

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

JASON HESTER,

Plaintiff,

vs.

LEONARD G. HOROWITZ, et al,

Defendants.

No. CIV 14-1-304

TRANSCRIPT OF
ELECTRONICALLY RECORDED PROCEEDINGS

held in connection with the above-entitled cause
before The Honorable Ronald Ibarra, Circuit Court
Judge, presiding on the 30th day of October, 2015,
in the County of Hawaii, State of Hawaii,
transcribed to the best of my ability, by me, Lisa
A. Steinmeyer, Certified Shorthand Reporter No. 514,
duly certified under and by virtue of the laws of
the State of Hawaii.

A P P E A R A N C E S

FOR THE PLAINTIFF:

Mr. Stephen Whittaker
Attorney at Law
P. O. Box 964
Kailua-Kona, HI 96745
(Appearing via phone)

FOR THE DEFENDANTS:

Ms. Margaret Wille
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1 *(Whereupon, the following proceedings were*
2 *had:)*

3 THE COURT: Okay. Good morning. This is
4 Judge Ibarra. Who's on the line?

5 MR. WHITTAKER: Good morning, Your Honor.
6 This is Stephen Whittaker appearing on behalf of
7 plaintiff, Jason Hester.

8 THE COURT: And in court, ma'am?

9 MS. WILLE: Yes. Margaret Wille appearing
10 on behalf of Leonard Horowitz and Sherri Kane.

11 THE COURT: Okay. I have a question. In
12 the first -- in the 2005 case, what is the status on
13 the appellate level now; do you know?

14 MS. WILLE: Yes. It's right now -- it's
15 pending, and the record on appeal is due on November
16 3rd, and it's -- so it's just pending.

17 THE COURT: So the status is the record on
18 appeal is due. There has been no brief submitted
19 yet?

20 MS. WILLE: No, no brief submitted yet.

21 THE COURT: Okay, and what is the status of
22 the property now pending this litigation?

23 MS. WILLE: It's the --

24 THE COURT: As far as the physical
25 possession or -- I'm not talking about the legal

1 issues.

2 MS. WILLE: No. The physical possession is
3 with Sherri Kane and Leonard Horowitz.

4 THE COURT: Okay. Mr. Whittaker, you
5 disagree with any of the statement Miss Wille made?

6 MR. WHITTAKER: Just now, Your Honor, no.

7 THE COURT: Okay. So let's then move to
8 the defendants' motion for stay or for dismissal
9 prior to entry of final judgment. Miss Wille?

10 MS. WILLE: There is one preliminary matter
11 I just want to raise, and that's really with -- I
12 don't believe there was ever a ruling on defendants'
13 motion to amend --

14 THE COURT: That's correct.

15 MS. WILLE: -- and join --

16 THE COURT: Both of you raised that, yes.

17 MS. WILLE: Yeah. So I just -- you know,
18 in theory they would have the time -- a motion to
19 amend at any time prior to an answer. There was
20 never an answer. So I was not the attorney through
21 that, and trying to get clear on -- basically I'm
22 trying to in my mind get this case back on track,
23 you know, what is the right track, and the two
24 issues that I'm bringing up at this time, you know,
25 one is standing. Standing is a jurisdictional issue

1 that can be raised at any time. And the second is
2 whether we should stay the proceedings rather than
3 going on and having a final judgment, which as I see
4 it, would be in conflict with the 2005 case. In
5 other words, there was a foreclosure. This is a
6 quiet title action based on a non-judicial
7 foreclosure. With -- and really this came about
8 while I was researching to do a motion for
9 reconsideration. As I started reading the cases and
10 the issues on a prior pending action, it became
11 clear to me that really that it's more appropriate
12 to stay the proceedings rather than go and have what
13 would be in effect two conflicting decisions on the
14 issue of foreclosure.

15 In any foreclosure case there's really, first,
16 the issue of whether to grant the foreclosure or
17 not, and then what happens otherwise, where are you
18 left, whether there's a deficiency judgment or
19 otherwise, but the idea here is that with regard to
20 foreclosure, you can go either way for a judicial
21 foreclosure or a non-judicial foreclosure, and in
22 this case it was for the judicial foreclosure.

