IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

HARTHMAN LEASING III, LLLP **Plaintiff/Respondent** **On Review,** **vs.** **FIRSTBANK PUERTO RICO,** **as assignee of EAST END PLAZA, LLC** **Defendant/Petitioner** **On Review.**	)	**CIVIL NO. ST-2015-CV-533** **ACTION FOR FORCIBLE ENTRY AND DETAINER**

MEMORANDUM OPINION

THE MATTER before the Court is on a motion to stay enforcement of judgment filed by Defendant/Petitioner FirstBank on March 21, 2016. The judgment involved was entered by the Court on March 9, 2016 granting restitution of the leased premises to Plaintiff/Respondent Harthman Leasing, III. Harthman filed an opposition to motion to stay on April 8, 2016. FirstBank filed a reply to Harthman's opposition on April 19, 2016 objecting to the late filing of Harthman's opposition, 18 days after the filing of the motion to stay.

While the motion to stay enforcement of judgment was pending before this Court, the Superior Court (Hon. Adam G. Christian) denied the petition for review filed by FirstBank by Order entered April 25, 2016 on grounds that FirstBank had failed to demonstrate that it had posted a bond as required by 28 V.I. CODE ANN. tit. 28, § 788.[1] FirstBank filed a motion for reconsideration, which the Superior Court granted on May 20, 2016. In granting the motion, the Superior Court vacated its April 25, 2016 Order denying the petition for review because it did not know that FirstBank had filed a motion for stay in the Magistrate Division, where a bond, if any, can be required. The Superior Court remanded the case to the Magistrate Division "for a determination of FirstBank's motion for stay on the merits."

The Local Rules of Civil Procedure for the District Court 7.1(e), made applicable to the Superior Court by Virgin Islands Superior Court Rule 7, requires a party to file an opposition or response to a motion 14 days after of service of the motion. However, under Federal Rule of Civil Procedure 6(d), when service is made by mailing, as it was done in this case, three days are added to the filing period. *See* FED. R. CIV. P. 5(b)(2)(C). Therefore, since Harthman's opposition is merely one day late, when the Court adds three days to the 14 days after service of the motion, it will accept the late filing and consider same.

FirstBank seeks a stay of enforcement of judgment before this Magistrate Court pursuant to FED. R. CIV. P. 62(d) and Virgin Islands Superior Court Rule 322.6. FirstBank must file its

[1] Case No.: ST-16-RV-002

petition for review ten days after entry of the order sought to be reviewed. Virgin Islands Superior Court Rule 322.1(b)(2)(A). Harthman does not challenge the timeliness of the FirstBank's petition for review of the Magistrate's decision, since intermediate Saturdays, Sundays, and holidays are excluded from computation of time when the period of time prescribed is less than 11 days. Virgin Islands Superior Court Rule 9.

There are four factors that this Court must balance in deciding whether to issue a stay:

1. Whether the litigant has made a strong showing that he is likely to succeed on the merits;
2. Whether the litigant will be irreparably injured absent a stay;
3. Whether the issuance of the stay will substantially injure the other parties interested in the proceedings; and
4. Where the public interest lies.

First American Development Group v. WestLB, S. Ct. Civ. No. 2012-0023, 2012 V.I. Supreme LEXIS 39, (V.I. April 30, 2012) (unpublished); *Virgin Islands Housing Authority v. Davis*, D.C. Misc. No. 1990-179, __ V.I. __, 1990 U.S. Dist. LEXIS 20860, (D.V.I. July 3, 1990).

In considering the four factors, the Court is not constrained to weigh them equally. Rather, the Court is called upon to balance these factors when determining whether a stay should be granted. If due to the emergency nature of the motion, the Court is prevented from thoroughly evaluating the first factor, a defendant's chances of success on the merits, defendant can still succeed in obtaining a stay if he/she demonstrates that there is a serious legal question and the other three factors favor granting a stay. *First American Development Group, supra,* at 11-12.

