IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JASON GRIFFITH and DANIELLE FLESHREN,	)	
	)	
Plaintiffs-Appellees,	)	
	)	**CASE NO.** ST-09-SM-519
vs.	)	
	)	
PAMELA CARPENTER,	)	
	)	
Defendant-Appellant.	)	
	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendant-Appellant Pamela Carpenter's *pro se* untitled submission dated October 29, 2010, but not filed until December 17, 2010, asking the Court to reconsider its Order dated August 19, 2012, dismissing this appeal without prejudice for failure of prosecution because Carpenter failed to request the transcript of the proceedings before the Magistrate and submit her brief within the deadlines established in the Court's Order dated May 14, 2010. Carpenter asserts that she never received the May 14, 2010 Order and was therefore not aware that deadlines had been established for her to obtain the transcript and submit her brief.

Local Rule of Civil Procedure 7.3 of the District Court of the Virgin Islands permits a party to file a motion for reconsideration based on (1) intervening change in controlling law, (2) the discovery of new evidence, or (3) the need to correct clear error or prevent manifest injustice. The motion must be filed within ten (10) days after the entry of the Court's order or decision unless the time is extended by the Court. Under the express terms of the Rule, "[e]xtensions will only be granted for good cause shown."

The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." *Hersco Corp. v. Zlotnicki*, 779 F2d 906, 909 (3d Cir.

1995); *WorldCom Technologies, Inc., v. Intelnet Int'l, Inc.*, 2001 WL 118957, *2 (E.D.Pa. 2001).

A motion for reconsideration is not a substitutes for an appeal or a "second bite at the apple", but

> is intended to focus the parties on the original pleadings as the "main event," and to prevent the parties from filing a second motion with the hindsight of the court's analysis covering issues that should have been raised in the first set of motions. It is not a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not. Local Rule ...[7.3] affirms the common understanding that reconsideration is an "extraordinary" remedy not to be sought reflexively or used as a substitute for appeal.

Bostic v. ATT of the V.I., 312 F.Supp.2d 731, 733 (D.V.I. 2004); see also *Pittston Co. Ultramar Am. Ltd. V. Allianz Ins. Co.*, 124 F.3d 508, 519 n.12(3d Cir. 1997) (noting that "[c]ourts often take a dim view of issues raised for the first time in post-judgment motions"); *Kona Enters., Inc., v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) ("[A] motion for reconsideration should not be granted absent highly unusual circumstances...[and] may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

The court notes that Carpenter's request was not filed until December 17, 2010, almost four (4) months after the Court's Order dismissing Carpenter's appeal. Thus, if treated as a motion for reconsideration under LRCi 7.3, the motion is untimely. However, that untimeliness does not dispose of this matter entirely. In *Ruiz v. Jung*, Civ. No. 2008-035, 2009 WL 3568182, at *3 (V.I. Oct. 19, 2009) (unpublished), the Supreme Court of the Virgin Islands analyzed the legal standards applicable to motions for reconsideration:

> In determining the appropriate standard that should have governed the court's consideration of the motion to reconsider, we turn first to Superior Court Rule 50, which provides:
>
>> For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. *Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications.*
>
> Super. Cr. R. 50 (emphasis added); *see also Chavayez v. Buhler*, Civ. No. 2007-060, 2009 WL 1810914, at *2 (June 25, 2009) (unpublished). Thus, Superior Court Rule 50 explicitly incorporates Federal Rule of Civil Procedure 59(e), which governs motions to alter or amend a judgment, and Federal Rule of Civil Procedure

> 60(b), which governs motions for relief from a final judgment or order. If a motion for reconsideration is brought within ten days of the order to be reconsidered, the motion is to be treated as a Federal Rule 59(e) motion to alter or amend judgment. If the motion is brought after ten days, however, the trial court should consider the motion to reconsider as one brought pursuant to Federal Rule 60(b). *Compare Chavayez*, 2009 WL 1810914, at *2 (motion for reconsideration filed within ten days of entry of judgment considered a Rule 59(e) motion), *with Lucan Corp, Inc.*, 2008 WL 901492, at *3 (because motion for reconsideration filed sixteen days after entry of judgment, trial court should have considered it a Rule 60(b) motion). *Accord Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002) ("Where…the motion is filed outside of the ten days provided for under Rule 59(e) but within the year permitted under Rule 60(b), and the motion may be read to include grounds cognizable under the latter rule, we will consider it to have been filed as a Rule 60(b) motion.")

