STATE OF VERMONT
WINDSOR COUNTY

RICHARD DANIELS	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 49-1-09 Wrcv**
	)	
THE ELKS CLUB OF HARTFORD, VT., INC.,	)	
VERMONT HUMAN RIGHTS COMMISSION,	)	
WALTRAUD KIELLY, MARILYN McMILLAN,	)	
JANE THIBODEAU, MAYLEEN E. CAMERON,	)	
WATTS LAW FIRM PC,	)	
and BEST BINGO SUPPLIES, INC.	)	

DECISION ON PENDING MOTIONS

Plaintiff Richard Daniels seeks foreclosure on two parcels of real property owned by defendant Elks Club of Hartford, Vermont. The complaint alleges that the Elks Club mortgaged the property to Mascoma Savings Bank in 1989 as security for a promissory note in the amount of $700,000. The complaint further alleges that Mascoma Savings Bank assigned the note and mortgage to Mr. Daniels in June 2008 and that the Elks Club has defaulted on its payments under the note.

The proposed foreclosure is opposed by two creditors or groups of creditors with junior security interests in the Elks Club property. The foreclosure is not opposed by the Elks Club itself.

The first group of creditors is comprised of defendants Vermont Human Rights Commission, Waltraud Kielly, Marilyn McMillan, Jane Thibodeau, and Mayleen Cameron. These individuals sued the Elks Club for gender discrimination in 1998 after they were denied membership in the club on account of their gender. The case was eventually tried to a jury after lengthy pre-trial litigation, and the jury returned a plaintiff's verdict in the amount of $20,000. The court subsequently awarded attorneys' fees in the amount of approximately $446,000. The gender discrimination creditors attached the Elks Club property in 2004 in an attempt to secure payment of the judgment and fee award.[1]

The second creditor obtained a more recent judgment against the Elks Club. Defendant Watts Law Firm represented the Elks Club during part of the gender discrimination litigation and subsequently sued the club for nonpayment of attorneys' fees. The law firm obtained a judgment in the amount of approximately $30,000, which is secured by a lien filed in April 2008.

[1] This is an abbreviated account of the timeline of the gender discrimination litigation. The 2004 attachment was really a pre-trial attachment that has been subsequently modified to reflect the jury verdict and subsequent fee award. The fee award itself was issued by the Washington Superior Court within the past few months. None of these timeline issues affect the court's decision, though, since the priority of the gender discrimination creditors' lien has been in place since it was first recorded in 2004.

Both sets of junior creditors oppose foreclosure on the grounds that Mr. Daniels is a longtime member and trustee of the Elks Club who is responsible for managing the club's real property.[2] The contention is that he purchased the mortgage for the purpose of extinguishing the junior security interests and clearing the property title for the benefit of the Elks Club. There are also intimations that Mr. Daniels is actively colluding with either the Elks Club or Mascoma Savings Bank. The junior creditors therefore seek equitable relief from the court that would either void the senior mortgage altogether or at least subordinate the interests of the senior mortgagee to the junior security interests.

It is important to clarify at the outset that the allegations in this case involve two separate and distinct transactions. The first transaction is the June 2008 assignment of the mortgage and promissory note from Mascoma Savings Bank to Mr. Daniels. This transaction involved two parties (Mascoma Savings Bank and Mr. Daniels) and the asset transferred was the secured right to collect payments on a promissory note. The Elks Club was not a party to this transaction.

The second transaction is the purchase of the Elks Club property at the foreclosure sale. The details of this transaction are not yet defined because the foreclosure sale has not yet taken place. The court does not assume anything about the foreclosure sale in this opinion.

There are a number of pending motions in this matter. The court addresses each motion in turn. Plaintiff Richard Daniels is represented by Attorney Nicholas Burke. Defendant Vermont Human Rights Commission is represented by Attorney Robert Appel. Defendants Waltraud Kielly, Marilyn McMillan, Jane Thibodeau, and Mayleen Cameron are represented by Attorney Edwin Hobson. Defendant Watts Law Firm is represented by Attorney Norman Watts.

Plaintiff's Motion for Default Judgment

The first motion before the court is the motion for default judgment filed by Richard Daniels on March 18, 2009 (MPR #3). Mr. Daniels seeks default judgment against defendants Elks Club, Best Bingo Supplies, and Watts Law Firm for failure to file verified answers to the complaint. V.R.C.P. 80.1(c). The court enters default judgment against defendants Elks Club and Best Bingo Supplies. Both defendants accepted service of the complaint but did not file an answer or otherwise contest the merits of the proposed foreclosure.

The court denies the motion for default judgment against defendant Watts Law Firm even though the law firm filed its answer approximately two weeks late. The general policies favoring the resolution of litigation on the merits would not be served by entering default judgment against a defendant who has appeared in the action and is actively defending its position on the merits. *Desjarlais v. Gilman*, 143 Vt. 154, 158–59 (1983). The court is not persuaded that any prejudice arising from the two week delay is significant enough to warrant the sanction of default judgment.

