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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GECC FINANCIAL CORPORATION, Plaintiff, vs. RICHARD JOHN BLANGIARDI, et al., Defendants.	CIVIL NO. 80828 MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT OR ORDER; AFFIDAVIT OF THOMAS A. SAKAMOTO; AFFIDAVIT OF GORDON N. NYUHA; AFFIDAVIT OF ROBERT S. TASSIE; AFFIDAVIT OF ALLEN I. MARUTANI; EXHIBITS "A"-"[illegible]" Hearing: July 25, 1985 Time: 8:30 a.m. Judge: Philip T. Chun

MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT OR ORDER

I. BACKGROUND

In January, 1982, RICHARD JOHN BLANGIARDI (hereinafter "BLANGIARDI") filled out a credit application form for GECC (hereinafter "Plaintiff") seeking a loan to finance the purchase of a condominium unit at the Mokuleia Surf. As evidence of sufficient income to repay the loan, BLANGIARDI represented to Plaintiff that he was a sales

(CERTIFICATE OF SERVICE ATTACHED)

manager for KGMB-TV where he earned a salary of $6,000 a month and received an annual bonus averaging $225 a month. BLANGIARDI also represented that he originally belonged to a limited partnership which had purchased the 12-unit Mokuleia Surf, that the limited partnership was being dissolved, and that each individual's equity in the partnership was being used as the downpayment for the condominium purchases.

Satisfied that BLANGIARDI's income was adequate to repay the loan and that his credit history was acceptable, Plaintiff, on June 22, 1982, made a loan to BLANGIARDI in the principal sum of $45,000.00. See Affidavit of Thomas Sakamoto attached hereto. As evidence of said loan, BLANGIARDI signed a promissory note in favor of Plaintiff on June 22, 1982 in the amount of $45,000.00. As part of the same transaction and for purposes of securing the amounts due under the promissory note, GECC took a mortgage interest in the condominium unit BLANGIARDI was purchasing at the Mokuleia Surf.

On November 10, 1983, Plaintiff notified BLANGIARDI that he was in default under the terms of the mortgage for conveying the property without securing prior written consent from Plaintiff. Although Plaintiff decided not to accelerate total repayment of the loan, it reserved the right to do so in the future. Plaintiff also advised BLANGIARDI that his

property taxes in the amount of $180.87 were again delinquent. See letter from Gordon Nyuha to BLANGIARDI dated November 10, 1983, attached hereto as Exhibit "A". On November 23, 1983, Plaintiff warned BLANGIARDI that if delinquent amounts totaling $1,760.00 were not received by November 30, 1983, collection would be referred to an attorney, and that BLANGIARDI would be responsible for all legal costs incurred. See letter from Gordon Nyuha to BLANGIARDI, dated November 23, 1983, attached hereto as Exhibit "B". When BLANGIARDI did not respond, Plaintiff's attorney, on December 2, 1983, sent a demand letter to BLANGIARDI for full payment of the principal sum of $43,130.19, accrued interest in the sum of $1,375.31, accruing late charges in the amount of $160.00, costs, and attorney's fees. See letter from Allen I. Marutani, Esq., to BLANGIARDI, dated December 2, 1983, attached hereto as Exhibit "C".

When repayment of the loan was not forthcoming, Plaintiff filed a Complaint against BLANGIARDI on December 21, 1983, to foreclose its mortgage and sell the condominium covered by the mortgage. BLANGIARDI failed to answer the Complaint and on February 1, 1984, Plaintiff moved for an Entry of Default against BLANGIARDI. A Motion for Summary Judgment and for Interlocutory Decree of Foreclosure was

filed by Plaintiff on February 14, 1984. The Findings of Fact, Conclusions of Law; Order Granting Motion for Summary Judgment and for Interlocutory Decree of Foreclosure was subsequently filed on May 18, 1984. After a commissioner's sale, confirmed on September 20, 1984, Plaintiff filed a Deficiency Judgment on November 21, 1984, to recover the sum of $25,401.07 from BLANGIARDI.

In an effort to work out a repayment program for the outstanding $25,401.07, BLANGIARDI met with Plaintiff's representative Robert Tassie on December 5, 1984. It was then, for the first time, that Robert Tassie learned from BLANGIARDI of his complicity in realtor Sam Daily's scheme to mislead Plaintiff. See Affidavit of Robert Tassie attached hereto. According to BLANGIARDI, Daily, who advertised at KGMB-TV, approached him with the following proposition: BLANGIARDI was to pretend to buy a condo unit for his own account, obtain credit based on his own personal credit standing and repayment ability, close the loan with GECC, take title to the property, and then later, unknown to GECC, convey the condo to Daily who promised to make the payments on the loan. BLANGIARDI admitted receiving valuable consideration in three forms from Daily: (1) cash in the amount of $1,500.00; (2) increased business (Daily would increase his amount of advertising on KGMB-TV which in turn

would personally enhance BLANGIARDI); and (3) Daily would let him in on his next unspecified deal. During this meeting, BLANGIARDI also claimed that Daily said Plaintiff was aware of this arrangement to make phoney loans. Plaintiff repeatedly told BLANGIARDI that it had not and never would participate in such a scheme. Id. At the close of the meeting, Plaintiff urged BLANGIARDI to come forth with a repayment program, and BLANGIARDI agreed to think it over.

