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UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAI'I

In re Mill Street Management, LLC,) CASE NUMBER: 07-00064
) (Chapter 7)
) Debtor.
) MEMORANDUM IN SUPPORT OF
) HAWAII NATIONAL BANK'S
) MOTION FOR RELIEF FROM
) AUTOMATIC STAY

Hrg: March 7, 2007; 1:30 p.m.
Hon. Robert J. Faris

MEMORANDUM IN SUPPORT OF
HAWAII NATIONAL BANK'S
MOTION FOR RELIEF FROM AUTOMATIC STAY

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I. INTRODUCTION

Debtor Mill Street Management, LLC was organized on April 23, 2006, by David Singer and Donnalee Singer, husband and wife.¹ Mr. and Mrs. Singer are its only two managers. Id.

On May 9, 2006, sixteen days after forming the LLC, Mr. Singer quitclaimed to it his right, title and interest in 1592 Mill Street, Wailuku, Maui, Hawaii (“the secured property”),² an office and apartment building. (Exhibit C at 45 (listing of Commercial Properties of Maui dated 11/21/06))

Secured creditor Hawaii National Bank (HNB) held a first mortgage on the secured property, signed by both Mr. and Mrs. Singer, but the bank had not been notified of the transfer to the new LLC, and certainly had not consented. Id. at 9 - 10 (Declaration of Indebtedness). Indeed, when Mr. Singer (as tenant in severalty) effected the transfer, HNB’s complaint to foreclose on the property and MSJIDF

¹Exhibit A is a true and correct copy of business information of the Department of Commerce and Consumer Affairs of the State of Hawaii for Mill Street Management, LLC, incorporated by reference pursuant to FRCP 10(c) and for which judicial notice is requested pursuant to FRE 201 and 801.

² Exhibit B is a true and correct copy of the Quit Claim Deed, recorded at the Bureau of Conveyances of the State of Hawaii (“BOC”) as Doc. 2006-086381 on May 9, 2006.

Exhibit C is a certified copy of HNB’s Supplemental Memorandum in Support of HNB’s motion for summary judgment and interlocutory decree of foreclosure (“MSJIDF”), filed December 29, 2006 (“HNB’s supplemental memorandum”), the pages of which have been bate-stamped. A certified copy of the quit claim deed is at pages 63 - 66 of this document.

The references to page numbers of exhibits refers to the bate-stamped numbers of said exhibits.

were pending in state court on Maui.³

On October 26, 2005, at the first hearing on HNB's motion for MSJIDF, Mr. and Mrs. Singer, alleging a need to conduct discovery, obtained a continuance under HRCP 56(f).⁴ Mr. and Mrs. Singer were given 90 days to conduct discovery, but ultimately were sanctioned by the state court for discovery abuse.⁵

On June 28, 2006, confronted with HNB's motion to compel production of documents and for discovery sanctions, Mr. and Mrs. Singer each filed declarations in opposition, neither of which disclosed the transfer.⁶ Their attorney further opposed the motion at hearing on July 26, 2006, and still the Singers did not disclose the transfer.⁷

On October 23, 2006, having independently learned of the transfer, HNB issued a demand for cure on Mr. and Mrs. Singer. (Exhibit C, supra at 67 - 77) On even date, HNB also demanded that Mr. Singer satisfy an IRS lien newly

³ Hawaii National Bank v. Singer, et alia, Civ. No. 05-1-0288(2), Second Circuit Court of the State of Hawaii, complaint filed July 25, 2005; MSJIDF filed October 5, 2005.

⁴ Exhibit D is a certified copy of Defendants David Mitchell Singer and Donnalee Singer's Memorandum in Opposition to Motion for Summary Judgment filed October 21, 2005. See Exhibit D at 9.

⁵ Exhibit H is a certified copy of the Order on Plaintiff's Motion to Compel Production of Documents, filed January 22, 2007.

⁶ Exhibit E is a certified copy of Defendants David Mitchell Singer and Donnalee Singer's Memorandum in Opposition to Plaintiff's Motion to Compel Production of Documents filed June 28, 2006.

⁷ Exhibit I is a true and correct copy of the transcript of hearing on July 26, 2006.

recorded against him at the BOC in August 2006. Id. at 78 - 79 (lien recorded at the BOC on 8/2/2006 as Doc. No. 2006-141039). After Mr. and Mrs. Singer failed to cure this further default (id. Declaration of Indebtedness at 11, TG Status Report at 91 - 97), HNB set a second hearing on its pending MSJIDF.

