For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DAWN MONTGOMERY, Appellant/Defendant, v. **VIRGIN GRAND VILLAS ST. JOHN OWNERS' ASSOCIATION,** Appellee/Plaintiff.	)	**S. Ct. Civ. No. 2018-0043** Re: Super. Ct. Civ. No. 155/2015 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: The Honorable Kathleen Mackay

Considered: May 14, 2019
Filed: July 17, 2019

Cite as: 2019 VI 27

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Dawn Montgomery
St. John, U.S.V.I.
Pro se,

Richard H. Dollison, Esq.
Law Offices of Richard H. Dollison, P.C.
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Dawn Montgomery appeals the Superior Court's April 23, 2018 judgment and order of foreclosure in favor of Virgin Grand Villas St. John Owners' Association ("Virgin Grand"). For

the reasons below, we vacate the judgment.

I. BACKGROUND

¶ 2 Montgomery obtained title to an interest in two timeshare units in the Virgin Grand Villas – St. John Condominium on St. John through an administrator's deed dated August 8, 2011. Montgomery owned "the Unit Weeks known as Unit Number 3210/45 and Unit Number 3410/44" (collectively the "Unit Weeks") at the condominium through an administrator's deed dated August 8, 2011, which was recorded as Doc. No. 2012001753 at the Office of the Recorder of Deeds for St. Thomas and St. John on March 14, 2012.[1] (J.A. 238.) Virgin Grand, a condominium association created by "the Declaration of Condominium for Virgin Grand Villas – St. John Condominium," is responsible for managing and keeping up the condominium property in accordance with the Declaration. To that end, Virgin Grand may impose dues on owners for the maintenance and utility costs of common areas. If an owner fails to timely pay these dues, Virgin Grand may assess interest and late fees against the owner's interests for nonpayment and may record a lien against the unit(s)

[1] The full description of the Unit is as follows:

> Undivided one Fifty-first (1/51) (1.96 %) interest in Unit Number 3210/45 and Unit Number 3410/44, Annual Unit Weeks, in the Virgin Grand Villas - St. John Condominium, located in a portion of the real property described as follows: Remainder Parcel No. 479 Estate Chocolate Hole, No. 1 1 Cruz Bay Quarter, St. John, U.S. Virgin Islands being 12.2971 acres, more or less, as shown on PWD No. D9-4224-T88, as more fully described in the Declaration Establishing a Plan for Condominium Ownership of Virgin Grand Villas - St. John Condominium, and amendments and supplements thereto (hereinafter the "Declaration"), and which Weekly Seasonal Ownership Interests and Periods of Use are created by the Third Supplemental Declaration Establishing a Weekly Seasonal Ownership Plan for Condominium Ownership of Virgin Grand Villas- St. John Condominium, and amendments thereto both as recorded in the Office of the Recorder of Deeds of St. Thomas and St. John, United States Virgin Islands; (hereinafter the "Property").

(J.A. 19.)

and foreclose upon the unit(s). Montgomery defaulted on her dues and failed to pay the outstanding amounts upon demand by Virgin Grand. As a result, Virgin Grand recorded a claim of lien against Montgomery's interests in the Unit Weeks at the Office of the Recorder of Deeds for St. Thomas & St. John on June 6, 2014.

¶ 3 By a complaint filed April 1, 2015, Virgin Grand sued Montgomery for the dues she owed. The complaint alleged that as of December 31, 2014, Montgomery owed $2,835.44 and $2,740.44, as to Units 3410/45 and 3210/44 respectively, plus interest and collection costs accruing in accordance with the Declaration.[2]

¶ 4 The parties eventually conferred at a planning meeting and submitted a report of their plan to the Superior Court. The Superior Court approved the report and ordered the parties to mediate by June 30, 2016, as set forth in the plan. The court later amended the report after Montgomery filed an unopposed motion to modify the discovery schedule.

¶ 5 Discovery then took place. Virgin Grand submitted its self-executing disclosures and submitted discovery requests, including interrogatories, to Montgomery. Montgomery made requests for admissions, interrogatories, and production of documents, to which Virgin Grand eventually responded. In the midst of discovery, Montgomery filed a document captioned as a "Motion to Dismiss," which argued that Virgin Grand had not shown the fees to be valid under the bylaws and that it received discovery from Virgin Grand 29 days late. Virgin Grand opposed the motion, arguing that it merely requested an extension of time from Montgomery but Montgomery denied the extension, and that her discovery requests were vague and immaterial. The Superior

[2] As of January 17, 2017, Montgomery owed Virgin Grand a total of $10,994.46, consisting of $9,393.73 in unpaid dues, $354.18 in late fees, $20.00 in non-legal collection, and $1,226.55 in interest, along with interest accruing thereafter, at a rate of $4.70 per diem in accordance with the Declaration as to Unit Numbers 3410/44 and 3210/45, individually. (J.A. 20.)

