

CAAP-11-0001101

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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Intermediate Court of Appeals**

CAAP-11-0001101

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WELLS FARGO BANK, N.A, NATIONAL
ASSOCIATION AS TRUSTEE FOR
SOUNDVIEW HOME LOAN TRUST 2007-
OPT2, ASSET-BACKED CERTIFICATES,
SERIES 2007-0PT2,

Plaintiff-Appellee,

vs.

HATOTA TEHIVA, JAYDEN PHILLIPS
TEHIVA, JOYCELENE PHILLIPS;

Defendants-Appellants,

JOHN DOES I-50; AND JANE DOES I-50,

Defendants.

DC CIVIL NO. 11-1-1133
(Ejectment)

**APPEAL FROM THE
(1) DENIED ORDER GRANTING
TEMPORARY RESTRAINING ORDER,
DATED DECEMBER 29, 2011;**

**APPELLANTS' EMERGENCY MOTION
FOR EMERGENCY STAY PENDING
HEARING; MEMORANDUM IN
SUPPORT OF THE MOTION;
DECLARATION OF ARNOLD T.
PHILLIPS; EXHIBITS "1"- "2";
CERTIFICATE OF SERVICE**

DISTRICT COURT OF THE SECOND
CIRCUIT, HANA DIVISION

HONORABLE KELSEY T. KAWANO
HONORABLE BLAINE KOBAYASHI
Judges

EXTREMELY TIME SENSITIVE

**APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING HEARING
TO ANY INDIVIDUAL JUDGE OF THE INTERMEDIATE COURT OF APPEALS**

MEMORANDUM IN SUPPORT OF THE MOTION

DECLARATION OF APPELLANTS' COUNSEL

EXHIBITS "1" – "2"

CERTIFICATE OF SERVICE

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**APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING HEARING
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COME NOW HATOTA TEHIVA, JAYDENE PHILLIPS TEHIVA, and JOYCELENE PHILLIPS (hereinafter "Defendants-Appellants") by and through their undersigned attorney, and hereby motion this Honorable Court pursuant to Hawaii Rules of Appellate Procedure, Rule 8(a) for an Emergency Stay Pending Hearing scheduled for February 7, 2012 because of a Denied Order to grant a Temporary Restraining Order dated December 29, 2011. The Defendants-Appellants requested a short preliminary injunction through a motion for a the Temporary Restraining Order to stay the orders and judgment of the Writ of Possession filed July 18, 2011, executed at the residence on December 23, 2011 and set for seizure of the Defendants-

Appellants' property on January 2, 2012. The Defendants-Appellants' motion is based on the files, pleadings, record and declarations attached hereto as Exhibit "1", DEFENDANTS' EX PARTE MOTION AND PETITION FOR TEMPORARY RESTRAINING ORDER; MEMORANDUM IN SUPPORT OF THE MOTION; DECLARATION OF ARNOLD T. PHILLIPS; EXHIBITS "A" – "C".

The requested Order Granting a Temporary Restraining Order was denied and returned unsigned by a specific judge with no instruction on December 29, 2011 and is attached hereto as Exhibit "2".

The threat of criminal trespass and physical ejectment of the homeowners is scheduled for noon on January 2, 2012 and the Hana District Court has refused to stay the execution of the Writ and thereby denied the Defendants-Appellants any meaningful opportunity for review or hearing, exposing them to imminent irreparable harm.

This emergency motion for stay pending hearing is made in the interests of justice to preserve the status quo and to prevent irreparable harm until such time as this Court may decide the merits of this appeal. The Defendants-Appellants consist of a family with 6 children ranging in age from 2 - 20 years of age living with their parents, along with an elderly grandmother with serious health issues including diabetes and high blood pressure, face irreparable harm. The property has been family owned for over 100 years handed down the Hawaiian generations from the Great Mahele. There are family members buried on the property.

