

Lee v. Mortg. Elec. Registration Sys. (In re Mortg. Elec. Registration Sys.)

United States Court of Appeals for the Ninth Circuit

November 8, 2013; January 8, 2014 *, No. 13-15291, Submitted; February 3,
2014, Filed

No. 12-16457, No. 13-15291

Reporter

555 Fed. Appx. 661 *; 2014 U.S. App. LEXIS 2049 **; 2014 WL 351358

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)(C).

In re: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., JUANITA PUALANI LEE, Plaintiff - Appellant, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; COUNTRYWIDE BANK FSB, Defendants - Appellees. JUANITA FAYE PUALANI LEE, individually and on behalf of all those similarly situated, Plaintiff - Appellant, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; COUNTRYWIDE BANK FSB, Defendants - Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Summary judgment granted by Lee v. Mortgage Elec. Registration Sys., 2014 U.S. Dist. LEXIS 178336 (D. Haw., Dec. 30, 2014)

Prior History: [**1] Appeals from the United States District Courts for the District of Arizona. DC Nos. 2:11 cv-0173 JAT, 2:09 md-02119 JAT. DC No. 1:10 cv-0687 JMS. James A. Teilborg, District Judge, Presiding and for the District of Hawaii J. Michael Seabright, District Judge, Presiding.

Lee v. Mortg. Elec. Registration Sys., 2012 U.S. Dist. LEXIS 181877 (D. Haw., Dec. 26, 2012)
Lee v. Mortg. Elec. Registration Sys.,

Inc. (In re Mortgage Elec. Registration Sys. Litig.), 2012 U.S. Dist. LEXIS 73182 (D. Ariz., May 25, 2012)

Disposition: AFFIRMED in part, REVERSED in part, and REMANDED.

Core Terms

transferee, transferor, Mortgage

Case Summary

Overview

HOLDINGS: [1]-The court had jurisdiction under 28 U.S.C.S. § 1291 over both appeals; [2]-Among other matters, the court held that the transferee court properly dismissed the mortgagor's claim that MERS and a bank violated former Haw. Rev. Stat. § 667-5.7 (repealed 2012) because her claim depended on a reading of the statute as regulating payment of the balance of the purchase price that was at odds with the statute's context, its legislative history, and the case law interpreting the statute. For the same reason, the transferee court did not abuse its discretion in denying her leave to amend; [3]-The transferee court erred, however, in dismissing her claim that MERS violated former Haw. Rev. Stat. § 667-5 (repealed 2012). Hawaii law required strict compliance with statutory foreclosure procedures, including with § 667-5.

Outcome

In No. 12-16457, the judgment of the transferee district court was affirmed in

part, reversed in part, and remanded. In No. 13-15291, the judgment of the transferor district court was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1 The rule in the Ninth Circuit is that once a final judgment is entered, an appeal from an order that otherwise would have been interlocutory is then appealable.

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN2 Former *Haw. Rev. Stat. § 667-5* (repealed 2012) authorized nonjudicial foreclosure under a power of sale by "the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises."

Real Property
Law > Financing > Foreclosures > General Overview

HN3 Hawaii law requires strict compliance with statutory foreclosure procedures, including with *Haw. Rev. Stat. § 667-5* (repealed 2012).

Civil
Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN4 An appellate court will not evaluate in the first instance, without the benefit of briefing, the effect of a fact that was not presented to the lower court.

Counsel: For JUANITA PUALANI LEE (12-16457), Plaintiff - Appellant: Gary Victor Dubin, Esquire, Senior Attorney, Zeina Jafar, Esquire, Attorney, Dubin Law Offices, Honolulu, HI; Frederick John Arensmeyer, Esquire, Law Office of Frederick Arensmeyer, Honolulu, HI.

For MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (12-16457), Defendant - Appellee: Robert M. Brochin, MORGAN, LEWIS & BOCKIUS LLP, Miami, FL; Lane Hornfeck, Esquire, Attorney, Stephanie E.W. Thompson, Esquire, Attorney, STARN O'TOOLE MARCUS & FISHER, Honolulu, HI.

For COUNTRYWIDE BANK FSB (12-16457), Defendant - Appellee: Thomas Hefferon, Joseph Yenouskas, Goodwin Procter LLP, Washington, DC; Patricia Jane McHenry, Esquire, Attorney, Cades Schutte LLP, Honolulu, HI.

For JUANITA FAYE PUALANI LEE, individually and on behalf of all those similarly situated (13-15291), Plaintiff - Appellant: Zeina Jafar, Esquire, Attorney, [**2] Dubin Law Offices, Honolulu, HI; Frederick John Arensmeyer, Esquire, Law Office of Frederick Arensmeyer, Honolulu, HI.

For MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (13-

15291), Defendant - Appellee: Robert M. Brochin, MORGAN, LEWIS & BOCKIUS LLP, Miami, FL; Stephanie E.W. Thompson, Esquire, Attorney, STARN O'TOOLE MARCUS & FISHER, Honolulu, HI.

For COUNTRYWIDE BANK FSB (13-15291), Defendant - Appellee: Seth Goldstein, Attorney, Goodwin Procter LLP, Los Angeles, CA; Thomas Hefferon, Joseph Yenouskas, Goodwin Procter LLP, Washington, DC; Patricia Jane McHenry, Esquire, Attorney, Cades Schutte LLP, Honolulu, HI.

Judges: Before: TASHIMA, W. FLETCHER, and NGUYEN, Circuit Judges.