23 So we now have two issues about -- or two
24 cases about a breach of the same mortgage. We have
25 the same parties or those claiming to be in privity

1 with the signors of the original mortgage, and then
2 we really have the same matter, breach of that, and
3 so you get down to are these interrelated or are
4 those totally independent issues? And reading over
5 the cases, it's not is it exactly the same identical
6 issue but really is it the same matter, and that's,
7 you know, how -- the more I studied it, the more I
8 realized what was going on here, and as the cases
9 say, it's not how in this later filed case how
10 it's -- what's the title, how it's characterized,
11 what exactly the remedy is. It's really all about,
12 you know, the same matter. Are they really
13 interconnected?

14 what's left in the first case, the 2005 case,
15 really comes down to what monies, if any, are still
16 owed. When they went in for the non-judicial
17 foreclosure, they went in for the full amount of the
18 mortgage. They didn't exclude the 150,000 that had
19 been paid in principal to intervening Mazie
20 (phonetic) based on the garnishment order. They
21 didn't exclude the 200,000 that was still in issue,
22 and I do just want to point out that when defendants
23 were told they need to make the final payment, at
24 that time it was the amended final judgment, and the
25 amount that was remaining due was the 150,000. They

1 did make that payment within a few days of the
2 amended final judgment.

3 So basically these are tied together. I think
4 it would be appropriate to stay the proceedings and
5 not go on and have it be where we've got two -- on
6 the issue of foreclosure, two conflicting final
7 judgments.

8 I'm just switching quickly over to in terms of
9 the issue of standing, which, again, can be raised
10 at any time. This is all about a breach of a
11 mortgage. Hester was not on that mortgage. It's
12 Cecil Loren Lee, and here Mr. Hester is seeking to
13 stand in the shoes of Mr. Lee, of the mortgagee, and
14 where that all came about was really based on a
15 motion to substitute the parties, whether Hester
16 would be a proper party, and when that was
17 introduced, it was introduced that it was his nephew
18 and we had a valid assignment of the mortgage. It
19 was then shown by the defendants that he's not the
20 nephew. In fact, they still question whether
21 there's any relationship, whether distant or no
22 relationship, and whether that was a valid mortgage,
23 including based on some of the alterations in the
24 document, which I think at one point the court asked
25 the plaintiffs to explain that issue and there was

1 never any response to the court's question on how
2 that document appeared to be altered.

3 So I think the one case that goes into this is
4 really the Imelda Marcos case to saying who is a
5 proper party. You know, in that case they even said
6 it's not even if you're an heir. Ordinarily if you
7 haven't been appointed the personal representative,
8 you should not be able to be substituted per Rule 17
9 as a proper party.

10 So in this case you have someone who's not --
11 was not a personal representative, was not an heir.
12 The facts that were given to support it, the close
13 kinship relationship was not true. There's been no
14 really establishment. The burden of proof to show
15 standing is on the --

16 THE COURT: Excuse me. Mr. Whittaker, are
17 you still there?

18 MR. WHITTAKER: I am, Your Honor.

19 MS. WILLE: So the burden of proof is on
20 the party claiming to have standing, in this case
21 standing to represent the interests of another
22 party, and so that's what has not been addressed,
23 and it all -- basically Hester appears at the same
24 time. There's also a mortgage with Hester making --
25 giving Attorney Paul Sulla a security interest in

1 the property. So we have all these -- I think that
2 there's a real question as to the standing of
3 Plaintiff Hester to stand in the shoes of the
4 mortgagee, the original mortgagee.

5 So I raise those issues at this time, and I
6 think it would be preferable to stay the proceedings
7 at this point rather than going on and having the
8 final decision putting the two cases in conflict.

9 THE COURT: Okay. Mr. Whittaker?

10 MR. WHITTAKER: Well, the kind of global
11 view, initially, Your Honor, I would have to say
12 that this is clearly an attempt to make an end run
13 around the gate to put up the bond to obtain a stay.
14 I'd also make the global observation that basically
15 everything that counsel really asks the court to do
16 is that it has been wronged at each and every turn
17 as it ruled in this case.

