

IN THE SUPREME COURT OF GUAM

**MARIANO T. PAULINO, JR., TERESITA S.N.
PAULINO, THOMAS MICHAEL PETRIE and
BRIGIDA PAULINO PETRIE,**
Plaintiffs-Appellants

vs.

**ROLAND C. BISCOE, RANDOLPH C. BISCOE,
GLENN C. BISCOE, SAMUEL C. BISCOE, MARYANN
C. BISCOE, OSHIMA CONSTRUCTION GUAM CORP.,
a Guam Corporation,**
Defendants-Appellees

**MARIANO T. PAULINO, JR., TERESITA S.N.
PAULINO, THOMAS MICHAEL PETRIE and
BRIGIDA PAULINO PETRIE,**
Plaintiffs-Appellants

vs.

**BENNY C. BELLO, PACIFIC FINANCIAL
CORPORATION and OSHIMA CONSTRUCTION
GUAM CORPORATION,**
Defendants-Appellees

Supreme Court Case No. CVA98-034
Superior Court Case Nos. CV0348-93 and CV0349-93

OPINION

Filed: April 10, 2000

Cite as: 2000 Guam 13

Appeal from the Superior Court of Guam
Argued and submitted on August 9, 1999
Hagåtña, Guam

Appearing for the Plaintiffs-Appellants:

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BEFORE: PETER C. SIGUENZA, Chief Justice (Acting)¹, MICHAEL J. BORDALLO, Designated Justice, and LAWRENCE J. TEKER, Justice *Pro Tempore*.

SIGUENZA, C.J.:

[1] The trial court held that a lender, who had foreclosed on land of the debtor pursuant to a private power of sale provision in the mortgages, could not sue the debtor to recover a deficiency judgment for the difference between the debt and the proceeds received from the sale of the foreclosed land. Because we find that the trial court erred in its conclusion we reverse and remand.

BACKGROUND

[2] On July 25, 1989, the Defendants-Appellees (the “Biscoes”) gave to the Plaintiffs-Appellants (the “Paulinos”) a promissory note in the amount of \$458,264.00. A mortgage on Lot 16-13, Talofof, Guam, was executed and delivered as security for the note. On that same date, a second promissory note in the amount of \$446,392.00 was given by the Biscoes to the Paulinos and a mortgage on another piece of real property, specifically Lot 16-14, Talofof, Guam, was also executed and delivered as security for the second note. Both mortgages were recorded at the Department of Land Management, Government of Guam. Each of the mortgages contained a provision allowing for the remedy of foreclosure by non-judicial sale upon default.²

¹The Chief Justice recused himself from deciding this matter. Justice Siguenza, as the senior member of the panel, was designated as the Acting Chief Justice.

²The two mortgages at issue in this case are virtually identical and the specific provisions regarding the mortgagee’s remedies upon the mortgagor’s default are as follows:

11. That the MORTGAGOR shall be in default if MORTGAGOR fails to pay on the due date any

[3] On April 23, 1990, Defendant Oshima Construction executed and delivered two mortgages as security for two promissory notes executed in favor of Defendant Bello. Subsequently, the mortgages were assigned to Defendant Pacific Financial for a valuable consideration. These mortgages were on the same lots which were subject to the mortgages executed by the Biscoes.

[4] On February 3, 1992, the Biscoes defaulted in their performance under the notes and mortgages to the Paulinos, and on that date the balances on the promissory notes were \$330,176.56 for Lot 16-13 and \$340,388.20 for Lot 16-14. The Paulinos recorded Notices of Default for each of the lots at the Department of Land Management on April 20, 1992. Subsequent Notices of Default were recorded by the Paulinos on April 29, 1992. On June 26, 1992, and again on August 5, 1992, the Paulinos recorded

indebtedness secured hereby or fails to perform any agreement hereunder, time being of the essence. In the event of default, MORTGAGEE may declare all sums secured hereby immediately due and payable by giving MORTGAGOR sixty (60) days' written notice. If said sums are not paid within said 60 day period, MORTGAGEE may institute legal proceedings for judicial foreclosure of this mortgage, in which case the net proceeds from the sale under the direction and decree of a court of competent jurisdiction shall be applied first to any expenses incurred by MORTGAGEE, including attorney's fees and court costs, then to the indebtedness secured hereby. *MORTGAGEE may be the purchaser at such judicial sale.*

