

NO. 22388

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

GE CAPITAL HAWAII, INC.,	)	CIV. NO. 98-1054
a Hawai'i corporation,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	FIRST CIRCUIT COURT
	)	
vs.	)	
	)	
CARINA CASTILLO BARLAN;	)	
MANOLITO ARCON ATIS; and	)	
JON ERIC BARLAN,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
NEMESIO CASTILLO;	)	
LOR CASTILLO; JOHN DOES 1-20;	)	
JANE DOES 1-20; DOE	)	
PARTNERSHIPS 1-20; DOE	)	
CORPORATIONS 1-20; DOE	)	
ENTITIES 1-20; and DOE	)	
GOVERNMENTAL UNITS 1-20,	)	
	)	
Defendants.	)	
	)	

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MEMORANDUM OPINION

Defendants-Appellants Carina Castillo Barlan (Carina), Manolito Arcon Atis (Manolito), and Jon Eric Barlan (Jon) (collectively Appellants), appeal the circuit court's February 25, 1999 Judgment. Specifically, they challenge the February 25, 1999 Plaintiff-Appellee GE Capital Hawaii, Inc.'s Findings of Fact, Conclusions of Law and Order Granting Motion for Summary Judgment Against All Defendants and for Interlocutory

Decree of Foreclosure Filed May 6, 1998<sup>1</sup> (February 25, 1999 FsOF, CsOL, Order) on the ground that there is insufficient admissible evidence in the record to support summary adjudication.

We vacate the February 25, 1999 Judgment and the February 25, 1999 FsOF, CsOL, Order, and remand for further proceedings consistent with this opinion.

#### BACKGROUND

The Promissory Note dated October 21, 1996, is for the principal sum of \$293,675.00, is signed by Carina, Manolito, Jon, Nemesio Castillo (Nemesio), and Lor Castillo (Lor), and imposes joint and several liability on each signer.

On March 5, 1998, Plaintiff-Appellee GE Capital Hawaii, Inc. (GE Capital), filed a Complaint for Foreclosure of the mortgage on the property located at 94-1080 Kukula Street, Waipahu, Hawai'i 96797, against Carina, Manolito, Jon, Nemesio, Lor, and various Doe entities (collectively the Five Defendants). On April 9, 1998, the Five Defendants, proceeding *pro se*, filed their answer in opposition to the Complaint for Foreclosure.

On May 6, 1998, GE Capital filed its Motion for Summary Judgment Against All Defendants and For Interlocutory Decree of Foreclosure (May 6, 1998 Motion for Summary Judgment). This

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<sup>1</sup> Although this document was prepared by Plaintiff-Appellee GE Capital Hawaii, Inc. (GE Capital), it became the court's document when it was signed and filed by the court.

motion was accompanied by the Affidavit of Gordon Okumoto (Okumoto) stating in relevant part as follows:

1. I am a Loan Adjustment Specialist employed by [GE Capital], and I am authorized to make this affidavit. I am competent, if called upon as a witness in this case, to testify as to the matters contained in this affidavit.

2. I have reviewed the files and documents relating to [the Five Defendants]. . . . These files were made in the regular course of [GE Capital's] business at or near the time of the acts or events referenced therein. They are maintained in the ordinary course of [GE Capital's] business.

. . . .

5. [The Five Defendants] are in default under the terms of the Note and Mortgage in that they have breached their covenant to pay the sums due thereunder.

. . . .

8. As of February 26, 1998, there was due and owing from [the Five Defendants] to [GE Capital] under the Note and Mortgage, the amount of \$300,314.85 calculated as follows:

<u>LOAN NO. NRO21944</u>	
Principal balance	\$292,159.22
Interest to 03/06/98	7,889.73
Late Charges to 02/11/98	<u>265.90</u>
TOTAL:	\$300,314.85

Interest continues to accrue on the Note at the present rate of 10.38% per annum, or \$83.05 per day, from and including March 6, 1998 to the date of payment or entry of a judgment thereon. Attorneys fees and litigation expenses will also continue to accrue.

