

**IN THE SUPREME COURT OF GUAM**

**PATRICIA EDWARDS**

Plaintiff-Appellant

vs.

**PACIFIC FINANCIAL CORP., HIGHSMITH & O'MALLAN, P.C.,  
DAVID HIGHSMITH and BASIL O'MALLAN**

Defendants-Appellees

**OPINION**

**Filed: September 14, 2000**

**Cite as: 2000 Guam 27**

Supreme Court Case No.: CVA99-049

Superior Court Case No.: CV2785-98

Appeal from the Superior Court of Guam

Submitted on the Briefs

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice, and JOHN A. MANGLONA, Designated Justice

CRUZ, C.J.:

[1] Patricia Edwards brought an action to set aside a foreclosure of her real property pursuant to a private power of sale provision in a mortgage with Pacific Financial Corporation. The trial court granted summary judgment in favor of Pacific Financial Corporation and other Defendants finding no genuine issue of material fact as to the terms of an oral foreclosure forbearance agreement entered into by the parties to allow Edwards to bring her payments current and cure her default, and Edwards appealed. We agree with the trial court and affirm its decision.

## I.

[2] On July 14, 1992, the Appellant, Patricia Edwards (hereinafter “Edwards”), borrowed \$150,000.00 from Appellee, Pacific Financial Corporation (hereinafter “Pacific Financial”), and secured the loan with a mortgage on real property. Edwards defaulted twice on this loan. As a result of her first default in 1996, Pacific Financial invoked the power of sale provision in Edwards’ mortgage and hired the law firm of Highsmith & O’Mallan, P.C. to foreclose Edwards’ interest in the mortgaged property. Edwards was served a Notice of Default and Election to Sell and thereafter a foreclosure sale was scheduled. However, prior to the date set for the foreclosure sale, Harry Gutierrez (hereinafter “Gutierrez”), as Edwards’ authorized representative, met with Attorney Highsmith (hereinafter “Highsmith”) or Attorney O’Mallan (hereinafter “O’Mallan”) and reached an oral foreclosure forbearance agreement. Under this agreement, Edwards was to make payments as follows:

\$4,000.00 by 2:00 p.m. on January 31, 1997,  
\$2,000.00 by 2:00 p.m. on February 7, 1997,  
\$2,000.00 by 2:00 p.m. on February 21, 1997, and  
\$2,000.00 by 2:00 p.m. on March 7, 1997.

Appellant's Excerpts of Record, Gutierrez Aff. at 2; Appellee's Excerpts of Record, O'Mallan Aff. at 2.

Pacific Financial asserts that the date for the foreclosure sale was postponed to each of the dates on which payment was due. Edwards disputes this assertion. While not all the payments were made on time, Edwards and Pacific Financial agree that the loan was brought current and foreclosure was averted.

[3] In December of 1997, Edwards again defaulted. Pacific Financial again invoked the power of sale provision in Edwards' mortgage and utilized the services of Highsmith & O'Mallan, P.C. to foreclose on the mortgaged property. Edwards was served a Notice of Default and Election to Sell and thereafter a foreclosure sale was scheduled for March 6, 1998. However, on February 19, 1998, Gutierrez once again met with O'Mallan and they entered into a second foreclosure forbearance agreement. Payments to bring the loan current were to be as follows:

\$4,000.00 by Feb. 23, 1998,  
\$4,000.00 by Mar. 2, 1998,  
\$2,000.00 by Mar. 9, 1998,  
\$2,000.00 by Mar. 16, 1998,  
\$2,000.00 by Mar. 23, 1998, and  
\$4,500.00 by Mar. 30, 1998.

Appellant's Excerpts of Record, Gutierrez Aff. at 2; Appellee's Excerpts of Record, O'Mallan Aff. at 4.

[4] A promissory note for the entire amount of \$18,500.00 was to be executed by Gutierrez. However, for reasons which the parties dispute, this promissory note was never executed. Gutierrez made the first two payments, albeit late on March 4 and 12, 1998, and O'Mallan consequently postponed the

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foreclosure sale and posted notices to that effect on March 6, 13, and 20, 1998 at the Dededo Mayor's Office. However, Gutierrez missed the next three payment dates, and on March 27, 1998 the foreclosure sale was held and Pacific Financial purchased the property by credit bid for the entire amount due.

