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

BANK OF NOVA SCOTIA, Plaintiff, vs. **FAMILY BROADCASTING, INC., G. LUZ A. JAMES; ASTA K. JAMES, UNITED STATES OF AMERICA, GOVERNMENT OF THE VIRGIN ISLANDS, and AMERICAN FLORAL SERVICE, INC.,** Defendants, **IKON OFFICE SOLUTIONS, INC.,** Intervenor.	**CIVIL NO. 755/1994** **ACTION FOR DEBT AND MORTGAGE FORECLOSURE** **NOT FOR PUBLICATION**

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CABRET, P.J.

MEMORANDUM OPINION
(April 28, 2000)

This matter is before the Court on Defendants', G. Luz A. James and Asta James (collectively the "Jameses"), motion for relief from a final judgment of foreclosure and order confirming sale. For reasons which follow, the motion is denied.

I. FACTS AND PROCEDURAL HISTORY

The record shows that in September, 1990, the Jameses personally guaranteed a $500,000 note and a $100,000 note (the "notes") payable to Plaintiff, Bank of Nova Scotia (the "Bank"). As additional security, the Jameses granted the Bank a mortgage on several parcels of real property they owned on St. Croix: Plot 7-H of Estate Catherine's Rest and Plots 4-A, 4-AA, 4-C, 6-A, 6-AB of Estate LaGrande Princess (collectively "subject parcels"). After default on the notes and demand on the Jameses, the Bank instituted this action to collect the debt and foreclose on the mortgage covering the subject parcels.

The Jameses were personally served with process, but failed to answer, and on April 19, 1995, the Court entered a Default Judgment in favor of the Bank. The Judgment awarded the Bank $520,794.00 principal, accrued interest of $32,576.05, and future interest at the rate of $149.82 per diem. In addition, the Judgment ordered foreclosure sale of the subject parcels.

Although the Jameses made several payments towards the judgment, on November 3, 1997, the date advertised for sale, there remained a balance of principal and interest of $454,509.67. Accordingly, the Marshal auctioned the property as advertised, and it was purchased by the Bank, the sole bidder at the sale. The Marshal's Report of Sale shows that the

Bank paid a total of $450,000 for all the subject parcels: $25,000 for plot 4-C Estate LaGrande Princesse, $125,000 for plots 6-A and 6-AB Estate LaGrande Princesse, $150,000 for plots 4-A and 4-AA Estate LaGrande Princesse, and $150,000 for plot 7-H Estate Catherine's Rest. On January 8, 1998, without objection from the Jameses, the Court entered an Order Confirming Sale and a Deficiency Judgment against the Jameses in the amount of $4,509.67.

Notwithstanding the Confirmation Order, the Jameses and their tenants continued to occupy the subject parcels. On January 25, 1998, the Bank petitioned the Court for a Writ of Assistance to have the Marshal assist the Bank in gaining possession. The Court issued the Writ on July 31, 1998. On August 7, 1998, the Jameses moved the Court to stay the Writ on the ground that their son was attempting to purchase two of the subject parcels from the Bank. In addition, on October 30, 1998, the Jameses filed the instant motion for relief from the Default Judgment and Order Confirming Sale.

II. DISCUSSION

In their motion, the Jameses assert that the judgment amount was erroneous and that the Marshal sold the subject parcels for a grossly inadequate price. Specifically, the Jameses contend that they "recently . . . found out that the proper amount owed to Plaintiff Bank at the time of the Judgment was . . . $381,408.16 as of June 30, 1997, and not for the amount for which Judgment was obtained."[1] In support of this contention, the Jameses attached an exhibit which appears to be a handwritten account history of payments on a debt with an "original amount [of]

[1] Defendants' Motion for Reconsideration and to Vacate Marshal Sale, at 2.

$500,000.00" and a balance of $381,408.16 on January 30, 1997.[2] In support of their contention that the Marshal sold the property for a grossly inadequate price, the Jameses offer their bare assertion assertion that the total appraised value of the subject parcels is $1,500,000. The Court must reject all these contentions.