[2] There is a third junior creditor holding a judicial attachment on the property. Defendant Best Bingo Supplies, Inc., filed an attachment on the property in November 2008. The supply company, however, does not oppose the proposed foreclosure.

Plaintiff's Motion for Summary Judgment

The second motion before the court is the motion for summary judgment filed by Mr. Daniels on March 18, 2009 (MPR #3). Mr. Daniels contends that the answer filed by the gender discrimination creditors does not disclose facts sufficient to constitute a defense to foreclosure. He also argues that the counterclaims are barred by the doctrine of collateral estoppel.

Summary judgment is appropriate if the moving party demonstrates that there are no genuine issues of material fact for trial and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). In assessing the motion, the court views all of the evidence in the light most favorable to the non-moving party and grants the non-moving party the benefit of reasonable doubts and inferences. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413. "It is not enough, however, for the non-moving party to 'rest on allegations in the pleadings to rebut credible documentary evidence or affidavits.'" *Id*. (quoting *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981)). Instead, once the moving party has met its initial burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citation omitted).

Here, the following facts are taken as true in light of the amended verified answer filed by the gender discrimination creditors on May 26, 2009, and the amended statement of material facts filed June 4, 2009.[3]

The Elks Club was first incorporated in 1940. The corporate charter was later revoked by the Vermont Secretary of State on June 23, 1989, for failure to file an annual report. The corporate charter remained suspended for this reason for almost twenty years until it was reinstated on May 2, 2008.

Approximately two weeks before the corporate charter was revoked in 1989, the Elks Club borrowed $700,000 from Mascoma Savings Bank. The loan was secured by a mortgage deed on the Elks Club's principal place of business in Hartford, Vermont. The 1989 promissory note was then allegedly paid off and superseded by a 1990 note. The 1990 note was allegedly executed and delivered by the Elks Club after its corporate charter was terminated.

[3] The court grants the motions to amend the answer and counterclaim filed by the gender discrimination creditors on April 17, 2009 (MPR #7) and May 26, 2009 (MPR #10), along with the motion to amend the statement of material facts filed June 4, 2009 (MPR #11). Given the rulings in this opinion there is no prejudice to Mr. Daniels in the granting of the motions. See *Hunters, Anglers & Trappers Ass'n of Vt., Inc. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 17, 181 Vt. 12 (explaining that leave to amend pleadings should be granted "when there is no prejudice to the objecting party, and when the proposed amendment is not obviously frivolous nor made as a dilatory maneuver in bad faith") (citation omitted). The amended answer additionally includes a request for judicial sale of the property pursuant to 12 V.S.A. § 4531a(a). The court allows this amendment because judicial sale is a prudent and reasonable procedure for protecting the interests of the junior secured creditors in this foreclosure action.

The gender discrimination creditors filed suit against the Elks Club in 1998. At the time of the lawsuit and judgment, the Elks Club was an unincorporated association. The gender discrimination creditors obtained an attachment on the Elks Club property in July 2004. The attachment was recorded.

Mascoma Savings Bank subsequently advanced money to the Elks Club. There was a $25,000 advance made in July 2006 and purportedly secured by the mortgage. Mascoma Savings Bank also amended the terms of the promissory note in January 2007 and September 2007 to reduce the amount of the monthly payment from principal and interest to an amount representing interest only. Mascoma Savings Bank was aware of the junior security interest held by the gender discrimination creditors at the time it made the advance and deferrals.

The Elks Club corporate charter was reinstated in May 2008. By June 2008, the Elks Club had fallen behind on its repayment obligations to Mascoma Savings Bank.[4]

Mascoma Savings Bank thereafter assigned the note and mortgage deed to plaintiff Richard Daniels on June 19, 2008. The terms of the transaction required Mr. Daniels to execute a promissory note to Mascoma Savings Bank in the amount of $493,558.35, deliver a collateral assignment of the 1989 Elks Club mortgage to the bank, and post additional cash collateral.

Mr. Daniels now seeks foreclosure on the grounds that the Elks Club has defaulted on its promise of repayment under the promissory note.[5] The gender discrimination creditors raise a number of defenses to foreclosure and arguments seeking equitable relief, as follows.

The first argument is that the mortgage cannot be foreclosed because the deed secures a 1990 note that was executed by an unincorporated association (the corporate charter of the Elks Club having been revoked in 1989 for failure to file an annual report). The gender discrimination creditors contend that the note was invalid because its execution was not authorized by the corporation. However, it is undisputed that the corporate charter was reinstated in 2008. The relevant corporations statute provides that when a corporate charter is reinstated, the reinstatement "shall relate back to and take effect as of the date of the corporation's termination . . . as if the termination had never occurred." 11A V.S.A. § 14.20(b). The corporate charter was therefore effective as a matter of law at the time of the 1990 note. The court accordingly discerns no defect in the alleged 1990 note.

