

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

BANK OF NOVA SCOTIA,

PLAINTIFF,

v.

**JUDY SIMMONS A/K/A J. SIMMONS; ROLAND
SIMMONS A/K/A R. SIMMONS; AND
GOVERNMENT OF THE VIRGIN ISLANDS,**

DEFENDANTS.

SX-15-CV-232

**ACTION FOR DEBT AND
FORECLOSURE OF REAL
PROPERTY MORTGAGE**

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiff Bank of Nova Scotia's (hereinafter "Plaintiff") motion for default judgment against Defendant Government of the Virgin Islands (hereinafter "GVI"),¹ Defendant Judy Simmons a/k/a J. Simmons (hereinafter "J. Simmons"), and Defendant Roland Simmons a/k/a R. Simmons (hereinafter "R. Simmons"), filed on August 1, 2016. No opposition has been filed in response.

BACKGROUND

On June 17, 2015, Plaintiff commenced an action for debt and foreclosure of real property mortgage against Defendants in connection with the real property described as Plot 85 (0.896) of Estate Salt River, Northside Quarter "B", St. Croix, U.S. Virgin Islands as

¹ In an order entered on June 22, 2017, the Court entered a default against Defendant GVI and explained why it construed Plaintiff's motion for summary judgment against Defendant GVI as a motion for default judgment. The Court granted Plaintiff leave to file its objections, if any, to the Court's June 22, 2017 order. On July 20, 2017, Plaintiff filed a notice of no objection whereby it advised the Court that Plaintiff does not object to the Court construing Plaintiff's motion for summary judgment against Defendant GVI as a motion for default judgment.

Moreover, a copy of the June 22, 2017 order was served on Defendant GVI—via Government of the Virgin Islands Office of the Governor, Attorney General of the Virgin Islands Department of Justice, and Virgin Islands Bureau of Internal Revenue—as additional notice pursuant to Virgin Islands Rule of Civil Procedure 55-1(a), which provides that "[t]he court may order written notice of the application for judgment to be served upon the party against whom judgment by default is sought if it shall seem to the court that justice so requires."

shown on OLG Drawing No. 4876, dated November 4, 1993, last revised June 22, 1995

(hereinafter "Subject Property"). Plaintiff alleged the following in her complaint:

Defendant J. Simmons and Defendant R. Simmons are titleholder of record by means of a deed to the Subject Property, dated November 15, 2005, which was recorded in the Office of the Recorder of Deeds for the District of St. Croix. (Compl. ¶ 5) On January 17, 2006, Defendant J. Simmons and Defendant R. Simmons executed and delivered to Plaintiff a promissory note obligating them to pay the principal amount of \$38,250.00, with interest at the rate of 6% per annum. (Id., at ¶ 6) Pursuant to the terms of the promissory note, payments were to be made by equal consecutive monthly installments of \$322.78 until all amounts were fully paid but no later than January 17, 2011. (Id., at ¶ 7) To secure payment of the promissory note, Defendant J. Simmons and Defendant R. Simmons executed and recorded a first priority mortgage over the Subject Property in favor of Plaintiff on January 18, 2006. (Id., at ¶ 8) The mortgage provides that Defendant J. Simmons and Defendant R. Simmons should pay Plaintiff the payments that are due under the promissory note. (Id., at ¶ 9) On or about February 10, 2014, Defendant J. Simmons and Defendant R. Simmons defaulted under the terms of the promissory note and the terms of the mortgage. (Id., at ¶¶ 10-11) Despite the notice of default given to Defendant J. Simmons and Defendant R. Simmons by Plaintiff, to date, Defendant J. Simmons and Defendant R. Simmons remains in default under the promissory note and the mortgage. (Id., at ¶ 12-15) Pursuant to the terms of the promissory note and the mortgage, Plaintiff is entitled to elect that the whole principal sum with all unpaid accrued interest shall be immediately due and payable, and to all court expenses, disbursements, and attorney's fees incurred in collecting the obligation due under the mortgage. (Id., at ¶¶ 16, 18) As of May 26, 2015, the outstanding balance under the promissory note is \$24,292.23—namely: \$22,241.96 (outstanding principal), plus \$1,694.13 (accrued interest), plus \$177.39 (late charges), plus \$178.75 (property inspection)—with interest accruing at the rate of \$3.71 per diem. (Id., at ¶ 20)