On June 20, 1985, over a year after the Interlocutory Decree of Foreclosure had been filed, BLANGIARDI filed the instant motion pursuant to Rule 60(b), Hawaii Rules of Civil Procedure (hereinafter "HRCP"), seeking relief from the Deficiency Judgment. In his motion, BLANGIARDI contends that he is entitled to relief from the Deficiency Judgment on the grounds of "fraud, misrepresentations, or other misconduct of an adverse party" under HRCP Rule 60(b) (3). Specifically, BLANGIARDI alleges that Plaintiff GECC (1) was aware of BLANGIARDI's "strawman" transaction with Daily when it made the loan, (2) fraudulently altered the loan application, financial statement, and DROA, and (3) made false and misleading representations that "lulled" BLANGIARDI into not contesting the foreclosure.

BLANGIARDI's motion, however, is entirely without merit. Foremost, a deficiency judgment in a foreclosure

action is not a final judgment from which relief under HRCP Rule 60(b) can be granted. Rather, it is the Order for Interlocutory Decree of Foreclosure that is the final judgment from which HRCP Rule 60(b) relief may be sought. With this clarification, it becomes evident that BLANGIARDI's motion is barred as it was not made within the one-year time limit specified in HRCP Rule 60(b)(3) for bringing such a motion. Additionally, BLANGIARDI's bald assertions of fraud and misrepresentation concerning his strawman scheme with Sam Daily do not provide clear and convincing evidence of fraud on the part of Plaintiff such that would entitle BLANGIARDI to relief under HRCP Rule 60(b) (3). Furthermore, BLANGIARDI cannot expect relief from a judgment obtained after he deliberately chose not to answer or defend when he had a full and fair opportunity to do so. Neither can BLANGIARDI expect relief from allegations of fraud where he, by his own admission, engaged in fraud. Based on the above, BLANGIARDI's Motion must fail.

II. A DEFICIENCY JUDGMENT IS NOT A FINAL JUDGMENT FROM WHICH RELIEF CAN BE GRANTED UNDER HRCP RULE 60(b)

HRCP Rule 60(b) provides as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or

> proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

Thus, a party may only seek relief from a final judgment, order or proceeding under HRCP Rule 60(b). BLANGIARDI, however, is seeking relief from other than a final judgment, order or proceeding. In the instant action, BLANGIARDI is seeking relief under HRCP Rule 60(b) from a deficiency judgment. A deficiency judgment is merely a collateral order which is incidental to the enforcement of the foreclosure decree, and as such, cannot be the basis of a motion for relief from a final judgment under HRCP Rule 60(b). MDG Supply, Inc. v. Diversified Investments, 51 Haw. 375, 463 P.2d 525 (1969) reh. denied, 51 Haw. 479, 463 P.2d 529 (1969) cert. denied, 400 U.S. 868 (1970).

In addressing the issue of when a final judgment is entered in a foreclosure action, the Hawaii Supreme Court in MDG Supply held that the foreclosure decree was the final judgment even though the decree left further matters, such as enforcement and collections, to be determined. In this regard, the Court stated:

> A judgment of foreclosure of mortgage or other lien and sale of foreclosed property is final, although it contains a direction to commissioners to make a report of sale and to bring the proceeds into court for an order regarding their disposition [citation omitted]. This is on the ground that such judgment finally determines the merits of the controversy and subsequent proceedings are simply incidents to its enforcement. [citations omitted] MDG Supply, supra, at 380.

The holding in MDG Supply, supra, has been reaffirmed by the Hawaii Appellate Courts on numerous occasions. For example, in Powers v. Ellis, 55 Haw. 414, 520 P.2d 431 (1974), the Supreme Court, in considering the timeliness of an appeal taken in a mortgage foreclosure case held:

> In this connection, we have held squarely in the past that a decree of foreclosure is an appealable final order notwithstanding the necessity for a post-decree sale of the mortgaged property and a judicial proceeding to confirm the sale. "This is on the ground that such judgment

finally determines the merits of the controversy, and subsequent proceedings are simply incidents to its enforcement." MDG Supply Inc. [supra]. Powers, supra, at 415. [emphasis added].

In Independence Mortgage v. Glen Construction Corporation, 57 Haw. 554, 560 P.2d 488 (1977), which also considered the timeliness of an appeal taken in a foreclosure action, the Supreme Court reiterated the well established rule that a Decree of Foreclosure is a final judgment even though it is titled "interlocutory". Id. at 555. In Glen Construction the appellant contended that the Decree of Foreclosure was not a final judgment because it failed to include a deficiency judgment. The Supreme Court rejected this contention and stated that "[t]he fact that future calculations would be necessary did not rob the Decree of Foreclosure of finality." Id. at n. 1, emphasis added. See also Sturkie v. Han, 2 Haw. App. 140, 627 P.2d 296 (1981), where the Hawaii Intermediate Court of Appeals stated:

> The foreclosure decree is an exception to the general rule that a judgment, order, or decree is not final unless it completely adjudicates an entire claim. The decree of foreclosure is deemed final for appeal purposes notwithstanding the fact that many matters such as the order of sale, appointment of commissioner, confirmation of sale, award of costs and fees, and award of deficiency judgment are deemed to be incidents to the

enforcement of the decree of foreclosure, MDG Supply v. Diversified Inv., supra. [emphasis added].

