For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

THE ESTATE OF ARNOLD S. SKEPPLE a/k/a ARNOLD SKEPPLE and DELORES SKEPPLE, Appellants/Defendants,	)	**S. Ct. Civ. No. 2014-0050** Re: Super. Ct. Civ. No. 592/2009 (STX)
v.	)	
THE BANK OF NOVA SCOTIA, Appellee/Plaintiff.	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: March 10, 2015
Filed: August 17, 2018

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

APPEARANCES:

Martial A. Webster, Sr., Esq.
Law Offices of Martial A. Webster, Sr.
St. Croix, U.S.V.I.
Attorney for Appellants,

Samuel Grey, Jr., Esq.
Nichols Newman Logan & Grey P.C.
St. Croix, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

SWAN, **Associate Justice**.

Appellant, Delores Skepple ("Skepple"), appeals an order of the Superior Court of the Virgin Islands ("Superior Court") denying her motion to vacate a default judgment entered against her in

favor of the Appellee, the Bank of Nova Scotia ("BNS"), in a civil action[1] to foreclosure a mortgage on her home. Because the default judgment was void due to the court's lack of personal jurisdiction—due to improper service of process by publication—over Skepple, when the court entered the default judgment, we conclude that the trial court erred in denying the motion to vacate. We note that Skepple subsequently filed papers with the Superior Court, including a challenge to the court's default judgment. Therefore, she voluntarily subjected herself to the jurisdiction of the court. Accordingly, we reverse the Superior Court's order denying Skepple's motion to vacate the default judgment and remand this case in order for the Superior Court to vacate the default judgment and enter an order providing Skepple with the appropriate time to answer the complaint.

I. FACTS AND PROCEDURAL HISTORY

On December 14, 2009, BNS filed an "Action for Debt and Mortgage Foreclosure" against Skepple in the Superior Court. On January 19, 2010, BNS filed a motion for leave to serve[2] Skepple by publication, "pursuant to the provisions of 5 V.I.C. § 112(a)(6)," which was granted on January 26, 2010. BNS supported this motion with affidavits of its counsel and its process server ("server"). The only assertions in this affidavit that could possibly be taken as operative in the legal analysis conducted by the Superior Court were that Skepple was a defendant in the case and that the server's affidavit "establishes that [the server] has made diligent efforts to locate Delores Skepple and serve her but has been unable to do so."

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[1] In this appeal, we apply due process notice considerations in a civil action, "'[a]n action to enforce, redress or protect a private or civil right . . . .'" *In re Najawicz*, 52 V.I. 311, 335 (V.I. 2009) (quoting BLACK'S LAW DICTIONARY 32 (8th ed. 2004)); *see In re Moorhead*, 27 V.I. 74, 85 (V.I. Super. Ct. 1992) (stating that civil actions include all actions brought to enforce, redress, or protect private rights, other than criminal proceedings); *cf. Najawicz*, 52 V.I. at 335 (A criminal action is "'[a]n action instituted by the government to punish offenses against the public.'").

[2] BLACK'S L. DICT., at 1399 (defining "serve" as meaning "to make legal delivery of (a notice or process)," as in "<a copy of the pleading was served on all interested parties>"; or "to present (a person) with a notice or process as required by law," as in "<the defendant was served with process>").

The server's affidavit confirmed that she had received the summons and complaint on December 28, 2009. Then, on January 14, 2010, at 10:30 a.m., the server spoke with Skepple on the telephone, telling Skepple that she "had a document for [Skepple] on behalf of the bank." Skepple responded that she would be at her home after 5:00 p.m. that day. The server again contacted Skepple at 6:00 p.m. to obtain directions to Skepple's home. Upon the server's arrival at Skepple's home, Skepple sent a person outside to inform the server that Skepple would not accept service of a copy of the documents. Importantly, the trial court record is devoid of any fact or information concerning whether the person the server met and spoke with at Skepple's home was a person of "suitable age and discretion" residing in the home for purposes of service of process.

BNS filed proof of publication of service on March 5, 2010. Then, on April 14, 2010, BNS sought entry of default against Skepple. Counsel for BNS provided an affidavit in support stating, *inter alia*, that Skepple had until March 28, 2010, to answer or otherwise defend the suit and had failed to do so. Default was entered on the court's docket on April 26, 2010. Based on the filings of BNS, the court concluded that Skepple was effectively served by publication on February 28, 2010, the last date on which the notice of summons was published in the newspaper. Then, on April 28, 2010, BNS sought a default judgment against Skepple. The default judgment was entered August 17, 2010. The trial court concluded that Skepple had been served with process in this matter and had failed to answer or otherwise defend. The trial court further found that Skepple was liable for breach of the promissory note and made findings regarding damages, interest, and fees.

On January 14, 2014, Skepple sought to set aside the default judgment. Skepple cited three factors to justify vacating the default judgment: Skepple's meritorious defense of the case, a lack

of prejudice to BNS, and Skepple's lack of willful or inexcusable conduct. Skepple cited several cases from the courts of this Territory that confirm a strong public policy for determining civil cases on the merits. *See generally Spencer v. Navarro*, S. Ct. Civ. No. 200-0069, 2009 WL 1078144, at *2 (V.I. Apr. 8, 2009) (*per curiam*) (unpublished) ("In assessing a trial court's decision, we are cognizant that default judgments are not the favored means of resolving civil actions and that doubtful cases should be decided on their merits. . . ." (citing *Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979, 981 (3d Cir. 1988); *Ryans Rest., Inc. v. Lewis*, 949 F. Supp. 380, 382 (D.V.I. App. Div. 1996)); *Toussaint v. Stewart*, 67 V.I. 931, 947-48 n.13 (V.I. 2017) (collecting cases). She further argued that BNS would face no greater burdens than it would have had the matter been prosecuted at the time entry of default was sought; however, Skepple failed to provide any discussion substantiating how this contention was true. To establish that her failure to respond was excusable, Skepple argued:

> Defendant Deloris [sic] Skepple lacked the knowledge and understanding to appreciate the significance of the documents served on her. Defendant Dwyane Fergus [sic] did contact the undersigned about said Summons and Complaint, but defendant Dwayne Fergus [sic] was not able to meet with the undersigned until November 2012, due to the undersigned's full schedule. In keeping with the standard for considering a motion to set aside default, any doubt should be resolved in favor of granting the Defendants' [sic] motion to set aside the default and give the Defendants [sic] the opportunity to respond to the complaint, which [s]he already did.

Finally, while stating the rule that "a meritorious defense is established when allegations of Defendant's answer, if established on trial, would constitute a complete defense to the action," Skepple failed to assert any argument as to what exactly the facts were that could have potentially established a meritorious defense to an action for breach of a promissory note or foreclosure of a mortgage.

BNS focused its opposition on a lack of excusable neglect on Skepple's part. BNS argued that Skepple actually refused to accept the summons and complaint on January 14, 2010, remaining in her home—which is the property that is the subject of the foreclosure—and sending an agent to respond on her behalf and inform the server that she would not accept the documents—after Skepple had been previously informed by the server that the documents were from BNS. BNS argued that these actions constituted a willful decision to not participate in this case and that Skepple had completely failed to demonstrate excusable neglect.

On July 24, 2014, the trial court denied Skepple's request to vacate the default judgment. First, the trial court recognized that Skepple's motion and memorandum of law in support thereof completely "fail[ed] to even identify a defense to the BNS Complaint, let alone 'set forth with some specificity the ground' for her defense." While recognizing that Skepple asserted "that 'Defendant's [sic] have a meritorious defense'," the trial court further concluded that "this unexplained conclusory statement alone cannot satisfy Skepple's burden . . . ." The trial court further explicated its finding that Skepple's conduct leading to the default judgment was not excusable. BNS attempted to serve Skepple on January 14, 2010. The server had contacted Skepple at 10:30 a.m. that day to confirm that Skepple would be home later that day at 5:00 p.m. At 6:00 p.m., Skepple again spoke with the server providing directions so that the server could locate her home. Skepple then sent a person outside her home to inform the server that Skepple would not accept service of process.[3]

[3] Service of process "is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party." *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946). More formally, service of process is "[t]he formal delivery of a writ, summons, or other legal process," BLACK'S L. DICT., at 1399, and grew out of the common law practice where "jurisdiction over a person [wa]s based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure." *Mich. Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913); *see generally Toussaint v. Stewart*, 67 V.I. 931, 943 n.7 (V.I. 2017) (defining process); 1 V.I.C. § 41 ("'process' signifies a writ or summons issued in the course of judicial proceedings").

On February 1, 2010, the court granted BNS leave to serve Skepple by publication, and BNS submitted what it asserted was prima facie proof of this constructive service to the trial court. Default judgment was then entered on August 18, 2010. It was not until April 15, 2011, that Skepple took any actions to defend this matter. The trial court concluded that Skepple "was sufficiently able to understand and appreciate the significance of the Process Server's documentation to determine to refuse service." The trial court further concluded that BNS had "served Skepple 'with every document filed in the foreclosure action up to entry of the Default Judugment." Despite these facts, Skepple failed to act until April 15, 2011. "The Court [found] that Skepple's behavior was willful, and not excusable."

Skepple filed her notice of appeal on August 22, 2014. In her brief, Skepple presents her various arguments in support of reversing the trial court's denial of her motion to vacate the default judgment. However, these arguments are not well articulated. For example, as her first issue, Skepple asserts "The Trial Court erred in Granting Default against Appellant." However, in this section of her brief, Skepple argues in substance that "the determination of whether to grant a Motion to Set Aside Default is based on liberal as opposed to strict interpretation . . . ." As this entire argument focuses on the standard for vacating a default judgment, it is obvious that the error Skepple complains of to this Court is that of the trial court's refusal to grant the motion to vacate the default judgment—not the trial court's granting of the default judgment. Skepple then proceeds to argue the three factors considered in determining whether vacating a default judgment is appropriate. She first argues that BNS would be subject to no other obligations than it would have been had Skepple answered the complaint at the outset of the litigation, but again fails to give any concrete examples of how this is true.

In addressing the excusable neglect portion of the trial court's opinion, Skepple argues that her "conduct was not willful." In support, Skepple asserts that she "was not served with the Summons and Complaint personally." Skepple then quotes from the affidavit of the server and argues that the affidavit established that BNS "knew the exact location of Appellant and was able to serve her personally." Skepple further argues that this affidavit establishes that the server "went to [Skepple's] home, [and then] spoke to someone but failed to leave the summons and complaint with the individual." Skepple concludes that these facts establish a failure of service of process and concludes that service by publication did not correct this failure.