Court determined that although Montgomery captioned the document as a "motion to dismiss," it was actually a motion for dismissal of discovery that is admissible at trial, and the court denied the motion.

¶ 6 In an apparent effort to comply with 28 V.I.C. § 53l (b) and the scheduling plan, Virgin Grand sent a letter regarding mediation on June 3, 2015, as well as an email on April 15, 2016,[3] which provided Montgomery with contact information for the American Mediation Institution. Montgomery did not respond to either the email or the letter. As a result, Virgin Grand filed a motion to deem mediation waived on June 27, 2016. The Superior Court granted the motion in a November 29, 2016 order, noting that Montgomery did not respond to the motion.

¶ 7 Thereafter, on February 8, 2017, Virgin Grand moved for summary judgment. Montgomery opposed the motion on both the merits and on procedural grounds, including that the matter had not been mediated and that Virgin Grand had failed to comply with the scheduling plan. In an April 23, 2018 judgment and order of foreclosure, the Superior Court found that the unpaid assessment resulted in a statutory lien pursuant to 28 V.I.C. § 922, the Declaration, and the bylaws. Accordingly, it granted Virgin Grand's motion for summary judgment and found that Virgin Grand was entitled to foreclose upon the statutory liens on the Unit Weeks and that 28 V.I.C. § 922 entitles Virgin Grand to an order authorizing a Marshal's Sale. The Superior Court further held that Montgomery was liable to Virgin Grand for $21,988.92 plus interest accruing thereafter at a rate of $4.70 per diem as set forth in the Declaration. Consequently, the court awarded Virgin Grand a judgment of foreclosure, foreclosing Montgomery's interests in the Unit Weeks, and

[3] In its brief, Virgin Grand alleges that it also sent a March 15, 2016 email that "mentioned the need for the parties to engage in mediation." (Appellee's Br. 9.) But the email that Virgin Grand references does not reflect any communication pertaining to mediation. Instead, it focused on scheduling discovery.

authorized a Marshal's Sale of the units. The court also awarded Virgin Grand attorney's fees in the amount of $10,529 for prosecution of the matter and $3,750 for executing the judgment.

¶ 8 On May 30, 2018, the Clerk of the Superior Court transmitted an untimely notice of appeal to this Court. *See* V.I. R. APP. P. 5(a)(11).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 9 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." The Superior Court's April 23, 2018 order constitutes a final order because it disposes of all claims that were presented to that court for adjudication; as such, this Court has jurisdiction over this appeal. *See Percival v. People*, 62 V.I. 477, 483 (V.I. 2015).

¶ 10 We review the Superior Court's factual findings for clear error, and we exercise plenary review over its legal determinations. *Francis v. People*, 56 V.I. 370, 379 (V.I. 2012).

B. Timeliness of Notice of Appeal

¶ 11 Rule 5(a)(1) of the Virgin Island Rules of Appellate Procedure provides that "[i]n a civil case . . . [an appellant's] notice of appeal . . . shall be filed with the Clerk of the Supreme Court within 30 days after the date of entry of the judgment or order appealed from[.]" Thus, to timely appeal from the April 23, 2018 order, Rule 5(a)(1) required Montgomery to file a notice of appeal with this Court on or before May 23, 2018. However, Montgomery did not file her notice of appeal with this Court by that deadline; rather, this Court received her notice of appeal after it was transmitted to us by the Clerk of the Superior Court on May 30, 2018. Rule 5(a)(11) further

provides that

> [i]f a notice of appeal is mistakenly filed in the Superior Court, the Clerk of the Superior Court shall note thereon the date when the Clerk received the notice and transmit it to the Clerk of the Supreme Court. Such notice shall be deemed filed in the Supreme Court on the date so noted by the Clerk of the Superior Court.