Id. at 146-147.

Thus, in a foreclosure action, a deficiency judgment is not a final judgment, but is merely an order incidental to the enforcement of a decree of foreclosure, and as such, is not a judgment from which relief under HRCP Rule 60(b) can be granted. Accordingly, BLANGIARDI cannot be relieved from the Deficiency Judgment in the instant case because it is not a judgment upon which relief can be granted under Rule 60(b).

III. BLANGIARDI'S MOTION FOR RELIEF FROM JUDGMENT OR ORDER IS BARRED ON ITS FACE FOR FAILING TO COMPLY WITH THE ONE-YEAR TIME LIMIT OF HRCP RULE 60(b)(3)

HRCP Rule 60(b) provides in pertinent part as follows:

> (b) Mistakes; Inadvertence; Excusable Neglgect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms that are just, the court may relieve a party or his legal representative from a final judgment, order, or proceding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . .

> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. [emphasis added].

Pursuant to the above-referenced rule, a motion for relief under Rule 60(b)(3) must be made within a reasonable time and, in any event, not more than one year after the judgment or order was entered. See United States v. Martin, 720 F.2d 229 (1st Cir. 1983) (relief from judgment barred under Rule 60(b)(3) where motion filed 16 months after expiration of the one-year period); Poftzer v. Amercoat Corp., 548 F.2d 51 (2nd Cir. 1977) (motion untimely).

In the instant action, the final judgment from which relief can be granted under Rule 60(b)(3) was the Findings of Fact, Conclusions of Law; Order Granting Motion for Summary Judgment and for Interlocutory Decree of Foreclosure, filed on May 18, 1984. BLANGIARDI moved for relief under Rule 60(b)(3), alleging fraud and misrepresentation on the part of Plaintiff, on June 20, 1985--more than one year after the final judgment was entered. Having failed to move within the one-year period provided under Rule 60(b)(3), BLANGIARDI's motion for relief is barred on its face. Thus, the Court has lost its jurisdiction to grant the relief requested by BLANGIARDI in his motion.

IV. THERE IS NO EVIDENCE OF FRAUD WARRANTING RELIEF UNDER HRCP RULE 60(b)(3) EVEN WERE IT APPLICABLE

A. BLANGIARDI Has Not Met His Burden of Proving Fraud By Clear and Convincing Evidence

Even were it applicable, HRCP Rule 60(b), which affords relief from a final judgment for the reasons specified therein, provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. Ackerman v. United States, 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed.2d 207 (1950); Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979); Di Vito v. Fidelity and Deposit Co. of Maryland, 361 F.2d 936, 938 (7th Cir. 1966). See also Isemoto Contracting Co., Ltd. v. Andrade, 1 Haw. App. 202, 205, 616 P.2d 1022, 1025 (1980). In determining whether to grant relief under Rule 60(b), courts "must engage in the delicate balancing of 'the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts.'" Compton, supra, at 102; Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir. 1970) cert. denied, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 793 (1970). In order to prevail under a 60(b)(3) motion for relief from a judgment based on fraud or misrepresentation, the movant must prove the fraud complained of by the heavy

burden of clear and convincing evidence. Ervin v. Wilkinson, 701 F.2d 59, 61 (7th Cir. 1983); Wilson v. Thompson, 638 F.2d 801, 804 (5th Cir. 1981); Di Vito, supra, at 909; 7 MOORE'S FEDERAL PRACTICE ¶ 60.24[5](2d ed. 1948).1/

In his motion for relief under Rule 60(b)(3), BLANGIARDI alleges (1) that information on his loan application and financial statements were altered; (2) that his signature was forged on the bottom of the DROA; (3) that Plaintiff knew all along that BLANGIARDI was a "mere straw buyer" and that the GECC loan was approved through its own fraud and misrepresentation; and (4) that Plaintiff's employee, Gordon Nyuha, told BLANGIARDI not to contest the foreclosure. BLANGIARDI's allegations of fraud and misrepresentation, however, are conclusory, made without particularity, and are improperly directed at the wrong party. They are not clear and convincing evidence of fraud on the part of Plaintiff. This is not a Motion for summary judgment where merely raising an issue of fact can carry the

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1/ BLANGIARDI would have this court believe that in making its determination of fraud, it may assume that the movant's factual allegations are true, and the burden to prove otherwise is on the adverse party. This is clearly erroneous. A movant's allegations may be accepted as true only where no evidence or response is offered in opposition. See Ervin, at 61. In this case and in all other cases where the adverse party responds in opposition, the movant under Rule 60(b)(3) bears the burden of proving the alleged fraud by clear and convincing evidence. See Id.; Wilson, supra at 804; Di Vito, supra, at 909.

motion. In the instant case, BLANGIARDI must prove his allegations of fraud on the part of Plaintiff by clear and convincing evidence to succeed on a Rule 60(b)(3) motion for relief.

