

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

GOVERNMENT OF THE VIRGIN ISLANDS

Plaintiff,

SX-18-CV-21

v.

**2.96 U.S. ACRES OF LAND CONSISTING OF
PLOT NO. 100-A ESTATE LA GRANGE WEST
END QUARTER, ST. CROIX; ZEPHYRINUS
THOMAS and VENASSA P. OSCAR;
THEODORE COHEN AS TRUSTEE FOR THE
THEODORE COHEN TRUST; and UNKNOWN
OWNERS AND ALL OTHERS CLAIMING AN
INTEREST HEREIN,**

ACTION FOR CONDEMNATION

Defendants.

MEMORANDUM OPINION

BEFORE THE Court is Plaintiff, Government of the Virgin Islands' (hereinafter "Government") Motion for an Order of Publication of Service (hereinafter "Motion") filed on January 31, 2018. The Motion shall be granted in part and denied in part.

BACKGROUND

This matter arises out of an action "brought by the Government of the U.S. Virgin Islands to obtain property under its statutory authority of eminent domain, in exchange for just compensation to be paid to the owners and all parties in interest."¹ "Governor Kenneth E. Mapp signed a declaration of taking to exercise the power of eminent domain for the completion of Phase II of the Frederiksted Economic Revitalization Project on St. Croix, USVI, pursuant to Title 28, V.I.C § 411 *et seq* and Virgin Islands Rule of Civil Procedure 71.1."² "The subject

¹ Compl. ¶1.

² Compl. ¶¶8,11.

property to be acquired in fee simple absolute is Plot No 100-A Estate La Grange, West End Quarter, St. Croix, Virgin Islands, consisting of 2.96 U.S. Acres, as more particularly depicted in survey map OLG File No. 5611, dated January 18, 2005 (hereinafter "Property").³ Defendants Zephyrinus Thomas (hereinafter "Thomas") and Venassa P. Oscar (hereinafter "Oscar") are the record fee simple title holders of the Property and claim an interest in the Property.⁴ Defendant Theodore Cohen (hereinafter "Cohen"), as Trustee of the Theodore Cohen Trust is a creditor of Thomas and Oscar who holds a lien secured by the Property, and has or may claim an interest in the Property.⁵ "Pursuant to Title 28 V.I.C. §421 the Government filed a Declaration of Taking and deposited to the court \$210,000 which was allegedly estimated by appraisers as just compensation for taking the Property."⁶ The Government moves to serve Thomas, Oscar, Cohen, Unknown Owners and All Others who may claim an interest in the Property with a copy of the Notice by publication.

DISCUSSION

Virgin Islands Rule of Civil Procedure 71.1 governs "proceedings to condemn real and personal property by eminent, except as this rule provides otherwise."⁷ According to Rule 71.1(c)(1), the Government must name "at least one owner of some part of or interest in the property."⁸ "Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later."⁹

³ Compl. ¶11.

⁴ Compl. ¶5.

⁵ Compl. ¶6.

⁶ Compl. ¶14.

⁷ V.I. R. CIV. P. 71.1(a).

⁸ V.I. R. CIV. P. 71.1(c)(1).

⁹ V.I. R. CIV. P. 71.1(c)(4).

Thomas, Oscar, and Cohen are named in the Complaint as an owners or interested parties along with Unknown Owners and All Others who may claim an interest in the Property. Upon careful review of the record, the Notice was properly prepared and delivered to the Clerk of the Court pursuant to Rules 71.1(d)(1) and (2). Therefore, the only issues before the Court are (1) whether the Notice was properly served on Thomas, Oscar, and Cohen —the only named Defendants and (2) whether it is proper to grant the Government leave to serve the Notice by publication on Thomas, Oscar, Cohen ,Unknown Owners and all others claiming an interest in the properties.

I. Thomas, Oscar, and Cohen were not properly served with a copy of the Notice and it is not proper for any of them to be served by publication.

Since Thomas, Oscar, and Cohen were individually named in the Complaint, the court must determine whether they were properly served with the Notice. Personal service of the notice shall be made in accordance with Rule 4.”¹⁰ According to Rule 71.1(d)(3), Thomas, Oscar, and Cohen must be properly served with a copy of the Notice in accordance with Rule 4.”¹¹ “Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.”¹² Rule 4(1) governs proof of service.”¹³ “Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.”¹⁴

When serving an individual within the Virgin Islands, Rule 4(e) provides that

Unless law of the Virgin Islands provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in the Virgin Islands by doing any of the following:

¹⁰ V.I. R. CIV. P. 71.1(d)(3).

¹¹ V.I. R. CIV. P. 71.1(d)(3).

¹² V.I. R. CIV. P. 71.1(d)(4).

¹³ V.I. R. CIV. P. 71.1(d)(3) and (5).

¹⁴ V.I. R. CIV. P. 71.1(d)(4).

- (1) delivering a copy of the summons and the complaint to the individual personally;
- (2) leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
- (3) delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process; or
- (4) completing service in another manner approved by order of the court in the pending case upon a showing:
 - (A) that plaintiff has exercised due diligence in attempts to complete service using the methods provided in subparts (d)(1) to (d)(3) of this Rule but specific circumstances have made these efforts ineffectual in completing service upon one or more defendants; and
 - (B) that alternative methods to be specified by order of the court will provide protections calculated to afford proper notice to the defendant(s) involved, and will comport with the requirements of Due Process.