On June 5, 1998, prior to the June 8, 1998 hearing on the May 6, 1998 Motion for Summary Judgment, Carina filed a

notice of her filing "a Chapter 13 petition in the U.S. Bankruptcy Court on April 13, 1998." The June 8, 1998 hearing on the motion was first postponed to August 24, 1998, then to October 19, 1998, and finally to February 1, 1999.<sup>2</sup>

On November 5, 1998, GE Capital filed a second Motion for Summary Judgment (November 5, 1998 Motion for Summary Judgment) against all the defendants except Carina.<sup>3</sup> It states in relevant part:

1. That, pursuant to [Hawai'i Rules of Civil Procedure (HRCP)] Rule[s] 56(a) and (c), summary judgment be entered in favor of Plaintiff GE Capital and against the Motion Defendants on their liability and damages under the Promissory Note dated October 21, 1996 (the "Note") on the grounds that there is no genuine issue as to any material fact and that GE Capital is, therefore, entitled to judgment as a matter of law;

. . . .

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<sup>2</sup> Attached to the November 5, 1998 Motion for Summary Judgment is an affidavit by Bruce C. Bigelow, one of the attorneys for GE Capital, stating in relevant part as follows:

3. Defendant Carina Castillo Barlan filed a Chapter 13 bankruptcy on April 20, 1998. Case No. 98-01566. That bankruptcy was dismissed on June 19, 1998 because Ms. Barlan failed to file her schedules and statement of affairs as required by the Bankruptcy Code.

4. Defendant Carina Castillo Barlan then filed a "no asset" chapter 7 bankruptcy on October 16, 1998. Case No. 98-04604. This case is pending so GE Capital has not included Ms. Barlan as one of the Defendants who are subject to the summary judgment motion filed simultaneously herewith.

<sup>3</sup> The named defendants are Manolito Arcon Atis, Jon Eric Barlan, Nemesio Castillo, and Lor Castillo.

This Motion is based on the attached Affidavit of Gordon Okumoto and Memorandum in support thereof, and upon the pleadings and records on file herein, and such oral and documentary evidence as may be presented to the Court during the hearing.

Please note that the foregoing Motion does not include any claims against Defendant CARINA CASTILLO BARLAN, who filed a Chapter 7 bankruptcy on October 16, 1998. Nor does the Motion seek to foreclose GE Capital's first mortgage against the property which secures the Note. This Motion is directly solely against the named Motion Defendants as to their obligations under the Note.

Attached to the November 5, 1998 Motion for Summary Judgment was an Affidavit of Gordon Okumoto which states in relevant part as follows:

2. I have reviewed the GE Capital files and documents relating to Defendants Manolito Arcon Atis, Jon Eric Barlan, Nemesio Castillo and Lor Castillo in the above-entitled action (collectively, the "Motion Defendants"). These files were made in the regular course of GE Capital's business at or near the time of the acts or events referenced therein. They are maintained in the ordinary course of GE Capital's business.

. . . .

4. For the purposes of securing payment to GE Capital when it became due and payable, Defendants executed that certain Mortgage, Security Agreement and Financing Statement dated October 21, 1996 on the property located at 94-1080 Kukula Street, Waipahu, HI 96797. . . .

5. The Motion Defendants are in default under the terms of the Note in that they have breached their covenant to pay the sums due thereunder.

6. By reason of the foregoing default, Plaintiff GE Capital exercised its option under the terms and covenants of the Note to declare the entire principal balance under the Note, together with interest, immediately due and payable.

7. Due notice was given to Motion Defendants of Plaintiff GE Capital's exercise of its option and although GE Capital made demand upon Motion Defendants, they have failed and continue to fail to pay the sums due under the Note.

8. To November 5, 1998, there was due and owing from the Motion Defendants to GE Capital under the Note the amount of \$320,579.05 (exclusive of attorneys fees and costs), calculated as follows:

**LOAN NO. NR021944**

Principal balance	\$292,159.22
Interest to 11/5/98	28,153.93
Late Charges to 02/11/98	<u>265.90</u>
TOTAL:	\$320,579.05

Interest continues to accrue on the Note at the present rate of 10.38% per annum, or \$83.05 per day, from and including November 5, 1998 to the date of payment or entry of a judgment thereon. Attorneys fees and litigation expenses will also continue to accrue.