On January 10, 2007, Mr. and Mrs. Singer filed pleadings opposing MSJIDF papers that explained that the property was being sold for \$1.5 million to a California investor, attaching a Deposit, Receipt, Offer and Acceptance (“DROA”) that identified the seller as the Debtor Mill Street Management, LLC.⁸ The DROA was to close on February 28, 2007. (Exhibit F, supra at 4, last line; 9 ¶ 4, and 11)). Mr. and Mrs. Singer asked for a continuance of the MSJIDF for three months, i.e. to April 2007. Id. at 4.

In its reply, HNB renewed its request for appointment of a commissioner, at minimum to ensure judicial supervision of the sale.⁹ HNB offered its agreement to stay the work of the commissioner if Mr. and Mrs. Singer would sign escrow instructions confirming payment to HNB in full, but that offer was ignored. Id. at

⁸ Exhibit F is certified copy of Defendant David Mitchell Singer and Donnalee Singer’s Memorandum in Opposition to Hawaii National Bank’s Motion for Summary Judgment and Interlocutory Decree of Foreclosure filed January 10, 2007. See Exhibit F at 11 and 20.

⁹ Exhibit G is a certified copy of Plaintiff’s Reply to Defendant David Mitchell Singer and Donnalee Singer’s Memorandum in Opposition to Hawaii National Bank’s Motion for Summary Judgment and Interlocutory Decree of Foreclosure filed January 12, 2007.

9 ¶ 4.

On January 17, 2007, the state court granted HNB's MSJIDF from the bench, setting a return date of February 14, 2007 for the commissioner to report to the court on the status of the sale. (Declaration of Joy Yanagida)

On January 24, 2007, Mill Street Management LLC filed this Chapter 7 petition. So far as HNB can ascertain, Debtor Mill Street Management, LLC has no apparent debt, for HNB's loan and mortgage were signed by Mr. and Mrs. Singer.

HNB moves to lift the stay pursuant to 11 USC § 362(d)(4), as a secured creditor of Mr. and Mrs. Singer, who transferred the collateral without consent of the court or the lender and then filed debtor's petition as part of a scheme to delay, hinder and defraud HNB.¹⁰

II. STATEMENT OF FACTS

On April 23, 2006, Mr. and Mrs. Singer formed Debtor Mill Street Management, LLC (Exhibit A, supra), sixteen days before Mr. Singer quitclaimed to it his right, title and interest in 1592 Mill Street. (Exhibit B, supra)

¹⁰Section 362(d)(4) provides in part:
the court shall grant relief from the stay *** (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved *** transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval ***."

The Mill Street property was collateral for the loan and first mortgage that Mr. and Mrs. Singer had made to buy it, which loan documents prohibited transfers without the lenders' consent. (Exhibit C, supra at 20 (note section X) and 36-37 (mortgage ¶24)) On August 24, 2001, Mr. and Mrs. Singer had borrowed \$420,000 from HNB, which loan was evidenced by an Adjustable Rate Note. Id. at 15-21 (Adjustable Rate Note). The note was secured on even date by a Mortgage, Security Agreement and Financing Statement on the Property, executed by David Mitchell Singer as Mortgagor and Donnalee Singer as Co-Borrower, in favor of HNB, as mortgagee. (Id. at 22-46 (Mortgage recorded at the BOC on August 31, 2001, as Doc. No. 2001-137151))

The Note was further secured by a Rental and Lease Assignment, executed by Mr. and Mrs. Singer, assigning all leases and rental contracts, rentals and income to HNB, and authorizing possession of the secured property, for as long as the borrowers are in default of the terms of the Adjustable Rate Note or the Mortgage. The Rental and Lease Assignment was recorded at the BOC on August 31, 2001 as Doc. No. 2001-137152. (Id. at 4-54 (Rental and Lease Agreement))

The UCC financing statement recorded at the BOC on August 31, 2001 as Doc. No. 2001-137153 covered all leases and rental contracts, rentals and income arising from the secured property. (Id. at 56-62 (UCC financing statement))

On July 25, 2005, HNB filed a foreclosure complaint in state court, naming Mr. and Mrs. Singer and several lien holders as defendants. (Hawaii National Bank v. Singer, supra; MSJIDF, supra). HNB filed a notice of pendency of action on July 25, 2005, and recorded it at the BOC on August 1, 2005 as Doc. No. 2005-152337.

