

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

JASON HESTER,

Plaintiff,

vs.

LEONARD G. HOROWITZ, et al,

Defendants.

No. CIV 14-1-0304

TRANSCRIPT OF

ELECTRONICALLY RECORDED PROCEEDINGS

held in connection with the above-entitled cause
before The Honorable Melvin Fujino, Circuit Court
Judge, presiding on the 26th day of February, 2016,
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.

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A P P E A R A N C E S

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FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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1 *(whereupon, the following proceedings*
2 *were had:)*

3 THE CLERK: Calling Civil 14-1-304, Jason
4 Hester versus Leonard Horowitz, et al. One, motion
5 for reconsideration or alternatively, for a new
6 trial; two, defendants' motion to stay judgment
7 pending finality of related action, Civil No.
8 05-1-096, HRCF Rule 62(B); three, defendants' motion
9 for stay HRCF Rule 62(B) pending the disposition of
10 defendants' post judgment motions.

11 THE COURT: State your appearance.

12 MR. WHITTAKER: Good morning, Your Honor.
13 Stephen whittaker appearing on behalf of Jason
14 Hester in opposition to the motions.

15 MS. WILLE: And Margaret Wille, attorney
16 for defendants, Leonard Horowitz and Sherri Kane.

17 THE COURT: Good morning. Okay. Let's
18 address the resubmission of defendants' motion to
19 stay pending finality in related action, Civil No.
20 05-1-196 now on appeal. Procedurally there's a
21 defendants' motion for stay or for dismissal prior
22 to entry of final judgment, HRCF 62(B), that was
23 filed on October 5th, 2015 and heard on October
24 30th, 2015 before Judge Ibarra; is that correct?

25 MS. WILLE: Correct.

1 THE COURT: And in the interim from that
2 time until today, the court's understanding is that
3 since it was not a final judgment filed at the
4 October 30th, 2015 hearing, Judge Ibarra allowed you
5 to continue your motion and to supplement your
6 motion. And is that what you did?

7 MS. WILLE: Yeah, but we did rehear it
8 following the final judgment.

9 THE COURT: And that's your resubmission of
10 defendants' motion to stay pending finality in
11 related action?

12 MS. WILLE: Correct, and he asked us to
13 submit any comments --

14 THE COURT: Supplemental.

15 MS. WILLE: -- or information within ten
16 days, ten days after the filing of that final
17 judgment, and plaintiff was to submit any opposition
18 within ten days of my filing, and that did not
19 happen, but --

20 THE COURT: Since the October 30th hearing,
21 and in the interim the court entered a final
22 judgment on December 30th, 2015.

23 MS. WILLE: Correct.

24 THE COURT: Right?

25 MS. WILLE: Correct.

1 THE COURT: Okay. So --

2 MR. WHITTAKER: May I, Your Honor?

3 THE COURT: Yes.

4 MR. WHITTAKER: I was at that hearing, too,
5 and what Judge Ibarra said was that your motion to
6 stay a judgment is premature because the judgment
7 hasn't been entered.

8 THE COURT: Right.

9 MR. WHITTAKER: You may file it anew after
10 the judgment is entered, which is what she did. He
11 did not prescribe any ten-day time period for me to
12 respond to her motion as she's urging on Your Honor,
13 and I am not in default in that particular --
14 there's no order to that effect, and I am -- it may
15 be that he said that but I sure didn't get it in my
16 notes, Your Honor, and if so, I apologize.
17 Nonetheless, Your Honor has our opposition, and I
18 believe you've had time to consider it.

19 MS. WILLE: He explicitly stated he did not
20 write an order. He stated it and directed, and he
21 questioned him concerning whether it was calendar
22 days or whether it was business days, but I think
23 let's get to the heart of the matter.

24 THE COURT: Well, I guess the question the
25 court has is if Judge Ibarra directed that you were

1 to file within ten days the supplemental brief and
2 the court's minutes indicate that Mr. Whittaker was
3 supposed to file ten days, business days after, he
4 said ten business days after your supplemental brief
5 and the court clarified ten calendar days, plus two
6 mailing days from certificate of service. So go
7 ahead.

