IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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THE BANK OF NOVA SCOTIA, Plaintiff, v. "JOHN DOE", being the unknown heirs of the deceased DAVID B. GOHMERT holding interest in Apartment Unit No. 200E (a/k/a 234) Barbados Building Sapphire Hill Village Condominium and SAPPHIRE HILL VILLAGE CONDOMINIUM OWNERS ASSOCIATION, Defendants.	CASE NO. ST-10-CV-497 ACTION FOR DEBT AND FORECLOSURE OF REAL PROPERTY

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION
(Filed: August 2, 2013)

Before the Court is the "Defendant Sapphire Hill Village Condominium Owners Association's Motion to Amend or Alter the Default Judgment Entered on June 14, 2013" filed on July 12, 2013. No response to said motion has been filed. For the reasons described below, the motion will be denied.

I. PROCEDURAL BACKGROUND.

This action for debt and foreclosure was filed on September 3, 2010, by the Bank of Nova Scotia ("Scotiabank") seeking to foreclose its first priority mortgage lien against Apartment Unit No. 200E (a/k/a 234) Barbados Building, Sapphire Hill Village Condominium, Parcel No. 16-1-1A Estate Smith Bay, No. 1, 2 and 3 East End Quarter, St. Thomas, U.S. Virgin Islands (the "Subject Property"). Scotiabank named as defendants the heirs of the deceased owner of the Subject Property and the Sapphire Hill Village Condominium Owners Association ("Sapphire Hill"). On November 23, 2010, Sapphire Hill filed an answer which contained a single affirmative defense and requested that the Court recognize its lien, set the priority of its lien, and direct that the lien amount be paid from the proceeds of a Marshal's Sale of the Subject Property.

After Scotiabank served process on the heirs of the property owner via publication, on April 2, 2013, it filed a motion for default judgment against the heirs of the owner and for summary judgment against Sapphire Hill. On April 16, 2013, Sapphire Hill filed a notice of no opposition to Scotiabank's motion. That notice again asked the Court to recognize its lien, set the priority of its lien, and direct that the lien amount be paid from the proceeds of a Marshal's Sale of the Subject Property. Notably, and like the answer, the notice of no opposition of Sapphire Hill lacked any information about the basis for or amount of the purported lien. On June 14, 2013,[1] the Court entered a Default Judgment in favor of Scotiabank setting the amount of its mortgage lien against the Subject Property,[2] directing the foreclosure of said lien, and foreclosing all junior liens on the Subject Property.

On July 28, 2013, Sapphire Hill filed the instant motion, asking this Court to amend its judgment to set the amount of its lien, fix the order of its lien priority vis-à-vis Scotiabank, and to direct that the lien amount be paid from the proceeds of any sale of the Subject Property. For the first time in this litigation, Sapphire Hill submitted evidence of its lien, the basis therefore, and its monetary amount.[3] Scotiabank has not responded to this motion, and no other defendants have appeared in this action at any time.

II. LEGAL DISCUSSION.

Although Sapphire Hill premises its argument on Rule 59 of the Federal Rules of Civil Procedure, the Court must first apply Rule 50 of the Rules of the Superior Court to determine which legal standard governs this motion.[4] 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.[5]

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1 The Default Judgment was dated June 13, 2013, and entered by the Clerk of the Court on the following day.

2 Scotiabank never identified any of the heirs of the owner of the Subject Property and simply designated them as "John Doe." While the rules of this Court do allow a plaintiff to designate fictitious defendants in the pleadings, the rules do not authorize a personal judgment against fictitious parties. *See, Bank of Nova Scotia v. Dore,* 57 V.I. 105, 113-15 (Super. Ct. 2012). Therefore, the Court did not issue any personal judgment for debt, and simply fixed the amount of the mortgage lien against the Subject Property.

3 Attached to Sapphire Hill's motion are: 1) a copy of its answer; 2) a copy of a notice of condominium lien which appears to have been recorded against the Subject Property on November 24, 2010; 3) a copy of its notice of no opposition to Scotiabank's motion; and 4) the affidavit of William Walsh, its General Manager.

4 *See, Harris v. Garcia,* S. Ct. Civ. No. 2008-082, 2010 WL 330331 at * 2-3 (V.I. Jan. 14, 2010).

5 SUPER. CT. R. 50.

If a party files a motion pursuant to this rule within 28 days of the challenged judgment, it is governed by FED. R. CIV. P. 59.[6] If the motion is filed outside of that timeline, the provisions of FED. R. CIV. P. 60 are applicable.[7] The Default Judgment at issue was entered on June 14, 2013, and Sapphire Hill filed its motion on July 12, 2013 – the twenty eighth day. Thus, ultimately Sapphire Hill is correct, and the Court will be guided by FED. R. CIV. P. 59.