II. JURISDICTION

Title 4, subsection 32(a) of the Virgin Islands Code states that "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." A "Final Order" ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment. *Ramirez v. People*, 56 V.I. 409, 416 (V.I. 2012) (citing *In re Truong*, 513 F.3d 91, 94 (3d Cir. 2008); *Bethel v. McAllister Bros., Inc.*, 81 F.3d 376, 381 (3d Cir. 1996)). The entry of a Final Order implicitly denies all pending motions, and all prior interlocutory orders merge with the Final Order. *Simpson v. Bd. of Dirs. of Sapphire Bay Condo. W.*, 62 V.I. 728, 731 (V.I. 2015).[4]

The Superior Court, on July 23, 2014, entered the Final Order denying Skepple's motion to set aside the default judgment. Skepple timely filed her notice of appeal on August 22, 2014. Therefore, we have jurisdiction over this appeal. V.I. R. APP. P. 5(a)(1); *see Billu v. People*, 57

[4] *See generally Penn v. Mosley*, 67 V.I. 879, 891 n.4 (V.I. 2017) (discussing the distinctions between a judgment, order, and decree); *Miller v. Sorenson*, 67 V.I. 861, 871-72 (V.I. 2017) (same); *e.g.*, *Demming v. Demming*, 66 V.I. 502, 506 (V.I. 2017) (holding that a divorce decree is a final judgment); *Cianci v. Chaput*, 68 V.I. 682, 688 (V.I. 2016) (quoting *Matter of Estate of George*, 59 V.I. 913, 919 (V.I. 2013)); *Williams v. People*, 58 V.I. 341, 347-48 (V.I. 2013) (holding that a stay of execution of judgment does not render an order non-final).

V.I. 455, 460 n.3 (V.I. 2012) (noting that, where an amended rule utilized the same language as the rule in effect at the time the notice of appeal was filed, the amended rule is applied); *cf. Webster v. FirstBank P.R.*, 66 V.I. 514, 519 n.3 (V.I. 2017) (applying former rules of the Superior Court in effect at the time the judgment was entered); *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 548 n.13 (V.I. 2015) (applying version of statute in effect at the time the action was commenced).

III. ISSUES AND STANDARD OF REVIEW

While presenting her argument as four separate issues, in essence, Skepple argues that the trial court abused its discretion when it denied her motion to vacate the default judgment because (1) BNS had failed to achieve personal service of process upon her and (2) the subsequent constructive service did not cure this failure; therefore, the Superior Court lacked personal jurisdiction over Skepple when it entered the default judgment. Generally, the standard of review for this Court's examination of the trial court's application of law is plenary, and its findings of facts are reviewed for clear error. *Rodriguez v. Bureau of Corr.*, 58 V.I. 367, 371 (V.I. 2011); *Blyden v. People*, 53 V.I. 637, 646-47 (V.I. 2010). "We review the Superior Court's ruling on a motion to grant relief from a judgment for an abuse of discretion." *Appleton v. Harrigan*, 61 V.I. 262, 268 (V.I. 2014) (citing *Gould v. Salem*, 59 V.I. 813, 817 (V.I. 2013)); *Ernest v. Morris*, 64 V.I. 627, 636 (V.I. 2016); *Beachside Assocs. v. Fishman*, 53 V.I. 700, 711 (V.I. 2010); *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 188 (V.I. 2009); *Spencer*, 2009 WL 1078144, at *2.

Specifically, as relates to this appeal, we review de novo a trial court's jurisdictional determinations, including sufficiency of service of process, and apply the same standard as the trial court. *Ernest*, 64 V.I. at 636 (citing *Appleton*, 61 V.I. at 268; *Gould*, 59 V.I. at 817); *see St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 473 (V.I. 2014) (*citing Molloy v. Independence Blue Cross*, 56 V.I. 155, 169 (V.I. 2012)). Likewise, the determination of whether the procedure in a

particular case constituted legal notice[5] is subject to plenary review. *Petrucelli v. Borhringer & Ratzinger, GMBH*, 46 F.3d 1298, 1303 (3d Cir. 1995). The trial court "must accept as true all of the . . . factual allegations that are supported by the affidavits or other competent evidence which would be admissible at trial and must resolve all factual disputes in the plaintiff's favor." *Molloy*, 56 V.I. at 173 (citing *Metcalfe v. Renaissance Marie, Inc.*, 566 F.3d 324, 330 (3d Cir. 2009); *Ford v. Amber Cape Prods., LLC*, No. 2009-144, 2010 WL 3827321, at *3 (D.V.I. Sept. 30, 2010) (unpublished)).

IV. DISCUSSION

The right of Due Process is "intended 'to secure the individual from arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and

[5] "Legal notice" is the equivalent of "due notice." BLACK'S L. DICT., at 1091. "Due notice" is "[s]ufficient and proper notice that is intended to and likely to reach a particular person or the public; notice that is legally adequate given the particular circumstances." *Id*. at 1090. Personal service of process is the "[a]ctual delivery of . . . process to the person to whom it is directed." BLACK'S L. DICT. at 1180 (also called "actual service'); *see Harkness v. Hyde*, 98 U.S. (8 Otto) 476, 478 (1879) ("Personal service within its limits, or the voluntary appearance of the defendant, is essential in such cases. It is only . . . where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action." (citing *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 735 (1878)); *see also* BLACK'S L. DICT., at 1169 (defining "*Pennoyer* Rule" as "[t]he principle that a court may not issue a personal judgment against a defendant over which it has no personal jurisdiction"). By comparison, substituted service of process is "[a]ny method of service [of process] allowed by law in place of personal service, such as service by mail." *Id.* A specific sub-category of substituted service is constructive service of process, which is service that is "[l]egally imputed; having an effect in law though not necessarily in fact." *Id.* at 333 (defining constructive). This could be purely "constructive service," which is service "accomplished by a method or circumstance that does not give actual notice," *Id.* at 1399. In contrast, "Actual notice" also called "express notice" has no requirement that notice be "legally adequate." *Id*. (defining "actual notice" as "[n]otice given directly to, or received personally by, a party" and "express notice" as "[a]ctual knowledge or notice given to a party directly, not arising from any inference, duty, or inquiry"). As such, actual notice is not a substitute for legal notice, but legal notice may be valid, though potentially not providing actual notice. *E.g.*, *Hess v. Pawloski*, 274 U.S. 352, 354, 356-57 (1927) (recognizing that service by registered mail in place of personal service in hand could be adequate to satisfy the notice requirements of due process); *see also Caledonian Coal Co. v. Baker*, 196 U.S. 432, 444 (1905) ("It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, 'except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." (citations omitted)); *Wilson v. Seligman*, 144 U.S. 41, 44 (1892) ("[T]he notice must be personally served upon the defendant within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed, unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient.").

distributive justice." *Scott v. McNeal*, 154 U.S. at 45 (quoting *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 554 (1876); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 465, 701-02 (1982) ("The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual's liberty interest."). Thus, what constitutes due process and the exercise of lawful judicial power varies by situation but, generally speaking, requires

> a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution – that is, by the law of its creation – to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process . . . .

McNeal, 154 U.S. at 46; *see Estate of Ludington v. Jaber*, 54 V.I. 678, 684 (V.I. 2011).[6] More concisely, Due Process requires that a defendant be given legal notice and an opportunity to be heard. *Dennery*, 55 V.I. at 993-94; *e.g.*, *In re Estate of Small*, 57 V.I. 416, 430-31 (V.I. 2012)

[6] *E.g.*, *Hard Rock Café v. Lee*, 54 V.I. 622, 632-33 (V.I. 2012) (finding a judgment void because the administrative hearing officer allowed in *ex parte* evidence); *J.S.I.*, 55 V.I. at 944 (holding that providing notice to a minor during a five-minute recess at a juvenile criminal transfer hearing was constitutionally inadequate); *Chavayez v. Buhler*, S. Ct. Civ. No. 2007-0060, 2009 WL 1810914, at *3 (V.I. June 25, 2009) (unpublished) (finding that a trial court violated a party's due process rights by ruling on a motion prior to the expiration of the time to respond); *see generally Burnham v. Superior Court of Cal.*, 495 U.S. 604, 608-09 (1990) (plurality opinion) ("Traditionally that proposition was embodied in the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment.").V.I.R. CIV. P. 4(f) (providing that service on parties outside the territorial jurisdiction of the Virgin Islands be in accordance with the provisions of the Virgin Islands Code addressed to the subject); V.I.R. CIV. P. 4-1 (providing procedure for constructive service by publication), V.I.R. CIV. P. 5 (providing methods of service of other papers and pleadings other than the initiating complaint); *Rubin*, 109 F.R.D. at 198-200 (discussing the due process notice requirements once service is completed).

(finding that the party's attorney's actual notice was sufficient notice to satisfy due process). A violation of due process rights will render a judgment void, and that judgment

> can have no force as to one on whom there has been no **service of process**, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That with respect to such a person, such judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community.

Harris v. Hardeman, 55 U.S. (14 How.) 334, 339 (1853) (emphasis added) (citations omitted); *Pelle*, 66 V.I. at 319; *Gore*, 50 V.I. at 239; *Employees Ret. Sys. of Gov't of the V.I. v. Armstrong* (*H. Armstrong*), 23 V.I. 35, 38 (V.I. Super. Ct. 1987) (citing *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)); *see also Hanley v. Donoghue*, 116 U.S. 1, 3-4 (1885). If any one of the following prerequisites to a valid judgment are absent, the judgment is void. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010).

A valid judgment requires, first, that the court that issued it "ha[d] cognizance of the class of case to which the one adjudged belonged"; it must have subject matter jurisdiction. *Reynolds v. Stockton*, 140 U.S. 254, 268 (1891); *Bredin v. Bredin*, 140 F. Supp. 132, 136 (D.V.I. 1956); *Isaac v. Isaac*, 25 V.I. 36, 39 (V.I. Super. Ct. 1990) (citing *Milliken v. Meyer*, 311 U.S. 457, (1940)).

The second requirement of a valid judgment is that the trial court validly exercised personal jurisdiction over the parties, which requires consideration of both: (a) whether the defendant had certain minimum contacts with the forum in which the court is located and (b) whether the defendant was validly served (or waived this requirement). *Stockton*, 140 U.S.at 268 ("That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities.");

Bryan, 61 V.I. at 441; *Najawicz*, 52 V.I. at 338; *see* 5 V.I.C. §§ 4902, 4903(a)(1-8); *Isaac*, 25 V.I. at 39.[7] Personal jurisdiction, also called *in personam* jurisdiction, is the "court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property rights." BLACK'S LAW DICTIONARY 870 (8th ed. 2004); *Molloy*, 56 V.I. at 172 ("Personal jurisdiction is the authority of a court to exercise jurisdiction over a party before it." (citation omitted)); *see also Mexican C. R. Co. v. Pinkney*, 149 U.S. 194 (1893). "The foundation of [personal] jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout the proceedings properly begun . . . ." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (citing *Penn. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Mich. Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913)). Therefore,

> [s]ervice of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. . . . The requirement that a defendant be brought into litigation by official service is the contemporary counterpart to [the writ of] *capias ad respondendum*.
>
> In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); [*Miss. Pub. Corp.*] *v. Murphree*, 326 U.S. 438, 444-445 (1946) ("Service of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served.").

