A

Electronically Filed
Intermediate Court of Appeals
CAAP-12-0000758
29-APR-2016
12:02 PM

NOS. CAAP-12-0000758 and CAAP-12-0000070

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company, Plaintiff-Appellee, v. KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually, Defendants-Appellants, DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Counterclaimants-Appellants, v. BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J, Counterclaim Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Third-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986, Third-Party Defendant-Appellee, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R, Third-Party Nominal Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Fourth-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED, Fourth-Party Defendants-Appellees, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH, and DOES S through Z, Fourth-Party Nominal Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-2523-10)

MEMORANDUM OPINION
(By: Foley, Presiding Judge, Fujise and Ginoza, JJ.)

I.

Defendants-Appellants Ke Kailani Development, LLC, (KKD) and Michael J. Fuchs (Fuchs) (collectively the "Borrowers") appeal from several orders and judgments entered by the Circuit Court of the First Circuit (Circuit Court).[1] Borrowers' appeal arises out of a failed commercial real estate development on the Island of Hawai'i and the subsequent foreclosure proceedings. This consolidated appeal[2] asserts error in the following decisions:

From CAAP-12-0000070:

(1) The October 3, 2011 "Order Granting Plaintiff Ke Kailani Partners, LLC's [KKP] Motion for Confirmation of Sale, Allowance of Costs, Commissions and Fees, Distribution of Proceeds, Directing Conveyance, and for Writ of Possession and for Deficiency Judgment Filed on July 8, 2011" (Order Confirming Sale);

[1] The Honorable Bert I. Ayabe presided.

[2] CAAP-12-0000758 and CAAP-12-0000070 were consolidated by order of this court dated October 5, 2012.

(2) The October 3, 2011 Judgment;

(3) The October 3, 2011 Writ of Possession;

(4) The December 19, 2011 "Order Denying [Borrowers'] Motion to Consolidate Two Related Cases, Civil No. 09-1-2523-10 BIA and Civil No. 11-1-1577-07 BIA[;]" and

(5) The January 5, 2012 "Order Denying [Borrowers'] Motion for Post-Judgment Relief, filed October 14, 2011[.]"

From CAAP-12-0000758:

(6) The April 23, 2012 "Order Granting Plaintiff [KKP's] Motion for Determination of Deficiency Amount, filed November 15, 2011[;]"

(7) The April 23, 2012 Judgment; and

(8) The July 30, 2012 "Order Denying [Borrowers'] Motion Based Upon Newly Discovered Evidence to Disqualify the Honorable Bert I. Ayabe From All Proceedings in Civil No. 09-1-2523-10 Filed June 12, 2012[.]"

II.[3]

Between 2005 and 2007, KKD and Ke Kailani Corporation (KKC) entered into and modified an Infrastructure Loan Agreement (Infrastructure Loan) with the Bank of Hawaii, Central Pacific Bank, and Finance Factors, Limited (collectively the "Banks"), whereby the Banks agreed to loan, and KKD and KKC agreed to borrow, moneys for the purpose of financing the development of a certain 65.526 acres of land located in the District of South Kohala, County of Hawai'i (Project). KKD and KKC executed a promissory note (Infrastructure Note) in favor of the Banks and secured the note with a mortgage on the Project property.

Fuchs executed and delivered to the Banks a Guaranty and Indemnification (Infrastructure Guaranty), in which Fuchs guaranteed full payment and performance of all obligations

[3] These facts are largely taken from the Circuit Court's September 1, 2010 "Findings of Fact, Conclusions of Law, and Order Granting [Banks'] Motion for Summary Judgment and Decree of Foreclosure Filed April 22, 2010" (Decree of Foreclosure). As Borrowers have not challenged the Decree of Foreclosure or these findings of fact, we are bound by them. Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002).

defined therein, including but not limited to, payment of all sums due under the Infrastructure Note.

Between 2006 and 2007, the Banks, KKD, and KKC also entered into and modified a Loan Agreement (Villas Loan Agreement) for the purpose of further development of a certain 8.14 acres of land in South Kohala, Hawai'i (Villa Property). KKD and KKC executed and delivered a promissory note (Villas Note) and a mortgage securing the note to the Banks. Fuchs also personally guaranteed this loan.

On or about October 1, 2009, the Banks sent a letter to Borrowers, notifying them that the amended Infrastructure Note and the Villas Note each had matured on July 20, 2009, and that the failure of Borrowers to repay those notes constituted default. The Banks demanded immediate payment of the entire unpaid amounts due thereunder.

As of October 1, 2009, KKD and Fuchs, as guarantor, jointly and severally, owed the Banks (1) the principal amount of $14,128,422.76 under the amended Infrastructure Note plus accrued and unpaid interest, late charges, advances, expenses, and attorneys' fees incurred and to be incurred by the Banks, in connection with the collection of the amounts due and unpaid under the Infrastructure Loan Documents, and (2) the principal amount of $8,099,303.75 under the Villas Note plus accrued and unpaid interest, late charges, advances, expenses, and attorneys' fees incurred and to be incurred by the Banks in connection with the collection of the amounts due and unpaid under the Villas Loan Documents.

At some unspecified point, KKC was dissolved.

On October 27, 2009, the Banks initiated the instant foreclosure action pursuant to defaults on the Infrastructure Loan and Villas Loan which was assigned Civ. No. 09-1-2523-10.

On December 23, 2009, Borrowers filed counter-claims for (1) breach of contract; (2) breach of good faith and fair dealing; (3) breach of fiduciary duty; (4) interference with advantageous economic relations; (5) unfair and deceptive banking practices; (6) fraud and deceit; (7) rescission; (8) dissolution of partnership; (9) discharge of guaranties; (10) declaratory and

injunctive relief; (11) abuse of process; (12) wrongful foreclosure; and (13) punitive damages.

On April 22, 2010, the Banks moved for summary judgment and decree of foreclosure as well as summary judgment on Borrowers' counterclaims. On September 1, 2010, the Circuit Court entered its Foreclosure Order finding that, as of that date, Borrowers owed the Banks a total of $26,114,860.79, with an additional per diem interest of $9,261.55272 to the date of payment of the indebtedness and also concluded that the Banks were entitled to a deficiency judgment against Fuchs, individually, for the difference between the amount owed to the Banks under the Infrastructure Loan Documents and the Villas Loan Documents and the foreclosure sale proceeds applied thereto, and entered summary judgment in the Banks' favor on the Borrowers' counterclaims.

On December 6, 2010, the Banks filed Plaintiffs' Motion for Substitution of Parties. The Banks requested that the Circuit Court substitute KKP in place of the Banks. The Banks asserted that on or about November 30, 2010, the Banks sold all of their interests in the Infrastructure Loan and Villas Loan and associated documents to Hawaii Renaissance Builders, LLC (HRB). The Banks further asserted that on or about December 1, 2010, HRB transferred all of those interests to KKP. The Circuit Court granted the substitution on December 30, 2010 without opposition by Borrowers.[4]

---

[4] On December 30, 2010, Borrowers filed a notice of appeal from the Foreclosure Order, Counterclaim Order and respective judgments, which was assigned appellate case number CAAP-11-0000009. Borrowers did not challenge the Order Granting Substitution.

On January 5, 2011, KKD filed for Chapter 11 Bankruptcy protection. On March 1, 2011, the Bankruptcy Court for the District of Hawaii entered its "Order Regarding Secured Creditor [KKP's] Motion for Relief From Stay" (Bankruptcy Order). The Bankruptcy Order required as a condition of lifting the stay that, *inter alia*, Borrowers would dismiss with prejudice the appeal filed December 30, 2010. The Bankruptcy Order further required that Borrowers not appeal any order, finding, conclusion, judgment, or other decision in Civil No. 09-1-2523-10 entered or rendered prior to the date of the Bankruptcy Order.

On March 18, 2011, Borrowers and KKP, "substituted as Plaintiffs/Counterclaim Defendants in this matter, in place of" the Banks, as well as others, filed a Stipulation to Dismiss Appeal in CAAP-11-0000009.

(continued...)

On June 21, 2011, an auction of the Infrastructure Property and Villas Property was held. KKP was the sole bidder and submitted a credit bid of $10,000,000.00.

On July 8, 2011, KKP moved for confirmation of the foreclosure sale, which was opposed by Borrowers on July 27, 2011. Borrowers alleged that KKP had no standing to foreclose or continue with confirmation of the sale because (1) the Banks' assignments to HRB and KKP were unlawful and void; and (2) HRB's transfer to KKP was unlawful and void. Borrowers' allegation was "based upon the facts set forth in the attached Complaint filed today in Civil No. 11-1-1577-07 BIA[.]"[5]

On August 1, 2011, KKP replied to Borrowers' July 27, 2011 memorandum in opposition. KKP asserted that (1) it did have standing; and (2) Borrowers waived any objection (a) by failing to object to the December 6, 2010 Plaintiffs' Motion for Substitution of Parties, and (b) by stipulating to the March 1, 2011 Bankruptcy Order requiring them not to object to any decision in Civil No. 09-1-2523-10 entered or rendered prior to the date of the March 1, 2011 Bankruptcy Order.

On August 4, 2011, Borrowers filed a motion to consolidate Civil No. 09-1-2523-10 and Civil No. 11-1-1577-07.

On October 3, 2011, the Circuit Court entered its (1) Order Confirming Sale; (2) judgment; and (3) writ of possession.

---

[4](...continued)
This court approved the Stipulation to Dismiss Appeal and CAAP-11-0000009 was dismissed with prejudice on March 24, 2011.

[5] On July 27, 2011, Borrowers filed a Complaint in Civil No. 11-1-1577-07 against KKP, HRB, the Banks, and George Van Buren, the commissioner appointed to conduct the foreclosure sale. Those defendants moved to dismiss Borrowers' July 27, 2011 Complaint on September 6, 2011. While that motion was still pending, on November 4, 2011, Borrowers filed an Amended Complaint with an additional party, the law firm of Bays Deaver Lung Rose & Holma (Bays).

The Amended Complaint purports to assert the following twelve counts: (1) breach of contract; (2) "business compulsion"; (3) "tortious interference"; (4) "wrongful contract repudiation"; (5) breach of services contract; (6) misrepresentation; (7) legal malpractice; (8) "indemnification"; (9) specific performance; (10) a prayer for reformation of contracts; (11) "rescission of escrow cancellation"; and (12) "rescission of sale agreements."

For these facts we take judicial notice of the files and records in Civil No. 11-1-1577-07 BIA. Hawaii Rules of Evidence Rule 201.

On October 14, 2011, Borrowers filed a motion for post-judgment relief from the October 3, 2011 Order Confirming Sale. Borrowers requested "(1) reconsideration of the Order under Rule 59(e) of the Hawai'i Rules of Civil Procedure [HRCP]; (2) to vacate the Order under HRCP Rule 60(b)(2) based on newly discovered evidence; and (3) to stay the Order under HRCP Rule 62(h) until the final disposition of a separate related action[, Civil No. 11-1-1577-07.]"

On November 4, 2011, Borrowers' counsel sent a letter to presiding Judge Bert I. Ayabe. The letter cited alleged conflicts of interest and requested that Judge Ayabe recuse himself. The alleged conflict of interest arose because Borrowers named Bays as an additional defendant in Civil No. 11-1-1577-07.

On November 7, 2011, Borrowers filed a Request for Judicial Notice of the November 4, 2011 letter and Borrowers' First Amended Complaint in Civil No. 11-1-1577-07.

On November 15, 2011, KKP filed a Motion for Determination of Deficiency Amount. Three days later, Borrowers moved to continue KKP's motion until there was a final judgment in Civil No. 11-1-1577-07. Borrowers filed their opposition to this motion on November 28, 2011.

On November 25, 2011, Borrowers filed a Motion to Disqualify the Honorable Bert I. Ayabe from all Proceedings in Civil No. 09-1-2523-10. The Circuit Court orally denied the motion after a hearing held on December 20, 2011 and followed with a written order entered on January 27, 2012.

On December 19, 2011, the Circuit Court entered its order denying Borrowers' August 4, 2011 motion to consolidate.

On January 5, 2012, the Circuit Court entered its order denying Borrowers' October 14, 2011 motion for post-judgment relief.

On February 3, 2012, the Borrowers filed a Notice of Appeal from: (1) the Order Confirming Sale; (2) the October 3, 2011 Judgment; (3) the October 3, 2011 Writ of Possession; (4) the December 19, 2011 order denying Borrowers' August 4, 2011 motion to consolidate; and (5) the January 5, 2012 order denying

Borrowers' October 14, 2011 motion for post-judgment relief. This appeal was given appellate case number CAAP-12-0000070.

On April 23, 2012, the Circuit Court entered its (1) order granting KKP's November 15, 2011 Motion for Determination of Deficiency Amount; and (2) Judgment.

On April 24, 2012, Borrowers filed a Notice of Supplemental Objections to the form of KKP's proposed Order on KKP's Motion for Determination of Deficiency Amount and proposed Judgment thereon.[6]

On May 3, 2012, Borrowers moved for reconsideration and rehearing based upon alleged manifest error and admissions against interest.[7] The request was based upon three claimed errors by the Circuit Court: (1) the failure to adequately explain the deficiency judgment; (2) the failure to consolidate Civil No. 09-1-2523-10 and Civil No. 11-1-1577-07; and (3) the violation of due process when it determined the deficiency amount.

On May 11, 2012, Borrowers' counsel again sent a letter to the Circuit Court urging Judge Ayabe to recuse himself. Borrowers' counsel alleged that Judge Ayabe had a conflict of interest based upon alleged ownership of Bank of Hawaii stock valued between $25,000 and $50,000.

On May 17, 2012, the May 11, 2012 letter was filed with the Circuit Court. The Circuit Court convened a status conference during which Judge Ayabe explained that the Bank of Hawaii stock at issue was held in a custodial UTMA account for the benefit of his adult daughter. Judge Ayabe concluded that the Bank of Hawaii stock did not violate Hawaii disqualification statutes and orally indicated that any motion to disqualify would be denied.

On June 12, 2012, Borrowers filed a second motion to disqualify Judge Ayabe from all proceedings in Civil No.

---

[6] These objections appear to constitute a memorandum in opposition to the November 15, 2011 Motion for Determination of Deficiency Amount, which was granted the day before.

[7] Apparently there was no written order denying the May 3, 2012 motion for reconsideration and rehearing.

09-1-2523-10 and to set aside all orders and judgments entered by Judge Ayabe, which was denied by order entered July 30, 2012.

On August 31, 2012, Borrowers filed a Notice of Appeal from: (1) the April 23, 2012 order granting KKP's November 15, 2011 Motion for Determination of Deficiency Amount; (2) the April 23, 2012 Judgment; (3) the July 30, 2012 order denying Borrowers' June 12, 2012 motion to disqualify Judge Ayabe from all proceedings in Civil No. 09-1-2523-10 and to set aside all orders and judgments entered by Judge Ayabe; and (4) the August 1, 2012 deemed denial of Borrowers' May 3, 2012 motion for reconsideration and rehearing. This appeal was given appellate case number CAAP-12-0000758.

III.

A.

To the extent that it can be discerned, Borrowers' first point error[8] apparently is that KKP lacked standing to foreclose, bid at auction, or receive a deficiency judgment. Borrowers allege that the Circuit Court erred in its October 3, 2011 Order Confirming Sale and Judgment Confirming Sale. Borrowers provide only limited and sporadic record citations for the facts they assert are related to this issue.

Moreover, the September 1, 2010 Foreclosure Order unambiguously concluded that Borrowers consented to the Banks' right to sell their interests in the loans to third parties. On December 6, 2010, the Banks filed their motion to substitute KKP in the place of the Banks. The Banks asserted that on or about November 30, 2010, the Banks sold all of their interests in the Infrastructure Loan and Villas Loan and associated documents to

---

[8] Borrowers' Amended Opening Brief is in substantial non-compliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), most notably because it provides inadequate record citations throughout. This deficiency is particularly disturbing in light of this court's March 27, 2013 Order striking Borrowers' opening brief and exhibits for violations of HRAP Rule 28(b) with the admonition that "[f]ailure to comply with HRAP Rule 28 or this order may result in sanctions, including dismissal of the appeal." Both briefs were filed by Borrowers' counsel, Gary V. Dubin.