It appears that the Government wishes to serve Thomas, Oscar, and Cohen with the Notice by publication pursuant to Virgin Islands Rule of Civil Procedure 4-1 and 5 V.I.C §112.

Although Thomas, Oscar, and Cohen were not specifically named in the Government's Motion for an Order of Publication of Service, the Court notes that Thomas, Oscar, and Cohen were named in the proposed order for publication which accompanied the Government's Motion.¹⁵

The Government has not provided proof that it exercised due diligence in attempting to locate Thomas, Oscar, and Cohen to personally serve each of them with a copy of the Notice in compliance with Rules 4(e) and (1).¹⁶ In addition, there is nothing on the record indicating that Thomas, Oscar, or Cohen have "departed from the Virgin Islands and remained absent therefrom

¹⁵ See Proposed Order Attached to the Mot. at 1.

¹⁶ See *Raimer v. Raimer*, 2017 V.I. LEXIS 67, *1 n.3 (citing *Fredericks v. Tourism Indus.*, 1995 V.I. LEXIS 37, *10-11, 33 V.I. 23, 28, [WL] (V.I. Terr. Ct. 1995) ("Personal service on a defendant is preferred over service by publication because service by publication is the least calculated method to bring to a potential defendant's attention the pendency of judicial proceedings. Therefore, counsel must exercise due diligence in attempting to serve a defendant personally before moving for substituted service by publication, because service by publication should be a last resort after other methods at actual service have failed")).

for six consecutive weeks” or that they “[are] not a resident[s] of the Virgin Islands, but [have property therein.”¹⁷ Significantly, there is no record that the Government attempted to serve Thomas, Oscar, or Cohen with the Notice. At this juncture, serving Thomas, Oscar, and Cohen by publication does not comport with Rule 4-1 or 5 V.I.C. §112. The Government, by exercising due diligence, must attempt to locate and personally serve Thomas, Oscar, and Cohen with a copy of the Notice utilizing the methods of service prescribed by Rule 4(e) and provide proof of service to the court pursuant to Rule 4(l).¹⁸

I. The Unknown Owners and all others claiming an interest in the Properties should be served by publication.

The Government moves to serve Unknown Owners and all others claiming an interest in the Property who were joined as defendants with a copy of the Notice by publication.¹⁹ Along with its Motion, the Government attached a Certificate Pursuant to Rule 4-1(a) (hereinafter “Certificate”) certifying that the Unknown Owners and all others claiming an interest in the Properties “cannot be personally served because after diligent inquiry within the Virgin Islands none have been found upon whom personal service may be made.”²⁰

Virgin Islands Rule of Civil Procedure 4-1 governs service when service cannot be made as prescribed in Rule 4. According to Rule 4-1(a),²¹

When service of the summons and complaint cannot be made as prescribed in Rule 4, and the requirements set forth in 5 V.I.C. § 112(a) for obtaining substituted service by publication are established by affidavit, and the prerequisites stated in that statute are satisfied, the court may grant an order that service be made by publication in accord with the provisions of that statute.

¹⁷ 5 V.I.C. § 112(a)(2) and (3).

¹⁸ V.I. R. CIV. P. 4(e) and 4(l).

¹⁹ V.I. R. CIV. P. 71.1(c)(3).

²⁰ See Certificate at 1.

²¹ V.I. R. CIV. P. 4-1(a).

Title 5, Section 112(a) of the Virgin Islands Code, prescribes in pertinent part that service by publication is proper where “service of the summons cannot be made as prescribed in Rule 4 [] and the defendant after due diligence cannot be found within the Virgin Islands.”²²

The Certificate is sufficient evidence that service of the Notice on the Unknown Owners and all others claiming an interest in the Properties cannot be “made as prescribed in Rule 4, and the requirements set forth in 5 V.I.C. § 112(a).”²³ Consequently, effectuating service by publication of the Notice on the Unknown Owners and all others claiming an interest in the Properties is proper.²⁴

CONCLUSION

In light of the foregoing, the Motion to Serve the Notice on the Unknown Owners and all others claiming an interest in the Properties by publication shall be granted. The Motion to Serve Thomas, Oscar, and Cohen by publication shall be denied. The Government must attempt to locate and serve Thomas, Oscar, and Cohen personally utilizing the methods of service prescribed by Rule 4(e) and provide proof of service to the court pursuant to Rule 4(l). An Order consistent with this Memorandum Opinion follows.

²² 5 V.I.C. § 112(a).

²³ V.I. R. CIV. P. 4-1(a).

²⁴ 5 V.I.C. § 112(b) and (c).

DATED this 17th day of February, 2018.

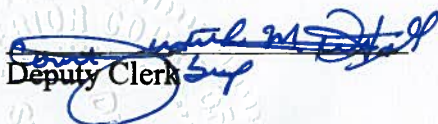
ATTEST:

Estrella George
Clerk of the Court



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

By:


Deputy Clerk

Dated:

2/14/18