

*** NOT FOR PUBLICATION ***

NO. 24990

IN THE SUPREME COURT OF THE STATE OF HAWAII

PETER A. BATANGAN and HELEN B. BATANGAN,
Plaintiffs-Counter-Claim Defendants-Appellants,

vs.

FIRST HAWAIIAN BANK, Defendant-Counter-Claim Plaintiff-Appellee.

FIRST HAWAIIAN BANK, Third-Party Plaintiff,

vs.

DEL NORTE REFI LLC, successor in interest to LIFE SAVINGS BANK,
F.S.B.; HOUSEHOLD FINANCE CORPORATION OF HAWAII; JOHN DOES 1-50;
JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE
ENTITIES 1-50 and DOE GOVERNMENTAL UNITS 1-50;
Third-Party Defendants.

APPEAL FROM THE FIFTH CIRCUIT COURT
(CIV. NO. 00-01-0178)

SUMMARY DISPOSITION ORDER

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

Plaintiffs-Counterclaim Defendants-Appellants Peter A.
Batangan and Helen B. Batangan [hereinafter "the Batangans"],
appeal from the fifth circuit court's¹ (1) December 3, 2001
"Revised Judgment Re: Findings Of Fact, Conclusions Of Law And
Order Granting Defendant And Third-Party Plaintiff First Hawaiian
Bank's Motion For Summary Judgment And Interlocutory Decree Of
Foreclosure Against Plaintiffs And Third-Party Defendants Del
Norte Refi LLC, Successor In Interest To Life Savings Bank,

¹ The Honorable George M. Masuoka presided.

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F.S.B.; Household Finance Corporation of Hawaii; Etc.”;² (2) December 3, 2001 “Order Granting First Hawaiian Bank’s Motion For Order Approving Report Of Commissioner, Confirming Sale At Public Auction, Directing Distribution Of Proceeds, For Deficiency Judgment And For Writ Of Possession Filed July 18, 2001”; and (3) February 25, 2002 “Order Denying Plaintiffs’ Motion For Reconsideration Of The Order Granting Defendant First Hawaiian Bank’s Motion For Summary Judgment And Interlocutory Decree Of Foreclosure Against Plaintiffs Filed December 3, 2001 Etc.”³

On appeal, the Batangans argue that the circuit court erroneously granted summary judgment insofar as: (1) their sworn affidavits and declarations stating that they were provided with inadequate disclosure documents, as required by the federal Truth In Lending Act [hereinafter “TILA”], were sufficient to rebut FHB’s written acknowledgment of receipt that delivery was made thereof; (2) FHB failed to support its motion for summary

² Del Norte Refi LLC and Household Finance Corporation of Hawaii were named as third-party litigants by virtue of their status as junior lienors with respect to the subject foreclosure property.

³ Although the Batangans’ notice of appeal purports to appeal from (1) the December 3, 2001 order granting First Hawaiian Bank’s [hereinafter “FHB”] “Motion For Order Approving Report Of Commissioner, Confirming Sale At Public Auction, Directing Distribution Of Proceeds, For Deficiency Judgment And For Writ Of Possession,” and (2) the February 25, 2002 order denying the Batangans’ motion for reconsideration of the December 3, 2001 revised judgment, the Batangans neither challenge the orders in their points on appeal nor present any argument identifying prejudicial error. Accordingly, we need not consider those orders on appeal. See Hawai’i Rules of Appellate Procedure [hereinafter “HRAP”] Rule 28(b)(4) (2002) (“Points not presented . . . will be disregarded[.]”); HRAP Rule 28(b)(7) (2002) (“Points not argued may be deemed waived.”); Whitey’s Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc., 110 Hawai’i 302, 318 n.26, 132 P.3d 1213, 1229 n.26 (2006) (“Appellants did not assign as error the circuit court’s dismissal of Appellants’ claim for injunctive relief nor did Appellants present an argument with respect to their claim for injunctive relief. As such, Appellants’ contention with respect to injunctive relief is deemed waived.”).

