

NOT FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

GREAT BAY CONDOMINIUM,)
OWNERS ASSOCIATION,)
)
Plaintiff,)
)
v.)
)
PHILLIP F. MERRYMAN,)
)
Defendant.)
_____)

CASE NO: ST-07-CV-0546

ACTION FOR DEBT AND
FORECLOSURE OF LIEN
AND BREACH OF CONTRACT

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: August 9, 2010)

This matter is before the Court on Plaintiff's "Motion for Order Confirming Sale" and "Renewed Motion for Order Confirming Sale". Both motions seek an order of this Court confirming the April 3, 2009 Marshal's Sale of certain real property in St. Thomas, Virgin Islands. Based on the record, the Court is constrained to deny Plaintiff's motions.

a. Factual and Procedural Background.

Plaintiff initiated this action on October 17, 2007, seeking a judgment against Defendant for debt for unpaid assessments and foreclosure of the corresponding statutory lien which

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attaches to the subject property pursuant to *V.I. Code Ann. tit. 28, § 922(a)*. The real property at issue is Residence Interest No. 1604-7 in the Club at Great Bay Condominium, Parcels Nos. 4-2, 4-3, 4-5, and 4-6 Estate Nazareth, No. 1 Red Hook Quarter, St. Thomas, U.S. Virgin Islands (“Subject Property”). On January 16, 2008, in accordance with *Super. Ct. R. 47*, the Clerk of the Court entered a default against Defendant for his failure to answer, plead or otherwise defend against Plaintiff’s Complaint. On July 31, 2008, Plaintiff moved for default judgment pursuant to *Super. Ct. R. 48*, and a hearing was held on said motion on November 17, 2008. On April 3, 2009, this Court entered a Default Judgment awarding Plaintiff damages of \$58,152.41, attorney’s fees of \$2,216.38, and post-judgment interest at 4% per annum. Importantly, however, the Default Judgment did not direct the foreclosure of Plaintiff’s statutory lien or the sale of the Subject Property.

On June 5, 2009, Plaintiff submitted a Praecipe requesting a writ of execution for the damages, attorney’s fees, and interest awarded via the April 3, 2009 Default Judgment. Plaintiff’s Praecipe further requested foreclosure and sale of the Subject Property, notwithstanding that the Court had not entered any directive for such relief. On June 9, 2009, the Clerk of the Court issued a Writ of Execution which directed the Superior Court Marshal “...to satisfy the said Judgment in lawful money of the Virgin Islands of the United States out of the property belonging to said debtor...” in the amount of \$60,770.10. This Writ of Execution did not direct the sale of the Subject Property. Nevertheless, a Verified Return of Writ of Execution for Judicial Sale was executed by the Superior Court Marshal on September 23, 2009, noting that a sale of the Subject Property took place on September 16, 2009, at which time Plaintiff was the highest bidder with a credit bid in the amount of \$61,801.21. On October 7, 2009, Plaintiff filed

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the instant motion seeking an order confirming the September 16, 2009 Marshal's sale of the Subject Property. The renewed motion was filed with the Court on July 6, 2010.

b. Legal Analysis.

This Court has jurisdiction over this matter pursuant to *V.I. Code Ann. tit. 4, § 76(a)*. A statutory lien for unpaid common assessments may be foreclosed upon in the same fashion as a mortgage lien. *V.I. Code Ann. tit. 28, § 922(a)*. The confirmation of a marshal's sale of real property is governed by *V.I. Code Ann. tit. 5, § 489*, which provides, in pertinent part,

“(2) If such objections are filed, the court shall, within 30 days of the date of the sale, rule on such objections, or shall hear arguments on such objections and rule within 30 days of such hearing; otherwise the objections shall be deemed denied and notwithstanding such objections, the court shall allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the later case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received on that date.”

Despite the language of 5 V.I.C. § 489, a court may entertain untimely objections if the interests of justice so require. *Lucerne Investment Co. v. Estate Belvedere, Inc.*, 7 V.I. 275, 278 (D.V.I. 1969). The decision of whether to confirm a marshal's sale rests in the discretion of the trial court. *Christian v. All Persons Claiming any Right, Title, or Interest in Newfound Bay*, 36 V.I. 279, 281, 962 F. Supp. 673, 675 (D.V.I. 1997). *See also, DJBAS Living Trust v. Meinhardt*, 755 N.W.2d 501, 503 (S.D. 2008) (noting that courts have broad equitable powers to set aside a foreclosure sale). Although this is a default proceeding and no objections have been filed, Plaintiff is not “...unquestionably entitled to confirmation under section 489”¹ as it asserts.