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[4] The gender discrimination creditors contend that more discovery on this issue is needed, but they have not disputed whether payments were being made. Instead, the creditors posit that the Elks Club may not have actually been in default at the time if the advances and deferrals made by Mascoma are either voided or otherwise not counted. For the reasons described in more detail herein, the court concludes that the advances and deferrals were valid transactions authorized by the terms of the 1989 mortgage deed. The court therefore discerns no genuine issue as to the default. Moreover, the court questions whether the gender discrimination creditors have standing to challenge the factual assertions of default in light of the fact that the mortgagor (Elks Club) has admitted default. See *Bischoff v. Bletz*, 2008 VT 16, ¶ 21, 183 Vt. 235 (noting the "general prohibition on a litigant's raising another person's legal rights") (citation omitted).

[5] The gender discrimination creditors contend that more discovery is needed on this issue as well. To the extent that there are any issues as to what has been paid and what remains due, it appears that the issues do not prevent a judgment of foreclosure but rather are matters of accounting. It does not appear that there is a genuine issue for trial as to whether Mr. Daniels is entitled to foreclosure in light of the default, since the non-moving parties have not presented any specific facts showing otherwise.

The second argument is that the assignment of the note and mortgage from Mascoma Savings Bank to Mr. Daniels was an improper collusive transaction. Here, the gender discrimination creditors assert primarily that (1) Mascoma was improperly funding the Elks Club's defense to discrimination litigation and knowingly advancing funds to the club despite awareness of the junior security interest in the property, (2) Mascoma sold the mortgage to Mr. Daniels in an attempt to avoid scrutiny of its actions in making the advances and deferrals, and (3) Mr. Daniels purchased the mortgage with the actual intent of extinguishing the junior security interests. The creditors seek either to void the mortgage altogether or otherwise subordinate the mortgage on equitable grounds, to invalidate the advances and deferrals, or at the very least to subordinate any amounts affected by the advances and deferrals.

The court first addresses the contention, implied here and elsewhere, that the gender discrimination creditors are entitled to equitable consideration of the nature of their judgment. It cannot be gainsaid that ending gender discrimination is a matter of important public policy, but it does not follow that gender discrimination judgments are viewed more favorably than other judgments (such as personal injury judgments compensating a plaintiff for serious bodily harm) in terms of equity. It would not be fair for the court to express preferences for one type of judgment creditor over another.

Second, the court addresses the argument that Mascoma Savings Bank was engaging in an improper practice of advancing funds on the mortgage even though it was aware of the gender discrimination creditors' intervening junior security interest in the property. The general rules are that a mortgage deed may secure repayment of future advances, and that such secured advances are accorded the same priority as the original mortgage even if there has been an intervening attachment. Restatement (Third) of Property (Mortgages) § 2.1(a)–(c). These rules enable ongoing credit relationships between borrowers and lenders such as commercial lines of credit and home equity loans (such ongoing relationships being impractical unless the lender is assured that future disbursements will be accorded priority as of the date of recording). The fairness of the rule lies in the understanding that prospective mortgagees and creditors will examine the existing mortgage deed prior to recording their junior security interest, and will therefore be on fair notice that the obligation secured by the existing mortgage deed may be increased or modified by future advances or deferrals. This general rule and its policy underpinnings have been in place for more than 150 years. See *McDaniels v. Colvin*, 16 Vt. 300, 306 (1844) (explaining that secured future advances have priority over intervening attachments "inasmuch as all such have notice by the record of the incumbrance, and of what it is intended to secure").

Vermont follows a common-law twist on the general rule known as the "optional/obligatory advance doctrine." This doctrine provides in pertinent part that secured future advances are accorded the same priority as the original mortgage unless (1) the future advance is optional on the part of the mortgagee and (2) the mortgagee receives written notice of an intervening security interest prior to the date of the future advance.[6] The doctrine was first stated by *McDaniels* in 1844 and has been carried down by case law and statute since then; it is presently codified at 27 V.S.A. § 410(b)(3)(B).

[6] There are different rules that apply to "obligatory" future advances and also to miscellaneous unrecorded liens such as contractors' liens. Those rules are not relevant here.

The optional/obligatory advance doctrine is intended to assist borrowers in obtaining further secured financing.[7] The premise is that a borrower who has already mortgaged his property is in a vulnerable position if the mortgage deed secures optional future advances, since the original lender might refuse additional advances and new lenders might be unwilling to accept the risk of future advances on the senior mortgage. The solution offered by the optional/obligatory advance doctrine is that the new lender can "cut off" the possibility of future advances on the senior mortgage by so advising the mortgagee in writing. The solution is intended to promote access to credit. Nelson & Whitman, *Rethinking Future Advances: A Brief for the Restatement Approach*, 44 Duke L.J. 657, 657–74 (1995).

