IN THE SUPREME COURT OF THE VIRGIN ISLANDS

PAMELA S. HAGLEY,	)	
	)	**S. Ct. Civ. No. 2007/26**
Appellant/Plaintiff,	)	Re: Super. Ct. Civ. No. 51/2005
	)	
v.	)	
	)	
VIGGO HENDRICKS, AGNES HENDRICKS, DONAJEN FARRAR D/B/A GIVE ME SHELTER REAL ESTATE, DONAJEN FARRAR, ROCHELLE ELLICK, INCORPORATED d/b/a ELLICK REAL ESTATE and ROCHELLE ELLICK,	)	
	)	
Appellees/Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT/ORDER

TO: **Justices of the Supreme Court**
Judges of the Superior Court
Pamela Lynn Colon, Esq.
Alan D. Smith, Esq.
Venetia Harvey Velazquez, Esq., Clerk of the Supreme Court
Denise D. Abramsen, Clerk of the Superior Court
Supreme Court Law Clerks
Janet Lloyd, Librarian
Janiese Kelly
Jacqueline Reovan
Arlene Sutton
Order Book

Please take notice that on December 28, 2007, an **ORDER and MEMORANDUM OPINION** dated December 28, 2007, was entered by the Clerk in the above-entitled matter.

Dated: December 28, 2007

VENETIA H. VELÁZQUEZ, ESQ.
Clerk of Court

By: _____
Deputy Clerk II

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

PAMELA S. HAGLEY, Appellant/Plaintiff, **v.** **VIGGO HENDRICKS, AGNES HENDRICKS, DONAJEN FARRAR D/B/A GIVE ME SHELTER REAL ESTATE, DONAJEN FARRAR, ROCHELLE ELLICK, INCORPORATED d/b/a ELLICK REAL ESTATE and ROCHELLE ELLICK,** Appellees/Defendants.	**S. Ct. Civ. No. 2007/26** Re: Super. Ct. Civ. No. 51/2005

On Appeal from the Superior Court of the Virgin Islands

APPEARANCES:
Pamela Lynn Colon, Esq.
Law Offices of Pamela Lynn Colon, LLC
St. Croix, USVI
Attorney for Appellant

Allan D. Smith, Esq.
Hodge & Francois
St. Thomas, USVI
Attorney for Appellees

ORDER

AND NOW, consistent with the reasons outlined in the Memorandum Opinion of even date, it is hereby

ORDERED that this appeal is **DISMISSED** for lack of jurisdiction.

SO ORDERED this 28th day of December, 2007.

FOR THE COURT:

MARIA M. CABRET
ASSOCIATE JUSTICE

ATTEST:

VENETIA HARVEY VELAZQUEZ, ESQ.
Clerk of the Court

By: _____
Deputy Clerk
12/28/07

Copies (with accompanying Memorandum Opinion) to:
Justices of the Supreme Court
Judges of the Superior Court
Pamela Lynn Colon, Esq.
Alan D. Smith, Esq.
Venetia Harvey Velazquez, Esq., Clerk of the Supreme Court
Denise D. Abramsen, Clerk of the Superior Court
Supreme Court Law Clerks
Janet Lloyd, Librarian
Janiese Kelly
Jacqueline Reovan
Arlene Sutton
Order Book
CAB 12/28/07

NOT FOR PUBLICATION

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

PAMELA S. HAGLEY, Appellant/Plaintiff, v. **VIGGO HENDRICKS, AGNES HENDRICKS, DONAJEN FARRAR D/B/A GIVE ME SHELTER REAL ESTATE, DONAJEN FARRAR, ROCHELLE ELLICK, INCORPORATED d/b/a ELLICK REAL ESTATE and ROCHELLE ELLICK,** Appellees/Defendants.	**S. Ct. Civ. No. 2007/26** Re: Super. Ct. Civ. No. 51/2005

On Appeal from the Superior Court of the Virgin Islands

APPEARANCES:

Pamela Lynn Colon, Esq.
Law Offices of Pamela Lynn Colon, LLC
St. Croix, USVI
Attorney for Appellant

Allan D. Smith, Esq.
Hodge & Francois
St. Thomas, USVI
Attorney for Appellees

MEMORANDUM OPINION

This matter is before the Court on the Motion to Dismiss for lack of jurisdiction filed by Rochelle Ellick, Inc. d/b/a Ellick Real Estate, and Rochelle Ellick (collectively the "Ellick Appellees"). For the reasons which follow, the Motion to Dismiss will be granted.