As such, Plaintiff sought to collect its debt from Defendant J. Simmons and Defendant R. Simmons and foreclose its lien on upon the Subject Property pursuant to Title 28 V.I.C. § 531.² (Id., at ¶ 28) Plaintiff also joined Defendant GVI as a party claiming a

² Title 28 V.I.C. § 531 provides:

§ 531. Foreclosure of liens, including mortgages; recovery of debt

(a) A lien upon real property, other than that of a judgment, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by an action of an equitable nature. In such action, in addition to the judgment of foreclosure and sale, if it appears that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also adjudge a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary judgment for the recovery of money.

right, title, or interest in the Subject Property by virtue of certain recorded encumbrances listed on the title search of the Subject Property—to wit: Notice of USVI Tax Lien in the amount of \$9,706.64 against Roland Simmons dated August 20, 2007, recorded August 23, 2007 in Photocopy 1101, Page 368, Document No. 2007004203 [NOTE: Kind of Tax: 720B and 720VI; ID No. xxxxx8237]; Notice of USVI Tax Lien in the amount of \$580.59 against Roland Simmons dated August 20, 2007, recorded August 23, 2007 in Photocopy 1101, Page 370, Document No. 2007004204 [NOTE: Kind of Tax: 720VI; ID No. xxxxx8237]; and Notice of USVI Tax Lien in the amount of \$5,929.19 against Roland Simmons and Judy Simmons dated January 20, 2011, recorded January 21, 2011 in Photocopy 1260, Page 20, Document No. 2011000196[NOTE: Kind of Tax: 4549Aand 720VI; ID Nos. xxxxx8237 and xxxxx1986]. (Id., at ¶ 29; Exhibit E) When Defendant J. Simmons and Defendant R. Simmons failed to file a response to Plaintiff's complaint, Plaintiff filed a motion for an entry of default. The Court granted Plaintiff's request and an entry of default was entered against Defendant J. Simmons and Defendant R. Simmons in this matter on June 21, 2015. On January 19, 2016, Plaintiff filed a motion to dispense with mediation as required under Title 28 V.I.C. § 531(b), which was subsequently granted by the Court. On March 3, 2017, Plaintiff filed this instant Motion. To date, no opposition has been filed in response.

STANDARD OF REVIEW

Entry of default and default judgment are separate matters under Superior Court Rules 47 and 48. In *King v. Appleton*, 61 V.I. 339, 346 (V.I. 2014), the Supreme Court of the Virgin Islands (hereinafter, "Supreme Court") instructed that "after entering the default, the Superior Court must consider whether the unchallenged facts constitute a legitimate cause of

(b) Prior to the entry of any judgment of foreclosure, the parties must provide the Court with evidence that a good faith effort was made to settle the matter through mediation. The type and form of the mediation report shall be prescribed by the Superior Court of the Virgin Islands.

action, since a party in default does not admit mere conclusions of law.” (internal quotations omitted). The Supreme Court explained that a defendant, “by his default, admitted the plaintiff’s well-pleaded allegations of fact, [he] is concluded on those facts by the judgment, and is barred from contesting the facts thus established.” *Id.* In other words, a defendant’s default does not in itself warrant the court to enter a default judgment. *Id.* (“the mere fact of [the defendant’s] default did not entitle [the plaintiff] to the entry of a default judgment against [the defendant]; instead, [the defendant’s] default only conceded the facts as alleged in [the plaintiff’s] complaint”). Rather, “[t]here must be a sufficient basis in the pleadings for the judgment entered.” *Id.* Thus, if the court finds the facts, as alleged in the plaintiff’s complaint, constituted a valid cause of action under the Virgin Islands law, the court is to hold a hearing to establish the amount of damages. *Id.*; *see also, Appleton v. Harrigan*, 61 V.I. 262, 269 (V.I. 2014) (after entry of default, damages generally must be established in an evidentiary proceeding [where] the defendant is afforded the opportunity to contest the amount claimed) (internal quotations and citations omitted).

