

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

MICHAEL BRYAN,
Plaintiff,
vs.
JAMES BRYAN, KEN BRYAN, and
FIRSTBANK PUERTO RICO,
Defendants.
CASE NO. ST-14-CV-316

MEMORANDUM OPINION

Pending before the Court are Plaintiff's January 29, 2015, Motion for an Order Holding a Party in Contempt for Failure to Obey Subpoena and Defendants' May 31, 2016, Emergency Motion for Stay. Plaintiff's motion will be denied because the circumstances do not warrant a finding of civil contempt, and Defendants' motion will be held in abeyance.

RELEVANT FACTUAL & PROCEDURAL HISTORY

On June 19, 2014, Michael Bryan filed an action for partition of property against his brothers and co-owners, James Bryan and Ken Bryan, and mortgagee FirstBank Puerto Rico. When Defendants did not respond to the Complaint within the time limits imposed by law, Plaintiff moved for an entry of default and default judgment on September 8, 2014. On September 30, 2014, the Acting Clerk of the Superior Court entered default against Defendants, and a default judgment hearing was held on October 23, 2014, after which the Court issued an Entry of Partial Default judgment against Defendants on December 30, 2014. In so doing, the Court concluded, *inter alia*, that "[u]ntil an accounting has been conducted an exact measure of damages is not possible," and directed James Bryan and Ken Bryan to account for all rental proceeds from October 1, 2007, to

the present, all payments on the Note and Mortgage, all payments for maintenance and upkeep of the property, and the reasonable rental value of the apartment used as their residence.¹ "In aid of the accounting procedure" the Court authorized Plaintiff to subpoena from Defendants James Bryan, Ken Bryan, and FirstBank Puerto Rico "all records related to income received, payments made on the Note and Mortgage, and maintenance and upkeep of the . . . [p]roperty."²

Plaintiff submits that on December 29, 2014, subpoenas duces tecum were issued and served on each Defendant and non-party Bank of Nova Scotia for the purposes of obtaining the records relevant to the accounting.³ When Defendants and the Bank of Nova Scotia did not respond, Plaintiff filed a Motion for an Order Holding a Party in Contempt for Failure to Obey Subpoena on January 29, 2015, requesting that the Court hold all Defendants and the Bank of Nova Scotia in contempt for failing to obey the subpoenas duces tecum without adequate excuse and that Plaintiff be reimbursed for the attorney's fees incurred in bringing the motion.⁴ By Orders entered on February 3, 2015, and February 9, 2015, Defendants and the Bank of Nova Scotia were directed to respond to the subpoenas duces tecum by March 10, 2015, or show cause in writing why they should not be held in contempt for failing to comply.

By Order entered on June 26, 2015, the Court granted Defendant FirstBank Puerto Rico's Motion to Set Aside Partial Judgment of Default and permitted FirstBank Puerto Rico to file an Answer to the Complaint. On October 23, 2015, Defendants James Bryan and Ken Bryan also moved to set aside the partial default judgment.⁵ In a Memorandum Opinion issued on April 14,

¹ December 30, 2014, Entry of Partial Default Judgment, pp. 3-4.
² December 30, 2014, Entry of Partial Default Judgment, p. 4.

³ See Pl.'s January 29, 2015, Mot. for an Order Holding a Party in Contempt for Failure to Obey Subpoena.
⁴ Pl.'s January 29, 2015, Mot. for an Order Holding a Party in Contempt for Failure to Obey Subpoena, p. 2.

⁵ On February 27, 2015, without seeking leave of Court, Defendants James Bryan and Ken Bryan filed a *pro se* Counterclaim and Response to the Complaint, which the Court construed as a motion for relief from the partial default judgment. See April 20, 2015, Order.

2016, the Court upheld the entry of partial default judgment against Defendants James Bryan and Ken Bryan, but amended and vacated portions of the December 30, 2014, judgment and issued an Amended Entry of Partial Default Judgment.⁶ The Court noted that Plaintiff's Motion for an Order Holding a Party in Contempt for Failure to Obey Subpoena remained pending, but declined to rule on the motion because the April 14, 2016, decision resolved a variety of outstanding issues and arguments.⁷ The Court then set a new deadline of May 18, 2016, by which Defendants and the Bank of Nova Scotia were to respond to the subpoenas duces tecum or show cause in writing why they should not be held in contempt for failing to comply.⁸

On April 22, 2016, Defendant FirstBank Puerto Rico and the Bank of Nova Scotia filed responses with the Court, advising that they had fully complied with Plaintiff's December 29, 2014, subpoenas duces tecum. Notices of compliance were also filed by Defendant FirstBank Puerto Rico on March 10, 2015, and June 19, 2015. On June 15, 2016, Defendants James Bryan and Ken Bryan filed a Notice of Service of Documents Subpoenaed, informing the Court that they had complied with the December 29, 2014, subpoenas duces tecum by serving documents that were not Bates stamped on Plaintiff's counsel on April 13, 2016. Defendants James Bryan and Ken Bryan submit that on May 20, 2016, the Bates stamped documents were served.⁹ Plaintiff has not opposed the notices of compliance filed by Defendants and the Bank of Nova Scotia.