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judgment with any admissible evidence that the Batangans defaulted on their loan payments; (3) they had a continuing right to rescind their October 18, 1995 and March 13, 1996 loan transactions based on FHB's alleged violations of TILA; and (4) the security interests on their property became void upon their notifying FHB of their rescission by way of recoupment.⁴ The Batangans also assert that final judgment was inappropriate inasmuch as numerous disputed factual issues remain unresolved.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that:

(1) The Batangans' right to rescind the March 13, 1996 loan transaction is not properly before this court insofar as the record on appeal indicates that the Batangans did not request rescission of that transaction before the circuit court.⁵

(2) Any rights the Batangans may have had to rescind the October 18, 1995 loan transaction expired after three years. See 15 U.S.C. § 1635(f) (2000) ("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of property, whichever comes first,

⁴ Points of error numbers (1), (3), and (4) have been consolidated and disposed of by this court's second holding, discussed infra.

⁵ The record indicates that the Batangans' "Demand For Truth In Lending Act Rescission," filed in the circuit court, only requested rescission of the October 18, 1995 loan transaction. The Batangans did not argue before the circuit court that their rights to rescind extended to the March 13, 1996 loan transaction. Accordingly, that argument is not properly before this court on appeal. See Honda v. Bd. of Trustees of the Employees' Retirement Sys. of the State, 108 Hawai'i 212, 241 n.14, 118 P.3d 1155, 1184 n.14 (2005) ("This court will not consider a question which was not raised and 'properly preserved in the lower court.'" (Citations omitted.)).

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notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor[.]"); 12 C.F.R. § 226.15(a)(3) ("If the required notice and material disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first."); Beach v. Ocwen Fed. Bank, 523 U.S. 410, 419 (1998) ("We respect Congress's manifest intent by concluding that [TILA] permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run."); Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 224, 11 P.3d 1, 12 (2000) (concluding that "[the Kekas'] right to rescission expired, at the latest, three years after they entered into the transaction, . . . and their attempt to assert that right as a defense in the Credit Union's action to foreclose on the mortgage on their residence was as ineffective as their original attempt to rescind the transaction by sending the cancellation notice"). Although 15 U.S.C. § 1635(i)(3) provides that "[n]othing . . . affects a consumer's right of rescission in recoupment under State law[,]," the Batangans have failed to identify any statute vesting a state right of rescission. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived."). Furthermore, although the Batangans assert that the common law provides for rescission by recoupment,

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they do not assert a common law basis for rescission.⁶ See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

(3) The account ledger attached to the January 16, 2001 affidavit of FHB's assistant vice-president, Gary Y. Kawamoto [hereinafter "Kawamoto"], was hearsay inasmuch as it (a) was not prepared by Kawamoto, (b) was offered to prove the truth of the matter asserted -- i.e., that the Batangans were in default on the loan, and (c) Kawamoto's affidavit failed to allege facts based upon personal knowledge establishing that the documents would have been admissible at trial. Nevertheless, summary judgment was supported by admissible evidence, insofar as Kawamoto's amended affidavit, filed on November 6, 2001, alleged facts sufficiently demonstrating that the appended documents fell within the scope of the business records exception to the hearsay rule.⁷ See Hawai'i Rules of Civil Procedure Rule 56(e) (2001)

⁶ E.g., fraudulent inducement, undue influence, misrepresentation, et cetera. See 13 Sarah H. Jenkins, Corbin on Contracts § 67.8, at 47 (Joseph M. Perillo, ed., rev. ed. 2004) (stating that "unilateral rescission . . . arises because of incapacity, such as infancy, or the inducement of assent through misrepresentation, or undue influence") (quotation marks omitted) (footnote omitted); Restatement (Second) of Contracts § 7 cmt. b (1981) ("Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract.").

