No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE HOLDERS OF NOMURA HOME EQUITY LOAN, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-FM2,

Plaintiff-Appellee/Respondent,

vs.

MARK MARCANTONIO, GWEN MARCANTONIO, AND ALINA NAULT,

Defendants-Appellants/Petitioners,

and

MC&A, INC.; STATE OF HAWAII, HAWAII HEALTH SYSTEMS CORPORATION DBA; MAUI MEMORIAL MEDICAL CENTER; DIRECTOR, DEPARTMENT OF TAXATION, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; AND DOE GOVERNMENTAL UNITS 1-10,

Defendants.

On Appeal from the Circuit Court of the Second Circuit
(Civil No. 13-1-0718 (3) -- The Honorable Joseph E. Cardoza, Presiding)
To the Intermediate Court of Appeals of the State of Hawaii
(CAAP-17-0000807)

♦♦♦♦♦

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE DECEMBER 28, 2018 SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS AND ITS JANUARY 23, 2019 JUDGMENT

Gary Victor Dubin 3181
Frederick J. Arensmeyer 8471
Dubin Law Offices
55 Merchant Street, Suite 3100
Honolulu, Hawaii 96813
Telephone: (808) 537-2300
Facsimile: (808) 523-7733
E-Mail: gdubin@dubinlaw.net
E-Mail: farensmeyer@dubinlaw.net
Attorneys for Petitioners

A. QUESTIONS PRESENTED

Did the ICA commit grave errors of fact and law, in violation of Hawaii Supreme Court Case Law and the Due Process Clauses of the Hawaii State Constitution and the United States Constitution, requiring reversal pursuant to both HRS Section 602-59(b)(1) and (2), by its affirming the Circuit Court's granting of a foreclosure confirmation of sale following a summary judgment, denying Rule 60(b) relief:

1. where the Circuit Court lacked subject matter jurisdiction pursuant to the supervening decisions of this Court in Bank of America, N.A. v. Reyes-Toledo 1, 139 Haw. 361, 390 P.3d 1248 (2017), and U.S. Bank v. Mattos, 140 Haw. 26, 398 P.3d 615 (2017), misconstruing the earlier decision of this Court in Mortgage Electronic Registration Systems v. Wise,130 Haw. 11, 304 P.3d 1192 (2013), as requiring a different result; and

2. where the Circuit Court refused to set aside that summary judgment and prior clerk's defaults, despite the existence of exceptional circumstances constituting client abandonment by otherwise retained counsel?

B. SUMMARY OF PRIOR PROCEEDINGS

This Application for a Writ of Certiorari, following a Clerk's thirty-day extension requested by Petitioners on February 23, 2019, seeks review of the December 28, 2018 ICA *Summary Disposition Order* (Exhibit "A") and the January 23, 2019 ICA accompanying *Judgment on Appeal* (Exhibit "B") in CAAP-17-0000807, which affirmed the confirmation of a Second Circuit judicial foreclosure sale following the Circuit Court's refusal to set aside its Clerk's prior entries of default and its prior summary judgment order and decree of foreclosure entered as a result of client abandonment and just prior to a dramatic supervening change in Hawaii Supreme Court caselaw.

C. STATEMENT OF THE CASE

This is a judicial foreclosure action filed by Respondent ("HSBC") in the Second Circuit Court on Maui on June 25, 2013 seeking to foreclose on a March 3, 2006 mortgage loan on residential real property located in Makawao in the County of Maui (Exhibit 1, Record, at 38-82).

Petitioners ("Marcantonio") were served with the Complaint and Summons, and failing to answer, entries of default by the Clerk were entered against each of them on March 12, 2014 (Exhibit 2, Record, at 157-171).

HSBC filed a motion for summary judgment on December 2, 2014 (Exhibit 3, Record, at 179-332), containing a sole supporting Declaration of Ryan P. Floyd (within Exhibit 3, *supra*, Record, at 189-194), said to be a "Contract Management Coordinator" of Ocwen Loan Servicing, LLC, Servicer for HSBC, attempting to attest to the relevant loan documents although there had been several servicers of the Marcantonio loan before then.

No parties other than HSBC appearing at a telephonic hearing held on January 21, 2015, the lower court granted summary judgment and entered a Rule 54(b)/Rule 58 judgment on March 11, 2015 (Exhibits 4 and 5, Record, at 350-363 and 364-366).

