For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

KENNEDY FUNDING INC. AS AGENT FOR CERTAIN CO-LENDERS, Appellant/Plaintiff, **v.** **GB PROPERTIES, LTD., and its successor in interest GAD PROPERTIES, LTD.,** Appellees/Defendants	**S. Ct. Civ. No. 2018-0014** Re: Super. Ct. Civ. No. 180/2014 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Renee Gumbs Carty

Considered: November 13, 2018
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Cite as 2020 VI 5

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

APPEARANCES:

Matthew J. Duensing, Esq.
Law Offices of Duensing and Casner
St. Thomas, U.S.V.I.
Attorney for Appellant,

Charles S. Russell, Jr., Esq.
Kanaan L. Wilhite, Esq.
Moore, Dodson and Russell, P.C.
St. Thomas, U.S.V.I.
Attorneys for Appellee.

OPINION OF THE COURT

SWAN, Associate Justice.

¶1 Appellant, Kennedy Funding, Inc., acting as the agent for certain co-lenders ("Kennedy"), appeals from the judgment embodied in the Superior Court's January 8, 2018 memorandum opinion and order, which entered summary judgment against it and in favor of the Appellee, GB Properties, Ltd., and its successor in interest, GAD Properties, Ltd. (collectively "GAD"). The Superior Court found that Kennedy's lease and the outstanding rent encumbered the property but did not take priority over GAD's statutory rights to collect rents during the redemption period, following the sale of the property by the United States Marshal (the "U.S. Marshal"). The court also found that the agreement between the parties did not include a requirement that GAD would pay the $50,000 statutory sale commission due to the U.S. Marshals Service (the "USMS") when it bought the property. Kennedy contends that the Superior Court erred. For the reasons explicated below, we affirm the Superior Court's judgment as embodied in its January 8, 2018 memorandum opinion and order.

I. FACTUAL BACKGROUND

¶2 On March 25, 2010, Kennedy, a money lending corporation, instituted a foreclosure action against property developer, Wintdots Development, LLC ("Wintdots"), after the corporation defaulted on a Kennedy loan. The foreclosure was based on Kennedy's mortgage and security agreement with Wintdots as well as an assignment of rents, which encumbered a part of commercial real property described as: Parcel No. 3A Dronningens Gade, Queens Quarter, St. Thomas, U.S. Virgin Islands (the "Property"). On May 9, 2011, this litigation resulted in a consent judgment and order of foreclosure that awarded Kennedy $9,603,640.93, with accruing interest until the judgment was fully satisfied. When Wintdots failed to comply with the terms of the consent judgment, GAD, which was the tenant occupying the Property at the time of foreclosure, expressed an interest in purchasing it. Kennedy arranged to have the Property sold at public auction by the USMS.

¶3 A public auction and sale to be conducted by the USMS was scheduled in furtherance of an execution upon the foreclosure judgment on the Property. Kennedy and GAD attended the auction on St. Thomas on November 7, 2013. Kennedy made a credit bid of $6,000,000 to purchase the Property. In response to Kennedy's credit bid, GAD made a cash bid of $6,001,000 and became the successful bidder to purchase the Property, for which it would receive title after the sale was confirmed and the statutory redemption period expired. GAD subsequently paid the purchase price and acquired all the rights and obligations associated with its purchase.

¶4 Subsequently, the USMS sent a letter dated November 8, 2013, to legal counsel for Kennedy and to the legal counsel for GAD. In both letters, the USMS informed the parties of the Justice Department's policy on property sales in private litigant foreclosure cases and the collection of the commission that is due to the USMS on sale, pursuant to title 28 section 1921 of the United States Code.[1] Specifically, the USMS informed the parties that the November 7, 2013

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[1] The pertinent language of 28 U.S.C § 1921 relied upon as the basis for the commission it claimed to be entitled to collect is as follows:

> **(c)(1)** The United States Marshals Service shall collect a commission of 3 percent of the first $1,000 collected and 1 ½ percent on the excess of any sum over $1,000, for seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise, and receiving and paying over money, except that the amount of commission shall be within the range set by the Attorney General. if[1] the property is not disposed of by marshal's sale, the commission shall be in such amount, within the range set by the Attorney General, as may be allowed by the court. In any case in which the vessel or other property is sold by a public auctioneer, or by some party other than a marshal or deputy

transaction that resulted in the sale of the Property at the auction generated $50,000 in commission and requested that the parties remit timely payment of the commission. The parties ignored the USMS' request. Consequently, the USMS deducted the $50,000 commission fee from the sale proceeds so that Kennedy ultimately received $5,951,000 rather than $6,001,000.