Time being of the absolute essence, Defendants-Appellants, who face irreparable harm and physical ejectment in a matter of a very few days – the majority of which are the New year weekend days and holidays, respectfully request that this application be considered and decided immediately by this Court, or in these exceptional circumstances by a single Judge of this Court

due to the requirements of time, as provided under Rule 8(a) and Rule 27(c) of the Hawaii Rules of Appellate Procedure.

Should this Court require additional time to evaluate this Emergency Motion, Appellants hereby request this Court immediately enter an order granting a temporary stay in order to preserve the status quo and prevent immediate eviction pending full consideration of this Emergency Application.

Dated: Honolulu, Hawaii December 30, 2011

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE
MOTION**

MEMORANDUM IN SUPPORT OF THE MOTION

I. INTRODUCTION

On December 28, 2011, Defendants-Appellants sought an ex parte motion to shorten time and a request telephonic conference which was denied on December 28, 2011.

On December 28, 2011, Defendants-Appellants then sought temporary injunction requesting a Temporary Restraining Order (“TRO”) from a Writ of Possession until such time as the Hana District Court could hear the Motion For Relief From Judgment Pursuant To District Court Rules Of Civil_Procedure 60(b), not only to prevent irreparable harm to them, but as a matter of law based on new evidence previously unavailable to the Defendants-Appellants and to correct the any possible fraud, misrepresentation, and circumvention used to obtain the judgments and orders.

On December 29, 2011, the District Court denied the Defendants-Appellants request without signature or instruction. This appeal stems from the denied Order for a Temporary Restraining Order. Defendants-Appellants are unable to determine if the request was denied on procedure or abuse of discretion as no commentary was attached and no Judge's signature was stamped or penned.

On or about December 22, 2011, Defendants-Appellants filed a Motion for Relief from Judgment pursuant to DCRCP 60(b) because new evidence indicated that the trustee of the securitized trust in this case is incorrectly claiming authority and standing to the Defendants-Appellants' title and property. The motion is to be heard on February 7, 2012.

On or about December 23, 2011, opposing counsel served a Criminal Trespass notice on Defendants-Appellants which activated for seizure of Defendants-Appellants' property on January 2, 2012 at noon.

Defendants-Appellants have learned and confirmed through McDonnell Property Analytics, Inc., of Dedham, MA, that the assignment of mortgage used by Wells Fargo Bank, N.A, a National Association as Trustee for Soundview Home Loan Trust 2007-OPT2 to effectuate a non-judicial foreclosure was fraudulent. As stated by securitization forensics expert, Marie MacDonnell,

“(21) Accordingly, neither Option One Mortgage Corporation nor its successor, Sand Canyon Corporation, had the authority to transfer the Tehiva Mortgage into the SVHE 2007-OPT2 Trust. [emphasis supplied]

(22) This Assignment of Mortgage does not represent a true purchase and sale of Tehiva's Mortgage from the Lender to a *bona fide* purchaser for value. Rather, **this Assignment was fabricated for recordation** in the Bureau of Conveyances to create the impression in the public's mind that Wells Fargo Bank, NA a National Association as Trustee for Soundview Home Loan Trust 2007-OPT2, Asset-Backed Certificates, Series 2007-OPT2 had the legal right to foreclose the Tehiva Property.”

A copy of the entire McDonnell report is included and attached hereto within Defendants-Appellants' Exhibit "1" as *Defendants' Exhibit "B"*.

II. JURISDICTION

Pursuant to HRCP 62(c) when an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. After a stay has been denied by a trial court, a stay may be sought under Hawaii Rules of Appellate Procedure, Rule 8. This Court has jurisdiction to "consider appeals from judgments which "require[] immediate execution of a command that property be delivered to the appellant's adversary, and the losing party would be subjected to irreparable injury if appellate review had to wait the final outcome of the litigation." *Penn v. Transportation Lease Haw., Ltd.*, 2 Haw.App. 272, 274, 630 P.2d 646, 649 (1981) (citing *Forgay v. Conrad*, 47 U.S. (6 Haw.) 201, 12 L.Ed. 404 (1848)). The *Forgay* doctrine is an exception to the finality requirement for appeals and it allows an appellant to immediately appeal a judgment for execution upon property, even if all claims of the parties have not been finally resolved. The issues herein are appealable under the *Forgay* Doctrine and HRS § 641-1.