Vermont law makes clear that the level of notice required to "cut off" the possibility of future advances is that the junior creditors must provide the mortgagee with written notice of their interest plus "an intimation, at least, that no further advances are to be made on the security of the mortgage as against them." *Patch & Co. v. First National Bank*, 90 Vt. 4, 7–8 (1916). In other words, the deeded security interest in future advances cannot be "cut off" merely by showing that the senior mortgagee had either actual or constructive knowledge of the junior attachment from some source of information other than the junior creditor. The junior creditor must instead prove that it provided direct written notice to the senior mortgagee as to the existence of its junior lien *and* its objection to future advances. "Something more than a mere knowledge in the mortgagee of such subsequent interest of the creditor, etc., is necessary. Notice must be given to [the mortgagee] to prevent any further dealings between him and the mortgagor on the security." *Id*. at 8; accord *In re Blackmore*, 2006 WL 1666194 at *2 (Bankr. D. Vt. Jan. 25, 2006) (explaining rule); *Myers v. LaCasse*, 2003 VT 86A, ¶ 26, 176 Vt. 29 (citing rule in dicta); *Federal Land Bank of Springfield v. Pollender*, 137 Vt. 42, 46 (1979) (same).

In this case, the recorded 1989 mortgage deed expressly provides that the mortgage was intended to secure repayment of the original principal sum plus "repayment of any future advances, with interest thereon." The deed further provides as follows:

> 18. Future Advances. Upon request of BORROWER, LENDER, at LENDER's option prior to release of this Mortgage, may make Future Advances to BORROWER. Such Future Advances, with interest thereon, shall be secured by this Mortgage when evidenced by promissory notes stating that said notes are secured thereby.

This paragraph secures repayment of future advances under the general rule. The provision also states that future advances are optional on the part of the lender, thus bringing the future advances within the scope of the optional/obligatory advance doctrine and 27

[7] Note that the optional/obligatory advance doctrine is not intended to protect junior security interests from future advances. Junior creditors are instead protected by the fact that the original mortgage deed is recorded and available for inspection. In other words, junior creditors are on notice as to the availability or non-availability of future advances in senior mortgages, and are able to tailor their expectations accordingly. See Nelson & Whitman, *Rethinking Future Advance Mortgages: A Brief for the Restatement Approach*, 44 Duke L.J. 657, 657–67 (1995) (discussing history and policies behind rules governing validity and priority of future advances).

V.S.A. § 410(b)(3)(B). Since the deed was recorded, the gender discrimination creditors were on notice of this provision at the time they recorded their attachment. The creditors were therefore on notice that the amount secured by the senior mortgage was subject to future advances. Restatement (Third) of Property (Mortgages) § 2.1 comment c.

The gender discrimination creditors have set forth a number of evidentiary materials showing that officers of Mascoma Savings Bank knew or should have known about the junior attachment at the time of the advances and deferrals. None of the evidence submitted by the creditors shows, however, that *the creditors* provided Mascoma Savings Bank with written notice of the attachment and an objection to future advances—at least not at any time prior to the advances. For this reason, the court concludes that Mascoma Savings Bank was entitled to make the advances, and that the advances are accorded the same priority status as the senior mortgage.

The same reasoning applies to the deferrals (meaning the decision of Mascoma Savings Bank to permit interest-only payments on the note). The gender discrimination creditors were on notice of the provision in the mortgage deed stating that the mortgage was intended to secure the original note "and all renewals, extensions, modifications and replacements of said Note(s)." The bank therefore had authority to make the deferrals. Restatement (Third) of Property (Mortgages) § 7.3 comments c–d. Moreover, there was no reason for the bank to assume that a time extension would be materially prejudicial to the junior secured creditors, since deferrals are generally viewed as more beneficial to the interests of junior lienholders than the alternative, which is foreclosure. *Id*. The court accordingly concludes that Mascoma Savings Bank was entitled as a matter of law to make the advances and deferrals in 2006 and 2007, and that the amounts secured by the advances and deferrals have the same priority as the original mortgage.

It follows that the gender discrimination creditors are not entitled to an inference that Mascoma assigned the mortgage to Mr. Daniels in an attempt to avoid scrutiny of its actions in making the advances and deferrals. Such an inference is not reasonable in light of the court's determination that the advances and deferrals were proper. There is no other evidence in the record demonstrating any collusion between Mascoma Savings Bank and Mr. Daniels with respect to the assignment of the mortgage.[8]

The next argument is that the assignment from Mascoma Savings Bank to Mr. Daniels was a fraudulent transfer of assets. The fraudulent conveyance statutes, however, prohibit *debtors* from transferring their assets for less than reasonably equivalent value or for the purpose of hindering creditors. The transaction at issue here was a transaction between *creditors* involving the secured right to collect money from the debtor. The fraudulent conveyance statutes do not apply to such a transaction.