In Di Vito, supra, where the plaintiff brought an action against a surety on a contractor's performance bond executed for a H.P. Reger in connection with a contract to construct a sewer, the defendant alleged that the sewer construction contract was a joint venture of the plaintiff and Reger and that the plaintiff was not entitled to recover from the defendant under the performance bond. The plaintiff denied the existence of such a joint venture. After the parties had settled the matter and an order dismissing the cause was entered, the defendant discovered an incompletely executed draft of a joint venture. The defendant moved with affidavits to vacate the order under Rule 60(b)(3) based on the plaintiff's fraud and misrepresentation in procuring the settlement. In denying the defendant's motion, the court held that:

> Except for defendant's discovery of an incompletely executed draft of such an agreement[,] defendant's affidavits present no more than conclusions set forth in the form of averments made on information and belief.
>
> To warrant vacation of a judgment under Rule 60(b)(3) for fraud and misrepresentation in procuring the

> settlement upon which the judgment is based existence of such fraud must be established by clear and convincing evidence. . . and conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud, much less carry the burden of resolving that issue. Di Vito, supra, at 939. [emphasis added].

Additionally, Rule 9(b) of the Hawaii Rules of Civil Procedure requires that allegations of fraud be made with particularity. Dement v. Atkins & ASH, 2 Haw. App. 324, 631 P.2d 606 (1981). Conclusory assertions of the existence of fraud, made without particularity, however, do not prove the issue of fraud in procuring a judgment such as to entitle the movant to relief under Rule 60(b)(3). Stebbins v. Keystone Ins. Co., 481 F.2d 501, 511, n. 11 (D.C. Cir. 1973); Di Vito, supra, at 939.

Here, BLANGIARDI alleges that Plaintiff GECC altered financial loan documents. As evidenced by the Affidavit of Thomas Sakamoto, there was never any alteration of financial loan documents by Plaintiff GECC. As is normal and typical in such loan transactions, Plaintiff GECC merely assisted Defendant BLANGIARDI in review of his financial statements, and with BLANGIARDI's full knowledge and consent, made corrections to reflect BLANGIARDI's equity interest in the Mokuleia Surf as the basis for his downpayment on the

purchase of the condominium unit. See Affidavit of Thomas Sakamoto attached hereto. Furthermore, BLANGIARDI's allegation of alterations of loan documents is made without particularity, are merely conclusory, and unaccompanied by clear and convincing evidence of fraud. As such, it does not even raise the issue of fraud under HRCP Rule 60(b)(3) so as to warrant relief from the decree of foreclosure.

Similarly, BLANGIARDI's allegation that Plaintiff knew all along he was a "straw buyer" and that the GECC loan was approved through its own fraud and misrepresentation is merely a conclusory statement unaccompanied and unsupported by any clear and convincing facts. Plaintiff never knew of BLANGIARDI's mortgage-pulling scheme with Daily when it recommended approval of the BLANGIARDI loan. See Affidavit of Thomas Sakamoto attached hereto. Plaintiff would never have made a loan to BLANGIARDI if it had known that BLANGIARDI was in cahoots with Mr. Daily and did not intend to make the payments on the loan. Id. Simply, BLANGIARDI has presented no evidence, other than his belief, that Plaintiff was aware of his mortgage-pulling scheme with Daily. Accordingly, his allegations do not rise to the level of fraud that a Rule 60(b)(3) motion may relieve.

BLANGIARDI's allegation that Mr. Nyuha told him not to contest the foreclosure and that he was "lulled" into

inaction is equally unsubstantiated and absurd. Mr. Nyuha never had a conversation with BLANGIARDI in which he advised BLANGIARDI not to contest the foreclosure. See Affidavit of Gordon Nyuha attached hereto. To the contrary, Mr. Nyuha warned BLANGIARDI that if delinquent amounts were not recieved by a certain date, Plaintiff would be forced to refer collection to an attorney. See Exhibit "B" attached hereto. BLANGIARDI has presented no evidence, let alone clear and convincing evidence, that Mr. Nyuha made any misrepresentations. Likewise, his unsupported, conclusory allegation of misrepresentation does not justify relief under Rule 60(b)(3).

BLANGIARDI's allegation that his signature was forged on the bottom of the DROA and that Plaintiff knew or should have known of the forgery is again a conclusory statement. Plaintiff was not a party to the DROA. Neither did Plaintiff make the loan to BLANGIARDI on the basis of the DROA; in fact, the DROA is totally immaterial to the loan transaction in the instant case. As purchaser of the Mokuleia Surf condominium pursuant to the DROA, BLANGIARDI's allegations of forgery should be addressed to the person he contracted with, and the person to whom he handed the incomplete DROA, the seller, Mr. Daily. See Affidavit of RICHARD JOHN BLANGIARDI, attached to BLANGIARDI's Motion herein.