After receiving the notice of appeal from the Clerk of the Superior Court on May 30, 2018, this Court noted in a June 18, 2018 order that it was unclear as to when the notice of appeal had been mistakenly filed in the Superior Court, in that the document on its face stated that it had been filed on May 22, 2018, but the Superior Court's timestamp indicated that it had been received on May 30, 2018. Because Montgomery's appeal would be timely if filed on May 22, 2018 (as the date fell before the May 23, 2018 deadline), but untimely if filed on May 30, 2018, this Court's June 18, 2018 order directed both Montgomery and the Clerk of the Superior Court to verify the date and manner in which Montgomery filed her notice of appeal.

¶ 12 Montgomery responded to our June 18, 2018 order on June 25, 2018. In her response, Montgomery stated that she had attempted to file her notice of appeal with the traffic clerk at the Virgin Islands Bureau of Motor Vehicles at St. John during lunch but an employee told her that the office was closed for business. According to Montgomery, she returned to the Post Office later that day to mail the notice of appeal to the Office of the Clerk of the Superior Court on St. Thomas. She attached with her response a copy of the pertinent United States Postal Service verifications indicating that the document had been mailed at 2:39 p.m. on May 22, 2018, and delivered on May 25, 2018. In its July 13, 2018 response, the Clerk of the Superior Court advised that because there was a May 30, 2018 date-stamp on the notice of appeal, that is the date that the court actually received it.

¶ 13 Here, it is clear that Montgomery did not file her notice of appeal on May 22, 2018. While

Montgomery claims that she attempted to file her notice of appeal on the date with the Virgin Islands Bureau of Motor Vehicles, the Rules of Appellate Procedure do not provide for an exception for the mistaken filing of a notice of appeal with an Executive Branch agency.[4] Rather, Rule 5 only creates an exception for when a notice of appeal is actually mistakenly timely filed in the *Superior Court*. V.I. R. APP. P. 5(a)(11) (emphasis added). That Montgomery mailed her notice of appeal to the Superior Court on May 22, 2018, is also irrelevant, for a paper is filed on the date it is actually delivered to the Clerk of the Superior Court. [5] *See* V.I. R. CIV. P. 5(d)(2). And while it is arguable that the notice of appeal should be deemed filed on May 25, 2018—the date the United States Postal Service verification identifies as the delivery date—rather than on May 30, 2018, this too is ultimately irrelevant, since her notice of appeal would nonetheless be untimely, as May 25, 2018 is still after the May 23, 2018 appeal deadline.

¶ 14 This, however, does not end our inquiry, for Rule 5(a)(8) provides that if a notice of appeal is filed within 30 days after the time to file a notice of appeal has expired, either this Court or the Superior Court may nevertheless accept the untimely appeal if the appellant has made "a showing of excusable neglect or good cause." As this Court has previously explained, "excusable neglect" and "good cause" are "essentially synonyms." *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700,

[4] We recognize that the Clerk of the Superior Court may occasionally station a clerk at the Bureau of Motor Vehicles for the purpose of accepting payments for traffic tickets to release traffic liens on vehicles and accept filings. This, however, does not transform the Bureau of Motor Vehicles into a satellite location at which documents, and notices of appeal in particular, may be filed in any and all cases.

[5] A limited exception to this rule is codified in Rule 5(c) of the Virgin Islands Rules of Appellate Procedure, which adopts a "prisoner's mailbox rule" that provides that a notice of appeal filed by an inmate confined in an institution "is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing." Because Montgomery was not incarcerated when she attempted to file her notice of appeal, this exception does not apply to this case.

713 (V.I. 2010). The determination "is at bottom an equitable one where the court should take into account 'all relevant circumstances surrounding [the] omission . . . includ[ing] . . . the danger of prejudice [to the opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Brown v. People*, 49 V.I. 378, 383 (V.I. 2008) (quoting *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993)) (internal quotation marks omitted). However, "the reason for the delay is the most important of [these] factors," and "[e]ven where there is no prejudice, impact on judicial proceedings, or trace of bad faith, the favorable juxtaposition of these factors does not excuse the delay where the proffered reason is insufficient." *In re Sheedy*, 875 F.3d 740, 744 (1st Cir. 2017) (collecting cases) (internal quotation marks omitted).

¶ 15 We conclude that Montgomery failed to act reasonably when she attempted to file a notice of appeal with the Bureau of Motor Vehicles. While Montgomery is a *pro se* litigant entitled to additional leniency, "that leniency is not a license [excusing non-compliance] with relevant rules of procedural and substantive law." *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 823 (V.I. 2017) (quoting *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012)). That is particularly true in this case, where even the most cursory reading of the Virgin Islands Rules of Appellate Procedure—which are freely available on this Court's website—would reveal the proper place to file a notice of appeal, and, of course, an appeal from any judgment entered by the Superior Court must be filed with this Court, the only appellate court in the Virgin Islands.