This court adheres to the policy of deciding parties' cases on the merits where possible, O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 386, 885 P.2d 361, 364 (1994), and we will endeavor to do so here. However, in light of the repeated violations of court rules by counsel, we will also refer him to the Office of Disciplinary Counsel for his conduct in this case.

HRB and that on or about December 1, 2010, HRB transferred all of those interests to KKP. Borrowers did not object to the substitution of KKP for the Banks. On December 30, 2010, the Circuit Court entered its Order Granting Plaintiffs' Motion for Substitution of Parties Filed December 6, 2010 and Borrowers did not appeal or otherwise challenge this order at the time.

Finally, Borrowers' arguments do not undermine KKP's standing in this case. As best as can be determined, Borrowers argue that, because KKP and its predecessor in interest HRB, allegedly made misrepresentations, failed to disclose information and otherwise breached agreements in Borrowers' failed attempt to secure their release from the loans involved in this action, KKP does not have standing to pursue the foreclosure and deficiency awarded in this case. Whatever attempts Borrowers may have made to renegotiate their loans in the interim, it is undisputed that the Banks ultimately assigned their interests in the Infrastructure and Villas Notes and mortgages to HRB, who in turn assigned its interest to KKP. "[B]orrowers do not have standing to challenge the validity of an assignment of [their] loans because they are not parties to the agreement and because noncompliance with a trust's governing document is irrelevant to the assignee's standing to foreclose." U.S. Bank Nat'l Ass'n v. Salvacion, 134 Hawai'i 170, 175, 338 P.3d 1185, 1190 (App. 2014). Similarly, Borrowers arguments here do not undermine KKP's standing to pursue this action.

B.

Borrowers' second point of error appears to be that Civil No. 09-1-2523-10 and Civil No. 11-1-1577-07 should have been consolidated. Borrowers provide no citations to the parts of the record relied on and no legal authority whatsoever in their argument.

> Although Rule 42(a) is designed to encourage consolidation where a common question of law or fact is present, the trial court is given broad discretion to decide whether consolidation would be desirable. The trial court's discretionary determination will not be reversed on appeal absent clear error or exigent circumstances.

Kainz v. Lussier, 4 Haw. App. 400, 407, 667 P.2d 797, 803 (1983) (internal quotations marks and citations omitted).

Borrowers failed to carry their burden of persuasion. In Sheehan, this court applied Kainz to uphold the trial court's denial of appellant's HRCP Rule 42(a) motion to consolidate. Sheehan v. Grove Farm Co., 114 Hawai'i 376, 394, 163 P.3d 179, 197 (App. 2005). Under facts similar to the instant case, the Sheehan court upheld the denial because, although the two cases involved the same issues, the two cases were in completely disparate procedural postures. Id. In the instant case, Civil No. 09-1-2523-10 was in its final stages, awaiting a confirmation of foreclosure sale, whereas Civil No. 11-1-1577-07 was newly filed and attempting to resuscitate claims decided in Civil No. 09-1-2523-10.

The Circuit Court did not abuse its discretion when it denied Borrowers' August 4, 2011 Motion to Consolidate.

C.

Borrowers' third point on appeal denominated "KKD and Fuchs' Claims Should Not Have Been Dismissed Absent Discovery," summarized in their argument section as

> Genuine issues of material fact existed precluding summary adjudication, which however Judge Ayabe granted in awarding confirmation of sale over objections as to adequacy of price and in dismissing the new action against HRB and KKP based on his interpretation of documents that were being challenged for fraud and rescission

is incomprehensible and therefore could be considered waived. HRAP Rule 28(b)(7). Moreover, to the extent it challenges the confirmation of sale based on the existence of genuine issues of material fact, Borrowers have failed to identify those facts or where they were brought to the attention of the Circuit Court. To the extent it seeks review of the dismissal of the "new action"--we presume Civil No. 11-1-1577-07 BIA--we have no jurisdiction to do so, as that case is not before us in this appeal.[9]

D.

In their fourth asserted point of error, Borrowers challenge the Circuit Court's July 30, 2012 Order denying their

---

[9] We note that on March 30, 2016, this court dismissed the appeal in appellate case CAAP-13-0004290 from Civil No. 11-1-1577-07 BIA for lack of jurisdiction.

June 12, 2012 motion to disqualify Judge Ayabe and set aside all decisions entered by Judge Ayabe.[10]

Pursuant to HRAP Rule 4(a)(3), "[a]n HRCP Rule 60(b) motion for relief from judgment may toll the period for appealing a judgment or order, but only if the motion is served and filed within ten (10) days after the judgment is entered." Lambert v. Lua, 92 Hawai'i 228, 234, 990 P.2d 126, 132 (App. 1999). The Borrowers did not file their June 12, 2012 HRCP Rule 60(b) post-judgment motion within ten days after entry of the April 23, 2012 deficiency judgment (or any previous judgment), and therefore the June 12, 2012 HRCP Rule 60(b) post-judgment motion did not invoke the tolling provision under HRAP Rule 4(a)(3) that would enable the Borrowers to obtain appellate review of the July 30, 2012 post-judgment order by way of their appeal from the April 23, 2012 deficiency judgment pursuant to HRAP Rule 4(a)(3).

The July 30, 2012 post-judgment order denying Borrowers' June 12, 2012 HRCP Rule 60(b) post-judgment motion to set aside all judgments (based upon the argument that the presiding judge should have been disqualified) is an independently appealable post-judgment order that the Borrowers failed to timely appeal under HRAP Rule 4(a)(1). Therefore this court lacks jurisdiction over the Borrowers' appeal to the extent that they challenge the July 30, 2012 post-judgment order denying Borrower's June 12, 2012 HRCP Rule 60(b) post-judgment motion to set aside all judgments.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Therefore, Borrowers' August 31, 2012 notice of appeal is untimely as to the July 30,

[10] Although Borrowers also moved to disqualify Judge Ayabe on November 25, 2011, they have not presented any legal argument regarding the January 27, 2012 order denying this motion We therefore deem any challenge to this order waived. HRAP Rule 28(b)(7).

2012 post-judgment order denying the Borrowers' June 12, 2012 HRCP Rule 60(b) post-judgment motion to set aside all judgments.

E.

Borrowers argue that the Circuit Court violated their due process rights when it "determined the amount of the deficiency judgment here by merely using a calculator to subtract the net proceeds of sale from the amount found owed." Although Borrowers provide no citations to the parts of the record relied on, they appear to assert (1) that the final bid price at auction was grossly inadequate, and (2) the process in Hawai'i for determining deficiency judgments violates procedural due process. The crux of Borrowers' argument is that this court should adopt a "fair market value"-based approach to deficiency judgment calculations and that there should be an evidentiary hearing to determine the value of the property received by the foreclosing mortgagee which would then be subtracted from the amount owed in order to determine the amount of the deficiency judgment.

However, Borrowers have waived this challenge to the method used to determine the deficiency judgment. The Foreclosure Order provided: "Plaintiffs are entitled to a deficiency judgment in favor of Plaintiffs and against Fuchs, individually, for the difference between the amount owed to Plaintiffs under the Infrastructure Loan Documents and the Villas Loan Documents, and the foreclosure proceeds applied thereto." Borrowers' appeal from the Foreclosure Order was dismissed by stipulation. Therefore, Borrowers are precluded from indirectly challenging the Foreclosure Order and the method by which the deficiency judgment would be ascertained that was contained therein.

Moreover, Borrowers identify no evidence in the record that demonstrates the fair market value of the Infrastructure Property and Villas Property at the time of foreclosure sale. Borrowers presented no evidence with their Memorandum in Opposition[11] even tending to establish what the fair market value

---

[11] As no transcript of the hearing on the motion has been included in the record, it is unknown what evidence, if any, was presented during this hearing. "'The burden is upon appellant in an appeal to show error by (continued...)

was at the time of the foreclosure sale or disposition of the motion to determine the deficiency amount. Therefore, even if we were to accept Borrowers' contention, Borrowers did not present to the Circuit Court evidence that the foreclosure sales price was short of fair market value.

Furthermore, Borrowers' argument that due process requires this court to change the procedure and method of determining any deficiency is unsupported by the authority they cite. First, Borrowers ignore that under existing Hawai'i case law, they had the opportunity to challenge the fairness of the auction price, and thus, the resulting deficiency judgment. See Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983) (stating, in a case where foreclosure defendants objected to the auction price, that "[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm"); see also Indus. Mortg. Co. v. Smith, 94 Hawai'i 502, 17 P.3d 851 (App. 2001); Mortg. Elec. Registration Sys., Inc. v. Wise, 130 Hawai'i 11, 18, 304 P.3d 1192, 1199 (2013) (noting the right to object to confirmation of a sale due to a grossly inadequate sale price). Here, Borrowers did not object to confirmation of the sale based on the sales price. Second, even if the majority of jurisdictions use the fair market value in calculating the deficiency amount, the vast majority of these have had it imposed by statute and primarily to address deficiencies arising from non-judicial foreclosure sales. See, e.g., Sostaric v. Marshall, 766 S.E.2d 396 (W. Va. 2014) (citing, in support of its assertion use of fair market value is the majority view, twenty-two states who adopted this measure by statute and four who did so by judicial decision). Hawai'i's foreclosure statute has been amended several times, most recently in 2015. The Legislature has not yet seen fit to provide this measure in determining a deficiency in judicial foreclosure actions. By contrast, we note the Legislature, in 2012, saw fit

---

[11](...continued)
reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)).

to limit deficiency judgments against resident-homeowner-mortgagors involved in a power of sale (non-judicial) foreclosure. HRS § 667-38 (Supp. 2015). Therefore, it appears the Legislature has afforded protections to mortgagors when it deems it appropriate to do so. We decline to adopt further protections beyond those already provided by Hawai'i case law or granted by the Legislature.

IV.

Based on the foregoing, the (1) October 3, 2011 "Order Granting Plaintiff Ke Kailani Partners, LLC's Motion for Confirmation of Sale, Allowance of Costs, Commissions and Fees, Distribution of Proceeds, Directing Conveyance, and for Writ of Possession and for Deficiency Judgment Filed on July 8, 2011"; (2) October 3, 2011 Judgment; (3) October 3, 2011 Writ of Possession; (4) December 19, 2011 "Order Denying [Borrowers'] Motion to Consolidate Two Related Cases, Civil No. 09-1-2523-10 BIA and Civil No. 11-1-1577-07 BIA"; (5) January 5, 2012 "Order Denying [Borrowers'] Motion for Post-Judgment Relief, filed October 14, 2011"; (6) April 23, 2012 "Order Granting Plaintiff Ke Kailani Partners, LLC's Motion for Determination of Deficiency Amount, filed November 15, 2011"; and (7) April 23, 2012 Judgment are affirmed.

DATED: Honolulu, Hawai'i, April 29, 2016.

On the briefs:

Gary Victor Dubin,
Frederick J. Arensmeyer,
Andrew D. Goff, and
Richard Forrester,
for Defendants-Appellants.

Terence J. O'Toole,
Sharon V. Lovejoy, and
Andrew J. Lautenbach,
Starn O'Toole Marcus & Fisher,
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge

B

NOS. CAAP-12-0000758 and CAAP-12-0000070

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company, Plaintiff-Appellee, v. KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually, Defendants-Appellants, DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Counterclaimants-Appellants, v. BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J, Counterclaim Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Third-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986, Third-Party Defendant-Appellee, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R, Third-Party Nominal Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Fourth-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED, Fourth-Party Defendants-Appellees, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH, and DOES S through Z, Fourth-Party Nominal Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-2523-10)

JUDGMENT ON APPEAL
(By: Fujise, J., for the court[1])

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawai'i entered on April 29, 2016, the (1) October 3, 2011 "Order Granting Plaintiff Ke Kailani Partners, LLC's Motion for Confirmation of Sale, Allowance of Costs, Commissions and Fees, Distribution of Proceeds, Directing Conveyance, and for Writ of Possession and for Deficiency Judgment Filed on July 8, 2011"; (2) October 3, 2011 Judgment; (3) October 3, 2011 Writ of Possession; (4) December 19, 2011 "Order Denying [Borrowers'] Motion to Consolidate Two Related Cases, Civil No. 09-1-2523-10 BIA and Civil No. 11-1-1577-07 BIA"; (5) January 5, 2012 "Order Denying [Borrowers'] Motion for Post-Judgment Relief, filed October 14, 2011"; (6) April 23, 2012 "Order Granting Plaintiff Ke Kailani Partners, LLC's Motion for Determination of Deficiency Amount,

[1] Foley, Presiding Judge, Fujise and Ginoza, JJ.

filed November 15, 2011"; and (7) April 23, 2012 Judgment are affirmed.

DATED: Honolulu, Hawai'i, May 26, 2016.

FOR THE COURT:

Associate Judge

C

Electronically Filed
Intermediate Court of Appeals
CAAP-12-0000758
08-APR-2013
02:28 PM

NO. CAAP-12-0000758

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company,

Plaintiff-Appellee,

vs.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually.

Defendants-Appellants,

DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Counterclaimants-Appellants,

vs.

CASE NO. CAAP-12-0000070

CIVIL NO. 09-1-2523-10

JURISDICTIONAL APPEAL FROM THE:

1) ORDER GRANTING PLAINTIFFS' MOTION FOR SUBSTITUTION OF PARTIES, FILED DECEMBER 6, 2010, filed on December 30, 2010;

2) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR CONFIRMATION OF SALE, ALLOWANCE OF COSTS, COMMISSIONS AND FEES, DISTRIBUTION OF PROCEEDS, DIRECTING CONVEYANCE, AND FOR WRIT OF POSSESSION AND FOR DEFICIENCY JUDGMENT FILED ON JULY 8, 2011, filed on October 3, 2011;

3) JUDGMENT, filed on October 3, 2011;

4) WRIT OF POSSESSION, filed on October 3, 2011;

[AMENDED OPENING BRIEF]

(CAPTION CONTINUED ON NEXT PAGE)

BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J,

Counterclaim Defendants-Appellants.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Third-Party Plaintiffs-Appellants,

vs.

MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986,

Third-Party Defendant,

and

ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R,

Third-Party Nominal Defendants.

---

5) ORDER DENYING KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION TO CONSOLIDATE TWO RELATED CASES, CIVIL NO. 09-1-2523-10-BIA AND CIVIL NO. 11-1-1577-07 BIA, filed on December 19, 2011; and

6) ORDER DENYING DEFENDANTS KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR POST JUDGMENT RELIEF FILED OCTOBER 14, 2011, filed January 5, 2012.

(CAPTION CONTINUED ON NEXT PAGE)

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Fourth-Party Plaintiffs-Appellants,

vs.

BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; and FINANCE FACTORS, LIMITED,

Fourth-Party Defendants-Appellees,

and

MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION,

Fourth-Party Defendants,

and

ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; and DOES S through Z,

Fourth-Party Nominal Defendants.

FIRST CIRCUIT COURT

The Honorable Bert I. Ayabe
Judge

(CAPTION CONTINUED ON NEXT PAGE)

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS,

Plaintiffs-Appellants,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; and BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership,

Defendants-Appellees,

and

GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CASE NO. CAAP-12-0000758

CIVIL NO. 09-2523-10

JURISDICTIONAL APPEAL FROM THE:

1) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT FILED NOVEMBER 15, 2011, filed on April 23, 2012;

2) JUDGMENT, filed on April 23, 2012;

3) ORDER DENYING KE KAILANI DEVELOPMENT, LLC AND MICHAEL J. FUCHS' MOTION BASED UPON NEWLY DISCOVERED EVIDENCE TO DISQUALIFY THE HONORABLE BERT I. AYABE FROM ALL PROCEEDINGS IN CIVIL NO. 09-1-2523-10, FILED JUNE 12, 2012, filed on July 30, 2012; and

4) COURT'S MINUTE ORDER DENYING DEFENDANTS KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' NON-HEARING MOTION, BASED ON MANIFEST ERROR AND NEWLY DISCOVERED ADMISSIONS AGAINST INTEREST, FOR RECONSIDERATION AND REHEARING (A) OF THE ENTRY OF THIS COURT'S APRIL 23, 2012 (1) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT FILED NOVEMBER 15, 2011, AND (2) JUDGMENT THEREON, AND (B) THE REFUSAL OF THIS COURT TO CONSOLIDATE THIS CASE WITH RELATED CASE CIVIL NO. 11-1-1577-07 BIA FILED AUGUST 9, 2012, filed on August 9, 2012 [no written order having

(CAPTION CONTINUED ON NEXT PAGE)

) been filed (appealable pursuant to HRAP
) Rule 4(a)(3)), the Motion for
) Reconsideration having been filed on May
) 3, 2012 and not having been disposed of
) within 90 days thereafter by August 1,
) 2012, was considered denied, with the
) time to file a notice of appeal pursuant to
) HRAP Rule 4(a)(1) otherwise having
) expired on August 31, 2012]
)
)
) FIRST CIRCUIT COURT
)
) The Honorable Bert I. Ayabe
) Judge
)

AMENDED OPENING BRIEF

CERTIFICATE OF SERVICE

APPENDIX:
Exhibits 1 through 100
(separately filed)

GARY VICTOR DUBIN 3181
FREDERICK J. ARENSMEYER 8471
ANDREW D. GOFF 9451
RICHARD FORRESTER 9750
Dubin Law Offices
Suite 3100
55 Merchant Street
Honolulu, Hawaii 96813
(808) 537-2300

Attorneys for Appellants
Ke Kailani Development LLC
and Michael J. Fuchs

NO. CAAP-12-0000758

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company,

Plaintiff-Appellee,

vs.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually.