On May 31, 2016, Defendants James Bryan and Ken Bryan filed an Emergency Motion for Stay that Plaintiff opposed on June 14, 2016.

⁶ See April 14, 2016, Memorandum Opinion; April 18, 2016, Am. Entry Partial Default J.
⁷ April 14, 2016, Memorandum Opinion, p. 22.
⁸ April 14, 2016, Memorandum Opinion, p. 22; April 14, 2016, Order, p. 2.
⁹ See Defs.' James Bryan and Ken Bryan's June 15, 2016, Notice.

DISCUSSION

I. Plaintiff's Motion for an Order Holding a Party in Contempt for Failure to Obey Subpoena.

Under Super. Ct. R. 11(e), "[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." "[W]hether a case is civil or criminal, it is unassailable that the decision to impose sanctions for contempt is wholly within the discretion of the trial court; therefore, unless it has abused its discretion by erroneously applying the law, violating an inherent constitutional protection, or making a clear error as to facts, the denial of the request for contempt will be affirmed."¹⁰ The Supreme Court of the Virgin Islands has thoroughly addressed orders of contempt and observed:

"[T]he Superior Court has both statutory and inherent power to compel obedience to its orders by way of contempt." A contempt sanction may be either civil or criminal in nature. A civil contempt sanction is "intended to enforce the rights of private parties [and] to compel obedience to orders and decrees," whereas the purpose of a criminal contempt sanction is "the vindication of the dignity and authority of the court." "A party may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner." However, to be held in criminal contempt for violating a court order, it must be established, beyond a reasonable doubt, that the contemnor willfully disobeyed the order. To prove willfulness, the contemnor must "know[] or should reasonably be aware that his conduct is wrongful."¹¹

The Supreme Court has also explained that because "the purpose of a civil contempt sanction is to either compel obedience or to compensate for disobedience . . . it is well-established that a non-dischargeable monetary fine assessed in conjunction with a contempt finding may

¹⁰ *Walters v. Parrott*, 58 V.I. 391, 407 (V.I. 2013) (citing *Griener v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 134 (3d Cir. 2009); *In re Rogers*, 56 V.I. 325, 334 (V.I. 2012)).
¹¹ *In the Matter of M.R. & W.V.*, 2016 V.I. Supreme LEXIS 3, *12-13 (V.I. 2016) (citing *In re Meade*, 63 V.I. 681, 684-685 (V.I. 2015)) (internal and other citations omitted).

nevertheless be civil rather than criminal when the court imposes the fine to compensate itself [or a party] for the harm . . . [the Court or a party] suffered from the contemnor's non-compliance."¹² Note, however, that "[a] civil contempt fine cannot be payable to a non-party . . . without losing its compensatory nature . . . [thus,] only parties harmed by . . . [the contemnor's non-compliance are] entitled to compensation" through a civil contempt fine.¹³ In addition, "if the purpose [of the fine] is to compensate rather than to punish[,]. . . a court may hold an individual in civil contempt for past misconduct."¹⁴

Here, at the time the subpoenas duces tecum were issued and Plaintiff's motion was filed, the Court had already rendered an Entry of Partial Default Judgment against all Defendants, none of whom had appeared, responded, or participated in the action in any way.¹⁵ The Bank of Nova Scotia is, of course, a non-party in this action. This Court has held that "defaulted parties should be treated as non-parties for the purposes of discovery."¹⁶ Consequently, although a subpoena under Super. Ct. R. 11¹⁷ "is a vehicle to compel documents from a nonparty, whereas Fed. R. Civ. P. 34¹⁸ is the device to compel production from a litigant[.]"¹⁹ the Court will treat Defendants as

