IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

CARMEN MARIA PEREZ, Plaintiff, v. VIRILO PEREZ, Defendant.	FAMILY NO. D369/1982 ACTION FOR DIVORCE

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PETERSEN, Judge

MEMORANDUM OPINION
December 17, 1984

This matter is before the Court upon the motions of each party brought, ostensibly, pursuant to 16 V.I.C. Section 110 for modification of the May 27, 1976, divorce decree entered by then Municipal Court Judge Antoine L. Joseph, sitting by designation on the District Court of the Virgin Islands, Division of St. Croix. Also before this Court is the plaintiff's motion for relief from judgment or order brought under Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure.

FACTS

In the divorce decree, Judge Joseph ordered, inter alia, that the defendant, Virilo Perez, transfer all of his right, title and interest in the jointly-owned business property known as "Perez bar" to the plaintiff, Carmen Maria Perez. In consideration of that transfer, the plaintiff was instructed to pay One Hundred Ten ($110.00) Dollars per week to the defendant from the business proceeds. On June 7, 1976, the plaintiff moved for reconsideration of the divorce decree, seeking relief from her obligation to pay One Hundred Ten $110.00) Dollars per week from business proceeds to the defendant because of an alleged lack of profit. However, after two postponements the hearing date on the motion was removed from the court calendar on January 28, 1977.

On February 6, 1980, a motion to modify the divorce decree was filed for the plaintiff by Attorney Albert A. Sheen who had replaced Attorney John P. Burke as the plaintiff's counsel. This motion raised for the first time the district court's alleged lack of jurisdiction to order dissolution of the jointly owned business interest (Perez bar) and to require the plaintiff to pay One Hundred Ten ($110.00)

Dollars per week from business proceeds to the defendant. The motion included a notarized affidavit signed by the plaintiff declaring that she had not known of Attorney Burke's alleged failure to pursue her desired modification of the divorce decree on the grounds of lack of income to pay One Hundred Ten ($110.00) Dollars per week. After these hearing date postponements, the court record indicates that no hearing was held on the plaintiff's motion.

On December 15, 1982, the defendant filed a motion to modify the divorce decree and a motion for an Order to Show Cause why the plaintiff should not be held in contempt for failing to comply with the divorce decree order that she pay One Hundred Ten ($110.00) Dollars per week to the defendant from business proceeds and that she account for rental income due the defendant. An amended motion to show cause was filed by the defendant on December 20, 1982. The case was transferred to the Territorial Court on December 27, 1982, pursuant to the Nunc Pro Tunc Order of District Court Judge David O'Brien. On January 13, 1983, Attorney Deana Bolling was substituted as counsel for the plaintiff, replacing Attorney Sheen. This Court issued to the plaintiff an Order to Show Cause on January 19, 1983. The plaintiff filed a response to the Order to Show Cause and a motion to modify the divorce decree on March 4, 1983, and a trial was held on the same day. This Court reserved ruling on the issues raised at trial until receipt of a memorandum of points and authorities from the plaintiff on the question of whether or not the plaintiff should now be allowed to challenge the jurisdiction of the divorce Court to order dissolution of jointly owned business property in the May 26, 1976 divorce decree. A hearing was held May 27, 1983, on the defendant's motion for modification of the divorce decree and for disposition of the marital real property. An appraisal of that real property was ordered by this Court on June 13, 1983. After failure of the parties to agree on an appraiser, this Court appointed an appraiser on December 28, 1983, pursuant to the motion of the plaintiff for said appointment.

ISSUES

The issues to be resolved by this Court are

(1) whether or not the plaintiff is estopped from challenging the jurisdiction of the Court's 1976 order of a dissolution of jointly-owned business property in its divorce decree, and

(2) whether or not this Court should modify the divorce decree to effect a partition of the jointly-owned marital real property located at #66 Estate Peter's Rest.

DISCUSSION

I. Estoppel to Challenge Subject Matter Jurisdiction

On January 19, 1983, this Court issued to the plaintiff an Order to Show Cause why she should not be held in contempt for, inter alia, her failure to comply with the May 26, 1976, divorce decree that she pay One Hundred Ten ($110.00) Dollars per week to the defendant from business proceeds of the Perez bar. The plaintiff responded by seeking relief from judgment, pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure, alleging that the divorce court lacked subject matter jurisdiction to order the defendant to transfer his right, title and interest to the plaintiff in the previously jointly-owned business property known as "Perez bar" in return for One Hundred Ten ($110.00) Dollars per week in business proceeds. Alternatively, the plaintiff alleges that extraordinary circumstances exist to warrant relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Rule 60(b)(4)

