

1 IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

2 STATE OF HAWAII

3

4 JASON HESTER,)
5 Plaintiff,)
6 vs.) No. 14-1-0304
7 LEONARD G. HOROWITZ, SHERRI)
8 KANE,)
9 Defendants.) Hearing Date:
) November 5, 2020

10 TRANSCRIPT OF PROCEEDINGS

11 on the hearing held before the Honorable Wendy DeWeese
12 at the Circuit Court of the Third Circuit Court, Kona
13 Division, commencing at 8:32 a.m.

14 TRANSCRIBED BY: WENDY L. GRAVES, CSR NO. 460

15 APPEARANCES:

16 (All parties appearing via Zoom video conference)

17 For the Plaintiff Stephen D. Whittaker, Esq.
18 Jason Hester 73-1459 Kaloko Drive
Kailua-Kona, Hawaii 96740

19 Also Present Jason Hester
Paul J. Sulla, Esq.

20 For the Defendants Leonard Horowitz, in pro se
21 Sherri Kane, in pro se

22 For Royal Bloodline Margaret Wille, Esq.
of David Margaret Wille and Associates
23 65-1316 Lihipali Road
Kamuela, Hawaii 96743

24 Also Present Mitch Fine, Esq.
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P R O C E E D I N G S

THE CLERK: Calling Civil Case No. 14-1-304. Jason Hester versus Leonard J. Horowitz, et al., for one, amended plaintiff's renewed motion for summary judgment post-remand; and, two, motion to intervene as to defendant, HRCF Rule 24.

THE COURT: Okay. Good morning. State your appearance, please. Let's start with Mr. Whittaker.

MR. WHITTAKER: Good morning, your Honor. Stephen Whittaker appearing on behalf of plaintiff Jason Hester, who is also on the call, your Honor.

Additionally, your Honor, Mr. Paul Sulla, prior counsel to Mr. Hester, and an affiant who has submitted a number of factual representations to the court is also online in the event that the Court may have questions for him.

THE COURT: Okay. So --

MR. WHITTAKER: Thank you, your Honor.

THE COURT: Thank you, Mr. Whittaker.

So for now the Court is going to treat Mr. Sulla as an observer, as if he was simply sitting in the gallery observing the hearing process.

But if we need him, I'm glad he's here.

Okay. Mr. Horowitz, state your appearance, please.

1 MR. HOROWITZ: Yes, hi. This is Leonard
2 Horowitz. I'm here with Ms. Kane.

3 THE COURT: Ms. Kane, are you here?

4 MS. KANE: Yes, I am here. I am Sherri.

5 THE COURT: Okay. And Mr. Fine, please state
6 your appearance.

7 MR. FINE: My name, your Honor, is Mitch Fine,
8 and I'm appearing with a motion to intervene.

9 THE COURT: And Ms. Wille?

10 MS. WILLE: Margaret Wille on behalf of Royal
11 Bloodline of David.

12 THE COURT: Okay. So we're here. I am going to
13 take the motion to intervene first that was filed by
14 Mr. Fine. I will -- I have read the motion, the
15 oppositions, the no oppositions, the replies, so nobody
16 needs to reiterate or restate anything that they have
17 put in writing.

18 But if there is anything that you wish to add,
19 Mr. Fine, Mr. Whittaker, Ms. Wille, Mr. Horowitz, I will
20 allow each one of you no more than five minutes to make
21 additional statements regarding the motion to intervene.

22 So Mr. Fine.

23 MR. FINE: Thank you, your Honor. I think my
24 motion was fairly clear. I think that I just want to
25 reemphasize that my motion to intervene is not based on

1 any claim of access, but in order to protect my economic
2 interest in the property, which is the subject of a
3 motion, the summary judgment motion.

4 And just the facts, the relevant facts very
5 simply are that a successor interest, Mr. Sulla,
6 basically took the legal description of Remnant A, which
7 is the property I have had the economic interest in, and
8 he basically adhered that or appended that as part 2 of
9 the property, which is designated as 049, which is the
10 major primary property, which is the subject of this
11 motion for summary judgment.

12 And I just want to make it clear that should the
13 Court grant this motion for summary judgment, it will in
14 effect convey Remnant A to successor in interest,
15 Mr. Sulla, and it will basically obviate my economic
16 interest.

17 So I am here to protect that interest, and
18 according to the rules of the court, the motion for
19 intervention should be looked at very, very widely, in
20 the interest of the Court's efficiency and process, and
21 I think that's the main point that I want to make.

22 And let me just see. I think that's essentially
23 the main points that I want to make, your Honor.

24 THE COURT: Okay. And so, but Mr. Fine, you are
25 talking about an economic interest that you obtained

1 after a final judgment was entered back in 2015. You
2 are talking about an interest that you obtained in 2018,
3 correct?

4 MR. FINE: Well, your Honor, my interest in the
5 property dates back to 2005, when I began my partnership
6 with Dr. Horowitz and the Royal Bloodline of David.

7 And as I understand it there really hasn't been
8 a final judgment that's been determined in this matter.
9 As I understand it, the Intermediate Court of Appeals
10 remanded it back to your court, because the motion for
11 summary judgment had not been pled according to Kondaur
12 and 667-5.

