

NOS. CAAP-12-0000758 and CAAP-12-0000070

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company, Plaintiff-Appellee, v. KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually, Defendants-Appellants, DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Counterclaimants-Appellants, v. BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J, Counterclaim Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Third-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986, Third-Party Defendant-Appellee, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UITALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R, Third-Party Nominal Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Fourth-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED, Fourth-Party Defendants-Appellees, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTLALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH, and DOES S through Z, Fourth-Party Nominal Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 09-1-2523-10)

MEMORANDUM OPINION

(By: Foley, Presiding Judge, Fujise and Ginoza, JJ.)

**I.**

Defendants-Appellants Ke Kailani Development, LLC, (KKD) and Michael J. Fuchs (Fuchs) (collectively the "Borrowers") appeal from several orders and judgments entered by the Circuit Court of the First Circuit (Circuit Court).<sup>1</sup> Borrowers' appeal arises out of a failed commercial real estate development on the Island of Hawai'i and the subsequent foreclosure proceedings. This consolidated appeal<sup>2</sup> asserts error in the following decisions:

From CAAP-12-0000070:

- (1) The October 3, 2011 "Order Granting Plaintiff Ke Kailani Partners, LLC's [KKP] Motion for Confirmation of Sale, Allowance of Costs, Commissions and Fees, Distribution of Proceeds, Directing Conveyance, and for Writ of Possession and for Deficiency Judgment Filed on July 8, 2011" (Order Confirming Sale);

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

<sup>2</sup> CAAP-12-0000758 and CAAP-12-0000070 were consolidated by order of this court dated October 5, 2012.

- (2) The October 3, 2011 Judgment;
- (3) The October 3, 2011 Writ of Possession;
- (4) The December 19, 2011 "Order Denying [Borrowers'] Motion to Consolidate Two Related Cases, Civil No. 09-1-2523-10 BIA and Civil No. 11-1-1577-07 BIA[;]" and
- (5) The January 5, 2012 "Order Denying [Borrowers'] Motion for Post-Judgment Relief, filed October 14, 2011[.]"

From CAAP-12-0000758:

- (6) The April 23, 2012 "Order Granting Plaintiff [KKP's] Motion for Determination of Deficiency Amount, filed November 15, 2011[;]"
- (7) The April 23, 2012 Judgment; and
- (8) The July 30, 2012 "Order Denying [Borrowers'] Motion Based Upon Newly Discovered Evidence to Disqualify the Honorable Bert I. Ayabe From All Proceedings in Civil No. 09-1-2523-10 Filed June 12, 2012[.]"

**II.<sup>3</sup>**

Between 2005 and 2007, KKD and Ke Kailani Corporation (KKC) entered into and modified an Infrastructure Loan Agreement (Infrastructure Loan) with the Bank of Hawaii, Central Pacific Bank, and Finance Factors, Limited (collectively the "Banks"), whereby the Banks agreed to loan, and KKD and KKC agreed to borrow, moneys for the purpose of financing the development of a certain 65.526 acres of land located in the District of South Kohala, County of Hawaii (Project). KKD and KKC executed a promissory note (Infrastructure Note) in favor of the Banks and secured the note with a mortgage on the Project property.

Fuchs executed and delivered to the Banks a Guaranty and Indemnification (Infrastructure Guaranty), in which Fuchs guaranteed full payment and performance of all obligations

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<sup>3</sup> These facts are largely taken from the Circuit Court's September 1, 2010 "Findings of Fact, Conclusions of Law, and Order Granting [Banks'] Motion for Summary Judgment and Decree of Foreclosure Filed April 22, 2010" (Decree of Foreclosure). As Borrowers have not challenged the Decree of Foreclosure or these findings of fact, we are bound by them. Okada Trucking Co. v. Bd. of Water Supply, 97 Hawaii 450, 458, 40 P.3d 73, 81 (2002).

defined therein, including but not limited to, payment of all sums due under the Infrastructure Note.

