

**Bank of Am., N.A. v. Miyake**

Intermediate Court of Appeals of Hawai'i

March 30, 2017, Decided; March 30, 2017, Electronically Filed

NO. CAAP-15-0000944

**Reporter**

2017 Haw. App. LEXIS 126 \*; 139 Haw. 426; 391 P.3d 1248; 2017 WL 1179505  
CIRCUIT. (CIVIL NO. 12-1-0676).

BANK OF AMERICA, N.A.,  
SUCCESSOR BY MERGER TO BAC  
HOME LOANS SERVICING, LP FKA  
COUNTRYWIDE HOME LOANS  
SERVICING LP, Plaintiff-Appellee, v.  
BRIAN SHIGEMI MIYAKE, Defendant-  
Appellant, and MILILANI TOWN  
ASSOCIATION, Defendant-Appellee,  
and JOHN DOES 1-50; JANE DOES 1-  
50; DOE PARTNERSHIPS 1-50; DOE  
CORPORATIONS 1-50; DOE  
ENTITIES 1-50; DOE  
GOVERNMENTAL UNITS 1-50,  
Defendants

**Notice:** SUMMARY DISPOSITIONAL  
ORDERS OF THIS COURT DO NOT  
CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED. SEE HAWAII  
RULES OF APPELLATE PROCEDURE  
FOR GUIDELINES RESTRICTING  
PUBLICATION AND CITATION OF  
SUMMARY DISPOSITIONAL  
ORDERS.

PUB-STATUS: PUBLISHED IN TABLE  
FORMAT IN THE HAWAII REPORTER.

PUBLISHED IN TABLE FORMAT IN  
THE PACIFIC REPORTER.

**Prior History:** [\*1] APPEAL FROM  
THE CIRCUIT COURT OF THE FIRST

**Core Terms**

foreclosing, summary judgment motion,  
Foreclosure, mortgage, entitlement,  
commencement, parties

**Counsel:** Gary Victor Dubin and  
Richard T. Forrester, for Defendant-  
Appellant.

David B. Rosen, for Plaintiff-Appellee.

**Judges:** By: Fujise, Presiding Judge,  
Reifurth and Ginoza, JJ.

**Opinion**

**SUMMARY DISPOSITION ORDER**

Defendant-Appellant Brian Shigemi  
Miyake (Miyake) appeals from the  
"Findings of Fact and Conclusions of  
Law; Order Granting Plaintiff's Motion  
for Summary Judgment and for  
Interlocutory Decree of Foreclosure  
Filed February 21, 2014" and the  
"Judgment" entered on November 18,  
2015 by the Circuit Court of the First  
Circuit (Circuit Court).<sup>1</sup>

<sup>1</sup> The Honorable Bert I. Ayabe presided.

On appeal, Miyake alleges that the Circuit Court erred in granting summary judgment in favor of Plaintiff-Appellee Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP formerly known as Countrywide Home Loans Servicing LP (Bank of America) because (1) a genuine issue of material fact remained as to whether Bank of America had standing to foreclose on the subject mortgage and (2) the Circuit Court should have given Miyake more time to conduct discovery pursuant to Hawai'i Rules of Civil Procedure Rule 56(f).

After due consideration of the point raised, the parties' arguments, the record on appeal, and applicable legal [\*2] authorities we resolve Miyake's points on appeal as follows.

The Hawaii Supreme Court recently reiterated that "[i]n order to prove entitlement to foreclose, the foreclosing party must demonstrate that all conditions precedent to foreclosure under the note and mortgage are satisfied and that all steps required by statute have been strictly complied with." Bank of America, N.A. v. Reyes-Toledo, No. SCWC-15-0000005, 139 Haw. 361, 390 P.3d 1248, 2017 Haw. LEXIS 37, 2017 WL 772603 at \*4 (Feb. 28, 2017). Furthermore, "[a] foreclosing plaintiff must also prove its entitlement to enforce the note and mortgage." *Id.* "A foreclosing plaintiff's burden to prove entitlement to enforce the note overlaps with the requirements of standing in foreclosure actions as 'standing is

concerned with whether the parties have the right to bring suit.'" 2017 Haw. LEXIS 37, [WL], at \*5 (brackets omitted) (quoting Mottl v. Miyahira, 95 Haw. 381, 388, 23 P.3d 716, 723 (2001)). Because "standing relates to the invocation of the court's jurisdiction, it is not surprising that standing must be present at the commencement of the case." Reyes-Toledo, 2017 Haw. LEXIS 37, [WL] at \*5. A plaintiff who does not have standing to enforce the note that has been defaulted on also does not have standing to foreclose on the mortgaged property. See 2017 Haw. LEXIS 37, [WL] at \*5.

Like the foreclosing bank in Reyes-Toledo, Bank of America attached two documents to its [\*3] motion for summary judgment to demonstrate that it possessed the subject Note: (1) a declaration of Lisa K. Townsend-Brown (Townsend-Brown), whereby Townsend-Brown declared that Bank of America, "directly or through an agent, has possession of the promissory note" and (2) the Note, which was indorsed in blank. Neither document establishes Bank of America had possession of the Note at the commencement of this action. Because Bank of America failed to meet its burden of demonstrating that it was entitled to judgment as a matter of law, the Circuit Court erred in granting Bank of America's motion for summary judgment. See Reyes-Toledo, 2017 Haw. LEXIS 37, [WL] at \*7.<sup>2</sup>

<sup>2</sup> Because we hold that the Circuit Court erred in granting Bank of America's motion for summary judgment, we need not

Therefore,

IT IS HEREBY ORDERED that the "Findings of Fact and Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment and for Interlocutory Decree of Foreclosure Filed February 21, 2014" and "Judgment" both entered on November 18, 2015 by the Circuit Court of the First Circuit are vacated and this case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, March 30, 2017.

/s/ Alexa D.M. Fujise

Presiding Judge

/s/ Lawrence M. Reifurth

Associate Judge

/s/ Lisa M. Ginoza

Associate Judge

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address Miyake's remaining point on appeal.