¶ 16 Likewise, Montgomery also did not act reasonably when she mailed her notice of appeal to the Superior Court at 2:39 p.m. on May 22, 2018. Because the notice of appeal was due the next day, it was unreasonable for Montgomery to assume that the United States Postal Service would

deliver it in such a short period. *See Matias-Antolin v. Mukasey*, 271 Fed. Appx. 606, 606 (9th Cir. 2008) (holding that litigant failed to establish circumstances to excuse the late filing of an appeal when he relied on the United States Postal Service's "guarantee of next-day delivery" when he mailed the notice of appeal the day before it was due); *See In re Genesis Health Ventures, Inc.*, 248 Fed. Appx. 475, 476 (3d Cir. 2007) ("It was [the appellant] who chose to assume the risk of mailing the notice of appeal by certified first-class mail on a Friday afternoon knowing that the deadline was the following Monday."). Significantly, the delay was entirely within Montgomery's control. Even though Montgomery had 30 days to file her notice of appeal, she inexplicably chose to wait until the day before the filing deadline to mail the document. *Id.* at 477 ("[The appellant] chose to mail his notice of appeal essentially at the eleventh hour. Although he had other reasonable options available to him, such as mailing the notice earlier in the week, or using a commercial express carrier, he took a chance on the regular mail service and lost."). Moreover, we take judicial notice of the fact that nothing included in the record precluded Montgomery from simply filing the document in-person on either the afternoon of May 22, 2018, or any time during business hours on May 23, 2018, given that travel by ferry between St. John and St. Thomas is a regular and normal part of daily activity for residents of St. John. *See MKB Constructors v. American Zurich Ins. Co.*, 83 F.Supp.3d 1078, 1096 (W.D. Wash. 2015) (taking judicial notice "that travel by ferry is a regular and normal part of daily commuting in the Puget Sound area").

¶ 17 Ordinarily, this Court would dismiss this appeal as untimely, given that Montgomery has failed to establish good cause or excusable neglect for her failure to file a notice of appeal by the May 23, 2018 deadline. However, we decline to do so because Virgin Grand has waived its right to challenge the timeliness of Montgomery's appeal. The time to file a notice of appeal from a final judgment is not a jurisdictional requirement, but rather a claims-processing rule that is subject

to waiver. *See Vazquez v. Vazquez*, 54 V.I. 485, 489–90 (V.I. 2010); *see also Gov't of the V.I. v. Crooke*, 54 V.I. 237, 253–54 (V.I. 2010) ("It is well established that time limits set exclusively by court rules are mere claims-processing rules which do not affect a court's subject matter jurisdiction even if they may result in dismissal if violated."). Thus, an appellee may waive a defect in the timeliness of a notice of appeal if it fails to raise the issue at the earliest opportunity. *Bryan v. Gov't of the V.I.*, 56 V.I. 451, 456 (V.I. 2012).

¶ 18 Here, Virgin Grand never asserted that Montgomery filed an untimely notice of appeal. Virgin Grand did not respond to this Court's June 18, 2018 order identifying the potential timeliness issue, nor did it respond to Montgomery's June 25, 2018 filing in which she conceded that the notice of appeal had been mailed—rather than delivered—on May 22, 2018. Nor did Virgin Grand raise the timeliness issue in response to the Clerk of the Superior Court's July 13, 2018 filing stating that the notice of appeal had not been received until May 30, 2018. And while Virgin Grand filed a motion to dismiss this appeal on October 19, 2018, that motion never addressed the timeliness of Montgomery's notice of appeal but was instead predicated solely on Montgomery's failure to timely file her brief.[6] And, perhaps most significantly, Virgin Grand expressly states in its appellate brief that Montgomery filed her notice of appeal on May 22, 2018. (Appellee's Br. 5.) Therefore, under this extremely unusual set of circumstances—Virgin Grand conceding that Montgomery filed her notice of appeal on May 22, 2018, despite this Court, the Superior Court, and even Montgomery herself recognizing that she did not—we conclude that Virgin Grand has waived the application of Rule 5(a)(1), and thus we will address the merits of

[6] In a November 29, 2018 order, this Court denied Virgin Grand's motion to dismiss, and instead granted a motion for extension of time that Montgomery had previously filed on September 17, 2018.