Between 2006 and 2007, the Banks, KKD, and KKC also entered into and modified a Loan Agreement (Villas Loan Agreement) for the purpose of further development of a certain 8.14 acres of land in South Kohala, Hawaii (Villa Property). KKD and KKC executed and delivered a promissory note (Villas Note) and a mortgage securing the note to the Banks. Fuchs also personally guaranteed this loan.

On or about October 1, 2009, the Banks sent a letter to Borrowers, notifying them that the amended Infrastructure Note and the Villas Note each had matured on July 20, 2009, and that the failure of Borrowers to repay those notes constituted default. The Banks demanded immediate payment of the entire unpaid amounts due thereunder.

As of October 1, 2009, KKD and Fuchs, as guarantor, jointly and severally, owed the Banks (1) the principal amount of \$14,128,422.76 under the amended Infrastructure Note plus accrued and unpaid interest, late charges, advances, expenses, and attorneys' fees incurred and to be incurred by the Banks, in connection with the collection of the amounts due and unpaid under the Infrastructure Loan Documents, and (2) the principal amount of \$8,099,303.75 under the Villas Note plus accrued and unpaid interest, late charges, advances, expenses, and attorneys' fees incurred and to be incurred by the Banks in connection with the collection of the amounts due and unpaid under the Villas Loan Documents.

At some unspecified point, KKC was dissolved.

On October 27, 2009, the Banks initiated the instant foreclosure action pursuant to defaults on the Infrastructure Loan and Villas Loan which was assigned Civ. No. 09-1-2523-10.

On December 23, 2009, Borrowers filed counter-claims for (1) breach of contract; (2) breach of good faith and fair dealing; (3) breach of fiduciary duty; (4) interference with advantageous economic relations; (5) unfair and deceptive banking practices; (6) fraud and deceit; (7) rescission; (8) dissolution of partnership; (9) discharge of guarantees; (10) declaratory and

injunctive relief; (11) abuse of process; (12) wrongful foreclosure; and (13) punitive damages.

On April 22, 2010, the Banks moved for summary judgment and decree of foreclosure as well as summary judgment on Borrowers' counterclaims. On September 1, 2010, the Circuit Court entered its Foreclosure Order finding that, as of that date, Borrowers owed the Banks a total of \$26,114,860.79, with an additional per diem interest of \$9,261.55272 to the date of payment of the indebtedness and also concluded that the Banks were entitled to a deficiency judgment against Fuchs, individually, for the difference between the amount owed to the Banks under the Infrastructure Loan Documents and the Villas Loan Documents and the foreclosure sale proceeds applied thereto, and entered summary judgment in the Banks' favor on the Borrowers' counterclaims.

On December 6, 2010, the Banks filed Plaintiffs' Motion for Substitution of Parties. The Banks requested that the Circuit Court substitute KKP in place of the Banks. The Banks asserted that on or about November 30, 2010, the Banks sold all of their interests in the Infrastructure Loan and Villas Loan and associated documents to Hawaii Renaissance Builders, LLC (HRB). The Banks further asserted that on or about December 1, 2010, HRB transferred all of those interests to KKP. The Circuit Court granted the substitution on December 30, 2010 without opposition by Borrowers.<sup>4</sup>

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<sup>4</sup> On December 30, 2010, Borrowers filed a notice of appeal from the Foreclosure Order, Counterclaim Order and respective judgments, which was assigned appellate case number CAAP-11-0000009. Borrowers did not challenge the Order Granting Substitution.

On January 5, 2011, KKD filed for Chapter 11 Bankruptcy protection. On March 1, 2011, the Bankruptcy Court for the District of Hawaii entered its "Order Regarding Secured Creditor [KKP's] Motion for Relief From Stay" (Bankruptcy Order). The Bankruptcy Order required as a condition of lifting the stay that, *inter alia*, Borrowers would dismiss with prejudice the appeal filed December 30, 2010. The Bankruptcy Order further required that Borrowers not appeal any order, finding, conclusion, judgment, or other decision in Civil No. 09-1-2523-10 entered or rendered prior to the date of the Bankruptcy Order.

On March 18, 2011, Borrowers and KKP, "substituted as Plaintiffs/Counterclaim Defendants in this matter, in place of" the Banks, as well as others, filed a Stipulation to Dismiss Appeal in CAAP-11-0000009. (continued...)

