Not for Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FIRST AMERICAN DEVELOPMENT GROUP/CARIB, LLC,	)	**S. Ct. Civ. No. 2012-0023**
Appellant/Plaintiff,	)	Re: Super. Ct. Civ. No. 535/2009 (STT)
v.	)	
WESTLB AG, ET AL.,	)	
Appellees/Defendants.	)	

On Appeal from the Superior Court of the Virgin Islands

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

APPEARANCES:

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ORDER OF THE COURT

PER CURIAM.

THIS MATTER is currently before the Court on Appellant's response Brief to this Court's April 12, 2012 Order regarding jurisdiction,[1] and on Appellant's Emergency Motion to Stay Execution of Judgment.

[1] The title of Appellant's Brief references an "April 12, 2012 Order," but the Order was issued on April 11, 2012.

First American Development Group/Carib, LLC, filed its Notice of Appeal in this case on March 9, 2012. This Court, on April 11, 2012, directed First American to show cause why the appeal should not be dismissed for lack of jurisdiction, as it appeared that a number of claims between various parties to the original action remained before the Superior Court.

First American filed its response on April 24, 2012, and accompanied its response with a request that this Court stay execution of a Judgment and Order for Foreclosure issued by the Superior Court on August 24, 2011.[2] In its request for a stay, First American asks us to set a supersedeas bond. WestLB filed a response to the Court's April 11, 2012 Order regarding jurisdiction on April 25, 2012, and on April 30, 2012, filed a response in opposition to First American's request for a stay.[3]

We find that we have jurisdiction. Although First American and WestLB concede that there are claims remaining in the original action proceeding below, they both draw the Court's attention to a certification made by the Superior Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Rule 54(b) permits the trial court to certify as a "final judgment" a judgment that disposes of fewer than all the claims or parties to an action. FED. R. CIV. P. 54(b); SUPER. CT. R. 7.

In *Hagley v. Hendricks*, S. Ct. Civ. No. 2007/26, 2007 WL 5060412 (V.I. Dec. 28, 2007), we implicitly recognized that a valid certification made pursuant to Rule 54 permits this Court to

[2] First American also requested a stay from the Superior Court, but this request was denied in an Order issued on April 30, 2012, which was transmitted to this Court by WestLB on the same date. Consequently, Rule 8(b) of the Supreme Court Rules, which requires that the party first seek a stay in the trial court, is satisfied. Notably, the Superior Court's Order did not address Rule 62(d), which permits a party to obtain a stay in that court by right upon the posting of a bond. *See Hoban v. Washington Metropolitan Area Transit Authority*, 841 F.2d 1157, 1159 (D.C. Cir. 1988) (posting a Rule 62(d) bond creates a stay); *see also Nicholas v. Wyndham Intern. Inc.*, Civil No. 2001-147, 2007 WL 4800132, at *1 (D.V.I. Dec. 21, 2007) (stating that Rule 62 "entitles a party who files a satisfactory supersedeas bond to a stay"); *see also One Stop, Inc. v. Smith*, et al., Civil No. ST-09-CV-169 (Slip op. at 1) (V.I. Super. Ct. June 15, 2011) (same).

[3] On April 25, 2012, this Court issued an Order to WestLB and any other interested party to file its response, if any, to the request for a stay on or before noon on April 30, 2012.

accept jurisdiction over a judgment that does not dispose of all parties or claims below. While this Court's appellate jurisdiction is not determined or impacted by the rules of the Superior Court—including the Federal Rules, such as Rule 54(b), that it might choose to adopt by reference, *see Tindell v. People*, S. Ct. Crim No. 2009-0107, 2012 WL 78885, at *4 n.12 (V.I. Jan. 5, 2012)—nonetheless a Rule 54(b) certification can inform this Court's determination of whether a judgment is final and whether the purposes of the final judgment rule are protected by an immediate appeal. *See World Fresh Market v. PCDM Assocs., S.E.*, S. Ct. Civ. No. 2011-0051, 2011 WL 3851739, at *1 (V.I. Aug. 25, 2011) (noting that the provision of our Code that vests this Court with jurisdiction—4 V.I.C. § 32—embodies the final judgment rule); *see also Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 315 (V.I. 2007) (recognizing that the purpose of the final judgment rule is to "promote[] efficient judicial administration," "emphasize[the] deference appellate courts owe to trial court decisions," "avoid the delay that inherently accompanies time-consuming interlocutory appeals," and generally avoid "unreasonable disruption, delay, and expense").