Montgomery's appeal. *See Bryan*, 56 V.I. at 456.

C. Summary Judgment

¶ 19 In her appellate brief, Montgomery asserts that the Superior Court erred when it granted Virgin Grand's motion for summary judgment because that motion had been untimely filed. Specifically, Montgomery asserts that Virgin Grand was required to file its motion for summary judgment no later than 30 days after the close of discovery but did not do so. Virgin Grand does not respond to this argument, and instead only argues that summary judgment was warranted on the merits.

¶ 20 We agree with Montgomery that Virgin Grand filed an untimely motion for summary judgment. Because it was filed before the March 31, 2017 effective date of the Virgin Islands Rules of Civil Procedure, Virgin Grand's February 8, 2017 summary judgment motion was governed by Federal Rule of Civil Procedure 56(b), made applicable through former Superior Court Rule 7. Federal Rule 56(b) expressly provides that "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery," unless a different deadline is established by the court.[7]

¶ 21 Here, the Superior Court's final scheduling order identified March 31, 2016, as the deadline

[7] Rule 56(b) of the Virgin Islands Rules of Civil Procedure contains similar language. *See* V.I. R. CIV. P. 56 (b) ("Unless a different time is set by the court, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.")

In this case, Virgin Grand did not file a motion to extend the discovery deadline or the deadline for dispositive motions past the mediation deadline, and the Superior Court did not modify its prior scheduling order *sua sponte*. But because of the cost and time savings that will result if a matter is settled through mediation, we agree that the better practice is to issue and, if necessary, modify scheduling orders so that the deadline to file a summary judgment motion is after the mediation deadline. *See, e.g.*, *United States v. Brink's Co.*, 2:13-CV-873, 2016 WL 1365989, at *2 (S.D. Ohio Apr. 6, 2016) (unpublished); *Mueller v. Chugach Fed. Sols., Inc.*, CV 12-S-624-NE, 2015 WL 12720293, at *1 (N.D. Ala. Jan. 26, 2015) (unpublished).

for the close of all discovery. Consequently, for it to be timely filed, Virgin Grand was required to file a motion for summary judgment on or before April 30, 2016. However, Virgin Grand did not do so; instead, it filed its motion for summary judgment nearly a year later, on February 8, 2017, without requesting leave to file the motion out of time or otherwise attempting to establish good cause or excusable neglect for the late filing. Thus, rather than consider the motion on the merits, the Superior Court should have denied the motion as untimely. *See Martinez v. Colombian Emeralds*, 51 V.I. 174, 191 (V.I. 2009) (holding that an untimely motion to dismiss was "not properly before the trial court and should not have been considered"); *see also Brill v. City of New York*, 814 N.E.2d 431, 435 (N.Y. 2004) (establishing a bright-line rule that untimely summary judgment motions will be denied when filed without leave of court or good cause shown, because holding otherwise would "threaten[] the integrity of our judicial system" by effectively "obliterat[ing]" such filing deadlines). Accordingly, we vacate the April 23, 2018 judgment and order of foreclosure, and remand the case to the Superior Court to proceed to trial.

D. Good-Faith Mediation Requirement

¶ 22 Having vacated the April 23, 2018 judgment and order, we need not decide the numerous other issues that Montgomery has raised in her appellate brief. However, in her brief Montgomery also challenges the Superior Court's November 29, 2016 order granting Virgin Grand's motion to deem mediation waived. Because this is an issue that will undoubtedly recur on remand, we exercise our discretion to address it as part of this appeal in the interests of judicial economy. *Hard Rock Café v. Lee*, 54 V.I. 622, 640 (V.I. 2011).

Title 28, section 531(b) of the Virgin Islands Code provides that:

> Prior to the entry of any judgment of foreclosure, the parties must provide the Court with evidence that a good faith effort was made to settle the matter through mediation. The type and form of the mediation report shall be prescribed by the

Superior Court of the Virgin Islands.

In both her trial filings and her appellate brief, Montgomery maintains that Virgin Grand did not make a good faith effort to settle the matter through mediation, in that Virgin Grand had simply provided her with contact information for the American Mediation Institute and apparently expected her to incur the costs of mediation. (J.A. 196-97; Appellant's Br. 16-17.)

