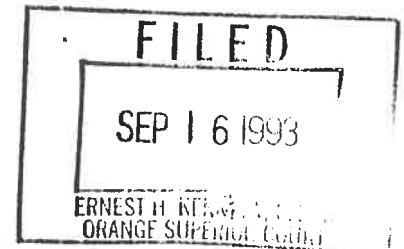


STATE OF VERMONT  
ORANGE COUNTY, SS



The Howard Bank, N.A.

Orange Superior Court

v.

Donald B. Valentine,  
Jr., Lynore A. Bolton,  
New England Rail Service,  
Inc., Grace Valentine, and  
Green Mountain Press, Inc.

Docket No. S-186-92 OeC

Plaintiff's Motion for Entry of Default/ Summary Judgment

This is an action for foreclosure of a residence and related real property which serve as security for a commercial demand note. Defendants Donald Valentine and Lynore Bolton had given plaintiff a mortgage deed on that property as security for the note. Plaintiff claimed that defendants were in default on the note on two grounds: (1) by failing to make timely payments on the note, and (2) by failing to have the bank listed as a named loss payee on the insurance covering the property. Plaintiff seeks foreclosure of the property, and also seeks to recover sums expended by it to see that the property remained fully and properly insured for its protection.

All defendants have defaulted, except for defendant Donald Valentine, who is pro se, and who has filed two counterclaims against the plaintiff bank. The first counterclaim alleges that plaintiff negligently handled a business VISA credit card account held by Mr. Valentine, leading to a loss of several hundred dollars. The second counterclaim alleges that plaintiff's claim that defendants failed to properly insure the mortgaged property is fraudulent. Defendant Donald Valentine has demanded a trial by jury on his counterclaims. Defendant Valentine's answer is not verified as required by V.R.C.P. 80.1.

Plaintiff has moved for entry of default against defendant Donald

Valentine, on grounds that his answer is not verified, or, in the alternative, for summary judgment, on grounds that his answer does not allege facts constituting a defense to plaintiff's claims. This motion is timely under the terms of V.R.C.P. 80.1(c). A hearing was held on this motion on September 7, 1993.

While Defendant's answer is not verified, it was signed by himself in his capacity as a party, and it does set forth his position clearly. Defendant is representing himself pro se. Plaintiff has not been prejudiced. The Court declines to find a default simply because the answer was not notarized. The motion for entry of default is denied and the Court will analyze Defendant's answer in response to Plaintiff's motion for summary judgment.

Defendant Donald Valentine has attempted to raise the defense that the commercial demand note was not truly a demand note, or, in the alternative, that he and the plaintiff, through their agreements and/ or course of conduct, had altered the terms of the original note, such that he was not actually in default under the note. These claims are unavailing. The uncontroverted evidence establishes that the note is indeed a demand note; by the terms of the note itself, any forbearance on the part of the lender does not modify the note or constitute a waiver of the lender's rights. It is undisputed that defendant Valentine was not current on his payments on the note; the fact that the bank may have tolerated such a situation at various previous times, or that interest was current at the time of the answer, does not constitute a defense to the foreclosure, or create a genuine issue as to a material fact. Accordingly, there is no dispute of material fact as to defendant's failure to pay the note under the terms of the note, and plaintiff is entitled to judgment as a matter of law on the foreclosure action based on this default of defendant in meeting

his obligations under the mortgage.

As defendant Donald Valentine is in default on the mortgage for failure to make payments on the note as provided therein, Plaintiff is entitled to foreclose on the property. Defendant's contentions relative to the insurance matters do not furnish a defense to foreclosure where Plaintiff is otherwise entitled to foreclosure. Plaintiff's allegations as to Defendant's default are cumulative and alternative theories of relief, either of which alone would justify the relief of foreclosure under the subject note. Since Plaintiff is entitled to foreclosure for non-payment of the note, the Court need not determine whether the insurance claim provides an independent basis. The issue of the cost of insurance coverage, and the dispute over recovery of expenditures by Plaintiff and Defendant Donald Valentine for insurance cost shall be considered by the court at the accounting stage of the foreclosure proceeding, and a hearing will be scheduled thereon. Such hearing shall be for the purpose of establishing an accounting in accordance with the terms of V.R.C.P. 80.1(f): "If the entry is not by default, an accounting shall be taken at such time and in such manner as the court may order."

Defendant Valentine is not entitled to jury trial on the foreclosure, as foreclosure is a proceeding in the nature of equity, where parties have never been entitled to trial by jury. He is, however, entitled to a trial by jury on his first counterclaim, which involves a claim at law and not in equity. Thus, the court will sever the first counterclaim and set that cause of action for a separate trial under Rule 42(b) in order to preserve Defendant's right to a jury trial on the claim.

On the second counterclaim, the relief requested by Defendant is a full accounting, restitution and punitive damages. The foreclosure proceeding

itself provides the relief of a full accounting and the equivalent of the restitution he seeks, and there is no right to a jury trial on these issues. Defendant has not included in his pleading a factual or legal basis on which his claim for punitive damages rests. Therefore, Defendant has demonstrated no claim under his second counterclaim which provides the basis for a right to a jury trial. In fact, the defendant has not pleaded a second counterclaim at all, but rather a request for an evidentiary accounting hearing in the main foreclosure action, which shall be scheduled and affords no right to a jury trial.

The foreclosure of the subject property must be allowed to proceed, despite the fact that Defendant Valentine's first counterclaim may remain pending as a jury case. A mortgagee's right to protect its interests by foreclosing on the relevant property must not be frustrated by a defendant's desire to bring counterclaims which are not directly connected to defenses to the foreclosure. See Reporter's Notes to 1982 Amendment to V.R.C.P. 80.1.

#### Order

1. Plaintiff's motion for default is DENIED.
2. Partial summary judgment is hereby granted against defendant Donald Valentine and in favor of plaintiff on plaintiff's claim for foreclosure. The defendant, Donald Valentine, shall be entitled to an evidentiary hearing on all accounting issues, including the parties' obligations and liabilities relative to defendant's obligation under the note to maintain insurance on the property. Such hearing shall be scheduled by the clerk of the court at the earliest reasonable opportunity.
3. Defendant Valentine's first counterclaim remains pending despite the above grant of foreclosure, and will be set on the calendar for separate

hearing as a jury case.

4. Defendant Valentine's second counterclaim is DISMISSED.

5. Plaintiff's renewed motion to sever the counterclaims was withdrawn on the record.

Dated this 11th day of September 1993, at Chelsea, Vermont.

Mary Miles Teachout

Mary Miles Teachout

Presiding Judge