IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: AT CHRISTIANSTED

FEDERAL DEPOSIT INSURANCE CORPORATION, in its CORPORATE CAPACITY, Plaintiff, vs. OHANIO HARRIS and CAROL ALLICK, and U.S.A. FARMERS HOME ADMINISTRATION, U.S.D.A. GOVERNMENT OF THE VIRGIN ISLANDS, Defendants.	CIVIL NO. 1073/81 ACTION FOR DEBT AND FORECLOSURE OF MORTGAGE

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PETERSEN, Judge

MEMORANDUM OPINION
January 27, 1983

A. FINDINGS OF FACT

1. People's Bank of the Virgin Islands (hereinafter referred to as P.B.V.I.) was a Banking Institution organized and existing under the laws of the United States and the Virgin Islands.

2. The Defendants Ohanio Harris and Carol Allick, on November 20, 1972, executed a Demand Note payable to P.B.V.I. in the amount of Twenty Three Thousand ($23,000.00) Dollars with interest at a rate of Nine (9%) per cent per annum.

3. A first priority mortgage was similarly and simultaneously executed for Twenty Five Thousand ($25,000.00) Dollars with interest at a rate of Nine (9%) per cent per annum on real property identified as Plot No. 35-G and 34-O of the Whim Estates, West End Quarter, Frederiksted, St. Croix, U.S. Virgin Islands.

4. The loan was for the purpose of financing the completion of Harris' three-bedroom dwelling.

5. The note provided for a payment schedule commencing on June 1, 1973 and ending June 1, 1993. Monthly payments of Two Hundred Twenty-Four ($224.00) Dollars were to be made.

6. On October 25, 1975, P.B.V.I. went into receivership

by Order of the Chief Judge of the District Court. The Federal Deposit Insurance Corporation (hereinafter referred to as F.D.I.C.), an agency of the Government of the United States, was appointed Receiver of P.B.V.I. with the authority to liquidate the affairs of the Bank.

7. Harris and Allick have made no payments on the loan.

B. <u>DISCUSSION</u>

Plaintiff, F.D.I.C., seeks in this action the sum of $23,000.00 as the principal amount due on the mortgage, plus interest thereon in the amount of $18,032.52, plus various incidental costs and fees. The Plaintiff further seeks an Order granting the judicial sale of the property involved herein, the proceeds of such sale to be applied to the amounts due the Plaintiff. Plaintiff also requests that a deficiency judgment be entered against Defendants if the proceeds of said sale are insufficient to satisfy the judgment.

The Defendants have raised four defenses to the claims of the Plaintiff. The Defendants' first affirmative defense is that the statute of limitations applicable to this action has expired and the claims are thereby barred. The Defendants' second argument is that the mortgage, since it is a mere instance of the debt, cannot be foreclosed when the underlying note is barred by the statute of limitations. The Defendants argue that if action on the debt is barred, so too should action on the mortgage be barred. Thirdly, Defendants claim that the first priority mortgage is void and unenforceable due to a material alteration of the instrument. Lastly, Defendants contend that the alleged material alteration renders the instrument fraudulent and illegal in that it charged a rate of interest in excess of that provided by the Virgin Islands usury laws applicable when the mortgage agreement at issue herein was executed.

Initially, there is some question as to which statute of limitations applies to this action. As was stated in the findings of fact, supra, the first priority mortgage as well as the demand note were executed on November 20, 1972. This action was commenced August 26, 1981. Title 5 V.I.C. Section 31(1)(A) provides a twenty-year period within which "[a]ctions for the recovery of real property, or for the recovery of the possession thereof" must be brought. Title 5 V.I.C. Section 32 brings "[a]n action for the determination of any right or claim to or interest in real property" within the twenty-year limitation period provided by 5 V.I.C. Section 31(1)(A). Title 5 V.I.C. Section 31(1)(c) also allows 20 years for bringing "[a]n action upon a sealed instrument." A six-year statute of limitations is provided by 5 V.I.C. Section 31(3)(A) for "[a]n action upon a contract or liability, express or implied, excepting those mentioned in paragraph (1)(c) of this section."

