IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

BANCO POPULAR DE PUERTO RICO, **PLAINTIFF,** **V.** **DIONISIO B. LORENZO D/B/A DION CONSTRUCTION; LIDIA DE JESUS; UNITED STATES INTERNAL REVENUE SERVICE; AND GOVERNMENT OF THE VIRGIN ISLANDS,** **DEFENDANTS.**	**SX-13-CV-268** **ACTION FOR DEBT AND MORTGAGE FORECLOSURE**

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiff Banco Popular de Puerto Rico's (hereinafter "Plaintiff"): (1) motion for summary judgment against Defendant Government of the Virgin Islands (hereinafter "GVI") and Defendant United States Internal Revenue Service (hereinafter "USIRS") and default judgment against Defendant Dionisio B. Lorenzo d/b/a Dion Construction (hereinafter "Lorenzo") and Defendant Lidia de Jesus (hereinafter "de Jesus"), filed on July 29, 2014; (2) renewed motion for summary judgment and default judgment, filed on October 1, 2015; and (3) renewed motion for summary judgment and default judgment, filed on May 16, 2016. No opposition has been filed in response to any of the aforementioned motions.

BACKGROUND

On July 29, 2013, Plaintiff commenced an action for debt and mortgage foreclosure against Defendants in connection with the real property described as Plot Nos. 9-V and 9-W (consisting of 0.566 U.S. acres each) of Estate Cottage, Queen Quarter, St. Croix, U.S. Virgin Islands (hereinafter "Subject Property"). Plaintiff alleged the following in its complaint:

> On January 12, 2012, Defendant Lorenzo executed and delivered to Plaintiff a promissory note in the amount of $228,000.00. (Compl. ¶ 2) To secure its obligations under the promissory note, on January 12, 2012, Defendant Lorenzo and

> Defendant de Jesus executed and recorded a mortgage modification agreement with regards to the second priority mortgage[1] in favor of Plaintiff. (Id., at ¶¶ 3-5) The promissory note is also further secured by a security interest in items of Defendant Lorenzo's personal property. (Id., ¶ 6) Defendant Lorenzo and Defendant de Jesus subsequently defaulted in their obligations under the promissory note and the mortgage modification agreement. (Id., at ¶ 7) Despite demands by Plaintiff, Defendant Lorenzo and Defendant de Jesus failed to pay sums due and owing under the promissory note and mortgage modification agreement, and Plaintiff exercised its option to accelerate the indebtedness evidence by the note and secured by the mortgage. (Id.) Again, despite demands made by Plaintiff, Defendant Lorenzo and Defendant de Jesus failed to pay the principal and interest due pursuant to the note and remains due in the total amount of $210,417.27 as of July 1, 2013—namely: $204,939.20 (principal), plus $5,478.07 (accrued interest thereon to July 1, 2013), plus $243.62 (late charges)—with interest accruing after July 1, 2013, at the rate of $45.54 per diem. (Id., at ¶ 8)

As such, Plaintiff sought to collect its debt from Defendant Lorenzo and Defendant de Jesus, and foreclose its lien on the Subject Property. Defendant GVI and Defendant USIRS were joined as parties claiming a right, title, or interest in the Subject Property by virtue of certain recorded encumbrances listed on the title search of the Subject Property—to wit: Notice of USVI Tax Lien in the amount of $7,343.72 against Dionisio B. Lorenzo dated June 11, 2009, recorded June 15, 2009 in Photocopy 1193, page 355, Document No. 2009002451 [Kind of Tax: 941VI; ID No. 660643379]; Notice of USVI Tax Lien in the amount of $104,248.37 against Dionisio B. Lorenzo dated September 14, 2010, recorded September 21, 2010 in Photocopy 1247, page 323, Document No. 2010003628 [Kind of Tax: 4549A, 1040X, 1040; ID NO. xxxxx1399]; Notice of Federal Tax Lien in the amount of $35,511.70 against Dionisio B. Lorenzo dated March 15, 2012, recorded March 27, 2012 at PC 1302, page 340, Doc. No. 2012001256 [Kind of Tax: 941; ID No.: 66-0643379]; Notice of Federal Tax Lien in the amount of $39,140.35 against Dionisio B. Lorenzo dated July 5, 2012, recorded July 16, 2012 at PC 1311, page 415, Doc. No. 2012002654 [Kind of Tax: 1040; ID

[1] On January 11, 2006, Defendant Lorenzo executed and delivered a second priority mortgage in favor of Plaintiff.