On June 21, 2011, an auction of the Infrastructure Property and Villas Property was held. KKP was the sole bidder and submitted a credit bid of \$10,000,000.00.

On July 8, 2011, KKP moved for confirmation of the foreclosure sale, which was opposed by Borrowers on July 27, 2011. Borrowers alleged that KKP had no standing to foreclose or continue with confirmation of the sale because (1) the Banks' assignments to HRB and KKP were unlawful and void; and (2) HRB's transfer to KKP was unlawful and void. Borrowers' allegation was "based upon the facts set forth in the attached Complaint filed today in Civil No. 11-1-1577-07 BIA[.]"<sup>5</sup>

On August 1, 2011, KKP replied to Borrowers' July 27, 2011 memorandum in opposition. KKP asserted that (1) it did have standing; and (2) Borrowers waived any objection (a) by failing to object to the December 6, 2010 Plaintiffs' Motion for Substitution of Parties, and (b) by stipulating to the March 1, 2011 Bankruptcy Order requiring them not to object to any decision in Civil No. 09-1-2523-10 entered or rendered prior to the date of the March 1, 2011 Bankruptcy Order.

On August 4, 2011, Borrowers filed a motion to consolidate Civil No. 09-1-2523-10 and Civil No. 11-1-1577-07.

On October 3, 2011, the Circuit Court entered its (1) Order Confirming Sale; (2) judgment; and (3) writ of possession.

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<sup>4</sup>(...continued)

This court approved the Stipulation to Dismiss Appeal and CAAP-11-0000009 was dismissed with prejudice on March 24, 2011.

<sup>5</sup> On July 27, 2011, Borrowers filed a Complaint in Civil No. 11-1-1577-07 against KKP, HRB, the Banks, and George Van Buren, the commissioner appointed to conduct the foreclosure sale. Those defendants moved to dismiss Borrowers' July 27, 2011 Complaint on September 6, 2011. While that motion was still pending, on November 4, 2011, Borrowers filed an Amended Complaint with an additional party, the law firm of Bays Deaver Lung Rose & Holma (Bays).

The Amended Complaint purports to assert the following twelve counts: (1) breach of contract; (2) "business compulsion"; (3) "tortious interference"; (4) "wrongful contract repudiation"; (5) breach of services contract; (6) misrepresentation; (7) legal malpractice; (8) "indemnification"; (9) specific performance; (10) a prayer for reformation of contracts; (11) "rescission of escrow cancellation"; and (12) "rescission of sale agreements."

For these facts we take judicial notice of the files and records in Civil No. 11-1-1577-07 BIA. Hawaii Rules of Evidence Rule 201.

**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

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On October 14, 2011, Borrowers filed a motion for post-judgment relief from the October 3, 2011 Order Confirming Sale. Borrowers requested "(1) reconsideration of the Order under Rule 59(e) of the Hawai'i Rules of Civil Procedure [HRCP]; (2) to vacate the Order under HRCP Rule 60(b)(2) based on newly discovered evidence; and (3) to stay the Order under HRCP Rule 62(h) until the final disposition of a separate related action[, Civil No. 11-1-1577-07.]"

On November 4, 2011, Borrowers' counsel sent a letter to presiding Judge Bert I. Ayabe. The letter cited alleged conflicts of interest and requested that Judge Ayabe recuse himself. The alleged conflict of interest arose because Borrowers named Bays as an additional defendant in Civil No. 11-1-1577-07.

On November 7, 2011, Borrowers filed a Request for Judicial Notice of the November 4, 2011 letter and Borrowers' First Amended Complaint in Civil No. 11-1-1577-07.

On November 15, 2011, KKP filed a Motion for Determination of Deficiency Amount. Three days later, Borrowers moved to continue KKP's motion until there was a final judgment in Civil No. 11-1-1577-07. Borrowers filed their opposition to this motion on November 28, 2011.

On November 25, 2011, Borrowers filed a Motion to Disqualify the Honorable Bert I. Ayabe from all Proceedings in Civil No. 09-1-2523-10. The Circuit Court orally denied the motion after a hearing held on December 20, 2011 and followed with a written order entered on January 27, 2012.

