons set forth herein, the court's March 20, 2002 judgment is affirmed.

On July 27, 2000, Defendant-Appellee Hawaii Forest Preservation, LLC (HFP) entered into two mortgages as a borrower with the Mortgage Group, Inc. (Mortgage Group). The contract documents consisted of (1) a Promissory Note in the amount of $5,850,000 (first note) and First Mortgage, Security Agreement and Financing Statement (first mortgage), and (2) a Promissory Note in the amount of $3,487,000 (second note) and Second Mortgage, Security Agreement and Financing Statement (second mortgage). HFP used this financing to purchase two parcels of land, Lot J-1 and Lot H, and the timber harvesting rights over a third parcel of land, Lot G, owned by Ohana (Ohana property).

Ohana was identified as an accommodation mortgagor in both mortgages. As an accommodation mortgagor, Ohana allowed HFP to use the Ohana property "to secure [HFP's] promises and performances under the [n]ote[s] and any of the [l]oan [d]ocuments."

[2] The Honorable Victoria S. Marks presided.

On July 27, 2000, Mortgage Group transferred all of its rights, title and interest in the first note and first mortgage to Old Standard. Mortgage Group transferred all of its rights, title and interest in the second note and second mortgage to Summit.

On July 28, 2000, Ohana, as owner, and HFP, as harvester, entered into a Timber Harvesting Agreement (harvesting agreement).[3]

As to Ohana, the relevant provisions of the first and second mortgages provided that Ohana's liability to the Lenders was limited solely to the mortgage lien on the Ohana property.

Read together, the notes and the mortgages define an event of default as "a default in the performance of or compliance with any term, covenant, condition or provision required to be performed or complied with by any person obligated" to the holder of the notes under the listed loan documents, including the first and second mortgages. Both mortgages also provided Ohana with a ninety-day cure period (cure period) from the date of receipt of notice of an event of default. The mortgages further stated that "[a]ll notices,

[3] On July 27, 2000, prior to the harvesting agreement entered into by HFP and Ohana, a second timber harvesting agreement was entered into by HFP, Metropolitan Mortgage, Koa Timber, Inc., K & K Investments, Ltd., Incentive Design Builders, Inc., Kyle Dong and Lanz Yamamoto, and Michael H. Nekoba and Daryl S. Nekoba. By this agreement, HFP sold its timber harvesting rights on all three lots to Metropolitan Mortgage. Koa Timber, Inc., K & K Investments, Ltd., Incentive Design Builders, Inc., Kyle Dong, Lanz Yamamoto, Michael H. Nekoba, and Daryl S. Nekoba were listed as guarantors to this agreement. On August 31, 2000, Metropolitan Mortgage assigned all of its right, title and interest in this agreement to Summit. In the case at bar, Lenders and Ohana do not appear to construe or dispute any provisions found in this harvesting agreement.

demands, or documents which are required or permitted to be given or served under this Mortgage shall be in writing and personally delivered or sent by registered or certified mail[.]" (Emphases added.)

As to remedies against HFP, both mortgages provided the Lenders six remedies in the case of an event of default, including the right to accelerate and the right of foreclosure.[4] The mortgages provided that Lenders "may, without notice, presentment or demand, declare the unpaid principal amount of the [notes] and any interest thereon accrued and unpaid to be immediately due and payable[.]" The mortgages further stated that Ohana specifically agreed to waive notice of presentment, dishonor, or protest.

The harvesting agreement required that HFP may only encumber the Ohana property with a "permitted mortgage," defined, inter alia as "includ[ing] language providing [Ohana] with 90 days prior written notice of and opportunity to cure any defaults thereunder[.]"

On April 20, 2001, Metropolitan Mortgage, on behalf of Lenders,[5] mailed other guarantors,[6] but not Ohana, a notice of

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[4] The six remedies are (1) the right to accelerate all amounts due, (2) the right to take possession of the property and revenues, (3) the right to a non-judicial sale or foreclosure of the property through a public auction, (4) the right to institute actions at law or equity to enforce payment and foreclose on the mortgage, (5) the right to institute judicial proceedings to enforce their rights under the mortgages, and to obtain the ex parte appointment of a receiver, and (6) the right to enforce one or more of the remedies listed in the mortgages successively or concurrently.

[5] In their opening brief, Lenders assert that the April 20, 2001 letter was served by Old Standard and Summit as a notice of default on HFP. (continued...)

default of the March and April 2001 mortgage payments and missed payments under the harvesting agreement as the specified events of default. The April 20, 2001 letter did not declare that the unpaid principal and interest due was accelerated and immediately due and payable.