[8] The court notes the allegation that Mr. Daniels purchased the mortgage with actual intent to extinguish the junior security interests in the property. This allegation does not establish collusion since it does not include any component of malfeasance on the part of Mascoma Savings Bank, and there is no remaining evidence or inference otherwise explaining Mascoma Savings Bank's participation in a collusive transaction. The court will address separately whether the allegation as to Mr. Daniels' intent entitles the junior creditors to equitable relief even if the allegation is assumed to be true.

The next argument is that foreclosure is not permitted because title to the property has merged. The doctrine of merger applies when two consecutive estates in land are held by the same person; application of the doctrine results in merger of the two estates into one. *Fletcher v. Ferry*, 2007 VT 8, ¶ 5, 181 Vt. 294. In the context of mortgages, however, merger occurs only when the mortgage and the equitable title are held by the same person *and* the mortgagee intends for the estates to merge.[9] *Id.*, ¶ 7. Here, even assuming for the sake of argument that the mortgagee (Mr. Daniels) and the mortgagor (Elks Club) are the same person, there is no evidence of intent. Mr. Daniels did not release the mortgage, and there is no other evidence in the record tending to show that he intended to combine the estates. The court accordingly finds no merger.

The gender discrimination creditors argue next that Mr. Daniels is personally liable on the jury verdict and fee award in the underlying gender discrimination lawsuit. The theory of personal liability is not that Mr. Daniels personally participated in the discrimination, but rather that he was a member of an unincorporated association at the time that the association incurred liability. See *Cookson v. Durivage*, 153 Vt. 576, 580 (1990) (explaining that a judgment against a partnership is entitled to preclusive effect in subsequent litigation involving individual partner). In response to the general reinstatement rule described above, see 11A V.S.A. § 14.20(b) (explaining that reinstatements of corporate charters relate back to date of termination "as if the termination had never occurred"), the gender discrimination creditors take the position that the rule does not shield individual members from liability that accrues during the period of charter revocation. See *Kingfield Wood Products, Inc. v. Hagan*, 827 A.2d 619, 624 (R.I. 2003) (explaining that, to discourage fraud and abuse, revocation of corporate charter may result in individual liability notwithstanding subsequent reinstatement).

Not even *Kingsfield Wood Products*, however, supports the far-reaching assertion that *every* member of the Elks Club (there were more than 1,000 members at one point) is personally liable on the gender discrimination judgment. The holding in *Kingsfield Wood Products* and related cases applies to officers and directors rather than to ordinary members of an unincorporated association. See *Pepin v. Donovan*, 581 A.2d 717, 718 (R.I. 1990) (reviewing cases and concluding that directors may be personally liable for financial obligations incurred during period of revocation of corporate charter notwithstanding retroactive reinstatement); accord *Karp v. American Legion Dept. of Connecticut, Inc.*, 1996 WL 457012 at *2 (Conn. Super. June 18, 1996) (holding that individual members of unincorporated association were not personally liable on judgment incurred during period of charter revocation where members were not officers of the club). In this case, even assuming that *Kingsfield Wood Products* is a correct statement of Vermont law, there is no allegation that Mr. Daniels was an officer of the Elks Club at the time of the gender discrimination. (He became a trustee only within the past year or so.) The court accordingly finds no grounds for personal liability.

The final argument involves an appeal to equity. Cf. *Merchants Bank v. Lambert*, 151 Vt. 204, 206 (1989) (explaining that "foreclosure actions are equitable in nature and therefore it is proper for the court to weigh the equities of the situation"). The gender discrimination creditors claim that Mr. Daniels purchased the mortgage with the actual intent

[9] See also Restatement (Third) of Property (Mortgages) § 8.5 (proposing to abolish the doctrine of merger in the context of mortgages since the doctrine's purpose of clarifying title to real property is satisfied by modern recording acts).

of extinguishing the legitimate junior security interests in the property. The creditors therefore seek equitable relief in the nature of (1) a declaration preventing Mr. Daniels from foreclosing entirely or (2) a declaration subordinating the senior mortgage to the interests of the junior lienholders for purposes of foreclosure. For the following reasons, the court concludes that the gender discrimination creditors are not entitled to equitable relief at this time.

First, the factual allegation of intent in the counterclaim is barred by issue preclusion. The relevant background here is as follows. Shortly after learning that Mr. Daniels had purchased the mortgage and intended to foreclose the property, the gender discrimination creditors sought a preliminary and permanent injunction from the Washington Superior Court preventing Mr. Daniels from pursuing a non-judicial foreclosure on the property. Judge Toor held an evidentiary hearing on the motion and issued written findings of fact and conclusions of law denying the motion for injunctive relief. She expressly found that the transaction between Mr. Daniels and the bank was arms-length in nature and that Mr. Daniels "did not enter into this transaction for the purpose of extinguishing junior lienholders." Rather, Mr. Daniels purchased the property for legitimate business reasons.

