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

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff, v. ALLAN S. TEEL, MONTPELIER HOLDING COMPANY, LLC, BANK OF ST. CROIX, INC., and UNITED STATES OF AMERICA, ACTING BY AND THROUGH ITS AGENCY, THE INTERNAL REVENUE SERVICE, Defendants.	)	SX-13-CV-219 ACTION FOR DEBT AND FORECLOSURE

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Allan S. Teel and Montpelier Holding Company, LLC (collectively Defendants') Motion to Set Aside, Alter or Amend the Court's June 1, 2016 Judgment and Order of Foreclosure (Motion) granting Plaintiff Federal National Mortgage Associations (FNMA)'s unopposed Motion for Summary Judgment. Defendants' Motion was filed pursuant to Super. Ct. R. 50, Fed. R. Civ. P. 59 and/or Fed. R. Civ. P. 60(b) on June 3, 2016. Plaintiff's Response to the Motion was filed June 20, 2016; and Defendants' Reply thereto was filed July 7, 2016. Because Defendants have failed to demonstrate that reconsideration of the Judgment and Order of Foreclosure is appropriate by reason of either intervening change in controlling law, availability of new evidence, or the need to correct clear error of law or prevent manifest injustice, Defendants' Motion will be denied.

Background

Plaintiff's predecessor in interest, JP Morgan Chase Bank, N.A., commenced this action for debt and foreclosure by Complaint filed June 26, 2013. Uncontroverted evidence establishes that on March 12, 2004, Defendant Allan Teel executed and delivered a promissory note to Coastal

Financial Company, LLC, secured by a mortgage, in the principal sum of $476,000, encumbering real property described as Plot No. 11 Estate Montpellier, St. Croix, U.S. Virgin Islands. *See* Motion for Summary Judgment, Exhibits 2, 3.[1] Defendant Teel conveyed the property to Defendant Montpelier—a Virgin Islands limited liability company in which Teel is a member and has a controlling ownership interest—by Warranty Deed recorded January 13, 2005. *Id.*, Exhibit 1. Defendant Teel defaulted under the terms and conditions of the Note and Mortgage by failing to make an installment payment when due on February 1, 2009, and was mailed a notice of default dated May 4, 2009. *Id.*, Exhibits 7, 8. Following the default, all amounts due under the Note were accelerated pursuant to the terms of the Note and, according to Plaintiff's accounting, the indebtedness due and owing to Plaintiff as of March 17, 2016 was in the sum of $780,365.67. *Id.*, ¶ 19.

Discussion

Superior Court Rule 50 provides: "For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications." In turn, under Federal Rule 59(e), "a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Federal Rule 6(b) establishes that the deadline to file a Rule 59(e) motion may not be extended for any reason. Thus, in *Beachside Assocs. LLC v. Fishman*, the Supreme Court of the Virgin Islands determined that: "If the motion for reconsideration is brought within [28 days] of the order to be reconsidered, the motion is to be treated as a Federal Rule 59(e) motion to alter or amend judgment. If the motion is brought after

[1]The Mortgage was subsequently assigned to JP Morgan Chase Bank by Assignment of Mortgage dated April 10, 2013, and then to Plaintiff Federal National Mortgage Association by Assignment of Mortgage dated April 5, 2014. *See* Motion for Summary Judgment, Exhibits 4, 5.

[28 days], however, the trial court should consider the motion to reconsider as one brought pursuant to Federal Rule 60(b)." 53 V.I. 700, 714 (V.I. 2010) (quoting *Ruiz v. Jung,* S. Ct. Civ. No. 2008-035, 2009 V.I. Supreme LEXIS 43, at *9 (V.I. Oct. 19, 2009) (unpublished)).[2]

Defendants filed their Motion on June 3, 2016, two days after entry of the Court's June 1, 2016 Judgment and Order of Foreclosure. Accordingly, the Motion is considered under Rule 59(e). In *Beachside*, the Supreme Court established that "[a] proper Rule 59(e) motion ... must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." 53 V.I. at 715 (quoting *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)). Defendants' Motion cites neither an intervening change in controlling law nor the availability of new evidence, but argues rather that the Judgment should be set aside in order to correct a clear error of law, or alternatively to prevent manifest injustice.