The issue confronting the Court in this matter is, notwithstanding that Defendant has not objected to the sale, the Court never entered a judgment of foreclosure in this civil action. Rather, the April 3, 2009 Default Judgment was solely for debt, and the writ of execution issued

¹ Plaintiff's Renewed Motion for Order Confirming Sale at p. 2.

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by the Clerk of the Court did not direct the sale of the Subject Property. Case law firmly indicates that an execution may not exceed the scope of the underlying judgment. *See, Bank One, N.A. v. Wohlfahrt*, 193 S.W.3d 190, 194-195 (Tex. Ct. App. 2006) (“enforcement orders may not be inconsistent with the original judgment”); *Bell v. Jones*, 139 P.2d 884, 885 (Utah 1943) (“An execution or order of sale may not go beyond the terms of the judgment upon which it is based”). Because the judgment in this case did not direct the Subject Property to be sold, the subsequent writ of execution could not direct the Marshal to sell said property, as such a sale would be void. *See, Clint Independent School District v. Cash Investments, Inc.*, 970 S.W.2d 535 (Tex. 1998) (“It is essential that the sheriff act according to a valid judgment and order of sale ‘to confer on the sheriff the power to sell.’”).

In this matter, and consistent with Virgin Islands law and the afore-cited precedent, the Writ of Execution directed the Superior Court Marshal to,

“...make the said sums due on accruing costs, to satisfy the said Judgment in lawful money of the Virgin Islands of the United States out of the property belonging to said debtor and to make return of this Writ within sixty (60) days after your receipt hereof, with what you have done endorsed hereon.”

While the Writ does not specify what kind of property the Marshal was to pursue, inasmuch as the Default Judgment makes no reference to real property whatsoever, the Writ can only properly be read to refer to personal property in accordance with Section 473(1) of Title 5, Virgin Islands Code. This section provides,

“The writ of execution shall be issued by the clerk and directed to the marshal. It shall contain the name of the court, the names of the parties to the action, and the title thereof. It shall substantially describe the judgment, and if it is for money, shall state the amount actually due thereon and shall require the marshal substantially as follows:

(1) If it is against the property of the judgment debtor and the judgment directs particular property to be sold, it shall require the marshal to sell such property and apply the proceeds as directed by the judgment; otherwise it shall require the marshal to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient

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personal property cannot be found, then out of the real property belonging to him on which the judgment has become a lien as provided in section 425 of this title;”.

Nothing in the record before the Court indicates that the Marshal attempted to satisfy the debt out of the personal property of the Defendant as directed by the Writ and required by 5 V.I.C. § 473(1). Rather, the September 23, 2009 Verified Return of Writ of Execution for Judicial Sale states that notice of the sale of the Subject Property was given for four (4) consecutive weeks in a newspaper of general circulation in the Virgin Islands, that the sale of the Subject Property occurred on September 16, 2009, and that Plaintiff was the prevailing bidder. Where the statutes governing the procedure for the execution of judgments require the executing official to first pursue the personal property of a judgment debtor, but, instead, said official proceeds directly to the sale of the judgment debtor’s real property the sale is void. *Raniere v. I & M Investments, Inc.*, 387 A.2d 1254, 1257-1259 (N.J. Super. Ct. Ch. Div. 1978), *aff’d*, 411 A.2d 719 (N.J. Super. Ct. App. Div. 1980). Because the personal property of Defendant was not first pursued to satisfy the Default Judgment, the Marshal’s Sale of the Subject Property was void and cannot be confirmed.

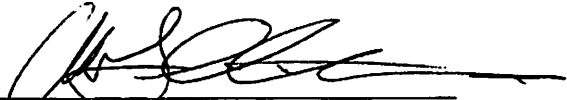
III. Conclusion.

Under the circumstances presented in the record, the Court concludes that there were substantial irregularities in the sale of the Subject Property which make said sale void.

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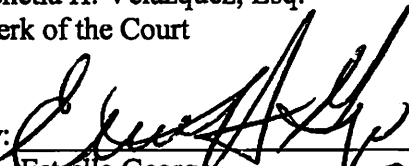
Therefore, Plaintiff's motion and renewed motion to confirm the sale cannot be granted. An appropriate order will be entered herewith.

Dated: August 9, 2010



Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

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

By: 

Estrella George
Court Clerk Supervisor 8/9, 2010