

NO. 26706

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

AAMES CAPITAL CORPORATION, Plaintiff-Appellee,

vs.

JIMENA D. HERNANDO, ARNOLD D. CRUZ, GENEVIEVE H. CRUZ, PAUL HERNANDEZ, AND ROCHELLE HERNANDEZ, Defendants-Appellants,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; AND DOE GOVERNMENTAL ENTITIES 1-10, Defendants.

JIMENA D. HERNANDO, ARNOLD D. CRUZ, GENEVIEVE H. CRUZ, PAUL HERNANDEZ, AND ROCHELLE HERNANDEZ, Counterclaimants-Appellants,

vs.

AAMES CAPITAL CORPORATION, a California corporation, Counterclaim Defendant-Appellee,

and

AAMES FUNDING CORPORATION, a California corporation, dba AAMES HOME LOAN, Additional Counterclaim Defendant-Appellee

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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APPEAL FROM THE FIFTH CIRCUIT COURT
(CIV. NO. 02-1-0162)

SUMMARY DISPOSITION ORDER

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

In this mortgage foreclosure and ejectment action, defendants-appellants and counterclaimants-appellants Jimena D. Hernando, Arnold D. Cruz, Genevieve H. Cruz, Paul Hernandez, and

Rochelle Hernandez [hereinafter collectively, Defendants] appeal from the June 18, 2004 final judgment and writ of possession entered by the Circuit Court of the Fifth Circuit¹ in favor of plaintiff-appellee and counterclaim defendant-appellee Aames Capital Corporation and counterclaim defendant-appellee Aames Funding Corporation [hereinafter collectively, Aames]. On appeal, Defendants argue that the circuit court erred in granting summary judgment in favor of Aames because: (1) the "power of sale" clause contained in the mortgage was part of a contract of adhesion and thus unenforceable; (2) there were genuine issues of material fact in dispute as to whether (a) the "power of sale" was exercised in good faith, and (b) default, cure, and acceleration notices were actually provided as required by the mortgage; (3) Aames failed to advertise the non-judicial foreclosure sale in a newspaper of general circulation in Kaua'i County as required by Hawai'i Revised Statutes (HRS) § 667-5 (1993);² and (4) the findings of fact and conclusions of law

¹ The Honorable George M. Masuoka presided over this matter.

² HRS § 667-5 provides in relevant part:

When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed

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contained in the summary judgment order were incomplete, unclear, and provide an inadequate basis for meaningful appellate review.

Upon carefully reviewing the record and briefs submitted, we hold as follows:

- (1) The mortgage containing the power of sale clause was not an unenforceable contract of adhesion because there is no evidence that Aames was the only source of home mortgage loans in Kaua'i or that the power of sale clause was unconscionable. See Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 247, 921 P.2d 146, 167 (1996) (holding that a contract is an unenforceable contract of adhesion where (1) the party seeking to avoid enforcement had no viable alternative source to obtain the services contracted for, and (2) the contract unconscionably advantages the stronger party);
- (2) Assuming arguendo that a breach of the covenant of good faith and fair dealing would be sufficient to rescind the mortgage loan transaction and set aside the foreclosure sale,³ Aames tendered

²(...continued)

with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.

³ See Ulrich v. Sec. Inv. Co., 35 Haw. 158, 168 (1939) (holding that a mortgagee's legal duties when foreclosing include the duty "to use all fair and reasonable means in obtaining the best price for the property on sale").

(continued...)

evidence that the foreclosure sale price was approximately \$15,000 more than the amount of the mortgage loan taken out by Defendants Jimena Hernando, Genevieve Cruz, and Arnold Cruz two years earlier and Defendants failed to meet their burden of demonstrating "specific facts" to show that this price was unreasonable. See French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004) (holding that where the party moving for summary judgment has met its burden of production, the opposing party must respond with specific facts);

- (3) There is no requirement that the amount of the loan default be proved with the general loan ledger in order to validate a non-judicial foreclosure sale. See Ames Funding Corp. v. Mores, 107 Hawai'i 95, 104 n.10, 110 P.3d 1142, 1151 n.10 (2005) (observing that there is no support for the proposition that a loan default must be proven by admissible evidence before summary adjudication of an ejectment action arising out of a non-judicial foreclosure sale is

³(...continued)

But see Maile v. Carter, 17 Haw. 49, 53 (1905) ("The alleged inadequacy of the price obtained for the property [at a non-judicial foreclosure sale] cannot in itself be considered sufficient cause for setting aside[.]").

permissible); Maile, 17 Haw. at 52 (holding that a non-judicial foreclosure sale will not be set aside for failure to provide an accounting or statement of the amount due);

- (4) The Honolulu Star-Bulletin, in which Aames advertised the foreclosure sale, is a newspaper of general circulation in Kaua'i County within the meaning of HRS § 667-5 because it publishes news of general interest and circulates within the county to some extent, even though its circulation may be limited. Nevada State Press Ass'n v. Fax, Inc., 378 P.2d 674, 675 (Nev. 1963) (citing 68 A.L.R. 542 (1930)); see also Great Southern Media, Inc. v. McDowell County, 284 S.E.2d 457, 462-68 (N.C. 1981) (collecting cases for the proposition that a newspaper with limited circulation may nevertheless be deemed to be in general circulation);

- (5) Assuming without deciding that the circuit court was required to enter findings of fact and conclusions of law in the instant case, its failure to do so was not reversible error because the record on appeal is sufficiently clear to provide a meaningful basis for appellate review.

See Lalakea v. Baker, 43 Haw. 321, 329 (1959) (holding that the failure of the trial court to make findings of fact is a waivable defect if it is not substantial in a given case); Richards v. Kailua Auto Mech. Serv., 10 Haw. App. 613, 621, 880 P.2d 1233, 1238 (1994) (concluding that under Hawai'i Rules of Civil Procedure Rule 52(a), "findings of fact by the circuit court are not jurisdictional and the appellate court may proceed where the record is clear and findings are unnecessary"). Therefore,

IT IS HEREBY ORDERED that the circuit court's June 18, 2004 final judgment and writ of possession are affirmed.

DATED: Honolulu, Hawai'i, April 17, 2006.

On the briefs:

Gary Victor Dubin for
defendants-counterclaimants-
appellants Jimena D. Hernando,
Arnold D. Cruz, Genevieve H.
Cruz, Paul Hernandez, and
Rochelle Hernandez

Lyle S. Hosoda, Raina P.B.
Mead, and Christopher T.
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& Associates, LLC) for
plaintiff-counterclaim
defendant-appellee Aames
Capital Corporation and
additional counterclaim
defendant-appellee Aames
Funding Corporation, dba
Aames Home Loan