13 So Defendant Horowitz has never had an
14 opportunity to be heard in this matter, there has been
15 no discovery in this matter. So there has been no final
16 judgment. And according to the ICA, they specifically
17 said, because Mr. Hester, plaintiff, did not meet his
18 additional burden, they did not need to address
19 Dr. Horowitz' and arguably these other others claims.

20 So, again, our position is that there has been
21 no final judgment in this matter. And again, the
22 argument that -- yes, so my protectable interest, it was
23 recorded in 2018, but again, it dates back to 2005.

24 THE COURT: All right. Thank you, Mr. Fine.
25 Mr. Whittaker.

1 MR. WHITTAKER: Yes, your Honor.

2 THE COURT: Go ahead.

3 MR. WHITTAKER: First of all, the motion to
4 intervene is filed under the wrong rule, and his
5 representation to the contrary notwithstanding, your
6 Honor, he does not have any interest in the subject
7 property, did not have any interest in the subject
8 property, has no access over it, and he cannot by
9 intervention gain something that he didn't have that his
10 purported grantor didn't have.

11 He claims to have acquired this option in 2018
12 at a point in time when neither the individual
13 defendants or Royal Bloodline of David had any interest.
14 Royal Bloodline of David having been dissolved in 2016
15 and having been defaulted herein in 2014.

16 And, your Honor, in that particular I would urge
17 the Court that Ms. Wille's appearance, her filings, and
18 any argument should be disallowed by the Court. Her
19 client has been in default for years. There was no
20 petition to the Court to set aside that default.

21 We filed a motion to strike her joinder on
22 September 29th. It wasn't answered. I think that
23 should be granted.

24 With respect to the motion to intervene,
25 however, your Honor, clearly it was not timely, as your

1 Honor observed in your questions about the timing of
2 Mr. Fine's acquisition of his interest.

3 He tries to backdate that by making reference to
4 work he claims to have done in 2005, your Honor. But if
5 that's so, he certainly was aware of what was going on
6 in that the litigation regarding the initial foreclosure
7 began in 2009.

8 He has no excuse at all to delay asserting his
9 interest until some years post-judgment and after
10 remand.

11 In so far as he argues to your Honor, that, oh,
12 gosh, the appeals court opened up everything that has
13 already been decided by the Third Circuit Court, Judge
14 Ibarra, and ruled on, that's just simply nonsense, your
15 Honor.

16 The record is abundantly clear that this case
17 was removed to the federal court by the defendants.
18 Over there they managed to accomplish the removal of
19 Mr. Sulla by making a point of his being involved in the
20 nonjudicial foreclosure sale, at which point I became
21 involved.

22 But the Circuit Court had dismissed all of these
23 claims made by Hester and Kane long before the appeal.
24 They cannot be resuscitated by this Intermediate Court
25 of Appeals returning it to your Honor's court for the

1 narrow purpose of determining whether or not the
2 standards of Kondaur were met, which standards are
3 apparently clear --

4 THE COURT: Hold on. Hold on. I will deal with
5 the MSJ in a moment. I'm just dealing now with the
6 motion to intervene.

7 MR. WHITTAKER: I'm sorry, your Honor. I
8 apologize.

9 The point is that in so far as Mr. Fine argued
10 on his motion to intervene, alleged relevant facts
11 underlining his interest and the interest he seeks to
12 advocate for, that is Horowitz and Kane, he simply has
13 no standing.

14 It's transparent to me what they are trying to
15 do. They know that they have been foreclosed. That is,
16 Horowitz and Kane, so they find a straw man to come in
17 to your Honor and pretend that somehow he's entitled to
18 intervene in this very old case and assert claims that
19 they have had disallowed on their behalf.

20 Your Honor, it's transparent. It's not lawful.
21 It shouldn't be allowed.

22 THE COURT: Thank you, Mr. Whittaker.
23 Mr. Horowitz or Ms. Kane, one or the other may speak on
24 this issue.

25 MR. HOROWITZ: Yes, your Honor. Thank you.

1 It's very clear to me that Mr. Whittaker is simply
2 throwing a lot of mud, frivolous and capricious
3 statements upon the Court in hopes that something will
4 stick to divert the Court's attention to the actual
5 facts.

6 I want to also correct Mr. Whittaker. He just
7 erred in stating that the dissolution of Royal
8 Bloodline was a later date. Actually, it was in 2012, I
9 seem to recall, because of the dissolution required
10 because of the insolvency, because of the continuous
11 litigation requiring attorney, attorney counsel
12 representation, which we could simply no longer afford.

13 Essentially, the joinder of Mr. Fine, and also
14 by the way he made a mistake and claimed that the claims
15 were made by Hester and Kane. I'm Horowitz. This is
16 Kane. Hester is not at all making claims with
17 Miss Kane. That's wrong.

18 But the most important fact here is that
19 Mr. Fine's agreement with me and his participation and
20 his financing with me, as Mr. Fine has correctly stated,
21 began in 2005. It didn't begin, and it's not at all an
22 estranged contract to have verbal contracts, to have
23 handshakes, whereby Mr. Whittaker seems to say that it
24 would be prudent for the Court to simply recognize a
25 grant, a final granting in 2018 of an option to have an

1 economic interest, which is substantial, because he
2 deserves it, he earned it. He helped with every aspect
3 of developing the property, even from physical labor.