The authority of a Virgin Islands divorce court to distribute real estate upon the dissolution of a marriage may be conferred only by statute. Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983); Dyndul v. Dyndul, 541 F.2d 132, 134 (3d Cir. 1976). This authority is limited to the provisions of 33 V.I.C. Section 2305(d), (1967), which specifies that in a divorce action the court "shall make disposition of the homestead in accordance with the equity of the case." See also, Hodge v. Hodge, 621 F.2d 590, 592 (3d Cir. 1980); Todman v. Todman, 571 F.2d 149, 152 (3d Cir. 1978). In view of this statutorily limited authority, the plaintiff's jurisdictional challenge might have had merit had it been raised on appeal, see Hodge v. Hodge, supra, or by timely motion for relief pursuant to Rule 60(b)(4). However, no appeal was taken. Therefore, since the divorce court made a specific finding of law that it had jurisdiction over the parties and of the subject matter, its decision is res judicata between the parties and not subject to collateral attack in later proceedings. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Hodge v. Hodge, supra. Even though the issue of subject matter jurisdiction was not actually litigated in the original proceeding, the opportunity to litigate existed. Chicot County Drainage District v. Baxter State Bank, supra. As the United States Court of Appeals for the Third Circuit noted in Hodge, supra,

> [U]nless more than the private interests of the litigants is at stake, even the issue of subject matter jurisdiction must at some point be laid to rest. The problem has always been one of balancing judicial concerns for finality

> against those for validity of judgments. Although traditional doctrine emphasized the importance of validity, the modern trend accords substantially greater weight to finality.

See also, Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939) (One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues ...).

Although it has been held in this jurisdiction that a trial court has no discretion in considering a motion predicated upon the voidness of the original judgment, Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978), Rule (60(b) of the Federal Rules of Civil Procedure specifically provides that a motion under subsection (4) "shall be made within a reasonable time." Moreover, it is settled in this jurisdiction that a court should vacate a judgment under Rule 60(b) only in extraordinary circumstances. Boughner v. Secretary of Health, Education and Welfare, supra; FDIC v. Alker, 234 F.2d 113, 117 (3d Cir. 1956). The plaintiff in this case did not challenge the subject matter jurisdiction of the divorce court until three years and eight months after judgment and then only as part of her motion to modify the decree. Moreover, she failed to successfully pursue a decision on this motion until a March 4, 1983, hearing on this Court's January 19, 1983, Order To

Show Cause, some six years and nine months after the initial divorce decree. The plaintiff's May 27, 1983, Memorandum of Points and Authorities raised for the first time her Rule 60(b)(4) and (6) motions. The plaintiff attempts to justify her three year and eight month delay in bringing the jurisdictional challenge by asserting that the failure of her first attorney to successfully pursue before his departure from the island the plaintiff's request that the portion of the divorce decree requiring that she pay to the defendant One Hundred Ten ($110.00) Dollars per week be modified constitutes gross neglect and abandonment of a client. However, the record indicates that the plaintiff requested only that her first attorney seek modification of the decree, which he did twelve days after its issuance, not that he challenge the subject matter jurisdiction of the court to order a dissolution of the business property. The failure of the attorney to challenge the court's subject matter jurisdiction, or to successfully pursue her motion to modify the decree, does not constitute gross neglect or abandonment of a client, see Boughner v. Secretary of Health, Education and Welfare, supra, at 978, nor does it constitute an extraordinary circumstance justifying the delay in bringing this Rule 60(b)(4) motion. Consequently, whether this Court focuses on the three year, eight month, or the six year, eleven month, delay in pursuing a judgment on the issue of subject matter jurisdiction the plaintiff's Rule 60(b)(4) motion for relief must be denied for its untimeliness. See, e.g, Hodge v. Hodge, 15 V.I. 154, 168, motion to amend denied, 15 V.I. 399, D.V.I. 1979), aff'd 621 F.2d 590 (3d Cir. 1980); Altona Corp. v. Smith, 16 V.I. 492, 499 (Terr. Ct. St. T. and J. 1979).

Also relevant to this Court's inquiry are the provisions of Section 69 of the RESTATEMENT OF THE LAW, SECOND ON JUDGMENTS, made applicable by 1 V.I.C. Section 4 (1967) to the rules of decision in the courts of the Virgin Islands in the absence of local laws to the contrary. The RESTATEMENT (SECOND) OF JUDGMENTS Section 69 (1982) states that

> a judgment rendered in a contested action may be avoided [for lack of subject matter jurisdiction] except when relief should be denied in order to protect a justifiable interest in reliance on the judgment.

Comment a to Section 69 further elaborates that subject matter jurisdiction may be subsequently attacked in a contested judgment only when

> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
> (2) Allowing the judgment to

> stand would substantially infringe the authority of another tribunal or other agency of government; or
>
> (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

None of the three criteria specified in Comment a are present in this case. However, notwithstanding the defendant's possible bad faith in failing to meet his maintenance and mortgage obligations under the divorce decree, the defendant was justified in relying on that portion of the judgment requiring the plaintiff to pay him One Hundred Ten ($110.00) Dollars per week from business proceeds as a means of meeting these obligations. Consequently, application of the principles of the RESTATEMENT (SECOND) ON JUDGMENTS provides an additional ground for denying the plaintiff's Rule 60(b)(4) motion for relief.