12. As an alternative, foreclosure may be by non-judicial sale. Upon such sale, MORTGAGEE may declare all sums secured hereby immediately due and payable by giving MORTGAGOR sixty (60) days' written notice and recording a written notice of default with the Department of Land Management, Government of Guam. If said sums are not paid within said 60 day period, MORTGAGEE may foreclose by public sale. MORTGAGEE shall then give notice of sale as required for the sale of real property under execution, without demand upon MORTGAGOR; therefore MORTGAGEE shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels, and in such order as MORTGAGEE may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. MORTGAGEE may postpone sale of all or any portion of said property by public announcement at such time and place of sale, and from time to time thereafter may postpone such sale by public announcement at the time fixed by the preceding postponement. MORTGAGEE, as agent of MORTGAGOR, or on behalf of , or in the name of MORTGAGOR, as authorized by this power of sale to the MORTGAGEE, shall deliver to such purchaser a deed conveying the property so sold, but without any covenant or warranty, expressed or implied. MORTGAGEE shall have the full right, power and authority to execute

Notices of Sale for each of the properties at the Department of Land Management.

[5] On August 21, 1992, a private sale was conducted at the Talofoto Mayor's office. Present at the sale were the Paulinos' counsel and Defendant Bello. Bello made an offer on the properties, the amount of which does not appear in the record; however, it was rejected as not in compliance with the terms of the Notices of Sale which required cash or a certified check for full payment. The Paulinos, however, bid \$100,000 for each of the two properties.

[6] On March 5, 1993, the Paulinos filed two separate actions in the Superior Court of Guam. Civil case CV 0348-93 was entitled a Complaint to Quiet Title and to Cancel Instruments filed against Defendants Bello, Pacific Financial and Oshima. Civil case CV 0349-93 was a Complaint for money damages and breach of promissory note.³ The two complaints were later consolidated.

[7] Prior to the bench trial on the matter and upon motion by the Defendants, the lower court issued a ruling that Guam law requires a judicial decree for a sale to satisfy a mortgage before a deficiency judgment can be sought; and that following a private sale pursuant to a power of sale no deficiency judgment shall be allowed.⁴ The lower court held that, although Guam did not specifically adopt the California anti-deficiency statute, specifically, Section 580 of the California Code of Civil Procedure, the Guam Legislature enacted a similar statute that prescribed when a deficiency judgment is available and that 7 GCA § 24107 constructively proscribes a deficiency judgment after a private power of sale transaction.

³We observe that the prayer for relief of both complaints listed the damages sought as (1) \$340,388.20 plus interest and costs with regard to Lot 16-14; and (2) \$330,176.56 plus interest and costs with regard to Lot 16-13. Both of these amounts represented the balances of the respective obligations at the time of the alleged breach but apparently do not include the proceeds from the sale to the Paulinos.

⁴Procedurally, the court entertained the Defendant's motion as one for summary judgment.

The trial court reasoned that the language of the statute is unambiguous and provides that only upon the sale of real property under a judicial decree for a sale to satisfy a mortgage or other encumbrance thereon, may a deficiency judgment be had. Thus, because there was no mention of or allowance for a deficiency judgment upon the exercise of a private power of sale the legislature must have intended to exclude the recovery of a deficiency judgment after a sale conducted pursuant to a private power of sale.

[8] In addition, the court observed that even though recourse to a deficiency judgment was a contractual provision included in the mortgage, such a provision is contrary to express provisions of law and is thus void.