In their Motion, Defendants appear to argue that the Court committed a clear error of law by granting Summary Judgment in favor of Plaintiff without giving due consideration to Defendants' affirmative defense of "failure to mitigate damages." Motion, ¶ 6. Defendants present this argument as follows:

> This case represents a very egregious case of a mortgagee's failure to mitigate damages. Defendants are prepared to show at trial that Plaintiff (and its predecessors in interest) sat on their hands for years and did *nothing* to mitigate their damages in connection with the property at issue herein (the "Property") while this case bounced from assignor to assignee and counsel to counsel, while the Property—which had been long ago handed over by Defendants—sat in ruin being picked over by thieves and vagrants and otherwise disintegrating without an ounce of care or attention from the mortgagee. Defendants are also able to show that, years before the mortgagee got around to filing a foreclosure, the mortgage [sic] was unwilling to discuss any negotiation whatsoever concerning a deed in lieu or other

[2] The 2009 amendment to Fed. R. Civ. P. 59(e), effective December 1, 2009, extended the time for filing a motion to alter or amend a judgment from 10 to 28 days.

> consensual workout that would have prevented the Property from falling into such a horrid state of disrepair.

Motion, ¶ 7.

While Defendants attempt to cast this issue concerning deterioration of the property as a failure on the part of Plaintiff and its predecessors in interest to mitigate their "damages," Defendants have offered no evidence to suggest that the maintenance of the property was in any way the legal responsibility of Plaintiff. In fact, it would seem that such an argument is effectively foreclosed by Defendants' assertion that Plaintiff was "unwilling to discuss any negotiation whatsoever concerning a deed in lieu or other consensual workout." Without any evidence to suggest that ownership, legal possession, or legal responsibility for maintaining the property was transferred to Plaintiff, there is no genuine issue of material fact as to Plaintiff's "failure to mitigate damages" and therefore entry of Summary Judgment for Plaintiff was appropriate.[3]

The second argument presented in Defendants' Motion consists of the following:

> Undersigned counsel acknowledges that he inadvertently neglected to inform the Court of the extension of time agreed upon between counsels. Nevertheless it would be manifestly unjust for Defendants to not be given a chance to respond to the Summary Judgment Motion after years of sitting around waiting for the mortgagee (and its predecessors in interest) to do something about the Property that has been left to disintegrate for years.

Motion, ¶ 10.

This argument is essentially the same as Defendants' first argument, discussed above, simply rephrased in terms of manifest injustice rather than clear error of law. However, Defendants fail to demonstrate how granting Summary Judgment in favor of Plaintiff constitutes an injustice. It is clear from the uncontroverted evidence in the record that Defendant Teel has been in default under the terms and conditions of the Note and Mortgage since February 2009, and that Defendants

[3] Even if Defendants abandoned the property to FNMA or its predecessors, it is unclear how the condition of the collateral pledged as security for the loan presents a genuine issue of fact as to Teel's default, the amount of the indebtedness due under the Note, or the Mortgage holder's right to foreclose in light of such default.

Teel and Montpelier have nonetheless retained ownership and the right to possession of the property for over six and one-half years without making any further payments against the indebtedness owing to Plaintiff. *See* Motion for Summary Judgment, Exhibits 7, 8. The fact that Defendants have apparently elected to abandon the property, allowing it to deteriorate during the pendency of this action, is of no moment. Rather, it would seem manifestly unjust to allow this action to languish any longer, given that there is no question as to any material fact of relevance either to Plaintiff's right to obtain judgment on the debt that Defendant Teel undisputedly owes, or to Plaintiff's right to foreclose on the property pledged as security for the debt.

