

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

KIVAT KARNI, LLC,

PLAINTIFF,

v.

**AUTO WORLD, LLC, AND GOVERNMENT OF
THE VIRGIN ISLANDS, BUREAU OF INTERNAL
REVENUE,**

DEFENDANTS.

SX-10-CV-492

**ACTION FOR FORECLOSURE
AND DEBT
2019 VI SUPER 144U**

Appearances:

Gerald T. Groner, Esq.
Groner Law, PC
For Kivat Karin, LLC

Erika M. Scott, Esq.
Department of Justice
For Govt. of the V.I.

MEMORANDUM OPINION

WILLOCKS, Presiding Judge.

¶1 **THIS MATTER** is before the Court on Plaintiff's Kivat Karni (hereinafter "Plaintiff") Waiver of Costs and Attorney's Fees, Supplemented Statement of Balance Due and Motion for Reconsideration (hereinafter "Motion") filed on Mach 24, 2015. The defendants Auto World, LLC, (hereinafter "Auto World") and Government of the Virgin Islands, Bureau of Internal Revenue (hereinafter "Government") did not file a response.

BACKGROUND

¶2 On November 21, 2006, Auto World entered into a series of loans with the Bank of Nova Scotia (hereinafter "Loan Agreement"). (First Am. Compl. at 3) The Loan Agreement encompasses the following loans:

1. The New Vehicle Flooring Loan and Promissory Note to finance Auto World's cost of acquiring new vehicles. The maximum of this loan was not to exceed \$1,000,000.00. According to the Loan Agreement, Auto World was required to pay interest at a fluctuating rate which, as of the date of the Loan Agreement, was 9.75% per annum.
2. The Used Vehicle Flooring Loan and Promissory Note was provided to finance the cost of acquisition by Auto World. The maximum amount of this loan was not to exceed at any one time outstanding the sum of \$300,000.00 with interest accruing at a fluctuating rate, as of the date of the Loan Agreement, 10.25% per annum.
3. The Term Loan and Promissory Note were provided as "a non-revolving construction/term loan...in an aggregate maximum amount outstanding of \$700,000.00 with interest accruing at a fluctuating rate, as of the date of the Loan Agreement, 10.25% per annum.

(*Id.* at 4-8.) On March 2, 2007, Auto World provided a Leasehold Mortgage as security for repayment of the loans and for the performance of all obligations of Auto World under any one or more of the Loan Documents. (*Id.* at 11.) According to the mortgage, Auto World granted Bank of Nova Scotia a first priority leasehold mortgage in real property described as:

Plots 12-C and 14-A of Estate La Grande Princesse, Company Quarter, St. Croix, United States Virgin Islands, consisting of 1.399 and 0.9093 U.S. acres, (respectively) more or less, as more fully described in OLG Drawing No. 1432, dated November 23, 1963, revised August 13, 1998.

(hereinafter "the Property") (*Id.* at 11-12.) In the event of default, the mortgage provides that the holder of the Loan Agreement may foreclose the lien of the mortgage. Given the Plaintiff the right to foreclose the mortgage and action at law, suit in equity or other appropriate proceedings. (*Id.* at 12.)

¶3 On April 23, 2008, the Government of the Virgin Islands, Bureau of Internal Revenue (hereinafter “Government”) recorded a tax lien in the amount of \$96,685.07 against Auto World. (*Id.* at 2.) Consequently, the Government may claim a right, title or interest in the Property. (*Id.*)

¶4 On January 30, 2009, Auto World acting by and through its four managers executed and delivered a letter agreement to Bank of Nova Scotia confirming that the Defendant was in default of its obligations under the Loan Agreement and that all indebtedness had been accelerated and was due in full. (*Id.* at 14-15.)

¶5 On September 2, 2010, The Bank of Nova Scotia assigned the Loan Agreement to the Plaintiff. (First Am. Compl. at Ex. E.) On November 15, 2010, the Plaintiff filed this action against Defendant Auto World, LLC only. (Compl. dated 11/15/2010.) Subsequently, Plaintiff filed a First Amended Complaint and added the Internal Revenue as the second defendant pursuant to 28 V.I.C. §532. (First Am. Compl. at 2.) Both Defendants were properly served as set forth in the Omnibus Notice of Service of Summons and Complaint filed by Plaintiff on February 1, 2011. The Government filed an answer on March 14, 2012. Auto World failed to answer, appear or otherwise defend as a result default was entered against them on August 1, 2011.

DISCUSSION

Default Judgment

¶6 This Court’s standard of review for default judgments is governed by V.I. R. Civ. P. 55.¹ Pursuant to Rule 55, the Court may grant default judgment against a party who has

¹ V.I. R. Civ. P. 55(b)(1).

defaulted due to failure to appear.² The party seeking the default judgment must show that the opposing party is not a minor or incompetent person.³

¶7 In an Order dated February 23, 2015, the Court granted the Plaintiff's Motion for Partial Default Judgment against the defendant Auto World and requested that the Plaintiff supplement its request for judgment with documentation reflecting the most recent calculation so that a Judgment Order for the proper amount could be entered. The Plaintiff has filed the present Motion in accordance with the Court's Order. The Court being satisfied with adequate documentation finds that entry of judgment is appropriate.