A. MSJIDF first heard in October 2005. On October 5, 2005, HNB filed an MSJIDF, set for hearing later that month. In his opposition tardily filed October 25, 2005, Mr. Singer admitted “I was late in making payments in June, July and August [2005],” (Exhibit D, supra at 14 (Singer Decl. ¶ 5)) Further, admitted Singer, “from the time I obtained this loan from Hawaii National Bank I occasionally missed payments.” Id. at ¶ 3. Nonetheless, on October 26, 2005, at the first hearing on HNB’s motion for MSJIDF, Mr. and Mrs. Singer, obtained a continuance under HRCP 56(f) for 90 days allegedly to conduct discovery, provided they timely made monthly payments at the nominal interest rate. (Exhibit C, supra, at 3) The state court reserved on whether the default interest rate applied. Id.

The complaint and MSJIDF were pending when David Singer transferred the secured property to the newly-formed Mill Street Management, LLC. As noted, the transfer was made without disclosure to HNB, and certainly without its consent. (Id. at 10-11)

Unaware of the transfer, HNB filed discovery motions, heard on July 19 and 26, 2006, during the course of which Mr. and Mrs. Singer did not disclose the transfer.¹¹

B. Demand to cure title transferred in April 2006. HNB learned independently of the transfer. By letter dated October 23, 2006, HNB gave Mr. and Mrs. Singer written notice of default, demand that default be remedied within fifteen days, failing which HNB would accelerate the note and mortgage and proceed with foreclosure. (Id. at 67-77 (Notice of Default)) HNB’s notice stated in part:

“The transfer is in violation of Note section X and Mortgage ¶24, both of which entitle HNB to accelerate the note. Note section X expressly identifies transfers as a condition that accelerates the mortgage:

“***

“Mortgagor covenants and agrees that if all or any part of the mortgaged real property or an interest therein is sold or transferred (or if a beneficial interest in Mortgagor is sold or transferred and Mortgagor is not a natural person without Mortgagee’s prior written consent Mortgagee may, at Mortgagee’s option, declare all the sums secured by this Mortgage to be immediately due and payable. ***”

HNB’s notice further stated:

“HNB did not provide prior written consent to this transfer. You are therefore in default and this letter is a formal request to you that this default be remedied within fifteen (15) days after mailing of this written notice.

¹¹Exhibit I, supra. At hearing on July 19, 2006, a judge recused himself.

Failure to do so will be a further basis on which Hawaii National Bank will proceed with foreclosure against the Mill Street property, in Hawaii National Bank v. David Mitchell Singer et al.; Civil No. 05-1-0288(2).”

Id. The fifteen-day period to cure such default is provided by the Mortgage section

(g)(A) signed by Singer Defendants:

“***if the mortgagor shall fail to have effected a cure of the same within fifteen (15) days after written notice *** the Mortgagee may *** declare the unpaid principal *** to be immediately due and payable***”

(Id. at 68-69 (notice), quoting 49-50 (mortgage))

Mr. and Mrs. Singer failed to cure. In state court, HNB submitted a Status Report issued by Title Guaranty Escrow Services, Inc. (“TG”), indicating that as of November 10, 2006, title remained in Mill Street Management, LLC. Id. at 90-97.

C. Demand to cure Internal Revenue Service (“IRS”) lien recorded in August 2006. HNB independently discovered that an IRS lien against David Singer was recorded at the BOC as Doc. 2006-141039. (Id. at 78-79 (IRS lien))

On October 23, 2006, simultaneously with its notice regarding the transfer of collateral, HNB gave Mr. and Mrs. Singer written notice of default due to the IRS lien, and demanded cure within fifteen days, failing which HNB would accelerate the note and mortgage and proceed with foreclosure. (Id. at 80-90 (Notice of Default)) Eighteen days later, as confirmed by the TG Status Report,

supra, Mr. and Mrs. Singer had not satisfied the lien.

On January 10, 2007, Mr. and Mrs. Singer filed pleadings opposing MSJIDF that explained that the property was being sold for \$1.5 million to a California investor, attaching a Deposit, Receipt, Offer and Acceptance (“DROA”) that identified the seller as the Debtor Mill Street Management, LLC. (Exhibit F, supra at 11-20 (DROA)) Closing was on February 28, 2007. Id. Mr. and Mrs. Singer asked for a three-month continuance, i.e. to April 2007. Id. at 4.