Lastly Defendants argue that entry of the Court's May 28, 2016 Judgment and Order of Foreclosure was inappropriate because, pursuant to § 536 of Title 28 Virgin Islands Code, actions for debt and foreclosure may not be maintained together in one action, but must be litigated sequentially, despite their admission that pursuing both actions at once is indeed routine practice in courts both in the Virgin Islands and nationwide.[4] Reply, ¶ 4. However, as Defendants raise this argument for the first time in their Reply it must be deemed waived. *See Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 528 n.4 (V.I. 2013) (citations omitted) ("Like an issue raised for the first time in an appellate reply brief, an issue raised for the first time in a reply brief

[4] "During the pendency of an action for the recovery of a debt secured by any lien mentioned in section 531 of this title, an action cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment is given in such action that the plaintiff recover such debt or some part thereof, and any execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part." 28 V.I.C. § 536. The language of the statute, as one Superior Court judge has recently held, appears to prohibit a plaintiff from initiating an action for foreclosure prior to obtaining and executing upon a judgment for debt. *See Freund v. Liburd,* 2016 V.I. LEXIS 87, *35 (V.I. Super. 2016) ("this Court will deny summary judgment on the foreclosure of mortgage lien claim because 28 V.I.C. § 536 prohibits [the plaintiff] from bringing an action to foreclose on a mortgage lien during the pendency of an action to also recover the debt secured by the lien"). However, the Supreme Court has recently upheld judgments of debt and foreclosure entered concurrently by the Superior Court. *See Carrillo v. Citimortgage, Inc.*, 63 V.I. 670, 674 (V.I. 2015) (holding that Superior Court properly granted summary judgment in favor of Plaintiff on dual claims for debt and foreclosure); *see also Brouillard v. DLJ Mortg. Capital, Inc.*, 63 V.I. 788, 792 (V.I. 2015) (holding that Superior Court properly granted summary judgment in favor of Plaintiff on dual claims for debt and foreclosure). Further, as Defendants acknowledge, and consistent with the Court's stated intention to eliminate unjustifiable expense and delay in the practice and procedure of the Superior Court (see Super. Ct. R. 1), concurrent litigation of dual claims for debt and foreclosure in the same action is common practice in courts in the Virgin Islands and across the nation.

supporting summary judgment is deemed waived because the opposing party typically does not have the opportunity to respond").[5]

Conclusion

Because Plaintiff's alleged failure to "mitigate damages" does not create a genuine of issue of material fact with respect to Plaintiff's action for debt and foreclosure, it was neither legally erroneous nor manifestly unjust for the Court to grant Summary Judgment without first allowing Defendants to brief the issue. Accordingly, because Defendants have failed to demonstrate that reconsideration of the Court's June 1, 2016 Judgment and Order of Foreclosure is appropriate by reason of either intervening change in controlling law, availability of new evidence, or the need to correct clear error of law or prevent manifest injustice, Defendants have failed to demonstrate that good cause exists to set aside the Judgment and Order of Foreclosure within the meaning of Superior Court Rule 50, and therefore their Motion will be denied. Accordingly, it is hereby

ORDERED that Defendants Motion to Set Aside, Alter or Amend Judgment Pursuant to Super. Ct. R. 50, Fed. R. Civ. P. 59 and/or Fed. R. Civ. P. 60(b) is DENIED.

Dated: October 14, 2016.

DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: _____
Court Clerk Supervisor 10/17/16

[5] Consistent with the Supreme Court's ruling that an argument raised for the first time in a reply brief to a party's opposition to a motion for summary judgment is considered waived, an argument raised for the first time in a reply brief to a party's opposition to a motion to *reconsider* an order granting summary judgment must also be waived. Waiver is particularly appropriate here, where Defendants' purely legal argument concerning statutory interpretation, without reference to the particular facts of the case, could have been raised, and in the interests of fairness and efficiency, should have been raised in a motion to dismiss for failure to state a claim, or a motion for judgment on the pleadings, or at some earlier stage than in reply to the opposition to its post-judgment motion for reconsideration, before the parties spent such time and incurred such expense in further litigating this three-year-old matter.