Here, certain factors convince us that the judgment should be treated as final and that the purposes of the final judgment rule will be promoted, rather than undermined, by an immediate appeal: (1) it wholly disposes of WestLB's claims for foreclosure against First American, and WestLB no longer has any claims remaining in the action below, either asserted by it, or by other parties against it; (2) certain of the claims remaining below are far from being finalized, including some that have yet to be submitted to arbitration and so the original action may persist for years; (3) deference to the Superior Court is better shown in this case through an acceptance of its designation of the judgment as final, rather than a rejection of it; (4) the remaining claims, according to the Superior Court, involve questions separate from the questions to be presented on

appeal; (5) and there is nothing left for the Superior Court to do regarding the claims adjudicated in the judgment.

We have acknowledged that we have the power to create and apply exceptions to the final judgment rule, such as the collateral order doctrine, and it follows, therefore, that we also have the power to determine the contours of the rule itself. *See Enrietto*, 49 V.I. at 319 (applying the collateral order doctrine exception to the final judgment rule). While a Rule 54(b) certification does not, by itself, vest this Court with appellate jurisdiction, and while we will not in every case where the Superior Court enters a certification order agree that the certified order constitutes a final order under 4 V.I.C. § 32(a), nonetheless such certification is a useful tool to apprise this Court of the trial court's position and of the factors relevant to the question of finality. *See* Diane M. Allen, Annotation, *Modern Status of State Court Rules Governing Entry of Judgment on Multiple Claims*, 80 A.L.R.4th 707 § 2(a) (noting that a trial court's certification cannot make a non-final order final for the purposes of appeal, but by certifying that the order "wholly dispose[s] of one or more" of the claims or parties, it can identify those orders that are final and for which there is no just reason for delay of an appeal); *see also Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956) (recognizing that Rule 54 does not alter the statutory provision of federal jurisdiction, but "merely administers [the] requirement [of finality] in a practical manner in multiple claims actions"). Consequently, a valid and well-reasoned certification—such as the one presented here, as discussed below—may convince us that a judgment that wholly disposes of some, but not all claims or parties, is a final judgment within the meaning of section 32 of title 4.

While WestLB argues that the Court does have jurisdiction because the trial court issued a Rule 54(b) Order, First American contends that the trial court's certification Order was

deficient, and that, therefore, the Court lacks jurisdiction. As we recognized in *Hagley*, a trial court order certifying a judgment as a "final judgment" must expressly state that there is "no just reason for delay," 2007 WL 5060412, at *3, and must also consider a number of relevant factors:

(1) the relationship between the adjudicated and unadjudicated claims;
(2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court;
(3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
(4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final;
(5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Id. at *4 (quoting *Berckeley Inv. Group Ltd. v. Colkitt*, 455 F.3d 195, 202 (3d Cir. 2006)). While none of these factors are dispositive or jurisdictional prerequisites, there must be some indication from the certification order that the trial court has considered these issues. *Id.* at *3-4. We review the question of whether the trial court properly made such certification for abuse of discretion. *Id.* at *3 (citing *Newfoundland Mgmt. Corp. v. Lewis*, 131 F.3d 108, 112 (3d Cir. 2007)).

In its February 8, 2012 certification Order, the trial court expressly stated that there was no just reason for delay, and also analyzed each of the factors discussed in *Hagley*. It stated:

> "[A]ll of the foregoing factors weigh expressly in favor of certification. In the [August 24, 2011] Judgment, this Court set forth the priority of all recorded liens and fully adjudicated WestLB's foreclosure claims against First American and the junior lienholder parties. In addition, this Court ordered that WestLB's "first priority liens shall be foreclosed and the Property shall be sold by the Superior Court Marshal . . . Accordingly, the Judgment fully and finally disposed of WestLB's foreclosure claims.
>
> While there are remaining claims between First American and other parties, those claims have no practical relationship to, nor would they impact, the foreclosure claim adjudicated in the Judgment. Indeed, regardless of the outcome on those

> claims (which do not involve WestLB), the Judgment would remain the same and WestLB would still have the same rights as it had before. Furthermore, if the Judgment is appealed (as First American has already done), there is no possibility that a reviewing court would have to consider the same issue more than once. Finally, the miscellaneous factors weigh very heavily in favor of certification since WestLB has represented to this Court that it is currently losing $16,238.40 per day while this matter is pending—resulting in millions of dollars in losses each year."

(Superior Ct. Order Feb. 8, 2012, at 3).[4]

First American argues that the Order "contains a number of conclusory assertions" and that its only factual finding—regarding the amount of money per day WestLB is allegedly losing—was based on an assertion made by counsel in a briefing, and not on admissible evidence. Consequently, First American argues, the trial court abused its discretion by certifying the Judgment.