On March 14, 2016, the undersigned, newly retained, entered an appearance below on behalf of Marcantonio (Exhibit 6, Record, at 443-446) and filed a Rule 55(c)/Rule 60(b) nonhearing motion to set aside the Clerk's entries of default and the related summary judgment of foreclosure (*see* Exhibit 7, HRCP 55(c) and 60(b) Motion, Record, at 452-474), based, *inter alia*, on two grounds:

1. that HSBC had not proven it owned the mortgage loan at the time the lawsuit was filed, and therefore had no standing to foreclosure; Mr. Floyd's supporting Declaration, *supra*, Exhibit 3 (Record, at 189-194), moreover lacked personal knowledge of the recordkeeping of prior loan servicers of which they were many, having claimed to have only seen the paperwork of his employer, nor was he the custodian of records, not able moreover to attest on personal knowledge to either the existence of a loan default or even the service of a notice of default:

> I am the Contract Managing Coordinator for Ocwen Loan Servicing . . . the servicer for HSBC. . . ; I have personal knowledge of the facts and matters stated herein based on my review of . . . Plaintiff's records and documents relating to this case . . . .
> According to the Ocwen records, Plaintiff is in possession of the original promissory note . . . endorsed to Plaintiff . . . ; the Mortgage was assigned to Plaintiff . . . ; the account history for the Loan in the Ocwen Records shows that . . . written notice was sent to Defendants concerning the payment default . . . attached hereto as Exhibit 4 [found within the motion's Exhibit 3, *supra*, Record at 234-

> 236, allegedly sent on the letterhead of a prior servicer, "Litton Loan Servicing," without having been marked "return receipt requested" and not to be confused with the equally unsworn fair debt collection practices act notice set forth in the motion's Exhibit 7]; . . . Defendants failed to timely cure the default.

2. that Marcantonio had hired a Hawaii attorney, Stuart E. Ragan, after being served with the Complaint, paying him a $4,900 retainer on August 14, 2013 before their answer was due (Exhibit 7, Record, at 469):

STUART E. RAGAN

ATTORNEY AT LAW

55 N. CHURCH STREET, SUITE #5 • WAILUKU, HI 96793 • PHONE: (808) 879-3352 • FAX: (808) 426-7204

PAYMENT RECEIPT

ON AUGUST 14, 2013 I, KIERSTEN ANDERSON, HAVE RECEIVED $4900.00 VIA CASH FROM MARK MARCANTONIO ON BEHALF OF THE LAW OFFICE OF STUART E. RAGAN.

KIERSTEN K. ANDERSON

MARK MARCANTONIO

Yet it was only after summary judgment was granted did they learn that their prior attorney had done nothing whatsoever to represent them, unknown to them not even entering an appearance in the case, filing no answer nor any opposition to summary judgment, upon whom they had been relying.

In his supporting Declaration (see Original Declaration, Exhibit 8, Record, at 495-500), Mark Marcantonio set forth under oath the details of how they were completely abandoned by their retained attorney:

> On August 14, 2013 we paid The Law Offices of Stuart E. Ragan $4900.00 as a down payment for Mr. Ragan's retainer. . . .
> A true and correct copy of the retainer receipt is attached . . . .
> We did not hear from Mr. Ragan for awhile and assumed he was working on our case.
> Around December of 2014, we received notice of the Plaintiffs MSJ.
> We contacted Ocwen Loan Servicing and was told by a representative that our property was not being foreclosed on.

> Around June 2015, we contacted Mr. Ragan and was told that there was nothing they could do since the Judgment was granted. Shortly after, Mr. Ragan had us sign a document releasing him as our attorney.
> Around the same time, I found out that Mr. Ragan never even entered an appearance in this case.

The lower court, however, on July 6, 2016, denied the Marcantonio's motion to set aside the Clerk's entries of default on two grounds, first, that Marcantonio did not have a meritorious defense, and, second, that the default was not the result of excusable neglect (Exhibit 9, Record, at 529-534). That Order, however, was not certified as final.

Then, following this Court's 2017 decisions in Reyes-Toledo 1 and Mattos, *supra*, which exactly paralleled in reasoning and grounds for reversal what Marcantonio had steadfastly argued to the lower court in his Rule 55(c)/Rule 60(b) motion earlier, Marcantonio on September 18, 2017, filed a renewed motion to set aside the summary judgment based on that dual intervening authority which was *jurisdictional*, notwithstanding the Clerk's entries of default (Exhibit 10, Record, at 640-649), Marcantonio seeking to block confirmation of sale.

The lower court nevertheless on October 2, 2017, after a hearing on August 9, 2017 (Official Transcript, Exhibit 11), granted Confirmation of Sale (Exhibit 12, Record, at 857-866) and Judgment (Exhibit 13, Record, at 867-869), but asked HSBC to wait on executing the confirmation order until the Reyes-Toledo 1/Mattos motion could be briefed and heard.

And then, after two more hearings, held on October 14, 2017 (Official Transcript, Exhibit 14) and on October 25, 2017 (Official Transcript, Exhibit 15), the lower court concluded that Reyes-Toledo 1 did not apply solely because the undated endorsement on the note was a "special endorsement," and that Mattos did not apply because it was not jurisdictional; see *id*. page 14, lines 5-22.