8 MS. WILLE: Yes. So I did hurry and get
9 that in within those ten days, and there was no
10 response from the plaintiff's attorney.

11 THE COURT: But it's a continued motion of
12 your motion for stay or for dismissal that was filed
13 on October 5th, 2015. Anything further that you
14 have to add to your motion, on that motion?

15 MS. WILLE: Okay. On that motion, you
16 know, first I just want to tie -- give a comment,
17 you know. This has been a really incredible, I
18 consider, scam starting with the original sale of
19 the property to defendants, despite an outstanding
20 lien on the property for over \$200,000, and that was
21 just the beginning.

22 THE COURT: Can I just stop you for a
23 moment? Just -- the court's understanding is this
24 case, this Civil 14-1-0304, deals only with the
25 quiet title action. The other case on appeal deals

1 with the foreclosure.

2 MS. WILLE: Yes, but the question here is
3 whether it's appropriate to stay this proceeding
4 pending the conclusion of that case, and as -- you
5 know, the court in Blake versus County of Kauai said
6 where the proceedings in the current litigation are
7 intertwined with the outcome of the prior case, that
8 a stay is appropriate. In this case they are
9 intertwined.

10 The 2005 judicial foreclosure case was based
11 on the same property, the same mortgage, the same
12 series of transactions, and the outcome was that
13 foreclosure was denied and, in fact, the original --
14 the final judgment and the amended final judgment
15 were for additional an \$200,000 in damages, which
16 would be deducted from -- which would be deducted
17 from the amount of the mortgage outstanding, which
18 was 350,000. At that time the court said pay up the
19 difference, which was 150,000, and then -- that was
20 like -- my clients considered this is done.

21 Then months later, following numerous other
22 filings arguing the same point, there was a 60(B)
23 motion to -- for -- to reverse on a motion for
24 judgment as a matter of law, to reverse the
25 vacation -- to vacate the damages. So it all ties

1 together. So that's the question outstanding there
2 is, did they pay it in full or did they not?

3 At the time the motion for judgment -- the
4 60(B) motion under -- following the motion for
5 judgment as a matter of law came about, it was
6 whether the complaint or the counterclaims filed
7 back in 2005 were submitted with sufficient
8 particularity. That's a Rule 50 motion, and the
9 prerequisite for that motion is to have made the
10 motion prior to the case going to the jury. That
11 was never done.

12 My point is that these two cases are
13 intertwined. I mean, it would be very wrong at this
14 point to just say, no, these are completely
15 separate. This is just a quiet title. This is a
16 different guy. He doesn't have to take on any of
17 the baggage of what happened before of his
18 predecessor interest; he just has to -- is able to
19 pursue whatever rights without taking on any of the
20 liabilities of the case.

21 My clients -- I mean, it's just obviously been
22 a nightmare for them. All of a sudden, the case is
23 done and up pops this repeated motion that had been
24 denied in the past to reconsider the case based on
25 failure to -- the insufficient particularity in the

1 complaint, and then it's suddenly whatever that's
2 filed four or five months later, and the court
3 grants it a few months later. So they are
4 intertwined because the key is, did they pay in
5 full? They paid in full at the time the court said
6 pay up and it was a done deal for them. They
7 thought it was all over. So now we have this, you
8 know, post judgment motion, which isn't a permitted
9 post judgment motion unless you did a motion prior
10 to the case going to the jury coming up.

11 So we're now -- there's two ways to do a
12 foreclosure. One is a judicial foreclosure; one is
13 a non-judicial foreclosure.

14 THE COURT: Okay, but --

15 MS. WILLE: Basically they weren't getting
16 their way in the non-judicial so they switched -- in
17 the judicial so they switched over and prior to
18 conclusion of this case began --

19 THE COURT: When you say this case, you
20 mean the one before the court today or the one
21 you're talking about, the foreclosure?

