STATE OF VERMONT
WINDSOR COUNTY, SS

The Supplemental Needs Trust for the Benefit of Josephina Diers, Richard E. Davis, Jr., Trustee, Plaintiff v. Terrence Jon Diers, Plante & Hanley, P.C., and Any Other Occupants of 340 Steele Road, Sharon, Vermont, Defendants	SUPERIOR COURT Docket No. 688-9-09 Wrcv

OPINION AND ORDER

This foreclosure case is before the court on the parties' various motions, including two for summary judgment and one to amend. Plaintiff is represented by Grant Rees, Esq. Defendant Terrence Jon Diers is represented by William Donahue, Esq. Defendant Plante & Hanley, P.C. is represented by Michael Hanley, Esq.

FACTS

Defendant Terrence Jon Diers is the owner of a certain parcel of property in Sharon, Vermont. On July 8, 2008, Mr. Diers executed a promissory note in favor of Plaintiff, The Supplemental Needs Trust for the Benefit of Josephina Diers, Richard E. Davis, Jr., Trustee (Trust). Under the note, Mr. Diers promised to pay the Trust $320,000, at a rate of 5.625% per year, by September 1, 2009. The note is secured by a mortgage on Mr. Diers's property in Sharon. The mortgage allows for the recovery of reasonable attorney's fees and costs in the event of foreclosure, but it makes no mention of the right to a judicial sale. Mr. Diers has failed to make payments on the note and is therefore in default. The Trust now seeks to strictly foreclose upon the mortgage.

Defendant Plante & Hanley, P.C. (Hanley) also has a mortgage on the Sharon property, subordinate to the Trust's. The junior mortgage is security for a promissory note Mr. Diers executed in favor Hanley. That note required Mr. Diers to pay Hanley $50,000, at a rate of 5.625% per year, by September 1, 2009. The junior mortgage allows for the recovery of reasonable attorney's fees and costs in the event of foreclosure, but it makes no mention of the right to a judicial sale. Mr. Diers has failed to make payments on Hanley's note and is therefore in default. Hanley seeks judicial foreclosure upon its mortgage.

The notes and mortgages in this case stem from an amended settlement order entered by the Washington Superior Court. See *Diers v. Diers*, No. 267-5-05 Wncv (Vt. Super. Ct.

2008). That order required Mr. Diers to pay $320,000, secured by a mortgage deed, to the Trust in order to settle a tort claim. The order stated:

> In the event Mr. Diers is in default of his obligations under the said promissory note or Mortgage Deed or both, the mortgage will be subject to strict foreclosure[,] and Mr. Diers waives his right to invoke a power of sale in the event of foreclosure, which waiver includes, but is not limited to, the rights to a power of sale set forth under 12 V.S.A. § 4531a and V.R.C.P. 80.1(h).

Id. at 3. Mr. Diers signed this stipulated settlement order.

Hanley represented Mr. Diers in the Washington County action, and it received a $50,000 note and a subordinate mortgage in exchange for its services in the case. In order to satisfy the notes, Mr. Diers sought to sell the Sharon property in the year after the Washington settlement order was entered, but he was ultimately unsuccessful, resulting in the instant breaches. He now seeks to invoke a power of sale in this foreclosure action.

DISCUSSION

The parties have filed seven various motions with the court. The court will address each one in turn.

A. Mr. Diers's request for a judicial sale

This motion is the converse of the Trust's motion for strict foreclosure. Mr. Diers's seeks to invoke the power of a judicial sale pursuant to 12 V.S.A. § 4531(a).

> All liens and mortgages affecting real property may, on the written motion of any party to any suit for foreclosure of such liens or mortgages, or at the discretion of the court before which the foreclosure proceedings are pending, be foreclosed by a judicial foreclosure sale, *even if the mortgage does not contain a sale provision* instead of a strict foreclosure.

12 V.S.A. § 4531(a) (Cum. Supp. 2009) (emphasis added). In this case, it is undisputed that the mortgages do not contain sale provisions. However, Mr. Diers asks the court to allow a judicial foreclosure sale at the court's discretion.

At first blush it would appear that § 4531(a) gives the court broad discretion to order or deny a judicial sale. However,

> [n]o decree of strict foreclosure shall be issued absent a finding by the court based on competent evidence presented by the party seeking such decree that there is no substantial value in the property in excess of the mortgage debt found by the court to be due to the plaintiff, plus assessed but unpaid property taxes due on the property.

12 V.S.A. § 4528(b) (Cum. Supp. 2009). Section 4528(b) indicates that the court's power to order a strict foreclosure is limited to only those cases where there is no substantial value in the property in excess of the mortgage debt.