The lower court then denied that Marcantonio's intervening authority Motion on January 30, 2018 (Exhibit 16).

This Appeal challenges the order confirming sale opposed on the same Reyes-Toledo 1/Mattos grounds, and also objects to confirmation of sale on the additional basis that the Clerk's entries of default should not be in any way considered an obstacle

to applying Reyes-Toledo 1/Mattos as grounds for setting aside all orders and judgments in the case because of client abandonment pursuant to HRCP Rule 60(b)(6), *infra*.

Marcantonio filed a notice of appeal on November 1, 2017 (Record, at 889-906). HSBC moved to dismiss this Appeal on February 5, 2018 for alleged lack of appellate jurisdiction, which motion the ICA correctly denied on March 29, 2018 (Exhibit 17), thereafter, however, inconsistently committing grave error by affirming the lower court orders and judgment (Exhibits "A" and "B", *supra*) on the grounds that (1) pursuant to this Court's earlier decision in Wise, *supra*, *res judicata* blocked the applicability of Reyes-Toledo 1 and Mattos and (2) despite reliance upon retained counsel and complete client abandonment, Marcantonio had received notice of the summary judgment hearing.

D. REASONS WHY CERTIORARI SHOULD BE GRANTED

There are six major contradictions in the ICA Summary Disposition Order, which highlight six independent yet to some extent interrelated reasons why this Court's review and reversal are mandatorily required, paralleling Petitioner's six major points on appeal listed above, lest inconsistency be thought to be an appellate virtue when affecting the lives of Hawaii residents.

1. Reyes-Toledo 1 and Mattos Require Reversal Notwithstanding Wise

HSBC below mistakenly argued that even if the underlying summary judgment was void, all of that was somehow irrelevant as to confirmation of sale because the superior doctrine of *res judicata* somehow protected even fraudulent judgments or judgments where a prior court had even lacked subject matter jurisdiction in the first place.

HSBC relied on several such prior rulings of the ICA, which *res judicata* argument however on its face contradicts common sense, the ICA having nonetheless come to such a surprising conclusion at the time in three unpublished summary dispositions in HSBC Bank USA v. Collman, 2016 Haw. App. LEXIS 376 (2016), Bank of America v. Panzo, 2017 Haw. App. LEXIS 129 (2017), and Nationstar Mortgage LLC v. Akepa Properties, LLC, 2017 Haw. App. LEXIS 150 (2017), interpreting as authority the earlier decision of this Court in Wise, *supra*, as having supposedly announced a

blanket rule preventing a collateral attack on any unappealed foreclosure summary judgment whatsoever, as here (only not appealed because ironically Marcantonio at that time knew nothing about the entry of summary judgment due to client abandonment).

Wise, however, did not involve a jurisdictional challenge to a foreclosure decree and, before Reyes-Toledo 1 was decided subsequently, standing was not considered jurisdictional in foreclosure proceedings in this State (although the undersigned had argued to this Court many times that it was), otherwise earlier considered to be an affirmative defense with an insurmountable burden of proof cost-wise placed on the defendant borrower, GECC Financial Corp. v. Jaffarian, 79 Haw. 516, 904 P.2d 530 (App. 1995), *modified on other grounds*, 80 Haw. 118, 905 P.2d 624 (1995).

Wise, moreover, did not seek to overturn the foreclosure decree there based on lack of subject matter jurisdiction, and no Rule 60(b) motion had been filed, but instead the attack on confirmation of sale in Wise was based on the failure to identify MERS' principal, since MERS had sued as nominee without stating nominee *for whom*, and in Wise there was no standing-at-inception rule in our case law at that time, and Wells Fargo submitted a declaration at confirmation ratifying the actions of MERS. None of that is present here.

Similarly, HSBC in this appeal in arguing for dismissal earlier attempted to resupport Wise by relying on a similarly pre-Reyes-Toledo1/Mattos Territorial case decided 132 years ago, Luce v. Chin Wa, 5 Haw. 629 (1886), for the view that a defaulted defendant as here cannot set aside a judgment even if procured by fraud or even if entered by a court lacking in subject matter jurisdiction, again because supposedly due to *res judicata*. Yet none of those grounds was present or even discussed in Luce.

That however is not the case law in Hawaii. Earlier, when the precise issue whether a collateral attack on a final judgment that had not been appealed was permissible, the ICA in its 2008 published decision in Smallwood v. City and County of Honolulu, 118 Haw. 139, 185 P.3d 887 (2008), thought differently and said YES, not only in that opinion methodically summarizing the long-standing body of Hawaii case law emanating from both the ICA and from this Court that recognized specific

exceptions to the otherwise thoughtless total ban on collateral attacks on final judgments, concluding unanimously (*per* Judges Leonard, Nakamura, and Watanabe) that specifically where a lack of subject matter jurisdiction is alleged, collateral attacks on final judgments are permissible even where previously not appealed.