22 MS. WILLE: Yeah. The judicial foreclosure
23 is the '05 case. The quiet title case here is to
24 enforce a non-judicial foreclosure that was
25 commenced after -- while the other was still

1 pending, and with a different -- up pops Jason
2 Hester as a successor to plaintiff (indecipherable),
3 but the key here is what is conclusion of the case?
4 I know that plaintiff says this has been going on
5 too long. It has been going on too long. My client
6 says the same thing. It's been going on ten years,
7 and I think now he's arguing it's moot because the
8 case has been knocked back to the Circuit Court
9 because it isn't a -- it didn't comply with Jenkins
10 and Rule 58, but we have submitted, resubmitted the
11 final judgment, consistent with what the court
12 directed, the Intermediate Court of Appeals
13 directed.

14 THE COURT: That's in the foreclosure case.

15 MS. WILLE: Yeah. So I'm just saying
16 they're tied together. The foreclosure case has not
17 terminated, and I think it would be very wrong to
18 say, okay, this is just a separate deal, they're not
19 tied together, when really they're proceeding based
20 on an outcome that wasn't concluded in that case.

21 MR. WHITTAKER: Your Honor, on the motion
22 to stay, first of all, counsel is asking Your Honor
23 to find that she and her client are going to prevail
24 on an appeal, and there's no basis for that. She's
25 asking you to look beyond the status of this case

1 that is before Your Honor and to imagine that her
2 clients are correct in every premise they advance in
3 the case that they lost that is now on appeal.

4 In addition, she is asking you to, I believe,
5 reconsider a host of decisions already made in this
6 and the case that was on appeal before the dismissal
7 by the ICA, and she's asking you to overturn a
8 brother judge of the same rank, and I don't think,
9 Judge, that that's your place with all due respect.

10 Now, I agree with the premise that the motion
11 that was filed in October was not ruled upon, and so
12 this is a fresh motion for Your Honor, but there is
13 not one single fact in support of the motion for
14 stay that hasn't been said a half a dozen times to
15 Judge Ibarra, either in connection with their
16 opposition for the motion for summary judgment or in
17 connection with their opposition to the motion to
18 dismiss the counterclaims or in connection with one
19 of their host of other motions for reconsideration.

20 So in its bare bones, this is an end run
21 around the statute that requires if you want to stay
22 a judgment, you post a bond, and she hopes to
23 persuade Your Honor that there is so much merit in
24 the appeal, that you'll ignore the law that requires
25 if you want to stay a judgment, you post a bond.

1 well, I don't believe, Judge, that they have shown
2 you anything that would result or ought to result in
3 such a conclusion.

4 The arguments she also advances are all
5 arguments that belong only to the defaulted Royal
6 Bloodline of David, and she continues, counsel does,
7 despite her education and her licensure, to urge on
8 the court that it's fine to disregard the default as
9 though it didn't exist. Were that so, Your Honor,
10 there would be no reason for a rule for default.
11 The law says once you're defaulted, you don't get to
12 argue, you don't get to make positions known to the
13 court. It may well be that as she posits to Your
14 Honor she is entitled to file an appeal at the end
15 of the case and include in it the determination of
16 default and the denial of the motion to set aside
17 the default, but in the interim she's got nothing.
18 She's got nothing. She has no standing before Your
19 Honor. The persons, Mr. Horowitz and Miss Kane,
20 have no standing. Royal Bloodline of David has been
21 defaulted. There's no one before Your Honor to ask
22 for a stay.

23 This stuff about Mr. Hester having no
24 standing, too, is just that, stuff that's been heard
25 by Judge Ibarra, declined by Judge Ibarra. There's

1 no basis for saying he has no standing. Pursuant to
2 the non-judicial foreclosure, he is the title
3 holder. He had standing to file his quiet title
4 case. He is the owner of record, and he's entitled
5 to a denial on the motion to stay.