⁷ We prudentially note that the issue is somewhat complicated by the procedural posture of the case. The record indicates that, on February 14, 2001, the circuit court rendered its findings of fact, conclusions of law, and order, as well as a judgment thereon, based only upon the defective January 16, 2001 affidavit. Accordingly, the findings of fact, conclusions of law, and order and the judgment were erroneous. However, that judgment is not relevant in the present case insofar as it was not the one appealed from. The record indicates that the Batangans' attempt to appeal from the February 14, 2001 judgment was dismissed by this court for lack of jurisdiction. During the interim, on November 6, 2001, FHB filed Kawamoto's amended affidavit. The circuit court thereafter filed a revised judgment from which the present
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("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein."); Nakato v. Macharg, 89 Hawai'i 79, 87, 969 P.2d 824, 833 (App. 1998) ("[Rule 56(e)] requires that facts set forth in the affidavits be admissible in evidence.") (brackets in original) (citation omitted).

(4) There was no genuine issue of material fact with respect to whether the Batangans' attempted to rescind their loan transaction beyond the deadline imposed by statute, and therefore FHB was entitled to summary judgment as a matter of law. Here,

⁷(...continued)
appeal was taken.

As a purely technical matter, the revised judgment shares the same defect as the February 14, 2001 judgment to the extent that it references the earlier findings of fact, conclusions of law, and order, which relied upon the faulty January 16, 2001 affidavit. However, that minor defect does not necessitate reversal inasmuch as it is axiomatic that we may affirm summary judgment on any ground in the record. See Waianae Model Neighborhood Area Ass'n, Inc. v. City & County of Honolulu, 55 Haw. 40, 43, 514 P.2d 861, 864 (1973) ("An appellate court may affirm summary judgment on any ground which appears in the record, regardless of whether the circuit court relied on it."); Helena Rubinstein, Inc. v. Bau, 433 F.2d 1021, 1023 (9th Cir. 1970) ("First it is proper for this court to affirm a summary judgment on any ground that appears from the record, whether or not the trial court relied on it.").

Here, the record indicates, via Kawamoto's amended affidavit, that the attached documents were admissible through the business records exception to the hearsay rule. The amended affidavit and appended documents demonstrate that: (1) the Batangans executed two loan transactions, secured by mortgage agreements, with FHB on October 18, 1995 and March 13, 1996; (2) the Batangans defaulted on their loan obligations; and (3) FHB was thus entitled to foreclose upon the real property that was the subject of the mortgage agreements and served as collateral for the loan transactions. The record further indicates that the Batangans attempted to rescind their October 18, 1995 loan transaction by letter dated September 5, 2000 -- beyond the three-year deadline imposed by 15 U.S.C. § 1635(f).

Thus, the record contains a sufficient basis upon which to affirm the circuit court's revised judgment, in relevant part, granting FHB's motion for summary judgment and interlocutory decree of foreclosure and dismissing the Batangans' "Demand For Truth In Lending Act Rescission."

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even if we assume that the alleged TILA violations occurred, thus obviating the need to adjudicate the issue, the Batangans' right to rescind has nevertheless expired pursuant to 15 U.S.C. § 1635(f).

Therefore,

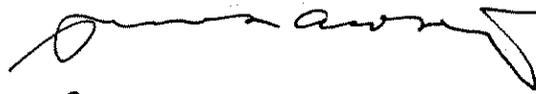
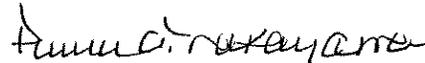
IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, July 13, 2006.

On the briefs:

Peter A. Batangan and
Helen B. Batangan,
plaintiffs-counterclaim
defendants-appellants,
pro se

Louis L.C. Chang of
Kuniyuki & Chang for
defendant-counterclaim
plaintiff-appellee
First Hawaiian Bank



Kama E. Duggan, Jr.