



R-608

STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
OCT 19, 2011 08:02 AM
Doc No(s) 2011-171298



/s/ NICKI ANN THOMPSON
REGISTRAR

20 1/4 Z8

LAND COURT SYSTEM

REGULAR SYSTEM

After Recordation, Return by Mail or Pick-up

Derek R. Kobayashi, Esq.
Kelly M. Camp, Esq.
SCHLACK ITO
745 Fort Street, Suite 1500
Honolulu, Hawaii 96813
Telephone: (808) 523-6779

Total Page(s): 11

TMK NOS: (2) 3-3-002-031

TITLE OF DOCUMENT:

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING PLAINTIFF
SOUTHWEST 7, LLC'S MOTION FOR ENTRY
OF DEFAULT JUDGMENT OR
ALTERNATIVELY, MOTION FOR SUMMARY
JUDGMENT AND INTERLOCUTORY DECREE
OF FORECLOSURE**

SCHLACK ITO
A Limited Liability Law Company

DEREK R. KOBAYASHI 5323-0
RAYMOND S. IWAMOTO 1457-0
KELLY M. CAMP 9247-0

Fort Street Tower, Suite 1500
Topa Financial Center
745 Fort Street
Honolulu, Hawaii 96813
Telephone: (808) 523-6040
Facsimile: (808) 523-6030

Attorneys for Plaintiff
SOUTHWEST 7, LLC, a Colorado limited
liability company

FILED

2011 APR 21 PM 3:05

D. PELLAZAR, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

SOUTHWEST 7, LLC, a Colorado limited
liability company,

Plaintiff,

vs.

HALE MUA PROPERTIES, LLC, a
Hawaii limited liability corporation;
STERLING KIM; JOHN DOES 1-10;
JANE DOES 1-10; DOE
CORPORATIONS, PARTNERSHIPS
AND OTHER ENTITIES 1-10,

Defendants.

CIVIL NO. 10-1-0290 (2)
(Foreclosure)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
PLAINTIFF SOUTHWEST 7, LLC'S
MOTION FOR ENTRY OF DEFAULT
JUDGMENT OR ALTERNATIVELY,
MOTION FOR SUMMARY
JUDGMENT AND INTERLOCUTORY
DECREE OF FORECLOSURE

DATE: April 20, 2011

TIME: 8:30am

JUDGE: Honorable Shackley F. Raffetto

NO TRIAL DATE SET

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING
PLAINTIFF SOUTHWEST 7, LLC'S MOTION FOR ENTRY OF DEFAULT
JUDGMENT OR ALTERNATIVELY, MOTION FOR SUMMARY
JUDGMENT AND INTERLOCUTORY DECREE OF FORECLOSURE**

I hereby certify that this is a full, true and
correct copy of the Original.

Clerk, Second Circuit Court

Plaintiff Southwest 7, LLC's Motion for Entry of Default Judgment or Alternatively, Motion for Summary Judgment and Interlocutory Decree of Foreclosure, filed herein on January 24, 2011 (the "Motion for Entry of Default Judgment"), was heard before the Honorable Shackley F. Raffetto in his courtroom on April 20, 2011 at 8:30 a.m. Derek R. Kobayashi appeared on behalf of Plaintiff SOUTHWEST 7, LLC ("Southwest 7"). No other appearances were made.

Based upon the evidence presented, and the records and files herein, the Court makes the following findings of fact, conclusions of law, and order granting the Motion for Entry of Default Judgment and decree of foreclosure.

FINDINGS OF FACT

1. Southwest 7 is and was at all times relevant herein a Colorado limited liability company, doing business in the State of Hawaii.
2. Defendant HALE MUA PROPERTIES, LLC ("Hale Mua Properties") is and was at all times relevant herein a Hawaii limited liability company, doing business in the State of Hawaii.
3. Defendant STERLING KIM ("Sterling Kim") is and was at all times relevant herein a resident of the State of Hawaii.
4. On or about July 3, 2008, Hale Mua Properties, for value received, made, executed and delivered to Southwest 7 that certain Promissory Note in the principal sum of TEN MILLION SIX HUNDRED THOUSAND NINE HUNDRED EIGHTY DOLLARS (\$10,612,980.00) in favor of Southwest 7, as Lender (the "Note"). Southwest 7 loaned \$10,612,980.00 to Hale Mua Properties.

5. As part of the loan transaction, Hale Mua Properties and Southwest 7 executed a Loan Agreement, dated July 3, 2008 (the "Loan Agreement").

6. As part of the same transaction, the Note is further secured by, inter alia, that certain Mortgage recorded in the Bureau of Conveyances of the State of Hawaii on July 3, 2008, as Document No. 2008-107894 (the "Mortgage"). The Mortgage covers the fee simple interest in all those certain parcels of land situated in Waiehu, County of Maui, State of Hawaii, identified as Tax Map Key No. (2) 3-3-002-031 (the "Subject Property").