As the Supreme Court of the Virgin Islands previously stated, "A proper Rule 59(e) motion therefore 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."[8] Importantly, however, a motion to amend a judgment cannot be used by a party to re-open a proceeding in which it failed to submit competent evidence to the court that was in its possession prior to judgment.[9] Congruently, on a motion to amend or alter a judgment, the movant may not raise legal arguments which were not presented to the trial court prior to the contested judgment.[10]

Sapphire Hill contends that the Default Judgment entered on June 14, 2013, must be amended because the Court did not set the priority of its lien or the lien amount as required by Virgin Islands law. The applicable statute provides,

> When it is adjudged that any of the defendants have a lien upon the property, the court shall make a like judgment in relation thereto and the debt secured thereby as if such defendant were a plaintiff in the action. When a judgment is given foreclosing two or more liens upon the same property or any portion thereof in favor of different persons not united in interest such judgment shall determine and specify the order of time, according to their priority, in which the debts secured by such lien shall be satisfied out of the proceeds of the sale of the property.[11]

Sapphire Hill is correct that the statute mandates, in the instance of competing liens against real property, the resulting judgment must declare the amount and priority of those liens. 28 V.I.C. 533 authorizes for a trial court to treat a defendant as a plaintiff solely for these purposes.[12] As a condominium association, if the owner of the unit at issue failed to pay common charges as they became due, those amounts become a statutory lien in favor of Sapphire

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6 *Beachside Assocs., LLC v. Fishman,* 53 V.I. 700-714-15 (V.I. 2010) (quoting *Ruiz v. Jung,* Civ. No. 2008-035, 2009 WL 3568182 at * 3, 2009 V.I. Supreme LEXIS 43 at * 9 (V.I. Oct. 19, 2009)).

7 *Id.*

8 *In re Hartlage,* 54 V.I. 446, 452 (V.I. 2010) (quoting *Lazaridis v. Wehmer,* 591 F.3d 666, 669 (3d Cir. 2010)).

9 *Blystone v. Horn,* 664 F.3d 397, 415-16 (3d Cir. 2010); *Navarro v. Fuji Heavy Indus., Ltd.,* 117 F.3d 1027, 1032 (7th Cir. 1997) ("The insuperable difficulty for the plaintiff is that a motion to alter the judgment may not be based on evidence that was available when the district judge took the motion for summary judgment under advisement but that was not presented then.").

10 *Bogosian v. Woloohojian Realty Corp,* 323 F.3d 55, 72 (1st Cir. 2003); *Pacific Ins. Co. v. Amer. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998) ("Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance.") (citations omitted).

11 V.I. CODE ANN. tit. 28, § 533 (1996).

12 *Nunez v. Lovell,* 50 V.I. 707, 717 (D.V.I. 2008).

Hill and against the Subject Property which is junior only to first priority mortgages and tax liens.[13] This statutory lien "...may be foreclosed by suit by the manager or Board of Directors...in like manner as a mortgage of real property."[14]

In order to foreclose on real property, of course, a mortgagee must first file a complaint and then serve all defendants with process. Under the language of Section 922(a), the same process applies to Sapphire Hill in its efforts to foreclose its statutory lien. But, rather than a complaint, it was obliged to file and serve a cross-claim for debt and foreclosure against the owner of the Subject Property, who was a co-defendant in this action.[15] In this case, Sapphire Hill filed an answer which contained a single affirmative defense, but a cross-claim was not submitted. Further, the answer was not served on the co-defendants. Thus, at this time, Sapphire Hill is seeking affirmative relief on a claim against parties who have no notice of such a claim in this proceeding. This would clearly violate the due process principle of "notice and an opportunity to be heard" which is the hallmark of our justice system.[16]

In addition, in response to the motion for summary judgment filed by Scotiabank, Sapphire Hill filed a notice of no opposition. In that filing, Sapphire Hill did request a recognition of its statutory lien, a setting of the priority of said lien, and payment of the same from the proceeds of any sale. However, it did not file any documents which comported with the requirements of the summary judgment rule in support of its naked entreaty.[17] Absent appropriate and timely presented evidence from Sapphire Hill, the Court could not determine whether there is a valid lien, and, if so, its amount and priority as required by statute. This is the reason the Default Judgment does not reflect Sapphire Hill's lien.

At this juncture, the record reflects that Sapphire Hill did not establish its claim via pleadings or in motion practice in this litigation prior to entry of the Default Judgment on June 14, 2013. Moreover, it has not provided any basis on which the Court can conclude that the arguments and evidence contained in the instant motion and the attachments thereto were not available to Sapphire Hill prior to entry of said judgment. Rather, the present request is an attempt to re-open this litigation for the purpose of rectifying Sapphire Hill's failure to pursue its claim in the manner provided by the rules of procedure. As noted above, this is an inappropriate use of a motion to alter or amend a judgment, and the motion will be denied.

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13 28 V.I.C. § 922(a) (1996).

14 *Id.*

15 *See,* SUPER. CT. R. 7, 12; FED. R. CIV. P. 13(g) ("A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action.").

16 *E.g., Oakes v. United States,* 400 F.3d 92, 98 (1st Cir. 2005) ("The ubiquity of the 'notice and opportunity to be heard' principle as a matter of fundamental fairness is deeply engrained in our jurisprudence.") (noting that a party need not anticipate and defend against an affirmative defense which was not raised by the opposition).

17 *See,* SUPER. CT. R. 7, 12; FED. R. CIV. P. 56(c); LRCi 56.1.

III. CONCLUSION.

Defendant Sapphire Hill Village Condominium Owners Association failed to provide information in support of its claim prior to the entry of final judgment in this case. Further, it has not established that the information it now seeks to utilize was unavailable earlier. Thus, said Defendant has not met the requirements for relief under Rule 59(e) of the Federal Rules of Civil Procedure. Therefore, the Court will enter an order of even date denying the Defendant Sapphire Hill Village Condominium Owners Association's Motion to Amend or Alter the Default Judgment Entered on June 14, 2013.

Dated: August 2, 2013

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

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

By: Donna D. Donovan
Donna D. Donovan
Acting Court Clerk Supervisor 8/2/2013