These written findings preclude new litigation on the issue of Mr. Daniels' intent in purchasing the mortgage. The doctrine of issue preclusion applies where "(1) preclusion is asserted against one who was a party . . . in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair." *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990). Issue preclusion conserves the resources of the courts and litigants by preventing repetitive litigation, promotes the finality of judgments, encourages reliance on judicial decisions, and decreases the chances of inconsistent adjudication. *In re P.J.*, 2009 VT 5, ¶ 8 (mem.).

Here, the parties and issues are the same, and there was a final decision on the merits. The parties expressly agreed at the hearing that the relief sought was a permanent injunction rather than a preliminary injunction. Judge Toor's order was therefore a determination that was "conclusive as opposed to merely tentative in the action in which it was rendered" and the order became final when it was not appealed. *Scott v. City of Newport*, 2004 VT 64, ¶ 12, 177 Vt. 491 (2004) (mem.) (citation omitted); see also Restatement (Second) of Judgments § 13 (explaining that the term "final judgment" "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect").

The gender discrimination creditors argue that applying preclusion here is not fair because they did not have an opportunity for discovery prior to the hearing on injunctive relief. However, the hearing was held at the request and on the motion of the gender discrimination creditors. The creditors are responsible for the existence of the prior litigation, and they now seek another day in court. The creditors furthermore had the opportunity to question Mr. Daniels under oath about his intent in purchasing the mortgage. There is no reason to believe that he would say anything different under oath in the present litigation.

For these reasons, the court concludes that the interest in preventing repetitious litigation of "what is essentially the same dispute" outweighs any interest of the gender discrimination creditors in having another day in court on this issue. *Stevens v. Stearns*, 2003 VT 74, ¶ 13, 175 Vt. 428 (citation omitted). The doctrine of issue preclusion applies here.

In the alternative, the court wishes to make clear that it would not grant the requested equitable relief at this time even if Mr. Daniels purchased the mortgage solely for the purpose of extinguishing the junior security interests. The reason (explained in more detail below) is that, under any analysis, the gender discrimination creditors have not been harmed by the transaction.

The first consideration here is that the mortgage predated the gender discrimination attachment by at least fifteen years. The gender discrimination creditors were on notice of the senior mortgage at the time they recorded their attachment, and therefore knew or should have known that their security interest was subject to a substantial first mortgage. This is not a situation where the mortgage itself was given for purposes of defrauding existing creditors. See, e.g., *Cook v. Cook*, 574 A.2d 1353, 1355 (Me. 1990) (foreclosure was collusive where note and mortgage were given by husband shortly after he initiated divorce proceedings).

The second consideration is that the position of the gender discrimination creditors has not been harmed in any way by the assignment of the mortgage. The gender discrimination creditors have always been second in line to a senior 1989 mortgage. The gender discrimination creditors are still second in line to the same mortgage after the assignment. Nothing has changed but the identity of the mortgagee.

The identity of the mortgagee does not matter under the circumstances presented here. The foreclosure sale will convert the real property into cash for the benefit of the secured creditors. The senior mortgagee will receive only the value of the mortgage (plus associated costs, etc.) but nothing more. The senior mortgagee will not receive any windfall from the sale.[10] Instead, any surplus proceeds will be paid first to the junior lienholders in order of the priority of their liens, and any remainder will be paid to the mortgagor. V.R.C.P. 80.1(j)(1). Thus, no one will receive a windfall unless there is more than enough money to go around.

If there is not enough money to go around, the junior creditors will lose their security interest but they will not lose the right to collect their debt through other means. The junior creditors must simply search out some other asset of the debtor for satisfaction of the debt. Foreclosure is not an all-or-nothing gamble for the junior creditors.

Finally, the judicial foreclosure sale will follow all of the procedural protections imposed by law. The junior lienholders will have an opportunity to redeem the property if they so choose. If there is a sale, it will be publicly noticed and all parties (plus the general public) will have the opportunity to bid on the property. There is no reason to believe at the present time that these procedures will not produce a fair and reasonable price for the property. The procedural protections of foreclosure are a bulwark against fraudulent

[10] The gender discrimination creditors have protested that Mr. Daniels paid either too little or too much to acquire the mortgage from Mascoma Savings Bank but have not set forth any specific facts showing that the purchase price was anything other than the amount remaining due on the senior mortgage.

transfers of property, and militate against departure from the general rule that a mortgagee is entitled to seek foreclosure under applicable state law. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541–46 (1994) (explaining that foreclosure sales generally satisfy bankruptcy requirements for exchanges for reasonably equivalent value).

