

**Bank of Haw. v. Mostoufi**

Intermediate Court of Appeals of Hawai'i  
June 30, 2016, Decided; June 30, 2016, Filed  
NO. CAAP-13-0001679

**Reporter**

2016 Haw. App. LEXIS 310 \*; 138 Haw. 141; 377 P.3d 1059

BANK OF HAWAII, Plaintiff-Appellee, v. HOSSAIN MOSTOUFI; MITRA MOSTOUFI, Defendants-Appellants, BRASHER'S SACRAMENTO AUTO AUCTION, INC.; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE "NON-PROFIT" CORPORATIONS 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

**Notice:** PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

PUBLISHED IN TABLE FORMAT IN THE HAWAII REPORTER.

**Prior History:** [\*1] APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT. CIVIL NO. 11-1-1366-07 BIA.

*Bank of Haw. v. Mostoufi, 138 Haw. 141, 377 P.3d 1059, 2016 Haw. App. LEXIS 311 (Haw. Ct. App., June 30, 2016)*

**Core Terms**

summary judgment motion, affirmative defense

**Case Summary**

**Overview**

HOLDINGS: [1]-It was error to grant appellee bank summary judgment in a foreclosure proceeding, even though the bank met its burden of establishing the existence and terms of mortgage agreements, appellees mortgagors' default, and the provision of notice of default to the mortgagors because the mortgagors' allegations created a genuine issue of material fact as to the mortgagors' affirmative defense that the bank did not act in good faith when processing the mortgagors' application for a loan modification by reporting the mortgagors to credit agencies despite promising not to.

**Outcome**

Judgment vacated.

**LexisNexis® Headnotes**

Civil Procedure > ... > Summary  
Judgment > Burdens of Proof > Movant

Persuasion & Proof

Civil Procedure > ... > Summary

Judgment > Evidentiary

Considerations > Absence of Essential Element

**HN1** A moving party seeking summary judgment has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact and may discharge its burden by demonstrating that, if the case went to trial, there would be no competent evidence to support a judgment for its opponent.

Real Property

Law > Financing > Foreclosures

**HN2** A foreclosure decree is only appropriate where all four material facts have been established: (1) the existence of an agreement, (2) the terms of the agreement, (3) default by mortgagors under the terms of the agreement, and (4) the giving of a cancellation notice and recordation of an affidavit to such effect.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

**HN3** Generally, a plaintiff-movant is not required to disprove affirmative defenses asserted by a defendant in order to prevail on a motion for summary judgment. A plaintiff is only

obligated to disprove an affirmative defense on a motion for summary judgment when the defense produces material in support of an affirmative defense. Generally, the defendant has the burden of proof on all affirmative defenses, which includes the burden of proving facts which are essential to the asserted defense.

**Counsel:** On the briefs: Gary Victor Dubin, Frederick J. Arensmeyer, and Andrew Goff, for Defendants-Appellants.

Mitzi A. Lee, for Plaintiff-Appellee.

**Judges:** By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.

## Opinion

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### SUMMARY DISPOSITION ORDER

Defendants-Appellants Hossain and Mitra Mostoufi (the Mostoufis) appeal from the February 25, 2013 "Findings of Fact, Conclusions of Law, Order Granting [Plaintiff-Appellee Bank of Hawaii (BOH)'s] Motion for Summary Judgment on All Claims and Against Defendants (1) Hossain Mostoufi, (2) Mitra Mostoufi, (3) Brasher's Sacramento Auto Auction, Inc., and (4) Director of Budget and Fiscal Services, City and County of Honolulu; Interlocutory. Decree of Foreclosure and Order of Sale Filed October 1, 2012" and the February 25, 2013 Judgment entered in the Circuit Court of

the First Circuit (Circuit Court).<sup>1</sup>

On appeal, the Mostoufis argue the Circuit Court (1) erred by granting summary judgment in favor of BOH because there were numerous issues of material fact in dispute related to the Mostoufis' affirmative defenses and BOH did not meet its evidentiary burden; (2) [\*2] abused its discretion in denying their motion to reconsider; and (3) abused its discretion in denying their request for a continuance pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 56(f).

After careful review of the record on appeal, the points raised, the parties' arguments, and the applicable legal authority, we resolve the Mostoufis' arguments on appeal as follows:

**HN1** As the moving party, BOH had "the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact" and could "discharge [its] burden by demonstrating that, if the case went to trial, there would be no competent evidence to support a judgment for [its] opponent." Ralston v. Yim, 129 Hawai'i 46, 59, 292 P.3d 1276, 1289 (2013) (citation omitted and formatting altered).

