

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

KEITH AUSTIN,	)	
	)	CIVIL NO. SX-13-CV-175
Plaintiff,	)	
	)	ACTION FOR DAMAGES
v.	)	
	)	JURY TRIAL DEMANDED
TIP TOP CONSTRUCTION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

MOLLOY, Judge.

BEFORE THE COURT are the following post-trial motions: (1) Defendant Tip Top Construction's ("Tip Top") Motion to Stay Execution on Judgment, filed on May 2, 2017;¹ (2) Tip Top's Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial, filed on May 4, 2017;² and (3) Plaintiff Keith Austin's ("Austin") Motion for Attorney Fees and Costs, filed on May 5, 2017. ³

Tip Top requests that the Court stay the execution the \$45,364.00 judgment entered in favor of Austin and against Tip Top while the case is pending appeal with the Supreme Court of the Virgin Islands. Tip Top is prepared to deposit \$47,000.00 into the registry of the Superior Court in lieu of a supersedeas bond as a condition for imposing stay of the execution of the judgment. For the reasons stated below, the Court will grant the motion to stay the execution of the judgment while this matter is on appeal and set the bond at \$50,000.00. The Court will also deny Tip Top's motion for judgment as a matter of law (and motion for a new

¹ Austin filed a response on May 15, 2017.

² Austin filed an opposition on May 25, 2017.

³ Tip Top filed an opposition on May 24, 2017.

trial) because the Court lacks jurisdiction to adjudicate that motion. Finally, the Court will deny Austin's motion for attorneys' fees and costs without prejudice to refiling because that issue is not ripe for adjudication.

I. BACKGROUND

The facts relevant to this motion are as follows. Austin commenced this civil action on May 21, 2013, when he filed the complaint allege various causes of action against Tip Top. After several years of discovery and motions practice, the Court commenced jury selection on March 27, 2017. The trial took place from March 28, 2017 to April 5, 2017. On April 5, 2017, the jury returned a verdict in favor of Austin on his claims for wrongful discharge and for breach of duty of good faith and fair dealing. The jury awarded Plaintiff \$45,200.00 in damages on his claim for wrongful discharge and \$164.00 in damages on his claim for breach of duty of good faith and fair dealing. The Court subsequently issued a Judgment memorializing the jury's verdict on April 6, 2017.

Tip Top subsequently filed a Notice of Appeal with the Supreme Court of the Virgin Islands on May 5, 2017. This appeal is currently docketed in the Supreme Court as Civil No. 2017-0045.

II. DISCUSSION

A. Tip Top's Motion for Stay Execution of the Judgment

On May 2, 2017, Tip Top filed a motion seeking a stay of the execution of the Judgment. Tip Top filed this motion pursuant to Rule 62(d) of the Virgin Islands Rules of Civil

Procedure.⁴ In his motion, Tip Top states that it “will be appealing that Judgement to the Virgin Islands Supreme Court” and “requests permission to deposit \$47,000 into the registry of the Superior Court in lieu of obtaining a supersedeas bond as a condition for imposing a stay of execution on the judgement during the pendency of any post-judgment motions and the appeal.” Def.’s Mot. at 1-2. Virgin Islands Rules of Civil Procedure 62(d) provides:

If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

V.I. R. Civ. P. 62(d). This rule is modeled after Rule 62(d) of the Federal Rules of Civil Procedure. Because Rule 62(d) of the Virgin Islands rules are nearly identical to Rule 62(d) of the Federal rules, the Court will look to federal court decisions interpreting Rule 62(d) for persuasive authority. *See King v. Appleton*, 61 V.I. 262, 269 n. 8 (V.I. 2014) (“Although the entry of default in the Superior Court is governed exclusively by Superior Court Rule 47, and not Federal Rule of Civil Procedure 55(a), because these rules are nearly identical we may look to federal decisions interpreting Rule 55(a) for persuasive authority.”); *see also Hawkins v. Greiner*, Super. Ct. Civ. No. SX-05-CV-493, 2017 V.I. LEXIS 65, *13-14 (Super. Ct. Apr. 27, 2017) (looking to federal case law interpreting Federal Rules of Civil Procedure 36 as persuasive authority to interpret Virgin Islands Civil Procedure 36).