On December 19, 2011, the Circuit Court entered its order denying Borrowers' August 4, 2011 motion to consolidate.

On January 5, 2012, the Circuit Court entered its order denying Borrowers' October 14, 2011 motion for post-judgment relief.

On February 3, 2012, the Borrowers filed a Notice of Appeal from: (1) the Order Confirming Sale; (2) the October 3, 2011 Judgment; (3) the October 3, 2011 Writ of Possession; (4) the December 19, 2011 order denying Borrowers' August 4, 2011 motion to consolidate; and (5) the January 5, 2012 order denying

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**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

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Borrowers' October 14, 2011 motion for post-judgment relief. This appeal was given appellate case number CAAP-12-0000070.

On April 23, 2012, the Circuit Court entered its (1) order granting KKP's November 15, 2011 Motion for Determination of Deficiency Amount; and (2) Judgment.

On April 24, 2012, Borrowers filed a Notice of Supplemental Objections to the form of KKP's proposed Order on KKP's Motion for Determination of Deficiency Amount and proposed Judgment thereon.<sup>6</sup>

On May 3, 2012, Borrowers moved for reconsideration and rehearing based upon alleged manifest error and admissions against interest.<sup>7</sup> The request was based upon three claimed errors by the Circuit Court: (1) the failure to adequately explain the deficiency judgment; (2) the failure to consolidate Civil No. 09-1-2523-10 and Civil No. 11-1-1577-07; and (3) the violation of due process when it determined the deficiency amount.

On May 11, 2012, Borrowers' counsel again sent a letter to the Circuit Court urging Judge Ayabe to recuse himself. Borrowers' counsel alleged that Judge Ayabe had a conflict of interest based upon alleged ownership of Bank of Hawaii stock valued between \$25,000 and \$50,000.

On May 17, 2012, the May 11, 2012 letter was filed with the Circuit Court. The Circuit Court convened a status conference during which Judge Ayabe explained that the Bank of Hawaii stock at issue was held in a custodial UTMA account for the benefit of his adult daughter. Judge Ayabe concluded that the Bank of Hawaii stock did not violate Hawaii disqualification statutes and orally indicated that any motion to disqualify would be denied.

On June 12, 2012, Borrowers filed a second motion to disqualify Judge Ayabe from all proceedings in Civil No.

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<sup>6</sup> These objections appear to constitute a memorandum in opposition to the November 15, 2011 Motion for Determination of Deficiency Amount, which was granted the day before.

<sup>7</sup> Apparently there was no written order denying the May 3, 2012 motion for reconsideration and rehearing.

09-1-2523-10 and to set aside all orders and judgments entered by Judge Ayabe, which was denied by order entered July 30, 2012.

On August 31, 2012, Borrowers filed a Notice of Appeal from: (1) the April 23, 2012 order granting KKP's November 15, 2011 Motion for Determination of Deficiency Amount; (2) the April 23, 2012 Judgment; (3) the July 30, 2012 order denying Borrowers' June 12, 2012 motion to disqualify Judge Ayabe from all proceedings in Civil No. 09-1-2523-10 and to set aside all orders and judgments entered by Judge Ayabe; and (4) the August 1, 2012 deemed denial of Borrowers' May 3, 2012 motion for reconsideration and rehearing. This appeal was given appellate case number CAAP-12-0000758.

**III.**

**A.**

To the extent that it can be discerned, Borrowers' first point error<sup>8</sup> apparently is that KKP lacked standing to foreclose, bid at auction, or receive a deficiency judgment. Borrowers allege that the Circuit Court erred in its October 3, 2011 Order Confirming Sale and Judgment Confirming Sale. Borrowers provide only limited and sporadic record citations for the facts they assert are related to this issue.

