IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: KINGSHILL

William J. Owens,	)	
	)	
Plaintiff	)	CIVIL NO. 435/1992
	)	
vs.	)	ACTION FOR DEBT AND MORTGAGE FORECLOSURE
	)	
	)	
Roger H. Halterman, United States of America Small Business Association,	)	
	)	
Defendant.	)	

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FINCH, JUDGE

MEMORANDUM OPINION
(December 3 , 1992)

This case is before the Court on plaintiff's, William J. Owens, motions for summary judgment and appointment of receiver. For reasons hereinafter stated, plaintiff's motions shall be denied.

The facts giving rise to plaintiff's motions are relatively simple. There is no dispute that on August 31, 1988, defendant, Roger H. Halterman, executed and delivered to plaintiff a Deferred Purchase Money Order Note (hereinafter

"Note") in the principal sum of $600,000. The Note was secured by a mortgage executed by the defendant covering several plots of real property situated in St. Croix. Plaintiff alleges in his complaint that the defendant has defaulted on his payments pursuant to the Note and mortgage and that the plaintiff has properly exercised his option to accelerate the maturity date on defendant's indebtedness. Defendant denies default as stated by the plaintiff and claims estoppel insomuch as the parties renegotiated the terms and conditions of the Note thereby releasing the defendant from any default prior to May 1992.

The Federal Rules of Civil Procedure, Rule 56(c) and 5 V.I.C. App. I, Rule 56(c) provides, inter alia:

> Motion for summary judgment may be granted where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

In applying this rule, consideration must be given to the pleadings, affidavits, if any, and other documentary submissions of the parties. Id. Summary judgment is not to be granted unless the movant has established its right to a judgment with such clarity as to leave no room for controversy, and that the non-moving party is not entitled to recover under any discernable circumstances. Reed, Wible and Brown v. Mahogany Run Development, 550 F.Supp. 1095, 1098 (D.C.V.I.

1982).

The mission of the summary judgment procedure is to "pierce the pleadings," assess the proof and determine whether a genuine issue exists for trial. Fed.R.Civ.P. 56(e), Advisory Committee's note. The Court interprets this to mean that it must go beyond the pleadings and discover whether any triable issues are present.

In the present case, plaintiff's evidence is insufficient to warrant judgment at such an early stage. As support for his motion, the plaintiff offers a memorandum of law and his affidavit to which is attached a copy of the Note. Neither the plaintiff's memorandum nor his affidavit does anything more than restate the allegations and conclusions contained in the original complaint. Review of the affidavit reveals that it duplicates the complaint almost verbatim. Furthermore, plaintiff's affidavit is unaccompanied by any documentary proof evidencing that the defendant is in default. Even the affidavit of plaintiff's attorney which was submitted as proof of plaintiff's communication with the defendant regarding the alleged default and plaintiff's proper acceleration of the Note is insufficient proof because, among other things, said affidavit is not notarized. The Note, which the plaintiff does provide, establishes only that the defendant is indebted to the plaintiff, a fact that the defendant, himself, does not deny.

Coupled with the fact that defendant denies plaintiff's allegations and has offered documents in support of his defense, plaintiff's evidence does not give the Court enough insight into the merits of the case to conclusively hold that no discernable circumstances exist under which the defendant could prevail. Consequently, the issue of default is a material fact still to be adjudicated and this Court is, therefore, unable to rule as a matter of law that the defendant is in default as proclaimed by the plaintiff. Summary judgment is denied.

According to the terms of the Mortgage, the Plaintiff is entitled to have a receiver appointed upon "the Borrower's failure to cure the default." Mortgage, para. 20 at page 7. This Court having found that a genuine issue of fact must be resolved with respect to default, plaintiff's motion for receivership must be denied.

DATE:

Raymond L. Finch, Judge