For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

CHAVEZ ALI,	)	**S. Ct. Civ. No. 2017-0046**
Appellant/Plaintiff	)	Re: Super. Ct. Civ. No. 1/2017
	)	(STX)
v.	)	
	)	
THISHELLE HAY,	)	
Appellee/Defendant	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise Hinds Roach

Argued: November 13, 2018
Filed: January11, 2019

Cite as: 2019 VI 1

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

APPEARANCES:

Lydia L. Moolenaar, Esq.
Law Offices of Lydia L. Moolenaar
St. Croix, U.S.V.I.
Attorney for Appellant,

Thishelle Hay
St. Croix, U.S.V.I.
Pro se.

OPINION OF THE COURT

HODGE, Chief Justice.

¶1 Chavez Ali appeals from the Superior Court's denial of his motion for an emergency temporary restraining order ("TRO"). Ali's attorney, Lydia L. Moolenaar, appeals from the

Superior Court's issuance of a $150 sanction against her for tardiness on the second day of Ali's hearing. For the reasons that follow, we dismiss both appeals for lack of jurisdiction.

I. BACKGROUND

¶2 Chavez Ali and Thishelle Hay have two minor children born in 2012 and 2014. The family lived together on St. Croix at Union Mt. Washington until approximately September 2016, when Hay and the children moved to Mutual Homes. Without informing Ali, Hay then moved with the children to Florida in October of 2016. Ali realized that Hay and his children were in Florida through social media. Hay changed her phone number and refused to disclose her exact location to Ali. The only mode of communication Ali had with Hay and his children was through infrequent Facebook calls.

¶3 As a result, Ali filed an "Emergency Motion for Return of the Minor Children" and a "Verified Petition for Custody" with the Superior Court. Because Hay's exact whereabouts were unknown, a hearing took place on February 23, 2017 and March 8, 2017 without her presence. At the time scheduled for commencement of the hearing on March 8, however, both Ali and his attorney were late to the proceeding. Although the court initially imposed a $150 fine on both Ali and Moolenaar, she later limited the fine to only Moolneaar after learning that Ali was sitting on a bench outside the courtroom waiting for Moolenaar. Moolenaar explained that she was approximately ten minutes late because she forgot her glasses and, rather than ask permission from the court to retrieve them, she determined that it was better to go back and get them. Unmoved by Moolenaar's explanation, the court refused to alter or eliminate the fine.

¶4 During the hearing, Ali testified that he financially supported his children while the family lived together. He expressed concern about the children's wellbeing, explaining that Hay was neglectful and that she had previously attempted suicide. Ali also revealed that he and Hay had

restraining orders against each other, but neither of them were permanent. During the time that Hay had a restraining order against Ali, she maintained custody of the children.

¶5 Construing Ali's "Emergency Motion for Return of the Minor Children" as a request for a temporary restraining order ("TRO"), the Superior Court found that Ali's testimony did not satisfy the necessary TRO elements and, on April 18, 2017, issued an order denying the motion. In the same order, the Superior Court deferred judgment on Ali's custody petition, and instead ordered a home study and scheduled a custody hearing for August 21, 2017. Additionally, pursuant to Moolenaar's subsequent motion to separate her sanction from Ali's TRO and custody order, the Superior Court entered a separate order on the same day addressing the sanction. In that order, the Superior Court scheduled a compliance hearing for May 12, 2017. The order gave Moolenaar the option of avoiding the hearing by paying a $150 sanction by one business day prior to the hearing. On June 20, 2017, the Superior Court acknowledged the filing of a notice of proof of payment.

¶6 Ali timely filed an appeal from the April 18, 2017 order with this Court on May 8, 2017. V.I. R. APP. P. 5(a)(1). However, on December 5, 2017, the Superior Court held a custody hearing, and on December 7, 2017, issued an interim visitation order. On February 6, 2018, the Superior Court issued an order incorporating the interim visitation order into a permanent visitation order and closed the case.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶7 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). We possess jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court," 4

V.I.C. § 32(a), and "[i]nterlocutory orders of the Superior Court of the Virgin Islands . . . granting, continuing, modifying, refusing, or dissolving injunctions." 4 V.I.C. § 33(b)(1).