¶5 After the sale, Kennedy continued to collect rents for the property from November 7, 2013, until February 2014, collecting a total of $40,120.16. The tenant then became aware of GAD's competing claim for rents. Thereafter, the tenant began placing the rents in escrow until the end of the redemption period, with these rents totaling $101,589.99.

II. PROCEDURAL POSTURE

¶6 A dispute between the parties regarding who was directly responsible for payment of the $50,000 statutory USMS sales commission after GAD successfully purchased the Property at the auction prompted Kennedy to file a lawsuit for debt on March 27, 2014. The lawsuit sought the assistance of the court to compel GAD to pay the $50,000 commission assessed by the USMS. In the lawsuit, Kennedy alleged that it had agreed with GAD that Kennedy would receive net proceeds of $6,001,000 as a result of the purchase of the property and that GAD would be solely responsible for the payment of any applicable fees and commission due to the USMS. Kennedy

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> marshal, the commission authorized under this subsection shall be reduced by the amount paid to such auctioneer or other party. This subsection applies to any judicially ordered sale or execution sale, without regard to whether the judicial order of sale constitutes a seizure or levy within the meaning of State law. This subsection shall not apply to any seizure, forfeiture, sale, or other disposition of property pursuant to the applicable provisions of law amended by the Comprehensive Forfeiture Act of 1984 (98 Stat. 2040).
> **(2)** The Attorney General shall prescribe from time to time regulations which establish a minimum and maximum amount for the commission collected under paragraph (1).

further alleged that GAD had wrongfully refused to pay the USMS commission, and that the refusal resulted in the USMS deducting $50,000 from the proceeds of the sale that Kennedy and GAD had agreed that Kennedy would be entitled to receive. Accordingly, Kennedy sought judgment against GAD for $50,000 and for interest, costs, attorney's fees, and post judgment interest.

¶7 GAD responded by filing an answer and counterclaim on April 22, 2014. In its answer and counterclaim, GAD denied that the parties had an agreement which obligated GAD to pay the USMS commission. Kennedy then filed an amended complaint dated May 6, 2014 to include an action for declaratory judgment in addition to its original action for debt. In its request for declaratory judgment, Kennedy alleges that the consent judgment included a stipulation that its assignment of rents would be enforced until the end of the contractual redemption period following the Marshal's sale which was scheduled to end after 162 days from the date of the order confirming sale of the property. Kennedy alleges that despite the valid assignments, GAD instructed its tenants to pay rental income to GAD instead of Kennedy. Accordingly, Kennedy sought a judgment declaring that it is entitled to rental income from its tenants through the end of the redemption contractual period, including amounts that were being held in escrow.

¶8 GAD filed its amended answer with the Superior Court on May 20, 2014 in response to Kennedy's amended complaint. GAD denied Kennedy's allegation that the consent judgment provided that its assignment of rents would be enforced until the end of the contractual redemption period following the USMS auction and sale, which was scheduled to end after 162 days from the date of the order confirming sale of the property. Nevertheless, GAD admitted that it had requested that the tenants pay their rent to GAD and not to Kennedy.

¶9 The parties conducted discovery and at the close of discovery, GAD filed a motion for summary judgment on July 8, 2015. Kennedy filed an opposition to GAD's motion for summary judgment and a cross-motion for summary judgment on July 30, 2015.