[5] Edwards filed suit in the Superior Court against Pacific Financial, the law firm of Highsmith & O'Mallan, P.C., and David Highsmith and Basil O'Mallan as separate defendants seeking primarily to set aside the foreclosure sale and have title to the mortgaged property restored to her. Subsequently, Pacific Financial filed a Motion for Summary Judgment. The trial court found that there was no genuine issue that terms of the foreclosure forbearance agreement required Edwards to make specific installment payments and granted summary judgment in favor of all Defendants. *Edwards v. Pacific Financial Corp.*, CV2785-98 (Super. Ct. Guam Sept. 17, 1999).

## II.

[6] This court has jurisdiction pursuant to 7 GCA §§ 3107 (1994).

[7] The trial court's decision to grant summary judgment shall be reviewed *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam) Inc.*, 1997 Guam 10, ¶ 7. Under the Guam Rules of Civil Procedure Rule 56, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* A genuine issue of fact exists if there is "sufficient evidence" which establishes a factual dispute requiring resolution by a fact-finder. *Id.* A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome

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of the suit. *Id.* Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *Id.* If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the complaint, but must produce at least some significant probative evidence tending to support the complaint. *Id.* at ¶ 8 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986)). In addition, the court must view the evidence and draw inferences in the light most favorable to the nonmovant. *Id.* (citation omitted). The "court's ultimate inquiry is to determine whether the "specific fact" set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *Id.* (citation omitted).

### III.

#### A.

[8] Edwards takes the position that the foreclosure forbearance agreement allowed her to complete payment of the \$18,500.00 on or before March 30, 1998, and, therefore, the foreclosure sale on March 27, 1998 violated the agreement. Pacific Financial argues that the foreclosure forbearance agreement required Edwards to make installment payments on specific dates and that any failure to make payment would cause foreclosure to proceed immediately.

[9] The parties agree that this case is essentially a contract dispute. Generally, in a contract dispute, a motion for summary judgment may be granted only where the agreement's language is unambiguous and conveys a definite meaning. *John Hancock Mutual Life Ins. Co. v. Amerford Int'l. Corp.*, 22 F.3d 458,

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461 (2nd Cir. 1994). The fact that the parties did not reduce the contract to writing aggravates the ambiguity alleged by Edwards and creates the central problem in this case. Under Guam law, “[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” 18 GCA § 87102 (1992). Therefore, the intent of the parties at the time they entered the foreclosure forbearance agreement must be examined.

[10] To garner the contract’s meaning, extrinsic evidence such as letters, reports of conversations, and the parties’ actions may be used. *Fitzsimmons v. Best*, 528 F.2d 692, 694 (7th Cir. 1976). This evidence will determine whether Edwards provided sufficient, significant probative evidence, viewed in the light most favorable to her, to show a genuine issue that foreclosure forbearance agreement allowed her until March 30, 1998 to pay the \$18,500.00; and whether this evidence, coupled with undisputed background or contextual facts, might lead a rational or reasonable jury to return a verdict in Edwards’ favor. *Iizuka*, 1997 Guam 10 at ¶¶ 7 and 8.

[11] Beginning with Edwards’ default in December of 1997, the undisputed evidence shows that Pacific Financial recorded a Notice of Default and Election to Sell at the Department of Land Management on December 4, 1997. This notice was addressed to Edwards’ Guam address and informed her of the right to stop foreclosure by paying the amount due within three months of the date of recordation. On February 5, 1998, Pacific Financial recorded a Notice of Sale Under Mortgage which noticed the foreclosure sale for March 6, 1998 at 10:00 a.m. at the Dededo Mayor’s Office. Pacific Financial alleges that this notice was served on Edwards and posted at the Dededo Mayor’s Office. Gutierrez, as Edwards’ authorized representative, met with O’Mallan on February 19, 1998, and they agreed to a payment schedule to cure

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the default. Pursuant to this agreement, O'Mallan postponed the March 6, 1998 foreclosure sale. In Edwards' Opening Brief, she admits that Gutierrez met with O'Mallan on February 19, 1998 in an effort to postpone the March 6, 1998 sale. Further, Gutierrez states in his affidavit that O'Mallan informed him that a payment had to be made before March 6, 199[8].<sup>1</sup> The facts that (1) the first payment was scheduled for February 23, 1998; (2) the foreclosure sale was set for March 6, 1998; and (3) Gutierrez knew he had to make a payment before March 6, 1998 to avoid foreclosure, contradict Edwards' argument that the foreclosure forbearance agreement postponed the foreclosure sale until March 30, 1998.

