IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

KYRA D. HANSEN, Plaintiff, v. **BENI IGUANA'S INC., TODD REINHARD,** Defendants.	)	**CASE NO. ST-15-CV-289**

MEMORANDUM OPINION

Pending before the Court is Plaintiff's May 13, 2016, Motion for Reconsideration of the Order [entered] May 3, 2016.[1] For the following reasons, Plaintiff's Motion for Reconsideration will be denied.

FACTUAL & PROCEDURAL HISTORY

Plaintiff filed a Complaint on June 22, 2015, alleging violations under the Federal and Virgin Islands Fair Labor Standard Acts, retaliation under 9 U.S.C. Section (a)(3), violation of the Virgin Islands Whistleblower Act, negligence, and wrongful discharge. After Defendant failed to respond, following Plaintiff's November 23, 2015, Motion, the Acting Clerk of the Court entered a default on December 1, 2015. On December 30, 2015, counsel entered a limited appearance on behalf of Defendants and by Order entered January 12, 2016, Defendants were directed to file a

[1] Defendant responded on May 27, 2016, to which Plaintiff replied on June 1, 2016. Although signed on April 26, 2016, the Clerk of the Superior Court did not enter the Order until May 3, 2016. For this reason, the dates of all other orders and opinions issued by the Superior Court in the underlying matter refer to the date of entry on the docket. *See Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 604, n. 4 (V.I. 2012) ("A judgment or order is entered within the meaning of this Rule when it is entered in the docket in compliance with Superior Court Rule 49." (quoting V.I.S.CT.R. 5(a)(9)).

Since no provision of the Virgin Islands Code or rule of this Court authorizes the filing of a motion for reconsideration, a motion for reconsideration of an interlocutory order is properly filed under LRCi 7.3, made applicable to the Superior Court of the Virgin Islands under Super. Ct. R. 7. Typically the motion must be filed within fourteen (14) days after the entry of the order. A motion under LRCi 7.3 may only be based on "(1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice."[6] A motion for reconsideration "is not a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not."[7]

ANALYSIS

Plaintiff seeks reconsideration of the Court's May 3, 2016, Order, asserting Defendants failed to show good cause for their untimely responses to Plaintiff's Complaint and asks the Court to amend its judgment under Fed. R. Civ. P. 59(e).[8] Plaintiff asserts that since the motion for reconsideration was brought within ten days of the Order, the motion is governed by Rule 59(e), but in her reply seeks reconsideration under LRCi 7.3, claiming the function of the motion dictates which rule applies.[9] Here, the Court's May 3, 2016, Order is interlocutory since it was not a final determination of the rights and obligation of the parties, but rather denied striking the Defendant's

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parties.") (other citations and quotation marks omitted) and *St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 472-473 (VI. 2014) ("all prior interlocutory orders, which "merge with the final judgment ... [and] may be reviewed on appeal from the final order") (citation omitted).

[6] *In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008) (quoting LRCi 7.3).

[7] *Worldwide Flight Services v. Gov't of the V.I.*, 51 V.I. 105, 110 (V.I. 2009) (citing *Bostic v. AT&T of the Virgin Islands*, 312 F. Supp. 2d 731, 733-34 (D.V.I. 2004)) (noting that, when a Court is considering a motion for reconsideration of an order – not a final judgment– the Court enjoys wider discretion in determining what may constitute 'manifest injustice')).

[8] "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." FED. R. CIV. P. 59 (e).

[9] *See Lucan Corp. v. Robert L. Merwin & Co.*, No. 2007-15, 2008 V.I. Supreme LEXIS 19, at *6 (V.I. Jan. 3, 2008) (unpublished) (citation omitted).

motion to set aside the entry of default or otherwise act upon his appearance by January 29, 2016. On January 29, 2016, counsel filed an answer on behalf of each Defendant. On February 12, 2016, Plaintiff filed a motion to strike Defendants' answers, asserting that Defendants had not filed motions to set aside the default or for an extension of time to answer. Defendants opposed the Motion to Strike on March 1, 2016, asserting they had complied with the Court's January 12, 2016, Order, to which Plaintiff replied on March 18, 2016. By Order entered on May 3, 2016, the Court denied Plaintiff's motion to strike Defendant's answers, deemed the answers filed as of January 29, 2016, and vacated the entry of default entered on December 1, 2015. Before receiving the Court's Order vacating the entry of default, on May 2, 2016, Plaintiff filed a motion for default judgment, and on May 6, 2016, the Court denied the Motion.