6 With respect to the point I made at the
7 outset, Your Honor, with all due respect, a trial
8 court's discretion to reconsider another judge's
9 prior ruling is necessarily narrow and usually only
10 appropriate when the prior judge is unavailable.
11 This is California authority. I didn't in the
12 interim between receiving notice that we would be
13 appearing before Your Honor and this morning's
14 appearance have time to find specific Hawaii
15 authority on the point, but I think it requires a
16 particular scrutiny for Your Honor to overturn a
17 brother jurist on these self, same facts, and there
18 isn't a new fact before Your Honor today.

19 MS. WILLE: Judge Ibarra made it clear he
20 was considering the motion for a stay and asked that
21 we -- he would address it following the final
22 judgment. He did not make a ruling on it. He
23 specifically did not dismiss that. So -- and I
24 think in terms of the issues, what we're saying is
25 not that it was not a done deal on the 200,000.

1 That's still pending. It's whether there are
2 serious questions remain. The reason I bring up
3 those legal arguments is to show the judge that
4 there are serious questions pending.

5 With regard to the standing issue, that the
6 Royal Blood of David's property or -- or their --
7 was quit claimed, whatever interest they had, prior
8 to dissolution of that corporation to these
9 defendants. That's number one. Number two, as far
10 as the default against the Royal Blood of David,
11 that -- that default was flawed as far as I'm
12 concerned. It was based on -- based on issues, and
13 I can run through the criteria there, but basically
14 this case seems to have come to a halt with that
15 default, but it's our -- my client or Royal Blood of
16 David have the right to not only appeal but also to
17 ask under Rule 59 and 60 for reconsideration. We're
18 following the proper procedure, and this is a point.
19 It's not -- Judge Ibarra was taking that division's
20 cases temporarily. He did not rule on this, that a
21 motion for reconsideration is appropriate, and he
22 said that the motion for a stay was appropriate and
23 he would consider it at this time.

24 You know, all of this California law says that
25 you shouldn't rule against your counter judge is

1 really out of line.

2 So I think the key thing here is really
3 whether these two cases are tied together and
4 whether there should be a stay, and if -- basically
5 if you rule on this case in this way, the two cases
6 are in conflict despite it being concurrent. You're
7 going to be executing a judgment before conclusion
8 of the matter where the court already ruled. Judge
9 Ibarra ruled that foreclosure was denied based on
10 the facts and in defendants' favor. So -- and it
11 was only -- that -- the issue of foreclosure isn't
12 being appealed. My client won that. It's just
13 whether there was any deficiency left in what was
14 owed to be paid and, again, they did pay it up based
15 on when the court said pay it up, but then up popped
16 the motion for judgment as a matter of law.

17 So I think it would be very unfair to just
18 treat this as separate when the whole question
19 that's involved would be related to the outcome in
20 the 196, the 2005 case.

21 MR. WHITTAKER: Your Honor, if I may, it
22 appears to be counsel's position that there can only
23 be one default and one result under an ownership
24 regime with respect to a piece of property and that
25 because they managed to prevail on the initial

1 judicial foreclosure, which argued that they had
2 failed to get permission to make some improvements
3 and/or otherwise comply with some terms of the
4 underlying mortgage, that, therefore, everything is
5 fine and copacetic, notwithstanding the fact that
6 there were monies yet owed on mortgage.

7 They went on about their way, and they
8 appealed that case, 196, where I was not counsel of
9 record, and I'm hard pressed to respond to all of
10 the claims about what's going on in that case but,
11 nonetheless, that had to do with a default that,
12 indeed, as counsel urges on Your Honor, Judge Ibarra
13 or the jury, I guess, found did not constitute a
14 default warranting foreclosure. There was, however,
15 an outstanding unpaid amount on the mortgage, which
16 was the subject of a judicial foreclosure, which has
17 not been challenged and which is the basis on which
18 my client has title and has prosecuted the quiet
19 title action to the point where judgment has entered
20 in his favor, and now we have this end run asking
21 you to avoid the million dollar bond that would be
22 required were they to try and keep this property
23 away from my client for another ten years and,
24 Judge, there's nothing, nothing in the record that
25 has not been looked at and rejected by Judge Ibarra

1 in Civil No. 0304.