18 One of the interesting things in her
19 memorandum is that she cites the court in connection
20 with the default that (unintelligible) her from
21 making most of the arguments which she's made to
22 Your Honor this morning. She cites the court to
23 this Mount of Zion (phonetic) case where counsel
24 really apparently succeeded at the Intermediate
25 Court of Appeals (unintelligible) by the default and

1 urges Your Honor that, well, of course, that's going
2 to happen here with respect to the default the
3 onerous court entered as to her now non-client Our
4 Royal Bloodline of David. On any behalf, Your
5 Honor, I strongly urge she should not be heard, but
6 in any event, in that case that she relies upon,
7 which she failed to attach a copy of in violation of
8 Rule 35 of the Hawaii Rules of Public Procedure,
9 nonetheless, that default, the court expressly
10 observed that the State did not argue in the
11 District Court and did not argue on appeal
12 (unintelligible) they would have suffered prejudice
13 if the default was set aside, clearly distinguishing
14 it from this case where, as Your Honor learned in
15 the initial two questions to Counsel Wille, that her
16 clients are in possession and control of the
17 property and have been throughout without posting a
18 bond in the 2005 case and now trying to avoid having
19 to do so here by asking Your Honor to take the
20 extraordinary step of staying this case before the
21 entry of judgment in a transparent attempt to avoid
22 need for a bond here to the considerable prejudice
23 of Plaintiff Hester.

24 As to these allegations (unintelligible)
25 accrued to Mr. Hester, it's just beyond me that

1 counsel really stands before Your Honor and says
2 that Mr. Hester wasn't in court when he was. She
3 challenges his lineage without -- you know, asked
4 her again, defaults should preclude her from making
5 most of these arguments, but she presumed in
6 everything she urges on Your Honor that, well, this
7 ruling was wrong and that ruling was wrong and the
8 2005 case was going to be reversed and, therefore,
9 you ought to just stop it now and wait for that to
10 happen, and that's not what I believe the law says,
11 and the important part about Counsel Wille making
12 the point that these are both foreclosure cases is
13 that is not as though, Your Honor, one foreclosure
14 case bars all foreclosure cases for all time. If
15 that were so, one would (unintelligible) to default
16 the mortgage, cure it and then be immune from
17 subsequent claims from the creditor. This creditor
18 was unpaid, and the 2005 case was on its way. To
19 where, I don't know. I wasn't counsel at that point
20 in time, but it was at some point in some appeal,
21 and a default occurred. A notice was given. A
22 proper non-judicial foreclosure was processed. No
23 objection was timely made. The title is now in Mr.
24 Hester, who is the grandnephew of Mr. Lee, and it
25 doesn't matter what his relationship was because as

1 established by the record before the Third Circuit
2 Court, before the relevant orders were entered,
3 title was duly transferred through the
4 Ecclesiastical Corporation to Mr. Jason Hester, the
5 plaintiff in this action.

6 The claim, Your Honor, that this is not a
7 repetitive vexatious motion is also not so. The
8 only reason it's not repetitive and vexatious is
9 because now it's being brought for the fourth time
10 by the third lawyer. It was brought first by the
11 plaintiff through the parties pro se, Horowitz and
12 Kane; then it was brought by Carroll; then it was
13 brought by Van Leer, and now it's being brought by
14 Counsel Wille.

15 But I suggest, Your Honor, that the facts have
16 never changed. The law has not changed, and the
17 results should not change. There's no basis for
18 granting this motion. It's extraordinary. It's not
19 within the contemplation of Rule 62. It should be
20 denied with costs to the plaintiff for having to
21 answer it.

22 THE COURT: Okay. Here's what the court is
23 going to do. First, the court -- as both counsel
24 know -- well, counsel were concerned about there has
25 been no judgment entered, and the procedural history

1 goes back as far as the counsel attempts to get
2 together to prepare a final judgment that would be
3 sufficient for appeal purposes. In fact, the
4 procedural history that it goes back to July of this
5 year when Miss Wille and Mr. Whittaker tried to get
6 together, to come together with a final judgment
7 that would be acceptable to both for appeal
8 purposes, and I see there's been letters going back
9 and forth, correspondences, until September at
10 least, September of this year, and so that's the
11 first concern.