¶10 On November 3, 2017, the Superior Court held a hearing on all outstanding motions and the parties presented oral arguments on the summary judgment motions. The Superior Court granted GAD's motion for summary judgment, finding that Kennedy failed to present any legal argument that would allow the court to ignore 5 V.I.C. § 500, pursuant to which GAD, as the purchaser of the Property, was entitled to all rents received from the date of the USMS auction and sale and that Kennedy failed to present evidence that GAD had agreed to pay the $50,000 statutory USMS commission.

¶11 Kennedy subsequently filed a motion for reconsideration, arguing *inter alia* that the Superior Court made a factual error in determining the judgment.[2] The Superior Court rectified the error but otherwise denied the motion for reconsideration. Additionally, the Superior Court granted Kennedy's motion to stay its payment to GAD of $40,120 in rental proceeds that it had collected following the date of the USMS auction and sale. This appeal ensued.

III. JURISDICTION

¶12 Title 4, section 32(a) of the Virgin Islands Code vests this Court with "jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court or as otherwise provided by law." The Superior Court's January 8, 2018 order granting summary judgment is a final order within the meaning of 4 V.I.C. § 32, since it disposed of all pending claims between Kennedy and GAD, *Machado v. Yacht Haven U.S.V.I., LLC,* 61 V.I. 373, 379 (V.I.

[2] The Superior Court stated in its grant of summary judgment that Kennedy recorded the assignment of leases and rents on April 18, 2015, rather than April 18, 2008.

2014), and Kennedy filed a timely notice of appeal on February 23, 2018. *See also Sealey-Christian v. Sunny Isle Shopping Ctr., Inc.*, 52 V.I. 410, 418 (V.I. 2009); V.I.S. CT. R. 5(a)(1). Therefore, we have jurisdiction over this appeal.

IV. STANDARD OF REVIEW

¶13 This Court's review of decisions granting or denying motions for summary judgment is plenary. *Joseph v. Daily News Publishing Company, Inc*. 57 V.I. 566, 581 (V.I. 2012) (noting that this Court applies the same test the Superior Court should have used in deciding the summary judgment motion in the first instance). Therefore, when reviewing a grant of summary judgment on appeal, this Court sits in the same position as the Superior Court and applies the same summary judgment test that governs the Superior Court's decision.

¶ 14 Accordingly, when reviewing the record, this Court must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party, and we must take the non-moving party's conflicting allegations as true if "supported by proper proofs." *See Williams v. United Corp*., 50 V.I. 191, 194 (V.I. 2008) (citing *Haugh v. Allstate Ins. Co.*, 322 F.3d 227, 230 (3d Cir.2003)). The movant may discharge this burden simply by "pointing out to the ... court that there is an absence of evidence to support the nonmoving party's case." *Aubain v. Kazi Foods of the V.I., Inc.*, 70 V.I. 943, 948 (V.I. 2019) (citing *Williams*, 50 V.I. at 194). If the moving party meets this burden, the non-moving party then has the burden of "set[ting] out specific facts showing a genuine issue for trial." *Williams*, 51 V.I. at 194. As to materiality, only those facts that "might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Additionally, the non-moving party may not rest upon mere allegations but must present actual evidence showing a genuine issue for trial. *See Anderson*, 477 U.S. at 248. Such evidence may be direct or circumstantial, but "the mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way." *Saldana,* 260 F.3d at 232, 234. Therefore, to survive summary judgment, the nonmoving party's evidence must "amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Id.* at 232 (internal quotations omitted). Importantly, in our analysis, this Court may not itself weigh the evidence and determine the truth of the competing allegations; rather, we decide only whether there is a genuine issue for trial such that a reasonable jury could return a verdict for the non-moving party. *See Anderson,* 477 U.S. at 255. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. CIV. P. 56(c).

V. DISCUSSION

¶15 Kennedy posits two issues on appeal: (1) whether the Superior Court erred in its determination that Kennedy was not entitled to certain rental income, irrespective of the assignment of lease and rent recorded against the property; and (2) whether the Superior Court erred when it required Kennedy to pay the $50,000 USMS commission fee generated under 28 U.S.C. § 1921 as a result of the sale of the Property.

A. The Superior Court correctly granted summary judgment to GAD and did not err in allowing GAD to collect all rental proceeds because it became the owner of the Property as a result of the USMS auction and sale.