STANDARD

Before addressing a motion for reconsideration, the Court must first determine the source of its authority to alter or set aside the order and whether the order is interlocutory and subject to LRCi 7.3, or final and subject to Fed. R. Civ. P. 59(e) or 60(b).[2] A final judgment[3] is "a court's final determination of the rights and obligations of the parties in a case or, in the alternative, any order from which an appeal lies."[4] All other orders are interlocutory.[5]

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[2] *Pate v. Gov't of the Virgin Islands*, 62 V.I. 271, 286 (V.I. Super. Ct. 2015) (citing *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 614 (V.I. 2012) ("The Court reviews the parameters established by Fed. R. Civ. P. 54(a) and (b) to determine whether an order is interlocutory and thus subject to LRCi 7.3, or final and subject to Fed. R. Civ. P. 59(e) or 60(b).").

[3] *Island Tile*, 57 V.I. at 613-616 (finding a "'judgment' for purposes of [FED. R. CIV. P.] 54(a) . . . may be altered or amended through a timely motion under [FED. R. CIV. P.] 59 or set aside through a [FED. R. CIV. P.] 60 motion" but concluding that because FED. R. CIV. P. 59(e) and 60(b) only apply to final judgments or "any order from which an appeal lies," they do not apply to nonappealable interlocutory orders) (citations omitted). The Federal Rules of Civil Procedure are made applicable to the practice and procedure in the Superior Court through Super. Ct. R. 7.

[4] *Id.* at 615 (quotation marks and citation omitted).

[5] *See id.* at 614-15 (quoting *Hagley v. Hendricks*, 2007 V.I. Supreme LEXIS 8, *7 (V.I. 2007) (unpublished) ("Absent certification under Rule 54(b) any order in a multiple-party or multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory. Additionally, the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the

answer and vacated the entry of default. Therefore, the Court will consider the motion in accordance with LRCi 7.3.[10]

Plaintiff believes the Court should reconsider the Order based on the need to correct clear error or prevent manifest injustice under LRCi 7.3 (3).[11] Plaintiff's argument is premised on the fact that the Court vacated the entry of default judgment without a motion from Defendant, instead accepting Defendants['] counsel's representation of excusable neglect even though Defendants were timely served with a summons and Complaint, and accepting Defendants' Answers. Defendants contend that Plaintiff fails to identify clear error or manifest injustice from the Court's Order to satisfy LRCi 7.3 and misconstrues the good cause standard for vacating entries of default with the excusable neglect standard for vacating a default judgment, which requires evidence showing whether the plaintiff will be prejudiced, whether the defendant has a meritorious defense, and whether the default was the result of defendant's culpable conduct.

Under Superior Court Rule 50, incorporating Federal Rules of Civil procedure 59 to 61, "[f]or good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default…."[12] Even though the "good cause" standard in Superior Court Rule 50 applies to both default and default judgments, Federal Rule of Civil Procedure 55(c) clearly distinguishes between the two standards, stating "[t]he court may set aside entry of default for good cause, and it may set aside a default judgment under Rule 60(b)", requiring excusable neglect.[13] But because

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[10] The Court notes that Plaintiff timely filed her May 13, 2016, Motion within the requisite fourteen days under LRCi 7.3 of the May 3, 2016, Order.

[11] *See In re Infant Sherman*, 49 V.I. at 457 (quoting LRCi 7.3).

[12] Super. Ct. R. 50.

[13] FED. R. CIV. P. 55(c); *see Appleton v. Harrigan*, 61 V.I. 262, 269, n.8 (V.I. 2014) ("Although the entry of default in the Superior Court is governed exclusively by Superior Court Rule 47, and not Federal Rule of Civil Procedure 55(a), because these rules are nearly identical we may look to federal decisions interpreting Rule 55(a) for persuasive authority.").

both rules adopt the standard of "good cause", the Court can rely on "federal decisions interpreting Rule 55(a) for persuasive authority."[14] Additionally, according to Fed. R. Civ. P. 60(a), the Court may correct "a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice."

