

STATE OF VERMONT  
WINDSOR COUNTY

LEDGEWORKS, INC. d/b/a  
HOME PARTNERS

v.

JOHN GREGSON, ABBIE GREGSON,  
and FINANCIAL FREEDOM SENIOR  
FUNDING CORPORATION

Windsor Superior Court  
Docket No. 446-6-08 Wrcv

**DECISION**

**Plaintiff's Motion for Judgment of Foreclosure, filed 7/31/08  
Defendant's Motion to Amend Answer, filed 8/14/08**

This is a foreclosure action in which plaintiff/contractor LedgeWorks, Inc. seeks foreclosure of a second mortgage on property owned by defendants John Gregson and Abbie Gregson. LedgeWorks is represented by attorneys Michael Hanley and Paul Perkins. The Gregsons are represented by attorney Colin Richardson.

In 2006, the parties entered into a contract for the renovation of the Gregsons' home in West Windsor, Vermont. Work commenced on the project in December 2006, and it appears that the Gregsons paid invoices as they came due until approximately May 2007, at which point they fell behind. The parties subsequently entered into negotiations, which resulted in LedgeWorks agreeing to perform more work and the Gregsons promising to pay \$145,851.45 plus interest to LedgeWorks in monthly installments. The promissory note was secured by a second mortgage on the home.

LedgeWorks now alleges that payments have not been made as promised, and seeks foreclosure of the second mortgage through a complaint filed on June 26, 2008. The Gregsons filed an answer on July 29, 2008 in which they admitted that the promissory note and mortgage deed contained their signatures, and that they had not made payments on the note. The Gregsons denied, however, that the documents had been knowingly or willfully executed, and asserted counterclaims for (1) rescission of the promissory note based on the assertion that the documents were signed under economic duress, and (2) breach of implied warranty of workmanship in connection with the renovations contract. The answer was neither verified nor supported by affidavit as required by V.R.C.P. 80.1(c).

Two days after the answer was filed, LedgeWorks filed a "motion for judgment" (MPR #1). The motion sought a judgment of foreclosure because (1) the answer was neither verified nor supported by an affidavit, therefore was insufficient to avoid the entry of default judgment under V.R.C.P. 80.1(c) and V.R.C.P. 55(a), and (2) the "conclusory and vague assertions of duress and poor workmanship" were not supported by sufficient

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verified assertions to avoid foreclosure. The motion contained no other factual or legal arguments, and was approximately 1½ double-spaced pages in length.

The Gregsons responded by filing an affidavit from Ms. Gregson asserting that the statements in the answer and counterclaims were true. Attorney Richardson also stated that the failure to include the affidavit with the answer was "an oversight," and requested permission to amend the answer under V.R.C.P. 15(a).

Ledgeworks then submitted a very lengthy reply brief consisting of 21 pages of new legal argument and 22 exhibits containing new factual information that had not previously been part of the record. In the reply brief, Ledgeworks contended for the first time that judgment is appropriate on the counterclaims because (1) on the claim for economic duress, the Gregsons had not pleaded any facts showing that Ledgeworks made "some threat to do something harmful which the threatening party has no legal right to do," *Kokoletsos v. Frank Babcock & Son, Inc.*, 149 Vt. 33, 36 (1987), and (2) on the claim for poor workmanship, the Gregsons signed a "settlement agreement" which released Ledgeworks from any claim that it breached the 2006 renovations contract. The Gregsons have not responded to these claims in a surreply.

Gregsons' Motion to Amend Answer

The court will permit the Gregsons to avoid a default judgment by amending their answer and counterclaim to include an affidavit asserting that the statements in the answer are true. Vermont courts maintain a "tradition of liberally allowing amendments to pleadings where there is no prejudice to the other party." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 4. In this case, permitting the amendment is consistent with the policy of providing "maximum opportunity for each claim to be decided on its merits rather than on a procedural technicality." *Bevins v. King*, 143 Vt. 252, 255 (1983); see also *Dejarlais v. Gilman*, 143 Vt. 154, 157 (1983) ("A judgment by default effectively deprives a defendant of an opportunity to have the merits of his position determined through the normal adversary judicial process."). The policies underlying Rules 55(a) and 80.1(c) would not be met by a default judgment in this case, where an attorney has entered an appearance on behalf of the defendants and the defendants have vigorously contested both the existence of the debt and the amount due.

Furthermore, it is not obvious that the amendments would be futile. The Gregsons have not yet responded to the new legal and factual assertions made by Ledgeworks for the first time in its reply brief. It would be unfair for the court to enter a judgment of foreclosure without first permitting the counterclaims and defenses to be tested through the adversarial process. For these reasons, the motion to amend the answer and counterclaim is *granted*.

Ledgeworks' Motion for Judgment of Foreclosure

The "motion for judgment of foreclosure" essentially seeks a default judgment under V.R.C.P. 55(a) and 80.1(c) based upon the Gregsons' filing of an answer that was

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neither verified nor supported by an affidavit. For the reasons described in more detail above, default judgment is not appropriate in this case.

The legal and factual assertions made for the first time in the reply brief are more consistent with a motion for summary judgment filed under V.R.C.P. 56 and 80.1(c). Viewed in this light, Ledgeworks' motion seeks summary judgment on (1) the defense that the note and mortgage were not knowingly and voluntarily entered into by the Gregsons, (2) the counterclaim for rescission based on economic duress, and (3) the counterclaim for poor workmanship. The defense basically amounts to economic duress, and cannot be decided without also deciding the counterclaim for rescission.

The counterclaims in this case challenge the validity of the note and security interest upon which foreclosure is sought, and seek to offset the amount of the debt through a breach-of-contract claim that arises out of the transaction that is the subject matter of the foreclosure action. Under Rule 80.1(d), the adjudication of these claims should come prior to the judgment of foreclosure. See *Retrovest Associates, Inc. v. Bryant*, 153 Vt. 493, 495-96 (1990) (trial court adjudicated mortgagor's counterclaims for duress, consumer fraud, and breach of the construction contract prior to judgment of foreclosure); see also *Merchants Bank v. Lambert*, 151 Vt. 204, 206 (1989) ("[F]oreclosure actions are equitable in nature and therefore it is proper for the court to weigh the equities of the situation."). In light of the significant new legal arguments and factual assertions made for the first time in the reply brief, it would be unfair to grant judgment on the merits without first providing the Gregsons with an opportunity to respond.

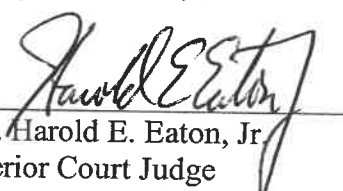
For these reasons, the motion for judgment of foreclosure is *denied* at this time. This decision does not preclude the submission by either party of a motion for summary judgment under V.R.C.P. 56 on the counterclaims, and the court has not offered any opinion on the merits of the legal and factual assertions made by Ledgeworks in its reply brief.

### ORDER

(1) Plaintiff's Motion for Judgment of Foreclosure (MPR #1), filed July 31, 2008, is *denied*; and

(2) Defendants' Motion to Amend Answer and Counterclaim (MPR #2), filed August 14, 2008, is *granted*.

Dated at Woodstock, Vermont this 14 day of October, 2008.

  
Hon. Harold E. Eaton, Jr.  
Superior Court Judge

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