[7] *See also Herndon v. Ridgway*, 58 U.S. (17 How.) 424, 425 (1855); *Rubin*, 109 F.R.D. at 178; *H. Armstrong*, 23 V.I. at 38 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)); *Najawicz*, 52 V.I. at 337 (discussing "minimum contacts" that satisfy constitutional due process protections enjoyed by a defendant in a civil suit); *Edney v. Edney*, Super. Ct. Case No. SX-05-DI-104, 2014 WL 5904728, at *3 (V.I. Super. Ct. Oct. 7, 2014) (unpublished) (citing *United Student Aid Funds*, 559 U.S. at 270); *see generally Int'l Shoe Co.*, 326 U.S. at 316 (citing *Milliken*, 311 U.S.at 463; *McDonald v. Mabee*, 243 U.S. 90, 91 (1917); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316, 319 (1943); *Blackmer v. United States*, 284 U.S. 421 (1932); *Pawloski*, 274 U.S. at 352; *Young v. Maci*, 289 U.S. 253 (1933)).

Murphy Bros. v. Michetti Pipe Stringing, 526 U.S. 344, 350 (1999).[8]

Third, the issue decided in the judgment must have been presented to the court by the parties. *Stockton*, 140 U.S. at 268 ("Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that power of judicial decisions arises. And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.'"). A court's judgment that "is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant" is void because the opposing party is denied notice and the opportunity to defend against the matters absent from the pleadings. *Stockton*, 140 U.S. at 265; *e.g.*, *Isaac*, 25 V.I. at 42; *Brandy v. Brandy*, 21 V.I. 267, 272 (V.I. Super. Ct. 1985) (finding that a divorce decree issued *ex parte* could not effectively determine the right of the absent spouse to alimony and support even if it did effectively end the marriage (citing *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957)).

The fourth, and final, requirement of a valid judgment is that the court issuing the judgment must have acted in accordance with due process of law. *Pelle*, 66 V.I. at 319; *Gore*, 50 V.I. at 239;

[8] The earliest case of the United States Supreme Court to intimate that "notice" is a prerequisite to valid exercise of personal jurisdiction and a valid judgment *in personam* was *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813). *See D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175 (1851) (clarifying *Mills* stating that notice was speaking of service, "the defendant had been served with process"); *Alton v. Alton*, 207 F.2d 667, (3d Cir. 1953) (discussing the evolution of the law of due process and the requirement of notice and an opportunity to be heard); *see generally Georgia v. Pa. R. Co.*, 324 U.S. 439, 467-68 (1945) ("'In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons.'" (quoting *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622-23(1925)); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1856), ("whenever an action is brought in one State on a judgment recovered in another, it is not enough to show it to be valid in the State where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the State, or had legal notice of the suit, and **was in some way subject to its laws**, so as to be bound to appear and contest the suit, or suffer a judgment by default." (emphasis added)); *Butterworth v. Hill*, 114 U.S. 128, 132 (1885) ("The prayer for process is one of the component parts of the structure of a bill, and its purpose is to compel the defendant to appear and abide the determination of the court of the subject matter of the proceeding." (citation omitted)).

Isaac, 25 V.I. at 39 (citing *Williams v. North Carolina*, 317 U.S. 287 (1942)); *e.g.*, *J.S.I.*, 55 V.I. at 944; *Hard Rock Café v. Lee*, 54 V.I. 622, 632-33 (V.I. 2012); *Chavayez v. Buhler*, S. Ct. Civ. No. 2007-0060, 2009 WL 1810914, at *3 (V.I. June 25, 2009) (unpublished). Actions inconsistent with due process of law that deny a party a "full hearing" render a judgment void. *L. Smith*, 67 V.I. at 803 n.5. Due Process requires that the rules and orders governing procedures and deadlines imposed and evidence admitted or excluded must have, in practical effect, allowed the defendant a reasonable opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *Roller v. Holly*, 176 U.S. 398, 414 (1900) ("It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose.").[9]

[9] *See also Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917) ("The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." (citations omitted)); *Louisville & Nashville R.R Co. v. Schmidt*, 177 U.S. 230, 236 (1900) ("All its requirements are complied with, provided in the proceedings which are claimed not have been due process of law the person condemned has had sufficient notice and **adequate opportunity** has been afforded him to defend." (emphasis added) (citing *Iowa Central Ry. v. Iowa*, 160 U.S. 389 (1896)); *Wilson v. North Carolina*, 169 U.S. 586 (1898)); *The Mary*, 13 U.S. (9 Cranch) 126, 142 (1815) ("In the same cause, a fact, not controverted by one party, who does not appear, and therefore as to him taken for confessed, ought not, on that implied admission, to be brought to bear upon another who does appear, does controvert, and does disprove it.").

A "full hearing" is "a hearing at which the parties are allowed notice of each other's claims and are given ample opportunity to present their positions with evidence and argument." *In re Smith*, 54 V.I. at 530 (quoting BLACK'S L. DICT., at 738). Typically, a full hearing requires the defendant have the right to obtain counsel of their choosing, present evidence, and conduct meaningful cross-examination of the witnesses. *In re A.A.*, 931 F. Supp. 1247, 1253 (D.V.I. App. Div. 1996) (citing *Kent v. United States*, 383 U.S. 541, 557-62 (1967); *United States ex rel. Turner v. Rundle*, 438 F.2d 839, 842 (3d Cir. 1971)); *Gov't of the V.I. v. Santana*, 9 V.I. 154. 160-61 (V.I. Super. Ct. 1972).

A. Because Skepple Presented a Different Argument on Appeal Than in the Trial Court Regarding the Validity of the Default Judgment, the Issue of Insufficient Legal Notice of the Lawsuit Was Waived.

Default judgments are disfavored, and a doubtful case should be resolved in favor of vacating the default and proceeding to a decision on the merits. *Spencer*, 2009 WL 1078144, at *2; *Skinner v. Guess*, 27 V.I. 193, 196 (D.V.I. App. Div. 1992).[10] However, a failure to timely assert a violation of due process—whether it is a general due process violation or a due process violation relating specifically to validity of process, service of process, the statutory basis for the exercise of personal jurisdiction, or personal jurisdiction minimum contacts—will result in such claim of error being waived. *Ruiz v. Jung*, S. Ct. Civ. No. 2008-0035, 2009 WL 3568182, at *4-5 (V.I. Oct. 19, 2009) (unpublished) (finding that a failure to argue that the failure to hold a hearing violated appellant's due process rights was a waiver of the argument).[11] In her motion to vacate the default judgment, Skepple argued the following:

> Defendant Deloris [sic] Skepple lacked the knowledge and understanding to appreciate the significance of the documents served on her. Defendant Dwyane Fergus [sic] did contact the undersigned about said Summons and Complaint, but defendant Dwayne Fergus [sic] was not able to meet with the undersigned until November 2012, due to the undersigned's full schedule. In keeping with the standard for considering a motion to set aside default, any doubt should be resolved in favor of granting the Defendants' [sic] motion to set aside the default and give the Defendants [sic] the opportunity to respond to the complaint, which [s]he already did.

[10] *See Irizarry v. Carpenter*, 274 F. Supp. 2d 729, 731 (D.V.I. App. Div. 2003); *Ryans Restaurant, Inc. v. Lewis*, 949 F. Supp. 380, 383 (D.V.I. App. Div. 1996) ("Since there is no requirement in the Small Claims Division . . . to submit an answer or other responsive filing that may indicate the existence of a meritorious defense, the preference for resolving controversies on the merits rather than by default is even stronger.").

[11] *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 719 (1838) ("An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue." (citations omitted)).

In contrast, on appeal, Skepple argues that her "conduct was not willful." Skepple asserts that she "was not served with the Summons and Complaint personally" even though BNS "knew the exact location of Appellant and was able to serve her personally." Because the server "went to [Skepple's] home, spoke to someone but failed to leave the summons and complaint with the individual," Skepple concludes there was a failure of service and further concludes that service by publication did not correct this failure.

Absent exceptional circumstances, we will not consider any argument that is raised for the first time on appeal or an argument that was raised in the trial court but not asserted on appeal. *Dupigny v. Tyson*, 66 V.I. 434, 439 (V.I. 2017). Here, Skepple argued to the trial court that the default judgment should have been vacated because she "lacked the knowledge and understanding to appreciate the significance of the documents served on her." However, before this Court, Skepple argues that the default judgment should be vacated because she was not personally served with process and service by publication never cured this defect.

Dupigny presented similar circumstances to what we have before us now. In that case, the appellant argued at the trial level that settlement proceeds from his personal injury case that had been subjected to a child support obligation were not "income" within the meaning of the applicable provisions of the Virgin Islands Code. *Id.* at 439-40. However, on appeal, the appellant argued that the income was exempt from a child support obligation, as provided in a different section of the Virgin Islands Code. *Id.* Both of Dupigny's arguments were at their core an argument that the money that had been subjected to the child support obligation was somehow legally not subject to such an obligation. But the legal theories presented were dramatically different, and we held that both arguments had been waived. *Id.* Like in *Dupigny*, both of Skepple's arguments were, at their core, an argument that circumstances existed that warranted

vacating the default judgment. Moreover, the legal theories are dramatically different, as in *Dupigny*; therefore, the arguments have been waived.

However, this does not end our inquiry. Due process protects the individual from coercion "except by lawful judicial power." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); and we have recognized that "a 'fundamental error . . . may be noticed by an appellate court notwithstanding the defendant's failure to raise it . . . .'" *Blyden*, 53 V.I. at 664 (quoting *Stevens v. People*, 52 V.I. 294, 309 (V.I. 2009)). Moreover, "before the . . . court may default a defendant, the plaintiff must prove service"; and a "default judgment rendered without personal jurisdiction is void." *Golub v. United States*, 593 Fed. Appx. 546, 548-49 (7th Cir. 2014).