Moreover, the September 1, 2010 Foreclosure Order unambiguously concluded that Borrowers consented to the Banks' right to sell their interests in the loans to third parties. On December 6, 2010, the Banks filed their motion to substitute KKP in the place of the Banks. The Banks asserted that on or about November 30, 2010, the Banks sold all of their interests in the Infrastructure Loan and Villas Loan and associated documents to

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<sup>8</sup> Borrowers' Amended Opening Brief is in substantial non-compliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), most notably because it provides inadequate record citations throughout. This deficiency is particularly disturbing in light of this court's March 27, 2013 Order striking Borrowers' opening brief and exhibits for violations of HRAP Rule 28(b) with the admonition that "[f]ailure to comply with HRAP Rule 28 or this order may result in sanctions, including dismissal of the appeal." Both briefs were filed by Borrowers' counsel, Gary V. Dubin.

This court adheres to the policy of deciding parties' cases on the merits where possible, *O'Connor v. Diocese of Honolulu*, 77 Hawai'i 383, 386, 885 P.2d 361, 364 (1994), and we will endeavor to do so here. However, in light of the repeated violations of court rules by counsel, we will also refer him to the Office of Disciplinary Counsel for his conduct in this case.

HRB and that on or about December 1, 2010, HRB transferred all of those interests to KKP. Borrowers did not object to the substitution of KKP for the Banks. On December 30, 2010, the Circuit Court entered its Order Granting Plaintiffs' Motion for Substitution of Parties Filed December 6, 2010 and Borrowers did not appeal or otherwise challenge this order at the time.

Finally, Borrowers' arguments do not undermine KKP's standing in this case. As best as can be determined, Borrowers argue that, because KKP and its predecessor in interest HRB, allegedly made misrepresentations, failed to disclose information and otherwise breached agreements in Borrowers' failed attempt to secure their release from the loans involved in this action, KKP does not have standing to pursue the foreclosure and deficiency awarded in this case. Whatever attempts Borrowers may have made to renegotiate their loans in the interim, it is undisputed that the Banks ultimately assigned their interests in the Infrastructure and Villas Notes and mortgages to HRB, who in turn assigned its interest to KKP. "[B]orrowers do not have standing to challenge the validity of an assignment of [their] loans because they are not parties to the agreement and because noncompliance with a trust's governing document is irrelevant to the assignee's standing to foreclose." U.S. Bank Nat'l Ass'n v. Salvacion, 134 Hawai'i 170, 175, 338 P.3d 1185, 1190 (App. 2014). Similarly, Borrowers arguments here do not undermine KKP's standing to pursue this action.

**B.**

Borrowers' second point of error appears to be that Civil No. 09-1-2523-10 and Civil No. 11-1-1577-07 should have been consolidated. Borrowers provide no citations to the parts of the record relied on and no legal authority whatsoever in their argument.

Although Rule 42(a) is designed to encourage consolidation where a common question of law or fact is present, the trial court is given broad discretion to decide whether consolidation would be desirable. The trial court's discretionary determination will not be reversed on appeal absent clear error or exigent circumstances.

Kainz v. Lussier, 4 Haw. App. 400, 407, 667 P.2d 797, 803 (1983) (internal quotations marks and citations omitted).

Borrowers failed to carry their burden of persuasion. In Sheehan, this court applied Kainz to uphold the trial court's denial of appellant's HRCP Rule 42(a) motion to consolidate. Sheehan v. Grove Farm Co., 114 Hawai'i 376, 394, 163 P.3d 179, 197 (App. 2005). Under facts similar to the instant case, the Sheehan court upheld the denial because, although the two cases involved the same issues, the two cases were in completely disparate procedural postures. Id. In the instant case, Civil No. 09-1-2523-10 was in its final stages, awaiting a confirmation of foreclosure sale, whereas Civil No. 11-1-1577-07 was newly filed and attempting to resuscitate claims decided in Civil No. 09-1-2523-10.

The Circuit Court did not abuse its discretion when it denied Borrowers' August 4, 2011 Motion to Consolidate.