7. The Note was further secured by the execution of that certain Collateral Assignment of Contracts, Permits and Development Rights, executed July 3, 2008 (the "Collateral Assignment") by Hale Mua Properties and Sterling Kim in favor of Southwest 7.

8. Hale Mua Properties and Sterling Kim guaranteed Hale Mua Properties' repayment of the Note, by virtue of that certain Guaranty Agreement dated July 3, 2008 (the "Guaranty Agreement").

9. Southwest 7 is the current holder of the Note, Loan Agreement, Mortgage, Collateral Assignment, and Guaranty Agreement (the "Loan Documents").

10. On or about August 20, 2008, an assignment of Deed of Trust and Promissory Note was executed by Southwest 7 in favor of South West 7, LLC a Delaware limited liability company (the "September 3, 2009 Assignment"), which did not assign any note and merely purported to assign the interests of Southwest 7 to a deed of trust with reference to recording information and not for a deed of trust.

11. On or about March 2, 2010, South West 7, LLC a Delaware limited liability company, as Assignor, executed that certain Assignment of Mortgage to Southwest 7, as Assignee, thereby confirming that the September 3, 2009 Assignment did not convey or transfer any interest in, and at no time did Assignor receive any interest in the Note secured by the Mortgage (the "March 2, 2010 Assignment").

12. Pursuant to the terms of the Note and other Loan Documents, the loan matured on July 2, 2009, and the entire amount of the indebtedness thereunder became immediately due and payable on such date.

13. After receiving a request for an extension for repayment by Hale Mua Properties and Sterling Kim, counsel for Southwest 7 sent Hale Mua Properties and Sterling Kim an email on December 1, 2009, offering to grant an extension pursuant to execution of a Forbearance Agreement and Amendment to Certain Loan Documents if they so agreed.

14. After more than one month, Southwest 7 received no response and the Forbearance Agreement and Amendment to Certain Loan Documents was not executed.

15. On or about January 14, 2010, Southwest 7 issued a letter to Hale Mua Properties withdrawing its offer of repayment extension and demanding immediate payment in full of all indebtedness and obligations due under the Loan Documents.

16. On or about January 14, 2010, Southwest 7 issued a letter to Sterling Kim withdrawing its offer of repayment extension and demanding immediate payment in full of all indebtedness and obligations due under the Loan Documents.

17. On or about January 27, 2010, counsel for Southwest 7 sent Hale Mua Properties and Sterling Kim an email whereby Southwest 7 stated the forbearance agreement and offer of forbearance would expire on January 28, 2010 if no response was received by that time.

18. Hale Mua Properties and Sterling Kim have defaulted in the observance and performance of the terms, covenants and conditions set forth in the Note and Guaranty Agreement. As a result of said default, the entire amount of said obligation presently unpaid is now due and payable as follows:

Principal Balance:	\$9,337,302.00
Interest and Fees to December 31, 2010	\$4,949,050.00
TOTAL:	<u>\$14,286,352.00</u>

plus a per diem interest accrual of approximately \$6,225.00 for each day from December 31, 2010, for a total of \$14,971,087.00 as of April 20, 2011, and reasonable attorneys' fees and costs. As of this date, no payment has been made by Hale Mua Properties or Sterling Kim.

To the extent any of the foregoing Findings of Fact constitute a Conclusion of Law, they shall be construed as such.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this Court makes the following legal conclusions. To the extent that any conclusion may constitute a finding of fact or a mixed statement of fact and law, it shall be treated as such.

1. This Court has jurisdiction over the parties and subject matter.

Venue in this Court is proper.

2. Southwest 7 is entitled to entry of default judgment as a matter of law, as further described below.

3. Southwest 7 is entitled to have the Mortgage foreclosed, the Subject Property sold in the manner provided by law, and the sale proceeds applied to the amounts owed to Southwest 7 under the Loan Documents.

**ORDER GRANTING PLAINTIFF SOUTHWEST 7, LLC'S
MOTION FOR ENTRY OF DEFAULT JUDGMENT OR
ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT
AND INTERLOCUTORY DECREE OF FORECLOSURE**

1. Southwest 7's Motion is hereby granted. An interlocutory decree of foreclosure is hereby entered. Upon completion of the foreclosure sale of the Subject Property, Hale Mua Properties and Sterling Kim, and all persons claiming any interests in the Subject Property, are forever barred and foreclosed from all right, title, interests and claims at law or in equity in and to said Subject Property and every part thereof.

2. GERALD T. JOHNSON, ESQ. whose address is

1325 LOWER MAIN STREET, ROOMN 105, and whose telephone number is 244-5444,
WAILUKU, HI 96793

is hereby appointed as Commissioner herein ("Commissioner"), effective immediately, and as such shall hold legal and equitable title to the Subject Property.

3. Commissioner shall take possession of and sell the Subject Property.

4. Commissioner shall serve without bond and at a reasonable fee to be determined by the Court. The Commissioner's fees and costs shall be deemed to be secured by the Mortgage.