III. STATEMENT OF FACTS

HATOTA TEHIVA, JAYDENE PHILLIPS TEHIVA, and JOYCELENE PHILLIPS are the True owners of the subject property located at 5305 Hana Hwy., Hana, HI 96713 and have been the owners as passed through the generations of their ancestors over 100 years from the time of the Great Mahele. Their deeds are incorporated in Defendants-Appellants' Exhibit "1", *Defendants' Rule 60(b) motion Exhibit "A"*, (see also Affidavit of Jaydene Phillips Tehiva) filed

on December 22, 2011.

As stated in her Affidavit filed within Defendants' Rule 60(b) motion, Defendant-Appellant Jaydene Phillips Tehiva affirms that neither her Promissory note, nor the assignment of mortgage was ever made a part of the record and did not even appear in the Plaintiff-Appellee's Affidavit of Foreclosure.

On or about Friday, December 23, 2011, the process server posted a Criminal Trespass notice on the Defendants-Appellants' residence ordering them to vacate the property by January 2, 2011 at noon.

On or about Monday, December 26, 2011, Defendants-Appellants and counsel received a final copy of the Foreclosure Forensics™, documenting the Gaps in the Chain of Title ("McDonnell Report") for Borrowers Jaydene Uluwehi Phillips, Joycelene Phillips-Tehiva and Hatota Tehiva, 5305 Hana Highway, County of Maui, Hana, Hawaii, 96713 prepared by Marie McDonnell, MCDONNELL PROPERTY ANALYTICS, INC., 888 Washington Street, Suite 101A, Dedham, MA.¹ A copy of the report is provided herein Exhibit "1"; *refer to Defendants' Rule 60(b) motion, Exhibit "B."*

THE FACTS IN THE MCDONNELL REPORT SUPPORT THE DEFENDANTS-APPELLANTS PRIMARY 60(b) DEFENSES

The McDonnell Report supports the Defendants-Appellants' defenses in their *Motion for*

¹ Marie McDonnell is a Mortgage Fraud and Forensic Analyst and a Certified Fraud Examiner credentialed by the Association of Certified Fraud Examiners. McDonnell has been auditing residential mortgage transactions throughout the nation on behalf of consumers and their attorneys since 1991. With 25 years of experience in the field, McDonnell is a pioneer in the field of forensic mortgage analysis and mortgage fraud examination. In the spring of 2009, McDonnell intervened in the now famous cases styled U.S. Bank v. Ibanez and Wells Fargo Bank v. LaRace. She submitted two expert reports to the trial court and a definitive Amicus Brief to the Massachusetts Supreme Judicial Court that revealed the fatal defects in the securitization of the Ibanez and LaRace loans that led the trial court judge to overturn these two foreclosures. In September 2011, Marie submitted an Amicus Brief to the Massachusetts Supreme Judicial Court in the matter of Eaton v. Fannie Mae in which she exposed a fraudulent assignment of mortgage belied the wrongful foreclosure of Eaton's property.

Relief of Judgment Pursuant to Rule 60(b) and upon hearing and oral argument it is likely Defendants-Appellants will prevail. Thus, on its face, the assignment of mortgage is fraudulent. Without a valid Assignment of Mortgage and substantiating documentation, Plaintiff-Appellee Wells Fargo, Trustee and Soundview Home Loan Trust 2007 OPT2 is not the real party in interest and had no standing to effectuate a non-judicial foreclosure or to come before the District Court for ejectment and Writ of Possession. Furthermore, without a valid assignment and continuous chain of title any non-judicial foreclosure proceedings are void.

The ejectment process would cause irreparable harm to the family with elderly family members with serious health issues and the six (6) children ranging in age from 2 years to 20 years old. Defendants-Appellants respectfully request a TRO in the interim between now and the hearing date of February 7, 2012.