All of BLANGIARDI's allegations of fraud and misrepresentation are vague, conclusory, and improperly directed at Plaintiff. BLANGIARDI simply has not met his burden of establishing the existence of fraud on the part of Plaintiff[2/] by clear and convincing evidence. On this basis alone, the motion for relief under Rule 60(b)(3) should be denied.

B. A Party That Has The Opportunity, But Fails To Assert Fraud, Cannot Later Expect Relief From Fraud

For relief to be granted under Rule 60(b)(3), it must be shown that the alleged misconduct was such as to have prevented the movant "from fully and fairly presenting his case or defense." Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Toledo Scales Co. v. Computing Scale Co., 261 U.S. 399, 421, 43 S.Ct. 458, 464, 67 L.Ed. 719 (1923).

BLANGIARDI, a sophisticated businessman, with experience in real estate transactions, had ample opportunity

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2/ Indeed, BLANGIARDI has sued the wrong party. All of BLANGIARDI's allegations of fraud are directed to Sam Daily and BLANGIARDI's own dealings with Sam Daily; BLANGIARDI can point to no direct evidence or proof of any fraud on the part of Plaintiff.

to present his alleged defense of fraud when Plaintiff filed its Complaint. BLANGIARDI was gainfully employed and held a managerial position. Further, Plaintiff warned BLANGIARDI that collection of the loan would be turned over to an attorney, and Plaintiff's attorney made demand for full payment of the amounts due and owing under the Promissory Note before instituting legal action. See Exhibit "C" attached hereto. Instead, BLANGIARDI chose to sit back and allow the entry of a default and the filing of an order granting summary judgment and decree of foreclosure. BLANGIARDI should have come forward with his allegations of fraud when Plaintiff moved to foreclose his property. Long before the foreclosure action, BLANGIARDI was fully aware that Plaintiff was looking to him for payments, that he was delinquent in making those payments and that his property would be foreclosed if those payments were not made. See Exhibits "A," "B," and "C." BLANGIARDI's inaction in light of Plaintiff's unequivocal demands for payment and subsequent foreclosure action is not what would be expected of a man with financial resources who thought he was being defrauded by Plaintiff. Rather than confront Plaintiff, BLANGIARDI chose to remain silent and not disclose at the time of the foreclosure action that he had made a secret deal with Sam Daily.

Assuming arguendo, that everything Defendant BLANGIARDI alleges in his moving papers is correct, then BLANGIARDI knew as of November, 1983, that: (1) he was in default of the loan agreement, (2) that Plaintiff GECC was looking t him for payment and (3) that Plaintiff would and did institute foreclosure proceedings to collect on the note. BLANGIARDI, thus, knew one year prior to the entry of the deficiency judgment that Plaintiff GECC was not cooperating in this alleged scheme with Sam Daily. To now allow BLANGIARDI to litigate the merits of his case when he expressly chose not to do so earlier, is not the showing of exceptional circumstances warranting the relief envisioned by Rule 60(b)(3), and would greatly undermine the strong policy favoring the finality of judgments. See Mastini v. American Telephone and Telegraph Co., 369 F.2d 378 (2nd Cir. 1966)(Rule 60(b)(3) motion properly denied where movant merely attempting to use such motion to relitigate merits of his claim); Biotronik, Etc. v. Medford Medical Instrument Co., 415 F.Supp. 133, 139 n. 15 (D. N.J. 1976)(there is a strong policy favoring the finality of judgments).

C. A Moving Party's Own Fraud Bars Relief From A Final Judgment

It is axiomatic that a moving party is not entitled to relief from a judgment under Rule 60(b)(3) on the basis of

his own fraud or related misconduct. 7 MOORE'S FEDERAL PRACTICE ¶60.24[5](2d ed. 1948); Simons v. United States, 452 F.2d 1110, (2nd Cir. 1971).

In Simons, a divorcee procured United States citizenship on the representation that she and her husband planned to make the United States their permanent residence. The court held that she could not later attack her own naturalization decree and that of her deceased, former husband on an allegation that the decrees were obtained by fraud because they always intended to return to Europe. Id. at 1116-1117.

Likewise, BLANGIARDI cannot now attack his foreclosure decree on the basis of his own fraud. BLANGIARDI represented to Plaintiff that he had the income and credit standing to repay the loan. In actuality, BLANGIARDI was "pulling a mortgage," in exchange for valuable consideration, and had no intention of making the mortgage payments. BLANGIARDI cannot now attack the loan agreement and subsequent foreclosure decree by claiming he never intended to repay the loan. By his own admission, BLANGIARDI is barred from relief under Rule 60(b)(3) due to his own actions in defrauding Plaintiff.