<u>Rule 60(b)(6)</u>

Relief under Rule 60(b) (6) is an extraordinary remedy and should be granted by a court only upon a showing of exceptional circumstances. <u>Ackerman</u> v. <u>United States</u>, 340

U.S. 193, 202 (1950); Hodge v. Hodge, supra, at 593; Boughner v. Secretary of Health, Education and Welfare, supra, at 978. See also, Davidson v. Dixon, 368 F.Supp. 482, 893-494 (D. Del. 1974), aff'd, 529 F.2d 511 (3d Cir. 1975) (Finality of judgments is the general rule; relief from their operation is the extraordinary exception). In addition, a Rule 60(b)(6) motion should be entertained only when it is based upon a reason other than one which would justify relief under Rule 60(b)(1-5). Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975). Rule 60(b)(6) may not be used as a substitute for appeal. Marshall v. Board of Education, 575 F.2d 417 (3d Cir. 1978); Martinez-McBean v. Government of the Virgin Islands, 562 F.2d 908, 911 (3d Cir. 1977); Hodge v. Hodge supra, at 170. Like Rule 60(b)(4), a Rule 60(b)(6) motion shall be brought "within a reasonable time." The burden is on the party moving for relief to show that absent such relief, extreme or unexpected hardship will result. Bougher v. Secretary of Health, Education and Welfare, supra, at 978; Hodge v. Hodge, supra, at 170.

As previously noted, the plaintiff waited six years and eleven months to bring her Rule 60(b)(6) motion. She has failed to show an extraordinary reason for her delay in bringing this motion before this Court. Moreover, although the plaintiff has testified that her business profits are insufficient for meeting her obligation to pay to the defendant One Hundred Ten ($110.00) Dollars per week, she has made no showing of extreme or unexpected hardship which would justify equitable relief under Rule 60(b)(6).

The provisions of the RESTATEMENT (SECOND) ON JUDGMENTS Section 74 are also germane to this Court's Rule 60(b)(6) inquiry. Section 74 provides that equitable relief from judgment will be denied if

> (1) The person seeking relief failed to exercise reasonable diligence in discovering the ground for relief, or after such discovery was unreasonably dilatory in seeking relief; <u>or</u>
> (2) The application for relief is barred by lapse of time; <u>or</u>;
> (3) Granting the relief will inequitably disturb an interest of reliance on the judgment. When such an interest can be adequately protected by giving the applicant limited or conditional relief, the relief will be shaped accordingly.

As stated previously, although the plaintiff filed a motion to modify the divorce decree twelve days after judgment, she did not challenge the court's subject matter jurisdiction until three years and eight months. Moreover, the plaintiff's Rule 60(b)(6) motion was not presented to this Court until seven years had expired. The plaintiff concedes that she does not know whether or not her first attorney discovered that the divorce court's decree was subject to jurisdictional challenge, yet she argues that his failure to make such a challenge and his alleged non-pursuit of a motion to modify constitutes gross neglect and abandonment. Just as this bare allegation fails to justify relief under Rule 60(b)(4), it does not constitute an extraordinary circumstance justifying the plaintiff's failure to exercise reasonable diligence in discovering and bringing before the Court a ground for relief. In addition, as held earlier, the plaintiff's Rule 60(b)(6) motion is time barred for failure to raise it "within a reasonable time."

Finally, while the actual extent of the defendant's reliance is somewhat questionable in light of his noncompliance with his maintenance, mortgage and custody obligations, the defendant was justified in relying to his detriment on receipt of One Hundred Ten ($110.00) per week in business proceeds from the plaintiff in order to meet his obligations. Even if, as his daughter testified at trial, the defendant permitted the plaintiff to give their daughter the One Hundred Ten ($110.00) per week due him for her schooling, this contribution would have been necessary for only the two years the daughter remained in college, leaving five years of nonpayment by the plaintiff since the divorce decree was issued. The fact that the defendant's reliance upon the judgment was justified is underscored in comment f to Section

74 which notes that a judgment determining property interest or creating rights and obligations concerning future conduct is usually a base of reference for specific future conduct by the parties. Moreover, that prejudice to one who relies upon a judgment may increase with the passage of time is emphasized in comment c to Section 74 which states that

> Undue delay and prejudice to the winner merge into each other. While delay in assertion of a claim does not as such produce adverse consequences, it can induce a sense of repose that itself may become a interest. Correlatively, the likelihood and extent of reliance on a judgment... increases as time passes after the judgment's rendition.

For the aforementioned reasons, the plaintiff's Rule 60(b)(6) motion for relief from judgment is denied.

Eileen Petersen

EILEEN R. PETERSEN
Judge