**HN2** "A foreclosure decree is only appropriate where all four material facts have been established: '(1) the existence of the Agreement, (2) the terms of the Agreement, (3) default by

[Appellants] under the terms of the Agreement, and (4) the giving of the cancellation notice and recordation of an affidavit to such effect.'" IndyMac Bank v. Miguel, 117 Haw. 506, 520, 184 P.3d 821, 835 (App. 2008) (quoting Bank of Honolulu, N.A. v. Anderson, 3 Haw. App. 545, 551, 654 P.2d 1370, 1375 (1982)).

BOH established the existence and terms of the agreements when it attached Note 1, Mortgage 1, Note 2 and Mortgage 2 to its motion [\*3] for summary judgment as exhibits B-E, respectively. The Mostoufis did not dispute either the existence or terms of the mortgage agreements. BOH established default by the Mostoufis in an affidavit by BOH records custodian Wendy Saito, which stated "[the Mostoufis] stopped making payments and has not made any payments on Note No. 1 since his January 3, 2011 payment and has not made any payment on Note No. 2 since his December 15, 2010 payment." BOH also provided evidence of the loan history as exhibits J and K to its motion for summary judgment. The Mostoufis did not dispute that they were in default or provide any evidence showing that their payments were current. Lastly, BOH established through affidavit and exhibits that it sent the Mostoufis notice of default letters on Note 1 and Note 2 on September 2, 2010 and May 2, 2011, respectively.

**HN3** Generally,

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<sup>1</sup> The Honorable Bert I. Ayabe presided.

a plaintiff-movant is not required to disprove affirmative defenses asserted by the defendant in order to prevail on a motion for summary judgment. [A] plaintiff is only obligated to disprove an affirmative defense on a motion for summary judgment when "the defense produces material in support of an affirmative defense." Generally, the [\*4] defendant has the burden of proof on all affirmative defenses, which includes the burden of proving facts which are essential to the asserted defense.

*U.S. Bank Nat'l Ass'n v. Castro*, 131 Hawaii 28, 41, 313 P.3d 717, 730 (2013)

Hossain Mostoufi's (Hossain) declaration asserted that (1) During discussions regarding a loan modification application, Hossain told BOH employee Ms. Kawana that he was interested in maintaining his credit "above everything else" because it was important to the running of his business and "if there was the slightest chance this would affect [his] credit [he] would rather go ahead and pay the payments in full, even if [he] had to borrow money in order to do so. That is how important [his] credit is." (2) Ms. Kawana said "her boss said it is okay and that the bank will not report [Hossain] to the credit companies." (3) Based on this assurance, Hossain began making reduced payments as they had discussed, but found, when he sought a line of credit for his business, his credit

score had dropped from over 720 to 500. (4) When he reported this to Ms. Kawana, she acknowledged this mistake, which was corrected as reflected in a March 2010 letter. (5) While BOH continued to process his loan modification application, Ms. Kawana told Hossain to [\*5] continue making the reduced payments and again assured him BOH would not negatively report these reduced payments. (6) BOH again reported his loan payment as late and his credit continued to suffer. (7) Thereafter, BOH informed Hossain that his application had been denied because he lacked sufficient income, he would need to pay \$20,000 to bring his payment up to date, and that the "previous arrangement" would end and BOH would "begin to report to credit companies." (8) Hossain signed a second agreement to make reduced loan payments in order to keep his home. (9) BOH "ruined" his credit, affecting his ability to borrow and to effectively run his business.

The Mostoufis argued, in opposition to BOH's motion for summary judgment, that BOH did not act in good faith during the course of processing his modification application and should be estopped from seeking the remedy of foreclosure. See *Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc.*, 107 Haw. 423, 436-37, 114 P.3d 929, 942-43 (App. 2005) (good faith claim) and *Stanford Carr Development Corp. v. Unity House Inc.*, 111 Hawai'i 286, 300-01, 303-05,

141 P.3d 459, 473-74, 476-78 (2006).

The Mostoufis' allegations created a genuine issue of material fact as to this defense. Thus, it was error to grant summary judgment in BOH's favor.

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End of Document

In light of our resolution of this first issue, it is [\*6] unnecessary to address the other issues raised by the Mostoufis.

Therefore, IT IS HEREBY ORDERED that the February 25, 2013 "Findings of Fact, Conclusions of Law, Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against Defendants (1) Hossein Mostoufi, (2) Mitra Mostoufi, (3) Brasher's Sacramento Auto Auction, Inc., and (4) Director of Budget and Fiscal Services, City and County of Honolulu; Interlocutory Decree of Foreclosure and Order of Sale Filed October 1, 2012" and February 25, 2013 Judgment, entered in the Circuit Court of the First Circuit, are vacated and the case is remanded for further proceedings consistent with this order.

DATED: Honolulu, Hawai'i, June 30, 2016.

/s/ Alexa D.M. Fujise

Presiding Judge

/s/ Lawrence M. Reifurth

Associates Judge

/s/ Lisa M. Ginoza

Associates Judge