WHETHER FIRSTBANK HAS SHOWN A STRONG LIKELIHOOD OF SUCCEEDING ON THE MERITS

FirstBank did not file an emergency motion for stay of enforcement of judgment that required the Court to act expeditiously.[2] Moreover, the Court was not subject to any inordinate

[2]While the Court maintained close watch on the case management system to find out when or if Harthman had filed a writ of restitution of the leased premises, it did not discovery that one had been filed until the Court saw the writ attached to Judge Adam G. Christian's April 25, 2016 Order denying FirstBank's petition for review. This is the reason why, lack of knowledge that Harthman had filed the writ, the Court did not act on the motion for stay expeditiously. The rules require the Magistrate to act upon the motion for stay "where practicable, within three days of filing of the same." *See* Superior Ct. R. 322.6(b)(3)(B). However, the filing of a motion for stay "shall serve as a temporary stay until entry of an order granting or denying the motion for stay. *See* Super Ct. R. 322.6(b)(3)(A).

time pressures to prevent it from fully considering this factor. In fact, the Court issued a 14-page, single spaced Memorandum Opinion on the issues involved in the underlying FED action.

The issue is whether FirstBank can properly withhold paying rent,[3] which it has placed into its attorney's escrow account from September 14, 2014 through the present time, on grounds that Harthman has interfered with its permissible use of the leased premises by contending that Parcel 17E Estate Smith Bay, St. Thomas, U.S. Virgin Islands, is part of the leased premises. Harthman filed an FED action to evict FirstBank from the leased premises consisting of Parcel 17B, 17C and 17D, but not Parcel 17E. FirstBank took a voluntary assignment of the lease in lieu of foreclosure proceedings from the prior lessee (East End Plaza) for default on its leasehold mortgage to secure $22 Million in construction loans. Because Harthman contends that the leased premises consists of not only B, C and D but also E, FirstBank claims that Harthman has interfered with its unfettered right to sell the lease because none of its interested purchasers are willing to finalize a deal until such purchaser(s) knows the parcels which make-up the leased premises. FirstBank is not in the business of managing commercial property but is in the business of finances and banking.

FirstBank filed a prior action against Harthman in Superior Court in Civil No. ST-12-CV-273 ("Civil No. 273"). In Civil No. 273, FirstBank seeks declaratory relief regarding *inter alia* the square footage comprising the leased premises and its definition in order to determine whether Parcel 17E is part thereof, plus damages for breach of contract, impairment of security interest, and unjust enrichment. It contended in a motion to dismiss, as it does in its reply, that the prior parallel action doctrine controlled and required the Court to defer this FED action because Civil No. 273 was filed first involving the same parties, issues, and subject matter as involved here. The Court denied the motion on grounds that Harthman had the right to utilize the FED's summary eviction process, over which the Magistrate Division has exclusive jurisdiction, to evict a tenant for not paying its rent under an unexpired leased. Had the Court ruled otherwise, a tenant could file a prior separate civil action in the Superior Court concerning the leased premises, and when the landlord files a FED action to evict the tenant for non-payment of rent, the tenant could claim that his prior filed action preempts the landlord from using the FED mechanism. The very purpose of the FED action – to enable a landlord to regain peaceful possession of his property in a speedy process in lieu of self-help – would be thwarted.

FirstBank also filed a motion in Civil No. 273 seeking an order to transfer this FED action to the Superior Court and to have the FED action dismissed based upon the same prior parallel action doctrine. By Order dated November 16, 2015, the Superior Court denied the motion on grounds that the Magistrate before whom the FED case was assigned should make the decision as to whether to transfer the FED case or to dismiss it. The Court believes that FirstBank will not likely succeed on the merits on its prior parallel action doctrine when the Superior Court reviews the Magistrate's decision denying its application in this FED action.

[3] Harthman claims in its opposition that "FirstBank states that as of March 21, 2016, it is withholding $1,088,374.02 in rent," which does not include interest and late fees. p. 3.

At the commencement of the January 22, 2016 hearing, the Court stated that it would not reconsider its denial of FirstBank's motion to dismiss on grounds of the prior parallel action filed in the Superior Court,[4] but that it would reconsider the grounds of whether FirstBank is properly withholding and escrowing its rent payments. FirstBank contends that because Harthman wrongfully claims that Parcel E is part of the leased premises, it has interfered with its permissible use of the property, i.e., its ability to sell the lease. Therefore, for such interference, it is justified in withholding and escrowing rent payments until Harthman relents. The Court informed the parties that it would allow FirstBank to present evidence on this point in accordance with case law precedents which instruct that a court must proceed with the hearing in an FED action until such time as the lessee presents good and bonafide grounds that the court lacks FED jurisdiction.