It is furthermore no excuse to claim that the Court's summary judgment in this case below survives jurisdictional scrutiny despite Reyes-Toledo 1/Mattos because it has been challenged in the second part of a foreclosure case, at time of sale confirmation, and specifically at the confirmation hearing.

Although a foreclosure case is divided into two parts, that division was done historically only for the purpose of allowing an immediate appeal from a summary judgment, *Beneficial Hawaii, Inc. v. Casey*, 98 Haw. 159, 45 P.3d 359 (2002), again ironically to establish a bright line to assist foreclosure defendants seeking to appeal, whereas the second part of every foreclosure case in Hawaii is the mere carrying out of the summary judgment, not a separate lawsuit.

The case number has not changed. The presiding judge has not changed. The parties are the same. Counsel are the same. The property is the same. Even the pleadings remain the same.

If a lower court has no jurisdiction to enter a decree of foreclosure because the foreclosing plaintiff provided no proof that it was other than a mere stranger to the proceeding, which is the very situation here pursuant to Reyes-Toledo 1/Mattos, then there is nothing to enforce and no jurisdiction to confirm a sale based thereon in law or in logic.

The otherwise misguided logic of such contrary reasoning as a matter of law was appropriately hopefully put to rest recently by the California Supreme Court in Yvanova v. New Century Mortgage Corp., 62 Cal. 4th 919, 365 P.3d 845, 857-858 (2016), presaging Reyes-Toledo 1/Mattos by one year:

> Nor is it correct that the borrower has no cognizable interest in the identity of the party enforcing his or her debt. Though the borrower is not entitled to object to an assignment of the promissory note, he or she is obligated to pay the debt, or suffer loss of the security, only to a person or entity that has actually been assigned the debt. (See Cockerell v. Title Ins. & Trust Co., supra, 42 Cal.2d at p. 292 [party claiming under an assignment must prove fact of assignment].) The

> borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security.
>
> It is no mere "procedural nicety," from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so. (Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title, supra, 63 Duke L.J. at p. 650.) "Such a view fundamentally misunderstands the mortgage contract. The mortgage contract is not simply an agreement that the home may be sold upon a default on the loan. Instead, it is an agreement that if the homeowner defaults on the loan, the mortgagee may sell the property pursuant to the requisite legal procedure." (Ibid., italics added & omitted.)
>
> The logic of defendants' no-prejudice argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee's sale — and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an "odd result" indeed. (Reinagel, supra, 735 F.3d at p. 225.) As a district court observed in rejecting the no-prejudice argument, "[b]anks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust." (Miller v. Homecomings Financial, LLC (S.D.Tex. 2012) 881 F. Supp. 2d 825, 832.)

And the contrary reasoning below by the ICA and the Circuit Court that Reyes-Toledo 1/Mattos did not apply in this case solely because the undated endorsement on the note was a special endorsement, unexplained by anyone with personal knowledge, makes no sense whatsoever, because such notes with additional endorsements and allonges are passed around in the underground secondary securitized mortgage market like a basketball in the NBA, the issue still being possession of the promissory note and entitlement to foreclosure at the time the foreclosure lawsuit was first filed, hardly satisfied by a copy of an undated special endorsement (see Official Transcript, Exhibit 15, page 14, lines 5-22).

Similarly the lower court's conclusion that Mattos itself did not apply because it was not "jurisdictional" was also flawed, since that is the means of proving Reyes-Toledo 1 jurisdiction; *ibid.*

To believe otherwise is to reject decades of Hawaii jurisdictional case law:

"It is well-settled that courts must determine as a threshold matter whether they have jurisdiction to decide the issues presented. If a party is found to lack standing, the court is without subject matter jurisdiction to determine the action." Hawaii Medical Association v. Hawai'i Medical Service Association, 113 Hawaii 77, 94, 148 P.3d 1179, 1196 (2006) (citations omitted).

This Court as well as the ICA have heretofore before this case at least continually reaffirmed that important timeless principle, for example, 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 again 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").

The need in particularly for redressing "fraud upon the court" in terms of false paperwork nevertheless submitted into evidence by attorneys was convincingly explained by Associate Justice Hugo Black in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), a case similarly involving false evidence, in our case documents shown to be defective on their face, nevertheless used by HSBC to begin the foreclosure lawsuit and then to foreclose (supported by a false Attorneys Affirmation):

> "[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, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Also, it is not only counsel for foreclosing plaintiffs that have a duty beforehand to inspect the adequacy of foreclosing paperwork as a matter of both professional ethics and now Hawaii statutory law, but trial judges themselves, who have been

reminded by this Court previously, have a duty to review the adequacy of the record at a summary judgment hearing even where there is no opposition, Arakaki v. SCD-Olanani Corp., 110 Haw. 1, 8-7, 129 P.3d 504 (2006).