V. BLANGIARDI'S MOTION IS BARRED BY HIS OWN MISCONDUCT UNDER THE RULE ESTABLISHED BY THE HAWAII SUPREME COURT IN SHINN V. YEE

In Shinn v. Yee, 57 Haw. 215, 553 P.2d 733 (1976), Shinn and Yee entered into a joint venture for the development of a condominum project. As part of this venture there was an illegal scheme with an executive of the then existing Island Federal Savings to obtain loans and kick back proceeds. (The executive was later convicted in U.S. District Court and sentenced to prison). There was a dispute among the parties concerning the division of the profits of the enterprise and scheme and Shinn brought an action for an accounting. Shinn contended that Yee had wrongfully and illegally withheld profits of the joint venture from Shinn. In defense of these allegations, Yee asserted that Shinn should be precluded from asserting his claims under the joint venture agreement because Shinn had agreed to an illegal "kickback" arrangement with the S & L official whereby 25% of the joint venture profits would go to that official for his help in arranging a loan to the joint venture. Yee contended that Shinn's action for an accounting of the joint venture profits was thus barred by the doctrine of unclean hands based on Shinn's own inequitable conduct. The evidence, however, established that it was Yee who represented to Shinn that the joint venture had obligated itself to pay the third

party under the kickback arrangement. The record also established that unknown to Shinn, Yee never made such an agreement with the third party, but had intended at 25% of the profits would go to Yee's two brothers. The Hawaii Supreme Court stated:

> If any iniquitous conduct ins chargeable to a party in this situation it must be charged to Yee and not to Shinn. Yee cannot have his cake and eat it too. The doctrine of "unclean hands" will not allow a party to profit by his own misconduct.

Id. at 231, emphasis added. The court further stated:

> The concept is based 'upon considerations that make for the advancement of right and justice,' (citation omitted) and will not be invoked when to do so would work injustice and wrong. Jones v. Jones, 30 Haw. 565 (1928).

Id. Thus, despite Yee's allegations of wrongdoing on the part of Shinn in the division of the profits of the joint venture, the court held that it did not matter that Shinn may have participated in such an illegal "kickback" arrangement; Yee would not be allowed to profit by his own misconduct in facilitating an illegal joint venture agreement.

In the present case, Defendant BLANGIARDI asks this Court to relieve him from a deficiency judgment under HRCP Rule 60(b)(3) on the grounds of alleged fraud, misrepresentation and other misconduct on the part of Plaintiff GECC. Assuming arguendo that Defendant BLANGIARDI could prove such allegations, he is, nevertheless, still barred from seeking

such relief under Shinn v. Yee, supra, based on his own inequitable conduct. 4/

According to BLANGIARDI's own affidavit, he was approached by Sam Daily in 1982 and asked to help Daily in "pulling a mortgage". Under Daily's scheme for pulling a mortgage, Defendant BLANGIARDI was to represent to Plaintiff GECC that he was seeking a loan based on his own repayment ability, to purchase a condominium unit in the Mokuleia Surf. Defendant BLANGIARDI also states in his affidavit that he was told by Daily that Daily could not purchase the property directly from his partner, Frederick Arthur Figge, who owned FAF Mokuleia, and therefore Defendant BLANGIARDI would have to act as a "strawman" to facilitate the purchase of the property. Defendant BLANGIARDI states that he received $1,500.00 for his part in this deal with Sam Daily.

Based on BLANGIARDI's express admissions, he was the prime actor engaged in an illicit scheme with Sam Daily to enable Daily to purchase more condominium units than a developer was allowed under applicable laws. Furthermore, BLANGIARDI received $1,500.00 compensation his role in the scheme. Therefore, according to BLANGIARDI, he knew that he

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4/ For purposes of argument only, Plaintiff assumes that Defendant BLANGIARDI could prove his allegations. Plaintiff GECC, however maintains that Defendant BLANGIARDI has not and cannot prove his allegations of alleged fraud on the part of the Plaintiff.

and Daily were acting to facilitate a fraud, the ultimate goal of the Daily/BLANGIARDI deal--the conveyance of condominium units to Daily in contravention of law. Like the joint venturers in Shinn v. Yee, however, the deal went sour when BLANGIARDI got burned by Daily. BLANGIARDI now attempts in equity to be relieved from a deficiency judgment in favor of Plaintiff GECC. And like the joint venturers in Shinn v. Yee, BLANGIARDI cannot now be allowed to profit by his own misconduct in facilitating an illegal deal with Sam Daily.

The relief requested by Defendant BLANGIARDI under HRCP Rule 60(b)(3) is thus barred by the rule of Shinn v. Yee. BLANGIARDI cannot assert fraud, illegality or other misrepresentation on the part of GECC when BLANGIARDI himself has unclean hands. Therefore, even if this Court finds that HRCP Rule 60(b)(3) applies to the instant case and that the Court can hear this motion, BLANGIARDI's motion must fail based on his express admissions of wrongdoing.

VI. CONCLUSION

Based on the foregoing arguments and authorities, Plaintiff GECC respectfully requests this Honorable Court to deny Defendant BLANGIARDI's Motion For Relief From Judgment Or Order.

DATED: Honolulu, Hawaii, JUL 22 1985.