On August 15, 2001, in Civil No. 01-1-2403, Lenders initiated a foreclosure action by filing a complaint in the first circuit court against HFP, HFP's guarantors,[7] and Ohana. On August 16, 2001, Lenders filed a first amended complaint in that action. Both the complaint and the first amended complaint alleged that HFP defaulted on the first and second notes and mortgages by failing to pay the monthly payments due under these documents. Because of these defaults, Lenders asserted that the April 20, 2001 letter to HFP and its guarantors constituted notice of Lenders' right and intention to declare defaults and accelerate the mortgage payments.

In both the complaint and first amended complaint, Ohana was listed as an accommodation mortgagor that had executed and delivered the first and second mortgages with HFP and HFP's guarantors. Ohana was not identified as a liable party under the

[5](...continued)
In its answering brief, Ohana does not appear to dispute that the notice was sent on behalf of Lenders collectively.

[6] The April 20, 2001 letter was addressed to Michael Nekoba, with the Mortgage Group, and Kyle Dong, with Pacific Isle Woods.

[7] Koa Timber Inc., K & K Investments, Ltd., Incentive Design Builders, Inc., Kyle Dong and Lanz M. Yamamoto, and Michael H. Nekoba and Daryl S. Nekoba were identified in the complaint and first amended complaint in this foreclosure action as "guarantors" to the first and second mortgage and as parties to the "July 27, 2001 [sic]" harvesting agreement.

harvesting agreement in either the complaint or first amended complaint.

On August 23, 2001, Ohana's attorney was served with a copy of the complaint and first amended complaint in the foreclosure action.

On September 12, 2001, in the foreclosure action, Ohana filed a motion to dismiss, alleging that it had not received proper notice and that Lenders had no right to foreclose on the Ohana property during the cure period. On September 27, 2001, a stipulation for (1) dismissal without prejudice of the foreclosure action as to Ohana and (2) withdrawal of Ohana's September 12, 2001 motion to dismiss was filed.

On October 1, 2001, Lenders filed their second amended complaint seeking to recover, from all guarantors except Ohana, the accelerated amounts due under the first mortgage, second mortgage, and harvesting agreement. Ohana was not named a party in that complaint, however, it was identified as the "owner" of Lot G and as an "accommodation mortgagor with respect to the second mortgage." Additionally, the second amended complaint stated that Lenders would seek foreclosure on the mortgages if Ohana failed to cure HFP's alleged defaults under the first and second notes within the cure period.

On October 2, 2001, Lenders sent Ohana a letter stating, "This letter shall serve as notice of default and demand for payment" under the first and second notes. On October 11,

2001, Lenders sent Ohana a second letter which stated it was "clarify[ing]" the October 2, 2001 letter. The October 11, 2001 letter stated Ohana had ninety days to cure from receipt of the October 2, 2001 letter and that "[Lenders] intend[ed] to proceed with a foreclosure action, unless the loans [were] paid in full within 90 days from the date on which [Ohana] received [Lenders'] October 2[, 2001] letter."

On October 30, 2001, in the instant case, Civil No. 01-1-3164, Ohana filed a complaint against various parties, including Lenders and HFP, for declaratory judgment regarding the rights, duties, and obligations of the parties. Lenders responded on November 26, 2001 by filing a motion to dismiss. On November 27, 2001, Ohana moved for summary judgment, seeking a judgment that (1) Lenders were required under the mortgages to provide Ohana proper notice of an event of default and a ninety-day period to cure such default prior to the Lenders' exercise of their right to foreclose on the Ohana property, and (2) in the event of default, Ohana was entitled to cure the alleged non-payment of the March 1 and April 1, 2001 payments due under the mortgages. Both motions were heard by the court on December 17, 2001.