A number of questions arise as a result of this issue of which statute of limitations applies. For instance, is a foreclosure action an action to determine a claim to or interest in real property so as to trigger the operation of the twenty-year statute of limitations provided by the interaction of 5 V.I.C. Sections 31(1)(A) and 32? 1/ Or is a foreclosure action on a mortgage simply an action on a contract or liability, thereby coming within the six-year statute of limitations provided in 5 V.I.C. Section 31(3)(A)? 2/

1/ There is no precise statute of limitations in the Virgin Islands dealing with the foreclosure of a mortgage. This Court is aware of various decisions in other jurisdictions which indicate that an action to foreclose on a mortgage is analogous to an action to recover possession of or to determine a claim of interest in land. See, e.g., Davis v. Stone, 236 F. Supp. 553, 557(D.D.C. 1964), where it is stated: "There is no specific Statute of Limitations on the foreclosure . . . of a mortgage in the District of Columbia, but the limitation applicable to the recovery of land is applied." See also Barnett v. Waddell, 27 So.2d 1 (Ala. 1946)(suit to foreclose equitable mortgage on realty is in nature of suit to recover land); Arnold v. Hollister, 37 A. 2d 695 (Conn. 1944) (statute of limitations governing right to possession of land applicable to proceeding to foreclose a mortgage). Accord, Campbell v. Ohio National Life Ins, Co., 74 N.W.2d 546 (Neb. 1956).

2/ A number of jurisdictions have held that an action to foreclose on a mortgage is not the same as an action for recovery of land for purposes of determining the applicable statute of limitations. See Rural Realty Co. v. Buckner, 158 S.W.2d 17 (Ark. 1942)(foreclosure proceedings are in no sense actions for the recovery or possession of land); Stroud v.

Furthermore, can this action be characterized as an action upon a sealed instrument, thereby coming within the twenty-year statute of limitations provided in 5 V.I.C. Section 31(1)(c)? [3/]

(footnote [2/] continued)

Paulk, 66 P.2d 24 (Okla. 1937)(action to foreclose a real estate mortgage governed by five-year statute of limitations rather than fifteen-year statute for recovery of real property).

[3/] Ohanio Harris signed the first priority mortgage at issue here on a line at the end of which appears the word "seal". It has been recognized that there is a sufficient sealing when the word "seal" is affixed to the signature. For example, in President and Directors of Georgetown College v. Madden, 505 F. Supp. 557, 584 (D.Md. 1980) it is stated: "The word '(Seal)' printed beside an individual's signature has been held sufficient to render the document under seal even in the absence of an attestation clause [i.e., a clause which states 'In Witness Whereof I have hereunto set my hand and seal,' or words to that effect]. See Wells v. Alropa Corp., 82 F.2d 887, 888 (D.C. Cir. 1936; Federal Reserve Bank of Richmond v. Kalin, 81 F.2d 1003,1006-07(4th Cir. 1936)." (Emphasis in original). In Kalin, cited in Madden, supra, the Court stated as follows:

> The fact that the instrument contains no attestation clause reciting that a seal is being used is not determinative. A.L.I. Restatement of Law of Contracts, Section 100. The use of the word 'seal' in a parenthesis is a sufficient sealing, if there is intention on the part of the maker to adopt this seal. And, in the federal courts, the intention of the maker is to be determined by by the court from an examination of the instrument itself. . . . And, as the word 'seal' in parenthesis is in common use as a seal, its presence upon an instrument in the usual place of a seal, opposite the signature, undoubtedly

(footnote 3/ continued)

> evinces an intention to make the instrument a sealed instrument, which should be held conclusive by the court, in the absence of other indications to the contrary appearing on the face of the instrument itself.