¶ 23 We agree that Virgin Grand has failed to comply with the statutory mediation requirement. "Section 531(b) does not simply require that the parties go through the motions of the mediation procedure; rather, it requires 'a good faith effort' on the part of the parties to settle through mediation." *Webster v. FirstBank P.R.*, 66 V.I. 514, 519 (V.I. 2017). In its November 29, 2016 order granting Virgin Grand's motion to deem mediation waived, the Superior Court held as follows:

> The Court is satisfied that Plaintiff has made sufficient effort to coordinate mediation with the Defendant and Defendant failed to respond to the inquiries. Therefore, the Court finds Plaintiff made a good faith effort to schedule mediation and Defendant did not respond. Therefore, the Court finds that Defendant has waived her right to have this dispute mediated.

(J.A. 182.) In other words, the Superior Court apparently based its decision entirely on the fact that Virgin Grand made inquiries to Montgomery to which she did not respond.

¶ 24 We disagree with the implication that the number of communications initiated by the plaintiff or the failure of the defendant to respond, standing alone, are the decisive factors with respect to determining whether the parties have complied with § 541(b). "[I]t is the content and not the quantity . . . that may indicate the existence or absence of good faith." *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 31 (S.D.N.Y. 1984).

¶ 25 An examination of the substance of the inquiries Virgin Grand directed to Montgomery

reflects that Virgin Grand's actions in sending correspondences did not amount to good faith efforts to settle the matter through mediation. After it filed its April 1, 2015 complaint, Virgin Grand sent a letter dated June 3, 2015 to Montgomery, which read, in pertinent part, as follows:

> Dear Ms. Montgomery:
>
> This letter is an attempt to collect a debt. Any information obtained as a result of or in connection with this communication will be used for the purposes of debt collection. Please note that the parties in the above referenced action need to make a good faith effort to mediate this matter. V.I. Code Ann. tit. 28 § 531(b) states:
>
> > Prior to the entry of any judgment of foreclosure, the parties must provide the Court with evidence that a good faith effort was made to settle the matter through mediation. The type and form of the mediation report shall be prescribed by the Superior Court of the Virgin Islands.
>
> Accordingly, please contact the undersigned or Nancy Clark, President, American Mediation Institute, Inc. at [her phone number and email address] to schedule mediation and make arrangements for paying the deposit for the mediation fee. If you have not contacted her or me within fourteen (14) days from receipt of this letter, we will assume that you do not want to participate in mediation.
>
> Please give this matter your urgent attention.

(J.A. 176.) One year later, Virgin Grand attempted to schedule mediation through an April 12, 2016 email from its counsel to Montgomery, which read:

> Good Afternoon Ms. Montgomery:
>
> Please note that the parties in the above referenced action need to make a good faith effort to mediate this matter. V.I. Code Ann. tit. 28 § 531(b) states:
>
> > Prior to the entry of any judgment of foreclosure, the parties must provide the Court with evidence that a good faith effort was made to settle the matter through mediation. The type and form of the mediation report shall be prescribed by the Superior Court of the Virgin Islands.
>
> We propose that either George Ethridge or Henry C. Smock act as mediator. Both are on the list of mediators accepted by the Court. Accordingly, please contact the undersigned or Nancy Clark, President, American Mediation Institute, Inc. at [her phone number or email address] to schedule mediation and make arrangements for

> paying the deposit for the mediation fee.
>
> If you have not contacted her or me within ten (10) days from receipt of this letter, we will assume that you do not want to participate in mediation. Thank you for your attention to this matter.

(J.A. 178.)

¶ 26 Together, the letter and the email do not meet the good faith requirement under § 541(b). The correspondences directed Montgomery to contact a private company to schedule the mediation and "make arrangements for paying the deposit for the mediation fee" with that company.[8] Additionally, the email required Montgomery to select a mediator. But there is no basis in Virgin Islands law for any of these requests. At all pertinent times, former Superior Court Rule 40 governed the procedure for conducting civil mediations. This rule did not place the burden of selecting a mediator or scheduling mediation entirely on the defendant, nor did it require that the mediation be conducted by a private company. Moreover, there is nothing in § 541(b) or any other applicable law that requires the *defendant* to pay for the costs of mediation. On the contrary, former Superior Court Rule 40 provided that "[t]he Mediator shall be compensated by the parties," and that "[e]ach party shall pay one-half or such other proportionate share of the total charges of the mediator as may be agreed upon," unless a different fee arrangement is ordered by the court, such as "by charging reduced fees or no fees to an indigent party." Former SUPER. CT. R. 40(e)(7) (repealed eff. Mar. 31, 2017).