Defendants-Appellants,

DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Counterclaimants-Appellants,

vs.

BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J,

CASE NO. CAAP-12-0000070

CIVIL NO. 09-1-2523-10

JURISDICTIONAL APPEAL FROM THE:

1) ORDER GRANTING PLAINTIFFS' MOTION FOR SUBSTITUTION OF PARTIES, FILED DECEMBER 6, 2010, filed on December 30, 2010;

2) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR CONFIRMATION OF SALE, ALLOWANCE OF COSTS, COMMISSIONS AND FEES, DISTRIBUTION OF PROCEEDS, DIRECTING CONVEYANCE, AND FOR WRIT OF POSSESSION AND FOR DEFICIENCY JUDGMENT FILED ON JULY 8, 2011, filed on October 3, 2011;

3) JUDGMENT, filed on October 3, 2011;

4) WRIT OF POSSESSION, filed on October 3, 2011;

5) ORDER DENYING KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION TO CONSOLIDATE TWO RELATED CASES, CIVIL NO. 09-1-2523-10-BIA AND CIVIL NO. 11-1-1577-07 BIA, filed on December 19, 2011; and

(CAPTION CONTINUED ON NEXT PAGE)

Counterclaim Defendants-Appellants.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Third-Party Plaintiffs-Appellants,

vs.

MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986,

Third-Party Defendant,

and

ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R,

Third-Party Nominal Defendants.

6) ORDER DENYING DEFENDANTS KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR POST JUDGMENT RELIEF FILED OCTOBER 14, 2011, filed January 5, 2012.

(CAPTION CONTINUED ON NEXT PAGE)

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Fourth-Party Plaintiffs-Appellants,

vs.

BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; and FINANCE FACTORS, LIMITED,

Fourth-Party Defendants-Appellees,

and

MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION,

Fourth-Party Defendants,

and

ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; and DOES S through Z,

Fourth-Party Nominal Defendants.

FIRST CIRCUIT COURT

The Honorable Bert I. Ayabe

Judge

(CAPTION CONTINUED ON NEXT PAGE)

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS,

Plaintiffs-Appellants,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; and BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership,

Defendants-Appellees,

and

GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CASE NO. CAAP-12-0000758

CIVIL NO. 09-2523-10

JURISDICTIONAL APPEAL FROM THE:

1) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT FILED NOVEMBER 15, 2011, filed on April 23, 2012;

2) JUDGMENT, filed on April 23, 2012;

3) ORDER DENYING KE KAILANI DEVELOPMENT, LLC AND MICHAEL J. FUCHS' MOTION BASED UPON NEWLY DISCOVERED EVIDENCE TO DISQUALIFY THE HONORABLE BERT I. AYABE FROM ALL PROCEEDINGS IN CIVIL NO. 09-1-2523-10, FILED JUNE 12, 2012, filed on July 30, 2012; and

4) COURT'S MINUTE ORDER DENYING DEFENDANTS KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' NON-HEARING MOTION, BASED ON MANIFEST ERROR AND NEWLY DISCOVERED ADMISSIONS AGAINST INTEREST, FOR RECONSIDERATION AND REHEARING (A) OF THE ENTRY OF THIS COURT'S APRIL 23, 2012 (1) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT FILED NOVEMBER 15, 2011, AND (2) JUDGMENT THEREON, AND (B) THE REFUSAL OF THIS COURT TO CONSOLIDATE THIS CASE WITH RELATED CASE CIVIL NO. 11-1-1577-07 BIA FILED AUGUST 9, 2012, filed on August 9, 2012 [no written order having

(CAPTION CONTINUED ON NEXT PAGE)

) been filed (appealable pursuant to HRAP
) Rule 4(a)(3)), the Motion for
) Reconsideration having been filed on May
) 3, 2012 and not having been disposed of
) within 90 days thereafter by August 1,
) 2012, was considered denied, with the
) time to file a notice of appeal pursuant to
) HRAP Rule 4(a)(1) otherwise having
) expired on August 31, 2012]
)
)
) FIRST CIRCUIT COURT
)
) The Honorable Bert I. Ayabe
) Judge
)

AMENDED OPENING BRIEF

TABLE OF CONTENTS

LEGAL ARGUMENT REQUIRING REVERSAL

1. KKP had no standing to foreclose, to a foreclosure auction, to bid, to a confirmed sale, or to a deficiency judgment, its predecessor having breached its agreement with KKD and Fuchs to cancel the foreclosure and to release the guaranties, substitution giving it no more rights than the Consortium had. *Page 25*

2. Both actions should have been consolidated, having common issues of law and fact, allowing KKD and Fuchs to prove their interrelated case against HRB and KKP. *Page 26*

3. Genuine issues of material fact existed precluding summary adjudication, which however Judge Ayabe granted in awarding confirmation of sale over objections as to adequacy of price and in dismissing the new action against HRB and KKP based on his interpretation of documents that were being challenged for fraud and rescission. *Page 26*

4. Judge Ayabe was a disqualified jurist with numerous appearances of impropriety in violation of due process and his orders and judgments should be set aside. *Page 28*

5. Judge Ayabe violated the constitutional rights of KKD and Fuchs, awarding a deficiency judgment in Civil No. 09-1-2523-10 in an amount calculated by subtracting the net proceeds of sale from the amount the foreclosing mortgagee otherwise lost, without after confirmation of sale holding a separate evidentiary hearing to determine what the fair market value of the property was at the time of sale and how much of an actual loss the foreclosing mortgagee actually suffered, denying to KKD and to Fuchs property rights protected pursuant to the fairness requirements of the due process clause of the Hawaii State Constitution. *Page 30*

TABLE OF AUTHORITIES

page

HAWAII CASES

FEDERAL CASES

OTHER STATE CASES

LAW REVIEWS

TABLE OF EXHIBITS

Exhibit Number	Opening Brief Page Numbers	Description of Each Exhibit
1	1	Diagram, Photos of Ke Kailani Development
2	1	6/27/05 & 7/31/06 Guaranties
3	1	4/28/05 & 5/23/06 BOH Appraisals
4	1	2/10/09 BOH Appraisal
5	2	10/12/09 Arbitration Award
6	3	6/1/10 Bays Conflict Waiver
7	3	9/1/10 FOF/COL Foreclosure Order
8	3	9/1/10 54(b) Counterclaim Judgment
9	3	9/1/10 Counterclaim Order
10	3	9/1/10 54(b) Foreclosure Judgment
11	3	7/9/10 KKD/HRB Acquisition Agreement
12	4	7/27/10 HRB Offer To Purchase To KKD
13	4	8/13/10 BOH Consent Agreement
14	5	8/13/10 HRB Offer To Purchase To BOH
15	5	10/22/10 BOH Offer To Sell To HRB
16	5	11/1/10 Acquisition Agreement Amendment
17	6, 8	11/9/10 BOH Purchase & Sale Agreement
18	7	11/10 Emails Dubin/Case
19	7	11/14/10 Faxed Email Dubin To Case
20	7	11/10 Emails Case/Dubin
21	7	11/16/10 Email Dubin To Dreher
22	7	11/10 Emails Dubin/Case
23	7	11/10 Emails Dubin/Case
24	7	11/18/10 Emails Dubin/Case
25	8	11/24/10 Case To Dubin Cancellation Letter
26	8	11/30/10 Assignment Letter To Dubin
27	9	11/30/10 Mortgage Assignment to HRB
28	9	11/30/10 Mortgage Assignment to HRB
29	9	12/1/10 Email Case To TG Escrow
30	9	12/6/10 TG Cancellation Instructions
31	9	12/10 Signed Cancellation Agreements
32	9	12/1/10 Proposed Acquisition Agreement
33	9	12/2/10 Email Van Buren to Case
34	9	12/6/10 KKP Substitution Motion
35	10	1/3/11 Order Denying Reconsideration
36	10	12/30/10 Order Granting KKP Substitution

37	10	12/30/10 KKD/Fuchs Notice of Appeal
38	10	1/5/11 KKD Chapter 11 Petition (Notice)
39	10	Notice of 1/6/11 Foreclosure Auction
40	10	3/1/11 Bankruptcy Stay Order (Notice)
41	10	3/18/11 Stipulation Dismissing Appeal
42	10	3/24/11 ICA Order Dismissing Appeal
43	10	5/12/11 Order Dismissing Chapter 11
44	10	Notice of 6/21/11 Foreclosure Auction
45	10	11/22-23/10 Termination, Indemnity
46	11	7/27/11 KKD/Fuchs 11-1577 Complaint
47	11	8/4/11 Transcript of Proceedings
48	11	10/3/11 Order Confirming Sale
49	11	10/3/11 54(b) Judgment Confirming Sale
50	11	10/3/11 Writ Of Possession
51	11	10/5/11 Transcript of Proceedings
52	11	9/6/11 Transcript of Proceedings
53	11	12/19/11 Order Denying Consolidation
54	17	Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969)
55	12	11/25/11 Disqualification Motion 2523
56	12	11/25/11 Disqualification Motion 1577
57	13	12/20/11 Original Of Patton Declaration
58	12	12/19/11 Order Dismissing Complaint 1577
59	12	12/19/11 Judgment Dismissing Complaint 1577
60	12, 13	1/5/12 Order Denying Post-Judgment Relief
61	12	11/4/11 First Amended Complaint 1577
62	12	8/1/11 1577 Complaint Verification
63	13	12/20/11 Transcript of Proceedings
64	13	1/27/12 Order Denying Disqualification
65	13	6/1/12 Order Denying Reconsideration 1577
66	14	1/3/12 KKD/Fuchs Notice of Appeal 2523
67	14	3/2/12 KKD/Fuchs CADS, Appellate Docket
68	14	3/11/12 KKD/Fuchs Notice of Appeal 1577
69	14	3/15/12 KKD/Fuchs CADS, 1577 Appellate Docket
70	14	4/23/12 Order Dismissing FAC 1577
71	14	4/23/12 Judgment Dismissing FAC 1577
72	14	4/23/12 Order Granting Deficiency
73	14	4/23/12 54(b) Judgment Granting Deficiency
74	14	3/7/12 Case Deposition Transcript
75	16	5/11/12 Letter Dubin To Judge Ayabe
76	28	Hawaii Revised Code of Judicial Conduct
77	16	5/14/12 Judge Ayabe Memorandum
78	16	5/16/12 Sarsfield Expert Report

79	16	5/17/12 Transcript of Proceedings
80	17	5/18/12 Letter Dubin To Judicial Commission
81	18	5/25/12 Judicial Commission Reply To Dubin
82	14	1/24/12 Court Minutes 1577
83	18	Impropriety Appearance Demonstrative Aid
84	18	6/1/12 Court Minutes
85	18	6/12/12 Disqualification Motion 2523
86	18	6/12/12 Disqualification Motion 1577
87	18	7/30/12 Order Denying Disqualification 2523
88	18	7/30/12 Order Denying Disqualification 1577
89	18	8/9/12 [Minute] Order Denying Reconsideration
90	19	8/21/12 Order Denying Reconsideration 1577
91	19	8/31/12 Notice of Jurisdictional Appeal 1577
92	19	8/31/12 Notice of Jurisdictional Appeal 2523
93	19	10/5/12 ICA Order Re: Appeal Consolidation
94	19	8/21/12 Order Transferring Case 1577
95	20	9/17/12 Paulo Deposition Transcript
96	20	9/17/12 Price Deposition Transcript
97	21	11/30/12 Colon Deposition Transcript
98	21	12/13/12 Mesick Deposition Transcript
99	21	2523 Docket Sheet at 4/7/13
100	21	1577 Docket Sheet at 4/7/13

A. STATEMENT OF THE CASE

While vacationing in Hawaii more than a decade ago, Michael J. Fuchs, the Founder of Home Box Office, understandably fell in love with the Big Island, decided to build a home there, eventually causing his company, renamed Ke Kailani Development (KKD), to invest nearly $100,000,000 in a more than 65-acre South Kohala spectacular luxury residential subdivision called Ke Kailani (Exh. 1, Record, Part ("RP") (2) 26 & Judicial Notice, filling in related Case Civil No. 11-1-1577 ("1577") as described) within the Mauna Lani Resort development, wanting to make a major contribution to the beauty of the State as his legacy.

KKD in 2005 and in 2006 accordingly proceeded to borrow a total of more than $70,000,000 in acquisition and construction funds for the development of the subdivision in the form of two short-term loans from three local banks, the Bank of Hawaii (BOH), Central Pacific Bank (CPB), and Finance Factors, Ltd. (FF).

Fuchs, residing in New York, as a passive investor personally guaranteed both company loans (Exh. 2, RP (1) 89-96 & 187-194), which appeared very safe investments, based on appraisals prepared for BOH in 2005 and 2006 (Exh. 3, Judicial Notice 1577), projecting market value well in excess of $100,000,000.

However, just as the subdivision was about completed and sales underway, a growing worldwide recession prevented further subdivision sales, while at the same time both loans after brief maturity date modifications had become due in mid-2009. Upon maturity, the remaining aggregate principal balance owed on both loans was approximately $26,000,000, whereas the market value of the unsold lots and condominium interests by mid-2009 had been reduced to slightly less than $24,000,000 owed to the Consortium, according to a professional appraisal prepared for BOH (Exh. 4, Judicial Notice 1577).

The prospect of immediately repaying the Consortium brightened due to an offer received from Quintess, a non-equity membership destination club composed of extremely wealthy members, seeking to acquire most of KKD's remaining interest in Ke Kailani, which would have enabled KKD to have paid off the Consortium, but one owner, Mary Morrison, objected, reading the Association Declaration to prohibit membership club use.

On March 11, 2009 Morrison filed suit in Third Circuit Court in Kona, Civil No. 09-1-078K, seeking injunctive relief, which was referred to AOAO arbitration by the Honorable Elizabeth A. Strance pursuant to Hawaii condominium procedures, with the Honorable

Thomas K. Kaulukukui, Jr. (Ret.) serving as Arbitrator, KKD represented by the Bays law firm who had represented KKD in loan extension negotiations earlier with the Consortium.

On July 13, 2009 the Arbitrator found in favor of Morrison, who then moved to confirm the arbitration award, S.P. No. 09-01-039K, the hearing in which was held before Judge Strance on September 9, 2009, who confirmed the arbitration award on October 12, 2009 (Exh. 5, RP (2) 420-439), ending KKD's chance of repaying the Consortium and heading off foreclosure and cancelling Fuchs' liability under his Consortium's guaranties.

KKD's attorneys, the Bays Law Firm, without Fuchs' knowledge, had filed a notice of "no opposition" and a notice of "non-appearance" in the special proceeding, resulting in the confirmation order and final judgment being granted without objection and recorded at the State Bureau of Conveyances on October 16, 2009, as Document No. 2009-159577.

KKD, meanwhile, was never informed by the Bays Law Firm that KKD had a right to timely appeal to the Circuit Court the arbitration award before it became final and non-appealable pursuant to HRS Section 514B-163, including Morrison's nearly six-figure attorneys' fee award, at which time KKD could have ignored the arbitration and fee award altogether and merely proceeded with a trial *de novo* on the merits before Judge Stance in Civil No. 09-1-078K, keeping alive its intended membership club sale to Quintess.