Lissa H. Andrews

DAVID A. EZRA
LISSA H. ANDREWS

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GECC FINANCIAL CORPORATION,	)	CIVIL NO. 80828
Plaintiff,	)	AFFIDAVIT OF THOMAS A. SAKAMOTO
vs.	)	
RICHARD JOHN BLANGIARDI, et al.,	)	
Defendants.	)	

AFFIDAVIT OF THOMAS A. SAKAMOTO

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

THOMAS A. SAKAMOTO, being first duly sworn upon oath, deposes and says:

1. That your affiant is an Assistant Vice President and Assistant Branch Manager of the Kaimuki Branch of Plaintiff GECC FINANCIAL CORPORATION herein, and has personal knowledge of the facts herein;

2. That your affiant processed and recommended approval of Defendant RICHARD JOHN BLANGIARDI's loan application.

3. That your affiant's decision to recommend approval of the loan was based entirely on the perceived good character and repayment ability of Defendant BLANGIARDI;

4. That your affiant was not told by Defendant BLANGIARDI or by anyone else prior to, or at the time of, the loan closing of any "mortgage pulling" scheme, nor would your

affiant have continued with the making of the subject loan if your affiant had been told of such a scheme;

5. That your affiant did have a direct telephone conversation on one or more occasions with Defendant BLANGIARDI regarding the subject loan prior to closing;

6. That your affiant was given to understand that the down payment on the condominium unit in the Mokuleia Surf was to be made by the conversion of Defendant BLANGIARDI's equity interest in a limited partnership which had originally purchased the 12 unit condominium building. Thereafter, your affiant assisted Defendant BLANGIARDI with the completion of his financial statements to reflect this equity as an asset.

Further affiant sayeth naught.

THOMAS A. SAKAMOTO

Subscribed and sworn to before me
this 22nd day of July, 1985.

L. Phillips
Notary Public, State of Hawaii

My commission expires: 11-8-86.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GECC FINANCIAL CORPORATION, Plaintiff, vs. RICHARD JON BLANGIARDI, et al., Defendants.	CIVIL NO. 80828 AFFIDAVIT OF GORDON N. NYUHA

AFFIDAVIT OF GORDON N. NYUHA

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

GORDON N. NYUHA, being first duly sworn upon oath, deposes and says:

1. Your affiant is an Assistant Vice President of Plaintiff GECC FINANCIAL CORPORATION and has personal knowledge of the facts herein;

2. That your affiant did not have any conversation with Defendant BLANGIARDI in which your affiant made any representations concerning the value of the property being foreclosed upon or the likelihood that Plaintiff would obtain a deficiency judgment in the present case;

3. That your affiant did not tell Defendant BLANGIARDI that this action was a "friendly foreclosure" and that he should not contest it;

4. That your affiant never promised Defendant BLANGIARDI a letter which would explain the circumstances surrounding the foreclosure;

5. That attached hereto as Exhibit "A" is a true and correct copy of a letter written by your affiant on November 10, 1983 to Defendants BLANGIARDI;

6. That attached hereto as Exhibit "B" is a true and correct copy of a letter written by your affiant on November 23, 1983 to Defendants BLANGIARDI;

Further affiant sayeth naught.

GORDON W. NYUHA

Subscribed and sworn to before me
this 22nd day of July, 1985.

Notary Public, State of Hawaii

My commission expires: 1/2/88.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GECC FINANCIAL CORPORATION, Plaintiff, vs. RICHARD JOHN BLANGIARDI, et al., Defendants.	)	CIVIL NO. 80828 AFFIDAVIT OF ROBERT S. TASSIE

AFFIDAVIT OF ROBERT S. TASSIE

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ROBERT S. TASSIE, being first duly sworn upon oath, deposes and says:

1. That your affiant is Vice President of Plaintiff GECC FINANCIAL CORPORATION and has personal knowledge of the facts herein;

2. That your affiant met with Defendant RICHARD JOHN BLANGIARDI on December 5, 1984 in an attempt to work out a repayment program;

3. That at this meeting on December 5, 1984, your affiant was first informed directly by Defendant BLANGIARDI that Defendant had entered into a deal with Sam Daily whereby he was to go to GECC to "pull a mortgage";

4. That Defendant informed your affiant that under Sam Daily's scheme for "pulling a mortgage", he was to (a) pretend that he was buying a condominium unit for his own account; (b) obtain credit based on his individual personal

credit standing and repayment ability; (c) close the loan; (d) take title to the property, and then later, unknown to the lender, (e) deed it over to Sam Daily, who promised to make payments on the loan;

5. That your affiant had no knowledge of Defendant BLANGIARDI's mortgage-pulling scheme with Sam Daily prior to this December 5, 1984 meeting with Defendant;

6. That your affiant did not make any representations to Defendant BLANGIARDI that the alteration of loan documents was a common practice between lender and real estate brokers.

Further affiant sayeth naught.

ROBERT S. TASSIE

Subscribed and sworn to before me
this 22nd day of July, 1985.

Notary Public, State of Hawaii

My commission expires: 1/2/88.