¹² *Meade*, 63 V.I. at 685-687 (citing *Walters v. Walters*, 56 V.I. 471, 479 (V.I. 2012)).
¹³ *Id.* at 687-688 (citing *McDonald's Corp. v. Victory Investments*, 727 F.2d 82, 87 (3d Cir. 1984)).
¹⁴ *Id.* at 686.
¹⁵ Defendants James Bryan and Ken Bryan did not respond to the Complaint or make any appearance before the Court until filing, without leave, their *pro se* Counterclaim and Response to the Complaint on February 27, 2015. The Court did not grant Defendant FirstBank Puerto Rico's June 19, 2015, Motion to Set Aside Partial Judgment of Default as to FirstBank Puerto Rico until June 26, 2015.
¹⁶ *Balbo Corp. v. Enighed Condos, LLC*, 2011 V.I. LEXIS 11, *9 (V.I. Super. Ct. Feb. 7, 2011).
¹⁷ Super. Ct. R. 11(c).
¹⁸ Super. Ct. R. 39(a) instructs that "[d]iscovery in the Superior Court is governed by Federal Rules of Civil Procedure 26 to 37, inclusive." *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2015 V.I. LEXIS 25, *3 (V.I. Super. Ct. Mar. 5, 2015) (citing Super. Ct. R. 39(a)).
¹⁹ *Joseph v. PricewaterhouseCoopers LLC*, 2016 V.I. LEXIS 17, *4 (V.I. Super. Ct. Feb. 29, 2016) (citing Fed. R. Civ. P. 34(a) and (c)). In *Joseph*, the Court stated that "Fed. R. Civ. P. 45 is a vehicle to compel documents from a nonparty, whereas Fed. R. Civ. P. 34 is the device to compel production from a litigant." *Id.* However, Super. Ct. R. 11 provides a procedure for issuing subpoenas in the Superior Court and therefore applies to the exclusion of Fed. R. Civ. P. 45, which is made applicable to Superior Court as a last resort "only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure." *Vanterpool v. Gov't of the Virgin Islands*, 2015 V.I. Supreme LEXIS 23, *16 (V.I. 2015) (citing *Sweeney v. Ombres*,

non-parties when considering Plaintiff's motion. In so doing, the Court will consider Plaintiff's motion as seeking contempt sanctions, as permitted under Super. Ct. R. 11(e), rather than for discovery abuse sanctions as provided under Fed. R. Civ. P. 37.²⁰

Here, the contempt sanctions sought are civil in nature because Plaintiff moves the Court for an Order directing Defendants and the Bank of Nova Scotia to produce the documentation requested in the subpoena duces tecum and for reimbursement of attorney's fees incurred by Plaintiff in bringing the motion, which seeks to compel obedience or compensate for disobedience rather than to vindicate the dignity and authority of the Court. However, Defendants and the Bank of Nova Scotia have since filed notices with the Court representing that they have fully complied with the subpoena duces tecum. While the Court is authorized to impose civil contempt sanctions against Defendants and the Bank of Nova Scotia for their past failure to comply with the subpoenas duces tecum, the Court declines to do so.

In order to impose a civil contempt fine, such as Plaintiff's request for reimbursement of the attorney's fees incurred in bringing the motion, the Court must first find that the three requirements for holding an individual in civil contempt are satisfied. In response to Plaintiff's motion, the Court set two deadlines within which Defendants and the Bank of Nova Scotia were directed to respond to the subpoenas duces tecum or show cause in writing why they should not be held in contempt for failing to comply.²¹ Because the record indicates that Defendants and the

60 V.I. 438, 442 (V.I. 2014)). Further, "reconciling the procedures and requirements of SUPER. CT. R. 11 and FED. R. CIV. P. 45 . . . is not justified because the Supreme Court of the Virgin Islands overruled . . . [this] rationale." *Go Fast Charters LLC v. Texaco Caribbean, Inc.*, 2015 V.I. LEXIS 93, *7-10 n. 17 (V.I. Super. Ct. July 31, 2015) (citing *Terrell v. Coral World*, 55 V.I. 580, 590-91 & n. 12 (V.I. 2011) ("However, this Court has effectively rejected the argument that Superior Court Rule 7 can be invoked to have a federal rule 'supplement' a local rule in such a manner") (citing *Blyden v. People*, 53 V.I. 637, 659 (V.I. 2010), *aff'd sub nom.*, *Virgin Islands v. Blyden*, 437 Fed. Appx. 127 (3d Cir. 2011)).
²⁰ *supra* n. 18.
²¹ See February 3, 2015, and February 9, 2015, and April 18, 2016, Orders.