No.: xxx-xx-1399]; Notice of Federal Tax Lien in the amount of $11,730.68 against Dionisio B. Lorenzo dated December 14, 2012, recorded December 19, 2012 at PC 1325, page 52, Doc. No. 2012004463 [Kind of Tax: 941VI and 941X; ID No.: 660643379]; and Notice of Federal Tax Lien in the amount of $132,762.98 against Dionisio B. Lorenzo dated December 14, 2012, recorded December 19, 2012 at PC 1325, page 53, Doc. No. 2012004464 [Kind of Tax: 720VI and 941VI; ID No.: 66-0643379]. (Id., at ¶ 9, Exhibit 5) On September 24, 2013, Defendant USIRS filed an answer in response to Plaintiff's complaint.

When Defendant Lorenzo and Defendant de Jesus failed to file a response to Plaintiff's complaint, Plaintiff filed a motion for an entry of default. The Court granted Plaintiff's request and an entry of default was entered against Defendant Lorenzo and Defendant de Jesus in this matter on July 29, 2014. On October 21, 2013, the Court entered an order whereby the Court granted Plaintiff's motion to dispense with mediation as required under Title 28 V.I.C. § 531(b). On July 29, 2014, Plaintiff filed this instant motion for summary judgment and default judgment. On July 31, 2014, Defendant GVI and Plaintiff filed a stipulation whereby they stipulated that: (1) Defendant GVI was made a party to this action pursuant to Title 28 V.I.C. § 532; (2) that Defendant GVI's liens are subsequent to Plaintiff's mortgage lien and consists of lien in the amount of $7,343.72, dated June 11, 2009, and recorded June 15, 2009, and lien in the amount of $104,248.37, dated September 14, 2010, and recorded September 21, 2010; and (3) that Plaintiff's interest created by its mortgage lien in the Subject Property is senior and superior to that of Defendant GVI's interest. In an order dated August 18, 2014, the Court granted and entered Defendant GVI and Plaintiff's stipulation. Thereafter, on October 20, 2015, Defendant GVI filed a response whereby it indicated that it holds no position as to Plaintiff's motion for summary judgment and default judgment. No oppositions were filed in response to Plaintiff's motion for summary judgment and default judgment.

STANDARD OF REVIEW

Motion for Summary Judgment[2]

A moving party will prevail on a motion for summary judgment where the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). As to materiality, "only those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*, at 195 (citations omitted).

"[T]o survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Williams*, 50 V.I. at 195 (quotation omitted). The nonmoving party then has the burden of "set[ting] out specific facts showing a genuine issue for trial." *Id.* (citation omitted). The Court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Id*; *see also Perez v. Ritz-Carlton (Virgin Islands), Inc.,* 59 V.I. 522, 527; *Joseph v. Hess Oil V. I. Corp.,* 54 V. I. 657, 668 (V.I. 2011).

Motion for Default Judgment

Entry of default and default judgment are separate matters under Superior Court Rules 47 and 48. In *King v. Appleton*, 61 V.I. 339, 346 (V.I. 2014), the Supreme Court of the

[2] Plaintiff cited to Federal Rule of Civil Procedure 56 as the applicable rule for its motion for summary judgment. However, in light of the Supreme Court of the Virgin Islands' ruling in *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (V.I. 2015),"the Federal Rules of Civil Procedure... should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure." Since there are precedents from the Supreme Court of the Virgin Islands regarding motions for summary judgment, the Court will use the standard of review set forth in said precedents.

Virgin Islands (hereinafter, "Supreme Court") instructed that "after entering the default, the Superior Court must consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." (internal quotations omitted). The Supreme Court explained that a defendant, "by his default, admitted the plaintiff's well-pleaded allegations of fact, [he] is concluded on those facts by the judgment, and is barred from contesting the facts thus established." *Id.* In other words, a defendant's default does not in itself warrant the court to enter a default judgment. *Id.* ("the mere fact of [the defendant's] default did not entitle [the plaintiff] to the entry of a default judgment against [the defendant]; instead, [the defendant's] default only conceded the facts as alleged in [the plaintiff's] complaint"). Rather, "[t]here must be a sufficient basis in the pleadings for the judgment entered." *Id.* Thus, if the court finds the facts, as alleged in the plaintiff's complaint, constituted a valid cause of action under the Virgin Islands law, the court is to hold a hearing to establish the amount of damages. *Id.; see also, Appleton v. Harrigan*, 61 V.I. 262, 269 (V.I. 2014) (after entry of default, damages generally must be established in an evidentiary proceeding [where] the defendant is afforded the opportunity to contest the amount claimed) (internal quotations and citations omitted).

However, such a hearing is not required "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain." *Harrigan*, 61 V.I. at 270 (citing Super. Ct. R. 48(a)(1)). The Supreme Court explained that, "[a] claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant's default." (citation omitted). *Harrigan,* 61 V.I. at 270 (the Supreme Court found the damage claimed therein—namely, unpaid rent—did not qualify as a sum certain because sum certain for the purposes of Superior Court Rule 48 "contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments") (internal quotations and citation omitted).