Federal Reserve Bank of Richmond v. Kalin, supra, at 1006-07 (citations omitted). The court in Kalin made reference to the decision in Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U.S. 514, 519, 16 S.Ct. 379, 381, 40 L.Ed. 515 (1896), wherein the Supreme Court stated: "Whether an instrument is under seal or not is a question for the court upon inspection. Whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper." (Emphasis added).

This view that the word "Seal" positioned to the right of an individual's signature operates to render the instrument a sealed instrument is supported by the Restatement (Second) of Contracts, Section 98 (1981), where it is stated: "Unless extrinsic circumstances manifest a contrary intention, the delivery of a written promise by the promisor amounts to the adoption of any seal then on the document which has apparent reference to his signature or to the signature of another party to the document." In an illustration further explaining this section, the following example appears: "A signs and delivers a written promise to B, his signature being immediately in front of the word 'seal' which has been previously printed or written there by another person. Unless A manifests a contrary intention, he thereby adopts the seal and makes a contract under seal." Restatement (Second) of Contracts, Section 98 comment a, illustration 1 (1981). As it is apparent that no precedent relates specifically to this issue, this would appear to be the law in the Virgin Islands since, pursuant to 1 V.I.C. Section 4, "The rules of the common law, as expressed in the restatement of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." See also Co-Build Companies, Inc. v. Virgin Islands Refinery Corp., 15 V.I. 528, 570 F.2d 492 (3d Cir. 1978).

There appears to still be some controversy over whether or not extrinsic evidence is admissible on the question of whether the printed word "seal" is intended as a seal. See Restatement (Second) of Contracts, Section 96, Reporter's Note to comment b; J. Calamari & J. Perillo, Contracts Section 115, at 191 (1970); 1A Corbin on Contracts, Section 241, at 395 (1963); 79 C.J.S. Seals, Section 3, at 479.

However, this Court need not address these issues which are apparently issues of first impression in the Virgin Islands.

This Court concludes that by the letter dated November 29, 1977, written by Attorney Jeffrey L. Resnick to Mr. Gary M. Holloway, liquidator-at-large for F.D.I.C., on behalf of Defendant Harris, whereby Harris agreed to make monthly payments in the amount of Two Hundred Seventy-Five ($275.00) Dollars, Harris acknowledged his debt. This action was brought on August 26, 1981, and less than 4 years had passed since the debt was acknowledged. Therefore, even were this Court to decide that the shortest statute of limitations potentially applicable, the six-year statute in 5 V.I.C. Section 31(3)(A), applied to this action, the claim would still not be barred, Thus, any conclusion this Court might reach on the previously mentioned issues of first impression would be merely advisory.

The Second Restatement of Contracts states the following:

> (1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.
> (2) The following facts operate as such a promise unless other facts indicate a different intention:
> (a) A voluntary acknowledgment to the obligee, admitting the present

> existence of the antecedent indebtedness . . . .

Restatement (Second) of Contracts, Section 82 (1981). Comment d to this section states: "An unqualified admission that a debt is owing operates as a promise to pay it for the purposes of the rule stated in Subsection (1). . . . But circumstances indicating an intention not to pay deprive the acknowledgment of effect in most States." Id., comment d.

Thus, it is generally recognized that the running of the limitations period does not bar the claim if the plaintiff can prove an acknowledgment either before or after the statute has run. Such an acknowledgment renews the claim so that the statute starts to run anew for the full limitations period. Gee v. CBS, Inc., 471 F. Supp. 600, 633 (E.D.PA. 1979). See also Developments in the Law-Statutes of Limitations, 63 Harv. L. Rev. 1177, 1254 (1950). "[A]ll that is required [to take a debt outside the limitations period under New York law] is that the writing clearly acknowledge an existing debt and that it contain nothing inconsistent with an intention by the debtor to pay it." United Rubber, Cork, Etc. v. Great Am. Industries, 479 F. Supp. 216, 230 (S.D.N.Y. 1979). See Generally 51 Am. Jur. 2d Limitation of Actions, Sections 319-360; 54 C.J.S. Limitations of Actions, Sections 302-320; 1A Corbin on Contracts, Section 216 (1963); 18 Williston on Contracts, 3d ed., Sections 2047-2088(1978).