The decision to grant a motion for relief from judgment lies in the discretion of the Court. *Hodge v. Hodge*, 621 F.2d 590 (3rd Cir. 1980). Relief from a judgment has also been described as an extraordinary remedy, and the determination of the trial court on a motion for relief from judgment will be set aside only upon a showing of abuse of discretion. *Rubin v. Johns*, 22 V.I. 194 (D.V.I. 1986).

There are two provisions of Rule 60(b) that are potentially applicable to Carpenter's request. Under Rule 60(b)(1), the Court may relieve a party from a judgment or order because of mistake, inadvertence, surprise, or excusable neglect. This category has been held to permit relief where the order or judgment results from, among other things, a failure to receive service. *See Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980).

Alternatively, Rule 60(b)(6) of the Federal Rules of Civil Procedure permits the Court to relieve a party from a final judgment or order to further the ends of justice if such relief will not affect the substantive rights of the parties. This "catch all" provision is reserved for extraordinary circumstances. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Relief under Rule 60(b)(6) is "exceedingly rare". *See In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 496 F.3d 863, 868 (8th Cir. 2007). *See also Kramer v. Gates*, 481 F.3d 788, 791-92 (D.C. Cir. 2007) (used "sparingly"). Relief under Rule 60(b)(6) is generally limited to those circumstances in which the movant shows actual injury and the presence of circumstances beyond its control that prevented timely action to protect the party's interests. *See Delay v. Gordon*, 475 F.3d 1039, 1044-45 (9th Cir. 2007).

However, the "catch-all" provision of Rule 60(b)(6) and the preceding five categories are considered mutually exclusive, and if the reason for which relief is sought fits within one of the five specific categories, even if the facts fail to meet the prerequisites for that relief, Rule 60(b)(6) is inapplicable. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Here, because Carpenter's request is based upon a lack of service for which she claims no responsibility, the Court determines that analysis under Rule 60(b)(1) is appropriate.

But, the standard for relief under Rule 60(b)(1) is a demanding one. *See U.S. v. $23,000 in U.S. Currency*, 356 F.3d 157, 164 (1st Cir. 2004). Whether relief is appropriate is assessed on a case-by-case basis, and a lack of diligence or confusion concerning the Rules may not qualify the movant for relief. *See Aguilar-Carrasquillo v. Acosta-Alicea*, 445 F.3d 19, 28 (1st Cir. 2006); *Connecticut State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1356 (11th Cir. 2009); *Noah v. Bond Cold Storage*, 408 F.3d 1043, 1045 (8th Cir. 2005). As a threshold showing, the moving party must demonstrate that the error made did not result from his or her own culpable conduct and instead that the party behaved with appropriate diligence. *See Robinson v. Wix Filtration Corp., LLC*, 599 F.3d 403, 413 (4th Cir. 2010).

The party seeking relief from a judgment or order bears the burden of demonstrating that the prerequisites for relief are satisfied. *See Gates v. Syrian Arab Republic*, 646 F.3d 1 (D.C.Cir. 2011); *U.S. v. Texas*, 601 F.3d 354, 373 (5th Cir. 2010). Because relief from an order is fundamentally an equitable remedy, equitable defenses against the moving party, such as unclean hands, may foreclose it. *See Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127 (2d Cir. 2009).

The Court finds that, even assuming Carpenter did not receive notice of the Court's May 14, 2010, Order as she asserts[1], Carpenter has not demonstrated that she acted with appropriate diligence to protect her interests.