¶ 16 On appeal Kennedy argues that the Superior Court erred when it held that the assignment of lease and rents was recorded on April 18, 2015 when it was actually recorded on April 8, 2008. Kennedy further argues that the assignment of lease was a valid first priority lien which subsequently merged into the consent judgment and order of foreclosure and continued to burden the property as a judgment lien after foreclosure. Kennedy argues further that this assignment of lease and rents that continued to burden the property after foreclosure as a judgment and lien should have put GAD on notice. Moreover, Kennedy claims that the consent judgment constitutes a "new and higher obligation," because the assignment of lease and rents survived the foreclosure proceedings and continued to burden the property as an existing and duly perfected judgment lien. (Appellant's Br. 12.)

¶ 17 GAD disagrees. GAD argues that the Superior Court properly granted it summary judgment by awarding GAD all the rents from November 7, 2013, when the sale of the Property occurred. To substantiate its argument, GAD cites 5 V.I.C. § 500 and *Chase Manhattan Bank v. Robert-Surzano,* 51 V.I. 1024, 1044 (D.V.I. App. Div. 2009) for the proposition that in the Virgin Islands the law is irrefutably clear that from the date of the auction the successful bidder on the property is entitled to possession of the property and to collect all or any rents from any tenant occupying the property. Accordingly, GAD requests that we affirm the Superior Court's ruling.

¶18 Kennedy filed a reply brief reasserting that GAD misinterpreted the consent judgment as foreclosing on the rents and that it mischaracterized it as a junior lien when the consent judgment makes clear that the assignment of rents merged with the consent judgment and continued to burden the property as a first priority lien. Kennedy also reasserted the following arguments: (1) that the Superior Court erred in finding that there was no contract requiring GAD to pay the $50,000 USMS commission; (2) that the email string appearing at J.A. 165-174 is evidence that GAD is responsible for any cost associated with the sale of the Property at the U.S. Marshal sale; and (3) that GAD incorrectly stated that it paid the USMS for the entire purchase price of the Property, because GAD has still refused to pay the commission.

¶ 19 Title 5, § 500 of the Virgin Islands Code provides that:

> The purchaser from the day of sale until a resale or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period. Any purchaser or prior redemptioner or both as the case may be, shall be entitled to cultivate and to reap, harvest, cut, etc., the first crop or any crops which he may have planted prior to the redemption.

The statute is exceedingly explicit in its unambiguous language. The statute gives a purchaser and a redemptioner the authority to possess the property from the day of sale—here, the USMS auction and sale, and it further authorizes the owner (purchaser or redemptioner) to collect any and all rents or the value of the use and occupation of the property. *See* 5 V.I.C. § 500.

¶ 20 As Kennedy argues, parties may contract to waive certain statutory rights. *Defoe v. Phillips*, 56 V.I. 109, 134 (V.I. 2012). However, GAD is not a party to the Order of Foreclosure, and one individual cannot contractually waive the statutory rights of one who is not a party to the contract. *See id.* Further, nothing in the Order of Foreclosure supports Kennedy's claim that the order preserved Kennedy's assignment of rent beyond the statutory period. The relevant language of the Order of Foreclosure is as follows:

> IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED THAT:
> The Kennedy Mortgage . . . is a valid first priority mortgage, superior to all other liens of record or claims of legal or equitable interest in the Mortgaged Premises which are hereby declared to be subordinate and secondary to Kennedy's first priority mortgage.
>
> IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED THAT: The Kennedy Security Agreement as perfected by the Kennedy UCC-1, the Kennedy Assignment of Licenses, and the Kennedy Assignment of Leases *are hereby declared valid first priority liens, superior to all other liens of record* or claims of legal or equitable interest an enforceable on behalf of Kennedy.

> IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED THAT: A judgment of foreclosure is hereby issued against Wintdots in favor of Kennedy, enforcing the Kennedy Mortgage and Loan Documents and, except as provided herein, *foreclosing all interests in the Mortgaged Premises* and personal property pledged as security for the Kennedy Loan held by any defendant herein.

(J.A. 85.) (Emphasis added).