IV. ARGUMENT

While there was a Writ of Possession hearing on June 7, 2011, Defendants-Appellants appeared Pro Se, unable to find legal representation. Defendants-Appellants were unaware that an assignment of mortgage existed; as neither the assignment of mortgage, nor the promissory note had been introduced to the District Court. Moreover, an assignment of mortgage is not readily accessible to the homeowner without a title search on the property. Research by legal counsel revealed the fraudulent assignment.

“The denial of a request for a temporary restraining order is appealable where, as here, the denial followed a full adversary hearing and, in the absence of review, the appellants would be effectively foreclosed from pursuing further interlocutory relief. In such cases the denial of the temporary restraining order is tantamount to the denial of a preliminary injunction.” See *Levesque v. Maine*, 587 F.2d 78 (1st Cir. 1978), citing from *Environmental Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 30 Fed.R.Serv.2d 331 (1980)

The primary argument is presented in the *Defendants-Appellants’ Rule 60(b) Motion for*

Relief from Judgment. The McDonnell Report, an exhibit in the Defendants-Appellants' *Ex Parte Motion and Petition for Temporary Restraining Order* adds a solid foundation substantiating that the Soundview Home Loan Trust 2007 OPT2 has fabricated a document in order to unlawfully confiscate the Defendants-Appellants' property. As stated above, the in-depth analysis of the Defendants-Appellants' loan determines that the mortgage documents were never timely or properly transferred into the Trust. The Trust has no standing to foreclose or eject the Defendants-Appellants.

As argued in the Defendants-Appellants' *Emergency Motion for a Temporary Restraining Order*, Adam Levitin, Associate Professor of Law Georgetown University Law Center, has testified before House Financial Services Committee Subcommittee on Housing and Community Opportunity ² defining New York common law trust and its impact on untimely Assignment of Mortgages and why the controlling trust documents and New York common law forbids later asset assignments to the trust. Levitin states on page 23: ³

“Therefore, if the PSA—the trust document—says that the transfer must be done in a certain way and the transfer did not comply, **the transfer is void**, irrespective of whether it would comply with the Uniform Commercial Code or other law. The trust document creates a higher level of conduct to which the transfer must comply.” [emphasis supplied]

New York law also provides that any transfer in contravention of the trust documents is void. ⁴

Thus, the Defendants-Appellants' had met their burden that (1) they will likely prevail in the February 7, 2012 hearing, (2) that the Writ of Possession will cause irreparable harm moving the Phillips-Tehiva family out of their family home and property where the majority of the family has lived for their entire lifetime, and (3) that there would be no prejudice to the Plaintiff-

² Levitin testimony on “Robo-Singing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing” on November 18, 2010.

³ The entire Levitin testimony presentation can be found (last viewed on 12/26/11) at <http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>

⁴ N.Y. E.P.T. L. § 7.2-4.

Appellee as it has no standing to assert title to the property through its false and fabricated documents.

Clearly, the Plaintiff-Appellee's non-judicial foreclosure was in error and previously lacked title and standing the District Court. Defendants-Appellants' deserve the opportunity to be heard.

IV. CONCLUSION

Time being of the absolute essence, the Phillips-Tehiva family, who face irreparable harm in **as little as a matter of a few days**, respectfully requests that Emergency Motion be considered and decided immediately by this Court, or in these exceptional circumstances by a single Judge of this Court due to the requirements of time, as provided under Rule 8(a) and Rule 27(c) of the Hawaii Rules of Appellate Procedure. Should this Court require additional time to evaluate this Emergency Motion, the Phillips-Tehiva family hereby further requests this Court immediately enter an order granting a temporary stay in order to preserve the status quo and prevent immediate eviction pending full consideration of this Emergency Motion.

For the many reasons set forth above, each and all, Defendants-Appellants' respectfully request that this Honorable Court to grant their Emergency Motion for a temporary stay pending hearing.

Dated: Honolulu, Hawaii December 30, 2011

Respectfully submitted,

/s/ A.T. Phillips
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