[9] The court below noted that judicial foreclosure, as opposed to a private sale, is a condition for a deficiency judgment because judicial oversight and supervision guarantees the integrity of the process and enables the court to determine whether a deficiency really exists. Moreover, such supervision aids in preventing shams, underbidding, and overvaluing of the security. Lastly, it made the comparison that, although judicial foreclosures afford the mortgagee the remedy of a deficiency judgment, the process is costly and timely and there is a redemption period. Private sales, on the other hand, do not afford deficiency judgments but the process is quick and informal and there is no redemption period. Finally, the court determined that anti-deficiency statutes and judicial supervision also prevent double recoveries.

[10] Thus, the court concluded that 7 GCA § 24107 is a constructive anti-deficiency statute and that it was not unreasonable to contemplate that the Guam Legislature had similar intentions to implement the policy considerations of an anti-deficiency statute when that provision and 7 GCA § 24101 were enacted. Summary judgment for the Biscoes was therefore granted and the complaint was dismissed with prejudice

as it pertained to the prayer for a deficiency judgment, monetary damages and attorney's fees against the defendants. The court also ordered that the Paulinos were the owners of the subject real properties free of all liens and mortgages alleged in the complaint.

DISCUSSION

[11] Jurisdiction of this court is not disputed by the parties and is found pursuant to Title 7 GCA §§ 3107(a) and 3108(a) (1994). Final judgment was entered on the docket on November 19, 1998. The Paulinos filed a timely Notice of Appeal pursuant to Rule 4(a) of the Guam Rules of Appellate Procedure.

[12] The parties agree that the standard of review in this matter is that applicable to a trial court's decision on grant of a summary judgment motion. A grant of summary judgment is reviewed *de novo*. *Iizuka Corporation v. Kawasho Int'l Inc.*, 1997 Guam 10, ¶ 7; *Kim v. Hong*, 1997 Guam 11, ¶ 5; *Guam v. Marfega Trading Co.*, 1998 Guam 4, ¶ 9. Also, because a major aspect of the instant case involves statutory interpretation, those issues are reviewed *de novo*. *People v. Quichocho*, 1997 Guam 13, ¶ 3.

[13] The only question presented in the instant case is whether a mortgagee who forecloses on a mortgage and conducts a private sale of the mortgaged property under a power of sale provision in the mortgage is entitled to an action to recover a deficiency if the proceeds of the sale are insufficient to satisfy the underlying debt.⁵ We hold that a mortgagee may indeed maintain an action to recover such a deficiency

⁵At oral argument, the Biscoes brought to the attention of the court that the power of sale provisions in the mortgage did not specifically provide that the mortgagee can be the purchaser at the sale. This issue was not briefed by the parties and is therefore not properly before this court nor is it germane to the issue herein discussed.

and that the court erred when it concluded that that relief was constructively prohibited by 7 GCA § 24107.

[14] The vitality and efficacy of the private power of sale in Guam was addressed in the case of *Y Aleman Corp. v. Chase Manhattan Bank*, 414 F.Supp. 93 (D.Guam 1975). In that case, the plaintiff had given to the defendant a mortgage as security for certain obligations owed to the latter. The mortgage contained a provision that in the event of a default the mortgaged property could be sold by non-judicial sale to satisfy the obligations of the mortgagor thereunder. Subsequent to the execution and delivery of said mortgage the plaintiff defaulted and the defendant elected to exercise its rights under the power of sale provision. The plaintiff had challenged the validity of the exercise of a power of sale clause in a mortgage in Guam on the basis that no such statutory authority exists for such an action.⁶ He further contended that the right of redemption is not destroyed by the exercise of a power of sale but to include such a clause in a mortgage would be illegal under Guam law. The court observed that neither of the statutes, relied upon by the plaintiff and identical to those enacted in California, were a bar to the practice of non-judicial foreclosures in California. *Id.* at 94-95. Moreover, the court found that Section 2932 of the Guam Civil Code provided statutory authority for a power of sale in Guam law. *Id.*⁷ However, the court concluded that even if that section did not exist, the act of the parties of agreeing to include a power of sale clause in a mortgage would not be invalid. *Id.* They would be essentially conducting the private ordering of their own affairs. *Id.*

⁶He had also advanced a constitutional argument that he had been deprived of his property without due process of law which is not addressed here because neither party has made this an issue.