However, there is no requirement in Rule 54 or in the caselaw that the trial court make specific findings of fact. Instead, the court's role is to consider and weigh the relevant factors. *See Berckeley Inv. Group Ltd.*, 455 F.3d at 203-04 (affirming a certification order in which the court considered the factors but did not make explicit factual findings). Here, the trial court evaluated the Judgment in the context of the entire case, determined that an appeal from the Judgment would not impact the case below, and that judicial economy was better served by certification and immediate appeal. While the trial court may have relied in part on facts not in evidence regarding the extent of WestLB's per diem loss, First American does not argue that WestLB is losing nothing while it continues to fund the Receivership and otherwise maintain the property pending the foreclosure sale. The trial court could properly consider the fact of loss when evaluating the economic impact of a delay. *Id.* (noting that the trial court properly

[4] First American provided this Court with a copy of the Certification Order in response to the Court's April 11, 2012 Order regarding jurisdiction.

considered the pragmatic effect of delay on the parties, including the costs to them and the risk that the appellee would be unable to recover the total judgment and damages). Recalling that the benchmark test is whether the trial court applied its discretion in "'the interest of sound judicial administration,'" we cannot say that the trial court's weighing of the equities in this case was "clearly unreasonable." *Id.* at 202 (quoting *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10 (1980)). Therefore, the certification was proper and we find that the August 24, 2011 Judgment was a final judgment. Consequently, we have jurisdiction over the Judgment and Order of Foreclosure.

Having decided that we have jurisdiction, we turn next to First American's request that we stay the Order of Foreclosure. This Court has essentially adopted the standard set by Rule 62 of the Federal Rules of Civil Procedure for the issuance of a stay of execution. *Rojas v. Two/Morrow Ideas Enters.*, S. Ct. Civ. Nos. 2008-0071, 2009 WL 321347, at *2 (V.I. Jan. 22, 2009). Under this standard, we consider:

> (1) whether the litigant has made a strong showing that he is likely to succeed on the merits; (2) whether the litigant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interest in the proceedings; and (4) where the public interest lies.

Id.[5]

Although this is a close case, and although the emergency nature of this request prevents this Court from thoroughly evaluating First American's chances of success on the merits, we find

[5] In its Rule 8(b), we have required that, "if the facts are subject to dispute," requests for stays "shall be supported by affidavits, other sworn statements or copies thereof, and documentation demonstrating ownership, liens or other encumbrances, and availability of resources offered as security." First American has not provided any of this. However, our decision today does not rely on disputed facts, but rather on our interpretation of whether First American as met the requirements for a stay that we adopted in *Rojas*. 2009 WL 321347, at *2. Furthermore, although we do not have evidence regarding First American's ability to offer a security, we make our granting of the stay conditioned on the ability to post such a security; if it cannot post such a security, the stay will not take effect. Therefore, WestLB suffers no prejudice from First American's failure to follow precisely the requirements of the rule. V.I.S.CT.R. 2 (permitting the Court to suspend any of this Court's rules "in the interest of expediting decision, or for other good cause shown").

that the balance of these factors favors a stay. *Id.* (noting that the question is one of "balance"). Here, First American presents "serious legal question[s]"—whether the trial court impermissibly ignored record evidence when granting WestLB summary judgment on First American's claims against it, and whether the trial court failed to accept First American's impossibility-of-performance defense to the foreclosure claim. *In re Najawicz,* S. Ct. Crim. No. 2008-098, 099, 2009 WL 321342, at *2 (V.I. Jan. 8, 2009) (noting that even if a litigant cannot fully satisfy the first factor, it may succeed if it can demonstrate a "serious legal question," and the other factors favor a stay). Furthermore, there is no question that First American will be irreparably injured by the sale of property that it currently owns.[6] While a stay will certainly harm WestLB, by forcing it to cancel a foreclosure sale on which it has almost certainly expended a great deal of time and money in preparation, it is protected by the posting of a bond which we will require from First American. Furthermore, the public interest is better served by a delayed sale that ensures that each party has the opportunity to fully and fairly have its case decided on appeal.