[12] The evidence shows that Gutierrez and O'Mallan intended the foreclosure forbearance agreement to include an installment payment plan. The fact that Gutierrez made the first two payments, albeit late, indicates that he knew installment payments were required or foreclosure would follow. This conclusion is supported by statements in O'Mallan's affidavit, which Edwards does not dispute, that Gutierrez contacted him to request an extension of time to make the late payments. In addition, when Gutierrez's made his first payment on March 4, 1998, the receipt he was given expressly stated "[f]oreclosure postponed until March 13, 1998." Record on Appeal, Complaint, Exh. B. In his affidavit, Gutierrez offers the excuse that he did not see this notation until it had been pointed out by Edwards' attorney. However, this notation provides actual notice of the fact that the sale was postponed until March 13, 1998, and, at the very least, Gutierrez had constructive notice of the postponed sale. *See, e.g.*, 1 GCA §§ 718 and 719

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<sup>1</sup> We note errors in Paragraphs 15 and 16 of Gutierrez's Affidavit in which he refers to payments in March of 1999. Clearly, the payments under the foreclosure forbearance agreement were due in Feb. and March of 1998, not 1999.

(1992).<sup>2</sup> Edwards' contention that she had until March 30, 1998 to make full payment to cure the default flies in the face of her agreement to make installment payments on specific dates. If O'Mallan had intended to give Edwards until the end of the month to make payment, there would have been little need to agree to a specific installment payment plan. Clearly, O'Mallan did not intend to postpone the foreclosure until March 30, 1998.

[13] Edwards further contends that neither she nor Gutierrez were informed by O'Mallan that foreclosure would proceed if any installment payment was missed and that O'Mallan represented to them that they had until March 30, 1998 to make full payment. The only substantive evidence that Edwards puts forth is the unsigned promissory note which she alleges allows her until March 30, 1998 to make full payment. While the unsigned note is unenforceable and of no effect pursuant to Title 18 GCA § 86106(2) (1992), it does indicate the terms to which Gutierrez and O'Mallan agreed upon at their February 19, 1998 meeting.<sup>3</sup> The relevant portion of the note provides:

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<sup>2</sup> Section 718 defines actual notice as notice "which consists of express information of a fact," and constructive notice as notice "which is imputed by law." 1 GCA § 718. Section 719 further defines constructive notice. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of that fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." 1 GCA § 719.

<sup>3</sup>This section provides in part:

What contracts must be written. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent:

....

2. A special promise to answer for the debt, default, or miscarriage of another; except for the cases provided for in § 31203 of the Title [Promise to Answer for the Obligation of Another] . . .

18 GCA § 86106(2).



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For value received, I HARRY GUTIERREZ . . . promise to pay to PACIFIC FINANCIAL CORPORATION, at the law office of Highsmith & O'Mallan, P.C. . . . the principal sum of EIGHTEEN THOUSAND FIVE HUNDRED DOLLARS (\$18,500.00) in two installments of FOUR THOUSAND DOLLARS (\$4,000.00) due on February 23, 1998 and March 2, 1998; three installments of TWO THOUSAND DOLLARS EACH (\$2,000.00) due on March 9, March 16, and March 23, 1998; and the final payment of FOUR THOUSAND FIVE HUNDRED DOLLARS (\$4,500.00) due on March 30, 1998. This note may be prepaid at any time, in whole or in part without penalty.

Record on Appeal, Tab 1, Complaint, Exh. C, Promissory Note at 1. Contrary to Edwards' assertion, nowhere in the note is Gutierrez expressly given the right to make full payment of \$18,500.00 by March 30, 1998. The last sentence of the paragraph allows Gutierrez to prepay the note in whole or in part anytime within the scheduled payment dates. It neither excuses late payment or nonpayment of the installments, nor does it expressly allow a lump sum payment to be made by March 30, 1998. Moreover, in Edwards' Opposition to the Motion for Summary Judgment, she admits that the promissory note did not mention a March 30, 1998 deadline: "As a part of the [foreclosure forbearance] agreement, Defendant O'Mallan, on behalf of his client, [D]efendant Pacific Financial, agreed to postpone the sale scheduled on March 6, 1998, until after March 30, 1998, **though the Promissory Note prepared by [D]efendant O'Mallan is silent on this matter.**" Record on Appeal, Tab 32, Opposition to Motion for Summary Judgment at 4 (emphasis added). This position is in direct conflict with Edwards' position on appeal that the promissory note provided a payment deadline of March 30, 1998. Thus, the promissory note does little to show a genuine issue of material fact.

