

Mellon Mortg. Co. v. Bumanqlag

Intermediate Court of Appeals of Hawai'i

February 14, 2002, Decided

NO. 23930

Reporter

2002 Haw. App. LEXIS 21 *

MELLON MORTGAGE COMPANY, a Colorado corporation, Plaintiff-Appellee, v. EDWARD BARGAS BUMANGLAG, SR., Defendant-Appellant, and ROSALIND BUMANGLAG; AMERICAN GENERAL FINANCE, INC.; JOHN AND MARY DOES 1-20; DOE PARTNERSHIPS, CORPORATIONS or OTHER ENTITIES 1-20, Defendants

Prior History: [*1] APPEAL FROM THE FIRST CIRCUIT COURT. CIV. NO. 97-4720.

Mellon Mortg. Co. v. Bumanqlag, 2002 Haw. App. LEXIS 11 (Haw. Ct. App. Jan. 24, 2002)

Core Terms

foreclosure, interlocutory decree, Confirming, moot, reconsideration motion, closing of the sale, deficiency judgment, summary judgment, circuit court, questions, Proceeds

Case Summary

Procedural Posture

The trial court granted summary judgment to the plaintiff mortgage company against the defendants and

entered an interlocutory decree of foreclosure. The Intermediate Court of Appeals (Hawai'i) vacated the trial court order and remanded for further proceedings. The mortgage company filed a motion for reconsideration in the court of appeals.

Overview

In support for its motion for reconsideration, the mortgage company claimed that the defendants did not obtain a stay of the interlocutory decree of foreclosure, and the trial court's prior order confirming sale, distribution of proceeds, deficiency judgment, and for writ of possession was finalized pursuant to *Haw. R. Civ. P. 54(b)*. Based on these facts, the mortgage company argued that the defendant's appeal was moot. The court of appeals denied the motion for reconsideration. The court noted that there was more to the trial court's order than an authorization of sale, including the possibility of a closing of the sale, which could not be undone. Additionally, the questions of whether the decree of foreclosure and everything that happened after it were authorized, and, if not, what redress the defendants were

entitled to were not moot. The court held that these were questions for the trial court to decide on remand.

Outcome

The motion for reconsideration was denied.

Counsel: On the briefs:

Gary Victor Dubin for Defendant-Appellant.

Lester K. M. Leu and Gary Y. Okuda for Plaintiff-Appellee.

Judges: (By: Burns, C.J., Watanabe and Lim, JJ.)

Opinion

ORDER DENYING MOTION FOR RECONSIDERATION

In this appeal No. 23930, we filed a Memorandum Opinion on January 24, 2002, (1) vacating the circuit court's (a) November 14, 2000 Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Edward Bargas Bumanglag, Sr., and All Other Defendants, and for Interlocutory Decree of Foreclosure; and (b) the November 14, 2000 Judgment entering a summary judgment and an interlocutory decree of foreclosure; and (2) remanding this case for further proceedings consistent with the Memorandum Opinion.

On February 4, 2002, Plaintiff-Appellee Mellon Mortgage Company filed its

motion for reconsideration, alleging the following facts:

1. Defendant-Appellant Edward Bargas Bumanglag, Sr. did not obtain a stay of the November 14, 2000 interlocutory decree of foreclosure.

2. The circuit court's Order Confirming Sale, Distribution of Proceeds, Deficiency Judgment, and for Writ of Possession [*2] (a) was entered on September 17, 2001, (b) was finalized pursuant to *Hawaii Rules of Civil Procedure Rule 54(b)*, (c) authorized the payment of the proceeds of the sale to various individuals and entities, and (d) authorized the entry of a deficiency judgment against Defendant-Appellant.

In *City Bank v. Saje Ventures II*, 7 Haw. App. 130, 748 P.2d 812 (1988), the Saje defendants sought (1) a reversal of the circuit court's order confirming the commissioner's public auction sale and (2) a remand for a new sale. Since the Saje defendants did not obtain a stay of the confirmation order and since there had been a closing of the sale, this court decided that it could not grant the relief sought and dismissed the appeal because it was moot.

Based on City Bank, Plaintiff-Appellee alleges that this appeal is moot and requests this court to reconsider its January 24, 2002 Memorandum Opinion.

As noted above, there is more to the circuit court's November 14, 2000 Judgment than authorization for the

sale. It may be that there has been a closing of the sale which cannot be undone. The circuit court can decide that question. However, the questions of whether the decree of foreclosure [*3] and everything that happened after it were authorized and, if not, what redress Defendant-Appellant is entitled to and from whom are not moot. On remand, the circuit court can decide those questions.