4 So I think that Mr. Fine's appearance here and
5 request for intervention is totally appropriate, and
6 that I think it's also extremely important, what
7 Mr. Whittaker and Mr. Sulla and apparently Mr. Hester,
8 and it's interesting that Mr. Whittaker refers to
9 Mr. Fine as a, quote, "straw man," end quote, when in
10 fact all of the evidence clearly indicates that
11 Mr. Hester is the straw man.

12 So we actually have a projection of what we are
13 alleging as the crime of both foreclosure fraud and
14 conveyance.

15 Now, the conveyance that Mr. Fine is
16 specifically concerned about mostly is Mr. Sulla's
17 effort to take his interest and include it in the 049
18 property and simply hoodwink the Court here in a quick
19 motion for summary judgment, when that clearly is a
20 material fact in dispute and --

21 THE COURT: Mr. Fine, please confine your
22 arguments only to the motion to intervene.

23 MR. HOROWITZ: Yes. So, in essence, Mr. Fine
24 has legitimate, real interests in protecting his
25 interest, and it's not at all adverse to Mr. Hester and

1 the plaintiff that Mr. Fine would join here or intervene
2 here with good cause to represent his interest, and even
3 continue to support us, as he has done now since 2005.

4 THE COURT: Thank you, Mr. Horowitz.

5 MS. WILLE: Your Honor, can I?

6 THE COURT: Ms. Wille. In response,
7 Mr. Whittaker, to your comment real briefly, I did grant
8 your motion to strike the pleadings filed on behalf of
9 the entity which was defaulted, which was, Ms. Wille,
10 your client.

11 So the current procedural status of the case is
12 that your client has been defaulted. There has been no
13 motion to set aside the default. So I know you are
14 appearing here on behalf of RBOD, but really, you know,
15 it's not proper for me to permit any argument on behalf
16 of that entity because it was defaulted. But I will
17 hear from you briefly, if you wish.

18 MS. WILLE: Yeah. In reviewing, I agree with
19 what you are doing. However, I think that at this
20 point, given the ICA's vacation of the nonjudicial
21 foreclosure and that Royal Blood was the owner at that
22 time, and also in light of Mr. -- of that Remnant A
23 being added to the nonjudicial foreclosure deed, I think
24 that it would be appropriate for RBOD to be able to
25 intervene, given the new current status.

1 So I would -- I will respectfully agree with the
2 default, but I will assess looking into that
3 intervention.

4 And I do just want to make a comment on that,
5 whereas I'm bringing up Mr. Fine and his intervention is
6 that it's only within the past year that that interest
7 really, in my mind, became legitimate, because the
8 County of Hawaii challenged Mr. Sulla's inclusion of
9 that parcel in his nonjudicial foreclosure deed. And
10 that parcel was given to RBOD.

11 So, again, I respect your opinion on that, and I
12 will look into intervention based on the current status
13 of the case now that the nonjudicial foreclosure has
14 been vacated.

15 THE COURT: Thank you, Miss Wille.

16 Mr. Fine, this is your motion. I will give you
17 the last word, if you want to speak for a couple
18 minutes.

19 MR. FINE: Thank you very much, your Honor.

20 Your Honor, the plaintiff makes a large deal
21 about how my interest was memorialized in 2018. And the
22 reason why my interest was memorialized in 2018 was in
23 direct response to plaintiff's actions.

24 In approximately 2016, which I did not discover
25 until a year, year and a half later, Mr. Sulla basically

1 took the title, the legal description of Remnant A, and
2 he included it unlawfully in 049.

3 And that action of Mr. Sulla was the subject of
4 a grand jury investigation, where they determined there
5 was probable cause that a crime had been committed.

6 Now, it does not matter what ultimately the
7 grand jury or the prosecutor's office determines based
8 upon being able to prove something beyond a reasonable
9 doubt. But that's not the standard here, your Honor.

10 So my interest, I determined that to protect my
11 interest, which Dr. Horowitz appropriately said was
12 based on since 2005, I have memorialized it in order to
13 protect it from Mr. Sulla, because I wanted to show that
14 there was actually an interest that was protectable.

15 But for Mr. Sulla now to come in and argue that
16 somehow I am prejudicing the Court or I am untimely
17 based upon his actions of taking the legal description
18 of Remnant A, which is not the subject of this. It
19 wasn't the subject of a nonjudicial.

20 THE COURT: Hold on, Mr. Fine. It's not
21 Mr. Sulla who is arguing this. It's Mr. Whittaker who
22 is arguing it on behalf of his client. I just want the
23 record to be clear.

24 MR. FINE: Well, your Honor, actually in
25 Mr. Whittaker's motions he said that Mr. Sulla was a

1 successor in interest. And he is the real party in
2 interest here, and he is the person who basically is
3 engaged in the warfare that we're experiencing here.

4 So what I'm saying is that it was Mr. Sulla --
5 the plaintiff's actions by taking the interest in
6 Remnant A, which he has no legal ownership of, he has no
7 equitable interest in, and the County of Hawaii
8 basically told him that. And they sent him a written
9 letter stating he has no interest in Remnant A.

10 And despite that, your Honor, he basically filed
11 a deed in this motion for summary judgment, which
12 basically describes Remnant A, my property, the property
13 that I --

14 THE COURT: You are going far afield of your
15 motion to intervene. I just wanted you to comment on
16 the issues pertaining to your motion to intervene at
17 this point.