12 So given that and there's also, as Miss Wille
13 points out and Mr. Whittaker points out, there's an
14 outstanding order on the -- I think this was Judge
15 Strance's decision -- denying the motion to amend
16 answer and join indispensable parties. So the court
17 will need to also enter that order.

18 So given the status of -- procedural status of
19 this case, it is the court's intent to proceed this
20 way: The court will enter the order denying motion
21 to amend answer and join indispensable parties, and
22 the court then will enter a judgment because the
23 parties were not able to come together with a
24 judgment. The court will issue its own judgment,
25 and on this motion the court will continue to ten

1 days after the file date of the judgment to allow
2 the parties to submit any supplemental based on the
3 court's issuance of the judgment without further
4 argument, and so Miss Wille's motion -- so, Miss
5 Wille, you will have ten days for the first filing,
6 any supplemental to this motion, and, Mr. Whittaker,
7 I'll give you, likewise, ten days, ten business days
8 thereafter to respond to Miss Wille's supplemental,
9 and without further hearing, the court will decide
10 the defendants' motion for stay or for dismissal
11 prior to entry of final judgment and, of course,
12 this will be after final judgment.

13 MS. WILLE: So just to be clear, so you
14 will be --

15 THE COURT: Issuing --

16 MS. WILLE: The judgment so --

17 THE COURT: Well, first of all, issue the
18 order --

19 MS. WILLE: The order.

20 THE COURT: -- denying motion to amend
21 answer --

22 MS. WILLE: Yes.

23 THE COURT: -- that was heard February of
24 this year before Judge Strance.

25 MS. WILLE: Yes.

1 THE COURT: Then the court will issue the
2 judgment and file it and, Miss Wille, regarding this
3 motion, it's continued. You have ten days, ten
4 business days after the filed date of the judgment
5 to submit any supplemental brief you wish to support
6 your motion for stay.

7 MS. WILLE: Okay.

8 THE COURT: And then Mr. Whittaker
9 thereafter will have ten days after Miss
10 Whittaker -- Miss Wille's file date and -- well,
11 service, of course.

12 MS. WILLE: Okay.

13 THE COURT: So defendants' motion for stay
14 or for dismissal are continued as stated.

15 MS. WILLE: Thank you, Your Honor.

16 THE COURT: Mr. Whittaker, any
17 clarification?

18 MR. WHITTAKER: The only clarification on
19 the timing of my reply and the filing, Your Honor,
20 you made it clear that it was ten business days for
21 Miss Wille.

22 THE COURT: After certificate of service.

23 MR. WHITTAKER: (Unintelligible).

24 THE COURT: So we'll make it clear. So if
25 Miss Wille says she mailed it to you, you get two

1 more days in the mail from that mailing date, plus
2 the ten.

3 MR. WHITTAKER: So that's ten calendar
4 days, plus the two mailing days. Got it.

5 THE COURT: If she mails it, yes.

6 MR. WHITTAKER: Yes, Your Honor. Thank
7 you.

8 THE COURT: Okay.

9 MS. WILLE: Thank you, Your Honor.

10 THE COURT: That's all.

11 *(whereupon, the proceedings were*
12 *concluded.)*

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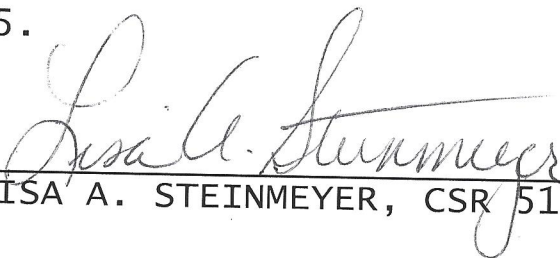
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C E R T I F I C A T E

STATE OF HAWAII }
COUNTY OF HAWAII } SS.

I, Lisa A. Steinmeyer, CSR 514, RPR,
CRR, Certified Shorthand Reporter of the Third
Circuit Court of Hawaii, do hereby certify that the
foregoing 16 pages contain a true and correct
transcript of the electronically recorded
proceedings, transcribed to the best of my ability,
held in connection with the aforementioned cause.

WITNESS MY HAND this 5th day of
November, 2015.



LISA A. STEINMEYER, CSR 514, RPR, CRR