

NO. 25613

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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CLERK, APPELLATE COURTS
STATE OF HAWAII

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NORWEST MORTGAGE, INC., and WELLS FARGO
HOME MORTGAGE, INC., Plaintiffs-Appellees

vs.

ALLEN A. VINCENT, individually and as Trustee
of the Vincent Kassis Family Trust, Defendant-Appellant

and

PERFECT TITLE COMPANY, and JOHN and MARY
DOES 1-20, DOE PARTNERSHIPS, CORPORATIONS or OTHER
ENTITIES 1-20, Defendants

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 97-160)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Allen A. Vincent (Allen) appeals from a January 21, 2003 Amended Final Judgment Nunc Pro Tunc of the circuit court of the third circuit (the court).¹ The judgment was filed pursuant to the January 21, 2003 Order Granting a Decree of Foreclosure Against All Parties and in favor of Plaintiff-Appellee Norwest Mortgage, Inc. (Norwest).

Allen married Martha Vincent (Martha) in October 1990. In July 1991, Allen and Martha bought residential property in Kamuela, Hawai'i, with title in both of their names. In 1993,

¹ The Honorable Riki May Amano presided over this proceeding.

both Allen and Martha applied to refinance their residential mortgage loan with Prudential Home Mortgage, Inc. (Prudential). However, Prudential would only extend credit to Allen. It conditioned its loan to Allen on having Martha removed from the title due to her past credit history apparently because "debts . . . were not paid during [her prior] divorce, and then subsequently were paid, but left a bad history." In October 1993, Allen and Martha agreed to Prudential's terms and Martha transferred title solely to Allen. Prudential subsequently extended credit to Allen.

In May 1996, Prudential assigned the mortgage to Norwest. Allen subsequently defaulted in payment after December 1996. Allen owed Norwest \$238,648.25 in outstanding principal plus interest and late charges as of July 2, 2002. On April 3, 1997, Norwest filed a complaint to foreclose on the mortgage against Allen only. During the proceedings Allen moved to join Martha as a co-defendant in the foreclosure action.² However, the court did not join Martha as a co-defendant. Martha thus is not a party to the suit.

On September 22, 1997, the court granted Summary Judgment and an Interlocutory Decree of Foreclosure in favor of Norwest and ordered the property to be sold at public auction.

² An unfiled motion to join Martha was initially appended to Allen's memorandum in opposition to the motion to confirm the sale, filed on July 13, 1998. Apparently this motion was not decided. On July 27, 1998, Allen filed a "Motion for Joinder of Co-Defendant Martha Vincent."

Judgment was also entered on September 22, 1997. On March 5, 1999, the court entered final judgment and confirmed the sale of the property. On April 24, 2000, the court granted Allen's Rule 60(b) motion and set aside the September 22, 1997 judgment. After a half-day trial on July 8, 2002, the court issued its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Decree of Foreclosure Against All Parties on October 18, 2002. The court entered final judgment in favor of Norwest and against Allen on October 18, 2002. On January 21, 2003, the court entered an Amended Final Judgment Nunc Pro Tunc. Allen timely appealed on January 28, 2005.

On appeal, Allen argues that (1) marital status discrimination was conclusively shown at trial, (2) he has standing to assert a marital status discrimination defense based on both the denial of Martha's credit on their joint application and the requirement that she be removed from the title to the property, (3) in Hawai'i, Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691-1691f (2005), violations are also considered to be unfair and deceptive acts or practices, which render the credit transactions void and unenforceable in this State, (4) mortgages in default may not be foreclosed on until all affirmative defenses, and especially affirmative jurisdictional defenses, are decided on the merits, and (5) the holder in due course defense is not available to bar Hawai'i Revised Statutes (HRS) chapter

477E marital status discrimination claims.⁵

In his legal argument, Allen primarily relies on and cites to the ECOA.⁶ In that connection, the ECOA states that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction -- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)[.]" 15 U.S.C. § 1691(a) (2005) (emphasis added). It also provides that "[a]ny creditor who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for any actual damages sustained." 15 U.S.C. § 1691e(a) (2005). Furthermore, "any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000, in addition to any actual damages provided in subsection (a)." 15 U.S.C. § 1691e(b) (2005). The ECOA allows "[a]ny action under this section [to be] brought in the appropriate United States

⁵ Allen first raised the defense of marital status discrimination under the ECOA and Hawaii's due process and equal protection clauses pursuant to article I, section 5 of the Hawai'i Constitution, in his April 12, 2000 Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Allen did not raise HRS chapter 477E until his June 18, 2002 Declaration in Opposition to Plaintiff's Third Repetitious Motion for Summary Judgment.