DISCUSSION

A. Whether Plaintiff is Entitled to Summary Judgment Against Defendant USIRS and Defendant GVI[3]

Here, Plaintiff argued that the liens of Defendant USIRS and Defendant GVI are subsequent and inferior to Plaintiff's mortgage lien. In support of its assertion, Plaintiff cited to *Balbo Corp. v. Enighed Condos, LLC,*. 58 V.I. 93, 100 (Super. Ct. Mar. 8, 2013), where the court noted that, "[i]n the Virgin Islands, the priority of liens is determined by the time of the recording of the liens." As such, Plaintiff argued that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law against Defendant USIRS and Defendant GVI.

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[3] It is interesting that even though Defendant GVI failed to plead or otherwise defend in this matter, Plaintiff never filed a request for an entry of default or moved for default judgment against Defendant GVI. Instead, Plaintiff filed this instant motion for summary judgment against Defendant GVI and Defendant USIRS and default judgment against Defendant Lorenzo and Defendant de Jesus. This is likely based on the general presumption that default judgment cannot be entered against Defendant GVI. For example, under Title 33 V.I.C. § 3411(a) provides that "[n]o judgment shall be granted on any claim against the Government of the United States Virgin Islands except upon such legal evidence as would establish liability against an individual or corporation in a court of law, and no judgment by default shall be entered against the Government." However, Title 33 V.I.C. § 3411(a) is part of the Virgin Islands Torts Claims Act, Title 33 V.I.C. § 3401 *et seq*., which is a general consent statute by which the government "waived its sovereign immunity to tort actions, and prescribed a specific procedure for filing tort claims against it." *McBean v. Government of the Virgin Islands*, 19 V.I. 383, *2 (Terr. Ct. Mar. 18, 1983). There is nothing in the statute that extends Virgin Islands Torts Claims Act to other causes of action, such as contract, or property, etc. In fact, under Virgin Islands Rule of Civil Procedure 55(d), "[a] default judgment may be entered against the Government of the Virgin Islands, its officers, or its agencies" but "only if the claimant establishes a claim or right to relief by evidence that satisfies the court."

Here, Plaintiff was required to join Defendant GVI as a defendant under Title 28 V.I.C. § 532. Defendant GVI was properly served—namely, proof of service for Defendant GVI/Office of the Governor, Attorney General of the Virgin Islands Department of Justice, and Virgin Islands Bureau of Internal Revenue were filed on August 20, 2013. While Defendant GVI did appear in this matter—namely, Defendant GVI filed a stipulation on July 31, 2014 and a response to Plaintiff's motion for summary judgment on October 20, 2015—Defendant GVI never filed a response to Plaintiff's complaint. Normally, the Court would enter a default against Defendant GVI pursuant to Virgin Islands Rule of Civil Procedure 55(a)[3] and construe Plaintiff's motion for summary judgment against Defendant GVI as a motion for default judgment. However, given that Defendant GVI's stipulation essentially admitted to Plaintiff's claim against it—to wit, that Plaintiff's mortgage lien is superior to Defendant GVI's lien, the Court will go ahead and address Plaintiff's motion for summary judgment against Defendant GVI.

Lawsuits to enforce promissory notes are well-suited for summary judgment "due to the well-established legal principles and often uncontested facts." *Balbo Corp.*, 58 V.I. at 100; *see also Celestin v. LLP Mortg., Ltd.*, 2007 V.I. Supreme LEXIS 6, *5 (V.I. 2007) ("In this case Appellants acknowledge that they signed the contract (note and mortgage), received the funds and for a while made loan repayments. There is no showing of fraud, coercion or other nefarious inducement into the contract. Rather this is simply a case where one party to a loan contract's trying to avoid their obligation to repay a loan."). Here, Plaintiff submitted, *inter alia*, copies of executed promissory note, executed second priority mortgage, executed mortgage modification agreement and title search of the Subject Property as evidence that its mortgage lien has priority over Defendant USIRS and Defendant GVI's liens. Based upon the dates of recording, Plaintiff is entitled to judgment as a matter of law against Defendant USIRS. However, before the Court can determine whether Plaintiff is entitled to judgment as a matter of law against Defendant GVI, the Court must first inquire whether either of Defendant GVI's liens on the Subject Property is a property tax lien. Title 33, section 2331 of the Virgin Islands Code provides:

> Taxes levied by the Tax Assessor upon real property shall be a first lien against the real property including any improvements that may be thereon or that may be subsequently placed thereon. The lien shall be prior to all other liens on the property whether they attached before or after this lien. However, the lien on each piece or parcel of real estate shall be only for the taxes due on such piece or parcel of real property and improvements thereon.