Consequently, the Consortium declared an "event of default" and without any prior notice to Fuchs, withdrew all funds in a Fuchs' $3,000,000 standby letter of credit pledged to secure an earlier payment extension, and the Consortium proceeded to file a foreclosure action in First Circuit Court, Civil No. 09-1-2523-10, on October 27, 2009, although the property is located in Kona, the case nonrandomly assigned by the Clerk's Office upon filing to the Honorable Bert I. Ayabe who by assignment hears all foreclosure cases in Honolulu.

KKD and Fuchs, retaining new counsel, opposed foreclosure, filing an Answer and Counterclaim alleging breach of contract, breach of fiduciary duty, interference with advantageous economic relations, unfair and deceptive banking practices, fraud and deceit, rescission, dissolution of partnership, discharge of guaranties, declaratory and injunctive relief, abuse of process, wrongful foreclosure, and punitive damages, and filed a Third-Party Complaint seeking to set aside the arbitration award as a result of inadequate notice to all condominium owners and a Fourth-Party Complaint to sell the condominium interests, removing it from HRS Chapters 514A and 514B to salvage the Quintess transaction.

Meanwhile, the foreclosure case being stalled for almost a year as a result of KKD's opposing claims and very extensive BOH settlement negotiations, the Bays Law Firm approached the CEO of KKD, William L. Beaton, and Fuchs, informing them it had had "for several years" the Hunt Companies, as a client, now interested in purchasing Ke Kailani, seeking permission to waive any confidentiality with respect to the Bays Law Firm, to allow it to negotiate an acquisition by Hunt notwithstanding having KKD's confidential proprietary information, and they all agreed on June 1, 2010 (Exh. 6, RP Judicial Notice 1577).

The very next day Judge Ayabe orally granted summary judgment in favor of the Consortium, decreeing foreclosure (Exh. 7, RP (7) 446-536), entering a foreclosure judgment (Exh. 8, RP (7) 435-441), granting summary judgment against KKD/Fuchs' Counterclaim (Exh. 9(7), RP 427-434), and judgment against the Counterclaim (Exh. 10, RP (7) 537-543, amend. 919-931), dismissing the Fourth-Party Complaint and related Joinder.

KKD had complained BOH interfered with the sale and/or refinancing of Ke Kailani, and requested time to complete pending discovery to prove it, but Judge Ayabe refused to allow time for needed discovery, delayed by agreement due to settlement discussions.

Instead, the BOH's attorneys argued to Judge Ayabe in their "Reply Memorandum," pages 6-7, filed May 27, 2010, the issue of interference should be reserved for later, the issue of damages they argued had nothing to do with their motion, claiming the issue of "tortious interference and similar causes of action" was *not* part of their summary judgment motion and should be decided *after* any auction sale as a separate issue of "damages".

Judge Ayabe refused to allow KKD three weeks for its pending discovery, yet Inconsistently waited three full months, doing nothing, until ordering foreclosure, *supra*, on September 1, 2010, also inconsistently granting summary judgment on KKD's interference Counterclaim, despite the BOH's attorneys' judicial admission that that was not a part of BOH's motion for summary judgment, but for later determination of any provable damages.

Meanwhile, with a foreclosure gun pointed at their heads, KKD and Fuchs, effective July 9, 2010, entered into an Acquisition Agreement (Exh. 11, RP (9) 509-549) negotiated with the Bays Law Firm representing a wholly-owned subsidiary of Hunt, Hawaii Renaissance Builders (HRB), agreeing in Paragraph 2.1 to sell Ke Kailani to HRB for no monetary consideration if HRB could purchase from the Consortium and retire KKD's two

promissory notes at whatever price to be paid by HRB that could be agreed to and HRB in turn agreed to cancel Fuchs' two guaranties, the purpose of the Acquisition Agreement.

All parties understood that the two-part transaction – HRB purchasing the promissory notes and cancelling the guaranties, and KKD transferring title from KKD to HRB – was one inseparable transaction, divided into two simultaneous stages so that HRB would have in effect a firm option to purchase Ke Kailani should its negotiations with BOH be successful.

Those listed in the initial Paragraph of the Acquisition Agreement as agreeing to terms, and those also signing on the concluding signature page of the Acquisition Agreement as agreeing to terms, were KKD, HRB, *and Fuchs*, and with respect to Fuchs it is recited before his signature that he has "AGREED with respect to the provisions of Section 8.7 applicable to Guarantor," making him as a party liable as well as having bargained for and entitled to consideration from HRB under Section 8.8, as follows:

> 8.7 EXISTING LOAN DOCUMENTS. . . . Owner and Guarantor undertake and agree that if, as a result of discussions with Existing Lender, the Parties and Existing Lender agree that, if at Closing, the Existing Loan Documents shall be amended and/or assigned to and assumed by HRB or a related entity, such that all further liability of Owner and Guarantor thereunder is terminated and the condition set forth in Section 8.8 is satisfied, then Owner and Guarantor shall be obligated to accept such resolution and shall not be entitled to object to Closing on such basis.
>
> 8.8 RELEASE AND INDEMNITY. It shall be a condition to HRB's delivery of a Notice to Proceed and right and obligation to proceed with Closing that HRB undertake and agree, from and after Closing, to release and indemnify Guarantor as guarantor of the Existing Loan under the Existing Loan Documents in the event HRB elects to assume or purchase the Existing Loan.

It was agreed for HRB to offer $14,000,000 to buy out the Consortium's loan position, an initial proposal made by Hunt's senior representative in Hawaii, Steven W. Colon, to KKD by letter dated July 27, 2010 (Exh. 12, Judicial Notice 1577). BOH agreed in writing on August 13, 2010 to entertain loan buyout proposals from HRB, but only if KKD and Fuchs would agree in writing to waive any claim of breach of confidentiality or tortious interference "relating to such communications between BoH and HRB;" and KKD, Fuchs, and HRB signed evidencing their individually needed approval (Exh. 13, Judicial Notice 1577).

Consequentially, on August 13, 2010 HRB transmitted its next buyout offer to BOH (Exh. 14, Judicial Notice 1577), this time increasing its buyout price from $14,000,000 to $16,000,000, and again setting forth a summary of the terms of its Acquisition Agreement.

However, this time HRB added to its initial offer the misrepresentation that "KKD/Fuchs are making significant additional payments at closing toward outstanding project claims and closing costs," deliberately intending to deceive BOH into believing that Fuchs was paying part of the buyout price, apparently HRB believing that that would make it easier to get BOH to agree due to what it believed were somewhat bad feelings that had developed between BOH and Fuchs over his opposition to summary judgment.

KKD and Fuchs finally lost confidence in HRB and Colon and hired on their own and at their own expense a retired highly respected former Hawaii banking executive, Howard Hamamoto, to contact the representatives of BOH, CPB, and FF to negotiate a reduced acquisition price to be paid by HRB, which included a full release of KKD and Fuchs as to all loan obligations, including Fuchs' guaranties which as HRB knew and agreed was the only reason the Acquisition Agreement was entered into in the first place, who successfully negotiated a $17,500,000 buyout price with BOH with a full release of Fuchs' guaranties.

As a direct result of Hamamoto's efforts, on October 22, 2010 Ralph Mesick, then Executive Vice President of BOH, with whom KKD, Fuchs, HRB, the Bays Law Firm, Colon, and Hamamoto had principally been dealing, now more recently having left BOH for a similar position at First Hawaiian Bank, delivered to HRB and Colon a buyout counteroffer of $17,500,000, with a letter of transmittal, conditioned on an attached Mortgage Loan Purchase and Sale Agreement (Loan PSA) being signed by everyone ("HRB, KKD and Fuchs on or before 5:00 p.m. H.S.T. on October 25, 2010" (Exh. 15, RP (9) 477-507).

KKD and Fuchs had entered into the Acquisition Agreement induced by the promises of HRB set forth therein to buy out the Consortium's position with its own monies in exchange for HRB cancelling KKD's promissory notes and releasing Fuchs' guaranties, but after receiving from BOH the $17,500,000 buyout price, HRB refused, demanding that KKD and Fuchs' come up with the extra $1,500,000 plus "new added expenses."

Under obvious duress, KKD and Fuchs agreed, both required by HRB to sign a First Amendment to Acquisition Agreement, effective November 1, 2010 (Exh. 16, RP (9) 819-824), agreeing to add $1,500,000 to HRB's $16,000,000 at closing. Once again, the

required signatures on the First Amendment to Acquisition Agreement were KKD, HRB, and Fuchs, reaffirming therein what no one disputed that all three were principal parties to the Acquisition Agreement as well as the First Amendment thereto ("A. Owner, HRB and Guarantor entered into that certain Acquisition Agreement effective July 9, 2010" based upon "their mutual promises"), all three again signing the First Amendment, reaffirming what no one disputed, that all three were also parties to the Loan PSA (Paragraph 13):

> 13. Agreement/Loan PSA Intention. HRB, Owner and Guarantor acknowledge and agree that their mutual intent, *in executing this amendment and the Loan PSA*, is that "Closing" as defined under both agreements encompasses both the acquisition by HRB of the Existing Lender's Interests and the immediate conveyance thereafter of the Property by Owner to HRB in a transaction akin to a conveyance in lieu of foreclosure, all as set forth in these agreements and subject to all conditions precedent thereto. (Emphasis added.)

The First Amendment to Acquisition Agreement recognized that both closings, separated only for HRB's strategic reasons to deceive BOH, had to close together or neither would close – about as joined together as two parts of the same transaction could possibly ever be. The joint closings were then extended to November 30, 2010. The First Amendment to Acquisition Agreement contained the following new term:

> 10. Owner/Guarantor Deposit. On or before 5:00 p.m., Hawaii Standard Time, on the third (3rd) day after the Amendment Effective Date, and as a condition of payment by HRB to Escrow Agent of the Loan PSA "Deposit", Owner shall deposit with Escrow Agent ("Owner/Guarantor Deposit"), by letter of credit, wire transfer or certified check **or other form of immediately available funds**, the amount of ONE MILLION SIX HUNDRED FIFTY THOUSAND DOLLARS AND NO/100 DOLLARS ($1,650,000.00). (Emphasis added.)

Immediately after the signing of the First Amendment to Acquisition Agreement, the Loan PSA was signed on or about November 9, 2010 by BOH, CPB, FF, HRB, KKD, and Fuchs (Exh. 17, Judicial Notice 1577), the document itself clearly recognizing KKD and Fuchs to be indispensable participants exchanging consideration in the Loan PSA:

> SECTION 22. Consent of Borrower and Guarantor. As evidenced by their signatures below, the Borrower and the Guarantor hereby assent to the execution, delivery and performance of this Agreement by Seller and Purchaser and to the closing of the transactions contemplated hereby. * * * *

Moreover, "Exhibit C" to the executed Loan PSA, entitled "Mutual Release Agreement," was a required document that specifically had to be signed before the Loan PSA would be effective, wherein KKD and Fuchs were listed as the "Borrower Parties" from start to finish ("This Mutual Agreement . . . entered into by and among: BANK OF HAWAII . . . , CENTRAL PACIFIC BANK . . . , FINANCE FACTORS . . . , KE KAILANI DEVELOPMENT . . . , MICHAEL J. FUCHS . . . AND HAWAII RENAISSANCE BUILDERS"), setting forth their promises and required performances throughout, with their signatures required within signature blocks specifically provided on the "signature page."

In furtherance of that part of the deal pertaining to the Fuchs' guaranties, it was specifically acknowledged by all parties to the Loan PSA that as a part of the bargained for contractual performance, the Fuchs guaranties were to be "released and cancelled":

> SECTION 2 (c) Guaranties Excluded. The Loans and the Loan Documents shall not include any right, title or interest of Seller under those certain guaranties (the "Guaranties") executed in favor of Seller in connection with the Loans by Michael J. Fuchs (the "Guarantor"), dated July 6, 2005, and July 31, 2006, respectively, which Guaranties shall be released and cancelled upon the Closing by way of the Mutual Release Agreement in the form of Exhibit C attached hereto and made a part hereof.

Escrows for both the Acquisition Agreement escrow and the Loan PSA escrow accordingly were opened at the same time for a joint closing at Title Guaranty (TG).

And while Fuchs was making his promised cash deposit into a New York escrow company with irrevocable instructions to transfer funds to TG upon closing, the Bays Law Firm representing HRB refused the tender, instead insisting on a cash deposit in Honolulu.

The result was an exchange of emails and faxes from November 11, 2010 to November 18, 2010 between Fuchs' counsel, Gary Dubin, who was mostly traveling in Japan at the time, and HRB's counsel from the Bays Law Firm, Ed Case, who could not be convinced to allow Fuchs to perform by making an irrevocable cash deposit with a licensed New York escrow as "another form of immediately available funds," which understandably caused Fuchs to believe that HRB was looking for a way to back out of the agreed joint transaction and joint closing (Exhs. 18-24, RP (9) 1198, *et seq.*, 1262-1297).

Fuchs had another reason for concern. Fuchs knew that BOH was receiving other inquiries from third parties also been contacting him, proposing to buy the two loans from

BOH for more than $17,000,000, and BOH could have easily backed out of the Fuchs, deal, having placed in its Loan PSA (Exh. 17, Judicial Notice 1577) an inexpensive exit clause:

> SECTION 8 (b): Purchaser's Remedies. If Seller fails or refuses to consummate the purchase of the Loans . . . on the Closing Date . . . then Purchaser shall have the right, as its sole and exclusive remedy . . . for liquidated damages in the amount of $100,000 . . . for the harm . . . caused by Seller's breach.

Vividly remembering how BOH without notice to him had already earlier seized his $3,000,000 letter of credit, *supra*, upon originally merely abruptly and gingerly declaring an "event of default" while he was in the middle of workout discussions with its representatives, Fuchs was understandably not about precipitously to place $1,650,000 in cash exposed in a Honolulu escrow, especially since BOH already had a recorded $26,114,861 foreclosure summary judgment against KKD as borrower and Fuchs as guarantor (Exhs. 7-8).

However, while Fuchs and Colon were discussing a resolution of the deposit impasse, Case on behalf of HRB on November 24, 2010, six days before the scheduled joint closings, suddenly without prior notice or any demand for assurance of performance notified Dubin on behalf of KKD and Fuchs that HRB was unilaterally terminating the Acquisition Agreement and Loan PSA, seeking to cancel the Acquisition Agreement and to have escrow release its escrow deposit (Exh. 25, RP (9) 1346-1350).

In Case's cancellation letter, second paragraph, page 2, once again he recognized the obvious, that the Acquisition Agreement and the First Amendment thereto and the Loan PSA were all inseparably interconnected, by their interlocking terms and intentions:

> The First Amendment was also executed in connection with HRB's execution of the Loan PSA, under which HRB undertook to purchase the referenced Loans for $17.5 million in reliance on KKD/Fuchs' commitment, set forth in the First Amendment, to pay $1.5 million of that amount.

Six days later, Case abruptly notified KKD and Fuchs through Dubin by letter dated November 30, 2010 that "effective today" the Consortium had assigned the KKD promissory notes and mortgages and the Fuchs' Guaranties to HRB by way of an "Omnibus Assignment and Assumption of Loan Documents" (Exh. 26, RP (9) 1401-1411), the exact date that instead the two earlier opened escrows, *supra*, were supposed to have closed.

HRB had therefore managed behind KKD's and Fuchs' backs to buy out the Consortium, which it had promised to do, yet negotiated for and secured a transfer of the

two Fuchs guaranties for itself which it promised to release, and simultaneously recorded implementing assignments (Exh. 27-28, RP (9) 1413-1415).

Thereafter, Case on December 1, 2010 requested escrow cancel the Acquisition Agreement escrow and return HRB's $150,000 deposit (Exh. 29, Judicial Notice 1577); TG responded, requesting the principals of KKD (Beaton) and HRB (Colon) sign its standard escrow cancellation form (Exh. 30, Judicial Notice 1577), which Colon signed for HRB on December 7, 2010 and Fuchs for KKD on December 10, 2010 (Exh. 31, RP (9) 561).

Fuchs had signed the escrow cancellation form for KKD, because HRB, anticipating a lawsuit, following further negotiations between Colon and Fuchs, Case and Dubin, initiated by Colon and Case almost immediately, had decided to offer to reinstate the original deal if Fuchs would cancel the prior escrow and deposit $1,550,000 into a new TG escrow.