On November 24, 1998, the United States Bankruptcy Court entered an Order Granting GE Capital Hawaii Inc.'s Motion to Modify Automatic Stay to Allow for Foreclosure, which allowed GE Capital to foreclose the mortgage and sell the mortgaged property but prohibited GE Capital from obtaining a deficiency judgment against Carina without permission by the bankruptcy court.

After a December 28, 1998 hearing on the November 5, 1998 Motion for Summary Judgment, the circuit court, on January 13, 1999, entered (1) Findings of Fact, Conclusions of Law, and an Order Granting Motion for Summary Judgment Against Defendants Manolito Arcon Atis, Jon Eric Barlan, Nemesio Castillo

and Lor Castillo and (2) a Judgment (January 13, 1999 Judgment).

The latter

ORDERED, ADJUDGED AND DECREED that, pursuant to Rules 54(b) and 58 of the Hawaii [Hawai'i] Rules of Civil Procedure, final judgment be entered in favor of Plaintiff GE CAPITAL HAWAII, INC. ("GE Capital") and against Defendants MANOLITO ARCON ATIS, JON ERIC BARLAN, NEMESIO CASTILLO and LOR CASTILLO as to their liability and damages under the Promissory Note dated October 21, 1996 as follows:

1. That judgment is rendered in favor of Plaintiff GE Capital in the principal amount of \$292,159.22, together with interest of \$28,153.93 through November 5, 1998 and late charges of \$265.90 through February 11, 1998, for a total of \$320,579.05, plus interest at the rate of 10.38% per annum, or \$83.05 per day, from and including November 5, 1998 to the date of entry of this judgment and, thereafter, at the judgment rate of interest of 10% per annum pursuant to Hawaii [Hawai'i] Revised Statutes §478-3 (1993 Repl.).

. . . .

3. That, pursuant to Rule 54(b), Hawaii [Hawai'i] Rules of Civil Procedure, this Court expressly determines and directs that this judgment is entered as a final judgment against Defendants MANOLITO ARCON ATIS, JON ERIC BARLAN, NEMESIO CASTILLO and LOR CASTILLO as to their liability and damages under the Promissory Note dated October 21, 1996, as there is no just reason for delay.

This judgment does not dispose of all claims or all parties in this case.

Subsequently, on February 8, 1999, GE Capital filed a Notice of Discharge of Debtor stating "that Carina Castillo Barlan, one of the defendants . . . , has been released from her personal liability on the Note which is the subject of this foreclosure action, pursuant to an Order dated January 26, 1999,

entered by the Honorable Lloyd King, United States Bankruptcy Judge, in Case No. 98-0464-4."

At the February 1, 1999 hearing on the May 6, 1998 Motion for Summary Judgment, the following was stated in relevant part:

[ATTORNEY FOR THE FIVE DEFENDANTS]: Good morning, Your Honor, Gary Dubin appearing on behalf of the five named Defendants, who just retained me last night. They've been appearing pro se. I did get a copy of the Motion for Summary Judgment, and I am prepared to argue against it.

[GE CAPITAL'S ATTORNEY]: Your Honor, we've received no pleadings in this matter, no opposition and--

[ATTORNEY FOR THE FIVE DEFENDANTS]: Your Honor, the objection is very simple. It's an evidentiary objection that the motion is not based upon any admissible evidence because it has a hearsay declaration which violates Rule 58(e) and Evidence Rule 802, hearsay rule, in accordance with the decision of Hawaii [Hawai'i] Supreme Court in Pacific Concrete 62322.<sup>4</sup> Therefore, I would ask the court deny the motion without prejudice.

THE COURT: Well, you understand the summary judgment has already been granted in this case against all the Defendants except Carina.

[ATTORNEY FOR THE FIVE DEFENDANTS]: I didn't know that, Your Honor.