"[I]n all instances the jurisdiction of the court rendering the judgment may be inquired into, and . . . allow the defendant to show that the court had no jurisdiction over his person." *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 463 (1874). Therefore, even though Skepple has waived this argument, we must consider whether the default judgment was entered without the trial court having first obtained personal jurisdiction over Skepple because the issuance of a judgment by a court that has not obtained personal jurisdiction over a defendant is not a valid exercise of judicial power, and the judgment is premised on a fundamental error. *See Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 139 (1912) ("[T]he conclusive effect of a judgment *in personam* . . . depends upon whether it is the judgment of a court which had jurisdiction over the person of the defendant sought to be bound.").[12]

[12] *See also Clark v. Wells*, 203 U.S. 164, 170 (1906) ("It must be taken at the outset as settled that no valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction or waiver of summons and voluntary appearance therein."); *Ins. Co. v. Bangs*, 103 U.S. (13 Otto) 435, 439 (1881) ("[A]ny decree . . . would necessarily have been *coram non judice*, unless the parties were before the court upon service . . . or their voluntary appearance."); *Hall v. Lanning*, 91 U.S. (1 Otto) 160, 169 (1875) ("[A] judgment

B. Skepple Did Not Receive Legal Notice, Due to BNS's Failure to Successfully Execute Either of Its Two Attempted Methods of Service of Process, Thus Resulting in the Trial Court's Lack of Personal Jurisdiction Over Skepple at the Time the Default Judgment Was Entered, and the Default Judgment Was Concomitantly Void *Ab Initio*.

"[P]ersonal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled *in personam*." *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (citing *McDonald*, 243 U.S. at 92). A failure to give legal notice will render the exercise of personal jurisdiction by a court invalid. *See Nicastro*, 564 U.S. at 877; *Roller*, 176 U.S. at 412; *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 474-75 (1830).

Historically, whether a particular method of service employed gave legal notice hinged largely on whether the proceeding was *in rem*[13] or *in personam*, but today, the nature of the proceeding only bears on the assessment of whether the method meets the requirements of due

rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign State, if the defendant had not been served with process, or voluntarily made defense because neither the legislative jurisdiction nor that of the courts of justice had binding force." (quoting *D'Arcy*, 52 U.S. at 176)).

[13] The term "in rem" has multiple meanings, though all related, depending on the issue being discussed when the term is used. An "action in rem" is probably most commonly understood as an "action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." BLACK'S L. DICT., at 32. Another common understanding of this term would also be an "action in which the named defendant is real of personal property." *Id.* "In rem jurisdiction" is a "court's power to adjudicate rights to a given piece of property, including the power to seize and hold it." *Id.* at 869. Whereas to call a proceeding "in rem" is to describe the proceeding as "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing. *Id.* at 809. Interestingly, the archaic term for this was "impersonal." *Id.* A "judgment in rem" then is a "judgment that determines the status or condition of property and that operates directly on the property itself. The phrase denotes a judgment that affects not only interests in a thing but also all persons' interests in the thing." *Id.* at 860. In *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-59 (1810), the Court explained the distinction at common law between service in a proceeding *in personam* versus *in rem*. If the judgment operated directly upon the person, a judgment *in personam*, service in hand directly upon the person when she was within the territorial jurisdiction of the state was essential to valid legal notice—valid service. *McDonald*, 243 U.S. at 91 ("There is no dispute that service by publication does not warrant a personal judgment against a non-resident." (citing *Pennoyer*, 95 U.S. at 714; *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 193-94 (1915))).

process. *Greene*, 456 U.S. at 450.[14] Instead, the determination of whether there was adequate legal notice focuses on whether the method of service—the form of notice—carries with it the "ability to inform people of the pendency of proceedings that affect their rights" as "'judged in light of its practical application to the affairs of men as they are ordinarily conducted.'" *Greene*, 456 U.S. at 451 (quoting *N. Larami Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)). A plaintiff fails to achieve valid service of process, and thus, fails to give a defendant legal notice under two circumstances.

First, unless a defendant has waived service, the defendant must either have consented to the particular method of service utilized or be served with process by a method that is authorized by law. *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 580 n.4 (V.I. 2012) (citing 5 V.I.C. § 115).[15] To be "authorized by law," there must be a statutory basis—or a statutory basis authorizing judicial ruling making, *e.g.*, 48 U.S.C. § 1611(c) (Section 21 of the Revised Organic Act); 4 V.I.C. § 83; *see also* 4 V.I.C. §§ 32(f)(2); 34; *Gerace v. Bentley*, 65 V.I. 289, 303 (V.I. 2016) ("[C]onflicts between rules promulgated by the judiciary and rules promulgated by the legislature are resolved

[14] *See generally Watkins v. Holman's Lesse*e, 41 U.S. (16 Pet.) 25, 25 (1842) ("That this deed is inoperative, is clear. It was executed by the administratrix, under a decree or order of the supreme court in Massachusetts, and by virtue of a statute of that state. The proceeding, it is not pretended, was authorized by any law of Alabama. And no principle is better established, than that the disposition of real estate, whether by deed, descent or by any other mode, must be governed by the law of the state where the land is situated. A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."); *Johnson v. M'Intosh*, 21 U.S. 543, 572 (1823) ("[T]itle to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie.").

[15] *See* 5 V.I.C. § 4904 (allowing service outside of the territory when the exercise of personal jurisdiction is authorized); *Davis*, 213 U.S. at 254 ("With this purpose in view many States have provided that foreign corporations, in order to do business within the State, must make provision for service upon some local agent, or by authority conferred upon some state officer to accept service. And but for such statutes and the authority given by the States to obtain service upon local agents there could be no recovery upon the contracts of such companies, unless redress be sought in a distant State where the company may happen to have its home office." (citations omitted)); *cf. Najawicz*, 52 V.I. at 335 n.17; *Doumeng v. Doumeng*, 12 V.I. 310, (D.V.I. 1975); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (citing *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964)).

in favor of the judiciary.") (collecting cases)—for both exercising personal jurisdiction over the defendant, *e.g.*, 5 V.I.C. §§ 4902 (personal jurisdiction based on a relationship to the forum), § 4903 (personal jurisdiction based upon conduct), § 4901 (defining person for matters of personal jurisdiction and service), and the method of service used to obtain personal jurisdiction, *e.g.*, 5 V.I.C. §§ 4904, 4911(a); *Najawicz*, 52 V.I. at 336; *see also Blyden v. Gov't of the V.I.*, 64 V.I. 367, 375 (V.I. 2016) (holding that the government's right to service is not based in due process but exclusively based in statutory and procedural law); *Thomas v. Bonanno*, Civ. No. 2013-06, 2013 WL 3958772, at *4 (D.V.I. July 30, 2013) (explaining that "actual notice is not a substitute for proper service" and observing that service by publication is permissible only in the limited circumstances authorized by statute, specifically, 5 V.I.C. § 112(a)(1)-(6)) (quoting *In re City of Phila. Litig.*, 123 F.R.D. 515, 518 (E.D. Pa. 1988)). Any attempted service by a method that has not been previously authorized cannot be regarded as effective service, i.e., legal notice, and cannot bring the person within the court's power. *Hollingsworth*, 29 U.S. at 476 ("[A]n unauthorized publication cannot be regarded as [legal] notice; and the case under consideration, is as if no attempt to give notice had been made.").[16]

Second, if constructive service was utilized, failure to strictly follow the statutory requirements renders a judgment void. *Settlemier*, 97 U.S. at 447 (observing that the substituted service in actions purely *in personam* was a departure from the rule of the common law, and the

[16] *See also Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928) (holding service insufficient where the statute did not provide for actual notice to the defendant, even though the defendant had actual notice of the suit, stating "Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it." (citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-25 (1915); *Louisville & Nashville R. R. Corp. v. Stock Yards Co.*, 212 U.S. 132, 144 (1909); *Cent. Ga. Ry. Co. v. Wright*, 207 U.S. 127, 138 (1907); *Sec. Trust Co. v. Lexington*, 203 U.S. 323, 333 (1906); *Roller*, 176 U.S. at 409); *Shriver Junior's Lessee v. Lynn*, 43 U.S. (2 How.) 43, 60 (1844) ("No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without [legal] notice, would be treated as a nullity.").

authority for it, if it could be allowed at all, must have been strictly followed); *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 453 (1836).[17] Therefore, except in instances of constructive service,[18] the inquiry of whether a defendant's actual notice also constitutes legal notice is a flexible analysis requiring that the notice procedure employed be appropriate for the situation and interest(s) involved. *Ludington*, 54 V.I. at 684; *Rubin v. Johns*, 109 F.R.D. 174, 177-78 (D.V.I. App. Div. 1986) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1970)).[19]

So, while "the provisions of the due process clause . . . restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights," *Am. Land Co. v. Zeiss*, 219 U.S. 47, 66 (1911), methods of service that are less likely to guarantee actual notice are considered valid legal notice and constitute due process when considered "in light of . . . history and the practical obstacles to provide personal service in every instance." *Greene*, 456 U.S. at 449. In order for legal notice to comply with the requirements of due process and support the exercise of personal jurisdiction over a defendant at the outset of a lawsuit—considering the totality of the

[17] *See also Grannis v. Ordean*, 234 U.S. 385, 395 (1914) ("The general rule, in cases of constructive service of process by publication, tends to strictness."); *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336 (1850) ("No principal is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make a defence. And every departure from this fundamental rule . . . in which a **publication of notice** is substituted for a service on the party, should be subjected to strict legal scrutiny." (emphasis added)); *Okley*, 17 U.S. at 241-42 ("We readily admit, that the provisions of this law are in derogation of the ordinary principles of private rights, and, as such, must be subjected to strict construction . . . .").

[18] *Hollingsworth*, 29 U.S. at 475 ("Constructive notice, therefore, can only exist in the cases coming fairly within the provisions of the statutes authorizing courts to make orders of publication, and providing that the publication, when made, shall authorize the courts to decree it.").

[19] *E.g.*, *Chavayez*, 2009 WL 1810914, at *3 (finding that a trial court violated a party's due process rights by ruling on a motion prior to the expiration of the time to respond); *In re Gov't of the V.I.*, S. Ct. Civ. No. 2011-0029, 2011 WL 1983415, at *4-5(V.I. May 18, 2011) (per curiam) (unpublished) (addressing the validity of "quick take" scheme established in the Virgin Islands Code); *Mulrain v. Mulrain*, 15 V.I. 149, 151 (D.V.I. App. Div. 1979) (discussing reasonable service alternatives for an indigent spouse who could not afford service by publication (citing *Mullane*, 339 U.S. at 317)).

circumstances—the notice must be reasonably calculated to apprise the interested party of the pendency of the case and afford the party a genuine opportunity to present the party's objections, such that the notice must reasonably convey all required information and likewise afford a reasonable time for the party to make an appearance and present such objections. Additionally, the service must be directed to those people and at those locations known to, and reasonably discoverable by, the plaintiff, such that the efforts at service demonstrate that the plaintiff was "desirous of actually informing the absentee" defendant. *Ludington*, 54 V.I. at 684; *Gore*, 50 V.I.at 236 (quoting *Mullane*, 339 U.S. at 314); *Small*, 57 V.I. at 426 (holding that known creditors must be given legal notice that is also actual notice).[20]

i. BNS's Failure to Effect Service of Process Deprived Skepple of Legal Notice—Due to the Server's Failure to Leave a Copy of the Summons and Complaint at Skepple's Home With a Person of Suitable Age and Discretion—and the Superior Court Lacked Personal Jurisdiction Over Her.