**C.**

Borrowers' third point on appeal denominated "KKD and Fuchs' Claims Should Not Have Been Dismissed Absent Discovery," summarized in their argument section as

Genuine issues of material fact existed precluding summary adjudication, which however Judge Ayabe granted in awarding confirmation of sale over objections as to adequacy of price and in dismissing the new action against HRB and KKP based on his interpretation of documents that were being challenged for fraud and rescission

is incomprehensible and therefore could be considered waived. HRAP Rule 28(b)(7). Moreover, to the extent it challenges the confirmation of sale based on the existence of genuine issues of material fact, Borrowers have failed to identify those facts or where they were brought to the attention of the Circuit Court. To the extent it seeks review of the dismissal of the "new action"--we presume Civil No. 11-1-1577-07 BIA--we have no jurisdiction to do so, as that case is not before us in this appeal.<sup>9</sup>

**D.**

In their fourth asserted point of error, Borrowers challenge the Circuit Court's July 30, 2012 Order denying their

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<sup>9</sup> We note that on March 30, 2016, this court dismissed the appeal in appellate case CAAP-13-0004290 from Civil No. 11-1-1577-07 BIA for lack of jurisdiction.

June 12, 2012 motion to disqualify Judge Ayabe and set aside all decisions entered by Judge Ayabe.<sup>10</sup>

Pursuant to HRAP Rule 4(a)(3), "[a]n HRCP Rule 60(b) motion for relief from judgment may toll the period for appealing a judgment or order, but only if the motion is served and filed within ten (10) days after the judgment is entered." Lambert v. Lua, 92 Hawai'i 228, 234, 990 P.2d 126, 132 (App. 1999). The Borrowers did not file their June 12, 2012 HRCP Rule 60(b) post-judgment motion within ten days after entry of the April 23, 2012 deficiency judgment (or any previous judgment), and therefore the June 12, 2012 HRCP Rule 60(b) post-judgment motion did not invoke the tolling provision under HRAP Rule 4(a)(3) that would enable the Borrowers to obtain appellate review of the July 30, 2012 post-judgment order by way of their appeal from the April 23, 2012 deficiency judgment pursuant to HRAP Rule 4(a)(3).

The July 30, 2012 post-judgment order denying Borrowers' June 12, 2012 HRCP Rule 60(b) post-judgment motion to set aside all judgments (based upon the argument that the presiding judge should have been disqualified) is an independently appealable post-judgment order that the Borrowers failed to timely appeal under HRAP Rule 4(a)(1). Therefore this court lacks jurisdiction over the Borrowers' appeal to the extent that they challenge the July 30, 2012 post-judgment order denying Borrower's June 12, 2012 HRCP Rule 60(b) post-judgment motion to set aside all judgments.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Therefore, Borrowers' August 31, 2012 notice of appeal is untimely as to the July 30,

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<sup>10</sup> Although Borrowers also moved to disqualify Judge Ayabe on November 25, 2011, they have not presented any legal argument regarding the January 27, 2012 order denying this motion. We therefore deem any challenge to this order waived. HRAP Rule 28(b)(7).

2012 post-judgment order denying the Borrowers' June 12, 2012 HRCP Rule 60(b) post-judgment motion to set aside all judgments.

**E.**

Borrowers argue that the Circuit Court violated their due process rights when it "determined the amount of the deficiency judgment here by merely using a calculator to subtract the net proceeds of sale from the amount found owed." Although Borrowers provide no citations to the parts of the record relied on, they appear to assert (1) that the final bid price at auction was grossly inadequate, and (2) the process in Hawai'i for determining deficiency judgments violates procedural due process. The crux of Borrowers' argument is that this court should adopt a "fair market value"-based approach to deficiency judgment calculations and that there should be an evidentiary hearing to determine the value of the property received by the foreclosing mortgagee which would then be subtracted from the amount owed in order to determine the amount of the deficiency judgment.

However, Borrowers have waived this challenge to the method used to determine the deficiency judgment. The Foreclosure Order provided: "Plaintiffs are entitled to a deficiency judgment in favor of Plaintiffs and against Fuchs, individually, for the difference between the amount owed to Plaintiffs under the Infrastructure Loan Documents and the Villas Loan Documents, and the foreclosure proceeds applied thereto." Borrowers' appeal from the Foreclosure Order was dismissed by stipulation. Therefore, Borrowers are precluded from indirectly challenging the Foreclosure Order and the method by which the deficiency judgment would be ascertained that was contained therein.