Here, it appears the Court inadvertently cited Fed. R. Civ. P. 65 in the May 3, 2016, Order instead of Superior Court Rule 50 and Fed. R. Civ. P. 55 for the "good cause" standard. Nevertheless, the Court is unable to find prejudice to Plaintiff because of this error since the Court still relied on the "good cause" standard when vacating the entry of default.[15] When "default judgment has not yet been entered… an even more liberal standard [is] employed when reviewing a Motion to set aside default because it is more appropriate to address an action on its merits whenever possible."[16] Additionally, any party adversely affected by entry of default may move to have the default set aside,[17] and the Court believes that, if default judgment has not been entered, a party's response and willingness to defend, in and of itself, supports a finding of good cause to proceed to a determination on the merits.

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[14] *Id.*

[15] *But see Bazzar v. Salem*, 2015 V.I. LEXIS 125, *5 (V.I. Super. Ct., Oct. 8, 2015) ("[T]his Court is hesitant to conclude that the Supreme Court of the Virgin Islands intended for the same stringent standard to be applied in instances of both a motion to vacate an entry of default as well as a default judgment, here, the Court reaches the same result applying the standard for excusable neglect."). *See Fuller v. Browne*, 59 V.I. 948, 954 (V.I. 2013) (internal citations and citations omitted) (the Court found good cause for Defendant's untimely appeal, and remanded to the Appellate Division to consider Defendant's appeal on the merits of the default judgment).

[16] *Id.* at 22-23; *Deal Furniture & Appliance v. Four Winds Plaza P'ship*, 961 F. Supp. 117, 120 (D.V.I. 1997)(citations omitted) (the Appellate Division of the District Court of the Virgin Islands, interpreting Superior [then Territorial] Court Rule 50 also cautioning that "[d]etermining whether to grant a motion to set aside default is based on liberal as opposed to strict interpretation, and any doubt should be resolved in favor of the petition to set aside the [default] so that case[] may be decided on the[] merits.").

[17] *Chavayez v. Buhler*, 2009 V.I. Supreme LEXIS 26, *30-31 (V.I. 2009).

Here, it is clear the Defendants are willing to defend themselves based on their timely responses to Court orders and responses to motions since counsel entered an appearance. When the Court vacated the entry of default in the May 3, 2016, Order, the Court explained, based on the circumstances, including that the case is in its relative infancy, because counsel promptly filed an appearance, and "because Defendants filed their Answers within the deadlines set by the Court, the Court concludes that the non-defaulting party will not be prejudiced if the default is vacated...[and] recognizing that the courts of this jurisdiction disfavor defaults and have expressed a consistent preference for disposition of suits on the merits."[18]

Even assuming *arguendo* the Court was required to make a finding of excusable neglect, the Court clearly identified that based on the relative infancy of the action and the fact that Plaintiff had not yet moved for default judgment Plaintiff would not be prejudiced, the default was not the result of defendant's culpable conduct even though Defendants were properly served,[19] and Defendant alleged meritorious defenses, including sixteen affirmative defenses in their answers. While the Court recognizes the procedural deficiencies in its Order based on the fact that Defendants did not move to vacate the entry of default, instead choosing to comply with the Court's Order by filing answers, in the interest of judicial economy and based on the Court's finding of good cause, the Court is unable to find clear error or manifest injustice from its May 3, 2016, Order to vacate the entry of default and to deny striking Defendants' answers.

[18] May 3, 2016, Order.

[19] *Bazzar*, 2015 V.I. LEXIS 125, at *8 ("Plaintiff argues that Defendant's failure to appear and failure to take action until ordered to do so by the Court is the equivalent of culpable conduct. Notably, Defendant was *pro se* until June 23, 2015...although it is clear that Defendant received notice of the current suit before the default was entered, once Defendant's insurer hired counsel, Defendant took prompt action toward defending the case shortly after the motion for default judgment was filed.").

CONCLUSION

For the forgoing reasons, Plaintiff's May 13, 2016, Motion for Reconsideration of the Order [entered] May 3, 2016, is denied. An Order consistent with this Memorandum Opinion shall issue.

Dated: November 4, 2016

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

ATTEST: Estrella H. George
Acting Clerk of Court ___/___/___

by: 11/15/16
Lori Boynes-Tyson
Court Clerk Supervisor ___/___/___

CERTIFIED A TRUE COPY
DATE: 11-15-16
ESTRELLA H. GEORGE
Acting Clerk of the Court
By: ______
Cameil A. Clarke
Court Clerk II