18 MR. FINE: Well, your Honor, I was really
19 responding to Mr. Whittaker's objection to my motion by
20 saying that somehow my interest is based on access. My
21 interest in this matter is not based on access, your
22 Honor. It's based on trying to protect the legal deed
23 to a property that Mr. Whittaker's client has no
24 interest in.

25 Just so I want to be really clear, your Honor.

1 Mr. -- the plaintiff in this case took the legal
2 description of a property he does not own and attached
3 it to 049, which is the subject matter. It goes to the
4 heart of this motion for summary judgment.

5 And so if I don't step in now and protect that
6 interest, I'm going to lose that opportunity. I mean,
7 he should really join me. I mean, that was really what
8 my motion was getting to.

9 But I understand the intervention, that's fine.
10 But again, I just want you to understand where -- and
11 finally, the last point, your Honor, is Mr. Sulla in his
12 declaratory statement said that Remnant A is intertwined
13 with 043 and 049, and that it's subject to adverse
14 possession, because he can't get access to his steam
15 vents unless he basically trusts back on Remnant A.

16 And I tried to survey the land. I tried to put
17 up no trespassing signs on the land, all of which I paid
18 for, and his agents drove me off the property and I was
19 unable to protect my interest in Remnant A.

20 And he, your Honor, is having dangerous
21 activities on that property. There is ceremonies being
22 conducted on that property --

23 THE COURT: Thank you, Mr. Fine. Thank you. I
24 think I have heard enough on the issue.

25 MR. FINE: Good.

1 THE COURT: The Court is ready to rule.

2 Mr. Fine, you filed your motion under Rule 19
3 for joinder. I believe that the proper rule would have
4 been Rule 24 for intervention. I'm not going to deny
5 your motion based on a procedural defect or citing to
6 the wrong rule. I recognize you are self represented.

7 With respect to Rule 24, there are A and B
8 intervention of right and permissive intervention. So
9 under that rule, frankly, based on having reviewed the
10 records and files of the case, as well as the pleadings,
11 files, and the arguments by the parties and counsel, the
12 Court is going to deny the motion to intervene.

13 The Court cannot find, A, that there was timely
14 application. It is unclear to the Court whether,
15 Mr. Fine, you intended to base your motion to intervene
16 on a 2005 economic interest or the 2018 recorded
17 interest that deals with -- and your arguments around
18 access.

19 If you intended to base it on the 2005 alleged
20 economic interest, we're now 15 years later, and the
21 Court cannot find that considering everything that that
22 is a timely application for permission or the right to
23 intervene.

24 The judgment was entered in December of 2015.
25 The motion to intervene was filed October 28, 2020, five

1 years after the judgment, 15 years after you allege that
2 you obtained an economic interest, and two years after
3 the recording of the option interest to which you refer.

4 As cited by the plaintiff, motions to intervene
5 filed after judgment has been entered are viewed with
6 disfavor, and the moving party has a heavy burden to
7 show facts or circumstances to justify intervention at
8 that late date. The Court cannot find that, Mr. Fine,
9 that you have met that heavy burden imposed by case law.

10 In addition, the Court is persuaded by
11 plaintiff's arguments that the option agreement for an
12 economic interest to an abutting land parcel given by
13 the defendants is also a basis for your motion, and that
14 based thereon the motion is also not timely, as it was
15 was acquired after final judgment.

16 Furthermore, the Court is persuaded by the
17 argument that there was no access when you, Mr. Fine,
18 acquired your economic interest. So your argument
19 claiming a loss or impairment for something that you did
20 not have when you acquired the interest does not rise to
21 the level that this court believes is appropriate to
22 allow intervention in this case.

23 And so the Court cannot find that there is any
24 additional impediment to that interest. Even if the
25 argument can be made that you are timely asserting that

1 interest, the Court cannot find any additional
2 impediment, and so the Court cannot find that you
3 qualify under Rule 24, intervention of rights, or Rule
4 24B, permissive intervention.

5 And so based on the arguments set forth in
6 plaintiff's memorandum in opposition to the motion to
7 intervene, the Court is going to deny your motion to
8 intervene, Mr. Fine.

9 Mr. Whittaker, you can prepare the order denying
10 the motion to intervene.

11 So with that, we will move on to the motion for
12 summary judgment.

13 Mr. Whittaker, this is your motion, so you may
14 go first.

15 Again, I have read the motions, the oppositions,
16 the replies. I have read the files and the relevant
17 pleadings that were previously filed in this matter.

18 So, Mr. Whittaker, you may proceed, and five to
19 seven minutes or so if you want to add anything
20 additional to your written pleadings.

21 MR. WHITTAKER: Your Honor, thank you very much.

22 First of all, the opposition, while voluminous
23 and certainly in the history of case repetitive, is
24 absolutely inappropriate to the matter before the Court.

25 The memorandum opinion of the Intermediate Court

1 of Appeals could not be clearer but that remand was to
2 be had in order to ascertain whether or not plaintiff's
3 foreclosure, nonjudicial foreclosure auction, complied
4 with or comported with the standards established in
5 Kondaur some five years after the nonjudicial
6 foreclosure.