¶21 Declaring the Assignment of Leases to be a first priority lien does not preserve it; rather, it confirms that the Assignment of Leases is subordinate to the Kennedy Mortgage and therefore foreclosed by the Order of Foreclosure. The language simply grants Kennedy first priority for satisfaction of all liens. Contrary to Kennedy's assertion that the assignment of rents somehow merged with the Order of Foreclosure and survived as a continuing encumbrance, the Order unambiguously foreclosed that and all other interests in the property.[3]

¶22 GAD became the purchaser of the property when it successfully bid $6,001,000 at the November 7, 2013 USMS auction and sale. Pursuant to 5 V.I.C. § 500, GAD is therefore "entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period." Because there are no issues of fact as to whether the Order of Foreclosure merged with the Consent Judgment or whether GAD otherwise contracted away its rights under 5 V.I.C. § 500, we affirm the Superior Court's grant of GAD's motion for summary judgment on the issue of

[3] Kennedy rightly points out that the Superior Court order granting summary judgment incorrectly stated that Kennedy recorded an assignment of rents on the property on April 18, 2015, after the Marshal sale, rather than the correct date of April 8, 2008. Kennedy argues that the Superior Court's incorrect recitation of the date of the assignment put GAD on constructive notice of the property's encumbrances. However, as the Superior Court explained in its denial of Kennedy's motion for reconsideration, Kennedy's recording of the assignment does not undercut GAD's statutory right to collect rental proceeds from the time of sale. Moreover, there is no evidence that the assignment of rents, recorded or not, was not foreclosed in the Order of Foreclosure.

rental payments paid to Kennedy from November 7, 2013, the date of sale, to January 31, 2014, as well as GAD's entitlement to the $101,589.99 in escrowed rents.

B. The Superior Court appropriately denied Kennedy's request to compel GAD to pay the $50,000 commission arising from the USMS sale.

¶23 Kennedy argues that the Superior Court erred in finding that there was no contract requiring GAD to pay the $50,000 cost of the USMS sale commission. Kennedy argues that the terms of the agreement between the parties were memorialized in a November 2, 2013 email correspondence, which "were slightly modified in subsequent oral negotiations between Kevin Wolfer, on behalf of Appellant, and Michael Knafo, on behalf of Appellee, to waive the requirement that Appellee place a $1 million deposit into escrow." (Appellant's Br. 16.) Kennedy argues that the parties determined that the deposit was unnecessary because payment would be made directly to the [U.S.] Marshal[s Service] rather than Appellant." (Appellant's Br. 16.) According to Kennedy, the "fundamental agreement was that [it] would stop bidding at $6,000,000 to ensure that they would receive that price for the property." (Appellant's Br. 17.)

¶24 In response, GAD contends that the Superior Court correctly granted summary judgment in its favor and against Kennedy's claim that GAD agreed to pay the statutory USMS sales commission. GAD defends the Superior Court's judgment by arguing that there is no written evidence to satisfy the statute of frauds and further argues that it never agreed to pay the commission and that Kennedy presented no evidence to the contrary. To further support its argument, GAD cites *First Bank & Trust v. F/V/Dragon Sea*, 2008 WL 2987040 (S.D. Ala. July 31, 2008) (unpublished) for the proposition that the seller should bear the cost at a USMS auction and sale when the foreclosure order and published terms of the auction and sale are silent with respect to payment of the statutory USMS commission arising under 28 U.S.C. § 1921. We find GAD's argument highly persuasive.

¶25 In the Virgin Islands:

> (a) Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any manner relating thereto, can be created, granted, assigned, transferred, surrendered, or declared, otherwise than-
> (1) by operation of law; or
> (2) by a deed of conveyance or other instrument in writing, signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law.

28 V.I.C. § 241. Here, the only established contract merely sets out parameters for bidding at the U.S. Marshal sale. This contract does not concern an interest in real property and is therefore not subject to the statute of frauds, which in the Virgin Islands, provides that

> [e]very contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority.

