IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

BANCO POPULAR DE PUERTO RICO, Plaintiff, vs. CHRISTOPHER EDWIN, ROSE MARIE EDWIN, MICHAELA DAVID and JEFFERSON ALEXANDER Defendants.	CIVIL NO. 485/1997 ACTION FOR DEBT AND MORTGAGE FORECLOSURE NOT FOR PUBLICATION

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Cabret, Presiding Judge

MEMORANDUM OPINION
(February 23, 2000)

This matter is before the Court on Plaintiff's Motion for Summary Judgment. For reasons which follow, the motion is denied.

I. SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party must show that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [it is] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this standard, the moving party "bears the initial burden of showing that no genuine issue of material fact exists. But once the moving party properly supports a motion for summary judgment, the nonmoving party 'may not rest upon the mere allegations or denial of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.' Any doubts are resolved in favor of the nonmoving party whose allegations are taken to be true." Mingolla v. Minnesota Mining and Mfg. Co., 893 F. Supp. 499, 503 (D.V.I. 1995). In determining whether the moving party has met its initial burden, the Court must view the evidence in a light most favorable to the party opposing the motion. *See* Fleming v. Frett, 33 V.I. 58, 60 (Terr. Ct. 1995).

II. EVIDENCE AND PROCEDURAL BACKGROUND

The undisputed evidence in this case shows that on June 7, 1991, Christopher and Rose Marie Edwin (the "Edwins") executed a promissory note when they borrowed $90,000 from Banco Popular de Puerto Rico (the "Bank"). The Edwins secured the loan with a mortgage executed in favor of the Bank on property located at Plot 37, Estate Sion Hill, St. Croix. The promissory note required the Edwins to pay the Bank $857.09 per month to satisfy the debt. In addition, Paragraph 2 of the mortgage required the Edwins to make escrow payments to the Bank for taxes and insurance on the property. Paragraph 2 provided that the sum due for the escrow payments was an amount "reasonably estimated initially and from time to time by [the Bank] on the basis of assessments and bill and reasonable estimate thereof."[1]

The Bank filed the instant foreclosure action in August 1997, alleging that the Edwins defaulted on their payment obligations under the note and mortgage.[2] The Edwins denied the

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[1] Mortgage dated June 7, 1991 at paragraph 2.

[2] Pursuant to title 28, section 532 of the Virgin Islands Code, the Bank also named as defendants potential lien holders Michaela David and Jefferson Alexander. *See* V.I. Code Ann.

Bank's allegations and filed a counterclaim alleging that the Bank misapplied payments and misrepresented the amount due for monthly payments in violation of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq.

In support of its motion for summary judgment, the Bank argues that the undisputed evidence shows that Edwins defaulted on their payments to the Bank and that it is therefore entitled to judgment of foreclosure. In support of its motion, the Bank submitted two affidavits. In the first affidavit, Josephine Williams, an administrative officer for the Bank summarily stated that the "Edwins are in default of their obligations under the Note, including, but not limited to, the failure to make timely payment of the monthly installments due the Bank."[3] According to Williams, "there remains past due and owing the principal sum of $84,448.30," together with accrued interest and late charges.[4]

In the second affidavit, Abraham Edwards, the Bank's manager of commercial loans elaborated on Williams' statement that the Edwins defaulted on their payments to the Bank. Edwards stated:

> The account history reflects that there were periodic arrearages in payments as early as August of 1991. Monthly payments ceased completely after June of 1995, when the payment for May, 1995 was made. In January of 1996, the Edwins made a payment of $7,000.00. This payment was applied to the

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tit. 28, § 532 (1996) (providing that "[a]ny person having a lien subsequent to the plaintiff upon the same property or any part thereof, or who has given a promissory note or other personal obligation for the payment of the debt or any part thereof, secured by the mortgage or other lien which is the subject of the action, shall be made a defendant in the action. Any person having a prior lien may be made defendant at the option of the plaintiff, or by the order of the court when deemed necessary.").

[3] Affidavit of Josephine Williams at paragraph 4.

[4] Id. at paragraph 5.

> payments due from June 1995 through January 1996, with the remainder applied to the escrow account. This payment made principal and interest current, but the escrow account was left with a negative balance of -$1,800.62 as a result of the sums advanced by the Bank for the payment of taxes and/or insurance.
>
> No payments were made in February through June of 1996. In July, a payment of $9,778.78 was made. This was applied to monthly payments from February through July of 1996, to accrued late charges, and to the escrow account, leaving the escrow account with a positive balance of $1,613.46. As of this payment, principal and interest were current.
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> No payments of any kind have been received on this account since July of 1996.[5]

In response to the Bank's motion and supporting affidavits, the Edwins argue that "[a]s per [their] record and recollection they are not in default of the note."[6] In support of this contention, the Edwins presented the Affidavit of Rosemarie Edwin. In her affidavit, Ms. Edwin stated that the Bank informed them that total payments due on the note were $1,000 per month and that they "paid the $1,000.00 monthly until January 23, 1998."[7] In January 1996, the Edwins left the Virgin Islands for St. Lucia. According to Ms. Edwin's affidavit, before they left, the Bank informed them that "monthly payments on the note were current. Nonetheless, we presented Plaintiff's agent Ms. Josephine Williams, with a check for $9,000.00 to apply to the installment on the note."[8] Ms. Edwin further stated that in September 1996, they authorized the Bank to apply a $10,000 Hurricane Marilyn settlement check to the monthly payments on the note. She concluded that "[a]s per our record and recollection we are not in default of the note."[9]

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[5] Affidavit of Abraham Edwards at paragraphs 4-6.

[6] Defendants' Response to Plaintiff's Motion for Summary Judgment at 5.

[7] Affidavit of Rosemarie Edwin at paragraph 3.

[8] Id. at paragraph 4.

[9] Id. at paragraph 10.

III. DISCUSSION

Under this evidence, the Bank is not entitled to summary judgment. The evidence presents the Court "with an oath against oath situation." Hankins v. City of Philadelphia, No. 98-1327, 1999 U.S. App. LEXIS 19573 (3d Cir. Aug. 18, 1999). The Bank's representatives swear that the Edwins are in default under the note, and Ms. Edwin swears that their payments on the note are current. "It is axiomatic that the finder of fact must resolve such conflicts in testimony, not a court making a judgment as a matter of law." Id. "'At the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact-finder.'" Id. (quoting Boyle v. County of Allegheny Pa., 139 F.3d 386, 393 (3d Cir. 1998)).

IV. CONCLUSION

For the reason stated above, the Court concludes that the Bank is not entitled to summary judgment. The evidence of record, viewed in a light most favorable to the Edwins, reveals a material issue of fact concerning the status of the Edwins' payments to the Bank. Accordingly, the Bank's Motion for Summary Judgment will be denied.

MARIA M. CABRET
Territorial Court Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court
By:___________________
Deputy Clerk
Dated:___________