THE COURT: That was December 29, 1998.

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<sup>4</sup> It appears that the attorney for the five defendants was referring to Pacific Concrete Federal Credit Union v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980). In that case, an affidavit was submitted to the court referring to a ledger not submitted to the court in accordance with Hawai'i Rules of Civil Procedure Rule 56(e). Id. at 337, 614 P.2d at 938. The Hawai'i Supreme Court stated that since the "ledger had not been attached to the affidavit, any information therefrom was inadmissible and should not have been considered by the circuit court" and that the "[a]ffiant's testimony as to what was in the ledger was inadmissible hearsay." Id. at 336, 337 n.5, 614 P.2d at 938, 938 n.5.

[ATTORNEY FOR THE FIVE DEFENDANTS]: Then I would make it against the one Defendant then that it hasn't.

THE COURT: All right. Your position is noted. Overruled.

This motion is granted.

(Footnote added.)

The February 25, 1999 FsOF, CsOL, Order and the February 25, 1999 Judgment followed. It authorizes and directs the foreclosure action to proceed, prohibits a deficiency judgment against Carina,<sup>5</sup> and directs "that final judgment shall be entered as to Plaintiff GE Capital's Complaint for Foreclosure as to all Defendants under Rule 54(b) of the Hawai'i Rules of Civil Procedure, as there is no just reason for delay."

#### ISSUES

We will discuss the following issues: (1) Did Manolito and Jon have standing to appeal the February 25, 1999 Judgment notwithstanding the judgment entered against them on January 13, 1999? (2) Did Carina have standing to appeal the February 25, 1999 Judgment? (3) Was the circuit court wrong when it entered the February 25, 1999 FsOF, CsOL, Order in favor of GE Capital?

#### DISCUSSION

##### 1.

HRCP Rule 54(b) authorizes the circuit court to "direct the entry of a final judgment as to one or more but fewer than

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<sup>5</sup> The court reasonably assumed that the foreclosure would result in a deficiency.

all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." See FFG, Inc. v. Jones, 6 Haw. App. 35, 45, 708 P.2d 836, 844 (1985).

For purposes of appeal, foreclosure cases are bifurcated into a maximum of three separate appealable parts. The first part is the decree of foreclosure and, to the extent they are included in the decree of foreclosure, the order of sale and the right of a party to obtain a deficiency judgment. Security Pacific Mortgage Corp. v. Miller, 71 Haw. 65, 783 P.2d 855 (1989); Hoge v. Kane I, 4 Haw. App. 246, 247, 663 P.2d 645, 647 (1983). If the order determining the right of a party to obtain a deficiency judgment is not included within the first part and is not a part of the final order in the case, it is the second part. Security Pacific Mortgage Corp., supra. The third part is the final order and all prior orders except the first part and the second part. Hoge, supra.

GE Capital contends that Manolito and Jon lack standing to challenge the February 25, 1999 Judgment. They argue that (1) the judgment that decided the case against Manolito and Jon was the January 13, 1999 Judgment which on its face was made final and appealable pursuant to HRCP Rule 54(b) and (2) the attorney for the Five Defendants objected only for Carina. We conclude (a) that the January 13, 1999 Judgment is not "a final

judgment as to one or more but fewer than all of the claims or parties" and, therefore, HRCP Rule 54(b) does not apply, (b) that the February 25, 1999 Judgment is a decree of foreclosure that is a final and appealable judgment "as to one or more but fewer than all of the claims or parties" and that it was timely appealed by Manolito and Jon, and (c) that HRCP Rule 56(e) imposes no burden on the adverse party or parties unless and until the "motion for summary judgment is made and supported as provided in this rule."

2.

The United States Bankruptcy Court's November 24, 1998 Order Granting GE Capital Hawaii, Inc.'s Motion to Modify Automatic Stay to Allow for Foreclosure permits the foreclosure action to proceed but prohibited a deficiency judgment in favor of GE Capital and against Carina "without further order of the Bankruptcy Court." GE Capital's February 8, 1999 Notice of Discharge of Debtor released Carina from her personal liability on the Note. Although a deficiency judgment cannot be entered against Carina, the record does not establish that she has no interest supporting her challenge to the fact of the foreclosure and/or its terms.

