

Foreclosure Workshop #71: — HawaiiUSA Federal Credit Union v. Monalim: The Validity of Hawaii Deficiency Judgments for the First Time Orally Argued Before the Hawaii Supreme Court (Certiorari Granted 11/14/18)

Listeners to our show know that Hawaii Courts have recently been at the forefront of foreclosure reform.

Unlike in most other States, the Hawaii Supreme Court has been systematically improving almost every aspect of its mostly judge made foreclosure system just in recent years.

For example, when compared to an otherwise thought to be progressive judiciary and legislature in California:

- 1. Hawaii now allows a wrongful foreclosure claim to be brought simultaneously in defense of foreclosure, whereas California homeowners in foreclosure irrationally must wait until evicted.**
- 2. Hawaii now allows challenges to a foreclosing plaintiff's standing to foreclose based on its lack of ownership and possession of a Promissory Note now considered a jurisdictional defense, whereas California homeowners in foreclosure irrationally are precluded from challenging standing by misconceived threshold notions of "voidability."**
- 3. Hawaii now reverses nonjudicial foreclosure sales where evidence of true market value does not accompany a nonjudicial foreclosure auction sale, whereas California homeowners in foreclosure irrationally are permitted to be nonjudicially foreclosed on without any evidence of true market value shown as considered to be irrelevant.**
- 4. Hawaii now rejects application of the stringent federal pleading standard subjecting wrongful foreclosure claims to dismissal, whereas California homeowners in foreclosure generally have their wrongful foreclosure claims dismissed under the irrational federal pleading standard while denied discovery to prove their claims.**
- 5. Hawaii now requires strict adherence to evidentiary requirements for proof of every element supporting a lender's burden for proving a foreclosure case based upon personal firsthand knowledge testimony, whereas California homeowners in foreclosure are generally irrationally unable to challenge unsworn business records of prior loan servicers.**
- 6. Hawaii now allows homeowners to defend against foreclosure without first tendering the full amount of a claimed accelerated loan default, whereas California homeowners in foreclosure are still required in some California courts irrationally to tender before being allowed to present defenses including those based on lack of standing.**

Yet there is one area of foreclosure litigation in which for decades Hawaii has trailed behind California: failure to protect borrowers from unfair, inequitable deficiency judgments (the amount of an unpaid loan balance that exceeds the net proceeds of a foreclosure sale, which then becomes a money judgment against a borrower in foreclosure).

Whereas California has long prohibited deficiency judgments for most residential purchase money home loans and also in cases of nonjudicial foreclosures, Hawaii has yet to change its historic judge-made foreclosure deficiency procedures which have created a gigantic thieves market in Hawaii in which credit-bidding rigged forced auction sales have resulted in a forfeiture of hundreds of millions of dollars of Hawaii homeowner equity and continue to do so.

However, the Hawaii Supreme Court now has before it all of those deficiency judgment issues in HawaiiUSA Federal Credit Union v. Monalim, which was orally argued on January 11, 2019.

The Monalim Application for Writ of Certiorari will be posted on our Website

www.foreclosurehour.com when the recording of this Sunday's show is posted thereafter in the Past Broadcast Section.

The Foreclosure Hour is pleased this Sunday to play for our listeners the oral argument in Monalim.

Due to time limitations, we are unable to play the brief oral rebuttal argument in Monalim, but listeners will find the entire oral argument in the Past Broadcast Section of our Website www.foreclosurehour.com attached to the posting of this Sunday's show shortly after aired.

It is important to understand that Monalim is no isolated instance where true market value of foreclosed property is not considered in awarding a deficiency judgment in Hawaii.

For example, on Maui in our Second Circuit Court such unfair inequitable deficiency judgments are the rule rather than the exception in every foreclosure case no matter how inequitable.

Thus, in Romspen v. L & E Ranch, nearly 2,000 acres of prime vacant land, recently appraised at \$48.2 Million, was sold and finalized last week in the Second Circuit Court to the foreclosing plaintiff credit bidding at \$15 Million, awarded a deficiency judgment of \$11 Million, now allowed to foreclosure on a multi-million dollar Canadian residence of an 85-year-old woman, her property given as additional collateral.

Thus, in LCP-Maui v. Tucker, a \$1.3 Million deficiency judgment was awarded in the Second Circuit Court, mechanically subtracting the forced auction sale net proceeds from the amount of the outstanding loan balance claimed, with no consideration given to the true market value of eight foreclosed properties, notwithstanding that the confirmed sale price being burdened by the foreclosure blight, whose original purchase prices combined exceeded ten times the forced sale price, the original loan amount being nearly \$4 Million.

Thus, in DB Private Wealth Mortgage, Ltd. v. Bouley, in the Second Circuit, a credit bid of \$6.3 Million was confirmed on a \$7 Million claimed loan balance due, which another subsidiary of Deutsche Bank flipped weeks later selling the property then appraised at nearly \$9 Million for more than \$2 Million above the confirmed sale price.

We have featured many other unfair deficiency judgments awarded against Hawaii homeowners on our show for years and years, and nothing has been done about it.

This literal theft of Hawaii homeowner equity takes place weekly in every judicial circuit in Hawaii, with most of the stolen monies going outside Hawaii to Mainland securitized trusts or federal government insider assignees.

Even worse, foreclosing plaintiffs pretending to own or otherwise owning most of these securitized loans bought the loans way below face value, or were already paid with partial or full no recourse insurance proceeds or with government guaranties against loss, resulting in being paid many times more than what they loaned or purchased the loans for.

The Monalim case is the first time that the Hawaii Supreme Court has agreed to review Hawaii judicial deficiency procedures.

The foreclosure world is watching. Will it narrow its reversal to laches, or will it broaden the scope of its reversal, agreeing, for instance, with Justice Douglas in *Gelfert v. National City Bank of New York*, 313 U.S. 221, 233 (1941), that "Mortgagees are constitutionally entitled to no more than payment in full"?

Five Justices of the Hawaii Supreme Court can now finally put an end to such prolonged gross injustice with the stroke of their pens. Gary Dubin