¶8 Before considering the merits of this appeal, we must first determine whether we possess appellate jurisdiction over the Superior Court orders at issue. *See Drayton v. Drayton*, 65 V.I. 325, 332 (V.I. 2016) (*sua sponte* disposing of a jurisdictional issue not raised by either party on appeal or before the Superior Court); *V.I. Waste Mgmt. Auth. v. Bovoni Invs. LLC*, 61 V.I. 355, 365 (V.I. 2014) ("[I]t is well established that a court may consider the issue of subject matter jurisdiction *sua sponte*.") (internal quotation marks and citation omitted); *In re Guardianship of Smith*, 54 V.I. 517, 527 (V.I. 2010).

i. Temporary Restraining Order

¶9 Generally, "temporary restraining orders are not appealable interlocutory orders." *In re Najawicz*, 52 V.I. 311, 325 (V.I. 2009); *Mass. Air Pollution and Noise Abatement Comm. v. Brinegar*, 499 F.2d 125, 126 (1st Cir. 1974) (explaining that except for "cases where there has been a full adversary presentation of evidence or where the circumstances are such that if review is refused there is no further possibility of interlocutory relief[,]" the "granting or denying of a temporary restraining order is seldom reviewable by an appellate court"). Here, the Superior Court and Ali treated the "Emergency Motion for the Return of the Minor Children" as an emergency motion for a temporary restraining order. Ali argued, and the Superior Court considered, the motion pursuant to the elements that courts must weigh when deciding whether to grant a TRO. *See Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012) (stating the TRO test as including the following elements: "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party;

and (4) whether granting the preliminary relief will be in the public interest") (quoting *Iles v. de Jongh*, 638 F.3d 169, 172 (3d Cir. 2011)). Because grants and denials of TROs are not appealable orders, we do not have jurisdiction to hear Ali's appeal from the Superior Court's denial of his "Emergency Motion for Return of the Minor Children." *See e.g.*, *In re Najawicz*, 52 V.I. at 325; *Mass. Air*, 499 F.2d at 126. Further, because the Superior Court order merely continued the resolution of Ali's custody matter, the order was non-final, and Ali's appeal was premature. Thus, we also lack jurisdiction to hear Ali's appeal from the Superior Court's denial of his "Verified Petition for Custody." *See* 4 V.I.C. § 32(a); V.I. R. APP. P. 5(a)(2).

¶10 We note that in some cases, prematurely filed appeals can ripen upon the entrance of a subsequent final order. *See Ottley v. Estate of Bell*, 61 V.I. 480, 496-97 (V.I. 2014); *Rohn v. People*, 57 V.I. 637, 642 n.4 (V.I. 2012) (observing that "subsequent events may ripen a prematurely filed appeal"); *Harvey v. Christopher*, S. Ct. Civ. No. 2007–115, 2009 WL 331304, at *3 (V.I. 2009) (unpublished) ("It is well established that subsequent events may ripen a prematurely filed appeal."). Generally, this Court will hear the merits of prematurely filed appeals if denial would lead to a "pointless" identical refiling, *Ottley*, 61 V.I. at 496-97, or if review would not lead to "unnecessary or duplicate proceedings." *Harvey*, 2009 WL 331304, at *3.

¶11 Here, after Ali filed his premature notice of appeal with this Court, the Superior Court issued a permanent visitation order and closed the matter.[1] For a prematurely filed appeal to ripen into a proper appeal, "the order leading to the premature notice of appeal [must have] some indicia

[1] Pursuant to Virgin Islands Rules of Appellate Procedure 5(a)(6), "[i]t is the responsibility of the appellant to keep the Supreme Court apprised of any change in the status of any action that may affect appeal." V.I. R. APP. P. 5(a)(6). Here, none of Ali's appellate materials indicated that the Superior Court entered a final judgment resolving the underlying case. As a result of this failure, this Court has wasted valuable judicial resources. Although we decline to issue a reprimand, we note that "(f)ailure to follow this rule may result in sanctions." *Id*.

of finality and [be] likely to remain unchanged during subsequent court proceedings." *Fields v. Oklahoma State Penitentiary*, 511 F.3d 1109, 1111 (11th Cir. 2007). The order denying Ali's TRO motion and continuing Ali's custody petition in this case lacked the necessary indicia of finality for two reasons: (1) the subsequent visitation and custody orders were subject to change; and, (2) the opposing party, Hay, was never served, nor did she appear at the TRO hearing. *Id*.; *see also Welch v. Cadre Capital*, 923 F.2d 989, 992 (2d Cir. 1991) (explaining that "a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard *and the appellee suffers no prejudice*") (emphasis added). In any event, even if this Court were to determine that Ali's premature appeal has ripened, the time-sensitive nature of an emergency TRO, coupled with the lack of appeal from the final visitation order by either party, would render any ruling from this Court moot at best and, at worst, disruptive to a seemingly successful final arrangement. *Harvey*, 2009 WL 331304, at *3. Therefore, we decline to reach the merits of Ali's appeal.