In its Memorandum Opinion, the Court found that under either the common law or the Restatement (Second) of Prop.: Landlord & Tenant, §§ 6.1, 11.3, an interference with a tenant's permissible use of the leased premises by a landlord must be an actual expulsion of the tenant from all or some portion of the leased premises or a deprivation of the tenant from making a permissible use thereof. In the FED action, the Court found that FirstBank had the full unfettered use and enjoyment of the leased premises as it operates its banking establishment there and it receives rental income from subtenants. FirstBank failed to cite any case, stateside or here, where a landlord's interference with a permissible use includes the exercise of a contract right or, as in this case, with a tenant's unfettered ability to sell the lease. "The Court was not inclined to broaden the scope of 'permissible use' under §6.1 to include an alleged landlord's interference with the tenant's ability to exercise some right under the lease, when such interference does not prevent the tenant from using the leased premises as contemplated."[5] While the Court will concede that this issue is a unique one that has much merit to be argued on appeal, it does not believe that FirstBank has made a strong showing that it is likely to succeed on the merits.

WHETHER FIRSTBANK WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

The Court does not see how FirstBank will suffer irreparable injury unless it issues a stay of execution of judgment. FirstBank's official clearly stated at the FED hearing that the bank would be willing to pay Harthman the rent it has been withholding and escrowing if Harthman would drop its claim that Parcel E is part of the leased premises so that it could sell the lease. The harm, if any, that FirstBank would suffer is simply financial. However, it has a claim for damages against Harthman pending in Civil No. 273. Further, FirstBank has not claimed that Harthman will not be able to satisfy any judgment for damages should it prevail in Civil No. 273.

On November 20, 2015, the Superior Court ruled in Civil No. 273 that FirstBank did not consent to Harthman's assignment of Parcel E to former tenant East End Plaza, and therefore Harthman was liable in damages to FirstBank, subject to proof. However, on December 21, 2015,

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[4] The Court ruled that although Harthman asserted a counterclaim (Count III) to regain possession of the leased premises in Civil No. 273, this did not preclude it from seeking summary relief in this FED action over which the Magistrate Division has exclusive jurisdiction.

[5] Memorandum, p. 14.

the Superior Court denied FirstBank's motion seeking a blanket declaration that Parcel E was not part of the leased premises. According to court's case management system, the Superior Court is now making the parties prepare for trial through the submissions of, among other things, witness lists and briefs on the issues to be tried, consistent with an approaching trial date. Moreover, the parties have not reached impasse and are still involved in mediation.

The real reason that Harthman filed the FED action was not to stop FirstBank from using and occupying the leased premises. Rather, it wanted to stop FirstBank from withholding and escrowing the rent that should be paid directly into its pockets since FirstBank continues to use and occupy the leased premises and to receive rent from subtenants. On balance, a stay would do more harm to Harthman than to FirstBank.

WHETHER THE ISSUANCE OF THE STAY WILL SUBSTANTIALLY INJURE HARTHMAN

From September 2014 through March 1, 2016, Harthman has received no rent for the leased premises used and occupied by FirstBank in the amount of $1 Million, according to Harthman's attorney who is receiving monthly escrow statements from FirstBank. The base monthly rent is $61,260.96. While it is true that FirstBank has escrowed the rent that Harthman would be entitled to receive, without interest and late fees, this is income that FirstBank has deprived Harthman from receiving to pay its own bills and obligations. Nonetheless, Harthman has not substantiated any financial hardship imposed upon it through FirstBank's escrowing of this rent. It only asserts that it is entitled to collect rent from FirstBank because it is using and occupying the leased premises. Because of the lack of any proof of financial hardship, the Court cannot make a firm determination on this factor of whether the stay will substantially injure Harthman, although it will give some credence to the underlying assumption that Harthman must be experiencing some financial hardship when it has received no rental payments for more than 1 ½ years.

WHERE THE PUBLIC INTEREST LIES

The Court perceives two separate and distinct public interests in this matter. On one hand, there is the disruption that the public would face should a stay not be issued and should Harthman pursue its eviction of the bank and subtenants from the leased premises. The public would be deprived of a major bank to serve the needs of the citizenry on the east end of St. Thomas. FirstBank, if evicted, may not return to serve these needs should it prevail on its appeal. On the other hand, the public has a strong interest in promoting laws that require a tenant to pay a landlord for property that the landlord has not prevented the tenant from using and occupying.