Under Rule 8(c), we may condition the grant of a stay upon the filing of bond. V.I.S.CT.R. 8(c). Such a bond exists "to secure the appellee from loss resulting from the stay of execution," *James v. Antilles, Inc.*, 27 V.I. 55, 57 (V.I. Terr. Ct. 1992), and the value of that bond is normally "fixed to satisfy the judgment in full, plus interest, costs and damages for delay." *Thompson v. Florida Wood Treaters, Inc.*, Civil No. 2006-224, 2010 WL 3119918, at *5 (D.V.I. Aug. 4, 2010). Consequently, if First American wishes to effectuate the stay of the execution of the Superior Court's August 24, 2011 Judgment, it must post a bond counter-signed by a

[6] WestLB argues that First American will not be irreparably injured by a foreclosure sale because First American has a statutory six-month right of redemption after foreclosure, 28 V.I.C. § 538, or can otherwise pay the amounts due on the mortgage before the sale. However, First American may not have the financial capacity to do so; indeed, it is WestLB's position that First American is insolvent. Assuming that the trial court erred in issuing the August 24, 2011 Judgment or failed to consider First American's defenses or claims either at the Receivership stage or when granting the summary judgment motion, First American will have lost its ability to retain its property. The fact of its insolvency should not deprive it of appellate review.

qualified surety or secured by unencumbered property of a value equal to or greater than the bond with the Superior Court in the amount of $74,650,000[7] by 4pm on Tuesday, May 1, 2012, and must provide notice to counsel for WestLB within thirty minutes of doing so.[8] Should a bond be posted, the Superior Court shall promptly review the bond for approval pursuant to Rule 62(d). At a later time, the Superior Court may also revise the amount of the bond should it, upon review the record before it, determine that the amount of the bond is insufficient or excessive.

Accordingly, it is hereby

ORDERED that Appellant's April 24, 2012 Emergency Motion to Stay Execution of Judgment Pending Appeal is conditionally **GRANTED**; and it is further

ORDERED that, upon Appellant's posting in the Superior Court of a bond counter-signed by a qualified surety or secured by unencumbered property of a value equal to or greater

[7] The trial court's Judgment awarded WestLB $73,145,869.89, of which $62,100,000 was the principal amount due on the contract. Interest accrues from that date on the amount owed at the statutory rate of four percent until satisfaction. 5 V.I.C. § 426. Consequently, expecting an appeal of at least six months, approximately $1,462, 917.38 will accrue in interest from March 9, 2012, the date the appeal began. *See* V. Woerner, Annotation, *Measure and Amount of Damages Recoverable under Supersedeas Bond in Action Involving Recovery or Possession of Real Estate*, 9 A.L.R.3d 330, § 11 (noting that the period of liability for a supersedeas bond is typically considered to begin with the filing of the notice of appeal). In addition, First American will be responsible for the costs of the appeal incurred by WestLB, which, including attorney's fees, could reasonably be expected to be at least $5,000. In addition, WestLB has borne the costs of preparation for the foreclosure sale, and may well have to expend more at a later date to entice purchasers because the first sale will have been cancelled at the last minute. Although the Court cannot closely calculate such an amount without evidentiary submissions from the parties, it will certainly be more than $2,000.00. In addition, WestLB continues to fund the Receivership, and Receivership's counsel. Although this Court does not have direct evidence of those costs, based on the docket entries from the Superior Court awarding fees to the Receiver, we can estimate those costs at least $5,000 per month, and we will assume this litigation lasts six months, for $30,000 in total Receivership costs during the pendency of the appeal. Therefore, the total of the bond to be posted by First American equals the total of these costs plus the value of the judgment, or $74,645,786.89. For convenience, we round this to $74,650,000.00. Although First American urges us to set the bond amount at the value of the collateral, rather than the full bond, it has not demonstrated that it cannot post a full bond, and we find that such an amount—even if this Court had the capacity at this time to approximate the value of the collateral—would not fully "secure the appellee from loss resulting from the stay." *James*, 27 V.I. at 57; *see also Thompson*, 2010 WL 3119918, at *5 (noting that the burden rests with the appellant seeking a reduced bond to demonstrate that a "'full bond is impossible or impracticable'") (quoting *Bank of Nova Scotia v. Pemberton*, 964 F. Supp. 189, 192 (D.V.I. 1997)); *see also United States v. O'Callaghan*, 805 F. Supp. 2d 1321, 1324 (M.D. Fla. 2011) (noting that the general practice under the Federal Rules is to require a full bond; that is, a bond valued by the entire judgment, plus interest, costs and damages).

[8] Because the Superior Court's April 30, 2012 Order did not address Rule 62(d), it may wish, upon reviewing the bond, to determine either on the record before it or after receiving evidence from the parties whether the amount of the bond is insufficient or excessive.

than the bond in the amount of **SEVENTY-FOUR MILLION, SIX HUNDRED FIFTY THOUSAND DOLLARS ($74,650,000)** by **4 p.m., AST, on Tuesday, May 1, 2012**, and upon notice within thirty minutes thereafter to counsel for WestLB AG, execution on the Superior Court's August 24, 2011 Order of Foreclosure shall be **STAYED**; and it is further

ORDERED that copies of this Order be served on the parties' counsel.

SO ORDERED this 30th day of April, 2012.

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