7 And that is all that is before your Honor is
8 whether or not the plaintiff, Mr. Hester, has shown in
9 undisputed material facts put before your Honor that
10 indeed the four criteria of the Kondaur matter were met,
11 and that is whether or not it was conducted.

12 That is, the foreclosure sale was conducted in a
13 manner that was fair, reasonably diligent, in good
14 faith, and whether an adequate price was obtained.

15 Instead of addressing those matters, which were
16 established clearly through the declarations of
17 Mr. Sulla as counsel during the nonjudicial foreclosure,
18 and otherwise, the defendants bring up a lot of
19 peripheral claims that have been adjudicated years ago,
20 your Honor, as discussed in our motion to strike at page
21 8, we described the history and the dismissal of the
22 defendant's counter-claims, which included all of the
23 stuff that they have tried to put in front of your Honor
24 on this motion for summary judgment years ago.

25 They appealed that. The Intermediate Court of

1 Appeals denied their appeal as to that and remanded the
2 matter to your Honor for one purpose and one purpose
3 only, which has been addressed by the motion.

4 In that particular, your Honor, plaintiff has
5 established, I believe indisputably, that the auction
6 was conducted in a manner that was fair. I don't know
7 if your Honor has had an opportunity to review
8 Exhibit 6 --

9 THE COURT: I have.

10 MR. WHITTAKER: -- to the -- you have, your
11 Honor?

12 THE COURT: Yes.

13 MR. WHITTAKER: So your Honor is aware then that
14 the defendants were in attendance at the auction. Your
15 Honor can make your own judgment as to whether or not
16 Mr. Sulla conducted that in a manner that was fair, and
17 I believe that he clearly did. Fundamental fairness to
18 the parties before the Court requires notice of
19 proceedings. 30 day notice. They were there.

20 The next criteria, reasonable diligence, has
21 been established, I believe, without dispute and beyond
22 dispute by the declaration of Mr. Sulla and the
23 multitude of communications with defendants before,
24 after, and indeed for years following the foreclosure,
25 showing his efforts in pursuing the foreclosure in the

1 first instance on behalf of plaintiff, and ultimately
2 trying to resolve it with defendants.

3 The third criteria, good faith, your Honor, I
4 haven't seen anything to suggest there is anything but
5 good faith in the context of this case. The plaintiff
6 Hester has no desire to punish defendants. He merely
7 sought to recover the monies that were owed to his
8 deceased great uncle. In any event, your Honor, the
9 suggestion of bad faith in this context is without
10 support in the record.

11 In the context of foreclosure context, your
12 Honor, to determine good faith the courts look to the
13 integrity of the actor's conduct during the proceedings.
14 Your Honor, nothing in the conduct of either plaintiff
15 or his then counsel suggests anything but good faith.

16 And lastly, your Honor, the Kondaur criteria
17 that we must meet before your Honor to show that, in
18 fact, the summary judgment was appropriate and should
19 now be entered anew is the adequacy of the price.

20 We discuss that in detail in the memorandum and
21 point out that the \$225,000 price that was obtained was
22 more than adequate under the circumstances, Judge. This
23 sale was conducted in 2010. As your Honor is aware,
24 that was during a major recession.

25 The other impediments to getting a higher price

1 were the fact that the defendants were holding over in
2 the property at the time. We had no possession. The
3 amount of repair required suppressed the price. The
4 fact that it's in a volcanic zone suppressed the price.
5 You can't get financing and insurance out there.

6 So, your Honor, it's just there is no evidence
7 to suggest that the price of \$225,000 wasn't fair.
8 We've shown your Honor the survey of prices for
9 properties in the region for a year before the sale, and
10 this is in the highest two or three sales in the area.

11 Moreover, even if the price is somehow
12 inadequate, that alone is not enough ground to set aside
13 a fairly conducted, open, transparent auction at a
14 nonjudicial sale, particularly when the defendants were
15 in attendance and had the opportunity to bid more, and
16 chose not to.

17 Frankly, we would wish, your Honor, that anybody
18 had bid more so that Mr. Hester could have avoided these
19 ten years of horror.

20 Judge, there is no reason to -- and the
21 defendants, so distracted by trying to resurrect claims
22 that the Circuit Court long ago denied, utterly failed
23 to suggest, your Honor, that plaintiff had failed to
24 established any one of these criteria.

25 They made some passing reference to, oh, well,

1 it should have been \$975,000, because at one point in
2 time in a fantasy Mr. Hester listed it at that price,
3 soon found it was ridiculous, dropped it \$200,000, and
4 when possession was actually in his hands listed it for
5 a more realistic price in the 2 to 300,000 range.

6 Your Honor, I don't think there is any question
7 but that the price was fair, and that the four elements
8 required by Kondaur have been established. They have
9 not been refuted by the defendants. Therefore, the
10 motion should be granted.

11 THE COURT: Thank you, Mr. Whittaker.

12 Dr. Horowitz or Ms. Kane.

13 MR. HOROWITZ: Yes, your Honor. Thank you.

14 I'd like to address several of the criteria that
15 Mr. Whittaker just stated in this oral testimony that
16 I'm prepared to give here.

17 First of all, my opening statement here, I want
18 to relay that the key material fact in dispute is that
19 the ICA, the remand tells this court that there are
20 material facts in dispute specifically regarding 667-5
21 compliance.