Because a court cannot have jurisdiction over a defendant unless that defendant was served with process such that she had legal notice, when the validity of a default judgment is being challenged, the first line of inquiry should be to ask "whether the court in which the judgment by default was taken, ever had jurisdiction as to the defendant, so as to warrant the judgment entered against him by default"; "no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that

[20] *E.g.*, *Cox v. Cox*, 457 F.2d 1190, 1192-93, 1197 (3d Cir. 1972); *see also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983) (actual notice will constitute legal notice if its "tenor indicates that it ought to be taken seriously"—"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (quoting *Mullane*, 339 U.S.at 314)); *Bd. of Trade v. Hammond Elevator Co.*, 198 U.S. 424, 434-35 (1905) (noting that failure of service is to make the court entirely without personal jurisdiction over the defendant); *H. Armstrong*, 23 V.I. at 38 ("Due Process requires that the defendant be given adequate notice of the suit." and noting that the function of service "is to provide notice of the commencement of the action to defendant's attention and to provide a ritual that marks the Court's assertion of jurisdiction over the lawsuit." (citing *Mullane*, 339 U.S. at 313-14; *World-Wide Volkswagen*, 444 U.S.at 292).

which it never was incumbent upon him to fulfill." *Harris*, 55 U.S. at 339; *Martinez*, 51 V.I. at 187.[21] In the trial court, it is the burden of the party seeking to bring the defendant, *see* 5 V.I.C. § 4901 (defining person), into court to prove that the statutory (or rule) requirements for legal notice were fulfilled. 5 V.I.C. § 740(5); *In re J.S.I.*, 55 V.I. 939, 944 (V.I. 2011); *see Edward v. GEC, LLC*, 67 V.I. 745, 755-56 (V.I. 2017). When served by "a disinterested person" who is authorized by law to do so, process of the Superior Court is effective throughout the Territory, and service may be made anywhere within the territorial limits of the U.S. Virgin Islands. 4 V.I.C. § 82(a-b), (d); BLACK'S L. DICT., at 1361 (defining "run" as meaning "to apply," as in "<the injunction runs against only one of the parties in the dispute>").

Proof of service demands proof of legal notice to the defendant or his voluntary appearance in the action. 5 V.I.C. §§ 114(a) ("Proof of the service of the summons and complaint . . . ."), 111(a) (same as applied to infant or incompetent defendant), 696(a)(1); *see* 5 V.I.C. § 115 ("A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him."). An affidavit is competent evidence to establish service, i.e., legal notice, and the filing of an affidavit asserting facts establishing compliance with the relevant rule of service is prima facie evidence giving rise to a rebuttable presumption of valid service providing legal notice. 5 V.I.C. §§ 114(a)(2), 696(a)(1), 4911(b); *Molloy v. Independence Blue Cross*, 56 V.I. 155, 172-73 (V.I. 2012); *Bonanno*, 2013 WL 3958772, at *6; *see Gore*, 50 V.I. at 236; *Spencer*, 2009 WL 1078144, at *3 (recognizing that affidavits are competent evidence to support a motion to vacate default

[21] *See also McDonough*, 204 U.S. at 15 ("'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.").

judgment).[22] In cases involving constructive service, the proof of service must contain those facts establishing strict compliance with such statute or court rule. 5 V.I.C. § 698.[23]

Where the proof of service fails to establish the statutory pre-requisites that justify the trial court's authorization of constructive service, the court has no personal jurisdiction. *See Settlemier v. Sullivan*, 97 U.S. (7 Otto) 444, 447 (1879) (holding that the facts stated in the proof of service are presumed to be true unless contradicted by the record); *but see* V.I.R. Civ. P. 4(l)(3) ("Failure to prove service does not affect the validity of service."); *cf. Frank L. Young Co. v. McNeal-Edwards Co.*, 283 US. 398, 399 (1931) (citing *Partridge v. Phoenix Mut. Life Ins. Co.*, 82 U.S. (15 Wall.) 573, 580 (1872))); *Saenger*, 303 U.S. at 67-68. However, a defendant's refusal to accept service or a defendant's avoidance of service will not defeat personal jurisdiction if the complaint and legally sufficient process "have reached the person to whom they are directed within the time prescribed by law, if any." V.I.R. CIV. P. 4(n); *e.g.*, *Errion v. Connell*, 236 F.2d 447, 457 (9th 2009).

While it is true that "the plaintiff bears the ultimate responsibility to prove by a preponderance of evidence that the trial court may exercise personal jurisdiction," including valid

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[22] *See also* 5 V.I.C. § 114(a)(4) (establishing that a defendant's written admission establishing legal notice also constitutes proof of service), (b) (admission must state the time and place of service); *compare FirstBank P.R. v. Jaymo Properties, LLC*, 379 Fed. Appx. 166, 170 (3d Cir. 2010) ("[A]n affidavit or affirmation from that party or its attorney stating in good faith that the non-responsive defendant is a competent adult is not less than competent evidence of that fact merely because it is founded upon information and belief rather than an assertion of personal knowledge. (citing *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009); 2A C.J.S. Affidavits § 46)) *with Henry v. Dennery*, 55 V.I. 986, *5 (V.I. 2011) ("The only proof that Henry received actual notice of the trial came from the unsworn representation of Dennery's attorney, and unsworn representations of an attorney are not evidence." (citing *In re Guardianship of Holly*, 164 P.3d 137, 143 (Okla. 2007); *Scott v. State*, 922 So.2d 1024, 1027 (Fla. Dist. Ct. App. 2006); *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997)).

[23] *See St. Clair v. Cox*, 106 U.S. (16 Otto) 350, 357-58 (1882) ("[W]hen service is made . . ., it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record – either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court . . . . [A] certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence . . . ."); *see also Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 329 (1854).

service of process, a party challenging whether a plaintiff has complied with the applicable requirements for service must submit an affidavit or other competent evidence showing that service in compliance with the applicable rule was never achieved, unless the facts in the record demonstrate a failure to make a prima facie showing that service was accomplished. *Molloys*, 56 V.I. at 172; *see also Settlemier*, 97 U.S. at 447; *Bonanno*, 2013 WL 3958772, at *3. A prior unsuccessful attempt at service does not invalidate a subsequent successful service—and *vice versa*—and the successful service is adequate to obtain personal jurisdiction. *See Bonanno*, 2013 WL 3958772, at *7.[24]

If the Superior Court is properly presented with a challenge to personal jurisdiction, whether it is a challenge to constitutional minimum contacts, long-arm statute jurisdiction, sufficient process, or sufficient service, the court must hold an evidentiary hearing to resolve any factual dispute between the prima facie evidence contained in the affidavit of service and the evidence (i.e., affidavit presenting facts that, if true, establish service was not properly achieved) as disputed by the party presenting the challenge. *Ernest*, 64 V.I. at 642-43 (citing 5 V.I.C. § 114(a)(2)-(3); *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 625 (V.I. 2012)); *Molloy*, 56 V.I. at 172 ("If the trial court holds an evidentiary hearing on the issue . . ., then the plaintiff must come forward with evidence to prove the court's jurisdiction by a preponderance of the evidence." (citing *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003)). A failure to hold an evidentiary hearing is an abuse of discretion. *People v. Armstrong*, 64 V.I. 528,

[24] In contrast, proving actual notice does not require the use of any particular form of service, but only requires that service be accomplished by such "means as certain to ensure actual notice" of the lawsuit. *In re Estate of Small*, 57 V.I. 416, 430-31 (V.I. 2012). Moreover, actual notice of a lawsuit is not a substitute for legal notice, but actual notice likely justifies a discretionary extension of time if a defendant avoids service or conceals a defect in process or attempted service. *Ross v. Hodge*, 58 V.I. 292, 310 (V.I. 2013) (citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56 (6th Cir. 1991)); *Beachside Assocs.*, 53 V.I. at 711.

536-37 (V.I. 2016) (citing *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 558 (V.I. 2015); *Boynes v. Transp. Servs. of St. John, Inc.*, 60 V.I. 453, 465 (V.I. 2014)); *Ernest*, 64 V.I. at 642-43; *see Island Tile*, 57 V.I. at 616.[25]

If the trial court never obtained personal jurisdiction over Skepple, any default judgment is void and must be set aside as a matter of law; said differently, the trial court lacks discretion to decline to set aside a judgment that is void. *Ernest*, 64 V.I. at 638-39; *but see* V.I. R. Civ. P. 4(*l*)(3) (failure to prove service does not render proper service defective). This Court is free to consider the evidence in the record and satisfy itself that subject matter jurisdiction to hear the case existed in the Superior Court and that personal jurisdiction of the court had attached to each party. *See Ernest*, 64 V.I. at 636-38; *Martinez*, 51 V.I. at 189. We review the facts as presented in the record and determine whether there has been a prima facie showing of compliance with the requirements of the method of service. *Henry v. Dennery*, 55 V.I. 986, 993 (V.I. 2011); *see also, e.g.*, *Old Wayne Mut. Life Asso. v. McDonough*, 204 U.S. 8, 15-16 (1907); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 615-16 (1899). A "failure to vacate a void judgment is *per se* an abuse of discretion." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009); *see also Hart v. Sansom*, 110 U.S. 151, 155 (1884).[26]

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[25] While Skepple has not presented an affidavit and no hearing was held, BNS"s own proof of service of process upon Skepple plainly demonstrated the factual inadequacy of the attempted service of process. Therefore, neither an affidavit from Skepple showing contrary facts nor a hearing were necessary in this specific case.

