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E.M. RIMANDO  
CIRK. APPELLATE COURTS  
STATE OF HAWAII

NO. 26713

IN THE SUPREME COURT OF THE STATE OF HAWAII

PACITA CABATU, Plaintiff-Appellant

vs.

THE BANK OF NEW YORK, AS TRUSTEE FOR AMRESKO RESIDENTIAL  
SECURITIES CORPORATION MORTGAGE LOAN TRUST 1997-3 UNDER  
THE POOLING AND SERVICING AGREEMENT DATED AS OF  
SEPTEMBER 1, 1997, Defendant-Appellee

and

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

APPEAL FROM THE THIRD CIRCUIT COURT  
(CIV. NO. 02-1-209)

SUMMARY DISPOSITION ORDER

(By: Nakayama, Acoba, and Duffy, JJ.; With  
Moon, C.J., Concurring Separately and Dissenting,  
With Whom Levinson, J., Joins)

Plaintiff-Appellant Pacita Cabatu (Cabatu) appeals from  
the June 22, 2004 judgment of the circuit court of the third  
circuit (the court)<sup>1</sup> granting summary judgment and dismissal of  
all counts as to Defendant-Appellee The Bank of New York (Bank),  
as trustee for Amresko Residential Securities Corporation  
Mortgage Loan Trust 1997-3 Under the Pooling and Servicing  
Agreement dated as of September 1, 1997.

On appeal, Cabatu argues that (1) "the orders and  
judgments entered in the ejectment case are void and

<sup>1</sup> The Honorable Riki May Amano presided. The Honorable Terence  
Yoshioka also presided over certain of the proceedings.

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unenforceable as a matter of law pursuant to Silva v. Lopez, [5 Haw. 262 (1884)]," (2) "the orders and judgments entered in this case are void and unenforceable as a matter of law pursuant to [Hawai'i Revised Statutes (HRS)] § 480-12,"<sup>2</sup> (3) "the judicial maxim of 'clean hands' should be applied to protect the integrity of courts from illegal and void power of sale foreclosures," (4) "res judicata does [sic] is not bar to the court declaring the [Bank's] power of sale foreclosure illegal and void," (5) "count VIII states a claim for bad faith pursuant to the public policy established in Best Place, [Inc. v. Penn Am. Ins., Co.], 82 Hawai'i 120, 920 P.2d 334, (1996)]," and (6) the trial court committed reversible error when "Judge Yoshioka . . . overruled Judge Amano's decision denying summary judgment."

In response, the Bank asserts that (1) "Judge Amano correctly dismissed counts I, II, III, IV, and VI based on res judicata," (2) "Judge Yoshioka [properly] dismissed the remaining claims," and (3) the "appeal is frivolous" and "sanctions are warranted pursuant to [Hawai'i Rules of Appellate Procedure (HRAP) Rule 38]."

Cabatu replies that (1) "res judicata and court rules do not prevent the application of the judicial maxim of 'clean hands' to protect the integrity of courts from illegal and void power of sale foreclosures," (2) "res judicata is not a bar to the court declaring the [Bank's] power of sale foreclosure

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<sup>2</sup> HRS § 480-12 (1993) states that "[a]ny contract or agreement in violation of this chapter is void and is not enforceable at law or in equity."

illegal and void," (3) "count VIII states a claim for bad faith pursuant to the public policy established in Best Place,"

(4) "Judge Yoshioka should not have overruled Judge Amano's decision denying summary judgment," and (5) "[Bank's] frivolous appeal argument is meritless."

Bank's first argument is correct that counts I, II, III, IV, V, and VI were properly dismissed based on res judicata. First, in the ejectment action, Bank petitioned the court to recognize its claim of title against Cabatu after the non-judicial foreclosure of the property. "It is axiomatic that the movant in an ejectment action must prove ownership and title to the parcel in issue." See State v. Magoon, 75 Haw. 164, 175, 858 P.2d 712, 718-719 (1993) (stating that, "in order for the State to maintain its ejectment action in the circuit court against the landowners, the State must necessarily prove that it owns the parcels in issue"); State v. Midkiff, 49 Haw. 456, 460, 421 P.2d 550, 554 (1966) (holding that "in ejectment a plaintiff must recover upon the strength of his own title and not upon any weakness in the defendant's title"); Bertelmann v. Lucas, 31 Haw. 71, 76 (1929) (regarding ejectment actions, "the court may adjudicate both title and right to possession"). Therefore, the prior ejectment action determined the property and title rights of the property at issue. The present suit raises the same issues, that is, title and right to the property. Counts I, II, III, IV, V, and VI pertain to quieting title to the property and

declaring the foreclosure void and illegal. These issues in effect were decided by the January 28, 2002 ejectment judgment in favor of Bank.