Therefore, IT IS HEREBY ORDERED that the February 4, 2002 motion for reconsideration is denied.

We note that "the failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation." *AIG Hawai'i Ins. Co. v. Bateman*, 82 Haw. 453, 460, 923 P.2d 395, 402 (1996) (citation omitted). When the sale occurred and this court's holding in *City Bank* became relevant, it was the duty of Plaintiff-Appellee and its attorneys to inform this court of that fact. That duty was violated.

DATED: Honolulu, Hawaii, February 14, 2002.

End of Document

Mellon Mortg. Co. v. Bumanglag

Intermediate Court of Appeals of Hawai'i

January 24, 2002, Decided

NO. 23930

Reporter

2002 Haw. App. LEXIS 446 *; 98 Haw. 142; 44 P.3d 293

MELLON MORTGAGE COMPANY, a
Colorado Corporation, Plaintiff-
Appellee, v. EDWARD BARGAS
BUMANGLAG, SR., Defendant-
Appellant, and ROSALIND
BUMANGLAG; AMERICAN GENERAL
FINANCE, INC.; JOHN AND MARY
DOES 1-20; DOE PARTNERSHIPS,
CORPORATIONS or OTHER ENTITIES
1-20, Defendants

Subsequent History: Reported in full
at *Mellon Mortg. Co. v. Bumanglag*,
2002 Haw. App. LEXIS 11 (Haw. Ct.
App., Jan. 24, 2002)

Prior History: [*1] APPEAL FROM
THE FIRST CIRCUIT COURT. CIV.
NO. 97-4720.

Opinion

Vacated and remanded.

Mellon Mortg. Co. v. Bumanglag

Intermediate Court of Appeals of Hawai'i

January 24, 2002, Decided

NO. 23930

Reporter

2002 Haw. App. LEXIS 11 *

MELLON MORTGAGE COMPANY, a Colorado Corporation, Plaintiff-Appellee, v. EDWARD BARGAS BUMANGLAG, SR., Defendant-Appellant, and ROSALIND BUMANGLAG; AMERICAN GENERAL FINANCE, INC.; JOHN AND MARY DOES 1-20; DOE PARTNERSHIPS, CORPORATIONS or OTHER ENTITIES 1-20, Defendants

Subsequent History: Reconsideration denied by *Mellon Mortg. Co. v. Bumanglag*, 2002 Haw. App. LEXIS 21 (Haw. Ct. App., Feb. 14, 2002)

Subsequent appeal at *Mellon Mortg. Co. v. Bumanglag*, 2002 Haw. LEXIS 274 (Haw., May 3, 2002)

Prior History: [*1] APPEAL FROM THE FIRST CIRCUIT COURT. CIV. NO. 97-4720.

Mellon Mortg. Co. v. Bumanglag, 98 Haw. 142, 44 P.3d 293, 2002 Haw. App. LEXIS 446 (Haw. Ct. App., 2002)

Disposition: Vacated and remanded.

Core Terms

Mortgage, summary judgment motion,

circuit court, interlocutory decree, minute order, Foreclosure, minutes

Case Summary

Procedural Posture

In an action to foreclose on a mortgage, defendant mortgagee appealed from the order of the First Circuit Court (Hawai'i), granting summary judgment in favor of plaintiff mortgage company.

Overview

On November 17, 1997, plaintiff mortgage company filed a complaint seeking to foreclose the mortgage given by defendants, in favor of a New Jersey corporation, to secure a similarly dated \$ 200,800 promissory note. The complaint alleged that the mortgage and the note were assigned to plaintiff. On August 4, 1998, the clerk of court entered a notice of proposed dismissal of the case on the ground that no pretrial statement has been filed within eight months after the complaint was filed. Plaintiff moved, pursuant to *Haw. R. Civ. P. 60*, for an order setting aside the order of dismissal. Defendant filed a counterclaim. Plaintiff moved for summary judgment. The trial court

granted plaintiff's motion in error. The lack of a written order reinstating plaintiff's case mandated a denial of the motion for summary judgment.

Outcome

The order granting summary judgment was vacated.

LexisNexis® Headnotes

Governments > Courts > Court Records

HN1 See Haw. R. Cir. Ct. 27.