22 Instead of dealing with 667-5 noncompliance, the
23 plaintiff advances a number of capricious arguments and
24 diverts this court again. Example, referring to the
25 video. The video is not related substantive to 667-5.

1 So let's stay with 667-5. By diverting from
2 667-5 noncompliance, the Whittaker and Sulla team for
3 Hester moves the court to become an accessory after the
4 fact of wrongful foreclosure, wrongful ejection and
5 wrongful dispossession.

6 The ICA vacating the NJF means the plaintiff
7 currently has no valid right to possess our property and
8 should be ordered to leave at once.

9 The first point, the plaintiff's amount to cure
10 notice in regard to 667-5 noncompliance, this amount to
11 cure notice was grossly defective. The ICA, to
12 reiterate, made clear that Hester has not met his
13 initial burden, that the burden never shifted to us.

14 In other words, we defendants were erroneously
15 precluded from raising our issues of material fact,
16 erroneously deprived of advancing our counter claims.
17 Erroneously ejected and dispossessed in only 2016.

18 This situation, the status quo before the
19 vacated foreclosure, is to be restored. Hester's
20 possession of the subject property must end.

21 The ICA ruled that we defendants do not have the
22 burden of proving that the nonjudicial foreclosure was
23 unfairly and improperly carried out. It is the
24 plaintiff's burden that 667-5 was meticulously followed,
25 which the plaintiff has not done, and cannot do, because

1 the payment amount misrepresented repeatedly as \$350,000
2 was always false.

3 The plaintiff repeatedly neglects the balloon
4 payment made and diverts from the correspondence between
5 me and Mr. Sulla that any settlement payment was, quote,
6 "conditioned upon the outcome of the appeal," end quote.

7 The plaintiff argues that he provided an email
8 thread dated January 19th through the 25th, 2010, that
9 he provided as a valid amount to cure the alleged
10 default.

11 So let us, your Honor, look at this as shown in
12 the defendant's Exhibit D. If you would kindly get out
13 Exhibit D from my filing, that would be appreciated, and
14 we can clarify this violation of 667-5 procedure very
15 quickly.

16 THE COURT: Go ahead, Mr. Horowitz. Your time
17 is running, so I'm just telling you.

18 MR. HOROWITZ: If you could access Exhibit D,
19 you could follow along then, your Honor.

20 THE COURT: I have it, Mr. Horowitz.

21 MR. HOROWITZ: Yes, it's Exhibit D in the packet
22 that was tabbed Exhibit D, I believe.

23 THE COURT: Well, I have Exhibit D, so you may
24 proceed.

25 MR. HOROWITZ: Thank you, your Honor.

1 On the email Sulla sent on January the 19th, the
2 second paragraph states quite clearly, the cure amount
3 of the alleged default amount was, quote, "conditioned
4 upon the outstanding appeal," end quote.

5 There was no express, valid accounting done.
6 That last two sentences in paragraph 2, you can read it,
7 it states, "If you agree to proceed with \$220,000 amount
8 outstanding, conditioned upon the outstanding appeal,
9 then we can now respond and begin to negotiate a
10 settlement of the entire balance. Before we counter
11 your prior \$100,000 offer settlement, please indicate if
12 this was a figure we can agree to start with," end
13 quote.

14 A material fact in dispute, your Honor, is that
15 the claimed amount in the default was both unknown and,
16 quote, "conditioned upon the outcome of the appeal,"
17 unquote.

18 And even if this was not the case, the 667-5
19 express requirements required an accurate payoff amount,
20 foreclosure fees that were never noticed, as well as
21 attorneys fees and costs for the foreclosure. These
22 three elements that were required were not provided.

23 Instead, the Court will note what happened next,
24 according to the plaintiff's email string, reprinted as
25 defendant's Exhibit D. You see the email dated January

1 22nd, 2010. Sulla emailed again asking, quote, "Do you
2 have any response to this or should I move to the next
3 step," end quote.

4 No next step is mentioned. It states, quote,
5 "The note is now a full year overdue. If I don't
6 heard," his error, "if I don't heard anything back from
7 you by Tuesday, January 26, 2010, I will proceed," end
8 quote.

9 Proceed with what, your Honor? The entire
10 matter was conditioned upon the outstanding appeal.

11 THE COURT: Mr. Horowitz, I am giving you a
12 two-minute warning on your argument.

13 MR. HOROWITZ: Yes. Essentially, your Honor,
14 this was not a clear fulfillment of his responsibilities
15 of 667-5, proper notice.

16 Further, this inadequate notice is false because
17 Mr. Sulla gave this notice not to the defendants. Look
18 at who he sent this notice to. It's corresponding to
19 Mr. Hester, and not on January 26th, which was the
20 deadline date, but in his email on January 25th, 2010.

21 Here he states in an altered email a forged
22 piece of evidence that does not comport with the format
23 of earlier email correspondence. If you look at those
24 emails carefully. He submitted this in his Exhibit D to
25 the court showing that, quote, "original message

1 captured on the others and the details provided were not
2 stated."

3 Sulla states in corresponding only to Hester,
4 not to me, in altered email at 5:23 p.m., quote, "I
5 already sent this out Friday. I will start with a
6 notice to the foreclosure this week. Paul," end quote.