In its reply, HNB renewed its request for appointment of a commissioner, at minimum to ensure judicial supervision of the sale. (Exhibit G, supra) HNB noted that Mill Street Management, LLC had signed a five-year lease for \$12,000/month for the 4,042 s.f. building. Id. at 45 (listing) and 12-43 (commercial triple-net lease). HNB offered to stipulate to stay the work of the commissioner for 30 days from hearing, provided Mr. and Mrs. Singer signed escrow instructions to pay HNB in full. Id. at 9 ¶ 4. The offer was ignored.

At hearing on January 17, 2007, counsel for Mr. and Mrs. Singer argued, “if the Court puts title in the commissioner that could -- that almost inevitably gums up private sales.” (Exhibit J, Tr. of hearing, 1/17/07 at 11, lines 11-13)

The state court judge responded, “Well, he shouldn't have transferred the property either,” id. at 14-15, and granted HNB’s MSJIDF from the bench. The court set a return date of February 14, 2007 for the commissioner to report to the

court on the status of the sale. Id. at 11.

On January 24, 2007, before the order granting MSJIDF was filed, Mill Street Management LLC filed this Chapter 7 petition.

III. ARGUMENT

HNB is entitled to relief from the stay under 11 U.S.C. § 362(d)(4), newly promulgated under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101 et seq. Section 362(d)(4), as noted, provides in part:

the court shall grant relief from the stay *******(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved *******transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval *******.

The conduct of Mr. and Mrs. Singer in respect of 1592 Mill Street meets this test. This memorandum sets out:

- (a) HNB has a secured interest in the real property of which Mr. and Mrs. Singer transferred ownership without the consent of the secured creditor or court approval; and
- (b) the Chapter 7 petition filed by Mill Street Management, LLC was part of a scheme to delay, hinder and defraud creditors.

A. HNB HAS A SECURED INTEREST IN THE REAL PROPERTY WHICH MR. AND MRS. SINGER TRANSFERRED WITHOUT THE CONSENT OF THE SECURED CREDITOR OR COURT APPROVAL.

Mr. and Mrs. Singer do not dispute that HNB had a first mortgage on the property, which after all was recorded at the BOC on August 31, 2001 as Doc. No. 2001-137151.

Mr. and Mrs. Singer have not disputed that they have transferred the collateral to Mill Street Management, LLC, for David Singer's quitclaim deed was recorded at the BOC as Doc. 2006-086381 on May 9, 2006. They did not respond to HNB's demand to cure the default, and did not dispute the transfer in the opposition to the appointment of a commissioner which they filed in state court on January 10, 2007. (Exhibit F, supra)

Mr. and Mrs. Singer did not have the approval of the lender, which demanded they cure (Exhibit C, supra at 67-76), or the state court, which appointed a commissioner to supervise the sale. (Exhibit I, supra at 11 lines 14-15). Indeed, at hearing on January 17, 2007 the court had exclaimed "Well, he [Singer] shouldn't have transferred the property either." (Exhibit J, supra at 14-15).

B. THE CHAPTER 7 PETITION FILED BY DEBTOR MILL STREET MANAGEMENT, LLC IS PART OF A SCHEME TO DELAY, HINDER AND DEFRAUD CREDITORS.

Debtor Mill Street Management, LLC, through its managers, filed this Chapter 7 petition as part of its “scheme to delay, hinder and defraud” HNB. Mr. and Mrs. Singer, as debtors, obtained continuances ostensibly to conduct discovery, abused the discovery process, triggering sanctions against them, and further abused the continuance by using the time to transfer title to Debtor Mill Street Management, LLC. Debtor Mill Street Management, LLC then signed a \$12,000/month lease on April 30, 2006 (Exhibit G, supra at 12-43), and a \$1.5 million DROA in December 2006. (Exhibit F, supra at 11-20) The real property meets the standard of 362(d)(4).

1. Hindrance and delay.

In re Muhaimin, 343 B.R. 159, 168 (Bankr. D. Md. 2006), the court applied 362(d)(4) and noted that the “common meaning” of “delay” is to “postpone until a later time,” while that for “hinder” is to “get in the way of.”