On January 2, 2002, the court entered an order denying Lenders' motion to dismiss. On January 24, 2002, the court entered an order granting Ohana's motion for summary judgment. On March 20, 2002, judgment was entered in favor of Ohana with

respect to all claims alleged in its complaint. In both the order granting summary judgment[8] and the judgment, the court ordered and adjudged as follows:

> 1. [Lenders] cannot proceed with the remedy of foreclosure based on the underlying March 1, 2001, and April 1, 2001, Events of Default if those Events of Default are/were cured within 90 days of notice to Ohana;
> 2. [Lenders] did not provide Ohana with proper notice of any Event of Default until the October 11, 2001 letter;
> 3. Acceleration is a remedy, not an Event of Default. Therefore, if [Lenders] choose to pursue acceleration against other mortgagors based on any Event(s) of Default as to which they did not give Ohana proper notice and an opportunity to cure the Event(s) of Default, then [Lenders], in essence, give up their right to foreclose against Ohana;
> 4. [Lenders'] right to accelerate the debt to remedy an Event of Default does not entitle [Lenders] to erase Ohana's right to cure the Event of Default and thereby prevent the remedy of foreclosure. [Lenders'] arguments that they can accelerate the payment of the note and mortgage in full based on an Event of Default, and then require Ohana to pay the full amount of the notes and mortgages to prevent foreclosure is not supported by the language of the mortgages in issue; and
> 5. Foreclosure against Ohana's property can only occur if proper notice of an Event of Default is given to Ohana and that Event of Default has not been cured within ninety (90) days of such notice.[9]

(Emphases added.)

Lenders filed a notice of appeal on April 19, 2002. On appeal, Lenders contend that the court erred in reaching each of its determinations on summary judgment. Lenders apparently argue that (1) they need not strictly comply with the notice requirements of the contract documents, (2) Ohana received notice of the acceleration as of August 23, 2001, when it was served with the complaint and first amended complaint in the foreclosure

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[8] The court did not distinguish between findings of fact or conclusions of law.

[9] The court also stated in its order that it "has made no ruling regarding whether the October 11th letter provides adequate notice regarding any alleged default relating to non-payment of amounts allegedly owed under the [harvesting agreement]."

action, inasmuch as these complaints stated Lenders' decision to accelerate the amounts due under the notes and mortgages,[10] (3) thus, as of August 23, 2001, Ohana knew of Lenders' acceleration of the entire debt owed, (4) HFP was in default as of August 23, 2001, with the accelerated amounts "immediately due and payable," (5) this default was confirmed by Lenders' October 2, 2001 and October 11, 2001 letters to Ohana and HFP, (6) by the hearing of December 17, 2001, Ohana had notice of HFP's default for more than ninety days from August 23, 2001, (7) the delay of foreclosure allowed in the cure period provision was not "illusory" because Ohana could pay the release price of $2,950,000 within ninety days,[11] and (8) summary judgment was inappropriate where the contract provisions were subject to reasonably differing interpretations.

As mentioned, Lenders assert that they need not strictly comply with the notice requirements and that Ohana received actual notice of HFP's defaults and Lenders' decision to

[10] While not easily comprehendible, Lenders apparently assert, in line with this contention, that the clear and unambiguous language of the notes and mortgages "delayed" Lenders from exercising only the remedy of foreclosure during the cure period. The record does not indicate that either the court or Ohana dispute that "[Lenders] were [not] precluded from exercising their remedy of acceleration." On December 17, 2001, in the colloquy between the court and Lenders' counsel at the hearing on Ohana's motion for summary judgment, the court "agree[d] with [Lenders'] argument that if [Lenders] want to exercise any of [their] other options in terms of [their] remedies, [they] do not have to notify Ohana of that."

[11] As to this contention, Lenders' interpretation is irrelevant as to the issue of whether Lenders could foreclose on Ohana without notice of the event of default. According to Lenders, their "promise to delay their exercise of only the remedy of foreclosure during the [c]ure [p]eriod does not lead to an illusory or unreasonable result." However, this release provision is irrelevant to the obligation of Lenders to provide Ohana with notice of an event of default so as to allow Ohana to cure such default.

accelerate the loan amounts when Ohana's counsel was served with the complaint and first amended complaint in the foreclosure action on August 23, 2001. Lenders also maintain that by the December 17, 2001 hearing on Ohana's motion for summary judgment, Ohana had more than ninety days from receipt of the complaints to cure the default by paying the accelerated loan debts in full.