For, Hawaii judicial policy favors disposition of litigation on the merits which did not happen here. 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").

And both the Circuit Court and the ICA conceded that had Marcantonio appealed the granting of summary judgment, the jurisdictional protections of both Reyes-Toledo 1 and Mattos would have been applicable and the alleged bar of Wise would have been inapplicable, which concession in and of itself should have resulted in an automatic reversal in favor of Marcantonio.

For, as highlighted in the next Section below, Marcantonio had no opportunity to appeal, never informed of the summary judgment by his retained counsel who had completely abandoned him, having even put Marcantonio in a default status by not filing an answer, and when his attorney was ultimately contacted by Marcantonio, after failing to even answer his telephone at first, he told Marcantonio, *supra*, that there was nothing he could do.

2. Client Abandonment Requires Reversal Notwithstanding Knowledge of Hearing

Attorneys' grossly negligent and deceptive actions, resulting in a default judgment against their client, create "exceptional circumstances" beyond a client's control, that merit relief from default judgments, Community Dental Services Group v. Tani, 282 F.3d 1164 (9th Cir. 2002).

Failure to inform a client of an adverse decision, for instance, as here, preventing a client from appealing, is an "exceptional circumstance" requiring reversal pursuant to Rule 60(b)(6), Foley v. Bitner, 793 F.3d 998, 1002-1003 (9th Cir. 2015):

> Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 614-

15, 69 S. Ct. 384, 93 L. Ed. 266 (1949). We apply this provision sparingly: "[a] party is entitled to relief under Rule 60(b)(6) where 'extraordinary circumstances prevented him from taking timely action to prevent or correct an erroneous judgment.'" Hamilton v. Newland, 374 F.3d 822, 825 (9th Cir. 2004) (alteration and citations omitted), Because a federal habeas petitioner has no Sixth Amendment right to an attorney and the attorney is the petitioner's agent, a habeas petitioner is "ordinarily bound by his attorney's negligence." Towery, 673 F.3d at 941. But the Supreme Court made clear in Maples v. Thomas that "when an attorney abandons his client without notice," the attorney has "severed the principal-agent relationship [and] no longer acts, or fails to act, as the client's representative." 132 S. Ct. 912, 922-23, 181 L. Ed. 2d 807 (2012). Thus, a petitioner may be excused from the consequences of his attorney's conduct where that conduct effectively severs the principal-agent relationship. See id. at 923 ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." (quoting Holland v. Florida, 560 U.S. 631, 659, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (Alito, J., concurring))).

* * * *

The district court clearly erred by finding that Foley was not abandoned by counsel. Greenberg failed to notify Foley that his petition had been denied, and he did not move to withdraw as counsel so that Foley could be served directly. Foley apparently believed Greenberg was representing him and, based on Greenberg's advice, expected a long delay before receiving a decision from the district court. Under these circumstances, Foley was effectively deprived of the opportunity to appeal the district court's denial of his habeas petition. We conclude that Greenberg's failure to communicate with Foley, which included discarding Foley's unanswered letters under the mistaken impression that Foley was no longer his client, severed the principal-agent relationship between Foley and Greenberg. This failure to communicate, to preserve Foley's ability to appeal, and to withdraw from the case clearly constituted abandonment. See Maples, 132 S. Ct. at 924-26 (holding that attorneys who left their law firm without notifying the petitioner they could not continue to represent him, withdrawing, or making arrangements for his continued representation abandoned the petitioner); Gibbs, 767 F.3d at 886 (holding that counsel's failure to notify petitioner of state supreme court's denial of his claim for post-conviction relief "constituted abandonment, and thereby created extraordinary circumstances sufficient to justify equitable tolling" of the federal habeas filing deadline).

Relief from a foreclosure decree is available in Hawaii under Rule 60(b)(6) in "exceptional circumstances," the ICA has held, based on attorney negligence even though not amounting to "excusable neglect," U.S. Bank National Association v. Salvacion, 2011 Haw. App. LEXIS 377, requiring at the very least careful consideration if not an evidentiary hearing, especially in Marcantonio's uncontested situation.

E. CONCLUSION

The demonstrated errors committed by the Circuit Court and by the ICA in this case are indeed grave, resulting in the otherwise loss of a family residence, worthy of review by this Court, the troubling facts here repeating themselves throughout all Islands continually in the experience of the undersigned.

First, the Judiciary needs clarification as to not only the supervening application as well as the retroactive application of Reyes-Toledo 1 and Mattos, but also as to what extent those two companion decisions are consistent or inconsistent with this Court's earlier decision in Wise, should Wise require reinterpretation.