I. FACTS AND PROCEDURAL HISTORY

In the underlying action, Pamela Hagley ("Appellant") alleged that she was attacked and raped in her apartment. The apartment was owned by Viggo and Agnes Hendricks, leased through Donajen Farrar d/b/a Give Me Shelter Real Estate, and rental income from the apartment properties was collected by Ellick Real Estate for approximately six weeks prior to the criminal incident. Appellant sued Viggo Hendricks, Agnes Hendricks, Donajen Farrar d/b/a Give Me Shelter Real Estate, Donajen Farrar, Rochelle Ellick, Inc. d/b/a Ellick Real Estate and Rochelle Ellick ("Appellees"), alleging negligence, breach of contract, and intentional and negligent infliction of emotional distress. By order entered December 8, 2006, the trial court granted summary judgment to the Ellick Appellees, finding that the Complaint lacked factual allegations to establish forseeability on the part of Rochelle Ellick, and the Ellick Appellees had no duty to protect Appellant. Additionally, the court found that the Ellick Appellees did not breach the warranty of habitability, and that the conduct of the Ellick Appellees was not outrageous or reckless.

On January 12, 2007, after being granted an extension of time, Appellant moved for reconsideration, and alternatively moved to certify the judgment as final and immediately appealable pursuant to Federal Rule of Civil Procedure 54(b). By order entered February 7, 2007, the trial court reaffirmed its grant of summary judgment and certified the judgment as final. On February 14, 2007, the Ellick Appellees moved for reconsideration of the certification, and on March 16, 2007 the trial court denied their Motion for Reconsideration.

Appellant filed a notice of appeal on February 20, 2007. The Ellick Appellees filed a Motion to Dismiss the appeal for lack of jurisdiction on July 5, 2007, alleging that the Superior

Court erred when it (1) extended the time for Appellant to file her Motion for Reconsideration of the dismissal order, and (2) certified the judgment as final and immediately appealable.

II. DISCUSSION

A. Timeliness of Appellant's Opposition to Appellees' Motion to Dismiss

As a threshold matter, this Court must determine whether Appellant's opposition to Appellees' Motion to Dismiss can be considered. Appellant filed her opposition to the Motion to Dismiss on August 17, 2007, forty-three days after the motion was filed, and sixteen days after a separate memorandum in support of the motion was filed. The Virgin Islands Supreme Court Rules provide, in pertinent part, that "[a]ny party may file a response in opposition to a motion within ten days after service of the motion." V.I.S.CT. R. 21(a). Additionally, Supreme Court Rule 17 provides, in pertinent part, that "[a]ll temporal deadlines shall be strictly construed." VISCR 17. Therefore, because Appellant's opposition to the Motion to Dismiss is untimely, and because she failed to request an extension of time pursuant to Supreme Court Rule 17, Appellant's opposition cannot be considered by this Court.

B. Authority of the Trial Court to Extend Appellant's Time to Move for Reconsideration

In their Motion to Dismiss for lack of jurisdiction, the Ellick Appellees contend that the trial court had no authority to extend Appellant's time to move for reconsideration of the order granting summary judgment. Appellant moved for an extension of time to file her Motion for Reconsideration pursuant to Local Rule of Civil Procedure 7.4, which governs such motions.[1]

[1] The Local Rules of Civil Procedure are applicable in the Superior Court of the Virgin Islands through Rule 7 of the Superior Court which provides that "[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence." Super. Ct. R. 7.

According to the Ellick Appellees, a motion to reconsider a final judgment pursuant to Local Rule 7.4 is really a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure, because Superior Court Rule 50 provides that Federal Rules 59 to 61 govern applications to set aside a judgment after hearing.[2] Rule 59(e), which regulates the amendment of judgments, provides, in pertinent part, that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment." Fed. R. Civ. P. 59(e). Because the ten-day time limit provided in the Rule 59(e) is jurisdictional, the Ellick Appellees contend that the trial court erred when it extended the time for the filing of Appellant's Motion for Reconsideration.

Rule 59(e), however, is inapplicable in the instant matter. This rule governs the opening of *final* judgments and "rel[ies] on the existence of a judgment as defined in Rule 54(a)." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2651 (1998). Rule 54(a) defines a judgment as "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). The Rule embraces two different types of orders: (1) any final decision from which an appeal is permitted, and (2) any appealable interlocutory order. *See* 10 Charles A. Wright et al., at § 2651, *supra*. "Even though denominated a 'judgment,' a nonappealable partial or interlocutory summary judgment under Rule 56 does not qualify as a judgment under Rule 54(a)." *Id.*

In the instant matter, the trial court's entry of summary judgment was limited to the Ellick Appellees. Rule 54(b) provides, in pertinent part, that "any order or other form of

[2] Superior Court Rule 50 provides: "For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications." Super. Ct. R. 50.

decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). "Absent certification under Rule 54(b) any order in a multiple-party or multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory." 10 Charles A. Wright et al., at § 2654. Additionally, "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." *Berckeley Inv. Group, Ltd. v. Colkitt* ("*Berckeley II*"), 455 F.3d 195, 202 (3d Cir. 2006). Therefore, although the trial court entered summary judgment in favor of the Ellick Appellees, the judgment was not final and immediately appealable. Because the entry of summary judgment in favor of the Ellick Appellees was not final until it was certified pursuant to Rule 54(b), Rule 59(e) was inapplicable to the Motion for Reconsideration, and the trial court was not prohibited from granting Appellant additional time to file the motion. "[W]hen a party seeks reconsideration of an order or other decision not amounting to a final judgment . . . it [is] within the [trial] court's discretion to extended [sic] the 10-day time limit as provided by Local Rule 7.4." *Bostic v. AT&T of the V.I.*, 312 F.Supp.2d 731, 734 (D.V.I. 2004). The trial court therefore acted within its discretion and did not err when it extended Appellant's time to move for reconsideration of the summary judgment order.