IN THE CIRCUIT COURT OF FIRST CIRCUIT

STATE OF HAWAII

GECC FINANCIAL CORPORATION, Plaintiff, vs. MICHAEL L. EINSTEIN, et. al., Defendants.	CIVIL NO. 80829 AFFIDAVIT OF ALLEN I. MARUTANI

AFFIDAVIT OF ALLEN I. MARUTANI

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ALLEN I. MARUTANI, being first duly sworn upon oath, deposes and says:

1. That your affiant is co-counsel herein for Plaintiff GECC FINANCIAL CORPORATION;

2. That your affiant was the attorney who handled the foreclosure proceedings on behalf of Plaintiff in the above-captioned action;

3. That pursuant to a title search, your affiant determined that the subject property had been conveyed to FAF Mokuleia Associates and Frederik Arthur Figge, however, your affiant did not have any knowledge of any "mortgage pulling" scheme between Defendant EINSTEIN and Sam Daily at

any time while your affiant was prosecuting said foreclosure proceeding;

4. That attached hereto as Exhibit "C" is a true and correct copy of a letter written by your affiant to Defendant EINSTEIN on December 2, 1983, prior to the filing of the foreclosure complaint;

Further Affiant sayeth naught.

ALLEN I. MARUTANI

Subscribed and sworn to before
me this 22nd day of July, 1985.

Notary Public, First Judicial
Circuit, State of Hawaii

My commission expires: 10-12-87

November 10,1983

Richard J. Blangiardi
978 Waiohinu Dr.
Honolulu, HI 96816

RE: Mokuleia Surf, Apt. 101
TMK: 6-8-11-7

Dear Mr. Blangiardi,

We have been recently advised that you have conveyed the property, which has been mortgaged to GECC Financial Corporation without having secured the prior written consent of GECC Financial Corporation.

Please be advised that even though you have failed to obtain the prior written consent of GECC Financial Corporation to such conveyance, which is deemed to be an act of default under the terms of the mortgage made in favor of GECC Financial Corporation, GECC Financial Corporation chooses not to declare the entire amount of the secured obligation to be presently due and payable at this time. However, be further advised that such action is being expressly made without prejudice to our rights to subsequently declare an acceleration of the amount due, or to exercise our rights to any future conveyance covering the subject mortgaged property, where you fail to secure our prior written consent thereof, all rights, power, and privileges contained in said mortgage and in favor of mortgagee thereunder, being expressly preserved and protected.

If you have any questions concerning the position of GECC Financial Corporation, please do not hesitate to call or write us.

Also, your property taxes are delinquent and must be paid. The 1st installment was due on August 20,1983 in the amount of $180.87. There is penalty and interest due. Please call the tax office and arrange for immediate payment. We need to see a receipt for payment after is is paid.

Very truly yours,

Gordon N. Nyuha
Assistant Vice President

EXHIBIT "A"

November 23, 1983

Richard Blangiardi
978 Waiohinu Drive
Honolulu, Hi. 96816

RE: Loan 012-1874

Dear Mr. Blangiardi:

During the last two weeks, we have left several phone messages for you to contact us. To date, you have not returned any of those calls.

Yourrloan account with us is currently past due for the following months:

October 15, 1983	$ 800.00
November 15, 1983	800.00
Late Charges	160.00
TOTAL DUE GECC	$1,760.00

If we do not receive the above amount by November 30, 1983, we will refer your account to our attorney for collection. In our efforts to collect these funds, you will be responsible for all legal costs incurred.

It is in your best interest to resolve this matter immediately.

Sincerely,

Assistant Vice President

GNN:aa

EXHIBIT "B"

ALLEN I. MARUTANI
ATTORNEY AT LAW
A LAW CORPORATION
SUITE 602, CAPITAL INVESTMENT BUILDING
850 RICHARDS STREET
HONOLULU, HAWAII 96813

TELEPHONE 537-6578

December 2, 1983

Richard J. Blangiardi
978 Waiohinu Drive
Honolulu, Hawaii 96816

Dear Mr. Blangiardi:

I represent GECC Financial Corporation, a Hawaii corporation, the owner and holder of that certain promissory note dated June 22, 1982, made and executed by you, as maker, in favor of my client, as payee, in the principal sum of $45,000.00, and the real property mortgage made to secure the repayment of said promissory note.

My client advises that you have not made the payments thereunder, in accordance with the payment schedule provided, and that you are now, and have been for some time now delinquent. Accordingly, my client has elected to treat the entire amounts due thereunder to become immediately due and payable.

Demand is hereby made upon you, and you are hereby so advised, for the immediate and full payment of the principal sum of $43,130.19, together with interest accrued to December 2, 1983, in the sum of $1,375.31, together with interest to accrue thereafter, together with late charges accrued in the sum of $160.00, together with late charges to accrue hereafter, costs, and attorney's fees. If full payment is not received within ten (10) days from the date of this letter, we shall be forced to take further and appropriate action.

EXHIBIT "C"

We trust that you will give this matter your most immediate consideration.

Very truly yours,

ALLEN I. MARUTANI

AIM:rbh

cc: GECC Financial Corporation
(Attn: Iris Yafuso)

REGISTERED MAIL
RETURN RECEIPT REQUESTED
RESTRICTED DELIVERY

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents were duly served upon the following parties at their last known addresses by hand-delivering the same to them on July 22, 1985:

DAVID L. TURK, ESQ.
MELVIN Y. AGENA, ESQ.
LYNN MINAGAWA, ESQ.
1555 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813

Attorney for Defendant

DATED: Honolulu, Hawaii, July 22, 1985.

Lisa H. Andrews