¶ 27 Perhaps even more significantly, the June 3, 2015 letter opens by stating that the "letter is an attempt to collect a debt" and that "[a]ny information obtained as a result of or in connection

[8] While we take judicial notice that the American Mediation Institute is a well-known mediation entity in the legal community, laypersons such as Montgomery may be unfamiliar with the organization.

with this communication will be used for the purpose of debt collection." But this statement is contrary to both former Rule 40, as well as then-applicable Federal Rule of Evidence 408,[9] both of which expressly provide that communications in the course of mediation, as well as settlement discussions generally, are completely inadmissible. *See* former SUPER. CT. R. 40(d)(5) ("Any or all communications, written or oral, made in the course of a mediation proceeding, other than an executed settlement agreement, shall be inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise."); FED. R. EVID. 408(a) ("Evidence of the following is not admissible . . . (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim . . . .").

¶ 28 Given these significant misrepresentations, we cannot conclude that either the June 3, 2015 letter or the April 12, 2016 email represents good faith efforts by Virgin Grand to settle the matter through mediation. On the contrary, the representations appear calculated to discourage Montgomery from agreeing to mediate the matter, in that they incorrectly convey that Montgomery was responsible for paying the costs of a mediation conducted by a private company in which any communications she made would be used against her.[10] Thus, it is no wonder that Montgomery

[9] Prior to the March 31, 2017 effective date of the Virgin Islands Rules of Evidence, the Federal Rules of Evidence were applicable to proceedings in the Superior Court pursuant to Act No. 7161.

[10] We take this opportunity to observe that Virgin Grand's counsel's inaccurate representations to Montgomery could plausibly be viewed as a violation of Rule 211.4.1 of the Virgin Islands Rules of Professional Conduct, which requires Virgin Islands attorneys, in the course of representing their clients, to "not knowingly . . . make a false statement of . . . law to a third person." The misrepresentations could also be viewed as a violation of Rule 211.4.4, providing that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to . . . burden a third person," inasmuch as they indicated that Montgomery—a third person proceeding *pro se* who, as a result of that status, can reasonably be presumed to be unfamiliar with the

questioned why she had to pay for the mediation and expressed a preference to have her "day in court" rather than respond to Virgin Grand's demands for mediation.

¶ 29 Under these circumstances, it is not surprising that Montgomery chose not to respond to either the letter or the email. But even if we were inclined to ignore those circumstances, the Superior Court further erred when it concluded that Montgomery's failure to respond to Virgin Grand justified dispensing with the requirements of § 531(b). As a threshold matter, the Superior Court's characterization of Montgomery as "ha[ving] waived her right to have this dispute mediated," (J.A. 182), misapprehends the purpose of § 531(b). Unlike a statute of limitations, which can be waived by a defendant if not timely asserted because the statute was enacted for the benefit of defendants, *see Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 537 (V.I. 2015), § 531(b) was enacted for the benefit of both the plaintiff and the defendant, as well as the administrative and institutional interests of the courts of the Virgin Islands. *See Simon v. Joseph*, 59 V.I. 611, 629 (V.I. 2013). The Legislature clearly intended for § 531(b) to reduce the costs of litigation for *both* parties, to avoid the detrimental effects of foreclosing and dispossessing owners of their homes and other real property by providing an opportunity to facilitate settlement, and to consequently reduce the amount of judicial resources directed to adjudicating foreclosure cases. This is

---

procedural aspects of initiating a mediation under Virgin Islands law—was required to, *inter alia*, wholly fund the mediation deposit by herself. It is beyond dispute that an inaccurate representation as to what the law requires of a third person in regards to the mediation process (or the litigation process in general) serves no legitimate purpose and results in a clear burden to that person, who has been led to believe by a licensed legal professional that she is required to perform acts which the law does not in fact obligate her to perform. Indeed, to the extent that Montgomery misunderstood Virgin Grand's counsel's role as a disinterested attorney when these inaccurate representations as to what Virgin Islands law required of her were made, Rule 211.4.3 specifically obligated Virgin Grand's counsel to "make reasonable efforts to correct th[at] misunderstanding," which would include correcting those inaccuracies. We condemn, in the strongest terms, the use of such inaccuracies as a technique of "zealous advocacy," and emphasize that they have no place in the practice of law in the Virgin Islands.

illustrated by the fact that § 531(b) expressly places the burden to mediate in good faith on both parties and provides that the court cannot enter a judgment of foreclosure unless the parties comply with the requirements of the statute.