Although, Defendant GVI and Plaintiff had already stipulated that Defendant GVI's liens are subsequent to Plaintiff's mortgage lien and that Plaintiff's interested created by its mortgage lien in the Subject Property is senior and superior to that of Defendant GVI's interest, "parties cannot stipulate to the law." *Matthew v. Herman*, 56 V.I. 674, 682 (V.I. 2012). Accordingly, the Court will order Defendant GVI to file a notice advising the Court whether either of Defendant GVI's liens on the Subject Property is a property tax lien.

B. Whether Plaintiff is Entitled to Default Judgment Against Defendant Lorenzo and Defendant de Jesus

The Court will first determine whether the facts, as alleged in Plaintiff's complaint, constitute a legitimate cause of action. According to Plaintiff's complaint, Defendant Lorenzo executed and delivered to Plaintiff a promissory note in the amount of $228,000.00 on January 12, 2012. (Compl. ¶ 2) To secure its obligations under the promissory note, Defendant Lorenzo and Defendant de Jesus executed and recorded a mortgage modification agreement with regards to the second priority mortgage in favor of Plaintiff on January 12, 2012. (Id., at ¶¶ 3-5) Plaintiff alleged that, notwithstanding the demands made by Plaintiff, Defendant Lorenzo and Defendant de Jesus failed to pay the principal and interest due pursuant to the note. (Id., at ¶ 5) In support of its allegations, Plaintiff submitted, *inter alia*, copies of executed promissory note, executed second priority mortgage, executed mortgage modification agreement and title search of the Subject Property. Based on the foregoing, the Court finds that these unchallenged facts constitute a legitimate cause of action for debt.

The Court must now determine whether an evidentiary hearing is necessary to establish the amount of damages. In its motion, Plaintiff indicated that Defendant Lorenzo and Defendant de Jesus defaulted in the payment of the principal and interests pursuant to the promissory note, in the total amount of $211, 175.91 as of June 12, 2014—namely: $200,000.00 (principal), plus $10,932.29 (accrued interest thereon to June 12, 2014), plus $243.62 (late charges)—with interest accruing at the rate of $44.44 per diem. Plaintiff submitted the affidavit of Francie C. Cruickshank, commercial relationship officer of Plaintiff, in support of its motion for default judgment against Defendant Lorenzo and Defendant de Jesus. Francie C. Cruickshank reiterated in his affidavit that Defendant Lorenzo and Defendant de Jesus defaulted in the payment of the principal and interests pursuant to the promissory note, in the total amount of $211, 175.91 as of June 12, 2014—

namely: $200,000.00 (principal), plus $10,932.29 (accrued interest thereon to June 12, 2014), plus $243.62 (late charges)—with interest accruing at the rate of $44.44 per diem. These numbers are significantly different from the numbers in Plaintiff's complaint. It is unclear whether the principal amount owed by Defendant Lorenzo and Defendant de Jesus is $204,939.20 as listed in the complaint or $200,000.00 as listed in the motion and whether interest was accruing at the rate of $45.54 per diem as listed in the complaint or $44.44 per diem as listed in the motion. Plaintiff did not submit any other documents it and the affiant, Francie C. Cruickshank, relied on in deriving these numbers. As such, the Court cannot discern the total amount owed by Defendant Lorenzo and Defendant de Jesus under the promissory note without more information from Plaintiff. Accordingly, the Court will grant Plaintiff leave to file supplemental supporting documents. If the Court subsequently determines that Plaintiff's claim for the total amount owed under the promissory note does not qualify as a sum certain, then the Court will schedule an evidentiary hearing at that time. *See King*, 61 V.I. at 346; *Harrigan*, 61 V.I. at 269. Thus, while the Court finds the facts, as alleged in Plaintiff's complaint, constituted a valid cause of action under the Virgin Islands law, the Court will reserve ruling on Plaintiff's motion for default judgment against Defendant Lorenzo and Defendant de Jesus until receipt of supporting documents.

CONCLUSION

Based on the foregoing, the Court will grant Plaintiff's motion for summary judgment as to Defendant USIRS. The Court will order Defendant GVI to file a notice advising the Court whether either of Defendant GVI's liens on the Subject Property is a property tax lien. The Court will also order Plaintiff to submit all supporting documents relied upon by Plaintiff and the affiant, Francie C. Cruickshank, in deriving the total amount owed by Defendant Lorenzo and Defendant de Jesus under the promissory note. At this juncture, the Court will reserve ruling on Plaintiff's motion for summary against Defendant GVI and Plaintiff's motion for default judgment against Defendant Lorenzo and Defendant de Jesus.

DONE and so ORDERED this 27th **day of June, 2017.**

HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

ATTEST:
Estrella H. George
Clerk of the Court

By: ______________
Court Clerk Supervisor

Dated: 6/27/17

CERTIFIED TO BE A TRUE COPY
This 27 day of June 2017
Estrella George
CLERK OF THE COURT
By ______________ Court Clerk