[14] We find that Edwards has not provided significant probative evidence to support her claim that the foreclosure forbearance agreement allowed her until March 30, 1998 to complete payment and cure the default. Thus, we hold that there is no genuine issue of material fact with respect to the terms of the

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foreclosure forbearance agreement.

**B.**

[15] Edwards also raises an issue of whether acceptance of late payments by O'Mallan excused other late payments and waived any right of Pacific Financial to declare a breach of the foreclosure forbearance agreement. The general rule is that a vendor's acceptance of payments past due under an executory contract temporarily suspends his right to declare a breach of the contract unless the purchaser is thereafter given notice that strict performance in the future will be required and the purchaser is given reasonable time to perform. *Lopez v. Bell*, 207 Cal. App. 2d 394, 398; 24 Cal. Rptr. 626, 629 (Cal. Dist. Ct. App. 1962); *see also Falk v. Allen*, Civ. No. 82-0184A, 1983 WL 30216, at 3 (D. Guam Ap. Div. Aug. 25, 1983) (applying California law which holding that the acceptance of late payments after breach of a lease precludes landlord from declaring a forfeiture by that breach).

[16] With regard to this argument, we established above that there is no genuine issue that the foreclosure forbearance agreement required Edwards to make payments by specific dates or foreclosure would proceed immediately. In his affidavit, Gutierrez states that at his meeting with O'Mallan to discuss a cure for the breach, a payment plan was devised. Gutierrez further states that he told O'Mallan that he would be tight on money and O'Mallan responded that a payment had to be made by March 6, 1998, the original foreclosure sale date. As a result, Gutierrez made the first payment on March 4, 1998. In the receipt for that payment, a notation informed Gutierrez that foreclosure was postponed to March 13, 1998. Not surprisingly, Gutierrez made his next payment on March 12, 1998 and again foreclosure was averted.

Thus, O'Mallan's conduct in informing Gutierrez to make payments by March 6 and March 13 was notice to Gutierrez that timely payment was required and does not indicate waiver of the right to proceed with the foreclosure sale.

[17] Further, in reviewing the parties' actions to ascertain the terms of the foreclosure forbearance agreement, we note that this was the second such agreement entered into by the parties. In Edwards' earlier default, the parties agreed on an installment payment plan to cure Edwards' default. In that agreement, Edwards paid four installments and the default was cured. Pacific Financial asserts that each time a payment was made, foreclosure was postponed to the next installment payment due date. Edwards argues that Gutierrez was not told that foreclosure would proceed on the installment payment due date if payment was not received. Gutierrez made timely installment payments on all but the last payment. For this late payment, O'Mallan alleges, and Edwards does not dispute, that Gutierrez contacted him to request an extension of the sale. The fact that Gutierrez made timely payments and contacted O'Mallan when the last payment would be late indicates that Gutierrez knew of the requirement to make timely payment or foreclosure would follow. Gutierrez's actions with respect to the first foreclosure forbearance agreement do not support his claim that he did not know that foreclosure would occur if he missed any payment in the second foreclosure forbearance agreement and do little to support his waiver argument.

[18] Thus, while O'Mallan did accept late payments, Gutierrez was informed that future payments would be required in a timely manner and Gutierrez was given reasonable time to perform. Moreover, we cannot ignore Gutierrez's conduct indicating that he was aware of his responsibility to make timely payments under the foreclosure forbearance agreement. Under these circumstances, we find that O'Mallan did not waive

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the right to foreclose despite accepting late payments.

C.

[19] Edwards claims that she did not receive adequate notice of the March 27, 1998 foreclosure sale in violation of the paragraphs 14 and 18 of the mortgage. Generally, “[t]he only requirements of notice of sale essential to the validity of a sale . . . are those expressly and specifically prescribed by the terms of the instrument and by the provisions of the applicable statutes.” *Lopez*, 207 Cal. App. 2d at 397; 24 Cal. Rptr. at 628 (citing *Lancaster Security Investment Corp. v. Kessler*, 159 Cal. App.2d 649, 652). Because Guam law contains no procedural requirements for a sale by a power of sale, the terms of Edwards’ mortgage control exclusively. Turning then to the mortgage, paragraph 14 addresses the method of service of notice, whereas paragraph 18 contains the power of sale provision and substantive notice requirements. In pertinent part, paragraph 18 provides:

If Lender invokes the power of sale, Lender shall mail a copy of a notice of sale to Borrower in the manner provided in paragraph 14 hereof and Lender shall publish the notice of sale. After the lapse of two weeks, Lender, without further demand on Borrower shall sell the Property at public auction at the time and place and under the terms designated in the notice of sale in one or more parcels and in such order as Lender by determine. **Lender may postpone sale of all or any part of the Property by public announcement at the time and place of any previously scheduled sale.** Lender or Lender’s designee may purchase the Property at any sale.