At the outset, Lenders rely on cases from outside this jurisdiction to support the rule that "strict compliance with the prescribed manner [in the contract] is not required where the debtor has actual notice and has not been prejudiced." These cases, however, are distinguishable inasmuch as they: (1) address the appropriate notice due to defaulting parties, as opposed to guarantors, see First Nat'l Bank of Commerce v. DiRosa, 545 So. 2d 692, 694 (La. Ct. App. 1989) (observing that "[t]here is no doubt the actual notice satisfied [the] function" of the requirement that notice of acceleration be given by certified mail); Forestier v. San Antonio Sav. Ass'n, 564 S.W.2d 160, 163 (Tex. Civ. App. 1978) (observing that the defaulting party had admitted to receiving actual notice and, therefore, the fact that she did not receive a separate mailed notice apart from her husband was insignificant (emphasis added)); Thompson v. Fairchild, 468 P.2d 316, 319 (Idaho 1970) (holding that the defaulting party had actual notice because she "was aware of her default"); (2) concern the resolution of conflicting notice provisions, see Wickahoney Sheep Co. v. Sewell, 273 F.2d 767, 769 (9th Cir. 1959); or (3) involve a provision that retracts the

notice requirement upon "wilful or fraudulent" breach, see Christensen v. Hunt, 414 P.2d 648, 651 (Mont. 1966).

Moreover, Lenders' argument and reliance on foreign case law is undermined by two facts. First, Lenders provided notice by the April 20, 2001 letter to all other guarantors against whom Lender attempted to foreclose. Ohana was the only guarantor that did not receive the contractually required notice. Second, after Ohana filed a motion to dismiss the foreclosure action for inadequate notice, Lenders dismissed Ohana without prejudice in their first amended complaint. Lenders then sent Ohana two letters, on October 2 and October 11, 2001, both of which purported to fulfill the notice requirement, acts inconsistent with Lenders' position that notice was given via the filing of the complaint.

Lenders also rely on Bank of Hawaii v. Kunimoto, 91 Hawai'i 427, 984 P.2d 1253 (App. 1997), recon. denied, 92 Hawai'i 146, 988 P.2d 665 (App. 1999), to support the contention that the complaint and first amended complaint served as adequate notice of HFP's defaults and the accelerated amounts due. In Kunimoto, defendants defaulted on payment of several notes. Id. at 429-30, 984 P.2d at 1255-56. The Intermediate Court of Appeals held that, where a mortgage note gives the mortgagee an optional right to accelerate, "the Bank was required to communicate its exercise of the option to [the d]efendants by some affirmative act." Id. at 436, 984 P.2d 1262. Kunimoto "recognize[d] that the holder's

initiation of a suit for the whole debt constitute[d] a sufficient affirmative act to communicate to the maker that he or she ha[d] chosen to exercise his or her option to accelerate." Id.

Kunimoto, however, is factually distinguishable from the case at bar and, therefore, not persuasive. The notes in Kunimoto provided that upon an event of default, "the entire principal amount outstanding hereunder and accrued interest thereon shall at once become due and payable, without notice, at the option of the Holder." Id. at 433, 984 P.2d at 1259 (emphasis added). In addition, the mortgagor and mortgagee in Kunimoto had not contracted for a cure period provision with a notice requirement.

The facts in the present case are inapposite. Both the first and second mortgages contain an identical provision requiring Lenders to give Ohana, the accommodation mortgagor, written notice of any event of default so that Ohana may exercise its right to cure during a ninety-day period. See supra. Ohana's opportunity to cure was contingent upon receipt of notice of an event of default from Lenders.

Thus, unlike in Kunimoto, Lenders' complaint and first amended complaint seeking to foreclose on Ohana's property were not sufficient to provide notice. Such notice was required to be either "in writing and personally delivered or sent by registered or certified mail." The complaints, therefore, did not

constitute adequate notice triggering the ninety-day cure period. Lenders' argument that the complaint and first amended complaint constituted adequate notice would render the notice requirement and ninety-day cure period provisions of the loan documents meaningless.[12]

Although Lenders advocate that this court adopt a rule not requiring "strict compliance with the prescribed manner" found in the contract documents where Ohana "has actual notice and has not been prejudiced," as indicated, the case law they cite is not controlling in this case. See supra. Therefore, the court was correct in determining that Lenders "did not provide Ohana with proper notice" by the service of the complaint and the first amended complaint on August 23, 2001.