⁷It is now codified in 18 GCA § 36113.

[15] One of the arguments advanced by the plaintiff in *Y Aleman* was that the Guam Legislature did not intend to allow for non-judicial foreclosures since two major pieces of legislation are missing in Guam which are found in California. *Id.* at 95. Those two provisions are the anti-deficiency statutes and the protective regulations with regard to notice of default and method of sale. *Id.* The court, in *dicta*, opined that it may be regrettable that the Guam Legislature did not adopt the same protective measures afforded to mortgagors in California; however, decreeing such safeguards was not the court's prerogative. *Id.*

[16] In the case of *Fitch v. Buffalo Federal Savings & Loan Ass'n*, 751 P.2d 1309 (Wyo. 1988), the defendant signed a promissory note in favor of the plaintiff which was secured by a real estate mortgage on property owned by the defendant. The mortgage contained a power of sale provision and which further provided that upon default, the mortgagee could invoke “* * * any other remedies permitted by applicable law. * * *” *Id.* at 1310. Defendant defaulted on the promissory note and the plaintiff invoked the provision of the power of sale and proceeded to accelerate the debt and foreclosed on the property. A sale was conducted and the property was sold to the Plaintiff. Thereafter, the plaintiff instituted an action to recover the unpaid balance on the note, interest and attorney's fees.

[17] The Supreme Court of Wyoming held that a deficiency action after foreclosure by power of sale is proper under Wyoming mortgage law. *Id.* at 1311. After reviewing several statutes that allowed the lenders to reserve a power of sale in a mortgage the court held that there were no statutory limits on the foreclosing mortgagee's right to seek a deficiency judgment when the foreclosure sale does not bring proceeds sufficient enough to satisfy the mortgage debt. *Id.* at 1312. It reasoned that the right to sue for a deficiency is logical to bind a mortgagor to the terms of the initial bargain and prevent redemption at a

deflated price after foreclosure. *Id.*

[18] The defendant in *Fitch* argued that a mortgagee must seek his deficiency in an initial suit on the note and the mortgage before foreclosure, and relied upon the statutes from other states that protect certain mortgagors from post-foreclosure sale deficiency suits. *Id.* The court surveyed these anti-deficiency statutes and concluded that:

(1) many state legislatures have decided statutorily to protect certain mortgagors from deficiency judgments; and, (2) where a state legislature has not passed such protection into law, deficiency judgments after foreclosure by advertisement and sale, on deeds of trust or purchase money mortgages, are allowed when the foreclosure and sale was proper and equitable.

Id. (citations omitted). The court ultimately concluded that it would not legislate such protections where the legislature has not provided for them in plain and unambiguous language. *Id.* The court held that power of sale mortgagors were already protected by the grant of an unqualified three month statutory right of redemption following foreclosure and sale, that the mortgagor is also free to challenge a declaration of default by lawsuit and that the defaulting mortgagor can contest the propriety of an advertisement and sale foreclosure in equity. *Id.*

[19] In the instant case, there is no direct and express prohibition against deficiency suits after a private sale of real property pursuant to a power of sale in a mortgage. Guam law recognizes the power of sale and provides that it may be conferred upon a mortgagee by a mortgagor that is exercised after a breach of the obligation for which the mortgage is security. *See* Title 18 GCA § 36113 (1992). A mortgage in Guam is considered a special lien, i.e., one which the holder can enforce only as security for the performance of a particular act or obligation. *See* Title 18 GCA §§36104 and 35104 (1992). As such,

the mortgagor maintains the right of redemption. *See* Title 18 GCA § 35501 (1992). However, that right may be foreclosed by the mortgagee but in the manner prescribed by statute. *See* Title 18 GCA § 36112 (1992).

[20] Chapter 24 of 7 GCA are Guam's statutory provisions regarding the foreclosure of mortgages.