28 V.I.C. § 242.

¶26 Rule 56 of the Virgin Islands Rules of Civil Procedure outlines the burden-shifting approach in summary judgment analysis. First, "the moving party [must] demonstrate the absence of a genuine issue of material fact." *Aubain v. Kazi Foods of the V.I., Inc.*, 70 V.I. 943,948 (V.I. 2019) (quoting *Chapman v. Cornwall*, 58 V.I. 431, 436-37 (V.I. 2013)), *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Subsequently, the burden shifts to the nonmoving party to produce specific evidence of a genuine factual dispute for trial." *Williams*, 51 V.I. at 194. A genuine issue of fact exists when the evidence presented could allow "a reasonable jury to return a verdict for the non-moving party." *Id.* at 195. Importantly, however, to survive summary judgment the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Rotec Indus., Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1250 (Fed. Cir. 2000) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 586 (1986)).

¶27 GAD filed a motion for summary judgment in the Superior Court on July 8, 2015. As the party requesting summary judgment, GAD bore the initial burden of showing that there was no issue of material fact. *Anderson v. American Federation of Teachers*, 67 V.I. 777, 778 (V.I. 2017) (citing *United Corp., v. Hamed*, 64 V.I. 297, 309 (V.I. 2016)). GAD could "carry this burden by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* (citing *Williams*, 50 V.I. at 194.) In its motion for summary judgment, GAD contended that there is no evidence of a written agreement to satisfy the statute of frauds and Kennedy is solely responsible to pay the USMS commission. In support of its motion for summary judgment, GAD offered a statement of undisputed facts, a consent judgment and order of foreclosure, a mortgage and security agreement, an assignment of leases and units, a proposed order, evidence of a newspaper advertisement for the sale of the Property, email correspondence, and Kennedy's responses to GAD's interrogatories to satisfy its burden of demonstrating that the record contains no triable issue of material fact and it is entitled to judgment as a matter of law.

¶28 Upon GAD'S successful demonstration that no triable issue of material fact existed in the record, the burden then shifted to Kennedy "to present affirmative evidence from which a jury might reasonably return a verdict in his favor." *Chapman v. Cornwall*, 58 V.I. 431, 436-37 (V.I. 2013) (quoting *Celotex*, 477 U.S. 322-25). Importantly, Kennedy, in responding to the summary judgment motion, was not free to simply rest on its pleadings or bare assertions, but was required to set forth specific facts to show a genuine issue of material fact. *Id*. (citing former FED. R. CIV. P. 56(e) V.I. R. CIV. P. 56(a). The Court will affirm a grant of summary judgment only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. CIV. P. 56(a); *Williams*, 50 V.I. at 194.

¶29 Kennedy filed a memorandum of law in opposition to GAD's motion for summary judgment. In its opposition, Kennedy argued that "Kennedy and GAD entered into a bidding agreement pursuant to which GAD agreed to pay all cost of sale of the . . . property." (J.A. 256.) Kennedy also argued that "[t]he parties proceeded to bid at the date exactly as agreed resulting in the successful purchase of GAD" excluding GAD's commitment and obligation to pay the USMS commission. (J.A. 256.) In sum, Kennedy argued that GAD should bear the responsibility to pay the USMS commission under the terms of the bidding agreement and as the successful purchaser of the property at the auction sale. In support of its motion in opposition to the summary judgment motion, Kennedy included the deposition of Michael Knafo, and a letter from the USMS to Attorney Russell and Attorney Duensing regarding payment of the outstanding USMS commission due from the sale of the Property.

¶30 Much of Kennedy's argument that GAD agreed to pay the USMS commission is based on a November 1, 2013 email chain, in which Knafo requested that Wolfer "send the contract so that he could start working on the funds." (J.A. 172.) On November 2, 2013, Wolfer sent the following email to Matthew Duensing, counsel for Kennedy, which was copied to Knafo and others, requesting a purchase contract incorporating several terms and conditions. The terms and the conditions outlined in the email correspondence are as follows:

> --Kennedy will bid $6,000,000 at the sale on November 7, 2013 for the commercial building.