Thus, even assuming that the mortgagee is acting with the intent to extinguish the junior security interests, all the mortgagee here has the power to do is initiate the process of converting the property into cash. Everything else, including the amount of cash ultimately generated by the sale, remains to be determined.[11]

In the meantime, the junior secured creditors are in exactly the same position as they were in prior to the challenged assignment. The junior creditors have not suffered any harm by virtue of the assignment. There is accordingly no equitable reason why the court should either impose a restraint on alienation or grant a windfall to the junior creditors by applying the doctrine of equitable subordination.[12]

The foregoing rulings of the court establish that there is no genuine issue of material fact that would prevent a judgment of foreclosure. V.R.C.P. 80.1(c). To the extent that there are any arguments raised by the gender discrimination creditors not addressed herein, the court has considered the issues and determined that they do not prevent the entry of summary judgment.

Defendants' Motion for Summary Judgment

The next matter before the court is the motion for summary judgment filed by the gender discrimination creditors on April 17, 2009. They seek a ruling that Mr. Daniels lacks standing to foreclose the mortgage because he is not the present holder of the mortgage. The creditors acknowledge that Mr. Daniels purchased the mortgage from Mascoma Savings Bank on June 19, 2008, but assert that he subsequently reassigned the mortgage back to Mascoma Savings Bank as security for his own promissory note, without reserving for himself the right to foreclose on the property. See *Crestwood Golf Club, Inc. v. Potter*, 493 S.E.2d 826, 833 (S.C. 1997) (reasoning that collateral assignor was real party in interest

[11] The court notes the possibility that equitable and practical considerations may come into play after the foreclosure sale has taken place. For example, there is the equitable rule that a foreclosed mortgagor may not purchase the property at the foreclosure sale of a senior lien and thereby eliminate a junior mortgage or attachment. The same rule prevents collusive arrangements between the foreclosure purchaser and the original mortgagor. See, e.g., Restatement (Third) of Property (Mortgages) § 4.9(a) (suggesting that if the foreclosed mortgagor purchases at the foreclosure sale or otherwise reacquires the property through a collusive transaction, the foreclosed junior liens may be revived); *Old Republic Ins. Co. v. Currie*, 665 A.2d 1153, 1155 (N.J. Super. 1995) (same). Since the foreclosure sale has not yet occurred, however, the court has no occasion to examine the equities and circumstances of the foreclosure sale itself. In the meantime, the court relies upon the general rule that a foreclosure sale conducted in accordance with applicable procedures establishes a fair and reasonable return on the property.

[12] The doctrine of equitable subordination requires proof of both unfair advantage to the creditor *and* harm to the debtor or another creditor. "We hold that the test should be in the conjunctive because of the 'no harm, no foul' rule. For one creditor to have achieved an unfair advantage there must have been a benefit. It must then be shown that such unfair advantage hurt the debtor or its other creditors." *In re Vermont Elec. Generation & Transmission Co-Op., Inc.*, 240 B.R. 476, 485 (Bankr. D. Vt. 1999) (citation omitted). Here, for the reasons stated, there is no harm.

where he expressly reserved the right to enforce the mortgage). The creditors argue that the real plaintiff in interest is Mascoma Savings Bank rather than Mr. Daniels.

The gender discrimination creditors are not entitled to summary judgment on this issue for two reasons. The first is that the appropriate remedy under V.R.C.P. 17(a) is not dismissal of the action but rather a continuance to allow the real plaintiff in interest to come into the action. *South Burlington Mechanical & Elec. Contractors, Inc. v. Graybar Elec. Co., Inc.*, 138 Vt. 580, 581 (1980). Here, Mascoma Savings Bank has already intervened in the action, and it is actively supporting Mr. Daniels' attempts to foreclose on the property. The court is not persuaded that this action lacks an interested plaintiff.

Second, and more importantly, the relevant documents make clear that the transaction was intended to transfer a security interest in the mortgage rather than assign the mortgage itself. The business loan agreement requires Mr. Daniels to transfer a "security interest" in the mortgage to the bank as collateral for his loan. The accompanying assignment instrument is clearly labeled as a "collateral assignment," and it transfers the rights to the mortgage to Mascoma "as collateral security for the full and complete repayment of the note." These provisions unambiguously establish that the parties meant to transfer a security interest in the mortgage rather than the mortgage itself. See *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir. 1984) (holding that assignment of "all [assignor's] rights and interests" was collateral and not total under circumstances presented). Mr. Daniels remains the holder of the note and retains the right to enforce the mortgage through foreclosure unless and until he defaults on his payments to the bank (and the bank chooses to foreclose on the collateral). The gender discrimination creditor's motion for summary judgment is denied.

Plaintiff's Motion for Summary Judgment against Watts Law Firm

The next matter before the court is the motion for summary judgment filed by Mr. Daniels on March 26, 2009 (MPR #4). Mr. Daniels seeks summary judgment against Watts Law Firm for the reason that the answer and counterclaims do not disclose facts sufficient to constitute a defense to foreclosure.