ii. Attorney Sanction

¶12 The only matter left for determination is whether we have jurisdiction to hear Moolenaar's purported appeal from the Superior Court's order sanctioning her $150 for tardiness. Pursuant to Rule 4(c) of the Virgin Islands Rules of Appellate Procedure, "the notice of appeal shall specify the party or parties taking the appeal and . . . shall designate the judgment, order, or part thereof appealed from and the reason(s) or issues(s) to be presented on appeal." V.I. R. APP. P. 4(c). The notice of appeal filed with this Court specifies one party—Ali—as the party taking the appeal, and

only references a single order.[2] Thus, Moolenaar never separately appealed the Superior Court order imposing a sanction against *her*. Instead, she merely included her argument in the appellate brief she submitted for her client.

¶13 Raising arguments for a separate appeal of a nonparty for the first time in a party's appellate brief is impermissible under Rule 4(b) of the Virgin Islands Rules of Appellate Procedure. Under Rule 4(b), "[i]f two or more persons are entitled to appeal from a judgment or order of the Superior Court and their interests are such that joinder is practicable, they may file a joint notice of appeal." V.I. R. APP. P. 4(b). However, this consolidation of appeals may be done only "by order of [this] Court upon its own motion, upon motion of a party, or upon stipulation of the parties to the several appeals." *Id*. Here, this Court gave no such order, and Moolenaar made no such motion. Further, under the same rule, if multiple parties file separate notices of appeal, they shall pay separate docketing fees. *Id*.[3] Here, one docketing fee was paid for one appeal. Moolenaar's attempt to present her argument under the umbrella of her client's appeal does not properly merge the two,

[2] The notice of appeal states, "Comes now the undersigned counsel *on behalf of the Appellant* and hereby files this appeal of *a Superior Court Amended Order* entered by Denise Hinds Roach, Judge in the Family Division[.]" (J.A. 1.)

[3] We note that our disposition in this case differs from our holding in *Brooks v. Gov't of the V.I.*, 58 V.I. 417, 429 (V.I. 2013). In *Brooks*, the Superior Court held that the appellant lacked standing where his union attorney had mistakenly included his name as the petitioner on a writ of review rather than include the union's name, and there was no question that the union was the real party in interest. *Id*. at 421. We reversed, holding that a mistake in naming the petitioner in the caption for a petition for review of a ruling reached in a Public Employees Relation Board proceeding should not constitute a jurisdictional defect—and was instead a curable claims-processing rule—because there was no clear indication that the Legislature intended such a result. *Id*. at 430. Unlike the situation in *Brooks*, however, Moolneaar did not accidentally name Ali as the petitioner to what was otherwise an appeal from the sanction order against her. Instead, Moolenaar essentially created a joint appeal under the guise of a single appeal from the order denying her client's TRO motion and custody petition, which undermines Rules 4(b) and 4(c) of the Virgin Islands Rules of Appellate Procedure. Substituting her name for Ali's on the appeal would not cure this defect, as it would have in *Brooks*. Therefore, *Brooks* does not apply to this unique set of circumstances.

given that the Superior Court specifically imposed the sanction upon her personally in a separate order and not on her client.

¶14 In light of Moolenaar's failure to either file a separate appeal or join her appeal with Ali's pursuant to Rule 4(c), we find that Moolenaar has not presented us with a proper appeal to consider. Because Moolenaar's attempted appeal from the Superior Court order issuing the $150 sanction against her is not properly before us, we need not address its merits. Further, because Moolenaar failed to file a notice of appeal within 30 days of the date that the Superior Court entered the order issuing her sanction, she waived her right to appeal that ruling. V.I. R. APP. P. 5(a)(1) ("In a civil case in which an appeal is permitted by law as of right from the Superior Court to the Supreme Court, the notice of appeal required by [V.I. R. APP. P. 4] 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. . . .").

III. CONCLUSION

¶15 Because the Superior Court's order denying Ali's "Emergency Motion for Return of the Minor Children" and "Verified Petition for Custody" was neither a final nor appealable interlocutory order, we do not have jurisdiction to consider his appeal. Additionally, because Moolenaar did not separately or timely appeal the Superior Court order sanctioning her in the amount of $150, we also lack jurisdiction to review her appeal. We therefore dismiss the appeal in its entirety for lack of jurisdiction.

Dated this 11th day of January, 2019. **BY THE COURT:**

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

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