However, such a hearing is not required “[w]hen the plaintiff’s claim against a defendant is for a sum certain or for a sum which can by computation be made certain.” *Harrigan*, 61 V.I. at 270 (citing Super. Ct. R. 48(a)(1)). The Supreme Court explained that, “[a] claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant’s default.” (citation omitted). *Harrigan*, 61 V.I. at 270. In *Harrigan*, the Supreme Court found the damage claimed therein—namely, unpaid rent—did not qualify as a sum certain because sum certain for the purposes of Superior Court Rule 48 “contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments.” *Id.* (internal quotations and citation omitted).

DISCUSSION

I. Whether Plaintiff is Entitled to a Judgment by Default against Defendant GVI

Here, Plaintiff argued that the liens of Defendant GVI are subsequent and inferior to Plaintiff's mortgage lien. In support of its assertion, Plaintiff cited to *Balbo Corp. v. Enighed Condos, LLC*, 58 V.I. 93, 100 (Super. Ct. Mar. 8, 2013), where the court noted that, "[i]n the Virgin Islands, the priority of liens is determined by the time of the recording of the liens." Plaintiff submitted, *inter alia*, copies of the executed promissory note, the executed second priority mortgage, the executed mortgage modification agreement and the title search of the Subject Property as evidence that its mortgage lien has priority over Defendant GVI's liens. However, before the Court can determine whether Plaintiff is entitled to a judgment by default against Defendant GVI, the Court must first inquire whether any of Defendant GVI's liens on the Subject Property is a property tax lien. Title 33, section 2331 of the Virgin Islands Code provides:

Taxes levied by the Tax Assessor upon real property shall be a first lien against the real property including any improvements that may be thereon or that may be subsequently placed thereon. The lien shall be prior to all other liens on the property whether they attached before or after this lien. However, the lien on each piece or parcel of real estate shall be only for the taxes due on such piece or parcel of real property and improvements thereon.

Accordingly, the Court will order Plaintiff to file a notice advising the Court whether any of Defendant GVI's liens on the Subject Property is a property tax lien.

II. Whether Plaintiff is Entitled to a Judgment by Default against Defendant J. Simmons and Defendant R. Simmons

The Court will first determine whether the facts, as alleged in Plaintiff's complaint, constitute a legitimate cause of action. According to Plaintiff's complaint, Defendant J. Simmons and Defendant R. Simmons executed and delivered to Plaintiff a promissory note obligating them to pay the principal amount of \$38,250.00 (hereinafter "Note"), with interest

at the rate of 6% per annum. (Compl. ¶ 6) To secure payment of the Note, Defendant J. Simmons and Defendant R. Simmons executed and recorded a first priority mortgage over the Subject Property in favor of Plaintiff on January 18, 2006 (hereinafter 'Mortgage'). (Id., at ¶ 8) Plaintiff alleged that, despite the notice of default given to Defendant J. Simmons and Defendant R. Simmons by Plaintiff, to date, Defendant J. Simmons and Defendant R. Simmons remains in default under the Note and the Mortgage. (Id., at ¶ 12-15) In support of its allegations, Plaintiff submitted, *inter alia*, copies of the executed promissory note, the executed second priority mortgage, the executed mortgage modification agreement and the title search of the Subject Property. Based on the foregoing, the Court finds that these unchallenged facts constitute a legitimate cause of action for debt.