Second, the Judiciary needs clarification concerning when client abandonment as here does or does not justify setting aside prior orders and judgments, in the interest of justice and in the interest of the Hawaii Judiciary's proper role in the supervision of Members of the Hawaii Bar practicing before it.

DATED: Honolulu, Hawaii; March 25, 2019.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Defendants-Appellants/
Petitioners Mark Marcantonio, Gwen
Marcantonio and Alina Nault

EXHIBIT "A"

NO. CAAP-17-0000807

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE HOLDERS OF NOMURA HOME EQUITY LOAN, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-FM2, Plaintiff-Appellee,
v.
MARK MARCANTONIO; GWEN MARCANTONIO;
Defendants/Cross-Claim Defendants/Appellants,
and
ALINA NAULT, Defendant-Appellant,
and
MC&A, INC.,
Defendant/Cross-Claim Plaintiff/Appellee,
and
STATE OF HAWAIʻI, HAWAII HEALTH SYSTEMS CORPORATION, dba MAUI MEMORIAL MEDICAL CENTER; and DIRECTOR, DEPARTMENT OF TAXATION, STATE OF HAWAIʻI,
Defendants-Appellees,
and
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 13-1-0718(3))

SUMMARY DISPOSITION ORDER
(By: Ginoza, Chief Judge, Fujise and Chan, JJ.)

Defendants-Appellants Mark Marcantonio (**Mark**), Gwen Marcantonio, and Alina Nault, the Marcantonio's daughter, (collectively, **the Marcantonios**) appeal from the "Judgment on Order Granting Plaintiff's Motion for Confirmation of Sale by

Commissioner" (**Judgment**) filed on October 2, 2017 in the Circuit Court of the Second Circuit (**Circuit Court**).[1] The Marcantonios also challenge the underlying "Order Granting Plaintiff's Motion for Confirmation of Sale by Commissioner" (**Order Confirming Sale**) filed on the same day in the Circuit Court in favor of Plaintiff-Appellee HSBC Bank USA, National Association, as Trustee for the Benefit of the Certificate Holders of Nomura Home Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM2 (**HSBC**).

On appeal, the Marcantonios argue that the Circuit Court erred because it lacked jurisdiction to confirm the sale of their property, as the previously entered foreclosure judgment was: (1) void pursuant to the Hawai'i Supreme Court's intervening decision in Bank of America, N.A. v. Reyes-Toledo, 139 Hawai'i 361, 390 P.3d 1248 (2017); (2) void pursuant to the Hawai'i Supreme Court's intervening decision in U.S. Bank N.A. v. Mattos, 140 Hawai'i 263, 98 P.3d 615 (2017); and (3) a result of abandonment by their counsel, which the Circuit Court should have deemed "excusable neglect" under Hawai'i Rules of Civil Procedure (**HRCP**) Rule 60(b)(1) or a separate basis under HRCP Rule 60(b)(6)[2] for reversal of the foreclosure judgment.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issued raised by the parties, we resolve the Marcantonios' points of error as follows and affirm.

On June 25, 2013, HSBC filed its Complaint seeking to foreclose upon the Marcantonios' property. The Marcantonios did not file an Answer.

On March 12, 2014, HSBC filed its request for entry of default against the Marcantonios, which was granted by the Clerk of the Court.

On December 2, 2014, HSBC filed its "Motion for Summary Judgment and Decree of Foreclosure Against all Defendants on Complaint filed June 25, 2013" (**motion for summary judgment**).

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[1] The Honorable Joseph E. Cardoza presided.

[2] The text of HRCP Rule 60(b) is provided *infra*.

On March 11, 2015, the Circuit Court entered its "Findings of Fact, Conclusions of Law and Order" granting HSBC's motion for summary judgment. The Circuit Court entered its corresponding Judgment (**foreclosure judgment**) on the same day. The Marcantonios did not appeal the foreclosure judgment.

On April 8, 2016, after a series of bankruptcy stays and more than a year after the foreclosure judgment had been filed, the Marcantonios, through new trial counsel, filed their "HRCP [Rule] 55(c) and 60(b) Motion to Set Aside Clerk's Entry of Default and Related Order Granting Default/Summary Judgment" (**4/8/16 Motion**).[3] The Marcantonios' motion was based on their prior trial counsel's alleged misconduct in the instant case. In a Declaration attached to the 4/8/16 Motion, Mark attested to the following: (1) on August 14, 2013, the Marcantonios paid the Law Offices of Stuart E. Ragan (**Ragan**) $4,900.00 as a retainer to

---

[3] HRCP Rules 55(c) and 60(b) provide, in relevant part:

> **Rule 55. Default.**
>
> . . . .
>
> (c) *Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).
>
> **Rule 60. Relief from Judgment or Order.**
>
> . . . .
>
> (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

represent them; (2) in December 2014, the Marcantonios contacted Ocwen Loan Servicing, HSBC's loan servicer, regarding HSBC's motion for summary judgment and were told that their property was not being foreclosed upon; and (3) in June 2015, the Marcantonios contacted Ragan and were told that there was nothing they could do since the foreclosure judgment was entered, and, around that time, the Marcantonios signed a document releasing Ragan as their counsel.