[26] The distinction between a void judgment and one that erroneously decided a point of law or fact is crucial because an erroneous judgment is subject only to direct attack and is described as being "voidable." *Davis v. Allied Mortgage Capital Corp.*, 53 V.I. 490, 502 (V.I. 2010). A judgment is void if it is "so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (citations omitted). These infirmities are jurisdictional defects or actions that deprive a party of legal notice and an opportunity to be heard, thus depriving the party of due process. *Id.* at 270; *Roller v. Holly*, 176 U.S. 398, 414 (1900). From its inception, a void judgment is a legal nullity and without legal effect, and any defect cannot be cured. *Rubin v. Johns*, 109 F.R.D. 174, 178 (D.V.I. App. Div. 1986). The concept of a void judgment is narrowly construed in order to promote finality of judgments, and only a demonstration of a clear usurpation of power will render a judgment void. *Id.* at 178 (citing *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st

BNS's agent, the server, made no efforts to leave process (i.e., the summons) and the complaint with or near Skepple. Because these documents were not left with Skepple, the fundamental purposes of service were not fulfilled. Skepple was not formally informed of the information essential for her to determine if she (1) had been properly served and made a party to the suit and (2) had a duty to respond. Even more problematic, by failing to leave a copy of the complaint at Skepple's home with her or with someone of suitable age, BNS failed to inform Skepple of the accusations against her such that she could properly respond. The server's actions completely fail to demonstrate an actual desire to inform the defendant of the contents of the documents being served. In light of the record evidence, which fails to provide prima facie evidence of personal service, personal service was not a basis upon which the Superior Court could have obtained personal jurisdiction over Skepple.[27]

Cir. 1972); *United States v. Manos*, 56 F.R.D. 655, 659 (S.D. Ohio 1972)); *see also Raymark Indus., Inc. v. Lai*, 973 F.2d 1125, 1132 (3d Cir. 1992). An error will not constitute a jurisdictional defect unless a statute establishes a specific procedure for 1) invoking the subject matter jurisdiction of the Superior Court or 2) obtaining personal jurisdiction over a party. *Farrell v. People*, 54 V.I. 600, 609 n.6 (V.I. 2011) (quoting *In re Guardianship of Smith*, 54 V.I. 517, 526-27 (V.I. 2010)); *Tindell v. People*, 56 V.I. 138, 146 (V.I. 2012) (quoting *In re Smith*, 54 V.I. at 526-27).

[27] *Cf. Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1136 (9th Cir. 2009) ("Sufficient service may be found where there is a good faith effort to comply with the requirements of Rule 4(e)(2) which has resulted in placement of the summons and complaint within the defendant's immediate proximity and further compliance with Rule 4(e)(2) is only prevented by the defendant's knowing and intentional actions to evade service."); *Errion v. Connell*, 236 F.2d 447, 457 (9th Cir. 1956) (finding that service is effective when the server "pitched the papers through a hole in the screen door of [defendant's] apartment"); *see generally Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982) ("We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the due process clause. 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974)); *Simon v. Craft*, 182 U.S. 427, 436 (1901) ("The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form." (citations omitted)).

ii. Because BNS Did Not Meet the Statutory Prerequisites Necessary to Justify Constructive Service of Process, the Superior Court's Allowance of Such Was Improper, and the Trial Court Lacked Personal Jurisdiction Over Skepple.

In cases where methods of substitute service are employed, the plaintiff must utilize "the substitute [method of service] that is most likely to reach the defendant" because this "is the least that ought to be required if substantial justice is to be done," *Milliken*, 311 U.S. at 463; *McDonald*, 243 U.S. at 92, and a defendant must be provided "every **reasonable** safeguard for the protection of the rights . . . and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested." *Zeiss*, 219 U.S. at 66 (emphasis added).[28] In contrast, when constructive service is employed, *Mulrain v. Mulrain*, 15 V.I. 149, 151 (D.V.I. App. Div. 1979) ("[S]ervice by publication . . . is the method [of service of process] least calculated to bring to a potential defendant's attention the pendency of judicial proceedings." (citing *Mullane*, 339 U.S. at 317)), determining whether an attempt at service constitutes legal notice depends upon strict compliance with the requirements of the method of constructive service, and whether a party has complied with the statutory requirements is subject to strict scrutiny. *Voorhees*, 35 U.S. at 453 ("[W]hen a special power is conferred to be exercised in a certain mode, it is equally competent for another tribunal to consider whether the power has been exercised in the mode prescribed; for, in such case, the mode is an ingredient essential to the power, constituting, indeed, a condition on which the power depends."); *see also Cheely v. Clayton*, 110 U.S. 701, 706-07 (1884).

[28] *See also Blackmer*, 284 U.S. at 438-39 ("The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad." (citing *McDonald*, 243 U.S. at 92)).

Constructive service without authorization is not legal notice; instead, attempts at such service are regarded as if no attempt was made to achieve service. *Hollingsworth*, 29 U.S. at 476 ("An unauthorized publication cannot be regarded as notice; and the case under consideration, is as if no attempt to give notice had been made."). Such an attempt may give actual notice, but this is not effective to allow a court to exercise power over a person. *Spratley*, 172 U.S. at 612 (noting that mere knowledge or notice would be insufficient without "service on the agent in the State where the suit was commenced").[29]

BNS asserts that Skepple was served by publication pursuant to 5 V.I.C. § 112. However, there is nothing in the record reflecting that Skepple consented to a particular method of service as part of the mortgage transaction. Without Skepple's consent, any attempted constructive service must meet all the statutory prerequisites. Therefore, we are confronted with the task of the appropriate statutory construction of section 112. The judiciary must presume that the legislative

[29] *See also Haddock v. Haddock*, 201 U.S. 562, 567-69 (1906) ("Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the 14th Amendment, void against the nonresident, even in the state where rendered . . . .").

However, resort to constructive service does not require that any possibility of a defendant failing to receive actual notice be eliminated; it, instead, requires constructive service be just and reasonable with reference to the circumstances of the particular case. *Blinn v. Nelson*, 222 U.S. 1, 7 (1911) ("If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years and presumably is dead, it acts within its constitutional discretion. Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done."); *see also Zeiss*, 219 U.S.at 66 ("The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."). Therefore, it is legally both possible and acceptable that a party could not receive actual notice but still be held to have legal notice and subject to the court's personal jurisdiction. S*ee Zeiss*, 219 U.S. at 68-69 ("The law cannot give personal notice of its provisions or proceedings to everyone. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice . . . ."); *see also Wilson v. Seligman*, 144 U.S. 41, 46 (1892) ("Upon fundamental principles of jurisprudence, he is entitled to legal notice and trial of the issue whether he is a stockholder, before he can be charged with personal liability as such; and personal service within the jurisdiction of the court is essential to support an order or judgment ascertaining and establish such liability . . . ."); *but see* 5 V.I.C. 4911(a)(3), (b); V.I. R. Civ. P. 4(f); Fed. R. Civ. P. 4(f)(2)(C)(ii) (requiring signed receipt).

branch means what it says and says what it means in a statute. *Coffelt v. Fawkes*, 765 F.3d 197, 202 (3d Cir. 2014) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). When the plain language of a statute is an unambiguous statement of legislative intent, no further judicial inquiry is appropriate. *Id.* at 793 (quoting *Germain*, 503 U.S. at 253-54). Where a statute is silent on a particular topic, this does not automatically make a statute ambiguous, and such silence should be considered in light of the underlying legislative intent. *Id.* at 793 (quoting *Burns v. United States*, 501 U.S. 129, 136 (1991); *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 156 (3d Cir. 2009)).

The statute in question, titled "Substituted service by publication," states as follows:

> (a) When service of the summons cannot be made as prescribed in Rule 4 of the Federal Rules of Civil Procedure, and the defendant after due diligence cannot be found within the Virgin Islands, and when that fact appears by affidavit to the satisfaction of the district court, or the Superior Court in an action therein, and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real or personal property in the Virgin Islands, the court shall grant an order that the service be made by publication of the summons in any of the following cases:
>
> (1) When the defendant is a foreign corporation, and has property within the Virgin Islands, or the cause of action arose therein;
>
> (2) When the defendant, being a resident of the Virgin Islands, has departed therefrom with intent to defraud his creditors or to avoid the service of the summons, or with like intent keeps himself concealed therein, or has departed from the Virgin Islands and remained absent therefrom six consecutive weeks;
>
> (3) When the defendant is not a resident of the Virgin Islands, but has property therein, and the court has jurisdiction of the subject of the action;
>
> (4) When an action is to have a marriage declared void, or for a divorce in the cases prescribed by law;
>
> (5) When the subject of the action is real or personal property in the Virgin Islands, and the defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein; or

> (6) When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the Virgin Islands, or satisfy or redeem from the same.
>
> . . . .
>
> (d) Personal service of a copy of the summons and complaint out of the Virgin Islands shall be equivalent to publication and deposit in the post office. In case of personal service out of the Virgin Islands the defendant shall appear and answer within thirty days from date of service.
> (e) The defendant as to whom publication is ordered, or his personal representatives, on application and sufficient cause shown, at any time before judgment shall be allowed to defend the action. The defendant as to whom publication is ordered, or his representatives, may in like manner, upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment and within one year after the entry of such judgment on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment to a purchaser in good faith shall not be thereby affected.

5 V.I.C. § 112. Implicit in any due diligence analysis under section 112 is that the plaintiff will make a prima facie showing that, after reasonable effort, neither personal service nor other methods of substitute service could be achieved wherever the defendant may be. 5 V.I.C. § 112; *see Settlemier*, 97 U.S. at 448 (holding that the failure to state in the affidavit of service that the defendant could not be found was a defect and that no personal jurisdiction was obtained over the defendant even though the defendant had knowledge of the suit because process had been left with his wife). This much is made plain by the language utilizing the conjunction "and" stating that, when "as prescribed in Rule 4 of the Federal Rules of Civil Procedure . . ." and "after due diligence" the defendant cannot be found within the Territory, service by publication may be had.

This choice of language directly indicates that other methods of substituted service should be resorted to prior to utilizing constructive service.

Therefore, section 112 very clearly requires that a plaintiff present prima facie evidence showing the following: (1) that a duly diligent effort to obtain personal service upon the defendant(s), using the methods prescribed in Federal Rule of Civil Procedure 4, was made; (2) failing to achieve successful personal service under the methods prescribed by Rule 4, that a duly diligent effort to provide legal notice to the defendant was made such that the efforts clearly indicate a plaintiff desirous of actually informing the defendant(s) of the litigation; and (3) that the defendant cannot be served by any of the foregoing methods within the Territory. 5 V.I.C. § 112; *see Zeiss*, 219 U.S. at 66 (noting that the statute "provide[s] every reasonable safeguard for the protection of the rights of unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested."). Even then, constructive service under section 112 is limited to the six enumerated circumstances listed therein. *Bonanno*, 2013 WL 3958772, at *4. However, the statute defines neither due diligence nor what constitutes a showing that a defendant cannot be found within the Territory.