Mr. and Mrs. Singer obtained a minimum of a 90-day continuance at the first hearing for MSJIDF in October 2005, ostensibly to conduct discovery. Singer admitted, “I was late in making payments in June, July and August 2005,” but claimed discovery would reflect that the bank had approved his repeated defaults.

(Exhibit D, supra at 15 and 18 (Dec. of David Singer)) They were ultimately sanctioned for discovery abuse at hearing in July 2006, for stalling for six months before admitting that they had no such documents. (Exhibit I, supra; Exhibit H, supra)

At hearings on July 19 and 26, 2006 on HNB's motion to compel, Mr. and Mrs. Singer filed declarations (Exhibit E, supra, Singers' opp. to motion to compel) and argued through counsel (Exhibit I, supra), never disclosing to the court in twelve pages of pleadings and seven pages of transcript they had transferred the collateral that was the subject of the pending MSJIDF.

After their conduct was discovered, Mr. and Mrs. Singer ignored HNB's demand to restore the collateral. (Exhibit C, supra)

Only when confronted by a second hearing on MSJIDF on January 17, 2007, did Mr. and Mrs. Singer disclose that Mill Street Management, LLC had signed a \$1.5 million DROA. The DROA was set to close on February 28, 2007. Mill Street Management, LLC, attempting to create one more delay and hindrance, asked that the hearing be continued until April 2007 (Exhibit F, supra at 4, last line; 9 ¶ 4, and 11), and ignored HNB's offer to stay the commissioner's work if it would instruct escrow to pay HNB in full.

On January 24, 2007, before the order issued (Mr. and Mrs. Singer had five days under HRCC 23 to object to the form of order), Mill Street Management,

LLC filed this Chapter 7 petition. Timing is a factor in evaluating whether a petition is filed to hinder or delay foreclosure or eviction. In In re McCray, 342 B.R. 668 (Bankr. D.D.C. 2006); In re Robertson, 2005 Bankr. LEXIS 3076 (Bankr. D.S.C. 2005).

2. Fraud.

In State v. Stan's Contr., Inc., 111 Hawai'i 17, 30, 137 P.3d 331, 344 (2006) the Hawaii Supreme Court explained that "actual fraud' involves a misrepresentation," but Collier on Bankruptcy 523-25 (15th ed. 2000) "defines the term much more broadly -- as 'any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another'"). Id. at 29, 137 P.3d 343, McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000).

Under Hawaii law, the elements of a claim of fraud by concealment are (1) concealment or suppression of a material fact; (2) by one who is under a duty to disclose it; (3) the fact must have been intentionally concealed or suppressed with the intent to defraud a person; (4) which must have been unaware of the fact and would not have acted as it did if it had known of the concealed or suppressed fact; (5) and, finally, as a result of the concealment or suppression of the fact, that person must have sustained damages. Ditto v. McCurdy, 86 Hawai'i. 93, 111, 947 P.2d 961, 979, rev'd in part, vacated in part on other grounds, 86 Hawai'i 84, 947 P.2d 952 (1997) .

The conduct of Mr. and Mrs. Singer meet these elements.

First, Mr. and Mrs. Singer concealed a material fact, namely transfer of the collateral to Mill Street Management, LLC.

Second, Mr. and Mrs. Singer had a duty to disclose that material fact, by express terms of the loan and mortgage.

Third, Mr. and Mrs. Singer intentionally concealed the material fact with the intent to defraud HNB, by failing to disclose the transfer when it occurred in April 2006, when they appeared in court to defend against discovery sanctions in July 2006, when they used the LLC to lease property in May 2006, and when they again used the LLC to sign a DROA to sell the collateral.

Fourth, HNB was unaware of the transfer of title and would not have acted as it did if it had known title had been transferred to debtor. After HNB independently learned of the transfer, it demanded cure and renewed its MSJIDE failing same.

Fifth, HNB sustained damages as a result of the unauthorized and undisclosed transfer of title. Mr. and Mrs. Singer may well succeed in diverting rental income and sales proceeds from the collateral, leaving HNB to collect against them personally. In Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 376-77, 984 P.2d 1198 (1999), Allan Kunimoto directed the income from his medical practice a corporation newly formed by him and his wife, to avoid payment to his

judgment creditor. Concerned by the mere prospect that “Kunimoto would dispose of income or assets without any payment to the plaintiff,” the trial court found “the harm or damage resulting to the plaintiff is severe, immediate, and irreparable.” Id. The Hawai’i Supreme Court affirmed. Id.