Federal courts applying Federal Rule 62(d) have uniformly held that the stay provisions in that rule are automatic and a party who files a satisfactory supersedeas bond

⁴ On January 18, 2017, the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure. These rules officially went into effect on March 31, 2017. *See In re: Adoption of the V.I. Rules of Civil Procedure*, Promulgation No. 2017-001, 2017 V.I. Supreme LEXIS 22 (V.I. Apr. 3, 2017).

is entitled to a stay. *See Am. Mfrs. Mut. Ins. Co. v. Am. Broadcasting-Paramount*, 87 S. Ct 1, 2, 17 L. Ed. 2d 37 (1966) (“With respect to a case arising in the federal system it seems to be accepted that a party taking an appeal from the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with Fed. R. Civ. P. 62(d) . . .”); *Cohen v. Metro. Life Ins. Co.*, 334 Fed. Appx. 375, 378 (2d Cir. 2009) (“Rule 62(d) provides that an appellant may obtain a stay pending appeal, as of right, by posting a supersedeas bond”); *Arban v. West Publ’g Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) (“Rule 62(d) entitled a party who files a satisfactory supersedeas bond to a stay of money judgment as a matter of right”); *Pharmacia Corp. v. Motor Carrier Servs. Corp.*, Civ. No. 04-3724, 2008 U.S. Dist. LEXIS, 25100, *9 (D.N.J. Mar. 28, 2008) (“Indeed, the Supreme Court [of the United States] has described the Rule 62(d) stay as ‘automatic’”) (citing *Becker v. United States*, 451 U.S. 1306, 1308, (1981)); *Nicholas v. Wyndham Int’l, Inc.*, Civil No. 2001-147, 2007 U.S. Dist. LEXIS 94333, *3 (D.V.I. Dec. 21, 2007) (“The rule entitles a party who files a satisfactory supersedeas bond to a stay of money judgment as a matter of right”); *Rodriguez v. Hernandez*, 304 F. Supp. 2d 227, 228 (D.P.R. 2004) (“When a losing party appeals, he or she may automatically avail themselves of Fed. R. Civ. P. 62(d) and stay the execution of a monetary judgment, provided they post a bond sufficient to protect the interests of the non-appealing party.”).

As one court explained, the primary “purpose of the bond is to ‘protect the interest of the judgment creditor whose execution is pending the outcome of the appeal.’” *Rodriguez*, 304 F. Supp. 2d at 228 (D.P.R. 2004) (citing *Perez v. Massachusetts Gen. Hosp.*, 193 F.R.D. 43, 44, (D.P.R. 2000)). The bond also “protects the appellant from the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal . . .” *Contract*

Design Group, Inc. v. Wanbe State Univ., Civ. Case No. 10-CV-14702, 2014 U.S. Dist. LEXIS 148859, *4 (E.D. Mich. Oct. 20, 2014). With the above legal principles in mind, the Court sees no reason to deviate from the decisions of federal courts ruling that the language in Fed. R. Civ. P. 62(d) entitles a party to an automatic stay of the execution of a money judgment upon the posting an appropriate bond. Thus, this Court is persuaded by the decisions of the federal jurisdictions and holds that V.I. R. Civ. P. 62(d) should be interpreted and applied just the same as Fed. R. Civ. P. 62(d). Accordingly, Tip Top would be entitled to an automatic stay upon the posting of a satisfactory bond.

Here, Tip Top requests permission to deposit \$47,000 into the registry of the Superior Court in lieu of obtaining a supersedeas bond. This amount, Tip Top argues, would be sufficient to satisfy the \$45,364.00 judgment awarded to Austin in this case. On the other hand, Austin argues that Tip Top should be required to post \$50,000 as condition for obtaining a stay arguing that the amount of the bond is supposed to be the amount to satisfy the judgment plus interest, and costs. Pl.'s Response to Mot. at 1.

The amount of the supersedeas bond should be set at "a sum sufficient to pay the judgment and costs, interest, and damages for delay." *Cashman Equip. Corp. v. U.S. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 95657, *13 (E.D. Pa. Nov. 21, 2008) (citations omitted). Furthermore, many courts have recognized that, "[w]ith respect to the supersedeas bond, the Courts have discretionary power in setting the amount of the bond." *First Am. Dev. Group/Carib, LLC v. WestLB AG*, 2012 V.I. LEXIS 14, 4 (V.I. Super. Ct. Apr. 30, 2012); *Bank of Nova Scotia v. Pemberton*, 964 F. Supp. 189, 191 (D.V.I. 1997) (opining that the court has discretion to grant a stay without a bond or with a modified bond). Under Virgin Islands law,

a party who has obtained a judgment is entitled to pre and post judgment interest in the amounts of four percent (9%) and nine percent (4%), respectively. *See* 11 V.I.C. § 951(a)(1) (“The rate of interest shall be nine (9%) per centum per annum on . . . all monies which have become due . . .”); 5 V.I.C. § 426(a) (“The rate of interest on judgments and decrees for the payment of money shall be 4 percent per annum.”). Additionally, the explicit language of 24 V.I.C. § 79 of the Wrongful Discharge Act permits a prevailing plaintiff to recover reasonable attorney’s fees and costs. Thus, in light of the fact that Austin may be able to recover pre and post judgment interest on his \$45,364.00 judgment as well as reasonable costs and attorney’s fees if he prevails on appeal, the Court finds that the \$50,000 amount requested by Austin is a more reasonable figure to protect Austin’s interest while the appeal is pending in the Supreme Court.

