NOT FOR PUBLICATION

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

THE BANK OF NOVA SCOTIA, Plaintiff, vs. **ROYER SOMARU, JEANNETTE SOMARU and THE ESTATE LA REINE HOMEOWNER'S ASSOCIATION, INC.,** Defendants.	**CIVIL NO. 187/1999** **ACTION FOR DEBT AND FORECLOSURE**

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CABRET, P.J.

MEMORANDUM OPINION
(January 14 2002)

THIS MATTER is before the Court on motion by the defendant, Jeannette Phillips (formerly Jeannette Somaru) for release of surplus proceeds from the Marshal's sale of the property which is the subject of this foreclosure action. For the following reasons, the Court holds that Jeannette Phillips ("Phillips") is entitled to the surplus proceeds and will enter an order to that effect.

FACTS AND PROCEDURAL HISTORY

Phillips and Royer Somaru ("Somaru") together held title, as husband and wife, to property described as Plot No. 160 (0.5055 U.S. acre) of Estate La Reine. The Somarus executed a mortgage on the property, in the amount of $15,000, in favor of the plaintiff. That mortgage was recorded on December 3, 1993. The Estate La Reine Homeowner's Association ("Association") also recorded a lien on the property for uncollected assessments on May 12, 1993. That lien also included a provision securing the association's interests for future unpaid assessments.

Phillips and Somaru bought the property in 1986 and were separated in 1995. The couple divorced in 1996. Following the separation, Phillips continued to make payments under the mortgage. Since their separation, Phillips has not been in contact with Somaru, despite efforts to get a current address through his family. In 1998, Phillips was laid off and, consequently, defaulted on the mortgage.

The plaintiff, The Bank of Nova Scotia ("Mortgagee"), filed a foreclosure action, naming as defendants Phillips, Somaru and the Association. The Association was duly served with the complaint, through its vice president Elta George. Somaru was served through publication by order of the Court. Neither Somaru nor the Association answered the complaint or appeared to defend against this action.

The mortgagee obtained a judgment for $7,595.91 on the defendant's' obligations under the mortgage. On June 30, 2000, that property was sold in a Marshal's sale for $9,050.00. The judgment amount was credited to the plaintiff, leaving surplus proceeds in the amount of $1,454.09.

Phillips filed a Motion urging the court to release those proceeds to her. The Court denied that motion without prejudice, and held a hearing to determine the parties' respective priorities to the surplus proceeds. Phillips appeared, along with counsel. Cheryl Harley, treasurer of the Association, appeared on behalf of the association. Somaru did not appear.

DISCUSSION

The proceeds from the foreclosure sale representing the amount of the judgment to satisfy the mortgage with the Bank of Nova Scotia was distributed to the Bank, as provided in Title 28, Section 531 of the Virgin Islands Code. The issue now before the Court is which party, among the defendants, is entitled to take from the surplus proceeds and the order of priority by which such proceeds are to be distributed.

Where a mortgage foreclosure involves competing security interests, the court must first determine the pre-foreclosure priority of each interest and distribute surplus proceeds accordingly. Because any existing lienors entitled to the proceeds take priority over the holders of the equity of redemption – in this case, Phillips and Somaru -- the Court must first decide whether the Association is entitled to take from the proceeds.

Claims of the La Reine Homeowners' Association

The priority of liens is generally determined by the order in which they were recorded. *See, e.g. Saastopankkien Keskus-Osake Pankki (Skopbank) v. Allen-Williams Corp.*, 7 F.Supp.2d 601, 606-608 (D.V.I. 1998); Virgin Islands Code Ann. tit. 28, § 533 (1996). Absent a contract to the contrary, a lien is senior to the foreclosed debt if recorded first in time. *Id.* Whether the association may share in the proceeds from the foreclosure sale depends on whether its lien was created prior to or subsequent to the foreclosed mortgage. The law applicable to this issue provides:

> When the foreclosure sale price exceeds the amount of the mortgage obligation, the surplus is applied to liens and other interests terminated by the foreclosure in order of their priority and the remaining balance, if any, is distributed to the holder of the equity of redemption.

RESTATEMENT (THIRD) OF PROPERTY (Mortgages) § 7.4 (1996). This provision must be read in concert with Section 7.1, which provides:

> A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law. <u>Foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed.</u>

RESTATEMENT § 7.1 (emphasis added). Surplus proceeds may, therefore, be applied only to satisfy junior liens, which are terminated by the foreclosure. *See* RESTATEMENT § 7.4 cmts. b, c. This is because junior liens created subsequent to the mortgage represent the residual value of the equity of redemption. *Id.* at illus. 6; *see also* §§ 7.1, 7.4; RICHARD R. POWELL AND MICHAEL A. WOLF, POWELL ON REAL PROPERTY § 37.41 (2000). Therefore, if there are no junior liens, then the owner of the equity of redemption is entitled to the surplus. POWELL, *supra.* On the other hand, liens senior to the foreclosed lien survive a foreclosure action and continue to bind the subject property even after the foreclosure; in effect, they stand on their own. *See* RESTATEMENT § 7.4 cmt. c.

Because the court may give effect only to junior liens, resolution of the issue presented rests on whether the Association's lien was senior or junior to the mortgage.

The Association's lien was recorded prior to the mortgagee's and provided for that security interest to cover all future assessments. Having been recorded prior to the mortgage lien, the association's lien is senior to mortgage and continues to bind the subject property, notwithstanding the mortgage foreclosure. As a senior lienor, the Association is, therefore, not entitled to proceeds from the sale, which are derived from the interests in the equity.[1]

Claims of Royer Somaru

Having decided that the Association has no claim to the surplus proceeds, the only issue to be decided is who, as between Royer Somaru and Jeanette Phillip, should take the surplus.

By order entered May 30, 2001, the Court ordered all parties claiming a share in the surplus proceeds to appear before the Court to present evidence regarding their share in such proceeds. The Court warned that the failure to appear will effect a waiver of any claim to the proceeds. Somaru failed to appear and is, therefore, barred from asserting any claim to the proceeds. Moreover, the Court further finds that, given the testimony and the facts of this case, Phillips has an equity interest in the property superior to that of Somaru.

Somaru left the couple's home and has maintained no contact with Phillips nor made any effort to protect his interest in the property. From the testimony, it is evident that Somaru left the territory, leaving no forwarding address, and did not contribute toward the mortgage

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1 Moreover, the association failed to appear or defend in this action, after being duly served. Thus, even assuming the association's lien was junior to the mortgage, it would be precluded from taking from the surplus because of its failure to defend its interests after being named in the complaint. *See, e.g.* 28 V.I.C. 532.

payments. Following the couple's separation, Phillips assumed the sole responsibility for the mortgage and continued to pay the mortgage until she was laid off from work and could no longer do so. Somaru has maintained no contact with his ex-wife since the separation and, despite efforts to contact him through family members, Phillips was unable to contact him. Additionally, unlike Phillips, Somaru has failed to appear or otherwise defend in this foreclosure action.

CONCLUSION

Based on the foregoing, the Court will distribute the surplus proceeds from the sale to Jeanette Phillips, because she has established an equitable interest in the property surpassing that of Royer Somaru. Additionally, because the Association's lien predates that of the Mortgagee, it is not entitled to share in the surplus. An appropriate order follows.

MARIA M. CABRET
Presiding Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court

By:__________________
Deputy Clerk
Dated:___________