⁶ Allen purportedly relies on HRS chapter 477E but does not cite any specific language directly from HRS chapter 477E in his opening and reply briefs, although he refers to the chapter in his Statement of the Case and mentions it once in his legal argument section.

district court without regard to the amount in controversy, or in any other court of competent jurisdiction." 15 U.S.C. § 1691e(f) (2005). As such, ECOA claims may be heard in federal and state courts.⁷

Allen requests that "the underlying mortgage transaction [be declared] void and unenforceable" on the basis of marital status discrimination and hence, raises the marital status discrimination violation defensively. Although marital status discrimination is prohibited by the ECOA, not all jurisdictions allow debtors to raise ECOA violations defensively. In cases involving guaranties obtained from spouses, a majority of jurisdictions faced with such cases have permitted the defensive use of alleged ECOA violations. See Silverman v. Eastrich Multiple Investor Fund, 51 F.3d 28, 33 (3rd Cir. 1995) (stating that "[i]f plaintiff was required to sign . . . [the] Guaranty . . . solely for the purpose of expediting a loan for her spouse and his business, . . . [the] Guaranty cannot be enforced against her"); FDIC v. Medmark, Inc., 897 F. Supp. 511 (D. Kan. 1995) (holding that wife may be relieved from a loan guaranty she was required to sign for her husband's business

⁷ HRS § 477E-3 (1993) similarly states that "[i]t shall be unlawful for any creditor to discriminate against any applicant on the basis of marital status with respect to any aspect of a credit transaction." HRS § 477E-4(a) (1993) provides that "[a]ny creditor who fails to comply with any requirement imposed under this chapter shall be liable to the aggrieved applicant in an amount equal to the sum of any actual damages sustained by such applicant." HRS § 477-4(b) (1993) further declares that "[a]ny creditor who fails to comply with any requirement imposed under this chapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000, as determined by the court, in addition to any actual damages[.]"

because her husband was independently creditworthy); but see CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 95 (E.D. Va. 1992) (stating that the "ECOA, by its own terms, sets forth the contemplated remedy . . . for actual damages, punitive damages not to exceed \$10,000 attorneys' fees or injunctive relief[and that n]owhere does it afford relief by way of an affirmative defense").

Allen further argues that because the ECOA and HRS chapter 477E violations may be raised defensively, the statute of limitations does not bar his assertion of marital status discrimination. The alleged discrimination occurred in October 1993, when Prudential required that Martha be removed from title to the property. Norwest filed its complaint in April 1997. Thus, if a counterclaim were filed for an ECOA violation, the counterclaim would be barred by the ECOA two-year statute of limitations. See Diamond v. Union Bank & Trust, 776 F. Supp. 542 (N.D. Okla. 1991) (reasoning that in addition to a lack of statutory language in the ECOA to render an instrument void, the two-year statute of limitations had expired because the most recent execution of documents involving debtors occurred in 1986 and the suit began in 1990, when it denied defensive use of an ECOA violation); Rodgers v. First Union Nat'l Bank of Ga., 470 S.E.2d 246, 248 (Ga. Ct. App. 1996) (stating that "even if [debtor] had asserted an alleged violation of the ECOA as a counterclaim, such claim was barred by the applicable statute of

limitation" because the guaranty was executed in 1988 and the ECOA defense was not invoked until 1992). However, some jurisdictions recognize an exception to the statute of limitations set forth in 15 U.S.C. § 1691e(f) (2005) on the ground of recoupment. See Bolduc v. Beal Bank, SSB, 167 F.3d 667, 672 (1st Cir. 1999) (ruling that under the common law doctrine of recoupment a defendant debtor could assert an ECOA defense after the statute of limitations had passed if the debtor were sued by her creditor for defaulting in payment).

Assuming, arguendo, that a marital status discrimination claim may be raised defensively and hence that a statute of limitations defense would not preclude such a claim, it is nevertheless concluded that Allen lacked standing to assert his wife's claim. The court, in its conclusion of law no. 14, concluded that Allen did not have standing to assert Martha's marital status discrimination claim. As stated by Norwest in its opening brief, standing depends on "'whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf.'" (Quoting Sierra Club v. Hawai'i Tourism Auth., 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002)). Thus, to establish standing, the injured party must show that: (1) he or she has suffered an actual or threatened injury as a result of the opposing party's wrongful conduct, (2) the injury is fairly

traceable to the opposing party's actions, and (3) a favorable decision would likely provide relief for the injury. Bush v. Watson, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996). The test is stated in the conjunctive and, hence, Allen must show that all three prongs are satisfied. See Sierra Club, 100 Hawai'i at 250, 50 P.3d at 885 ("Since the [standing] test is stated in the conjunctive, Petitioner must satisfy all three prongs to establish its standing.").

Allen has failed to show he suffered an actual or threatened injury. Norwest alleges that Allen did not suffer any injury because he obtained a mortgage. In his reply brief, Allen declares that his injury was the denial of the joint mortgage application with Martha, but does not elucidate further. Allen also apparently alleges that he suffers from "economic separation" resulting from Martha's removal from the title. There is no "economic separation" injury recognized in this state or ascertainable in other jurisdictions, and Allen fails to cite any authority to that effect. Under these circumstances the injury prong has not been satisfied.