On July 6, 2016, the Circuit Court issued its Order denying the Marcantonios' 4/8/16 Motion.

On November 7, 2016, HSBC filed its "Motion for Confirmation of Sale by Commissioner" (**motion for confirmation of sale**).

On October 2, 2017, following another series of bankruptcy stays, the Circuit Court granted HSBC's motion for confirmation of sale in its Order Confirming Sale and subsequent Judgment.

On November 1, 2017, the Marcantonios timely appealed.

Points of Error (1) and (2): In Mortgage Electronic Registration Systems, Inc. v. Wise, a foreclosure action, the Hawai'i Supreme Court held that the defendants-mortgagors' failure to appeal from the foreclosure judgment in that case "barred challenges to [the foreclosing plaintiff's] standing under the doctrine of res judicata." 130 Hawai'i 11, 12, 304 P.3d 1192, 1193 (2013). There, the court reasoned that:

> foreclosure cases are bifurcated into two separately appealable parts: (1) the decree of foreclosure and the order of sale, if the order of sale is incorporated within the decree, and (2) all other orders. It is evident that orders confirming sale are separately appealable from the decree of foreclosure, and therefore fall within the second part of the bifurcated proceedings.

Id. at 16, 304 P.3d at 1197 (citations and internal quotation marks omitted). Because the defendants in Wise never challenged the foreclosure judgment, it became final and binding. Id. at 17, 304 P.3d at 1198. The supreme court further explained:

> we conclude that res judicata would preclude Petitioners from challenging Respondent's standing in their appeal from the order confirming sale, despite the general proposition

> that a lack of standing may be raised at any time. Under the doctrine of res judicata, challenges to Respondent's standing were subsumed under the foreclosure judgment, which had became final and binding.

Id. (emphasis added). Wise is directly on point with regard to the Marcantonios' appeal from the Judgment and the Order Confirming Sale, in that the Marcantonios cannot raise a standing objection where they did not appeal from the foreclosure judgment and it became final and binding. Id. at 19, 304 P.3d at 1200.

Although the supreme court also recently held that, in a foreclosure action, the foreclosing plaintiff must establish its standing at the commencement of the case, see Reyes-Toledo, 139 Hawai'i at 366-69, 390 P.3d at 1253-56, lack of standing does not render a court's ruling void under HRCP Rule 60(b)(4). "In the sound interest of finality, the concept of a void judgment must be narrowly restricted." Cvitanovich-Dubie v. Dubie, 125 Hawai'i 128, 141, 254 P.3d 439, 452 (2011) (citations omitted). As multiple Hawai'i cases have recognized, "[i]t has been noted that a judgment is void only if the court that rendered it lacked jurisdiction of either the subject matter or the parties or otherwise acted in a manner inconsistent with due process of law." Id. at 139, 254 P.3d at 450 (emphasis added) (quoting In re Hana Ranch Co., 3 Haw. App. at 146, 642 P.2d at 941); see also Dillingham Inv. Corp. v. Kunio Yokoyama Tr., 8 Haw. App. 226, 233-34, 797 P.2d 1316, 1320 (1990) ("[I]f a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgments, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned.") (citation omitted).

Here, there is no challenge based on personal jurisdiction, and an argument that a party lacks standing is not equivalent to challenging a court's subject matter jurisdiction. Rather, this foreclosure action is "'in the class of suits' that the [circuit] court 'has the general power to adjudicate.'" Cvitanovich-Dubie, 125 Hawai'i at 142, 254 P.3d at 453; see also

Nationstar Mortg. LLC v. Akepa Props. LLC, Nos. CAAP-15-0000407 and CAAP-15-0000727, 2017 WL 1401468 (Hawai'i App. Apr. 19, 2017) (SDO). In sum, the Marcantonios' first and second points of error are without merit.

Point of Error (3): When reviewed for abuse of discretion, as we must in the context of HRCP Rule 60(b) motions, see Ass'n of Apartment Owners of Wailea Elua, 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002), we hold that the Circuit Court did not err in denying the Marcantonio's 4/8/16 Motion with regard to their contention that they were abandoned by their counsel.

We note that HRCP Rule 60(b)(6)

> provides for extraordinary relief and is only invoked upon a showing of exceptional circumstances. Generally, relief granted under HRCP Rule 60(b) has been confined to those cases where either a default judgment or dismissal has been entered, reflecting a historical preference for cases to be decided in a trial on their substantive merits.