Opinion

[*663] MEMORANDUM *

This case, originally filed in the District of Hawaii (the "transferor court"), was transferred in part by the Judicial Panel on Multidistrict Litigation to the District of Arizona (the "transferee court") to be consolidated with multidistrict litigation already pending in that court entitled *In re: Mortgage Electronic Registration System (MERS) Litigation*, MDL No. 2119. Plaintiff Juanita Faye Pualani [*63] Lee appeals [*664] from the transferor and transferee courts' judgments of dismissal.¹ We affirm the

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

¹ These are two separate appeals from two different district

transferor court's judgment, and affirm in part and reverse in part the judgment of the transferee court.

1. In No. 12-16457, when Plaintiff filed her notice of appeal from the transferee court's order of dismissal, a final judgment had not yet been entered. See *Rollins v. Mortg. Elec. Registration Sys., Inc.*, 737 F.3d 1250, 1251 n.1 (9th Cir. 2013) (treating as an unsettled question whether when "the MDL court enters judgment on the transferred claims, such a judgment is a 'final decision' under 28 U.S.C. § 1291, even though the claims remanded to the transferor court remain pending"). But the subsequent entry of a final judgment by the transferor court, cured any problem regarding appellate jurisdiction arising from the lack of a "final decision." See *Eastport Assocs. v. City of L.A. (In re Eastport Assocs.)*, 935 F.2d 1071, 1075 (9th Cir. 1991) ("Whatever prematurity existed in the . . . original appeal . . . has been cured by the entry of a final judgment on the merits . . . [*4] . . . **HN1** [T]he rule in this circuit [is] that once a final judgment is entered, an appeal from an order that otherwise would have been interlocutory is then appealable." (citing *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980))). We thus have jurisdiction under 28 U.S.C. § 1291 over both appeals.

2. The transferee court properly dismissed Lee's claim that Defendants violated former *Haw. Rev. Stat. § 667-*

courts which were consolidated under *Fed. R. App. P. 3(b)*.

5.7 because Lee's claim depends on a reading of the statute as regulating payment of the balance of the purchase price that is at odds with the statute's context, its legislative history, and the case law interpreting the statute. For the same reason, the transferee court did not abuse its discretion in denying Lee leave to amend. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc).

3. The transferee court erred, however, in dismissing Lee's claim that defendant Mortgage Electronic Registration Systems, Inc. ("MERS") violated former Haw. Rev. Stat. § 667-5. HN2 Section 667-5 authorized nonjudicial foreclosure under a power of sale by "the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises." Lee plausibly [****5**] alleged that MERS was neither the mortgagee, see MERS v. Wise, 130 Haw. 11, 304 P.3d 1192, 1193 n.2 (2013), nor the mortgagee's successor in interest, see Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1039-40 (9th Cir. 2011), nor authorized by the power to act in the premises, because Lee's lender's bankruptcy terminated MERS' status as the lender's nominee under the power of sale.² Lee thus stated a claim under

² Although the parties now agree that Lee's lender transferred Lee's mortgage two days before it declared bankruptcy, this fact, even if judicially noticeable, was neither raised nor argued in the transferee court. Nor do the briefs on appeal address the effect of this transfer on MERS' authorization to act under the power of sale. **HN4** We will not evaluate in the first instance, without the benefit of briefing, the effect of a fact

former § 667-5. See Kekauoha-Alisa v. Ameriquest Mortgage Co. (In re Kekauoha-Alisa), 674 F.3d 1083, 1090 (9th Cir. 2012) (noting that **HN3** "Hawaii law requires strict compliance with statutory foreclosure procedures," including with § 667-5). Thus, it was error to dismiss this claim.

[***665**] 4. The transferor court did not err in dismissing Lee's breach of contract claim based on former Haw. Rev. Stat. § 667-5. Lee waived her claim against defendant Countrywide Bank ("Countrywide") by failing to contest Countrywide's dismissal motion below. See Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1081 n.16 (9th Cir. 2002) (en banc). She failed to state a claim against MERS because she did not cite to any provision in the contract that MERS allegedly violated. See Au v. Au, 63 Haw. 210, 626 P.2d 173, 181 (1981). Nor did the transferor court abuse its discretion in denying Lee a fourth opportunity to state a claim. See Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1133 (9th Cir. 2013).

5. The transferor court did not abuse its discretion in dismissing the action under Federal Rule of Civil Procedure 41(b) after Lee failed timely to amend or to indicate her intent not to amend her breach of contract claim based on

that was not presented to the transferee court. See McKay v. Ingleson, 558 F.3d 888, 891 n.5 (9th Cir. 2009); [****6**] Flick v. Liberty Mut. Fire Ins. Co., 205 F.3d 386, 392 n.7 (9th Cir. 2000).

Section 22 of the mortgage. See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065 (9th Cir. 2004). The only factor weighing against the dismissal is "the public [****7**] policy favoring disposition of cases on their merits, which, standing alone, is not sufficient to outweigh the other four factors." Leon v. IDX Sys. Corp., 464 F.3d 951, 960-61 (9th Cir. 2006) (internal quotation marks omitted). "We therefore affirm the dismissal sanction." Id. at 961.

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6. Even assuming that the sanction of dismissal was an abuse of discretion, the transferor court properly dismissed Lee's Section 22 breach of contract claim on the merits. Lee "fail[ed] to specify what provisions of the agreement . . . were breached," to permit determination of "the nature of the claim alleged." Au, 626 P.2d at 181. This failure warranted dismissal, *id.*, as did Lee's failure to allege that MERS owed Lee a "contractual duty," see Miyashiro v. Roehrig, Roehrig, Wilson & Hara, 122 Haw. 461, 228 P.3d 341, 357 (Haw. Ct. App. 2010).

In No. 12-16457, the judgment of the transferee district court is affirmed in part, reversed in part, and remanded.

In No. 13-15291, the judgment of the transferor district court is affirmed.

Each party shall bear her or its own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.