HNB has other quantifiable damages. As explained by its officer and Maui district manager, HNB seeks to keep a performing portfolio, and regularly reports to the federal regulatory authorities the amount of its delinquent loans. Their loan secured by 1592 Mill Street, Wailuku, Maui, Hawaii 96793 has been deemed a non-performing loan on HNB’s books since June 2005. “It is a large loan to be delinquent for so long,” and opportunities lost by the long delinquency are gone.

Further, HNB management has devoted several hundred hours of management and clerical time on this matter, as Mr. and Mrs. Singer made repeated requests for payoff demands that they never fulfilled, made inflammatory allegations about bank personnel, and stalled the litigation. This is a substantial expense, and detracts from the bank’s business of providing retail services and making loans.

Further, during the pendency of this action, HNB has not yet collected its default interest, though David Singer admitted he was in default when the foreclosure suit was filed.

Finally, HNB has advanced substantial attorney fees in this case. Even if

Singer is ultimately awarded to pay those fees, these monies have not been earning interest.

3. Scheme

In Stan's Contr., Inc., supra, the Hawaii Supreme Court found theft by deception contains an “element of fraud,” citing Kenty v. Bank One, 92 F.3d 384, 389-90 (6th Cir. 1996) for the proposition that “[a] scheme to defraud consists of intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right’ Stan's Contr., Inc., supra at 29-30, 137 P.3d at 343. The Kenty court further stated that “[t]o allege intentional fraud, there must be proof of misrepresentations or omissions which were reasonably calculated to deceive persons of ordinary prudence and comprehension.” Id.

In the context of a motion to lift the stay under Section 362(d)(4), in In re Muhaimin, 343 B.R. 159, at 13 (Bankr. D. Md. 2006), the court had explained that the common meaning of scheme is “a plan or program; esp: a crafty or secret one,” citing Webster’s Ninth New College Dictionary (1991).

The “crafty or secret” program is evinced by Mr. and Mrs. Singer’s repeated failure to disclose the transfer of title to their LLC.

4. The standards of section 362(d)(4) to grant HNB relief from the automatic stay have been met.

The elements of 362(d)(4) are parallel to the elements of the Uniform Fraudulent Transfer Act, HRS Chapter 651C, which deem fraudulent any transfers made “[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.”¹² (HRS § 651C-4) Applying that statute in Kunimoto, supra, the Hawaii Supreme Court held a judgment debtor to have hindered, delayed or defrauded Bank of Hawaii when he tried to direct income from his medical practice to corporations newly formed by him and his wife, to avoid paying a deficiency judgment in favor of the lender after foreclosure.

Mr. and Mrs. Singer actions echo Kunimoto’s, for they have directed rental income to an LLC newly formed by husband and wife, and tried to direct the proceeds of a sale to that LLC as well. That LLC is now in Chapter 7, where its assets are presumptively out of reach of the lender.

While § 651C-4 is in the disjunctive, the trial court’s findings held that Kunimoto’s conduct constituted hindrance, delay and fraud:

the court further finds that defendant Allan Kunimoto has made misrepresentations of material fact and engaged in a course of

¹²HRS § 651C-4 provides in part:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or ***

conduct designed to hinder and delay the plaintiff's collection efforts and that without the appointment of a receiver, the court believes that he would continue in his willful course of conduct and frustrate the plaintiff's efforts to account for and collect on its outstanding ... judgment. Id. at 375 (emphasis in the original).

“Judgment debtors should not lie, deceive, or attempt to manipulate the legal system,” found the trial court, “to avoid paying monies which are owed to a creditor.” Id. The Hawaii Supreme Court affirmed. Id.

Section 362(d)(4) relief should be granted to HNB. The Debtor’s filing of its bankruptcy petition was part of a plan of action to delay, hinder and defraud HNB, that included the transfer of the secured property without notice to or approval from HNB or the Court.

IV. CONCLUSION

Secured Creditor HNB respectfully requests that this Court lift the automatic stay.

DATED: Wailuku, Maui, Hawai’i, February 2, 2007.

Respectfully submitted,

/s/ Joy Yanagida
Joy Yanagida
Attorney for Hawaii National Bank