7 The case law clearly shows that changing or
8 altering or not properly noticing foreclosure or
9 foreclosure dates is grounds for voiding the
10 foreclosure.

11 But this was also before the January 26 deadline
12 that this email went to Mr. Hester. You can see that
13 it's captioned May's Bank Receipts. It's not captioned
14 any notice of foreclosure, and so subsequently it
15 violates Kondaur.

16 And regarding the purchase price, if I can use
17 my last few seconds here, Kondaur references Ulrich
18 (ph.), Ulrich, excuse me. And in Ulrich you see it goes
19 into great detail that a property in foreclosure must be
20 advertised expressly, detailing the benefits of the
21 property.

22 If you look at not only what I shared already as
23 Mr. Sulla's foreclosure notice, but the actual
24 advertisement in a single newspaper that Mr. Sulla
25 presents as having advertised his notice for

1 foreclosure, you will see that there is no express
2 detailing.

3 And Exhibit Z, the last exhibit of yours, your
4 Honor, shows that Mr. Sulla listed the property, not
5 Mr. Hester listed the property, Mr. Sulla listed the
6 property with his cohorts within his own business
7 operation, his own real estate firm which Greg Datt
8 (ph.) and Associates, that it was listed for \$975,000,
9 your Honor, by Mr. Sulla, not Mr. Hester.

10 So essentially the inadequacy of the NJF, lack
11 of following 667-5, improper sales price, and the fact
12 that we haven't even now gotten to the fact of the
13 underlying matter that is not regurgitating, not simply
14 regurgitating what any Court has ruled on.

15 In fact, at this point we have tacit admission
16 that Mr. Sulla's concerns and conveyance of the mortgage
17 and note to the church revitalized, which was the
18 foreclosing mortgagee in 2010. That that is based on
19 substantial fraudulent filings with the State and the
20 court, as you can also review that person Exhibit S,
21 which goes into great forensic detail showing that
22 ultimately the organization that foreclosed wasn't even
23 formed at the time of the transfer by assignment of
24 mortgage and assignment of note into revitalized church.

25 Certainly, there is the case law we published

1 that shows that this untimely transfer voids the
2 transfer. But even if it didn't, look at all of the
3 facts, that there is the false signature, falsified
4 altered date or dates, false certification of the
5 Articles of Incorporation of this entity.

6 Therefore, Mr. Hester has no standing as a
7 successor in interest to this fake sham church, nor does
8 Mr. Sulla and HLLC. Subsequently, these are tacitly
9 admitted by evasion of these most important facts, and I
10 think this is most clearly an indication that the
11 Court's grant of this motion would be unconscionable.

12 The Court should dismiss this motion and then
13 permit the return of our dispossessed property that we
14 certainly deserve, and we no longer deserve to be abused
15 like this, your Honor.

16 THE COURT: Thank you, Mr. Horowitz.

17 Mr. Whittaker, in five minutes or less, please,
18 you may respond.

19 MR. WHITTAKER: Thank you, your Honor.

20 Mr. Horowitz tries desperately to divert the
21 Court's attention from the specific ruling of the
22 Intermediate Court of Appeals, which remanded this for
23 compliance with Kondaur, which had four elements.

24 He wants to direct your Honor's attention to
25 667-5, which if there was an objection under that

1 statute should have been made ten years ago. Any sort
2 of objection under that statute has long since been
3 waived or adjudicated adversely to the defendants in the
4 motion to dismiss their counter claims heard at the
5 Circuit Court back in 2014.

6 The allegations that are made vis-a-vis counsel
7 Sulla are there just, your Honor, again to distract you
8 and to try and besmirch the plaintiff with some alleged
9 misconduct of his counsel, which is irrelevant to this
10 motion, which deals only with the propriety of the
11 conduct of the nonjudicial foreclosure sale, which we
12 have addressed in detail.

13 The Intermediate Court of Appeals was quite
14 clear, your Honor, at page 14 of its decision that the
15 issue that it identified, and the only issue, was the
16 compliance with Kondaur. And for that reason -- and it
17 specifically confined its decision to vacating the
18 summary judgment.

19 And it vacated the summary judgment only because
20 the showing at the trial court then in 2010, and after,
21 relative to the nonjudicial foreclosure, didn't show the
22 Kondaur elements.

23 The Kondaur elements have now been shown, and
24 while Mr. Horowitz argues about the incredible value, he
25 has not put a single shred of paper before your Honor

1 that shows that any realtor or anyone with any
2 competence about property values in the area of the
3 subject property believes it to be worth anything even
4 near the \$225,000 that was bid by plaintiff at the
5 nonjudicial foreclosure sale.

6 It strikes me as a little odd that while he was
7 standing there at the foreclosure sale he now wants to
8 tell your Honor that the price was unfair. If it was
9 unfair, he had every opportunity to make bid. He chose
10 not to.

11 Judge, I just don't think that there is any
12 question but that the narrow matter for remand has been
13 answered in full and in detail by the motion, the
14 declaration, and that there is no competent evidence to
15 the contrary and no disputed question of material fact.

16 THE COURT: Okay. Thank you, Mr. Whittaker.

17 MR. WHITTAKER: I have nothing further.

18 THE COURT: So the Court has reviewed the
19 records and files of this matter, as well as
20 specifically your motion, Mr. Whittaker, and
21 Mr. Horowitz and Miss Kane, your opposition, and
22 Mr. Whittaker your reply.