Governments > Courts > Clerks of Court

Governments > Courts > Court Records

HN2 Though the substance of the court's decision is captured in the minutes of court proceedings kept by the clerk who attends the hearing, they do not substitute for the requisite written document; they are merely prepared for the court's own use.

Civil Procedure > Appeals > Record on Appeal

Governments > Courts > Court Records

HN3 Haw. R. App. P. 10(a) itemizes the items included in the record on appeal. The minutes and other documents attached to the back of the circuit court record and not filed are not items included in the record on appeal.

Governments > Courts > Court Records

HN4 See Haw. R. App. P. 10(a).

Counsel: On the briefs: Richard Lee

and Paul D. Hicks (Brian K. Yomono, of counsel) for Defendant-Appellant.

Russell K. L. Leu, Gary Y. Okuda, and Lester K. M. Leu for Plaintiff-Appellee.

Judges: By: Burns, C.J., Watanabe and Lim, JJ.

Opinion by: Burns

Opinion

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Edward Bargas Bumanglag, Sr., (Edward) appeals from the November 14, 2000 "final judgment" entered by Circuit Court Judge Kevin S. C. Chang in favor of Plaintiff-Appellee Mellon Mortgage Company (Mellon). We vacate and remand.

BACKGROUND

On November 17, 1997, Mellon filed a Complaint to Foreclose Mortgage seeking to foreclose the mortgage (Mortgage) given by Edward and Rosalind Bumanglag (Rosalind) on July 19, 1996, in favor of Citizens Mortgage Corporation, a New Jersey corporation, to secure a similarly dated \$ 200,800 promissory note (Note). The Complaint alleged that the Mortgage and the Note had been assigned to Mellon.

The Complaint was not served on Edward until July 20, 1998.

On August 4, 1998, the clerk of the

court entered a notice of proposed dismissal of [*2] the case on the ground "that no pretrial statement has been filed within eight months after the complaint has been filed[.]" On August 28, 1998, the clerk entered an Order of Dismissal.

On October 26, 1998, notwithstanding the fact that the case had been dismissed, Mellon filed a suggestion that Rosalind had died on March 18, 1998.

On January 13, 2000, Mellon moved, pursuant to Rule 60 of the Hawai'i Rules of Civil Procedure (HRCP), for an order setting aside the August 28, 1998 Order of Dismissal.

HN1 Rule 27 of the Rules of the Circuit Court of the State of Hawai'i states, in relevant part: "The court shall cause minutes to be prepared for its own use. Such minutes shall be appended chronologically at the bottom of the case folio." It follows that HN2 "though the substance of the court's decision is captured in the minutes of court proceedings kept by the clerk who attended the hearing, they do not substitute for the requisite written document; they are merely 'prepared for [the court's] own use.'" State v. English, 68 Haw. 46, 52, 705 P.2d 12, 16 (1985).

In this case, the circuit court clerk's minutes attached at the back of the court record contains the following language: [*3]

MINUTE ORDER: (03/01/00)

AFTER CONSIDERING THE WRITTEN SUBMISSIONS AND THE ARGUMENTS OF COUNSEL, PURSUANT TO HRCP RULE 60(b), THE COURT FINDS THAT PLAINTIFF'S FAILURE OR LACK OF ACTIVITY WAS THE RESULT OF INADVERTENCE AND EXCUSABLE NEGLIGENCE, AND THEREFORE, GRANTS PLAINTIFF'S MOTION TO RECONSIDER AND SET ASIDE FINAL ORDER OF DISMISSAL FILED 8/28/98 FILED ON 1/13/00 AND SETS ASIDE THE FINAL ORDER OF DISMISSAL FILED ON 8/28/98 IN THIS CIVIL ACTION ON THE FOLLOWING TERMS AND CONDITIONS: FIRST, PLAINTIFF FILE A MOTION FOR SUMMARY JUDGMENT AND FOR INTERLOCUTORY DECREE OF FORECLOSURE OR OTHER DISPOSITIVE MOTION NO LATER THAN 3/24/00; AND SECOND, THAT PLAINTIFF IS BARRED FROM RECOVERING ANY ACCUMULATED INTEREST, LATE FEES, ATTORNEY'S FEES OR OTHER DAMAGES, IF ANY, WHICH MAY BE DUE AND OWING BY DEFENDANTS TO PLAINTIFF, WHICH ARISES FROM OR IS BASED UPON THE PERIOD 8/28/98 TO 2/29/00.