The letter which this Court considers to be an acknowledgment by the Defendant Harris of his debt to the Plaintiff states as follows: "Mr. Harris is agreeable to paying $275.00 a month to liquidate his obligation, but, has been awaiting preparation of a document setting up such repayment schedule. If you will notify him directly, he will come in and sign such an agreement and commence payment thereunder." It is signed by Jeffrey L. Resnick, and was sent to Gary M. Holloway. This Court concludes that this letter undoubtedly contains an unqualified and direct admission of a previous debt and expresses a willingness to pay it. Furthermore, the letter was sent to an appropriate individual for acknowledgment purposes, the liquidator-at-large of the Plaintiff Corporation. The fact that it was signed by Attorney Resnick rather than the Defendant Harris poses no problem. Although Title 5 V.I.C. Section 39 provides that for an acknowledgment to be valid it must be in writing signed by the person to be charged, it is generally recognized that a valid acknowledgment may be made by the debtor's attorney if he was properly authorized to so bind the client. 51 Am. Jur. 2d Limitation of Actions, Section 349. See also Restatement (Second) of Contracts, Section 82 comment g (1981); 54 C.J.S. Limitations of Actions, Section 318, at p. 403. A showing that the attorney is authorized to act, beyond a simple statement of such by the attorney, is necessary, Ely Const. Co. v. Town of Timmonsville, S.C., 138 F.2d 739 (4th Cir. 1943). In the case at bar, Defendant Harris stated in his deposition that Attorney Resnick was his attorney at the time the letter was written, and that Defendant Harris "was going to go according to what he [Resnick] said . . . ." 4/ Attorney Resnick's authority to act is thereby sufficiently established, and the letter of November 29, 1977 constituted an unqualified acknowledgment of the debt and fixed a new date from which the statute of limitations ran. Therefore, no matter which statute of limitations applies to this action, whether it be the twenty-year period provided by 5 V.I.C. Section 31(1)(A) for the recovery of real property, the twenty-year period provided by 5 V.I.C. Section 31(1)(c) for actions on sealed instruments, or the six-year period provided by 5 V.I.C. Section 31(3)(A) for actions on a contract or liability, this action is not barred since less than four years has passed between the date of the acknowledgment and the filing of the complaint. The complaint was thus within

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4/ Harris Deposition, p.28. Mr. Harris' deposition was taken on May 24, 1982.

even the narrowest limitations period potentially applicable. 5/

Beyond the questions previously addressed, the Defendants argue alternatively that the first priority mortgage is invalid since it was materially and fraudulently altered. The Defendant stated that the underlying promissory note in this mortgage transaction was executed for the sum of Twenty Three Thousand ($23,000.00) Dollars, with Nine (9%) per cent per annum interest and claims that the first priority mortgage executed on the same date and as part of the same transaction was signed by the Defendant in blank with the belief that it would conform to the terms of the note. Defendant argues, however, that the mortgage instrument was completed in the amount of Twenty Five Thousand Dollars - Two Thousand Dollars more than the amount contemplated and borrowed by him. The Defendant testified that no explanation was given at the closing as to the discrepancy in amounts and that, as a result, the completion of the first priority mortgage for

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5/ The Defendants, in their Trial Memoranda, further claimed that if the suit on the debt underlying the mortgage is barred, then a suit on the mortgage is likewise barred. This Court takes note of the divergent lines of authority on this issue. See 55 Am. Jur. 2d Mortgages, Section 602. However, since it has been concluded that the debt for which the mortgage was secured is not time-barred, this issue has been rendered moot in the case at bar.

$25,000.00 was unauthorized, constituting a material alteration under Title 11A V.I.C. Section 3-115 and 3-407 sufficient to render it void and unenforceable.