23 The Court also went back and reviewed the
24 previous filings, and specifically the opposition to the
25 original motion for summary judgment, the opposition

1 being filed by Horowitz and Kane on April 6 of 2015.

2 So, first of all, this Court agrees with the
3 plaintiff's interpretation of the remand. This Court
4 does not read the remand as a setting aside of the
5 nonjudicial foreclosure, as argued by Mr. Horowitz and
6 Miss Kane.

7 The remand from the ICA says that it appears
8 from the record that our ruling above -- I'm just
9 paraphrasing -- under Kondaur could potentially affect
10 this case. Therefore, although we reject Horowitz'
11 arguments on appeal in CAAP-18-584, we conclude it would
12 be prudent to remand this case to the Circuit Court, the
13 Third Circuit, for further proceedings as the Court
14 deems necessary in light of our rulings in this
15 memorandum opinion.

16 So the Court does read the remand to focus on
17 whether or not the nonjudicial foreclosure sale was
18 conducted in a manner consistent with the Kondaur case.

19 Also, the Court will point out that under state
20 versus Oughterson, which is O-U-G-H-T-E-R-S-O-N, 99
21 Hawaii 244, that case holds and it cites to various
22 other cases, which I will get to in a moment.

23 That case precedent commands that unless cogent
24 reasons support a second court's action, any
25 modification of a prior ruling of another court of equal

1 or concurrent jurisdiction will be deemed an abuse of
2 discretion. And that's the Oughterson court citing
3 Grayhound Computer Corporation versus IBM, 559F2d488,
4 which is a Ninth Circuit case from 1977.

5 Also, the Oughterson case cites Wong versus City
6 and County of Honolulu, 66 Hawaii 389, which held that a
7 judge should be hesitant to modify, vacate or overrule a
8 prior interlocutory order of another judge who sits in
9 the same court.

10 In reviewing the defendant's opposition to the
11 motion for summary judgment that was filed on April 6 of
12 2015 and their current opposition to plaintiff's second
13 motion for summary judgment, the Court finds that the
14 arguments raised are virtually if not completely
15 identical to those that were raised back in April of
16 2015.

17 The only major differences that this Court could
18 glean from a review of both oppositions was, one, that
19 in the current opposition plaintiffs cite to HRS Section
20 490:3-203, and in their previous opposition they cite it
21 as UCC Article 3, Section 3-203. And so that argument
22 was raised, previously.

23 Also, the Court would note that the 667-5
24 noncompliance arguments were raised and briefed
25 extensively in the April 6, 2015 opposition, as they are

1 in this case.

2 The only other change the Court noted between
3 the two oppositions substantively was a cite to HRS
4 Section 651D, as in David, in the current opposition.
5 In the 2015 opposition, the defendant cited extensively
6 to 651C, as in cat.

7 The Court attempted to look up 651D, AND I don't
8 believe that section applies. I think it may have been
9 a typo, and that the defendants intended to cite to
10 651C.

11 Nevertheless, the arguments in both the April 6,
12 2015 opposition, as well as the opposition filed today
13 are substantively the same.

14 The Court in its ruling, which was filed on May
15 27, 2015, had considered the defendant's arguments at
16 that point in time, and had found that there was no
17 genuine issue of material fact and granted plaintiff's
18 motion for summary judgment.

19 This court is not going to revisit, vacate,
20 modify or amend prior rulings of this very court, it was
21 just a different judge, made back in 2015. So the Court
22 is not going to consider or reconsider any of the
23 arguments previously made by the defendants and that are
24 now being made again by the defendants.

25 The only issues that this Court believes that

1 are before it are the Kondaur issues, as articulated by
2 the plaintiff.

3 Based thereon, and having reviewed the
4 admissible evidence in the case, the Court will find
5 that plaintiff has established the four elements
6 required by the Kondaur case.

7 The Court will find there is no genuine issue of
8 material fact and that plaintiff is entitled to a
9 judgment as a matter of law. The Court will enter a
10 final judgment pursuant to 54B in favor of the
11 plaintiff.

12 Again, I believe this resolves all matters.
13 Correct, Mr. Whittaker?

14 You are muted.

15 MR. WHITTAKER: Sorry, your Honor. Yes, your
16 Honor, it was sent back down simply for the purpose of
17 Kondaur compliance, which your Honor has found. That's
18 all that remains.

19 THE COURT: Right. So the Court will then grant
20 final judgment pursuant to 54B, finding no just reason
21 for delay.

22 Mr. Whittaker, you may prepare or you will
23 prepare the order granting your motion.

24 MR. WHITTAKER: Thank you, your Honor.

25 THE COURT: I think that concludes this matter.

1 Thank you all.

2 MR. WHITTAKER: Thank you, your Honor.

3 (Hearing concluded at 9:25 a.m.)

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1 STATE OF HAWAII)
2) ss.
3 COUNTY OF HAWAII)
4

5 I, WENDY L. GRAVES, a certified court reporter
6 in the State of Hawaii, do hereby certify that the
7 foregoing pages are a true and correct transcription of
8 the proceedings in the above matter.

9
10 Dated this 4th day of December, 2020.

11
12
13 *Wendy Graves*
14

15 _____
16 Wendy L. Graves, CSR No 460
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