Isemoto Contracting Co., Ltd. v. Andrade, 1 Haw.App. 202, 205, 616 P.2d 1022, 1025 (1980) (citations omitted); see also Thomas-Yukimura v. Yukimura, 130 Hawai'i 1, 9, 304 P.3d 1182, 1190 (2013).

To support their third point of error, the Marcantonios' Opening Brief cites Foley v. Bitner, 793 F.3d 998 (9th Cir. 2015) and Community Dental Services Group v. Tani, 282 F.3d 1164 (9th Cir. 2002).

In Tani, the Ninth Circuit held that "[t]he circuits that have distinguished negligence from gross negligence in the [Federal Rules of Civil Procedure (**FRCP**) Rule 60(b)(6)] context have granted relief to the client where the default judgment was a result of his counsel's displaying 'neglect so gross that it is inexcusable.'" 282 F.3d at 1168 (emphasis added).[4]

Tani is distinguishable. In the instant case, each of the Marcantonios were individually served with a copy of the Complaint and Summons on July 12, 2013. However, according to

[4] HRCP Rule 60(b) is similar to Federal Rules of Civil Procedure Rule 60(b), except for some minor variations not relevant to this case. See Dubie, 125 Hawai'i at 142 n.15, 254 P.3d at 453 n.15.

Mark's Declaration attached to the 4/8/16 Motion, he and the other Marcantonios did not retain Ragan as their counsel until August 14, 2013, thirty-three days later. HRCP Rule 12(a)(1) requires that "[a] defendant shall serve an answer within 20 days after being served with the summons and complaint, except when service is made under Rule 4(c) and a different time is prescribed in an order of court under a statute or rule of court." No alternate time was established in this case. Therefore, it was the Marcantonios' delay, not Ragan's conduct, which prompted entry of default.

In Foley, the Ninth Circuit held that the district court erred in finding that incarcerated defendant Foley was not abandoned by counsel, based in part on Foley's counsel's declaration stating that he failed to inform Foley of the denial of his petition for writ of habeas corpus, of which Foley was otherwise unaware. 793 F.3d at 1003. The court concluded that "[u]nder these circumstances, Foley was effectively deprived of the opportunity to appeal the district court's denial of his habeas petition." Id.

The instant case is unlike Foley. According to the Mark Declaration, the Marcantonios "received notice of" HSBC's motion for summary judgment in December 2014. Furthermore, "Notice of Entry of Judgment" was mailed to the Marcantonios, personally, on March 11, 2015, the same day the foreclosure judgment was entered. Finally, according to Mark's Declaration, the Marcantonios did not contact Ragan until "[a]round June 2015," long after the thirty-day deadline to appeal from the March 11, 2015 judgment had passed. See Hawai'i Rules of Appellate Procedure Rule 4(a)(1) ("When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order."). The foregoing events do not rise to the level of "exceptional circumstances" justifying HRCP Rule 60(b)(6) relief.

Therefore, IT IS HEREBY ORDERED that the "Order Granting Plaintiff's Motion for Confirmation of Sale by Commissioner" and the "Judgment on Order Granting Plaintiff's Motion for Confirmation of Sale by Commissioner," both filed on October 2, 2017 in the Circuit Court of the Second Circuit, are affirmed.

DATED: Honolulu, Hawaiʻi, December 28, 2018.

On the briefs:

Gary Victor Dubin,
Frederick J. Arensmeyer,
for Defendants-Appellants.

David B. Rosen,
David E. McAllister,
Justin S. Moyer,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge

EXHIBIT "B"

NO. CAAP-17-0000807

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE HOLDERS OF NOMURA HOME EQUITY LOAN, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-FM2, Plaintiff-Appellee,
v.
MARK MARCANTONIO; GWEN MARCANTONIO;
Defendants/Cross-Claim Defendants/Appellants,
and
ALINA NAULT, Defendant-Appellant,
and
MC&A, INC.,
Defendant/Cross-Claim Plaintiff/Appellee,
and
STATE OF HAWAI'I, HAWAII HEALTH SYSTEMS CORPORATION, dba MAUI MEMORIAL MEDICAL CENTER; and DIRECTOR, DEPARTMENT OF TAXATION, STATE OF HAWAI'I,
Defendants-Appellees,
and
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 13-1-0718(3))

JUDGMENT ON APPEAL
(By: Ginoza, Chief Judge, for the court[1])

Pursuant to the Summary Disposition Order of this court entered on December 28, 2018, the "Order Granting Plaintiff's

[1] Ginoza, Chief Judge, Fujise and Chan, JJ.

Motion for Confirmation of Sale by Commissioner" and the "Judgment on Order Granting Plaintiff's Motion for Confirmation of Sale by Commissioner," both filed in the Circuit Court of the Second Circuit on October 2, 2017, are affirmed.

DATED: Honolulu, Hawai'i, January 23, 2019.

FOR THE COURT:

Chief Judge