Lenders also apparently assert that the acceleration and waiver provisions allow Lenders to accelerate the loan payment without notice of any kind. As mentioned previously, the notes provide that Lenders "shall have the option to declare the unpaid principal sum . . . immediately due and payable . . . without presentment, demand, protest or notice of any kind[.]" (Emphases added.) Similarly, the mortgages state that Lenders

[12] Hawai'i case law has long dictated against interpreting a contract such that any provision be rendered meaningless. Cf. Sierra Club v. Hawai'i Tourism Authority, 100 Hawai'i 242, 267, 59 P.3d 877, 902 (2002); Reed v. Martin, 50 Haw. 347, 349, 440 P.2d 526, 528 (1968); Lord v. Territory, 27 Haw. 792, 799 (1924); Richards v. Ontai, 19 Haw. 451, 453-54 (1909). See also Candlelight Prop., LLC v. MHC Operating Ltd. P'ship, 750 N.E.2d 1, 17 (Ind. Ct. App. 2001) (explaining that in interpreting the rights and duties under a promissory note and a mortgage, the court "make[s] all attempts to construe the language in a contract so as not render any words, phrases, or terms ineffective or meaningless").

"may, without notice, presentment or demand, declare the unpaid principal amount . . . and any interest . . . unpaid to be immediately due and payable[.]" (Emphasis added.) Lastly, the waiver provisions as found in the mortgages state, in relevant part, that Ohana "agrees to waive any right" requiring Lenders to "(a) demand payments of amounts due (known as **'presentment'**); (b) give notice that amounts due have not been paid (known as **'notice of dishonor'**); and (c) obtain an official certification of nonpayment (known as **'protest'**)." (Boldfaced font in original.)

Lenders' reliance on these provisions is, however, misplaced. Ohana argues that such waivers are separate and distinct from Ohana's right to cure. According to Ohana, the cure period is triggered by receipt of notice from Lenders of an event of default.

In the instant case, the contract language is clear and Ohana's position is persuasive. The waiver provisions pertain only to presentment, dishonor and protest. Ohana, in the instant case, is not asserting that it is entitled to presentment, dishonor, or protest. By contrast, the notice requirement, contained in the cure period provisions found in the mortgages, is a duty that Lenders owe to Ohana in order to trigger Ohana's opportunity to cure. Ohana has never waived the right to this specific notice provision.

As to Lenders' contention that HFP's default was confirmed by Lenders' October 2, 2001 and October 11, 2001

letters to Ohana and HFP, the court was correct in ruling that Lenders "did not provide Ohana with proper notice of any Event of Default until the October 11, 2001 letter."

In this regard, both mortgages required Lenders to provide Ohana with "written notice" of any occurrence of an event of default, prior to exercising its right to foreclose on Ohana's property. Additionally, both mortgages required that this written notice be "personally delivered or sent by registered or certified mail" to Ohana. The October 2, 2001 letter begins, "This letter shall serve as notice of default and demand for payment[.]" However, this letter did not specify the event of default which triggered Lenders' right to accelerate.

The October 11, 2001 letter opened by recognizing the shortcomings of the October 2, 2001 letter:

> I am writing to clarify the purpose of my letter dated October 2. That letter was intended only to comply with the [Lenders'] alleged obligation to provide Guarantor Ohana Sanctuary LLC 90 days notice before the mortgagees seek to foreclose on their collateral. The defaults referred to in my October 2 letter were those which triggered the enclosed April 20 letter accelerating the debt . . . .
>
> . . . .
>
> The [Lenders] intend to proceed with a foreclosure action, unless the loans are paid in full within 90 days from the date on which Ohana Sanctuary received my October 2 letter.
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> . . . .
>
> The [Lenders] sent the October 2 letter and are making this clarification without prejudice to their contentions that the October 2 letter was not a prerequisite to filing a complaint that included a prayer for foreclosure in August and that service of that complaint on Ohana was sufficient to provide notice of the intent to seek foreclosure[.]

(Emphasis added.)

The October 2, 2001 letter to Ohana did not identify the alleged event of default. The April 20, 2001 letter, which

did identify the event of default, was not sent to Ohana on April 20, 2001, and did not reach Ohana until it was enclosed with the October 11, 2001 letter, well after Lenders instituted the foreclosure action on the Ohana property on August 15, 2001. Thus, the court was correct in determining that Ohana did not receive proper notice of any event of default until the October 11, 2001 letter.

As to Lenders' argument that summary judgment was inappropriate because of the existence of different interpretations of the contract provisions, Lenders maintain that their understanding of such provisions was "that only their right to foreclose would be restricted during Ohana's [c]ure [p]eriod and that Lenders were free to exercise all other remedies allowed under the [m]ortgages." As discussed previously, see supra note 10, in general the court did not disagree with this proposition. However, as to whether proper notice was required and given by Lenders, other interpretations that would render the cure provisions and the notice requirements meaningless, see supra note 12, would not be reasonable.

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's judgment filed on March 20, 2002, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, March 23, 2005.

On the briefs:

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