> --Diamond International will bid $1,000 more than our bid and continue to bid if there are any other bidders so that DI shall be the successful bidder.
>
> --Upon KF's receipt of the winning bid proceeds, not less than $6 million net to KF, KF agrees to refund the difference in the amount received in excess of $6 million to DI
>
> --DI is responsible for any costs associated with the bidding procedures, transfer of title etc.
>
> --DI shall place $1 million in your attorney trust account no later than Tuesday, November 5, 2013, time of the essence. This $1 million shall be released back to DI upon KF's receipt of the sale proceeds. In the event, DI does not bid more than $6 million at the sale or DI is not the successful bidder, the $1 million shall be released to KF. For clarity purposes – essentially KF is selling the commercial building to DI for $6 million. KF loses the opportunity to retain any proceeds in excess of $6 million, however KF has the added protection knowing DI will bid in excess of $6 million.

(Appellee's Br. 7; J.A. 17.)

¶31 Read in the light most favorable to Kennedy, the non-moving party, the evidence Kennedy presented in response to GAD's motion for summary judgment reveals that there was no written contract signed by the parties to bid at the USMS auction, much less a written agreement that GAD would pay the USMS commission as argued by Kennedy. The email exchange does not support Kennedy's claim that Kennedy requested that GAD pay the USMS commission as part of the agreement or that GAD ever directly agreed to the terms and conditions described in the email or to pay the USMS commission. There was no evidence of a response in writing or otherwise manifesting GAD's acceptance of these terms and conditions. Additionally, there is no evidence of a written contract memorializing the terms and conditions outlined in the email correspondence.

¶32 Moreover, the Knafo deposition submitted on the motion, directly disputed that GAD agreed to pay the Marshal's commission. During deposition, in response to the question of who was responsible for the cost related to the purchase of the property, Knafo stated that "the discussion [between him and Wolfer] was very straightforward at $6 million 1,000 the property is yours." (J.A. 228.) "That's it. It was nothing more, nothing less $6 million 1,000 you buy it. It is yours." (J.A. 228.) Further, in response to the question of GAD's responsibility to bear the cost related to the purchase of the property, Knafo averred in his deposition that when he received the November 2, 2013 email stating, that among other things, GAD would pay the cost related to the purchase of the property, he responded internally in an email dated November 3, 2013 that "the deal is off the table." (J.A. 230, 231.) Knafo further stated that he communicated this information "internally or [to] internal counsel, so there is no need to review the contract. There's no need to sign the contract. There's no need to make any commitment." (J.A. 230.) However, he also acknowledged that he did not share or communicate that information to Kennedy. Kennedy provides no evidence that there was such an agreement.

¶33 There was no evidence of a written contract signed by the parties, and although their actions in the transaction that culminated in the USMS's sale of the property at an auction may be proceeded from a premise that Kennedy would net at least $6,000,000, if it made a successful bid on the property, no evidence in the record remotely implies that GAD agreed to pay the Marshal's commission, and there is no evidence that GAD agreed to any proposal that Kennedy would net at least $6,000,000. The cornerstone of the parties' agreement concerns an agreement to bid at the USMS's sale and does not involve the sale of land, which would involve the statute of frauds. Moreover, besides the fact that accepting Kennedy's argument would compel this Court to an illogical and irrational holding, the record is bereft of any evidence that would indicate or imply that GAD was on notice that it was responsible for paying the USMS commission arising from the sale of the property. The notice of sale did not put GAD on notice of this fact. Likewise, there was no evidence that the notice of sale that was published in the newspaper notified potential buyers that they would be solely responsible for paying the USMS commission, which would be a statutory percentage of the winning bid as provided in 28 U.S.C. § 1921. In fact, no information provided in the notice of sale of the property could put any person, much less a reasonable person, on notice of the responsibility to pay the USMS commission. In sum, Kennedy failed to produce any evidence indicating that GAD offered or agreed to pay the USMS commission and has therefore failed to prove an issue of triable fact in regard to the USMS commission.