¶ 30 We recognize that in certain cases, a defendant may adamantly refuse to mediate in good faith, despite genuine efforts by the plaintiff to settle the matter through mediation. Such a refusal might even be for strategic reasons, in that a defendant who has no legitimate defense to a foreclosure action may conclude that refusing to mediate would preclude entry of judgment. However, even in such extreme cases, both the plaintiff and the Superior Court have means to obtain compliance short of a ruling by the Superior Court relieving the parties of their obligation to comply with § 531(b). For instance, in this case Virgin Grand, after not having received a response to its June 3, 2015 letter or April 12, 2016 email, could have filed a motion with the Superior Court to compel mediation, including a request for the Superior Court to appoint a mediator pursuant to former Rule 40(e)(6)(B) and to designate a specific date, time, and place for mediation to occur pursuant to former Rule 40(b)(1)(C). In the vast majority of cases, such an order would be all that is needed to obtain compliance with the mediation statute. If Montgomery failed to comply with the order compelling mediation, the Superior Court could have held her in civil contempt or otherwise sanctioned her for her non-compliance pursuant to its inherent and statutory authority to do so, whether by imposing fines or even by ordering her incarceration. *In re Rogers*, 56 V.I. 325, 334 (V.I. 2012); *In re Burke*, 50 V.I. 346, 354 (V.I. 2008).

¶ 31 But the Superior Court did not consider any alternate means of achieving compliance with § 531(b) by all parties. Rather, it dispensed with § 531(b) entirely, as if the statute is "merely a procedural hurdle which must be overcome prior to filing an inevitable motion with the Court." *Access Now, Inc. v. City of Miami*, No. 02-21413-CIV, 2008 WL 708605, at *2 (S.D. Fla. Mar.

14, 2008) (unpublished). For these reasons, we conclude, on the facts presented,[11] that the Superior Court erred when it granted Virgin Grand's motion to deem mediation waived. Rather than constituting evidence of a good faith effort to resolve the matter through mediation, the substantial misrepresentations in Virgin Grand's June 3, 2015 letter and April 12, 2016 email appear calculated to discourage Montgomery from participating in mediation. And to the extent Montgomery herself may have failed to act in good faith by not responding to Virgin Grand's correspondence, the Superior Court was obligated to consider appropriate alternate remedies to obtain her compliance and waive the application of § 531(b) only as a last resort.

¶ 32 Consequently, we vacate the November 29, 2016 order granting Virgin Grand's motion to deem mediation waived and direct the Superior Court to immediately refer this matter to mediation on remand. Moreover, because the Superior Court ruled in Virgin Grand's favor on the merits when it granted its motion for summary judgment and issued a judgment of foreclosure, it has "significantly chang[ed] the mediation dynamics" so as to render any mediation "an empty formality" given that Virgin Grand "[i]s aware that if it cho[oses] not to settle through mediation, it w[ill] receive a complete recovery on all its claims," and so "we exercise our supervisory authority to order that this case be assigned to a different Superior Court judge on remand, who, in the event the parties fail to reach an agreement through mediation," may preside over the trial in this matter without any reliance on or deference to the Superior Court's prior decisions.

[11] In reaching this decision, we do not mandate that the Superior Court mechanically and uncritically take certain actions in each and every case before concluding that it is not possible to fully comply with § 531(b) in a given case. Rather, the actions the Superior Court must consider will necessarily depend on the facts of the case before it. For example, the way the Superior Court proceeded in this case, although inappropriate with respect to this set of facts, may very well have been appropriate when dealing with a situation in which a defendant had been served, but never entered an appearance in the action and was in default.

Webster, 66 V.I. at 520-21.

III. CONCLUSION

¶ 33 The Superior Court erred when it granted Virgin Grand's motion for summary judgment, given that it had been untimely filed and was not accompanied by a motion for leave to file out of time setting forth excusable neglect or good cause to excuse the untimely filing. Further, we conclude that the Superior Court improperly relieved the parties of their obligations under 28 V.I.C. § 531(b). Consequently, we vacate the April 23, 2018 judgment and order of foreclosure, as well as the November 29, 2016 order granting the motion to deem mediation waived, and remand this matter to the Superior Court for immediate referral to mediation and for assignment to a different judge.

Dated this 17th day of July, 2019.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court