Due diligence is clearly a mutable concept that varies according to the facts and derives its form from both context and by comparison to other standards, such as excusable neglect. *See Coon v. Grenier*, 867 F.2d 73, 76 (3d Cir. 1989) (discussing "good cause" for vacating default under Federal Rule of Civil Procedure 55); *cf. Urland v. Merrell-Dow Pharm.*, 822 F.2d 1268, 1275 (3d Cir. 1987) (discussing when a party reasonably should have known to act to preserve legal claims before a statute of limitations expires). Due process dictates that a plaintiff expend "reasonably diligent efforts" to identify and serve "reasonably ascertainable parties" whose

interests in the lawsuit are not merely conjectural. *Small*, 57 V.I. at 423 (quoting *Tulsa Prof'l Collection Servs., v. Pope*, 485 U.S. 478, 490-91 (1988)).[30] Both the doctrine of laches and statutes of limitation prevent parties from claiming relief when they have "inexcusably slept on [their] rights so as to make a decree against the defendant unfair"; "'there must be conscience, good faith, and reasonable diligence, to call into action" a court's powers of equity. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *McKnight v. Taylor*, 42 U.S. (1 How.) 161, 168 (1843); citing *Russell v. Todd*, 309 U.S. 280, 285 (1940)).

Laches is "unreasonable delay in pursuing a right or claim[,]almost always an equitable one[,]in a way that prejudices the party against whom relief is sought." Also termed "sleeping on rights," it is further described as "the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." BLACK'S L. DICT., at 891; *e.g.*, *Hodge v. Hodge*, 15 V.I. 154, 164 n.5 (D.V.I. 1979).[31] Similarly, the test for seeking modification of a non-final court order requires

[30] *E.g.*, *Stewart v. V.I. Bd. of Land Use Appeals*, 66 V.I. 522, 544 (V.I. 2017) (holding that a plaintiff's failure to inspect a permit upon receiving actual notice of the permit's issuance was a lack of due diligence in identifying the proper party); *Pichierri v. Crowley*, 59 V.I. 973, 981-82 (V.I. 2013) (finding that the trial court did not abuse its discretion when it determined that the plaintiff had not diligently pursued his claims and had failed to timely obtain personal jurisdiction over the defendant); *Fontaine v. Hess Oil V.I. Corp.*, 42 V.I. 117, 119-20 (V.I. Super. Ct. 2000) (finding that a 114-day delay in seeking reconsideration of an interim discovery order was not a demonstration of due diligence); *see also Mennonite Bd. of Missions*, 462 U.S. at 798 n.4; *Mullane*, 339 U.S. at 317.

[31] *See also Exploration Co. v. United States*, 247 U.S. 435, 448 (1918) ("Every statute [of limitations] is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, which they could be repelled." (quoting *Sherwood v. Sutton*, 21 Fed Cas. (5 Mas.) 1303, 1307 (D.N.H. 1828)); *cf. Bailey v. Glover*, 88 U.S. 342, 349-50 (1875) (adopting common law equity rule that for "the party injured by . . . fraud who remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . . ." (citations omitted)); *Holmberg*, 327 U.S. at 396-97 ("Equity will not lend itself to such fraud and historically has relieved form it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by a fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the party of the party committing the fraud to conceal it from the knowledge of the other party." (citations and quotations omitted)).

that such relief should be granted so long as "due diligence be employed [in seeking the revision or relief] and a revision be otherwise consonant with equity." *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 90-91 (1922); *cf. Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 388 (1993) (defines neglect as "to give little attention or respect" to a matter or "to leave undone or unattended to especially through carelessness." (quoting WEBSTER'S NINTH NEW COLLEGIATE DICT. 791 (1983)); *id.* at 395 (holding that "excusable" is an equitable determination taking into account all relevant circumstances). So, like the "good cause" inquiry for vacating default under Rule 55 of the Federal Rules of Civil Procedure, an assessment of due diligence must be made from a practical standpoint and in a commonsense manner, without rigid adherence to any mechanical formula. *Gen. Contracting & Trading Co., LLC v. Interpole, Inc.*, 899 F.2d 109, 112 (3d Cir. 1990).[32]

Generally speaking, due diligence is "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." *Fontaine v. Hess Oil V.I. Corp.*, 42 V.I. 117, 119 (V.I. Super. Ct. 2000) (citing BLACK'S LAW DICTIONARY 411 (5th ed. 1979)); *Beauty Time, Inc. v. VU Skin Sys.*, 118 F.3d 140, 144 (3d Cir. 1997) (defining reasonable diligence as "[a] fair, proper and due degree of care and acting, measured with reference to the particular circumstances; such diligence,

[32] *See generally Frank v. Mangum*, 237 U.S. 309, 326 (1915) ("As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense." (citations omitted)); *Snyder v. Massachusetts*, 291 U.S. 97, 116-17 (1934) ("Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.'" (citation omitted)).

care, or attention as might be expected from a man of ordinary prudence and activity" (citation omitted)). "'To demonstrate reasonable diligence, a plaintiff must establish[] that he pursued the [issue] with those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.'" *Santiago v. V.I. Hous. Auth.*, 57 V.I. 256, 273 (V.I. 2012) (quoting *Mest v. Cabot Corp.*, 449 F.3d 502, 511 (3d Cir. 2006)); *cf. Bonanno*, 2013 WL 3958772, at *5-6 (finding that the plaintiffs' attempts at service were unreasonable but finding a lack of prejudice).

The record evidence discloses that BNS was fully aware that Skepple was present in the Territory and knew exactly where to find her when BNS sought to utilize constructive service. After Skepple informed the server, through a third-party agent, that she declined to accept service, the server simply proceeded to file an affidavit of no service. BNS used this affidavit as the basis for its motion to allow service by publication. The Superior Court, relying on this affidavit, granted the motion for service pursuant to section 112 of tile 5. Given the requirement of strict compliance with statutes that allow constructive service, *Settlemier*, 97 U.S. at 447, the error in allowing substituted service under the circumstances presented to the Superior Court is apparent. The unambiguous language of the statute requires a showing of due diligence in seeking to serve the defendant via the means most reasonably likely to provide actual notice prior to constructive service being authorized, and the record plainly demonstrates that BNS made only one attempt to serve Skepple. 5 V.I.C. § 112(a); *Priest v. Trs. of Las Vegas*, 232 U.S. 604, 616 (1914) (finding service by publication invalid because the defendant was known to the plaintiff and holding that the defendant was "either not intended to be made a party under the designation 'unknown claimants of interest' or the designation was under"); *cf. Lynch v. Murphy*, 161 U.S. 247, 252 (1896) (finding service by publication valid because the defendant was in fact unknown at the

institution of the proceeding and complying with the statutory prerequisites for service by publication).

In *V.I. Cement & Building Products, Inc. v. Capital Int'l Corp.*, 42 V.I. 64, 66-67 (V.I. Super. Ct. 2000), the Superior Court was faced with a similar inquiry under 13 V.I.C. § 348.[33] The Virgin Islands Legislature has mandated that business organizations doing business in the Virgin Islands[34] must notify the Office of the Lieutenant Governor of the updated name and contact information of their registered agent and must keep such information current by promptly notifying the Lieutenant Governor's office of any changes. *V.I. Cement*, 42 V.I. at 66.[35] Under this

[33] The full text of section 348 is as follows:

> In case legal process against a corporation cannot by due diligence be served upon any person authorized to receive it, such process, including the complaint, may be served in duplicate upon the Lieutenant Governor, which service shall be effectual for all purposes of law. Within two days after service upon the Lieutenant Governor, he shall notify the corporation thereof by letter directed to the corporation at its last registered office, in which letter shall be enclosed a copy of the process, the complaint or other papers served. In any action in which the process shall be so served the plaintiff shall pay to the Lieutenant Governor the sum of twenty-five dollars ($25.00), which sum shall be taxed as a part of the costs in the action if the plaintiff shall prevail therein. The Lieutenant Governor shall enter alphabetically in a process book, kept for that purpose, the name of plaintiff and defendant, the title and number, if any, of the cause in which process has been served upon him, and day and hour when the service was made.

13 V.I.C. § 348; *cf.* 13 V.I. § 112(b); 26 V.I.C. § 527(d).

[34] *E.g.*, 13 V.I.C. § 2003(b) ("[O]wnership in the Virgin Islands of an income-producing property or tangible personal property . . . constitutes [an LLC's] transacting business in the Virgin Islands"); 26 V.I.C. § 244(same as applied to a foreign partnership); *cf.* 13 V.I.C. §§ 403 (excluding certain activities of corporations from the ambit of "doing business"), 2003(a)(1-10) (same as applied to foreign LLC's); 26 V.I.C. § 244(a)(1-10) (same as applied to a foreign partnership).

[35] *E.g.*, 13 V.I.C. §§ 51 (requiring a corporation appoint a registered agent), 52-55 (listing notice requirements for changes of agent or agent's address), 401 (requiring a foreign corporation doing business to appoint a registered agent), 405 (requiring any change in the agent or the agents contact information to be updated), 499 (making the previous provisions applicable to non-profit corporations), 583 (making previous provisions applicable to cooperatives), 1109 (requiring an LLC to designate a registered agent), 1110-1111 (listing notice requirements for changes of LLC's agent or agent's address); 26 V.I.C. §§ 243(a)(3) (requiring a foreign partnership to identify an agent for service of process), 325 (requiring limited partnership to identify an agent for service of process); 522 (requiring foreign limited partnership to identify agent), 525 (requiring changes of agent and agent's contact information to be updated).

provision, if a party cannot achieve service in order to bring a business organization within the personal jurisdiction of the Superior Court, the party may direct service to the Lieutenant Governor's office. *V.I. Cement*, 42 V.I. at 66-67.

In its ultimate holding, the Superior Court found that constructive service was not justified because the statutory prerequisites had not been met. The court explained that, where a party has knowledge of possible contact information and locations at which persons authorized to accept service could be located and served with process but fails to avail itself of this information and attempt service, a finding of due diligence is precluded, and constructive service violates the defendant's due process rights. *Id.* at 68 (citing 13 V.I.C. §§ 51-55 (1998)); *Mullane*, 339 U.S. 306. Any substituted service achieved in the absence of the statutory prerequisites is absolutely void and of no consequence. *Id.* at 68.

Similar to section 112 of title 5, under section 348 of title 13, resort to substituted service may only be had if the party exercised due diligence in attempting to serve process upon "any person authorized." *V.I. Cement*, 42 V.I. at 66-67. Upon the facts presented in the record of this case, the statutory prerequisites for an order approving service by publication pursuant to section 112 of title 5 were not met, and no other form of service was achieved. Consequently, the conclusion that the default judgment is "one that [was] rendered by a court lacking jurisdiction over the default" and is, therefore, void is inescapable. *Yale v. Nat'l Indem. Co.*, 602 F.2d 642, 644 (4th Cir. 1979). The trial court's failure to vacate the void default judgment was an abuse of discretion.