¶34 We therefore review 28 U.S.C. § 1921 to determine which party is responsible for paying the Marshal's commission. "The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *In re of Adoption of L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) (quoting *In re Reynolds*, 60 V.I. 330, 334 (V.I. 2013)). 28 U.S.C. § 1921(c)(1) provides in relevant part:

> The United States Marshals Service shall collect a commission of 3 percent of the first $1,000 collected and 1½ percent on the excess of any sum over $1,000, for seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise, and receiving and paying over money, except that the amount of commission shall be within the range set by the Attorney General.

The statute clearly and unambiguously establishes the amount of the Marshal's commission, and, most importantly, specifically identifies the particular source of monies from which the Marshals are directed to collect their commission. Section 1921 plainly directs the Marshals to collect, as their commission, 3 percent *of* the first $1,000 *collected*, as well as 1½ percent of any sum *collected* over the first $1,000. In the context of a foreclosure sale, the sum *collected* by the Marshal is the purchase price paid over by the winning bidder. *See Redus Florida Commercial, LLC v. College*

Station Retail Center, LLC, 777 F.3d 1187, 1194-96 (11th Cir. 2014) (explaining that the word '"collected' unambiguously refers to the winning bid the USMS receives [and 'collects'] at auction"). Thus the statute specifically directs the Marshals to collect their commission directly out of the purchase price received, before paying over the remainder of the purchase price to the judgment creditor.[4] Under this statutory framework, although the commission is directly collected from the monies paid by the purchaser, it is the judgment creditor who ultimately bears financial responsibility for payment of the marshal's commission because, by operation of statute, the marshal's commission is collected directly from the purchase price which would otherwise be paid over to the judgment creditor.

¶35 On appeal, Kennedy effectively claims that it is entitled to a reimbursement from GAD for the amount of the Marshal's commission deducted from the purchase price ultimately paid over to Kennedy. However, Kennedy has failed to identify, and our own research has not revealed, any authority to support this proposition. Rather in this case the sum actually collected by the Marshals was the $6,001,000 winning bid of GAD. $50,000 was properly deducted out of this sum for the commission, before the final proceeds were paid over to the judgment creditor, Kennedy, in accordance with 28 U.S.C. § 1921(c). In this sense, Kennedy, the party that called upon the

[4] This interpretation is consistent with the longstanding practice of the District Court of the Virgin Islands in ordering that the Marshal's commission under 28 U.S.C. 1921 be collected from the proceeds of such sale. *See e.g., LoanCare, LLC v. Thomas-Barry*, 2019 WL 6841973, at *3(D.V.I. Dec. 16, 2019); *Bank of Nova Scotia v. Davis*, 2018 WL 4355177, at *5 (D.V.I. Sept. 11, 2018) (ordering that property be sold by the United States Marshal according to law and the proceeds of such sale shall be applied first to the expenses associated with any sale, including but not limited to the cost of publication and the commission assessed by the United States Marshal's Service); *Banco Popular de Puerto Rico v. Majestic Construction, Inc*., 2018 WL 5796096, at *1 (D.V.I. Nov. 5, 2018) (ordering same); *Flagstar Bank, FSB v. Haynes*, 2013 WL 12084864, at *1 (D.V.I. May 31, 2013) (same); *Banco Popular de Puerto Rico v. Davis*, 2007 WL 4143216, at *2 (D.V.I. Nov. 14, 2007) (same).

Marshals for their services in selling the property, is the party responsible for payment of the commission under the statute, because the Marshals are directed by § 1921(c) to collect their commission directly out of the purchase price before paying over the remainder to the judgment creditor, Kennedy. Therefore, the Superior Court was correct in determining that there was no dispute of material fact as to who should pay the USMS commission, and thus the court properly entered summary judgment for GAD.

VI. CONCLUSION

¶36 Because GAD is entitled to receive rental payments commencing on the date when it purchased the Property under 5 V.I.C. § 550, and Kennedy provided no evidence that GAD had agreed to pay the statutory USMS commission or even evidence that GAD was put on notice of this requirement, the Superior Court's judgment, as reflected in its January 8, 2018 memorandum opinion and order, is affirmed.

Dated this 20th day of May 2020

BY THE COURT:

/s/ Ive Arlington Swan_____
IVE ARLINGTON SWAN
Associate Justice

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