

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

FIRSTBANK PUERTO RICO,)	CASE NO. SX-09-CV-497
)	
Plaintiff)	ACTION FOR FORCIBLE ENTRY,
)	DETAINER AND RESTITUTION
v.)	
)	
DANIEL SIMMIOLKJIER and)	
CHARMAINE PAUL,)	
)	
Defendants)	

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on November 10, 2009 on a Complaint for Forcible Entry, Detainer And Restitution filed by the Plaintiff, First Bank Puerto Rico, against Defendant Daniel Simmiolkjier and Charmaine Paul. Plaintiff appeared through its representative and counsel Yolan Brow, Esq. Defendants appeared personally and through counsel Kye Walker, Esq. At the hearing Attorney Walker indicated to the Court that she had just filed an Answer And Counterclaim (hereinafter "counterclaim") that very morning. Attorney Brow and the Court having just received a copy of the counterclaim agreed that a continuance was warranted and the matter was continued to December 8, 2009. Prior to the December 8, 2009 hearing, the Court determined that it could render a decision based on the pleadings and that there was no need for further testimony. Without objection from the parties, the hearing scheduled for December 8, 2009 was cancelled.¹

Plaintiff's basic premise is that it is the owner of Plot No. 42 Estate Catherine's Rest, Christiansted, St. Croix, USVI pursuant to a Default Judgment, Summary

¹ On the same date Defendants filed a Motion To Dismiss For Lack of Subject Matter Jurisdiction. This Motion will be addressed in a separate Order.

Judgment, and Order of Foreclosure entered on November 22, 2006 against the Defendants by this Court (Civil No. SX-05-CV-021). Subsequent to said Judgment Plaintiff purchased said property at a Marshal's Sale held on April 20, 2007 and the Marshal's Sale was confirmed by Order dated June 21, 2007. Despite a Notice To Quit served on the Defendants on September 10, 2009 they remain in possession of the property without making any sort of payments.

Defendants responded to Plaintiff's Complaint by filing a counterclaim on November 10, 2009. In their counterclaim Defendants deny that Plaintiff is the owner of the subject property and that the Plaintiff is not entitled to possession. *See Nos. 3. and 4. of Counterclaim.* The basis of Defendants' position regarding ownership and possession is expounded on in Defendants' counterclaim. This Court finds that Superior Court Rule 37 "Joinder in landlord and tenant cases" is directly on point and controlling with respect to whether or not Defendants can file a counterclaim in this action.

"Summary proceedings between landlord and tenant for the recovery of possession of premises and for forcible entry and detainer which are brought under the provision of 28 V.I.C. §781 *et. seq.* shall not be joined with any other cause of action, nor shall a defendant, in any such proceedings, be permitted to file a counterclaim or third-party complaint, although the defendant is permitted to raise any defenses he may have to the plaintiff's cause." Super Ct. R. 37

Thus, by its plain language, Rule 37 prohibits Defendants from filing a counterclaim in this action and it must be dismissed.

Rule 37 also allows a Defendant to raise any defenses he may have to the Plaintiff's cause. Defendants list four (4) defenses in their counterclaim all of which should have been raised in the original action for foreclosure but were not. More than

two (2) years after the Order confirming the Marshal's Sale the Defendants are now asserting affirmative defenses.

The Plaintiff in this action is seeking to evict the Defendants from the property and an Order from this Court granting it restitution of the premises known as Plot No. 42 Estate Catherine's Rest, St. Croix, USVI.

Section 782(a) of Title 28 of the V.I. Code instructs us on who may bring an action for restitution:

"when an entry is made in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover possession thereof."

Clearly in any action for restitution the first question would be is the person bringing the action the property owner and entitled to possession? If the answer is yes then the second question would be is the person currently in possession holding such possession by force. Once we reach the second question such an action will not lie if the Defendant raises "a facially *bona fide* and good faith claim of right to possession of the premises. *VI Port Authority v. Joseph*, 2008 WL 2329281 (V.I. May 7, 2008).

There is no question that Plaintiff is in fact the property owner and entitled to possession of the premises. By Order of this Court dated November 22, 2006 it states in unambiguous terms that

"In the event that any party purchases the subject real property at Marshal Sale that party is entitled to exercise the right of possession as of the date of confirmation of sale."

Pg. 5 Default Judgment, Summary Judgment & Order of Foreclosure.

Confirmation of the Marshal's Sale to the Defendant was entered on June 21, 2007.

To answer the second question we must look at Defendants' Affirmative Defenses. Do any of these defenses raise "a facially bona fide and good claim of right to possession of the premises? This Court finds that they do not. Defendants' defense, re: mitigation of damages, doctrine of unclean hands, duty of good faith and fair dealing, and equitable estoppel are all defenses that go to the issue of right of possession which was already adjudicated in a prior action.

By further Order of the Court on November 22, 2006 Defendants "are entitled to exercise their statutory rights to redeem the foreclosed mortgaged premises as authorized by law, and in the event they fail to make timely redemption, they will be forever barred and foreclosed from all right to claim, lien, title, or interest in and to the mortgaged premises...."² *Id.*, at 6

Upon consideration of the pleadings of the parties and being fully advised in the premises, it is hereby

ORDERED that the Defendants' Counterclaim is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that Judgment will enter in favor of FirstBank Puerto Rico and against Daniel Simmiolkjier and Charmaine Paul for restitution of the premises known as Plot No. 42 (consisting of 0.230 U.S. acres, more or less), Estate Catherine's Rest, Company Quarter, St. Croix, U.S. Virgin Islands; and it is finally

ORDERED that all parties shall be served with a copy of this Memorandum Opinion and Order.

² Under Title 28 V.I.C. § 535, Defendants had until 12/21/06 (six months after the Order of Confirmation of Territorial Marshal's Sale) to exercise their statutory right of redemption but failed to do so.

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Dated: July 29, 2010



MIGUEL A. CAMACHO
Superior Court Magistrate

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 

Court Clerk Supervisor

7/30/10