C. When Skepple Unsuccessfully Challenged Service of Process, She Waived Any Objection to the Superior Court's Exercise of Personal Jurisdiction; Therefore, the Superior Court Has Already Obtained Personal Jurisdiction Over Skepple.

Objections to personal jurisdiction—including objections to process and service—are personal defenses that are waived if not raised in a timely manner. *Najawicz*, 52 V.I. at 338-39.[36] As such, consent to and waiver of personal jurisdiction could be effectuated by innumerably varying facts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). Such consent to being subject to a state's power may be express or implied through words or conduct and can result

[36] 5 V.I.C. § 115 ("A voluntary appearance of the [counterclaimant/]defendant shall be the equivalent to personal service of the summons . . . ."); *Munter v. Weil Corset Co.*, 261 U.S. 276, 279 (1923) ("Pleading to the merits or a general appearance without objecting to the service is waiver."); *e.g.*, *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 299 n.7 (V.I. 2014) (holding that the Government's full participation in the trial court proceedings without raising the purported defect in service was waiver of the objection); *Ross*, 58 V.I. at 311 n.22 (noting that a counterclaim defendant who was not originally a plaintiff in the lawsuit may have waived any objection to lack of service by her participation in the litigation); *Farrell v. People*, 54 V.I. 600, 608 (V.I. 2011); *see also Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 331 (1838) ("The cases of *Pollard v. Dwight*, 8 U.S. (4 Cranch) 421 (1808), and *Barry v. Foyles*, 26 U.S. (1 Peters) 311 (1828), are decisive to show, that after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege, which may be waived; and that appearing and pleading will proceed the waiver."); *Sachs v. Sachs*, 265 F.2d 31, 33 (3d Cir. 1959) ("Plaintiff, having submitted himself to the jurisdiction of the district court by filing his complaint and appearing therein, put it within the power of the court to render a personal judgment against him on the counter claim." (citing *Adam v. Saenger*, 303 U.S. 59 (1938)); *Perrin v. Perrin*, 408 F.2d 107 (3d Cir. 1969); *Prosser v. Prosser*, 33 V.I. 32, 40 (V.I. Super. Ct. 1995); *Isaac*, 25 V.I. at 41; *cf. Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 376 (1937) ("Obtaining removal from the state court into the federal court did not operate as a general appearance by the defendant." (citations omitted)); *Davidson Bros. Marble Co. v. United States*, 213 U.S. 10, 18 (1909) ("The jurisdiction of the circuit courts is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid."); *see generally* V.I. R. Civ. P. 12(a)(1)(A) (must respond to complaint within 21 days of being served); 12(a)(4)(A) (must serve a responsive pleading within 14 days of receiving notice of the court's denial of the motion or the court's postponement of deciding the motion); 12(b)(2), (4), (5) (requiring that the defenses of lack of personal jurisdiction, insufficient process, and insufficient service be made **before** a responsive pleading is filed); 12(b)(2) (prohibiting the filing of a second motion under Rule 12 when the objection was available when the first motion was filed); 12(h)(1)(A) (a party waives the defenses of lack of personal jurisdiction, insufficient process, and insufficient service under the circumstances in 12(g)(2)); 12(h)(1)(B) (a party waives the defenses of lack of personal jurisdiction, insufficient process, and insufficient service by failing to raise the defenses by a motion pursuant to Rule 12 or in a responsive pleading); *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913) ("[I]f a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of [the court] to bind him by every subsequent order in the cause."); *Gov't of the V.I. v. Lorillard*, 358 F.2d 172, 176 n.3 (3d Cir. 1966) (noting that a plaintiff may not challenge the personal jurisdiction of a court because the plaintiff's choice of forum subjects the plaintiff to the personal jurisdiction of the court); *Smith v. Turnbull*, 54 V.I. 369, 373-74 (V.I. 2010) (per curiam) (holding that Federal Rule of Civil Procedure 12(a) governs the time limit in which a Federal Rule 12(b) motion may be made).

from the acts of both the person or his/her agent. *Greene*, 456 U.S. at 450 (citing *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856); *St. Clair*, 106 U.S. at 356; *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245, 254 (1909); *Washington v. Sup. Ct.*, 289 U.S. 361, 364-65 (1933); *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150-51 (S.D.N.Y. 1915)).[37] Regardless of how the waiver occurs, when a party voluntarily appears, the court obtains jurisdiction over her person, and service is unnecessary. *Caledonian Coal Co. v. Baker*, 196 U.S. 432, 444 (1905) ("It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, 'except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." (citations omitted)).[38]

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[37] *See also Ex parte Schollenberge*r, 96 U.S. (6 Otto) 369, 376-77 (1877) (holding that, although a forum cannot exercise its powers of government beyond its borders to serve process and give a person legal notice of a lawsuit, it can place conditions on doing business within its territorial limits (citing *Lafayette*, 59 U.S. at 407-08)); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1858) ("No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 343 (1908) ("As the state possessed the plenary power to exclude a foreign corporation from doing business within its borders, . . . it follows that the prohibition against continuing to do business in the State because of acts done beyond the State was none the less a valid exertion of power as to a subject within the jurisdiction of the State."); *McDonough*, 204 U.S. at 21-22 (A business organization that fails to comply with the registration requirements for doing business in a jurisdiction is "deemed to have assented to any valid terms prescribed by that Commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that Commonwealth and there exert its corporate powers."); *Wabash W. Ry. v. Brow*, 164 U.S. 271, 278 (1896) ("An appearance which waives the objection of jurisdiction over the person is a voluntary appearance and this may be effected in many ways, and sometimes may result from the act of the defendant even when not intended."); *Murphree*, 326 U.S. at 442 ("By consenting to service of process upon its agent residing in the southern district, petitioner rendered itself 'present there for purposes of service." (citing *Schollenberge*r, 96 U.S. at 377; *Int'l Shoe Co.*, 326 U.S. at 310); *Ins. Corp. of Ir.*, 456 U.S. at 703-05 (citing *McDonald*, 243 U.S. 90; *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964); *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 496 (1956); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29-30 (1917)).

[38] *See generally Kendell v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (noting that the requirement of service "is a personal privilege which may be waived by appearance"); *cf. Comm. Mut.*, 213 U.S. at 249 ("The company made no appearance in the court below or in the state court, except for the purpose of raising the question of jurisdiction, and removing the case to the Federal court. Such proceedings did not amount to a general appearance in the suit." (citing *Goldey v. Morning News*, 156 U.S. 518, 525-26 (1895)).

Once a court has obtained personal jurisdiction over a party, service pursuant to Virgin Islands Rule of Civil Procedure 4 is unnecessary, and service of other such filings in accordance with Rule 5(b) and other less formal notice procedures is only required. V.I.R. Civ. P. 4(c)(1) ("A **summons** must be served with a copy of the **complaint**."

Commonly, objections relating to a lack of personal jurisdiction are waived when a defendant substantively participates in the civil action without timely asserting such a defect. *E.g.*, *Najawicz*, 52 V.I. at 337-39. Applicable in this matter, if a party challenges personal jurisdiction and that challenge is found to lack merit, the failed challenge to jurisdiction is considered a voluntary appearance and a submission to the personal jurisdiction of the court. *See, e.g., In re Expungement of Criminal Record*, S. Ct. Civ. No., 2016-0007, 2017 WL 283478, at *1 n.1 (V.I. Jan. 23, 2017).[39] Because Skepple filed a motion to vacate the default judgment but failed to raise an argument that was legally sufficient to challenge the Superior Court's personal jurisdiction, Skepple voluntarily appeared in this action, thus submitting herself to the Superior Court's authority. Because Skepple is presently subject to the personal jurisdiction of the Superior Court, on remand, BNS has no obligation to achieve service.

(emphasis added)); 5(a)(1) (listing documents that must be served in accordance with rule 5(b)); 5(b)(1-2) (listing methods for validly serving court documents other than a summons and complaint); *Rubin*, 109 F.R.D. at 178 ("'When the actual notice of an action has been given, irregularity in the content of the notice or the manner in which it was given does not render the notice inadequate.' We perceive this to apply even more forcefully when what is involved is not notice of the commencement of the action, such as service of process, but rather actual notice of one of the ongoing steps in the litigation, such as fixing the trial date."); *see Mich. Trust Co.*, 228 U.S. at 353 ("[I]f a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of [the court] to bind him by every subsequent order in the cause."); *e.g.*, *Isaac*, 25 V.I. at 41. In contrast, if personal jurisdiction has not been obtained over a party and the party is in default, any pleading (e.g., an amended answer, an amended counterclaim, a cross-claim) adding new causes of action or claims for damages must be served on the party in compliance with Virgin Islands Rule of Civil Procedure 4 because the court lacks personal jurisdiction over the party as to the newly pleaded causes of action or claims for damages. *E.g.*, *H. Armstrong*, 23 V.I. at 39 (holding that the mailing of a cross-claim to defendants in default did not constitute service and declaring the default judgment void for lack of personal jurisdiction over the defendants in default).

[39] *See generally W. Life Indem. Co. v. Rupp*, 235 U.S. 261, 272 (1914) ("That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled." (citing *York v. Texas*, 137 U.S. 15, 20 (1890); *Kauffman v. Wootters*, 138 U.S. 285, 287 (1891)); *cf. Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874-75 (3d Cir. 1944) (finding that, after stipulating for an extension of time to respond to the complaint, the limited act of appearing and challenging service or personal jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12 prior to filing an answer or asserting those defenses in an answer was not a voluntary appearance).

V. CONCLUSION

The Superior Court committed error when it allowed service by publication. Additionally, no other valid form of service upon Skepple was achieved. Therefore, at the time of entry of the default judgment, the Superior Court lacked personal jurisdiction over Skepple; and the default judgment was void *ab initio*. However, when Skepple participated on the merits of this case by filing a motion to vacate the default judgment and, in that motion, put forth an ineffective challenge to personal jurisdiction, she waived her claim of defective service. This active participation in this case subjected Skepple to the personal jurisdiction of the Superior Court. Therefore, consistent with both the precedent of this Court and the past courts of the Virgin Islands preferring that cases be resolved on the merits, the default judgment is vacated. *See Toussaint*, 67 V.I. at 947-48 n.13; *Spencer*, 2009 WL 1078144, at *2. On remand, no further action is required in order to make Skepple a party to this suit, due to her waiver of any objection to personal jurisdiction, and the Superior Court is directed to enter an order providing an appropriate amount of time for Skepple to file her answer or otherwise defend this matter.

Dated this 17th day of August 2018

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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