Motion for Reconsideration

¶8 Motions for reconsideration are governed by Virgin Islands Rules of Civil Procedure 6-4. According to Rule 6-4, a party may file a motion asking the Court to reconsider a decision within 14 days of the ruling except for final decisions provided for in Rules 59 and 60.⁴ Motion to reconsider must be based on: (1) intervening change in controlling law; (2) availability of new evidence; (3) the need to correct clear error of law; or (4) failure of the court to address an issue specifically raised prior to the court's ruling.⁵

¶9 However, a motion to reconsider does not give a party a second chance, rather it is a means to focus on the original pleading and "prevent 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."⁶

¶10 The Plaintiff is requesting that the Court reconsider its February 23, 2015, Opinion denying Plaintiff's Motion for Summary Judgment against the Government. According to the

² *Id.*

³ *Id.*

⁴ V.I.R. Civ. P. 6-4(a).

⁵ V.I.R. Civ. P. 6-4(b).

⁶ *Smith v. Law Office of Karin A. Bentz, P.C.*, 2018 V.I. LEXIS 13 at *13 (V.I. Super. Ct. Jan. 29, 2018).

Plaintiff, the Court denied the motion pursuant to Rule 55(d) of the Federal Rules of Civil Procedure, which prohibits entry of default against the Government of the Virgin Islands. However, the Plaintiff claims that Rule 55(d) does not apply to its motion for summary judgment and is not applicable in this instance. Moreover, the Plaintiff argues that motions for summary judgment are governed by Fed. R. Civ. P. 56.

¶11 At the time the Court ruled on the Plaintiff's motion for summary judgment the Federal Rules of Civil Procedure governed pursuant to Superior Court Rule 7.⁷ Subsequently, the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure, which became effective March 31, 2017.⁸ However, since the Court is reconsidering a decision that was based on the Federal Rules of Civil Procedure and pursuant to Virgin Islands Rule of Civil Procedure 1-1(c)⁹, the Court will apply the Federal Rules of Civil Procedure.

¶12 Here, dismissal under Rule 55(d) of the Fed. R. Civ. P. was improper because Rule 55(d) does govern default judgments rather than summary judgments.¹⁰ Rule 55(d) prevents entry of default against the United States or agencies unless there is evidence that establishes a claim of relief that is sufficient to the Court.¹¹ The rule was designed to protect taxpayers from being subjected to judgments as penalties against the government.¹² However, summary judgments are governed by Rule 56 and are not issued as a penalty but rather when there is no

⁷ V.I. Super. Ct. Rule 7 (2013) ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, . . . the Federal Rules of Civil Procedure . . .")

⁸ *In re Adoption of the V.I. Rules of Civ. P.*, S. Ct. Prom. No. 2007-001, 2017 V.I. Supreme LEXIS 22, *1-2 (V.I. 2017).

⁹ V.I.R. Civ. P. 1-1(c) ("These rules, and subsequent amendments, govern: proceedings in any action commenced after their effective date; and proceedings in any action pending on the effective date of the rules or amendments. . . .") See also *The Litwin Corp. v. Universal Oil Products Co.*, 69 V.I. 363 at *n.2 (V.I. Super. Ct. 2018) ("[T]his Court has concluded that rather than reaching back in time, Rule 1-1 must require that the rules in effect prior to March 31, 2017 continue to govern motions pending as of that date, but all motions filed after March 31, 2017, the new rules will apply unless application to the case (not a particular motion) would be unjust or infeasible.") (quoting *Jones v. Lockheed Martin Corp.*, 68 V.I. 158, 184 (V.I. Super. Ct. 2017)).

¹⁰ Fed. R. Civ. P. 55(d). Cf. Fed. R. Civ. P. 56.

¹¹ Fed. R. Civ. P. 55(d).

¹² *Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000).

genuine dispute as to any material facts.¹³ Moreover, this Court has previously granted summary judgment against the Government.¹⁴ Therefore the Court shall grant the Plaintiff's motion for reconsideration and decide the Plaintiff's motion for summary judgment under Rule 56 of the Virgin Islands Rules of Civil Procedure pursuant to .¹⁵

Motion for Summary Judgment

¶13 A motion for summary judgment shall be granted, "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."¹⁶ "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."¹⁷

¶14 "The moving party bears the initial burden of pointing out to the court that there is no genuine issue of material fact"—or in other words, "an absence of evidence to support the nonmoving party's case."¹⁸ The non-moving party then has the burden of setting out specific facts showing a genuine issue for trial.¹⁹ The court may consider the cited materials and other materials in the record.²⁰ But "the court may not weigh the evidence or determine the credibility of witnesses."²¹ The Court "must consider the record evidence in the light most favorable to the non-moving party."²² "The court must satisfy itself that the evidence in the

¹³ Fed. R. Civ. P. 56.