In discussing the Superior Court's requirements for the record necessary for the review of a Magistrate's judgment or order, Rule 322(h)(2)(A) of the Rules of the Superior Court provides, in part:

> Unless the need for a transcript is waived by the Court, it is the duty of the petitioner in each instance to request a transcript of proceedings upon filing of a petition for review, by completing the "Request for Transcript" ("RTF") form provided by the Court. Financial arrangements for such transcript must be made in accordance with the deadlines provided by the Court. The Petitioner must further submit to the Court, within ten (10) days of filing of the Petition for Review, evidence that he/she has made financial arrangements with the court reporter/transcriber for the transcript...

Rule 322(h)(2)(B) indicates, "Failure to request the transcript and submit evidence of payment therefor, within ten days (10) [sic] after filing of the petition for review, **shall be cause for dismissal of the petition for review for failure to prosecute, without any further notice to the petitioner**." (emphasis added). Thus, under the express provisions of the rule, the grounds submitted by Carpenter for her failure to prosecute the appeal, her alleged failure to receive the Court's Order requiring her to make arrangements for preparation of the transcript of proceedings before the Magistrate and setting a briefing schedule, do not constitute a cognizable excuse for failure to make arrangements, within ten days of filing the petition for appeal, to have the transcript prepared and constitute grounds for dismissal of the appeal.

Further, Carpenter had an obligation to inquire of the status of the appeal. There is no indication in the record that Carpenter did anything to advance her appeal, or even to check its status, between the time she initiated the appeal and the time the Court dismissed the appeal for failure of prosecution nearly ten (10) months later.

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[1] Carpenter's untitled submission is not notarized or verified, nor are her representations supported by affidavit.

Nor is there evidence that Carpenter has done anything to advance her appeal in the year and a half since she sought reconsideration or relief from the Court's dismissal order. To date, over two and a half years after appealing the Magistrate's Judgment, Carpenter has still not submitted a transcript order form to obtain the record of the trial before the Magistrate or caused the transcript to be prepared. Moreover, having been put on notice that it is her obligation to file a brief, she has still not done so.

The Court recognizes that Carpenter is proceeding without the assistance of counsel. Generally, pleadings of *pro se* litigants in civil cases are to be construed liberally. *Habib v. General Motors*, 15 F.3d 75, 75 (6th Cir. 1994). But, this does not mean that courts are required to be more lenient when reviewing *pro se* litigant's pleadings or that *pro se* litigants need not follow court procedures and rules. See *Braun v. State of Oklahoma*, 937 P.2d 505, 510 (Ok.Crim.App. 1997); *Sanjines v. Ortwein*, 984 S.W.2d 907 (Tenn. 1998). *Pro se* litigants are still expected to comply with the rules of civil procedure, and a *pro se* plaintiff's apparent lack of familiarity with the rules of the Court does not provide good cause to excuse failure to comply with those rules. *Sykes v. Blockbuster Video*, 205 Fed. Appx. 961, 963 (3rd Cir. 2006) (unpublished) (*pro se* plaintiff failed to show good cause for failure to timely serve).

Finally, the Court wishes to point out that it appears Carpenter filed this appeal for strategic purposes, hoping to avoid the full impact of the Magistrates Judgment. In her prayer for relief Petitioner indicates, "I would ask the Court to order both parties meet halfway and I am willing to settle with ½ of the monies the Plaintiff is claiming. Both parties bear their attorney's fees and Court costs to save the Court anymore time on this issue." [sic] While the Court does not base its decision on this request, it appears that Petitioner filed the appeal for reasons beyond a mere disagreement with the Magistrate's decision.

Having filed an appeal of the Magistrate's Judgment (through another unsworn letter that the Magistrate treated as a notice of appeal) on October 30, 2009, it was incumbent upon Carpenter to comply with the Court's rules and order the transcript of the proceedings below. Some two and one-half years after filing her petition for appeal, she still has not done so, and Superior Court Rule 322(h)(2)(B) indicates that her failure constitutes grounds for dismissal of the appeal, regardless of whether she received notice of her obligation to take that action. As a result, the Court does not find that Carpenter is entitled to relief from the Court's Order of May 14, 2010, dismissing her appeal for failure to prosecute. An Order consistent with this Opinion will issue.

Dated: June 7, 2012.

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

ATTEST: Venetia H. Velazquez, Esq.
Clerk of the Court ___/___/___

by: Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor 6/8/12