The motion for summary judgment was supported by the allegations in the complaint, which are treated as an affidavit pursuant to V.R.C.P. 80.1(c), as well as a statement of material facts submitted on March 18, 2009, and incorporated into the motion. The law firm did not file a statement opposing the material facts set forth in the motion for summary judgment, and the court therefore assumes those facts to be true. V.R.C.P. 56(c)(2). The facts establish that Mr. Daniels is entitled to a judgment of foreclosure.

Moreover, the law firm has not argued that its material allegations are any different than those raised by the gender discrimination creditors. Instead, it has asked the court to rely on the pleadings filed by the other creditors as grounds for denial of the summary judgment motion. Therefore, for the reasons set forth in more detail above, the court concludes that Mr. Daniels is entitled to summary judgment on the defenses and counterclaims presented by the law firm.

Defendant Watts Law Firm's Motion to Amend Counterclaim

The law firm filed a motion to amend its counterclaims on June 26, 2009 (MPR #15). The motion seeks to add a claim for breach of contract. The premise of the claim is that Mr. Daniels is personally liable on the law firm's judgment and that he has breached the contract by failing to pay the overdue attorneys' fees.

The motion to amend is denied as futile. The law firm has alleged that Mr. Daniels incurred personal liability for the reason that he was a member of an unincorporated association at the time of nonpayment of attorneys fees. For the reasons set forth in more detail above, the court concludes as a matter of law that Mr. Daniels did not incur personal liability by reason of his membership in the Elks Club. See 11A V.S.A. § 14.20(b) (providing that reinstatement of corporate charter relates back to date of revocation). The other amended allegations in the counterclaim duplicate allegations discussed in more detail *supra*. The amended counterclaim therefore does not entitle the law firm to relief even if the factual assertions therein are taken as true. See *Hickory v. Marlang*, 2005 VT 73, ¶¶ 5–6, 178 Vt. 604 (mem.) (futility constitutes grounds for denial of motion to amend pleadings).

Requests for Oral Argument

Mascoma Savings Bank and the gender discrimination creditors requested oral argument on the pending motions on June 24, 2009 (MPR #13) and July 14, 2009 (MPR #16), respectively. The requests for oral argument are denied because the parties did not seek to present evidence and because no further argument was necessary to the resolution of the pending motions. V.R.C.P. 78(b)(2); *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶ 21, 180 Vt. 14.

Other Pending Motions

Mascoma Savings Bank filed a motion for leave to file surreply and a motion to strike or exclude evidence on June 24, 2009 (MPR #14). The motions are denied as moot. The court did not consider the surreply in its rulings herein, and the motion to strike or exclude evidence is moot in light of the foregoing rulings.

Conclusion

After granting the motions to amend the pleadings filed by the gender discrimination creditors and reviewing all of the evidence and allegations in the light most favorable to the junior secured creditors, the court concludes that Mr. Daniels has standing to foreclose the mortgage and that he is entitled as a matter of law to a judgment of foreclosure as against all parties. The matter shall be scheduled for an accounting by the clerk. V.R.C.P. 80.1(f).

ORDER

(1) Mr. Daniels is entitled to a judgment of foreclosure as against all parties. The matter shall be scheduled for an accounting by the clerk.

(2) Plaintiff's Motion for Default Judgment and for Summary Judgment (MPR #3), filed March 18, 2009, is ***granted***.

(3) Plaintiff's Motion for Summary Judgment (MPR #4), filed March 26, 2009, is ***granted***.

(4) Defendant's Motion for Summary Judgment (MPR #6), filed April 17, 2009, is ***denied***.

(5) Defendant's Motion to Amend Answer (MPR #7), filed April 17, 2009, is ***granted***, but the granting of the amendment does not affect Plaintiff's right to a judgment of foreclosure.

(6) Defendant's Motion to Amend Counterclaim (MPR #10), filed May 26, 2009, is ***granted***, including the request for judicial sale of the property, but the granting of the amendment does not affect Plaintiff's right to a judgment of foreclosure.

(7) Defendant's Motion to Amend Opposition to Plaintiff's Statement of Material Facts (MPR #11), filed June 4, 2009, is ***granted***, but the granting of the amendment does not affect Plaintiff's right to a judgment of foreclosure.

(8) Mascoma Savings Bank's Request for Oral Argument (MPR #13), filed June 24, 2009, is ***denied***.

(9) Mascoma Savings Banks' Motion for Leave to File Surreply and Motion to Strike or Exclude Evidence (MPR #14), filed June 24, 2009, are ***denied as moot***.

(10) Defendant Watts Law Firm's Motion to Amend Counterclaim (MPR #15), filed June 26, 2009, is ***denied***.

(11) Defendant's Request for Oral Argument (MPR #16), filed July 14, 2009, is ***denied***.

Dated at Woodstock, Vermont this ____ day of August, 2009.

_____

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