The District Court described the public interest in enforcing the strong policy considerations underlying the FED statute as follows:

> … the underlying action in this matter was one for forcible entry and detainer and restitution of the premises. In enacting the statute, the Legislative and Executive branches of the Virgin Islands Government have weighed the public interest and

> decided to provide for summary proceedings to allow a landlord to recover possession of his or her property in a speedy fashion. To allow an unsuccessful defendant in a forcible entry and detainer action to delay enforcement of a judgment against him by filing for a stay of the judgment entered against him would frustrate the underlying goal of the statute. This court must be cautious not to substitute its judgment for that of the Legislative and Executive branches. Consequently, the court finds that under the facts of this case, the public interest lies in deferring to the policy decisions of the Executive and Legislative Branches of the Virgin Islands Government to provide a speedy remedy to landlords seeking repossession of real property.

Virgin Islands Housing Authority, supra, at 216.

In balancing these same four factors in deciding a motion for stay of a FED judgment granting the landlord restitution of the premises, Superior Court Judge Adam G. Christian also emphasized the strong policy underlying our FED statute:

> 2010). [The Tenant] is improperly maintaining possession of the Subject Premises by force, as defined in V.I. CODE ANN. tit. 28, § 789(a)(2). [The Tenant's] request for a stay would allow him to continue in possession of the Subject Premises in contravention of Virgin Islands law, and will not be sanctioned by this Court. Thus, [the Tenant] cannot demonstrate any, much less a strong, likelihood of success on the merits of the case. In addition, he cannot claim irreparable harm in the absence of the stay, as he has no legal right to remain on the Subject Premises. Third, granting the stay would deprive [the Landlord] of the rightful possession and use of her real property. Finally, the public interest in this dispute is neutral. Therefore, the Court concludes that [the Tenant] is not entitled to a stay of eviction pending his appeal.

Courtney v. O'Connor, 59 V.I. 3, 10-11 (Super Ct. 2010).

While the competing public interests would appear to cancel each other out, the Court believes that the policy of preventing a tenant from using and occupying property for which that tenant is not paying rent outweighs the policy of the possible loss of this tenant from serving the public. Therefore, the Court weighs this factor in favor of Harthman. To hold otherwise would be for this Court to undercut, rather than support, the strong policy considerations underlying our FED statute.

In balancing the four factors in deciding whether to issue a stay of enforcement of judgment, the Court finds that the balance weighs against issuing the stay. First, Firstbank has not made a strong showing that it is likely to succeed on the merits. It has presented no case law or restatement provision showing that an interference with an exercise of a contract right under the lease agreement is an interference with a permissible use, when Harthman has done nothing to interfere with its banking operations or it subtenants' business on the leased premises. Nor does the Court believe that FirstBank is likely to succeed on the merits on its prior parallel action doctrine.

Second, FirstBank has not shown that it will be irreparably injured absent a stay. It has a civil case against Harthman with a trial upcoming, and Harthman does not appear to be judgment proof. Again, it operates its banking establishment on the leased premises and any interference by Harthman in claiming that Parcel E is part of the leased premises can be remedied in Civil No. 273 through a declaratory judgment and/or an award of compensatory damages.

Third, while the Court can speculate on what financial hardship has been caused by withholding rent payments in excess of $1 Million, Harthman has submitted no proof that it is actually suffering any such financial hardship. However, the Court does believe that some financial hardship has been inflicted. In what amount and the seriousness of that financial hardship, the Court does not know.

Fourth, because Harthman has done nothing to interfere with FirstBank using and occupying the leased premises as contemplated under the lease, the public interest weighs in favor of allowing Hartman to recover immediate possession. In addition, the Court would be upholding the policies underlying the FED statute. Here, FirstBank is using its withholding and escrowing the rent as leverage to gain the concession it seeks from Hartman.

Based upon its balance of the four factors above, the Court finds issuing a stay is not warranted. Any issues of payment of interest and late fees under the lease are beyond the jurisdiction of this FED action and must be decided in another forum. An appropriate order will follow.

DATED: May 23, 2016

HENRY V. CARR, III
Magistrate of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

By ______________________
HYACINTH M. LOCKHART
Senior Deputy Clerk 5/23/2016

CERTIFIED A TRUE COPY
DATE 5/24/16
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY Kaysa Rogers-Huggins
COURT CLERK