B. Tip Top’s Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial

Tip Top filed a Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial, filed on May 4, 2017. One day later, Tip Top filed a Notice of Appeal appealing the Court’s April 6, 2017 Judgment with the Supreme Court. “[A]n effective notice of appeal of a final order typically divests the trial court of jurisdiction.” *In re Rogers*, 56 V.I. 325, 342 (V.I. 2012); *see also Walter v. Walters*, 60 V.I. 768, 782 (V.I. 2014) (“In any event, we agree that, by appealing the final judgment in this case on June 4, 2010, Aubrey divested the Superior Court of any jurisdiction to rule on his subsequently filed motion.”). The Court notes that Tip Top’s Notice of Appeal raises some of the same legal issues raised in its motion for judgment as a matter of law. In light of the fact that this matter is on appeal, this Court has no jurisdiction to render a decision on Tip Top’s post trial motion.

C. Austin's Motion for Attorney Fees and Costs

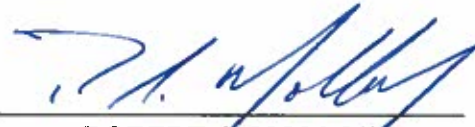
Title 24, Section 79 of the Virgin Islands Code permits a prevailing plaintiff in a wrongful discharge case to recover “reasonable attorney’s fees and costs of the action.” To that end, Austin seeks an award of attorneys’ fees in the amount of \$101,087.00 and costs of \$14,522.31. *See* Pl.’s Motion for Attorney fees and Costs at 6. Austin filed his motion for attorneys’ fees and costs on May 5, 2017, the same day Tip Top filed a Notice for Appeal with the Supreme Court. Because there are dispositive issues that are currently on appeal before the Supreme Court, Austin’s motion for attorney’s fees and costs is not ripe for adjudication. *See V.I. Gov’t Hosp. & Health Facilities Corp. v. Gov’t of the V.I.*, 50 V.I. 276, 281 (V.I. 2008) (“the [respondent’s] motion for attorney’s fees – filed one week after the [petitioner’s] Notice of Appeal to the [appellate court] – was not ripe, for the prevailing party cannot be ascertained until the [appellate court] rules on the appeal”). If Tip Top is successful in its appeal, Austin would not be the prevailing party and thus, he would not be entitled to recover fees and costs. Accordingly, the Court is precluded from ruling on Austin’s request for attorneys’ fees and costs at this time. *See id.* at 280-81 (“A ruling on a motion for attorney’s fees must be vacated on ripeness grounds when the presence of ongoing litigation precludes an informed determination of whether the moving party is in fact entitled to attorney’s fees under the relevant law.”) (internal quotations omitted).

III. CONCLUSION

For the reasons stated above, the Court will grant Tip Top’s motion to stay the execution of the judgment, but will condition the stay upon the posting of a bond in the

amount of \$50,000.00.⁵ The Court will also deny Tip Top's Motion for New Trial for lack of jurisdiction. Finally, the Court will dismiss Austin's motion for attorneys' fees and costs because it has not been determined that Austin is the prevailing party. An appropriate order follows.

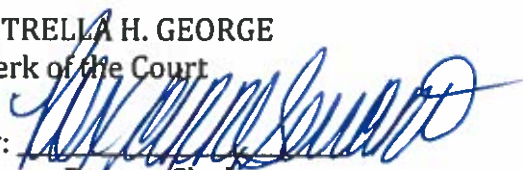
DATED: May 31, 2017



ROBERT A. MOLLOY
Judge of the Superior Court

A T T E S T:

ESTRELLA H. GEORGE
Clerk of the Court

By: 

Deputy Clerk

Date: 6/1/17

⁵ The Court takes note that Tip Top is not requesting to post a supersedeas bond in order to obtain a stay of the execution of the judgment. Instead, Tip Top is requesting to post \$47,000 cash in the registry of the Superior Court. The Court sees no reason to require Tip Top to post a bond when it is electing to post cash – a more liquid asset – in order to perfect a stay. The posting of cash in the registry of the Superior Court satisfies the same purpose of posting a bond.