Sections 4528(b) and 4531(a) were enacted as part of a sweeping change to Vermont's foreclosure law in 2005. See 2005, No. 133 (Adj. Sess.). "The foreclosure landscape changed radically after the 2005 amendments." *In re Willette*, 395 B.R. 308, 317 (Bankr. D. Vt. 2008). Whereas strict foreclosure was the normal method of foreclosure in Vermont before 2005, "the 2005 amendments[] signaled the demise of strict foreclosure as the primary means for foreclosing mortgage interests against homestead properties in Vermont." *Id.* at 320. "[W]hen the State Legislature revised Vermont's foreclosure statute, it did so with the express intent of avoiding the potentially inequitable results and title vulnerabilities presented by strict foreclosure." *Id.* at 321.

With this intent in mind, it is unclear whether Mr. Diers's waiver of his right to a power of sale is enforceable in this case. Section 4528(b) is directed at the court's ability to order a strict foreclosure and not Mr. Diers's ability to waive the power of sale. The latter ability is implicitly found in 12 V.S.A. §§ 4531(a) & 4531a(a) (Cum. Supp. 2009). Although Mr. Diers's has the ability to waive his rights under these sections, it is far from clear that he can circumvent the restriction § 4528(b) puts on the court's power. Indeed, it would appear to undermine the legislature's intent if a mortgagor could waive his right to invoke a power of sale because § 4528(b) "appears to be premised on the equitable priorities of shielding mortgagors' equity in homestead properties (for the benefit of both the mortgagor and the mortgagor's creditors) and preventing mortgagees from reaping economic windfalls." *Willette*, 395 B.R. at 321. If Mr. Diers could waive his right to invoke the power of sale, then he would circumvent a law designed not only to protect him but his other creditors, like Hanley.

Regardless of whether Mr. Diers's waiver is effective against the proscription of § 4528(b), this court cannot order a strict foreclosure until the Trust presents competent evidence that there is no substantial value in the property in excess of the mortgage debt. The value of the property is a point of contention among the parties. Without a hearing on the matter, there is insufficient evidence to assess the value of the property at this time. Therefore, at such time as shall be set by the clerk, the parties will present to the court competent evidence of the value of the mortgaged property. At the hearing, counsel for the parties will also advise the court on the effectiveness of Mr. Diers's waiver of his right to judicial sale vis-à-vis the proscription of § 4528(b). Judgment on Mr. Diers's motion is therefore DEFERRED.

B. The Trust's motion for summary judgment

The Trust moves for summary judgment on the issue of foreclosure generally. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In a mortgage foreclosure action, to make out its *prima facie* case, the foreclosing party must prove by a preponderance of the evidence that it

was the owner of the note and mortgage and that the mortgagee defaulted on the note. See *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 57 (Conn. App. Ct. 2002).

The pleadings in this case clearly show that there is no disputed issue of fact. The Trust owns a note and mortgage from Mr. Diers, and he has admitted that he defaulted on the note. Furthermore, Mr. Diers has not "file[d] a verified answer or answer supported by affidavits, disclosing facts alleged to constitute a defense to plaintiff's claim" pursuant to V.R.C.P. 80.1(c). Therefore, the Trust's motion for summary judgment is GRANTED.

C. The Trust's motion to shorten the redemption period

The Trust moves to shorten the redemption period. "If a decree is made foreclosing the right of redemption, the time of redemption shall be six months from the date of the decree unless a shorter time is ordered." 12 V.S.A. § 4528(a) (Cum. Supp. 2009). When considering a motion to shorten the redemption period, the court shall take "into consideration whether there is value in the property in excess of the mortgage debt and debt owed to junior lienholders, any assessed but unpaid property taxes, the condition of the property, and any other equities." *Id.*

"Presumably the court, in order to avoid an unnecessary forfeiture on interests already determined, will require the mortgagee to show that events after the filing of the complaint necessitate a shortened redemption period." Reporter's Notes—1982 Amendment, V.R.C.P. 80.1 (citing *Kelly v. Clement Nat'l Bank*, 111 Vt. 65 (1940)).

In this case, it is not clear whether the value in the property exceeds the mortgage debt. Nor has there been any claim of unpaid property taxes. The Trust has not shown that events after the filing of the complaint necessitate a shortened redemption period. For instance, there is no allegation that Mr. Diers is making waste of the property.

The Trust argues that the court should shorten the redemption period because Mr. Diers does not currently occupy the property. "If a sale is ordered with respect to any property other than farmland or a dwelling house of two units or less when currently occupied by the owner as his . . . principal residence, the redemption period shall be eliminated or reduced by the court to no more than 30 days." 12 V.S.A. § 4531a(a) (Cum. Supp. 2009). However, section 4531a(a) only applies "[w]hen a power of sale is contained in a mortgage . . . ." *Id.* No such provision is contained in the mortgages in this case. Furthermore, even if the property is sold at a judicial sale, the court cannot shorten the redemption period if the mortgaged property is "farmland." Both Hanley and Mr. Diers have submitted unrebutted evidence indicating that the mortgaged property is used as farmland. Therefore, the Trust's motion to shorten the redemption period is DENIED.