Bank of Nova Scotia responded to the subpoenas duces tecum within these Court imposed deadlines,²² the Court finds the third requirement, that "the contemnor has not diligently attempted to comply in a reasonable manner[.]" is not satisfied. Moreover, the purpose of a civil contempt sanction is to compensate the harmed party for the disobedience, but Plaintiff has benefitted from Defendants James Bryan and Ken Bryan's lack of participation in these proceedings, as evinced by the Court's recent decision to uphold its prior Entry of Partial Default Judgment against Defendants James Bryan and Ken Bryan due to their failure to respond to the Complaint within the time limits imposed by law.²³

Consequently, the Court declines to hold Defendants and the Bank of Nova Scotia in civil contempt of Court and will not impose civil contempt sanctions against them. Accordingly, Plaintiff's Motion for an Order Holding a Party in Contempt for Failure to Obey Subpoena will be denied.

II. Defendants' Emergency Motion for Stay.

In their Emergency Motion for Stay, Defendants James Bryan and Ken Bryan seek a stay of the portion of the Amended Entry of Partial Default Judgment that directed the Superior Court Marshal to seize the subject property and sell it at public auction because "Defendants have a good faith belief that after the close of discovery and subsequent mediation, there exists a genuine and significant likelihood that this matter can be resolved in such a manner as to permit Defendants to maintain their ownership in the Subject Property while satisfactorily resolving the matter to all of the parties' benefits."²⁴ On the other hand, Plaintiff argues a stay is not warranted because

²² See Defs.' James Bryan and Ken Bryan's June 15, 2016, Notice; Def. FirstBank Puerto Rico's April 22, 2016, March 10, 2015, and June 19, 2015, Notices; Bank of Nova Scotia's April 22, 2016, Notice.
²³ See April 14, 2015, Mem. Op.; April 18, 2016, Am. Entry of Partial Default J.
²⁴ Defs.' Emergency Mot. for Stay, p. 3.

Defendants allege no facts justifying emergency relief and the deadlines for seeking reconsideration or appeal have passed.²⁵ Further, Plaintiff argues "[t]he sale order has been fully litigated and there is no likelihood that Defendant would prevail on any further amendment thereto" and Defendants' "'good faith belief' [that] the case will likely be settled in mediation is not sufficient" to warrant a stay of the sale.²⁶

Defendants' Emergency Motion for Stay is premised on deadlines that have already expired under the current Scheduling Order entered on November 4, 2015.²⁷ However, that discovery plan was made expressly contingent upon the Court relieving Defendants James Bryan and Ken Bryan "from the effects of the Entries of Default and the Partial Default Judgment."²⁸ As discussed, the Court did not set aside its prior entry of default or the Entry of Partial Default Judgment against Defendants James Bryan and Ken Bryan.²⁹ Consequently, it is necessary for the parties to submit an amended proposed discovery plan and proposed Order. Defendants acknowledge the necessity of such in their March 29, 2016, Motion for Status Conference, which Plaintiff joined and did not oppose.³⁰

Nevertheless, without addressing the merits of Defendants' Emergency Motion for Stay, the Court recognizes the uniqueness of the subject property and Defendants' apprehension regarding a public auction, but also notes that, (1) this litigation is based on Plaintiff's action for partition, (2) the Court has already found that a sale of the property is the only viable method for

²⁵ Pl.'s Opp'n to Defs.' Emergency Mot. for Stay, p. 1.
²⁶ *Id.*
²⁷ November 4, 2015, Rule 26 Joint Proposed Scheduling Plan, pp. 1-2 (stating "[t]he Parties will conduct fact discovery to be completed by February 15, 2016 . . . [and a]ny agreed upon mediation shall be completed as soon as the Parties agree, but not later than February 28, 2016").

²⁸ November 4, 2015, Rule 26 Joint Proposed Scheduling Plan, p. 1.
²⁹ See April 14, 2016, Memorandum Opinion; April 18, 2016, Am. Entry Partial Default J.
³⁰ See Pl.'s April 11, 2016, Notice of No Opp'n and Joinder in Defs.' Motion for Status Conference.

partitioning the property, and (3) the mere prospect of settlement is likely inadequate, in and of itself, to warrant a stay of the sale. Notwithstanding, the Court finds the parties must enter into a new Scheduling Order and mediate this matter before the Court can render a determination on Defendants' Emergency Motion for Stay. In the meantime, the Court will hold Defendants' Emergency Motion for Stay in abeyance.

An Order consistent with this Memorandum Opinion shall follow.

Dated: July 22, 2016

ATTEST: Estrella George
Acting Clerk of Court
by: Lori Boynes-Tyson
Court Clerk Supervisor
7/26/16

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY
DATE: 7-26-16

ESTRELLA H. GEORGE
Acting Clerk of the Court

By: Camell A. Clarke
Court Clerk II