HRB presented KKD and Fuchs on December 3, 2010 with a new Acquisition Agreement (Exh. 32, Judicial Notice 1577), for instance, already dated December 1, 2010, whereby on December 10, 2010, Fuchs believing HRB was attempting to mitigate its liability and he and KKD would have the same deal that had been promised them originally by HRB and the Consortium, and in reliance thereon, Fuchs wired $1,550,000 to Dubin's client's trust account and sent KKD's signed escrow cancellation form to TG as partial consideration for the new Acquisition Agreement so that a new escrow at TG could be opened.

However, negotiations conducted thereafter through December 17, 2010 terminated when KKD and Fuchs concluded the new Acquisition Agreement was merely a bad faith effort on the part of HRB to deflect its obvious breach of contract and would never close.

KKD and Fuchs came to that conclusion because (1) Van Buren, the Foreclosure Commissioner, suddenly announced on December 2, 2010 he was holding a foreclosure auction sale on January 6, 2011, and began advertising (Exh. 33, Judicial Notice 1577), (2) the Consortium on December 6, 2010 meanwhile filed a nonhearing motion (Exh. 34, RP (7) 942-1077) to substitute as the foreclosing Plaintiff Ke Kailani Partners (KKP), a Hunt wholly owned company of HRB formed as early as October 27, 2010, and (3) the new Acquisition Agreement contained performance terms that likely could not be timely met.

It further seemed too coincidental just as the December 30, 2010 closing date approached for executing the new Acquisition Agreement, Judge Ayabe both denied

reconsideration of his foreclosure decree (Exh. 35, RP (8) 270-277), and granted the Consortium's nonhearing motion to substitute KKP as Plaintiff (Exh. 36, RP (8) 266-269).

KKD and Fuchs immediately appealed (Exh. 37, RP (8) 13-138, CADS 139-144), and KKD filed Chapter 11 on January 5, 2011 (Exh. 38, RP (8) 310-321) to seek to protect its property and to forestall the January 6, 2011 auction sale (Exh. 39, RP (8) 433-469).

In order to remain in Chapter 11 while hunting for purchasers, KKD was forced to stipulate to pay KKP several hundred thousand dollars (Exh. 40, RP (8) 327-373) and to dismiss its foreclosure appeal (Exhs. 41-42, RP (8) 382-392, 325-326), but unable to prepare a viable Chapter 11 Plan, KKD voluntarily stipulated to dismissing its Chapter 11 on May 12, 2011 (Exh. 43, RP (8) 402-404, 406-408), and KKP and Fuchs found themselves back in Judge Ayabe's Foreclosure Court, this time with KKP as foreclosing mortgagee.

The auction was held on June 21, 2011 (Exh. 44, RP (8) 433-469), with no bidders other than KKP, whose maximum credit bid was advertised as exceeding $26,000,000.

KKP's $10,000,000 bid was declared the winning bid by Van Buren, to await confirmation at an August 4, 2011 hearing, whose corporate twin, HRB, had purchased the loans from the Consortium less than 10 months earlier for nearly twice that amount.

KKD and Fuchs found out only on September 20, 2011, however, what a year earlier had actually happened, when KKP's attorney, Sharon Lovejoy, accidentally emailed Dubin, who had been requesting more information, a PDF copy of a November 22, 2010 "Termination and Indemnity Agreement" ("Indemnity") between the Consortium and HRB and a copy of a companion November 23, 2010 "Mortgage Loan Purchase Agreement" ("new Loan PSA") executed by the Consortium and HRB (Exh. 45, RP (9) 1352-1399).

It was only then that the truth was revealed that on November 22, 2010, HRB secretly had terminated its Loan PSA with the Consortium, which had included a release of KKD and Fuchs, by misrepresenting to the Consortium that KKD and Fuchs had refused to close:

> RECITALS:
>
> B. Purchaser has stated that it is unable to fulfill the terms of the Original MLPSA due to certain actions and conduct of Ke Kailani Development LLC and Michael J. Fuchs (collectively, the "Borrowers") and is thus apparently unable to perform thereunder, as a consequence of which Seller has terminated the Original MLPSA.

> C. Purchaser has acknowledged such termination and requested that Seller and Purchaser enter into a new Mortgage Loan Purchase and Sale Agreement (the "New MLPSA").
> 3. Effective as of the termination date [November 22, 2011], Purchaser hereby stipulates and agrees . . . to indemnify . . . against all loss or liability from any and all claims . . . by Borrowers . . . .

On November 23, 2010 HRB proceeded to sign a new PSA with the Consortium which provided no release of KKD and Fuchs, thereby aborting HRB's performance of its promised contractual obligations to KKD and to Fuchs under their Acquisition Agreement which at the time was still active, no notice of anticipatory breach having been delivered to KKD and Fuchs, requesting assurances of their performance as required by contract law.

HRB meanwhile waited until the next day, November 24, 2010, *supra*, to announce after the fact its unilateral cancellation of its Acquisition Agreement with KKD and Fuchs, even though KKD and Fuchs still had until November 30, 2010 to close.

Without knowing what had really occurred on November 22, 2010, or more accurately what had really occurred before November 22, 2010 as presumably it must have taken considerable time for HRB and the Consortium to come to agreement aborting the joint closing and papering their new deal, KKD and Fuchs, with the hearing confirming sale set for August 4, 2011 and with pleadings closed in the foreclosure action, on July 27, 2011 filed a new, related Complaint in Civil No. 11-1-1577-07 (Exh. 46, RP (9) 1057-1091) against KKP, HRB, the Consortium, and the Commissioner, seeking specific performance, injunctive relief and damages, which new lawsuit was similarly assigned to Judge Ayabe.

KKD and Fuchs sought to consolidate the two actions, take discovery, deny KKP the right to continue the foreclosure action, and delay confirmation. Instead, Judge Ayabe granted confirmation over their objection, reserving the determination of the amount of the deficiency judgment (Exhs. 47-48, RP (10) 579-600, 31-160), entered judgment confirming sale and issued a writ of possession (Exhs. 49-50, RP (10) 161-168, 169-295), and denied consolidation (Exhs. 52-53, RP (9) 727-741, (14) 325-329), ignoring the new case entirely.

Judge Ayabe then denied discovery in the new action, and after an October 5, 2011 hearing (Exh. 51, RP (13) 516-569,(14) 106, *et seq.*), dismissed that Complaint, finding despite the above (1) that the escrow cancellation form signed by KKD released all claims against the Defendants and (2) that Fuchs was not a party to the Acquisition Agreement

with HRB, and (3) that KKD and Fuchs were not even parties to the first Loan PSA with the Consortium, lacking standing to claim breach of contract (Exh. 58, Judicial Notice 1577).

Before a dismissal order was entered by Judge Ayabe on December 19, 2011, however, KKD and Fuchs had filed a First Amended Complaint in Civil No. 11-1-1577-07 on November 4, 2011 (see Exh. 61, RP (10) 681-809) based upon their learning of HRB's cover-up of its early misrepresentations to the Consortium that allowed HRB to run away with the loan without releasing the Fuchs' guaranties, although they had an uncontested right to amend their pleading (Exh. 54, Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969)).

Yet Judge Ayabe went ahead nevertheless on December 19, 2011 (Exh. 58, Judicial Notice 1577) and dismissed the new lawsuit (Exh. 59, Judicial Notice 1577), denying reconsideration on January 5, 2012 (Exh. 60, Judicial Notice 1577), and when his many substantive and procedural errors were called to his attention, he nevertheless ignored even clearly established Hawaii Supreme Court binding precedent to the contrary allowing amendments to complaints prior to the entry of a written dismissal order (*ibid.*).

Filing a Verified First Amended Complaint (Exhs. 61-62, RP (12) 37-161), nevertheless, KKP and Fuchs eliminated the Consortium as Defendants based upon learning the banks had been tricked by HRB, and instead sued KKP, HRB, and Bays variously for Breach of Contract, Business Compulsion, Tortious Interference, Wrongful Contract Repudiation, Breach of Services Contract, Fraud, Deceit, Misrepresentation, Legal Malpractice, Indemnification, Specific Performance, Reformation of Contacts, Rescission of Escrow Cancellation, and Rescission of Sale Agreements.

KKD and Fuchs on November 25, 2011 then proceeded to file timely motions to disqualify Judge Ayabe in both cases (Exhs. 55-56, RP (12) 11, et seq., Judicial Notice 1577) before he had ruled on their motion for reconsideration of confirmation of sale in Civil No. 09-1-2523-10, before he had entered his written Order dismissing their First Amended Complaint in Civil No. 11-1-1577-97 (Exh. 58, Judicial Notice 1577), and before he had determined the amount of any deficiency, based on the following facts that they learned:

1. Gail Ayabe, Judge Ayabe's Wife, had been affiliated with the Mauna Lani Resort Development as its attorney, although three of the Mauna Lani Associations were named Defendants below, opposing KKD and Fuchs in virtually every motion, yet that family affiliation had not been disclosed at any time during of the foreclosure case or that his Wife

gave legal advice to some of those Defendants, a relationship freely admitted by the Mauna Lani Resort Association (Exh. 57, RP (14) 334-338).

2. Two partners in the Defendant Bays Law Firm alleged in said First Amended Complaint to have ethically defrauded KKD and Fuchs were Case and Crystal Rose, both of whom undisclosed were good friends of Judge Ayabe, contemporaries of his at the Hastings Law School, including Harvey Lung and particularly Crystal Rose, who were believed to have been in the same study group with Judge Ayabe as law students together.

3. When Case, running for political office, ran into well-publicized difficulties with the Hawaii Democratic Party, it was discovered that Judge Ayabe was asked by Crystal Rose to intercede on Case's behalf and that Judge Ayabe did make that attempt to personally assist Case in his political campaign, and also gave campaign contributions to Case, undisclosed.

Were Judge Ayabe, for instance, to continue to preside in both cases, he would be making decisions that not only would potentially inflict a $21,000,000 or more deficiency judgment by indemnification/contribution on his good friends in the Bays Law Firm, but he would be tasked with making credibility assessments concerning his good friends also as material witnesses in both cases – thus creating an unavoidable personal conflict of interest and an enormous objective appearance of impropriety.

A joint hearing in both cases was held before Judge Ayabe on December 20, 2011 to consider both disqualification motions and also KKP's and HRB's motion to dismiss the First Amended Complaint in Civil No. 11-1-1577-1-07 (Exh. 63, RP (16) 205-258).

Judge Ayabe denied he was ever in a study group with Bay's members or that he ever tried to assist Case personally with a political matter, but did acknowledge that he had "supported Ed Case in the past and we went to a fund-raiser once" (Exh. 63, RP (16) 205-258, p. 10) making a political contribution to Case's campaign which is a matter of government campaign contribution public records ("Regarding Ed Case, he is a classmate and I have supported him in the past in his political campaign" – *id.* at p. 23), and did not comment on his Wife's role, while proceeding to dismiss the First Amended Complaint.

Judge Ayabe entered identical Orders in both cases denying disqualification (Exh. 64 for the Order in Civil No. 11-1-1577-07; RP (14) 362-365), denying post-judgment relief in Civil No. 09-1-2523-10 (Exh. 60, RP (14) 344-350), denying reconsideration of the dismissal of the Complaint in Civil No. 11-1-1577-07 (Exh. 65, Judicial Notice 1577), as a result of

which KKD and Fuchs appealed on February 3, 2012 (Exh. 66, RP (14) 366, *et seq.*) filing a Civil Appeal Docketing Statement on March 2, 2012 (Exh. 67, Appellate Docket), also in Civil No. 11-1-1577-07 (Exhs. 68-69, Judicial Notice, Appellate Docket CAAP-12-0000153).

On April 23, 2012, again without allowing KKD and Fuchs to conduct discovery, Judge Ayabe had dismissed the First Amended Complaint as to KKP and HRB on the same grounds as he had dismissed the original complaint (Exh. 70, Judicial Notice 1577) and entered judgment (Exh. 71, Judicial Notice 1577), notwithstanding numerous additional Counts alleged therein, for instance, for rescission and for fraud that were fact-intensive.

Also on April 23, 2012 Judge Ayabe granted KKP's motion for a deficiency judgment against KKP and Fuchs jointly and severally in the amount of $21,594,668.55 (Exh. 72, RP (15) 275-280) and entered judgment the same day (Exh. 73, RP (15) 281-286).

Bays had also filed a motion to dismiss the claims against it on December 12, 2011 in Civil No. 11-1-1577-07, which had been denied by Minute Order on January 24, 2012, Judge Ayabe seemingly apologetically suggesting therein it might instead file a motion for summary judgment (Exh. 82, Judicial Notice 1577), which it then proceeded to do on March 9, 2012, giving KKD and Fuchs their first chance to take discovery in either case, and Ed Case's deposition was taken on March 7, 2012 (Exh. 74, RP (15) 451 & (16) 386, *et seq.*), in which he contradicted virtually all of Judge Ayabe's prior rulings in both cases, admitting:

1. BOH required KKD and Fuchs sign the Loan PSA or it would not have closed the buyout transaction and HRB would not have been able without their agreement to purchase the notes and mortgages. In that way the two agreements were clearly directly linked (*id.*, Deposition transcript pages 30-32), a pivotal material fact tying the agreements together;

2. the date for the joint closings was extended to November 30, 2010 (*id.*, p. 34);

3. a cashier's check, Case admitted, would take a day or two to clear and thus a money wire from a back-to-back New York-to-Honolulu escrow would actually have been a faster means of payment than a cashier's check that was stated in the First Amendment to the Acquisition Agreement to be a permitted alternative method of payment (*id.*, pp. 40-42);

4. at least eight days before the closing scheduled for November 30, 2010 and before KKD and Fuchs could perform, Case behind their back intentionally participated with his clients going to BOH and telling BOH that HRB could not close with the Consortium and instead negotiated and had HRB enter into a new buyout agreement with the Consortium,

but this time the new Loan PSA that Case negotiated provided not for the cancellation of the Fuchs' guaranties, but for their assignment to HRB (*id.*, pp. 50-53);

5. Case did all of this according to his own sworn testimony, supposedly assuming that KKD and Mr. Fuchs would not close on November 30, 2010, based solely upon the alleged, disputed content of a single conversation that Colon, the principal of HRB, purported to have had with Fuchs, yet Case never sent KKD or Fuchs a notice of anticipatory repudiation, giving them the requisite opportunity to acknowledge that they would perform as required by the law of anticipatory breach (*id.*, pp. 53-54);

6. Case further acknowledged he had planned back-to-back Honolulu escrows for the buyout and purchase transactions, but was unable to explain how a back-to-back escrow was acceptable for those transactions and not a back-to-back escrow for the $1,500,000 payment between the purchase escrow and an irrevocable New York escrow proposed by Fuchs intending to wire money to Honolulu that would have beaten any cashier's check clearance by at least one day even though payment by cashier's check was deemed acceptable in the written agreement between KKD and Fuchs and HRB (*id.*, p. 57);

7. Case never told KKD or Fuchs of the agreements that were signed by HRB and the Consortium at least eight days before the scheduled November 30, 2010 joint closing date; they only learned many months later those interfering documents had been signed at least eight days before the scheduled November 30, 2010 joint closing date (*id.*, pp. 58-60);

8. Case, who had earlier represented KKD and Fuchs, interpreted the "conflict waiver" he drafted, *supra*, to allow his law firm to do whatever his law firm wanted to do for HRB, which Hunt company his law firm had introduced to Fuchs to ironically help him avoid the guaranties, Case admitting nowhere in the "conflict waiver" did it say that (*id.*, pp. 63);

9. Case further admitted that the Acquisition Agreement he drafted was inextricably linked to the original Loan PSA between HRB and the Consortium, which KKD and Fuchs were also required by HRB and the Consortium to sign; one could not close without the other, each being conditioned on the simultaneous closing of the other (*id.*, pp. 67-69);

10. BOH required an indemnification agreement so it would not be sued for closing with HRB in violation of the promises the Consortium expressly made in writing to KKD and Fuchs and for its assigning Fuchs' guaranties to HRB, again contrary to the Consortium's written agreement to release and not assign the two guaranties upon closing (*id.*, p. 75);

11. Case admitted that had he and HRB instead accepted Fuchs' offer of a back-to-back irrevocable New York-to-Honolulu escrow for the $1,500,000 payment, the transactions scheduled for joint closing on November 30, 2010 would have been concluded and there would not now be an escalating $21,600,000 deficiency judgment (*id.*, pp. 80, 82);

12. HRB had completed its due diligence and was contractually required to close on November 30, 2010, but for the contrary agreements it signed with BOH, derailing the prior agreements between the parties without knowledge by KKD or Fuchs (*id.*, pp. 87-88, 90).