The Jameses' motion is governed by Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) authorizes a court to

> relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

In this case, the Jameses state that they are relying on reasons (3), (4) and (6). The record reveals absolutely no evidence of fraud, however, and the Jameses do not even remotely argue that any instance of fraud, intrinsic or extrinsic, occurred. In addition, notwithstanding their citation to reason number four, that the judgment is void, they have raised no argument which would render the judgment void. *See* Ingvoldstad v. Kings Wharf Island Ent., Inc., 21 V.I. 130, 139-40, 593 F.Supp. 997 (D.V.I. 1984) (ruling that judgment is not void merely because it is erroneous). Rather, the Jameses are contending that the amount of the judgment is erroneous.

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[2] Id. at Exhibit "A".

The statement in their brief that they "recently . . . found out that the proper amount owed to Plaintiff Bank at the time of the Judgment was . . . $381,408.16,"[3] is of unmistakable import: they believe the judgment amount should be amended due to newly discovered evidence. Such challenge, however, must be raised "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Thus, the Jameses' challenge to the judgment amount, filed approximately three and one-half years after the Court entered the default judgment, is untimely. In addition, the Jameses have cited nothing establishing that this newly discovered evidence could not "by due diligence . . . have been discovered in time to move for a new trial," as required by Rule 60(b). To the contrary, during a hearing on the Jameses' motion, Mr. James stated to the Court that he discovered the purported discrepancy "after checking through [his] records." Inasmuch as this evidence was a part of his own records, it appears that it could have been discovered and brought to the Court's attention with minimal diligence within the required time.

Furthermore, even if this ground was timely asserted, the Court would necessarily reject it. There is no affidavit or other evidence of record which lays a foundation for admission into evidence of the handwritten account history. *See, e.g.*, Fed. R. Evid. 803(6) (requiring qualified witness to lay proper foundation for admission of business record). Moreover, even if the document was admissible, the Bank's Motion for Confirmation of Sale indicates that it accounted for each of the payments shown on the exhibit. Finally, it is evident from the face of

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[3] Defendants' Motion for Reconsideration and to Vacate Marshal Sale, at 2.

the exhibit that it only purports to account for the balance due on a $500,000 debt, and the evidence shows that the Jameses were also liable for the balance due on a $100,000 note. Indeed, the Bank has an affidavit of an account manager who reviewed the exhibit and stated that it reflects "payments only on the $500,000 note . . . and not payments on the [the second note]."[4] Thus, the exhibit would have no probative value concerning the portion of the judgment based on the $100,000 note.

Turning to the last ground asserted by the Jameses, they contend that Order Confirming Sale should be vacated and a new sale conducted because the Marshal sold the subject parcels for a grossly inadequate price. The Jameses likewise argue that the sale of any one of the parcels could have satisfied the judgment and that the sale of all the parcels was therefore unnecessary. However, the Jameses offer absolutely no evidence to support their contention that the appraised value of the subject parcels totals $1,500,000, and without such proof there is no basis upon which the requested relief can be granted. *See* Christian v. All Persons Claiming Any Right, Title, 962 F.Supp. 676, 675-76 (D.V.I. 1997). Furthermore, in a colloquy with the Court at the hearing on this matter, Mr. James acknowledged that he did not have a current appraisal and that the purported $1,500,000 appraisal was conducted in 1990, when he delivered the subject mortgage to the bank. Considering that the Marshal's sale was conducted approximately seven years later, the probative value of such an appraisals is questionable.

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[4] Affidavit of Paul W. Andrews at paragraph 3.

III. CONCLUSION

For the reasons stated above, the Court concludes that the Jameses' Motion for Relief from Judgment must be denied. The challenge to the judgment amount based newly discovered evidence was untimely, the evidence could have been discovered earlier by due diligence and the evidence is not probative of the issue raised. The challenge raising inadequacy of the bid price was not supported by any evidence and is therefore also without merit. An appropriate order will issue.

MARIA M. CABRET
Territorial Court Presiding Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court
By: ______________________
~~Deputy~~ Clerk ASST. II
Dated: 4/28/00