2 THE COURT: Okay. Court is ready to rule.
3 Court has reviewed the files and records in this
4 case, heard the arguments of counsel.

5 As to defendants' motion for stay or for
6 dismissal prior to entry of final judgment, HRCP
7 62(B), that was filed on October 5th, 2015 and
8 together with the resubmission of defendants' motion
9 to stay pending finality in related action, Civil
10 No. 05-1-196 that's now on appeal, court will find
11 as to defendants' representation that they represent
12 the Royal Bloodline of David, even under a Rule 59,
13 the time period to -- 59(E), the time -- ten days
14 has already expired. Looking at Rule 60, court will
15 find that under the factors of Rule 60 Hawaii Rules
16 of Civil Procedure, the court will still find that
17 there is no new evidence or deny the request for
18 reconsideration of a Rule 60 default as to Royal
19 Bloodline of David. Accordingly, the default
20 judgment stands.

21 As to the motion itself, while the defendants
22 cites to Rule 59(A) as grounds, that's for a new
23 trial. In Civil No. 14-1-0304, there was not a
24 trial in that case. So there cannot be grounds for
25 a new trial, even considering that defendant meant

1 59(E). As to the final judgment under Rule 58 filed
2 on December 30th, 2015, that request is timely under
3 59(E). However, the court will find that under the
4 grounds of 59(E), subsection -- as well as 59(A) for
5 the grounds, the court will deny the request and
6 find that there's no new evidence or evidence that
7 could have been presented as a reconsideration.

8 It appears in this case that in 14-1-0304,
9 there was a motion for summary judgment, which was
10 granted in part, that was filed on August 28th,
11 2015. Thereafter, at a hearing on October 30, 2015,
12 the court -- that court believed that the
13 defendants' motion was premature, as there was no
14 final judgment and that the court had requested the
15 parties to submit the judgment within ten days of
16 that hearing, which was not complied with.

17 Thereafter, the court prepared its own final
18 judgment and filed it on December 30th, 2015 as
19 such, and also the court will find that this Civil
20 No. 14-1-0304 deals with quiet title and the merits
21 have already been adjudicated. There is a 58
22 judgment in this case. The question then becomes
23 whether or not the court can have jurisdiction to
24 entertain the request now before the court today.

25 The court will find that the Rule 58 is a

1 final judgment in this case. The court would deny
2 the motion to stay pending finality in action, Civil
3 No. 15 -- 05-1-196, as well as deny the defendants'
4 motion for stay or for dismissal prior to entry of
5 final judgment filed on October 5th, 2015.

6 As to defendants' continued motion for stay or
7 for dismissal prior to entry of final judgment,
8 court has heard the motions today. That issue is
9 moot.

10 As to defendants' motion for stay, Hawaii
11 Rules of Civil Procedure 62(B), pending disposition
12 of defendants' post judgment motions, that will be
13 denied as well.

14 Mr. Whittaker, you prepare the orders.

15 MR. WHITTAKER: Thank you, Your Honor.

16 THE COURT: Anything further from counsel?

17 MS. WILLE: Yes. Will you at least stay
18 this while we prepare an appeal and address that?

19 THE COURT: No. That's been denied.

20 MS. WILLE: That's been denied?

21 THE COURT: Yeah.

22 *(Whereupon, the proceedings were*
23 *concluded.)*

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C E R T I F I C A T E

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STATE OF HAWAII)
) ss.
COUNTY OF HAWAII)

I, Lisa A. Steinmeyer, CSR 514, RPR,
CRR, Certified Shorthand Reporter of the Third
Circuit Court of Hawaii, do hereby certify that the
foregoing 19 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 9th day of March,
2016.



LISA A. STEINMEYER, CSR 514, RPR, CRR