It is not the practice of Hawaii lawyers to investigate the stock holdings of our Judges. Dubin preferred to resolve the matter informally after receiving additional information from Internet media monitoring the cases, that Judge Ayabe during both cases had held and continued to hold stock in BOH, the lead bank in the Consortium, causing Dubin on May 11, 2012 immediately to write Judge Ayabe, *inter alia*, as follows (Exh. 75, RP (16) 94-103):

> Late yesterday afternoon I was more than surprised for the first time to learn, upon receiving a copy of your April 25, 2011 Supreme Court of Hawaii Certified Financial Disclosure Statement, a copy of which is enclosed with this letter, that Your Honor has presided over the above two lawsuits at the same time that you have owned between $25,000 and $50,000 worth of stock in the Bank of Hawaii, which has not only been a principal party to both actions, but its officers material witnesses to this day in both cases. * * * *
>
> As a result of the above new circumstances, and given the prior disqualification history of these two cases questioning unsuccessfully your campaign contribution to Mr. Ed Case and your familiarity with Members of the Bays Law Firm, I am requesting on behalf of my clients that Your Honor immediately *sua sponte* set aside all of your prior orders and judgments in both cases, that you recuse yourself, and that these two cases be referred to the Chief Judge of this Circuit, the Honorable Derrick H. M Chan, for his reassignment to another First Circuit Court Judge. (Bracketed material added)

Judge Ayabe responded on May 14, 2012, asking counsel to attend a conference on May 17, 2012 (Exh. 77, RP (16) 105); meanwhile, Dubin consulted with a banking expert, who concluded the outcome of the foreclosure case could have had a significant impact on BOH stock, impacting the value of its shares (Exh. 78, RP (16) 122-187).

At the May 17, 2012 conference (Exh. 79, RP (16) 107-112), Judge Ayabe said he considered the allegations "serious" (*id.*, Transcript of Proceedings, page 3), but explained

the stock had been in a custodial account since 1995, purchased for $10,102.67, believed now to be 600 shares worth $29,334, with his Wife now the account fiduciary (*ibid.*).

Nevertheless, Judge Ayabe refused to answer any questions (*id.*, p. 5) or to disqualify himself (*id.*, p. 5), making the following statements, then abruptly departing:

1. Judge Ayabe acknowledged that in the federal judicial system "if a judge owns just one share of stock" a judge would be disqualified, but said that the ethical rule in Hawaii is different: (a) "the federal statute does not apply to a situation where the stock belongs to a judge's adult child," and (b) Hawaii instead has "adopted a *de minimis* standard" (*id.*, p. 4);

2. Judge Ayabe appeared to be relying upon the ethical advice of and clearance by the Hawaii Commission on Judicial Conduct, explaining that he "had already reported this matter to the Commission on Judicial Conduct" (*id.*, p. 4);

3. Judge Ayabe concluded that 600 shares of BOH stock "is a *de minimis* amount and does not unreasonably impair this Court's ability to remain impartial," and "believes it has been fair and impartial throughout this case and feels that it can remain to do so throughout the remainder of this case (*id.*, pp. 4-5);

4. Judge Ayabe applied a subjective test for appearances of impropriety, concluding that in his opinion he could decide fairly despite family ownership of BOH stock (*id.*, pp. 4-5).

Judge Ayabe's statements above gave the appearance that he had been misinformed by the wrong advice given to him by the Hawaii Commission on Judicial Conduct: (1) since federal law does not exempt the stock holdings of a judge's immediate family members or their fiduciary holdings, (2) since States that have adopted the same Model Code of Judicial Conduct as Hawaii have nevertheless held that the *de minimis* language found in Rule 2.11 is trumped by the appearance of impropriety standard under which it is subsumed as but one example, and (3) since the test is not subjective, whether a judge himself or herself believes that he can be impartial, but is controlled instead by the objective state of mind of a reasonable person appearing before him.

As a result, Dubin wrote the Commission on May 18, 2012 (Exh. 80, RP (16) 114-120), questioning its erroneous advice to Judge Ayabe as not only unfair to his clients, but to Judge Ayabe, opposing parties, and the BOH as well.

By letter dated May 25, 2012, the Commission responded, backing away, stating only that the "function of the Commission is to assist judges with advisory opinions and to afford

judges an opportunity to discuss issues related to judicial conduct for guidance," pursuant to Supreme Court Rule 8.15 ("Advisory Opinions") (Exh. 81, RP (16) 189-190).

In effect, such *ex parte* communications with the Commission forming the basis of Judge Ayabe's decision, on the other hand, squarely would violate Rule 2.9(a) of the Hawaii Revised Code of Judicial Conduct, further aggravating the ethical problems in both cases, Rule 2.9(a) requiring to the contrary that "a judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter" (no listed exceptions applicable here as there was no disclosure of the content of the communications from the Commission whatsoever by Judge Ayabe or the Commission).

Fuchs is a resident New York, who was already arguable double-crossed by his own former Hawaii law firm. Fuchs then learned that Judge Ayabe admitted that he went to law school with members of that law firm who he considers his good friends. Fuchs meanwhile was suing those good friends of Judge Ayabe for upwards of $21,600,000 for fraud and for indemnification and who are material witnesses in the cases before Judge Ayabe. Fuchs then learned that Judge Ayabe's Wife has been doing legal work for three of this adversary parties in the foreclosure case. Fuchs then learned that Judge Ayabe's family, while he was presiding over the foreclosure action against him and his action against BOH, had an *undisclosed* 600-share stock ownership in BOH despite the fact that he is *the* First Circuit Court Foreclosure Judge presiding over foreclosure cases, including others brought by BOH against other borrowers to this day.

As a result, based upon a plethora of appearances of impropriety (Exh. 83), on June 12, 2012 KKD and Fuchs timely filed formal motions again in both cases to disqualify Judge Ayabe (Exhs. 85, 86, RP (16) 15, *et seq.*, Judicial Notice 1577); both motions were perfunctorily heard on July 3, 2012; both motions were summarily denied at the hearing; and written orders were entered denying both motions on July 30, 2012 without further explanation (Exh. 87, 88, RP (16) 747-750, Judicial Notice 1577).

Thereafter, Judge Ayabe on August 9, 2012 abruptly entered a Minute Order (Exh. 84) in Civil No. 09-1-2523-10 reducing the amount of the deficiency judgment a pitiful $16,601.60, and very uncustomarily filed the Minute Order, contrary to State v. English, 68 Haw. 46, 705 P.2d 12 (1985), without waiting for a written order (Exh. 89, RP (16) 751-756).

On August 21, 2012 Judge Ayabe entered an Order in Civil No. 11-1-1577-07 denying KKD and Fuchs' motion for reconsideration of his dismissal of HRB and KKP from that case (Exh. 90, Judicial Notice 1577), notwithstanding the admissions contained in the deposition of Case, and simultaneously transferred that case only for reassignment to another judge (Exh. 94, Judicial Notice 1577), which on August 23, 2012 was transferred by the Chief Judge of the First Circuit Court to the Honorable Gary W.B. Chang.

On August 31, 2012 KKD and Fuchs simultaneously filed Notices of Appeal in both cases (Exhs. 91, 92, RP (16) 757, *et seq.,* Judicial Notice 1577), the Hawaii Intermediate Court of Appeals later on October 5, 2012, consolidating the two appeals arising from Civil No. 09-1-2523-10, but dismissing the two appeals in Civil No. 11-1-1577-07 as premature due to KKP's attorneys have failed to draft the appealed judgments properly with required finality language (Exh. 93, Judicial Notice, Appellate dockets, including CAAP-12-0000153).

Judge Chang held a status conference on September 13, 2012 and heard arguments on the one remaining motion in Civil No. 11-1-1577-07 from the one remaining adverse party, the Bays Law Firm, its motion for summary judgment pending since March 9, 2012, and became the only Judge other than Judge Ayabe to view the above facts, and continued the summary judgment hearing, giving KKD and Fuchs their first opportunity after more than three years of protracted litigation before Judge Ayabe to finally be able to take the depositions of Colon and Mesick, HRB's and BOH's principal representatives respectively, they had noticed for years only to be blocked by motions to dismiss and protective orders.

Four oral depositions were taken, the official transcripts of which have been filed in Civil No. 11-1-1577-10 of which this Court may take judicial notice in the interests of justice: the oral deposition of TG's involved escrow officer Barbara Paulo, the oral deposition of TG's custodian of records, Leta H. Price, the oral deposition of Colon, and the oral deposition of Mesick -- the latter two a treasure trove of admissions against interest, despite constant improper interruptions and leading speeches by opposing counsel.

Collectively they affirm the obvious based on the documents already adduced alone, *supra*, what KKD and Fuchs had been arguing before Judge Ayabe for years and what Case testified to in his oral deposition, (1) that the two transactions between KKD/Fuchs and HRB *and* between HRB and the Consortium were one inseparable transaction, (2) that KKD and Fuchs were parties to both contracts, (3) that a cash deposit with an irrevocable

instruction to a licensed New York escrow was full performance by KKD and Fuchs pursuant to the First Amendment to the Acquisition Agreement, (4) that HRB wrongfully aborted the joint closings by secretly misrepresenting to the Consortium the true intentions of KKD and Fuchs, (5) that the two actions should have been consolidated involving common issues of law and fact, (6) that the escrow release form signed by KKD and HRB was merely a TG boilerplate form and not negotiated by the parties, sign only in anticipation of settlement, (7) and that the deficiency judgment awarded KKP was not only entirely contrary to the contractual agreements aforesaid, but HRB had valued the property to be worth at least $16,000,000, yet KKP, its corporate twin, rigged the auction sale with a very low credit bid.

First, KKD and Fuchs secured additional evidence from Paulo (Exh. 95, Judicial Notice 1577) (1) that a cashiers' check, a form of "immediately available funds" that was approved for KKD and Fuchs' payment into escrow, takes longer to accept as clear funds, sometimes as long as ten days especially from a Mainland bank ("Q: Is there any way to speed it up. A: No."), than a wire from a Mainland back-to-back escrow holding cash in hand with irrevocable wiring instructions customarily done through escrows (*id.*, pp. 9-10), and (2) that the escrow cancellation form KKD and HRB signed was a standard TG boilerplate form initiated by Paulo containing release language not requested by the parties (*id.*, pp. 14-17).

Second, KKD and Fuchs secured additional evidence from Price (Exh. 96, Judicial Notice 1577) (1) that in an email to Paulo from Case sent on November 10, 2010, Case affirms in admissions against interest that the joint closing date was "November 30, 2012," that "the intent" of the parties "is a back-to-back under which HRB acquires the loan and property and releases the mortgage and security interests (and foreclosure-related liens if possible) all together," and that HRB considers "the value of the property conveyed is the $16M" (*id.*, first attachment), (2) that in an email from Case to Fuchs/Dubin sent on November 9, 2012, Case affirms in admissions against interest that the "property purchase escrow" was between "HRB, KKD and Fuchs" who together "will close the property escrow," and that the Acquisition Agreement was between "HRB, KKD and Fuchs" (*id.*, second attachment), and (3) that the balance of the Case-Paulo emails similarly refer throughout to Fuchs being acknowledged by Case as a party to the Acquisition Agreement, to its First Amendment, and to the property escrow as far as HRB was concerned (*id, et seq.*).

Third, KKD and Fuchs secured additional evidence in admissions against interest from Colon despite his being highly evasive with an incredulous constant bobbing and weaving "I don't recall" non-memory (Exh. 97, Judicial Notice 1577) (1) that HRB's boss Chris Hunt ("one of the Hunt family members – nephew of the chairman") set the value of the property at no more than $16,000,000 as "that was as far as my boss was willing to go" (*id.*, pp. 18-20), (2) that Case drafted the deposit instructions in the First Amendment to the Acquisition Agreement and that HRB's boss Chris Hunt probably was the one who decided not to accept an irrevocable commitment from a licensed New York escrow holding cash and not to go through with the deal, Colon unable to explain, hemming and hawing, the difference between doing so, admitting that such a wire could take as little as 15 minutes, and a letter of credit which was also a permitted means of deposit much slower (*id.*, pp. 53, 72, 25-26, 55, generally 39-75), (3) that Fuchs was not a party to the purchase escrow and therefore not a party to the escrow cancellation form (*id.*, pp. 75-76), (4) Chris Hunt was the one who gave Colon instructions to "include the guarantees" (*id.*, pp. 84-85), and (5) Fuchs told Colon that "he was going to come back with proposed new terms and conditions under which he might proceed," but Chris Hunt made the decision not to wait (*id.*, pp. 88-92, 96).

Fourth, KKD and Fuchs secured additional evidence in admissions against HRB's interest from Mesick (Exh. 98, Judicial Notice 1577) (1) BOH viewed $17,500,000 as an acceptable price for HRB buying out the notes and mortgages based not only on the market value of the property *but also* upon being able to terminate KKD and Fuchs' claims against BOH, which is why as necessary consideration BOH wanted, required and secured their consent and their agreement to the original Loan PSA, including their promise to sign a mutual release ("otherwise less attractive to the bank"), which consideration HRB replaced with an indemnity (*id.*, pp. 26, 15-25 generally), (2) Mesick made no effort to contact Fuchs to verify the truth of Colon's call to him that Fuchs was refusing to close, although "everyone was disappointed" (*id.*, pp. 29, 38, 40), (3) Mesick was led to believe that HRB had not deposited its $1,000,000 in escrow within three days because Fuchs defaulted in payment to HRB, another misrepresentation by HRB (*id.*, p. 51), and (4) Mesick admitted that indemnification was required because the guaranties were to be transferred (*id.*, p. 60).

The record in Civil No. 11-1-1577-07 is vital to a fair disposition of this Consolidated Appeal, for which reason Judicial Notice has been requested (Exhs. 99, 100, Ho'ohiki).

Appellate courts may take judicial notice of documents filed in related cases, Fujii v. Osborne, 67 Haw. 322, 329, 687 P.2d 1333 (1984); Peters v. Aipa, 119 Haw. 308, 311 n.3, 188 P.3d 822 n.3 (App. 2008); Kaleikini v. Thielen, 124 Haw. 1, 5, 237 P.3d 1067, 1071 (2010).

B. POINTS OF ERROR

1. KKP Lacked Standing To Foreclose, To Bid, Or To A Deficiency Judgment

KKP had no standing to foreclose, to a foreclosure auction, to bid, to a confirmed sale, or to a deficiency judgment, its predecessor having breached its agreement with KKD and Fuchs to cancel the foreclosure and to release the guaranties, substitution giving it no more rights than the Consortium had. *Rule 28 Compliance*: KKD and Fuchs objected on this ground (7/27/11 Opposition Memorandum (8) 545, *et seq.*; 8/4/11 Transcript of Proceedings, (10) 579-600, especially 595-597; 10/14/11 Reconsideration Motion, (10) 343, *et seq.;* (10) 300-306; 12/20/11 Transcript of Proceedings, (16) 51-252), whose specific objections however were rejected below (10/3/11 Order Confirming Sale, (10) 31-160; 10/3/11 54(b) Judgment Confirming Sale, (10) 161-168).

2. Consolidation Of Both Cases Was Required

Both actions should have been consolidated, having common issues of law and fact, allowing KKD and Fuchs to prove their interrelated case against HRB and KKP. *Rule 28 Compliance*: KKD and Fuchs objected on this ground (9/6/11 Transcript of Proceedings, (9) 727-741;(14) 106, *et seq.*, especially 120-126; (9) 9/12/11 Reply 399, *et seq.*; (10) 300-306), whose specific objections however were rejected below (12/19/11 Order Denying Consolidation, (14) 325-329).

3. KKD And Fuchs' Claims Should Not Have Been Dismissed Absent Discovery

Genuine issues of material fact existed precluding summary adjudication, which however Judge Ayabe granted in awarding confirmation of sale over objections as to adequacy of price and in dismissing the new action against HRB and KKP based on his interpretation of documents that were being challenged for fraud and rescission. *Rule 28 Compliance*: KKD and Fuchs objected on this ground (10/5/11 Transcript of Proceedings, (13) 516-569, (14) 106, *et seq.*, especially 120-126; 12/20/11 Transcript of Proceedings,

(16) 205-258, especially 225, 215-245), whose specific objections however were rejected below (4/23/12 Order Dismissing First Amended Complaint, Judicial Notice 1577 (Exh. 70)).