Section 24101 provides:

Any action for the recovery of any debt, or the enforcement of any right secured by mortgage on real or personal property, must be in accordance with the provisions [sic] of this Chapter. All actions for the foreclosure of a mortgage [sic] or other encumbrance upon real estate must be brought in the Superior Court.

Title 7 GCA § 24101 (1992).⁸ The succeeding provisions outline the essential requirements for a complaint for the foreclosure of a mortgage, the obligations of the court upon trial, the requirements of the judgment to be given, the sale of the mortgaged property, for the disposition of proceeds and for the rendition of a decree for any deficiency that may occur after the sale. *See* Title 7 GCA §§ 24102-24107 (1992).

[21] The sale of the mortgaged property must be conducted in the manner and under the regulations that govern the sales of real estate under execution. *See* Title 7 GCA § 24104 (1992), Title 7 GCA §§ 23113, 23115, 23121 (1994). The sale, when confirmed by the decree of the court, operates to divest the rights of all the parties and, in turn, vests their rights in the purchaser. *See* Title 7 GCA §23121 (1994)..

[22] Because the sale under a power of sale involves no confirmation decree by a court, the purchaser of the encumbered real property takes subject to the right of redemption. *See* Title 7 GCA § 23122 (1994). Guam law provides for a twelve month period of redemption after the sale of real property. *See*

⁸At first glance, the statute mandates that any action for the foreclosure of mortgages must be brought before the Superior Court; however, this would be inconsistent with the statutory empowerment of the power of sale. *See* 18 GCA § 36113.

Title 7 GCA § 23124 (1994). *But see Y Aleman*, 414 F.Supp. 93 (D.Guam 1975) (observing that the sale itself may serve to foreclose the right of redemption).

[23] Thus, there does not appear to be a restriction upon a mortgagee's right to pursue a deficiency action after foreclosure is achieved via a private sale. Like the *Fitch* case, there are statutes that allow for a power of sale and which dictate the manner and procedures with which foreclosure sales are conducted thus obviating the need for judicial supervision of the foreclosure and sale. Similarly, mortgagors have protections and other remedies such as the right of redemption and the right to challenge the propriety of sale or the declaration of default. Moreover, an important consideration made by the *Fitch* court, with which we are in agreement, was that the "right to sue for a deficiency is logical to bind a mortgagor to the terms of the initial bargain and prevent redemption at a deflated price after foreclosure." *Fitch*, 751 P.2d at 1312.

[24] Therefore, we hold that a mortgagee who conducts a private sale, pursuant to a power of sale provision contained in a mortgage, may maintain an action to recover a deficiency judgment when the foreclosure sale does not bring proceeds sufficient to satisfy the mortgage debt.

[25] We also conclude that the trial court erred in finding that 7 GCA § 24107 constructively prohibited the Paulinos recovery of a deficiency judgment. The court below discussed 7 GCA § 24107 and held it as similar to the anti-deficiency statute from California.⁹ The particular Guam statute provides as follows:

⁹ The California statute provides:

§ 580d. Foreclosure under power of sale; no deficiency judgment; exceptions

No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the

§ 24107. Judgment for Balance After Sale of Property.

Upon the sale of any real property, under a decree for a sale to satisfy a mortgage or other encumbrance thereon, if there be a balance due to the plaintiff after applying the proceeds of the sale, the court, upon motion, shall give a decree against the defendant for any such balance for which, by the record of the case, he may be personally liable to the plaintiff, upon which execution may issue immediately if the balance is all due at the time of the rendition of the decree; otherwise the plaintiff shall be entitled to execution at such time as the balance remaining would have become due by the terms of the original contract, which time shall be stated in the decree.

7 GCA § 24107.

[26] In all cases involving statutory construction, the starting point must be the language of the statute itself. Here, the statute outlines a procedure for the summary rendition of a decree against a defendant for the balance due after the sale of property ordered sold under a decree for sale of the property to satisfy a mortgage. Nothing in the plain language of the statute indicates that such an expedited procedure is available for the balance due after a private sale.