¹⁴ See *Roberts v. Gov't of the V.I.*, 45 V.I. 173, 176-77 (V.I. Super. Ct. Feb. 3, 2003); *Lafrance Equip. Int'l Corp. v. Reed*, 1983 V.I. lexis 28, 10 (V.I. Super. Ct. Dec. 28, 1983); *Centralpack Eng'g Corp. v. Gov't*, 24 V.I. 264, 275 (V.I. Super. Ct. Nov. 22, 1989).

¹⁵ Although the instant Motion was filed when the Federal Rules of Civil Procedure were applicable, this Court finds that the Supreme Court of the Virgin Islands framework in *Williams v. United Corp.*, for adjudicating motions for summary judgment pursuant to Rule 56 of the Fed. R. Civ. P. is suitable for determining motions for summary judgment pursuant to Rule 56 of the V.I. R. Civ. P. See in *Bellot v. Cardow, Inc.*, 2017 V.I. LEXIS 66, n. 10 (V.I. Super. Ct. May 1, 2017); see also *Williams v. United Corps.*, 50 V.I. 194, 194 (V.I. 2008).

¹⁶ V.I. R. Civ. P. 56(a); see *Rymer v. Kmart Corp.*, 68 V.I. LEXIS 571, 575 (V.I. 2018) ("A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record."); see also *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) (citations omitted); see also *Martin v. Martin*, 54 V.I. 379, 387 (2010) (citations omitted).

¹⁷ *Rymer*, 68 V.I. LEXIS 575

¹⁸ *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (citations omitted).

¹⁹ *Rymer*, 68 V.I. LEXIS 575-76

²⁰ V.I. R. Civ. P. 56(c)(3).

²¹ See *Williams*, 50 V.I. at 194-95.

²² *Rymer*, 68 V.I. LEXIS 576

summary judgment record supports this relief.”²³ Summary judgment is a “drastic remedy, a court should only grant summary judgment when the ‘pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact.’”²⁴

¶15 The Plaintiff has successfully established that there is no genuine dispute as to any material fact. The Plaintiff has provided evidence of the Loan Agreement, Leasehold Mortgage, and letter executed by the Defendant confirming the Loan Agreement, Lease Mortgage and default. (First Am. Compl. Ex. H.) In addition, the Plaintiff ‘s first priority mortgage that was recorded on March 5, 2007 takes priority over the Government’s tax lien that was recorded on April 23, 2008. (*Id.* at 2 & 3.) Thus, upon review of the record, summary judgment is appropriate.

¶16 However, it is unclear whether the Plaintiff has the authority to foreclose on the Property. Although, paragraph 18 of the Lease Mortgage permits the Plaintiff to foreclose on the mortgage in the event of a default, paragraph 4.1 of the Commercial Lease (hereinafter “Lease”) between the Defendant as tenant and Juan Antonio Hendricks as landlord of the Property specifically states that the Defendant “shall not encumber . . . the Lease with a leasehold mortgage . . . without the consent of the Lessor which shall not be unreasonably withheld.” (First Am. Compl. Ex. G.) Therefore, additional documentation is required in order to determine whether Juan Antonio Hendricks allowed the Defendant to grant the Plaintiff a leasehold mortgage of the Property before foreclosure can be determined.

²³ *Vanterpool v. Gov’t of the V.I.*, 63 V.I. 563, 583 (V.I. 2015).

²⁴ See *Rymer*, 68 V.I. LEXIS 575; see also *Martin*, 54 V.I. at 386.

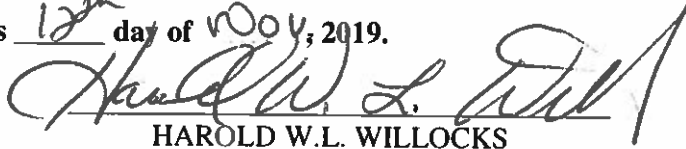
CONCLUSION

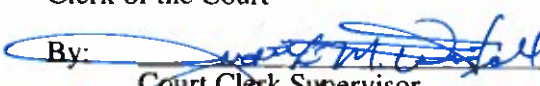
¶17 Based on the foregoing analysis, the Plaintiff's Motion for Reconsideration is granted. The Court's February 23, 2015, Order shall be vacated. An Order consistent with this Memorandum Opinion shall follow.

DONE and so ORDERED this 12th day of NOV, 2019.

ATTEST:

Estrella H. George
Clerk of the Court


HAROLD W.L. WILLOCKS
Presiding Judge of the Superior Court

By: 

Court Clerk Supervisor

Dated: 11/13/19