Moreover, Borrowers identify no evidence in the record that demonstrates the fair market value of the Infrastructure Property and Villas Property at the time of foreclosure sale. Borrowers presented no evidence with their Memorandum in Opposition<sup>11</sup> even tending to establish what the fair market value

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<sup>11</sup> As no transcript of the hearing on the motion has been included in the record, it is unknown what evidence, if any, was presented during this hearing. "'The burden is upon appellant in an appeal to show error by (continued...)

was at the time of the foreclosure sale or disposition of the motion to determine the deficiency amount. Therefore, even if we were to accept Borrowers' contention, Borrowers did not present to the Circuit Court evidence that the foreclosure sales price was short of fair market value.

Furthermore, Borrowers' argument that due process requires this court to change the procedure and method of determining any deficiency is unsupported by the authority they cite. First, Borrowers ignore that under existing Hawai'i case law, they had the opportunity to challenge the fairness of the auction price, and thus, the resulting deficiency judgment. See Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983) (stating, in a case where foreclosure defendants objected to the auction price, that "[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm"); see also Indus. Mortg. Co. v. Smith, 94 Hawai'i 502, 17 P.3d 851 (App. 2001); Mortg. Elec. Registration Sys., Inc. v. Wise, 130 Hawai'i 11, 18, 304 P.3d 1192, 1199 (2013) (noting the right to object to confirmation of a sale due to a grossly inadequate sale price). Here, Borrowers did not object to confirmation of the sale based on the sales price. Second, even if the majority of jurisdictions use the fair market value in calculating the deficiency amount, the vast majority of these have had it imposed by statute and primarily to address deficiencies arising from non-judicial foreclosure sales. See, e.g., Sostaric v. Marshall, 766 S.E.2d 396 (W. Va. 2014) (citing, in support of its assertion use of fair market value is the majority view, twenty-two states who adopted this measure by statute and four who did so by judicial decision). Hawai'i's foreclosure statute has been amended several times, most recently in 2015. The Legislature has not yet seen fit to provide this measure in determining a deficiency in judicial foreclosure actions. By contrast, we note the Legislature, in 2012, saw fit

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<sup>11</sup>(...continued)  
reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)).

to limit deficiency judgments against resident-homeowner-mortgagors involved in a power of sale (non-judicial) foreclosure. HRS § 667-38 (Supp. 2015). Therefore, it appears the Legislature has afforded protections to mortgagors when it deems it appropriate to do so. We decline to adopt further protections beyond those already provided by Hawai'i case law or granted by the Legislature.

**IV.**

Based on the foregoing, the (1) October 3, 2011 "Order Granting Plaintiff Ke Kailani Partners, LLC's Motion for Confirmation of Sale, Allowance of Costs, Commissions and Fees, Distribution of Proceeds, Directing Conveyance, and for Writ of Possession and for Deficiency Judgment Filed on July 8, 2011"; (2) October 3, 2011 Judgment; (3) October 3, 2011 Writ of Possession; (4) December 19, 2011 "Order Denying [Borrowers'] Motion to Consolidate Two Related Cases, Civil No. 09-1-2523-10 BIA and Civil No. 11-1-1577-07 BIA"; (5) January 5, 2012 "Order Denying [Borrowers'] Motion for Post-Judgment Relief, filed October 14, 2011"; (6) April 23, 2012 "Order Granting Plaintiff Ke Kailani Partners, LLC's Motion for Determination of Deficiency Amount, filed November 15, 2011"; and (7) April 23, 2012 Judgment are affirmed.

DATED: Honolulu, Hawai'i, April 29, 2016.

On the briefs:

Gary Victor Dubin,  
Frederick J. Arensmeyer,  
Andrew D. Goff, and  
Richard Forrester,  
for Defendants-Appellants.

Presiding Judge

Terence J. O'Toole,  
Sharon V. Lovejoy, and  
Andrew J. Lautenbach,  
Starn O'Toole Marcus & Fisher,  
for Plaintiff-Appellee.

Associate Judge

Associate Judge