D. The Trust's motion for strict foreclosure

For the reasons stated in section (A) above, a decision on the Trust's motion for strict foreclosure is DEFERRED until after a hearing is held on the value of the mortgaged property.

E. Hanley's motion for summary judgment

Hanley also moves for summary judgment on its foreclosure claim against Mr. Diers. As noted above, the pleadings in this case clearly show that there is no disputed issue of fact. Hanley owns a note and junior mortgage from Mr. Diers, and Mr. Diers has admitted that he defaulted on the note. Furthermore, Mr. Diers has not "file[d] a verified answer or answer supported by affidavits, disclosing facts alleged to constitute a defense to [the cross-claim] plaintiff's claim" pursuant to V.R.C.P. 80.1(c). Therefore, Hanley's motion for summary judgment is GRANTED.

F. Hanley's motion for an accounting

Hanley moves for a clerk's accounting. After summary judgment has been entered pursuant to Rule 80.1(c), "the clerk, upon request of the plaintiff accompanied by an affidavit as to the amount due and upon six days' notice to all parties who have appeared, shall proceed to take an accounting and find the amount of principal, interest to date, and costs due." V.R.C.P. 80.1(f). Since summary judgment is being entered against Mr. Diers, Hanley's motion for an accounting is GRANTED.

G. The Trust's motion to amend its complaint

Finally, the Trust moves to amend its complaint to add an additional count for specific performance. Specifically, the Trust alleges that it is entitled to specific performance of the Washington County settlement order in which Mr. Diers's purportedly waived his right to invoke the power sale. A party may amend its pleading by leave of the court, and leave shall be freely given when justice so requires. See V.R.C.P. 15(a). "In general, amendments to the pleadings are freely allowed where there is no prejudice to the parties and when the proposed amendment is not obviously frivolous or dilatory." *Desrochers v. Perrault*, 148 Vt. 491, 493 (1987).

Both Hanley and Mr. Diers oppose amendment. They argue that the Trust cannot compel specific performance of Mr. Diers's waiver because Mr. Diers cannot waive the power of sale as a matter of law under 12 V.S.A. § 4528(b) (Cum. Supp. 2009). Mr. Diers also argues that it would be inequitable to require specific performance in this case because he potentially stands to lose the value of the property in excess of the mortgage debt. See *Quenneville v. Buttolph*, 2003 VT 82, ¶ 11, 175 Vt. 444 ("A grant of the equitable remedy of specific performance is at the trial court's discretion."); see also *Champlain Oil Co. v. Trombley*, 144 Vt. 291, 297 (1984) ("forfeitures are not favored in equity").

These arguments are better addressed to the Trust's motion for strict foreclosure and Mr. Diers's motion for judicial sale. The defendants do not present any argument that the motion to amend should be denied due to "(1) undue delay; (2) bad faith; (3) futility of amendment; [or] (4) prejudice to the opposing party." *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313 (1982) (trial courts should consider the propriety of plaintiff's motion to amend by examining several factors). There is no indication of bad faith, and the amendment is not obviously frivolous or dilatory. The motion was filed shortly after Mr. Diers moved for judicial foreclosure in contravention of his waiver in the settlement order. The instant motion to amend would not

prejudice the defendants because a successful outcome on the amended count for specific performance would be no different than a successful outcome on the Trust's current motion for strict foreclosure. Furthermore, the defendants cannot assert that the amendment is futile because the court has yet to rule on the issue strict foreclosure. Therefore, the Trust's motion to amend is GRANTED.

ORDER

For the reasons stated above,

(1) Mr. Diers's motion for a judicial sale, filed Feb. 3, 2010, is DEFERRED until after a hearing;

(2) The Trust's motion for summary judgment, filed Feb. 11, 2010, is GRANTED;

(3) The Trust's motion to shorten the redemption period, filed Feb. 11, 2010, is DENIED;

(4) The Trust's motion for strict foreclosure, filed Feb. 11, 2010, is DEFERRED until after a hearing;

(5) Hanley's motion for summary judgment, filed Feb. 17, 2010, is GRANTED;

(6) Hanley's motion for a clerk's accounting, filed Feb. 17, 2010, is GRANTED; and

(7) The Trust's motion to amend its complaint, filed Mar. 17, 2010 is GRANTED.

The Clerk shall schedule a hearing on the value of the mortgaged property in relation to the mortgage debt. Should the parties be in agreement as to the value of the property in relation to the mortgage debt they may submit a stipulation regarding the same.

Dated at Woodstock, Vermont this 21 day of May, 2010.

Harold E. Eaton, Jr.
Superior Court Judge