When the court's decision was made known to the parties, it was incumbent upon counsel for the prevailing party to prepare the order, present it to opposing

counsel for "approval as to form" signature, and present it to the court. Counsel did not do so and no written order signed by the judge was [*4] entered.

On March 15, 2000, Mellon filed a motion for a summary judgment and an interlocutory decree of foreclosure.

On March 28, 2000, Edward filed a counterclaim alleging, in relevant part, that: (a) Edward and Rosalind received written notice that they were in arrears and a demand for them to immediately vacate their home; (b) Edward and Rosalind unsuccessfully sought clarification because "as far as they were aware, payments on the mortgage note were then current"; (c) Edward and Rosalind vacated their home in August 1997; (d) the conduct of Mellon "evidences a complete lack of good faith and fair dealing which is tantamount to bad faith" and liability "for a tortious breach of the" mortgage note; and (e) Mellon's negligence caused Edward "to experience severe emotional distress and mental anguish." Edward prayed for special and general damages and other relief.

On March 31, 2000, Edward filed his memorandum in opposition to Mellon's March 15, 2000 motion for summary judgment and alleged (a) Mellon's noncompliance with the "Minute Order," (b) genuine issues of material fact, (c) Mellon's not being a real party in interest and lack of standing to file and prosecute the motion, [*5] (d) Mellon's

breach of its contract, and (e) Mellon's laches.

On November 14, 2000, the circuit court entered its Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Edward Bargas Bumanglag, Sr., and All Other Defendants, and For Interlocutory Decree of Foreclosure.

On November 14, 2000, the circuit court entered a judgment in favor of Mellon and finalized it pursuant to HRCP Rule 54(b).

Edward presents the following points on appeal:

1. The lack of a written order reinstating Mellon's case mandated a denial of the motion for summary judgment.
2. In light of the one year limitation on the giving of relief pursuant to HRCP Rules 60(b)(1), (2), and (3), Mellon's case should never have been reinstated.
3. The following were themselves, or were the basis of, genuine issues of material fact:
 - a. the facts that Mellon attached the wrong mortgage to its complaint and attached the right mortgage to its motion for summary judgment;
 - b. the fact that the amount sought by Mellon from Edward included

amounts disallowed by the "Minute Order" for the period August 8, 1998, through February 29, 2000;

c. the questions [*6] whether Mellon (i) was a real party in interest or (ii) had standing;

d. the questions whether Mellon breached its contract when it (a) failed to adequately respond to Edward's inquiry and (b) never gave Edward the required pre-acceleration notice; and

e. the issues regarding Mellon's laches and the prejudice Edward thereby suffered.

DISCUSSION

Edward contends that the lack of a written order reinstating Mellon's case mandates denial of summary judgment. Mellon responds that "the lack of a written order reinstating the case, despite a prior minute order noticed to all parties, does not preclude the Court from ruling on the summary judgment motion." We agree with Edward and disagree with Mellon.

As long as the August 28, 1998 Order of Dismissal has not been set aside, the case remains dismissed. The question is whether the record on appeal reflects that the August 28, 1998 Order of Dismissal was set aside. The answer is no. HN3 Hawai'i Rules of Appellate Procedure Rule 10(a) itemizes the items included in the record on appeal. 1 The minutes and other documents

"attached" to the back of the circuit court record and not "filed" are not items included in the record on appeal. [*7] In the instant case, the April 10, 2000 "Minute Order" is neither an order of the court nor a part of the record on appeal.

CONCLUSION

Accordingly, we vacate the following:

1. The November 14, 2000 Findings of Fact; Conclusions of Law; Order Granting Plaintiff's Motion for Summary Judgment Against Edward Bargas Bumanglag, Sr., and All Other Defendants, and For Interlocutory Decree of Foreclosure.
2. The November 14, 2000 Judgment entering a summary judgment and an interlocutory decree of foreclosure.

We remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, January 24, 2002.

1. HN4 Hawai'i Rules of Appellate Procedure Rule 10(a) (2001) states as follows:

(a) *Composition of the record on appeal.* The record on appeal shall consist of the following:

- (1) the original papers filed in the court or agency appealed from;
- (2) written jury instructions given, or requested and refused or modified over objection;

(3) exhibits admitted into evidence or refused;

(4) the transcript of any proceedings prepared pursuant to the provisions of *Rule 10(b)*;

(5) in a criminal case where the sentence is being [*8] appealed, a sealed copy of the presentence investigation report; and

(6) the indexes prepared by the clerk of the court appealed from.

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