This testimony is in direct conflict with that given by Mrs. Maria Roebuck Martin, who was the Assistant Loan Manager for P.B.V.I. at the time the Defendant applied for the construction loan. 6/ Mrs. Martin testified that all the terms and conditions of the mortgage agreement were explained to the Defendants at the closing and that all the terms of the mortgage agreement had been completely filled in prior to the Defendant signing it. 7/

With such conflicting testimony before the Court, the question becomes one of credibility. Generally, the trial

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6/ Martin Deposition, pp. 5-6. Mrs. Martin's deposition was taken on July 14, 1982 and admitted into evidence at trial pursuant to Title 5, Appendix I, Virgin Islands Code, Rule 32(a)(3), as made applicable to the Territorial Court by Title 4 Virgin Islands Code Section 83 (1981 Supp.).

7/ Martin Deposition, pp. 13-14. Further testimony presented at trial established that the note was made out in the amount of Twenty Three Thousand ($23,000.00) Dollars while the mortgage was made out in the amount of Twenty Five Thousand ($25,000.00) Dollars. It was further established that the Two Thousand ($2,000.00) Dollars difference was to be paid to Harris, pursuant to bank policy, after the completion of the construction of his home and upon his presentment of the certificate of occupancy to the bank. Martin Deposition, p. 16.

judge has the function of resolving conflicts in evidence and appraising witness credibility in a case without a jury. Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980). The court must choose those factual inferences and conclusions which it considers most reasonable and has the right to disregard any testimony which it considers false or inherently improbable. Thomas E. Snyder Sons Co. v. Industrial Molasses Corp., 270 F.2d 875 (7th Cir. 1959). As stated in 9 C. Wright & A. Miller, Federal Practice and Procedure, Civil, Section 2586 (1971):

> At a trial without a jury it is for the trial judge to determine the credibility of the oral testimony given by the witnesses and the weight to be accorded it. He need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable. Credibility involves more than demeanor and comprehends an overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.

Having listened carefully to the testimony given and having had an opportunity to observe the Defendant on the stand, this Court finds that the testimony by Harris on this issue of material and fraudulent alteration is not credible and will be disregarded. The first priority mortgage at issue in the case at bar was not fraudulently made nor materially altered.

The Defendant's final contention is that the rate of interest on the mortgage loan was usurious. However, this claim is premised on the previous claim that the mortgage was completed in an amount which exceeded that contemplated by the Defendant by Two Thousand ($2,000.00) Dollars and was thus fraudulently made and materially altered. Having held that the first priority mortgage was not fraudulently made nor materially altered, this Court concludes that the argument of the Defendants that the interest rate was usurious is meritless. According to 11 V.I.C. Section 951 (Cum. Supp. 1980), the maximum legal rate of interest on first priority mortgage loans was Nine (9%) per cent per annum. By the terms of the statute, "The provisions of this section shall be effective from the date this Act shall become law [July 3, 1972] through June 30, 1973, ... Id. As this mortgage was entered into on November 20, 1972 and provided for a rate of interest of Nine (9%) per cent per annum, the exact amount allowed by law, Defendants' claim that it violated the Virgin Islands Usury Statute is wholly without merit.

C. CONCLUSION

This Court holds that the Defendant Ohanio Harris acknowledged his debt as a result of the letter written by his attorney dated November 29, 1977, and delivered to the liquidator-at-large of the Plaintiff Corporation; that since this action was initiated on August 26, 1981, less than four years after the acknowledgment, it is not barred by any statute of limitations potentially applicable; that the first priority mortgage was not fraudulently made nor materially altered; and that the rate of interest charged on the loan was not usurious. Accordingly the defendant's failure to repay the principal and interest due caused them to be in default on their loan.

Judgment will be entered in favor of the Plaintiff for the principal and interest owed and the premises shall be sold by judicial sale with the proceeds to be applied against the amount due Plaintiff. A deficiency judgment will be entered against the Defendants if the proceeds from such sale are insufficient to satisfy the judgment, and the Defendants are to be barred from any rights or claims against the property except for statutory redemption in accord with Virgin Islands law.

Eileen R Petersen

EILEEN R. PETERSEN, Judge