[27] Ordinarily, “where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.” 2A Sutherland Stat. Const. § 47.23 (5th ed.) (footnotes omitted). Thus, while the availability of a summary decree for the balance due to a plaintiff after a sale of real property is

mortgage or deed of trust.

This section does not apply to any deed of trust, mortgage or other lien given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or which is made by a public utility subject to the Public Utilities Act (Part 1 (commencing with Section 201) of Division 1 of the Public Utilities Code).

Cal. Civ. Pro. Code § 580d (West’s 1976).

exclusively limited to a plaintiff who had brought an action of judicial foreclosure; we fail to see how the statute could be read to abrogate a disappointed mortgagee's cause of action to recover the full payment of the underlying obligation should a deficiency exist from the proceeds of the sale. No such prohibition appears on the face of the statute. Nor can it be said that the statute's function is as similar to California's unambiguous proscription against deficiency judgments after foreclosure by power of sale. Moreover, prior to its adoption of an anti-deficiency legislation during the Great Depression, California had freely permitted deficiency judgments after a sale under a power contained in a mortgage. *See* 18 CAL. JUR. *Mortgages*, § 556 (1924).

CONCLUSION

[28] Unless and until the Guam Legislature sees fit to provide mortgagors with the same protections which the California Legislature has extended in its anti-deficiency laws, it is not this court's function to legislate those protections by implication and we hold that a mortgagee may maintain an action to recover the deficiency after foreclosure pursuant to a private power of sale.

[29] Accordingly, the court hereby **REVERSES** the decision of the lower court and **REMANDS** the matter for further proceedings consistent with this opinion.

LAWRENCE J. TEKER
Justice Pro Tempore

PETER C. SIGUENZA
Chief Justice (Acting)

BORDALLO: Concurring

[30] I concur in the result reached by the court, however, I write this opinion to clarify the basis on which I agree that a mortgagee may maintain an action to recover the deficiency after foreclosure.

[31] The inclusion of language intimating that the sale itself may serve to foreclose the right of redemption (and the subsequent cite to *Y Aleman Corp. v. Chase Manhattan Bank*, 414 F. Supp 93 (D.Guam 1975)) undermines the very support for the conclusion that adequate safeguards and protection exist which obviate the need for judicial supervision. The court in *Y Aleman* simply held that the statutory right to redemption does not implicitly bar a private power of sale clause in a mortgage. I agree. The court continued, *in dicta*, citing to *Witkins*, that California courts would probably hold that the sale itself forecloses the right of redemption. To hold so would give undue importance to 18 GCA § 36113 over explicit statutes which grant and protect the right of redemption. Title 18 GCA §§ 35501, 36302 (1992). Title 7 GCA § 23122 (1994) expressly states all sales for real property, except a lease term for less than two years are subject to redemption under the statutory right to redemption is foreclosed pursuant to law. The only means by which to foreclose the right of redemption is pursuant to Title 7 GCA § 24101 (1992).

[32] Lastly, the concern of the majority as expressed by the *Fitch* court that the “right to sue for a deficiency is logical to bind a mortgagee to the terms of the initial bargain and prevent redemption at a deflated price after foreclosure” is misplaced. If the mortgagee simply bids the total amount due, he either receives his property plus any payments made prior to foreclosure, or, if redemption is made, receives the full performance of the initial bargain. If no absolute right of redemption exists, then immediately upon the foreclosure of property, as in the case at bar, the mortgagee (appellants here) receive title to the property,

and the right to a deficiency of the unpaid balance, which may be substantial. Thus, the mortgagee recovers well in excess of the bargain, and in essence recovers double on a substantial portion of the initial sale price.

[33] I would reverse and remand to the court to determine whether the sale was in accordance with Title 7 GCA § 23122 (1994), more particularly subsection 4. Prior to recovering a deficiency, the mortgagee must prove he provided the mortgager with notice of the statutory right of redemption or foreclosed that right pursuant to 7 GCA § 24107.

MICHAEL J. BORDALLO
Designated Justice