4. Judge Ayabe Was A Disqualified Jurist

Judge Ayabe was a disqualified jurist with numerous appearances of impropriety in violation of due process and his orders and judgments should be set aside. *Rule 28 Compliance*: KKD and Fuchs objected on this ground (6/12/12 Disqualification Motion 2523, (16) 15, 23-48, *et seq.*; 12/20/11 Transcript of Proceedings, (16) 205-258, especially 208-211, 218-227), whose specific objections however were rejected below (1/27/12 Order Denying Disqualification, (14) 362-365; 7/30/12 Order Denying Disqualification 2523, (16) 747-750).

5. Hawaii's Judge-Made Deficiency Procedures Are Unconstitutional

Judge Ayabe violated the constitutional rights of KKD and Fuchs, awarding a deficiency judgment in Civil No. 09-1-2523-10 in an amount calculated by subtracting the net proceeds of sale from the amount the foreclosing mortgagee otherwise lost, without after confirmation of sale holding a separate evidentiary hearing to determine what the fair market value of the property was at the time of sale and how much of an actual loss the foreclosing mortgagee actually suffered, denying to KKD and to Fuchs property rights protected pursuant to the fairness requirements of the due process clause of the Hawaii State Constitution. *Rule 28 Compliance*: KKD and Fuchs objected on this ground (8/4/11 Transcript of Proceedings, (10) 579-600, especially 585; 4/24/12 Objections (15) 291, 294-302, cases 317-337); 1220/11 Transcript of Proceedings, (16) 253-254, whose specific objections however were rejected below (4/23/12 Order Granting Deficiency, (15) 275-280; 4/23/12 54(b) Judgment, (15) 281-286; 8/9/12 [Minute] Order Denying Reconsideration, (16) 751-756).

C. STANDARDS OF REVIEW

The policy of the law favors disposition of litigation on the merits. Webb v. Harvey, 103 Haw. 63, 67, 79 P.3d 681, 685 (2003) (*citing* Compass Development, Inc. v. Blevins, 10 Haw. App. 388, 402, 876 P.2d 1335, 1341 (1994)); Rearden Family Trust v. Wisenbaker, 101 Haw. 237, 255, 65 P.3d 1046 (2003) (*citing* Oahu Plumbing & Sheet Metal, Inc. v. Kona

Constr., Inc., 60 Haw. 372, 380, 590 P.2d 570, 576 (1979) (noting "the preference for giving parties an opportunity to litigate claims or defenses on the merits").

Point One: Standing is jurisdictional, and whenever a failure of standing is discovered, it requires immediate dismissal at any stage of a case, Fairley v. Patterson, 493 F.2d 598, 603 (5th Cir. 1974), Skolnick v. Board of Commissioners, 435 F.2d 361, 363 (7th Cir. 1970); a trial court has "an independent obligation" to examine its own subject matter jurisdiction, including standing, and whenever it appears there is a lack of standing, courts must dismiss, Benavidez v. Eu, 34 F.3d 825, 830 (9th Cir. 1994), citing the requirements of Rule 12(h)(3) of the Federal Rules of Civil Procedure, adopted *verbatim* in Hawaii.

Such jurisdictional requirements always remain open for review and cannot be waived, In re Landmark Hotel & Casino, Inc., 78 B.R. 575, 582 (9th Cir. BAP 1987); the requirement of standing is best understood in that it "contemplates access to the courts only for those litigants suffering an injury," Texas Association of Business v. Texas Air Control Board, 852 S.W.2d 440, 444 (Tex. 1993).

And in determining standing where there is a substitution of parties, the substitution does not change standing; HRCP Rule 25(c) substitutions are procedural and not substantive, altering no substantive rights. "The merits of the case and the disposition of the property are still determined with respect to the original parties." Moore's Federal Practice & Procedure (3d edition), Section 25.32.

Point 2: Consolidation is a matter within the discretion of the trial judge, warranted to prevent undue delay and promote the interests of justice, especially in order to avoid inconsistent results, Sanders v. Point After, Inc., 2 Haw. App. 65, 626 P.2d 193 (1981).

Point 3: Pleadings must be viewed in a light most favorable to the pleading parties, consideration being strictly limited to the allegations in the challenged pleading, Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, *clarified on reconsideration*, 74 Haw. 645, *reconsideration granted in part on other grounds*, 74 Haw. 650, 875 P.2d 225 (1993).

HRCP Rule 8(e) in this "notice pleading jurisdiction" merely requires that averments in pleadings "shall be simple, concise, and direct. No technical forms of pleading . . . are required," Island Holidays, Inc. v. Fitzgerald, 58 Haw. 552, 574 P.2d 884 (1978) (pleadings must be construed liberally and not technically); Au v. Au, 63 Haw. 210, 626 P.2d 173,

reconsideration denied, 63 Haw. 263, 626 P.2d 173 (1981) (pleadings required only to give defendants fair notice of what Plaintiff's claims are and the grounds upon which they rest).

Point 4: The standard of review for denials of judicial disqualification is "whether the court abused its discretion," State v. Ross, 89 Haw. 371, 375-376 (1998). However, when constitutional rights are implicated, such questions of law are reviewed *de novo* under a right/wrong standard, Bank of Hawaii v. DeYoung, 92 Haw. 347, 351, 992 P.2d 42 (2000).

Point 5: Questions of law are reviewed *de novo* under a right/wrong standard, Bank of Hawaii v. DeYoung, 92 Haw. 347, 351, 992 P.2d 42 (2000).

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner," Evans v. Takao, 74 Haw. 267, 283 (1992).

D. LEGAL ARGUMENT REQUIRING REVERSAL

1. KKP had no standing to foreclose, to a foreclosure auction, to bid, to a confirmed sale, or to a deficiency judgment, its predecessor having breached its agreement with KKD and Fuchs to cancel the foreclosure and to release the guaranties, substitution giving it no more rights than the Consortium had.

KKP had no standing to foreclose, since KKD and Fuchs signed a settlement buyout agreement with the Consortium halting the foreclosure proceedings that was breached by the Consortium and KKP, HRB's corporate twin subsidiary of Hunt, when HRB secretly ran off with an assignment of the promissory notes and mortgages and Fuchs' guaranties.

In Hawaii, as earlier as 1918, the Hawaii Supreme Court instructed our trial courts that "courts should be prompt to set aside a verdict which has been secured by corrupt or improper acts." Dwight v. Ichiyama, 24 Haw. 193, 195 (1918).

The need for redressing such "fraud upon the court," *no matter how long it may take to surface*, was subsequently explained by Justice Black in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), a case similarly involving false testimony: "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

The Hawaii Supreme Court on two occasions has reaffirmed that important principle, in Kawamata Farms v. United Agri Products, 86 Haw. 214, 256-257, 948 P.2d 1055 (1997)

("fraud, misrepresentation, and circumvention used to obtain a judgment are generally regarded as sufficient cause for the opening or vacating of the judgment," quoting approvingly from Southwest Slopes, Inc. v. Lum, 81 Haw. 501, 511, 918 P.2d 1157 (App. 1996), and in Matsuura v. E.I. du Pont de Nemours and Co., 102 Haw. 149, 157-158, 73 P.3d 687 (2003) ("HRCP Rule 60(b)(3) . . . reflects this court's preference for judgments on the merits over finality of judgments procured through fraud").

Where parties are substituted, the substitution does not change standing; HRCP Rule 25(c) substitutions are procedural, not substantive, altering no substantive rights. "The merits of the case and the disposition of the property are still determined with respect to the original parties." Moore's Federal Practice & Procedure (3d edition), Section 25.32.

2. Both actions should have been consolidated, having common issues of law and fact, allowing KKD and Fuchs to prove their interrelated case against HRB and KKP.

Identical standing questions are involved in both cases. This is in the second part of a foreclosure action, dealing with the foreclosure sale and its confirmation. Civil No. 11-1-1577-07 similarly had as its main focus identical standing issues as to the right to foreclose.

Hunt through KKP and HRB indemnified the three banks, inducing them to break their agreement with KKD and Fuchs, parties to not only the Acquisition Agreement but also the original Loan PSA, without whose consent there would never have been any purchase and sale to HRB in the first place. Nevertheless, Judge Ayabe denied consolidation and approved the sale of the property while the other case on its merits was still pending.

3. Genuine issues of material fact existed precluding summary adjudication, which however Judge Ayabe granted in awarding confirmation of sale over objections as to adequacy of price and in dismissing the new action against HRB and KKP based on his interpretation of documents that were being challenged for fraud and rescission.

First, Judge Ayabe quickly dismissed the Complaint in Civil No. 11-1-1577-07, entering final judgment contrary to existing Hawaii Supreme Court case law, since an amended pleading had been filed before his written dismissal order was entered, and then Judge Ayabe dismissed the First Amended Complaint finding, contrary to the documentary evidence presented, that Fuchs was supposedly not a party to either the Acquisition

Agreement or the original Loan PSA and that the absence of his signing off on the escrow cancellation and release form as Guarantor was therefore not needed.

On the other hand, the First Amended Complaint, *inter alia*, sought rescission of the KKD escrow cancellation and release form that Judge Ayabe relied on, due to fraud.

Moreover, ambiguity or not, fraud or not, where several instruments are made at the same time (the First Amendment to the Acquisition Agreement made necessary by the parties as a condition at the last minute for closing the original Loan PSA) and have the same relation to the same subject matter, for more than a century as a matter of law in Hawaii they must be considered parts of one transaction and construed together in ascertaining the agreement between parties, Johnson v. Tisdale, 4 Haw. 605 (1883).

Where several writings are made as part of one transaction, executed between the same parties, the law in Hawaii Courts remains to this day that they must be read together as one instrument, Hayashi v. Chong, 2 Haw. App. 411, 634 P.2d 105 (1981).

Separate agreements must be read together as to parties and performances when their relationship or connection to each other appears on their face evidencing internal unity, Glockner v. Town, 42 Haw. 485 (1958). Judge Ayabe's dismissal Orders to the contrary contain absolutely no supporting authority whatsoever, as there is none whatsoever.

A promissory note as a matter of law is, moreover, a negotiable instrument governed by the Uniform Commercial Code, and the decision of this Court in Cosmopolitan Financial Corporation v. Runnels, 2 Haw. App. 33, 625 P.2d 390 (1981), held that oral promises are admissible), which Judge Ayabe's decisions have further overlooked. This Court in Runnels, 2 Haw. App. at 38-39, adopted a "liberal approach towards the receipt of extrinsic evidence" *even in the absence of any evidence of fraud* ("As between immediate parties, however, all evidence, whether written or oral, whether of conditions precedent or subsequent, should be admitted to determine what the parties understood the true contractual relationship to be."

"Fraud in the inducement" to enter into a written agreement may be shown by parol or extrinsic evidence in Hawaii trial courts, thus permitting the trier of fact to set aside such agreements, which defense Judge Ayabe ignored, Honolulu Federal Savings and Loan Association v. Murphy, 7 Haw. App. 196, 201, 753 P.2d 807 (1988).

Subsequent to Runnels, the Hawaii Supreme Court in Fujimoto v. Au, 95 Haw. 116, 157, 19 P.3d 699 (2001), reaffirmed that governing evidential principle that parol evidence is

clearly admissible where fraud in the inducement is alleged: "Fraud vitiates all agreements as between the parties affected by it. . . . The general rule is that '[i]f a party's misrepresentation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable.'"

Judge Ayabe's decisions were clearly contrary to the recently published decision of the Hawaii Supreme Court in Ralston v. Yim, 129 Hawaii 46, 292 P.3d 1276 (2013).

4. Judge Ayabe was a disqualified jurist with numerous appearances of impropriety in violation of due process and his orders and judgments should be set aside.

Section 601-7(a)(1) of the Hawaii Revised Statutes understandably requires that judges shall be disqualified in any case in which a judge has "more than a *de minimis* pecuniary interest," *de minimis* being undefined in the statute.

Additionally, Rule 2.11(a)(2)(C) and 2.11(a)(3) of the Hawaii Revised Code of Judicial Conduct (Exh. 76; RP (12) 28-33) requires that judges shall be disqualified in situations that create the appearance of impropriety, a broader ethical standard, including but not limited to where a judge or a family member "has more than a *de minimis* interest that could be substantially affected by the proceeding" or an "economic interest in the subject matter."

While federal courts and other state courts whose jurisdictions have adopted somewhat identical ethical requirements have disqualified judges possessing even one share of stock in a corporate party, Judge Ayabe failed to explain why the ethical result should be any different here than in the federal system, and depend appearance-wise on which side of Punchbowl Street, for instance, one happens to stand on.

To the contrary, for nearly 100 years Hawaii appellate case law has held that any stock ownership in a party automatically required recusal or disqualification, Thomson v. McGonagle, 33 Haw. 565 (1935) ("it is settled that a stockholder of a corporation has a 'pecuniary interest' in an action in which the corporation is interested in its individual capacity . . . and it follows that Mr. Justice Peters is disqualified to sit in this cause").

As the U.S. Supreme Court held in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 865 (1988), where a jurist holds an financial interest in a party before him "we must continually bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice".' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623,

625, 99 L.Ed. 942 (1955) * * * * to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."

Nor can a judge merely divest himself or herself of such stock and continue to preside, Shell Oil Co. v. United States, 672 F.3d 1283, 1291 (Fed. Cir. 2012) ("because the judge's wife owns shares in the parent company of Texaco and Union Oil . . . requires recusal" and "the judge's decision to *sua sponte* sever Texaco and Union Oil did not satisfy the statutory requirement of disqualifying himself").

Judge Ayabe's family's BOH 600-share stock ownership can hardly be considered *de minimis* in any event considering that it reportedly has a value of nearly $30,000, which is a significant percentage of a Hawaii Circuit Court Judge's entire annual salary.

Other States, moreover, that have adopted the same Model Code of Judicial Conduct as has Hawaii, have held that the "appearance of impropriety" standard supersedes any *de minimis* inquiry where disqualification is based on stock ownership.

Thus, the Arkansas Supreme Court rejected a *de minimis* excuse in Huffman v. Arkansas Judicial Discipline and Disability Commission, 344 Ark. 274, 281-282, 42 S.W.3d 386, 344 (2001) ("while there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a minuscule percentage of the total stock existing in Wal-Mart, this analysis on the *de minimis* value of an economic interest mentioned in Canon 3E(1)(c) ignores the more basic issue of appearance of impropriety").

Similarly, the Georgia Court of Appeals rejected a *de minimis* excuse in White v. Suntrust Bank, 245 Ga. App. 828, 538 S.E.2d 889 (2000) ("a judge who holds stock in a corporation that is a party to a suit should recuse herself from the case"), even though its Code of Judicial Conduct is identical to that in Hawaii (*e.g.*: "judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where: . . . the judge . . . is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding").

BOH was in fact the principal and only Plaintiff in the foreclosure action, Civil No. 09-1-2523-10, when it began and when summary judgment for foreclosure was entered.

As the New Hampshire Supreme Court held in Blaisdell v. City of Rochester, 135 N.H. 598, 593-594, 609 A.2d 388 (1992), "it is the judge's responsibility to disclose, *sua sponte*, all

information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned. . . . [There is no] obligation to investigate the judge's impartiality; * * * * we hold that a judge's failure to disclose to the parties the basis for his or her disqualification under Canon 3C will result in a disqualification of the judge."

Here, all of the many appearances of impropriety and all of the contrary to law rulings below, taken together, compelled disqualification (Exh. 83, RP (16) 722, 739); *see, e.g.* Peters v. Jamieson, 48 Haw. 247, 264, 397, P.2d 575 (1964) ("collectively considered").

5. Judge Ayabe violated the constitutional rights of KKD and Fuchs, awarding a deficiency judgment in Civil No. 09-1-2523-10 in an amount calculated by subtracting the net proceeds of sale from the amount the foreclosing mortgagee otherwise lost, without after confirmation of sale holding a separate evidentiary hearing to determine what the fair market value of the property was at the time of sale and how much of an actual loss the foreclosing mortgagee actually suffered, denying to KKD and to Fuchs property rights protected pursuant to the fairness requirements of the due process clause of the Hawaii State Constitution.

Judge Ayabe determined the amount of the deficiency judgment here by merely using a calculator to subtract the net proceeds of sale from the amount found owed.