Allen argues that husbands are permitted to assert a marital discrimination defense where the resulting injury was incurred by the wife only. But he cites no case law that allows a husband to assert an ECOA marital discrimination claim on behalf of his wife. He does rely on In re Brazil, 21 B.R. 333 (Bankr. N.D. Ohio 1982). In In re Brazil, a gas company refused

to provide service to a wife if her husband resided in their home. The refusal was based on the husband's bad credit. The bankruptcy court stated that "[t]o base an acceptance or rejection of an application for credit on whether a person is or is not living with her spouse and to require a marital separation in order to obtain credit is to discriminate on the basis of that person's marital status." Id. at 335. However, in the instant case, directing that Martha be removed from the title and, hence, from liability for the mortgage, would not "encourage the breakup of the family" in the manner In re Brazil contemplated, id., and in fact no facts indicate that the mortgage acceptance required Martha to exit the family home.

Assuming, arguendo, the presence of an injury, the injury must be fairly traceable to Norwest's actions. In that regard, the ECOA defines a creditor as "[a]ny person who regularly extends, renews, or continues credit . . . or any assignee of an original creditor who participates in the decision to extend, or continue credit." 15 U.S.C. § 1691a(e) (2005) (emphasis added).⁸ The definition of "creditor" is further refined by the Code of Federal Regulations (C.F.R.), which states that "[a] person is not a creditor regarding any violation of the [ECOA] . . . unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation

⁸ Allen further argues that it does not matter who the current creditor is because he seeks to have the mortgage declared void and is not suing for monetary damages.

before becoming involved in the credit transaction." 12 C.F.R. § 202.2 (2005). HRS chapter 477E-2 (1993), like 15 U.S.C. § 1691a(e), similarly defines a creditor as "any assignee of an original creditor who participates in the decision to grant, extend, renew, or to continue such loan or credit." (Emphasis added.)

In its conclusion of law no. 9, the court concluded that Norwest is not a "creditor" as defined by the ECOA.⁹ In its findings of fact nos. 16¹⁰ and 17,¹¹ the court found that Norwest had no actual or constructive notice of any defense Allen may have to the subject note or mortgage and that Norwest had no actual or constructive notice that the ECOA was violated.

Allen does not object to the court's conclusion of law no. 9, but does object to the court's findings of fact nos. 16 and 17. However Allen does not argue or cite to evidence showing that Norwest had actual or constructive notice of any ECOA violation. If any evidence that Norwest had reasonable notice of

⁹ The court's conclusion of law no. 9 states:

Only a "creditor", as specifically defined by ECOA, can be held liable under the statute. As a matter of law, Plaintiff is merely an assignee of the loan, did not participate in the making of the loan to Defendant and, therefore, is not a "creditor" as defined by ECOA. 15 U.S.C. Sec. 1691a.

¹⁰ The court's finding of fact no. 16 states that "Plaintiff had no actual or constructive notice of any defense Defendants may have to the subject note or mortgage. [Exhibit '17' and the testimony of Jeanette Ibarra]"

¹¹ The court's finding of fact no. 17 states that "Plaintiff had no actual or constructive notice of any claim by Defendants that the Equal Credit Opportunity Act, 15 U.S.C. Sec. 1691 et seq. ("ECOA") was violated. [Exhibit '17' and the testimony of Jeanette Ibarra]."

the alleged marital discrimination were included in the transcript of proceedings, that cannot be considered because Allen did not provide the transcript on appeal. See State v. Hoang, 93 Hawai'i 333, 3 P.3d 499 (2000). Additionally, inasmuch as the same facts which would establish "creditor" status of Norwest under HRS § 477E-2 were not proved for purposes of 15 U.S.C. § 1691a(e), see Armstrong v. Nationwide Mortgage Plan/Trust, 288 B.R. 404, 424 (Bankr. E.D. Pa. 2003) (holding that because the debtor has not proven that the creditor (assignee) purchased the loan knowing of the ECOA violation, "it is not charged with creditor status and will not be held liable under ECOA"), Norwest would not be a creditor within the scope of HRS § 477E-2.

As noted previously, to establish standing, a favorable decision by this court must also provide relief for the injury. Norwest argues that a favorable decision would not provide relief for Allen because Allen suffered no injury. Allen does not address this issue but apparently relies on his position that the mortgage is unenforceable and, thus, would provide relief for any alleged injury that Allen may have suffered. As noted above however, Allen has failed to establish a cognizable legal injury.

Accordingly, Allen lacked standing to assert Martha's claim. 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 amended final judgment nunc pro tunc as of October 18, 2002, filed on January 21, 2003, from which the appeal is taken, is affirmed.

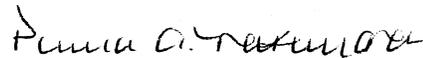
DATED: Honolulu, Hawai'i, July 7, 2005.

On the briefs:

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Gary Y. Okuda (Leu Okuda &
Leu), Neil F. Hulbert and
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