Second, a final judgment on the merits of Bank's ejectment action, Civil No. 01-1-00391, was issued by the court on January 28, 2002, when it granted summary judgment in favor of Bank and required Cabatu to vacate the premises. That judgment was not appealed. Moreover, there is no evidence in the record that Cabatu opposed the non-judicial foreclosure by a separate action, during her multiple bankruptcy filings, or the ejectment action. Third, in the present case, the third prong of privity is not an issue. Both Bank and Cabatu were parties in the prior September 10, 2001 ejectment case filed under Civil No. 01-1-00391.

"Under the doctrine of res judicata, 'the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies[.]'" In re Dowsett Trust, 7 Haw. App. 640, 644, 791 P.2d 398, 401 (1990) (brackets omitted) (quoting In re Bishop Estate, 36 Haw. 403, 416 (1943)). Res judicata "precludes a second suit based on the same cause of action involved in a prior suit between the same parties or their privies[.]" Henderson v. Pence, 50 Haw. 162, 163 (1967) (quoting Territory v. Howell, 25 Haw. 320, 322 (1920)).

Bank also correctly argues that Judge Yoshioka properly dismissed the remaining claims of counts VII and VIII. Cabatu

argues that Bank had not offered any new evidence in its motion for reconsideration to support Judge Yoshioka's overruling of Judge Amano's decision denying summary judgment. Cabatu further contends that Bank did not provide the required cogent reasons or evidence for a court of equal authority to modify issues previously determined. However, the order filed by Judge Amano stated that "[t]he motion is denied, without prejudice, as to Counts V and VII (Chapter 480), and VIII (Bad Faith Tort)." (Emphasis added.) Patently, a decision issued "without prejudice" maintains the legal rights of a party in anticipation that further proceedings may resolve the issue. Hence, Judge Yoshioka had the authority to revisit these counts under the circumstances.

Furthermore, the court barred count VII of Cabatu's complaint on the ground that the allegation of "unfair deceptive trade practice" was a compulsory counterclaim that had not been pled in the September 10, 2001 case. Both the ejectment action and the present suit for unfair deceptive trade practices arise out of the same operative facts and issues concerning the validity of the non-judicial mortgage foreclosure. The issue of unfair deceptive trade practice should have been raised during the ejectment action as a compulsory counterclaim. Hawai'i Rules of Civil Procedure Rule 13(a) states in relevant part that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing

party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Cabatu's failure to litigate this compulsory counterclaim during the prior action is now precluded by res judicata. See Booth v. Lewis, 8 Haw. App. 249, 252, 798 P.2d 447, 449 (1990) (discussing the four part test to determine whether a counterclaim is compulsory).

As to count VIII, Cabatu argues that because the damages filed in the current suit for bad faith could not be ascertained during the ejectment action, res judicata does not apply pursuant to State Savings & Loan Assoc. v. Corey, 53 Haw. 132, 488 P.2d 703 (1971). However, Cabatu does not support her claim that she could not ascertain her damages with any facts or argument as to how this suit is analogous with the issues in Corey. Furthermore, although Cabatu requests "attorney's fees and costs as provided by law," these are claims that could have been determined during the ejectment action or on appeal of that suit.

Cabatu also claims that the doctrine of "clean hands" precedes the application of res judicata. Although it is important to protect the integrity of the judicial process from deceptive acts, it is equally vital to ensure finality through the resolution of lawsuits. This claim should have been raised during the ejectment action or during an appeal from that judgment, and not in the current suit.

Cabatu contends in her opening brief and in her reply brief that the pecuniary injury suffered should be recovered from the Estate of Warren Hiromi Mijo. Her assertion that the pecuniary injury created a "cause of action which is different from the defense that could have been asserted in response to the cause of action in the prior foreclosure case" does not present any discernable legal argument.

Cabatu's argument that res judicata is not the applicable standard for this suit, but rather that collateral estoppel applies, is incorrect. It is evident that the complaint filed in the present case arises from the same issues in the prior ejection suit establishing the right to the subject property and is not a different cause of action.

Bank contends that Cabatu should be sanctioned under HRAP Rule 38 for (1) filing a frivolous appeal, (2) employing an inappropriate collateral attack, (3) misleading the appellate courts, and (4) misapplying controlling law of which her attorney had clear knowledge. Cabatu's actions do not warrant sanctions pursuant to HRAP Rule 38 because the necessary requisite of bad faith is not evident. Therefore,

In accordance with HRAP 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 final judgment filed on June 22, 2004, from which the appeal is taken, is affirmed. Additionally, Bank's request for HRAP Rule 38 sanctions is denied.

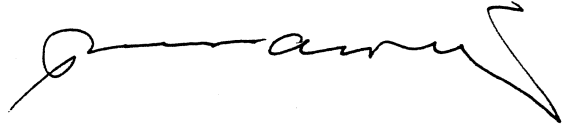
DATED: Honolulu, Hawai'i, March 8, 2006.

On the briefs:

Andrew S. Iwashita and  
George J. Sweibel for  
plaintiff-appellant.

Robert E. Chapman and  
Mary Martin (Stanton Clay  
Chapman Crumpton & Iwamura)  
for defendant-appellee.

*James E. Duggan, Jr.*



*James E. Duggan, Jr.*