Appellee’s Excerpts of Record, Benito Aff., Exh. B, Mortgage at ¶ 18 (emphasis added). Edwards’ mortgage thus permits postponements and provides the notice requirements the lender must fulfill in the event of a postponement. Under paragraph 18, the lender need only appear at the time and place of the previously scheduled sale and announce the new date of the sale. This paragraph does not expressly and

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specifically require the lender to provide notice of the postponement directly to the borrower, it requires only that the lender provide notice of the original sale date to the borrower. Thus, under the rule expressed in *Lopez, supra*, the foreclosure sale was valid. Presumably, if the borrower, wanted to bid on property, she could appear at the time and place of the announced sale and could either submit her bid or be informed of a postponement and thus be made aware of the new foreclosure sale date.

[20] Edwards does not dispute receiving notice of the March 6, 1998 sale date. Thus, the only question remaining is whether Pacific Financial complied with the notice requirement for the postponement. The uncontested evidence shows that O'Mallan appeared three times at the Dededo Mayor's Office at the times and dates of the scheduled foreclosure sales and announced the postponements by posting notices thereof. We find that such public declarations of the postponements meet the requirements of paragraph 18 and are reasonably calculated to inform those who would be interested, including a mortgagor. *See, California Livestock Prod. Ass'n v. Sutfin*, 165 Cal. App. 3d 136,142, 211 Cal. Rptr. 152, 155 (Cal. Ct. App. 1985). Further, we find that under the express and specific terms of the mortgage, that Pacific Financial was not required to serve notice of the postponements directly upon Edwards, and that the foreclosure sale was appropriately noticed.<sup>4</sup>

[21] Finally, Edwards claims that summary judgment was premature because she was not afforded reasonable opportunity to conduct discovery. Generally, summary judgment is inappropriate when the non-

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<sup>4</sup> The trial court found that notice and postponement requirements of the foreclosure sale are set forth in 15 GCA §§ 2341 and 2343. However, these sections govern notice of sale requirements and procedures for the sale of the real property of a decedent's estate. These sections are inapplicable to the foreclosure of mortgaged property pursuant to a power of sale provision. Unlike other jurisdictions, Guam has yet to adopt statutory procedures to regulate power of sale foreclosures. Thus, for better or worse a borrower and a lender are free to establish and incorporate their own procedures within the power of sale provision in a mortgage.

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moving party has not been given adequate time for discovery to establish the existence of an element essential to a party's case, and on which the party will bear the burden of proof at trial. *Elvis Presley Enterprises, Inc., v. Elvisly Yours, Inc.*, 936 F.2d 889, 893 (6<sup>th</sup> Cir. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552 (1986)). However, Edwards failed to raise this issue until her appeal was filed. The court notes that in her Opposition to Summary Judgment, Edwards requested more time to oppose summary judgment. However, her request was not based on an allegation that she had insufficient time to conduct discovery; it was based on the reason that she was obtaining new counsel and that she might desire to assert new matters through her new counsel to support her opposition to summary judgment. As a general rule, this court will not address arguments raised for the first time on appeal. *Ward v. Reyes*, 1998 Guam 1, ¶ 9. Edwards had ample opportunity to request more time for discovery prior to the summary judgment hearing, such as through a GRCP 56(f) affidavit but failed to do so. Thus, this court will not consider this issue on appeal.

#### IV.

[22] The evidence submitted by Edwards, viewed in the light most favorable to her, does not tend to support her claim that there is a genuine issue that the foreclosure forbearance agreement ultimately postponed the sale until March 30, 1998. Further, this evidence, coupled with the undisputed background or contextual facts does not lend to a belief that a rational or reasonable jury would return a verdict for Edwards. Therefore, we find no genuine issue of material fact with respect to the terms of the foreclosure forbearance agreement. Additionally, we see no merit in Edwards' argument that summary judgment was

premature and that the notice of sale was inappropriate. We hold that Appellees are entitled to summary judgment as a matter of law. Accordingly, the trial court's decision is **AFFIRMED**.

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PETER C. SIGUENZA  
Associate Justice

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JOHN A. MANGLONA  
Designated Justice

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BENJAMIN J. F. CRUZ  
Chief Justice