While earlier valuing the property at $16,000,000, which is the reason that Hunt belatedly demanded an additional $1,500,000 from KKD and Fuchs when BOH required $17,500,000 which Hunt paid, Hunt now has ownership of the property through KKP *and* an escalating now $24,000,000 deficiency judgment as an unearned and unjust enrichment windfall profit after having contracted with KKD and Fuchs to release the guaranties, through at rigged $10,000,000 credit bid, while potential competitive bidders were deterred by the overhanging $30,000,000 debt allegedly owed, KKP never lent out in the first place.

During the Great Depression, Hawaii Courts like courts in other jurisdictions grappled with the perceived unfairness of forcing a sale in a down economy. Ultimately, a common auction practice arose whereby an upset sale price was set at a judicially determined value.

The Hawaii Supreme Court in 1933 in Wodehouse v. Hawaiian Trust Co., 32 Haw. 835, 852-853 (1933), announced approved procedures for selling properties at a foreclosure sale and at confirmation, and our appellate courts interpreted Wodehouse to mean that "[t]he lower court's authority to confirm a judicial sale is a matter of equitable discretion" and "[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm." Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983).

The reasoning behind this rule is based partly on ensuring that neither party gets a windfall, and partly on upholding the stability of judicial sales. *See* Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983). The fair or true value of a property for purposes of awarding a deficiency judgment is a completely different issue however.

The Woodhouse procedure as applied to deficiencies ignores reality -- that mortgagees have the ability to credit bid for much more than the property is usually worth, thus scarring away competition and in effect "rigging" auction sales, enabling foreclosing mortgagees to recover property at less than fair market value, while at the same time using that artificial auction sales price to secure a windfall profit over and above what is actually owed by adding onto its below-market purchase a sizeable deficiency judgment.

At first, State courts nationally appear to have blindly allowed foreclosing mortgagees windfall profits through bloated deficiency judgments, concluding that otherwise it would be an unconstitutional impairment of capital and interference with the right to contract, viewing exclusively the return of money, and not property, to be what lenders had bargained for.

In 1941, the U.S. Supreme Court in Gelfert v. National City Bank of New York, 313 U.S. 221 (1941), finally gave authoritative approval to the constitutionality of States preventing "sacrificial prices" by regulating the amount of deficiency judgments.

Today, many States have passed anti-deficiency statutes requiring that after a foreclosure auction, the courts must hold a separate evidentiary hearing to determine the "fair value" of the foreclosed property which is not necessarily the "auction price" even if the "auction price" does not shock the conscience of the court. And more recently, State courts have not waited for state legislatures to pass anti-deficiency statutes, but have acted *on their own* to correct obvious injustices; *e.g.*:

In Pearman v. West Point National Bank, 887 S.W.2d 366, 368 (Ky. Ct. App. 1994), the Kentucky Court of Appeals refused to allow a mortgagee to recover any deficiency judgment whatsoever where as foreclosing mortgagee it had purchased the property at two-thirds of its actual value, had a large deficiency judgment, and then contracted to sell the property for slightly more than the amount of money it had in the property, concluding that the foreclosing mortgagee breached the covenant of good faith and fair dealing implied within every mortgage contract, resulting in non-enforcement of the deficiency; *see also* the

same result in First National Bank of Southeast Denver v. Blanding, 885 P.2d 324 (Colo. Ct. App. 1994) (lack of good faith bid by mortgage holder requires full adjustment of deficiency).

In Wansley v. First National Bank of Vicksburg, 566 So.2d 1218, 1224 (Miss. 1990), the Mississippi Supreme Court held that a foreclosing mortgagee must show more than just a difference between the net sale proceeds and the amount of the indebtedness, but must affirmatively show the property's fair value was insufficient to satisfy what the mortgagee had in the property, which requires both a prior determination of adequacy of auction price, as well as fair value of the property for deficiency purposes after confirmation.

Whereas, while an inadequate winning bid price may not be enough to defeat an auction sale, it is considered nevertheless grounds for denying in its entirety a request for a subsequent deficiency judgment; *see, e.g.*: In re Slizyk, 2006 WL 2506489 (Bankr. M.D. Fla.) ("the amount for which mortgaged property sells at during a properly conducted sale is neither conclusive as to the value of the property nor the right to a deficiency judgment"); *see also*, Barnard v. First National Bank of Okaloosa County, 482 So.2d 534 (Fla. 1986); Savers Federal Savings & Loan Association v. Sandcastle Beach Joint Venture, 498 So.2d 519 (Fla. 1986); see also for a Hawaii-based historical analysis, Georgina W. Kwan, Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i, 24 U. Haw. L. Rev. 245, 261 (2001). Otherwise, due process is violated.

In Fuentes v. Shevin, 407 U.S. 67, 81 (1972), the U.S. Supreme Court held that one purpose of the Due Process Clause is "to protect [a person's] use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property." The U.S. Supreme Court recognized that there may be procedures set up to return wrongfully taken property, or provide damages for the taking, but "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 82.

A timely hearing before property is taken from an individual is a fundamental principle of due process; *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976). The well known test announced in Eldridge determines the adequacy of a pre-deprivation process by balancing "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

When this framework is applied to the Hawaii procedure for determining deficiencies after confirmation of sale, it is obvious that due process is violated. The private interest affected is an individual's money, the most literal and unassailable of all the definitions of "property" inherent within due process protections against confiscation and forfeiture.

Furthermore, as described above, there is no procedure in Hawaii to challenge, at a subsequent evidentiary hearing, the value of property received by a foreclosing mortgagee bidding at its own auction. This opens the door for a myriad of fraudulent practices.

A foreclosing mortgagee can easily sell the rights to foreclose to a third party which low balls the bidding at an auction, exactly what occurred here, thereby obtaining property at a steep discount. The same third party, as KKP, can then obtain a deficiency judgment based on the discounted property price, rather than the actual value of the property received, and based on the original debt, rather than the amount paid to acquire the debt.

Hawaii Courts has always protected procedural due process: Bank of Hawaii v. Kunimoto, 91 Haw. 372, 388, 984 P.2d 1198 (1999); State v. Christian, 88 Haw. 407, 424, 967 P.2d 239 (1998); Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 243, 953 P.2d 1315 (1998); Kerman v. Tanaka, 75 Haw. 1, 22, 27-28, 856 P.2d 1207, *cert. denied*, 510 U.S. 1119 (1993); Evans v. Takao, 74 Haw. 267, 282-283, 842 P.2d 255 (1992); Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 261, 378, 773 P.2d 250 (1989); In re Smith, 68 Haw. 466, 471, 719 P.2d 397 (1986); Bank of Hawaii v. Horwoth, 71 Haw. 204, 216, 787 P.2d 674 (1990); KNG v. Kim, 107 Haw. 73, 80, 82, 110 P.3d 397, *reconsideration denied*, 107 Haw. 348, 113 P.3d 799 (2005).

Moreover, "[A]lthough a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

The application of substantive due process has been the source of much debate amongst the courts. Justice Scalia, while a judge for the Court of Appeals for the Third

Circuit, explained that there are two types of state action that may be challenged under this theory, legislative and non-legislative acts. Nicholas v. Pennsylvania State University, 227 F.3d 133, 142 (3d Cir. 2000). In Nicholas, the Court held:

> [W]hen a plaintiff challenges the validity of . . . non-legislative state action . . . , we must look, as a threshold matter, to whether the property interest being deprived is "fundamental" under the Constitution. If it is, then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of procedures used.

The Nicholas Court also pointed out that a legislative act "that burden[s] certain 'fundamental' rights may be subject to stricter scrutiny." *Id.* (citing Alexander v. Whitman, 114 F.3d 1392, 1403 (3d Cir.1997)).

The U.S. Supreme Court has further recognized that allowing a foreclosing entity to collect a double recovery is constitutionally impermissible, stating "[m]ortgagees are constitutionally entitled to no more than payment in full." Gelfert, 313 U.S. at 233.

Addressing deficiency judgments, the U.S. Supreme Court noted that "[t]he 'fair and reasonable market value' of the property has an obvious and direct relevancy to a determination of the amount of the mortgagee's prospective loss," *id.* at 234. Concerning determining a deficiency judgment the U.S. Supreme Court concluded, *id.* at 232-233:

> [T]he price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

Various States have addressed the distinction when the issue is not the auction price, but the amount of any deficiency judgment when confronted with the inherent unfairness of a situation in which a mortgagee bids less than the fair value of a property, obtains a deficiency judgment from the borrower, and then turns around and sells the property, garnering more than what the borrower owed in the first place, especially a loan

shark who purchases an assignment in default. The landmark case is Rainer Mortgage v. Silverwood Limited, 163 Cal. App. 3d 359, 366-367, 209 Cal. Rptr. 294, 297-298 (1985):

> [I]t is clear the Legislature's purpose in inserting the "fair value" language into Code of Civil Procedure section 726, subdivision (b) was to protect the defaulting mortgagor. (To do this, the Legislature found it necessary to credit the borrower with the intrinsic or underlying value of the property. The fair market value of the property was deemed an insufficient measure as circumstances might conspire to render valueless property which under normal conditions would have significant value. The Legislature therefore determined not to let the protection afforded a foreclosed mortgagor depend entirely on the vagaries of the marketplace. The mortgagor was to receive a credit for "the fair value of the property at the time of the sale (*irrespective of the amount actually realized at the sale*) ...." (*Cornelison v. Kornbluth*, supra, 15 Cal.3d at p. 601, 125 Cal.Rptr. 557, 542 P.2d 981.) (Italics added.) The "fair value" of foreclosed property is thus its intrinsic value.

E. CONCLUSION

For all of the reasons set forth above, Appellants respectfully request that the orders and judgments appealed from all be reversed, with the sincere hope that this Court will address the merits of this Consolidated Appeal in way that will benefit all borrowers in this State similarly situated so that some good will come out of all of the unfair morass that has drained their financial resources and Fuchs' emotional well being as well.

DATED: Honolulu, Hawaii; April 7, 2013.

Respectfully submitted,

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
ANDREW D. GOFF
RICHARD FORRESTER
Attorneys for Appellants
Ke Kailani Development LLC
and Michael J. Fuchs

STATEMENT OF RELATED CASES

CIVIL NO. 11-1-1577-07 GWBC

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS,

Plaintiffs,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

NO. CAAP-12-0000758

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company,

Plaintiff-Appellee,

vs.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually.

Defendants-Appellants,

DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Counterclaimants-Appellants,

vs.

BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J,

CASE NO. CAAP-12-0000070

CIVIL NO. 09-1-2523-10

JURISDICTIONAL APPEAL FROM THE:

1) ORDER GRANTING PLAINTIFFS' MOTION FOR SUBSTITUTION OF PARTIES, FILED DECEMBER 6, 2010, filed on December 30, 2010;

2) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR CONFIRMATION OF SALE, ALLOWANCE OF COSTS, COMMISSIONS AND FEES, DISTRIBUTION OF PROCEEDS, DIRECTING CONVEYANCE, AND FOR WRIT OF POSSESSION AND FOR DEFICIENCY JUDGMENT FILED ON JULY 8, 2011, filed on October 3, 2011;

3) JUDGMENT, filed on October 3, 2011;

4) WRIT OF POSSESSION, filed on October 3, 2011;

5) ORDER DENYING KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION TO CONSOLIDATE TWO RELATED CASES, CIVIL NO. 09-1-2523-10-BIA AND CIVIL NO. 11-1-1577-07 BIA, filed on December 19, 2011; and

(CAPTION CONTINUED ON NEXT PAGE)

Counterclaim Defendants-Appellants.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Third-Party Plaintiffs-Appellants,

vs.

MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986,

Third-Party Defendant,

and

ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R,

Third-Party Nominal Defendants.

6) ORDER DENYING DEFENDANTS KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR POST JUDGMENT RELIEF FILED OCTOBER 14, 2011, filed January 5, 2012.

(CAPTION CONTINUED ON NEXT PAGE)

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually,

Fourth-Party Plaintiffs-Appellants,

vs.

BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; and FINANCE FACTORS, LIMITED,

Fourth-Party Defendants-Appellees,

and

MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION,

Fourth-Party Defendants,

and

ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; and DOES S through Z,

Fourth-Party Nominal Defendants.

FIRST CIRCUIT COURT

The Honorable Bert I. Ayabe

Judge

(CAPTION CONTINUED ON NEXT PAGE)

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS,

Plaintiffs-Appellants,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; and BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership,

Defendants-Appellees,

and

GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CASE NO. CAAP-12-0000758

CIVIL NO. 09-2523-10

JURISDICTIONAL APPEAL FROM THE:

1) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT FILED NOVEMBER 15, 2011, filed on April 23, 2012;

2) JUDGMENT, filed on April 23, 2012;

3) ORDER DENYING KE KAILANI DEVELOPMENT, LLC AND MICHAEL J. FUCHS' MOTION BASED UPON NEWLY DISCOVERED EVIDENCE TO DISQUALIFY THE HONORABLE BERT I. AYABE FROM ALL PROCEEDINGS IN CIVIL NO. 09-1-2523-10, FILED JUNE 12, 2012, filed on July 30, 2012; and

4) COURT'S MINUTE ORDER DENYING DEFENDANTS KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' NON-HEARING MOTION, BASED ON MANIFEST ERROR AND NEWLY DISCOVERED ADMISSIONS AGAINST INTEREST, FOR RECONSIDERATION AND REHEARING (A) OF THE ENTRY OF THIS COURT'S APRIL 23, 2012 (1) ORDER GRANTING PLAINTIFF KE KAILANI PARTNERS, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT FILED NOVEMBER 15, 2011, AND (2) JUDGMENT THEREON, AND (B) THE REFUSAL OF THIS COURT TO CONSOLIDATE THIS CASE WITH RELATED CASE CIVIL NO. 11-1-1577-07 BIA FILED AUGUST 9, 2012, filed on August 9, 2012 [no written order having

(CAPTION CONTINUED ON NEXT PAGE)

) been filed (appealable pursuant to HRAP
) Rule 4(a)(3)), the Motion for
) Reconsideration having been filed on May
) 3, 2012 and not having been disposed of
) within 90 days thereafter by August 1,
) 2012, was considered denied, with the
) time to file a notice of appeal pursuant to
) HRAP Rule 4(a)(1) otherwise having
) expired on August 31, 2012]
)
)
) FIRST CIRCUIT COURT
)
) The Honorable Bert I. Ayabe
) Judge
)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was duly served on the date first written below through the JEFS electronic system or by U.S. Mail to the following persons:

Terence J. O'Toole, Esq.
Sharon V. Lovejoy, Esq.
733 Bishop Street, Suite 1900
Honolulu, Hawaii 96813
Telephone: (808) 537-6100
Email: totoole@starnlaw.com

Attorneys for Appellee
Ke Kailani Partners, LLC,
Bank of Hawaii, Central
Pacific Bank, and
Finance Factors, Limited

Shelby Anne Floyd, Esq.
David D. Higgins, Esq.
65-1241 Pomaikai Place, Suite 2
Kamuela, Hawaii 96743
Telephone: (808) 885-6011
Email: sfloyd@ahfi.com

Attorneys for Mary Miles Morrison, Robert Batinovich, and Barry and Carolyn Shames

Christian P. Porter, Esq.
R. Laree McGuire, Esq.
841 Bishop Street, Suite 1500
Honolulu, Hawaii 96813
Telephone: (808) 526-3011
Email: cporter@btpqlaw.com

Attorneys for Ke Kailani Community Association, Mauna Lani Resort Association, and The Association of Villa Owners of Ke Kailani

George W. Van Buren, Esq.
745 Fort Street, Suite 1950
Honolulu, Hawaii 96813
Telephone: (808) 522-0420
Email: gvb@vcshawaii.com

Court-Appointed Foreclosure Commissioner

David M. Louie, Esq.
State Attorney General
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1282
Email: david.m.louie@hawaii.gov

HRAP Rule 44 Courtesy Copy (State Constitutional Questions)

Lex R. Smith, Esq.
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813
Telephone: (808) 539-8700
Email: lsmith@ksgl.com

Courtesy Copy to Attorney for Bays Deaver Lung Rose & Holma (Defendant in Related Case – Civil No. 11-1-1577-07)

DATED: Honolulu, Hawaii; April 8, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
ANDREW D. GOFF
RICHARD FORRESTER
Attorneys for Appellants