5. The Commissioner is hereby authorized and directed to:

a. Take control, possession, manage, preserve, and dispose of the Subject Property as herein directed;

b. Seize, demand, collect and control all income, rents, royalties, profits and proceeds generated by Hale Mua Properties and Sterling Kim with respect to the Subject Property and all funds of Hale Mua Properties and Sterling Kim as provided in the aforementioned Mortgage, whether in the hands of the operator or manager of the Subject Property or otherwise;

c. Pay real property taxes, penalty and interest thereon;

d. Make all necessary arrangements to sell the Subject Property for cash in the manner provided for by law and as ordered by this Court;

e. Make and deliver to the purchaser(s) such instruments of conveyance of the Subject Property as may be appropriate upon the confirmation of the sale by this Court;

f. Publish notice of the sale of the Subject Property in (i) a newspaper having a general circulation published in the County of Maui, State of Hawaii, and (ii) a newspaper having a general circulation in the State of Hawaii, once in each week for three (3) consecutive weeks, the first notice to be published as soon as possible;

g. Sell the Subject Property without an upset price to the highest bidder at a public auction, which the Commissioner may postpone from time to time as necessary, to be conducted no sooner than fourteen (14) days after the third notice of the sale, with ten percent (10%) of the sale price payable to the Commissioner in cash, certified or cashier's check, at the time of the auction, which amount shall be subject to forfeiture if the purchaser fails to close the purchase as ordered by the Court, and the balance payable to the Commissioner in cash or cashier's check, concurrently with delivery of documents transferring title to the Subject Property to the purchaser, the sale being subject to confirmation by this Court. Such sale of the Subject Property shall be free and clear of any and all claims, rights, title, and interest of any person whatsoever, including all parties to this action and all persons claiming by, through, or under them;

h. File a report with this Court after the sale of the Subject Property;

i. Execute and deliver documents transferring title to the Subject Property to the purchaser, or designee, within thirty (30) days after entry of an order confirming the sale by this Court; and

j. Disburse all cash seized or obtained by the Commissioner from the Subject Property or any and all parties associated therewith, including but not limited to the operator or property manager thereof, and all receipts from the sale and operations of the Subject Property according to further orders of this Court. After payment of all necessary expenses of the foreclosure sale and reasonable attorneys' fees, the Commissioner shall be authorized and directed to make application of the proceeds

thereof so far as may be necessary; first, to the payment of the sums found to be due and owing to Southwest 7 as determined by the Court, including all of Southwest 7's reasonable costs and expenses and if there shall be a surplus, then to be applied as the Court deems just and proper;

6. If the proceeds of the foreclosure sale are insufficient to pay the aforementioned sums owing to Southwest 7 and it shall appear, at an appropriate time thereafter in this proceeding that a deficiency exists, that Southwest 7 be allowed to move for a judgment for such deficiency as to the Note and that said Southwest 7 be allowed to have execution, thereon.

7. The Commissioner shall be awarded a reasonable fee as Commissioner in an amount to be subsequently determined by the Court. The Commissioner's fees and costs shall be deemed to be secured by Southwest 7's lien on the Subject Property. In the event the person appointed in this order refuses or becomes unable to act as Commissioner, the Court shall appoint another person to serve as Commissioner, without further notice or hearing.

8. The cost of drafting documents transferring title to the Subject Property to the purchaser, notary fees, escrow fees, conveyance tax, recordation fees, consent fees, and title insurance shall be payable by the purchaser thereof. Neither the availability of title insurance nor securing possession of the Subject Property shall be a condition of closing.

9. The purchaser shall be responsible for securing possession of the Subject Property as of the date of closing.

10. Southwest 7 is hereby authorized to bid for the Subject Property at the public auction. If Southwest 7 is the highest bidder, Southwest 7 shall be allowed to offset the amounts owed to Southwest 7 against the down payment and the balance of the sale price.

11. Pursuant to Sections 634-51 and/or 501-151 of the Hawaii Revised Statutes, as amended, any and all other or further encumbrances or purchasers in respect of the Subject Property or any part thereof, whose interest arises from and after May 7, 2010, the recording date of Southwest 7's Notice of Pendency of Action, are hereby forever barred of and from any and all right, title and interest in and to the Subject Property and every part thereof.

12. Pursuant to HRCF Rule 55(a)(2), this Court expressly determines and directs that this Order is a final judgment.

13. This Court retains jurisdiction in this action over all matters not herein determined.

DATED: Wailuku, Hawaii, APR 20 2011.

/s/ SHACKLEY F. RAFFETTO (Seal)

JUDGE OF THE ABOVE-ENTITLED
COURT

Southwest 7, LLC v. Hale Mua Properties, LLC, et. al.; Civil No. 10-1-0290 (2); FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF SOUTHWEST 7, LLC'S MOTION FOR ENTRY OF DEFAULT JUDGMENT OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT AND INTERLOCUTORY DECREE OF FORECLOSURE