3.

HRCP Rule 56(e) states as follows:

**Form of Affidavits; Further Testimony; Defense Required.** 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 matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

We review a trial court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992) (citation omitted). "[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any [,] show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Roxas, 89 Hawai'i at 116, 969 P.2d at 1234 (citation omitted); see HRCF Rule 56(c).

Noting that the only evidence offered consisted "of a hearsay affidavit of an employee of the lender describing what he claims to have seen on the lender's books without placing in evidence a sworn copy of the general loan ledger itself[,]" the

Appellants argue that the circuit court was wrong when it entered summary judgment in favor of GE Capital.

In Mednick v. Davey, this court stated that "[i]t is only when the moving party satisfies its initial burden of production that the burden 'shift[s] to the non-moving party to respond to the motion for summary judgment and demonstrate specific [material] facts, as opposed to general allegations, that present a genuine issue worthy of trial.'" 87 Hawai'i 450, 457, 959 P.2d 439, 445 (App. 1998). The basis for this conclusion was the fact that

HRCF Rules 56(c) and (e) specify that the initial burden of production is to show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law by: (1) filing an affidavit (a) made on personal knowledge, (b) setting forth such facts as would be admissible in evidence, and (c) showing affirmatively that the affiant is competent to testify to the matters stated therein; and (2) attaching thereto or serving therewith sworn or certified copies of all papers or parts thereof referred to in the affidavit.

GE Capital Hawaii, Inc. v. Miguel, 92 Hawai'i 236, 241, 990 P.2d 134, 139 (1999).

In the instant case, GE Capital did not satisfy burden (2) and may not have satisfied burdens (1) (b) and (c). See Pacific Concrete Federal Credit Union v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980). GE Capital submitted Okumoto's affidavit as evidence of Carina's default and the balance due.

These statements are hearsay.<sup>6</sup> HRCP Rule 56(e) required these statements to be supported by sworn or certified documents attached to the affidavit. No such documents were attached. The rule in Hawai'i is that "[a]n affidavit consisting of inadmissible hearsay cannot serve as a basis for awarding or denying summary judgment." Nakato v. Macharg, 89 Hawai'i 79, 89, 969 P.3d 824, 834 (App. 1998).

GE Capital offers two reasons in support of its contention that there was no violation of HRCP Rule 56(e). First, it contends that the information could not be attached to the affidavit because it was in a computer, not a ledger. Second, it argues that the testimony in Okumoto's affidavit is admissible under Hawai'i Rules of Evidence (HRE) Rule 1006.<sup>7</sup>

GE Capital's first argument lacks merit because, as it admits in its Answering Brief, it "could have had its computer print a statement of the Debtor's account."

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<sup>6</sup> Hawai'i Rules of Evidence (HRE) Rule 801(3) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

HRE Rule 802 states that "[h]earsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii [Hawai'i] supreme court, or by statute."

<sup>7</sup> HRE Rule 1006 states as follows:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

GE Capital's second argument lacks merit because it has not established that HRE Rule 1006 applies in this case. Although GE Capital alleges that the statements made in Okumoto's affidavit are a summary of the records in the computer, it failed to establish that the relevant computer printout would be so "voluminous" that it "cannot conveniently be examined in court."

#### CONCLUSION

Accordingly, we (1) vacate the February 25, 1999 (a) Findings of Fact, Conclusions of Law, and Order Granting Motion for Summary Judgment Against All Defendants and for Interlocutory Decree of Foreclosure Filed May 6, 1998, and (b) Judgment and (2) remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i,

On the briefs:

Gary Victor Dubin  
for Defendants-Appellants.

JAMES S. BURNS  
Chief Judge

Bruce C. Bigelow,  
Eric H. Tsugawa, and  
Nancy J. Youngren,  
for Plaintiff-Appellee.

CORINNE K. A. WATANABE  
Associate Judge

JOHN S. W. LIM  
Associate Judge