The Court must now determine whether an evidentiary hearing is necessary to establish the amount of damages. In its motion, Plaintiff indicated that Defendant J. Simmons and Defendant R. Simmons defaulted in the payment of the principal and interests pursuant to the Note, in the total amount of \$29,438.78 as of June 27, 2016—namely: \$22,241.96 (outstanding principal), plus \$3,165.83 (accrued interest), plus \$575.61 (late charges), plus \$373.75 (property inspection), plus \$3,066.63 (property taxes), plus \$10.00 (statement fee), and plus \$5.00 (priority fax fee)—with interest accruing at the rate of \$3.71 per diem until entry of judgment and at the statutory rate thereafter. Plaintiff submitted the affidavit of Jeffrey Stanley, foreclosure supervisor for Cenlar FSB as servicer for Plaintiff, in support of its motion for default judgment against Defendant J. Simmons and Defendant R. Simmons. Jeffrey Stanley reiterated in his affidavit that Defendant J. Simmons and Defendant R. Simmons defaulted in the payment of the principal and interests pursuant to the Note, in the total amount of \$29,438.78 as of June 27, 2016—namely: \$22,241.96 (outstanding principal), plus \$3,165.83 (accrued interest), plus \$575.61 (late charges), plus

\$373.75 (property inspection), plus \$3,066.63 (property taxes), plus \$10.00 (statement fee), and plus \$5.00 (priority fax fee)—with interest accruing at the rate of \$3.71 per diem until entry of judgment and at the statutory rate thereafter. Jeffrey Stanley noted in his affidavit that “[t]he sum of \$2,575.00 was subtracted from the total pay-off of \$32,013.78 as shown on Exhibit ‘A’... [because] [t]his sum represents attorney’s fees and costs incurred as of June 27, 2016, which will be awarded at the Court’s discretion.” (Stanley Aff.)

Plaintiff submitted, as Exhibit A, a one-page computer printout reflecting Defendants’ account with Plaintiff. However, the information contained in the computer printout does not support the numbers provided in Plaintiff’s motion or in Jeffrey Stanley’s affidavit. Most notably, the principal balance under the Note provided in Plaintiff’s motion and in Jeffrey Stanley’s affidavit—\$22,241.96, is different from the principal balance provided in the computer printout—\$22,640.18. Additionally, the late charges provided in Plaintiff’s motion and in Jeffrey Stanley’s affidavit—\$575.61, is also different from the late charges provided in the computer printout—\$177.39. There are also other issues Plaintiff need to clarify with regards to the computer printout.³ As such, the Court cannot discern the total amount owed by Defendant J. Simmons and Defendant R. Simmons under the Note without more information from Plaintiff. Accordingly, the Court will grant Plaintiff leave to file supplemental supporting documents. If the Court subsequently determines that Plaintiff’s claim for the total amount owed under the promissory note does not qualify as a sum certain, then the Court will schedule an evidentiary hearing at that time. *See King*, 61 V.I. at 346; *Harrigan*, 61 V.I. at 269. Thus, while the Court finds the facts, as alleged in Plaintiff’s complaint, constituted a valid cause of action under the Virgin Islands law, the Court will

³ It is unclear whether the property inspection fee was reflected in the computer printout, and if so, where. It is also unclear what the recoverable balance consisted of since only \$2,575.00 were attributed to attorney’s fees and costs.

reserve ruling on Plaintiff's motion for default judgment against Defendant J. Simmons and Defendant R. Simmons until receipt of supporting documents.

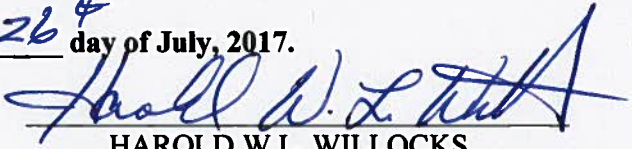
CONCLUSION

Based on the foregoing, the Court will order Plaintiff to file: (1) a notice advising the Court whether any of Defendant GVI's liens on the Subject Property is a property tax lien and (2) all supporting documents relied upon by Plaintiff and the affiant, Jeffrey Stanley, in deriving the total amount owed by Defendant J. Simmons and Defendant R. Simmons under the Note. At this juncture, the Court will reserve ruling on Plaintiff's motion for default judgment. An Order consistent with this Memorandum Opinion will follow.

DONE and so ORDERED this 26th **day of July, 2017.**

ATTEST:

Estrella H. George
Clerk of the Court


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

By: 

Court Clerk Supervisor

Dated: 7/31/17