C. Certification for Appeal of the Trial Court's Summary Judgment Order

The second issue this Court must determine is whether the trial court erred when it certified the summary judgment order for appeal. The propriety of the trial court's Rule 54(b)

certification is reviewed for abuse of discretion. *Newfoundland Management Corp. v. Lewis*, 131 F.3d 108, 112 (3d Cir. 1997). The Ellick Appellees contend that Rule 54(b) does not control certification of an interlocutory appeal from the Superior Court to the Supreme Court of the Virgin Islands. They contend that certification of an interlocutory appeal is governed by VISCR 5(a)(2)[3] and 4 V.I.C. §§ 33(b) and (c).[4] Appellant did not, however, seek certification for interlocutory appeal under these provisions. Rather, Appellant sought certification under Rule 54(b) which provides, in pertinent part, that "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). Rule 54(b) "gives the court discretion to enter a final judgment . . . and it

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[3] VISCR 5(a)(2) provides as follows: "[t]o be appealable as of right, an order of the Superior Court must either be final or must be classified within the categories of interlocutory orders specified in 4 V.I.C. Sections 33(b) and (c)."

[4] 4 V.I.C. § 33 provides as follows:

> (a) Appealable judgments and orders to the Supreme Court shall be available only upon the entry of final judgment in the Superior Court from which appeal or application for review is taken.
>
> (b) Interlocutory review-civil. The Supreme Court of the Virgin Islands has jurisdiction of appeals from:
>
> (1) Interlocutory orders of the Superior Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (c) Whenever the Superior Court judge, in making a civil action or order not otherwise appealable under this section, is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order. The Supreme Court of the Virgin Islands may thereupon, in its discretion, permit an appeal to be taken from the order, if application is made to it within ten days after the entry of the order; except that application for an appeal hereunder may not stay proceedings, in the Superior Court unless the Superior Court judge or the Supreme Court or a justice thereof orders a stay of the proceedings.

provides much-needed certainty in determining when a final and appealable judgment has been entered." 10 Charles A. Wright et al., at § 2654.

Although Appellant's motion for Rule 54(b) certification was erroneously titled "Motion to Certify for Interlocutory Appeal" (J.A. at 383.), this Court is not constrained by the parties' characterization of the motion. "[W]e are free to characterize the motion . . . to match the substance of the relief requested." *Ahmed v. Dragovich*, 297 F.3d 201, 208 (3d Cir. 2002) (determined the applicability of Rule 59(e) and 60(b) to a post-judgment motion improperly characterized as a motion to amend). Despite the language in the title of the motion, Appellant properly requested certification for appeal pursuant to Rule 54(b) in the body of the motion. (J.A. at 392.)

We next determine whether the trial court properly certified its summary judgment order pursuant to Rule 54(b). "The appellant having timely filed a notice of appeal after obtaining certification from the trial court, this Court may properly exercise its jurisdiction to reach the merits of the case, but only to the extent such certification was proper." *Frederick v. Armstrong, et al.*, 47 V.I. 473, 481 (D.V.I. 2005) (citing *Newfoundland Management Corp. v. Lewis*, 131 F.3d 108, 114 (3d Cir. 1997). A decision to certify under Rule 54(b) involves two separate findings: "'an express determination that there is no just reason for delay,' as literally required by the text of Rule 54(b), and a clear indication from the [trial c]ourt's rulings that it was considering all the questions relevant to a Rule 54(b) determination." *Berckeley Inv. Group, Ltd. v. Colkitt ("Berckeley I")*, 259 F.3d 135, 140-141 (3d Cir. 2001). The Third Circuit Court of Appeals has set forth several factors that courts should consider when assessing the propriety of certifying a judgment as final under Rule 54(b):

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Berckeley II, 455 F.3d at 203 (citing *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975)). "Although the factors set forth in *Allis-Chalmers* are not jurisdictional prerequisites[, they] . . . constitute 'a prophylactic means of enabling the appellate court to ensure that immediate appeal will advance the purpose of the rule. . . .'" *Id.* (citing *Carter v. City of Philadelphia*, 181 F.3d 339, 345 (3d Cir.1999)).

In the instant matter, as in *Berckeley I*, the trial court did not consider the *Allis-Chalmers* factors, or even cite to Rule 54(b) or discuss its application. Absent an express determination by the trial court that there was no just reason for delay, this Court cannot reach the merits of the appeal. *Frederick*, 47 V.I. at 481. The trial court's reasoning was limited to the following:

> Plaintiff argues that if this Court does not reconsider its December 6, 2006 order, it should certify said order for appeal. Plaintiff cites "[T]he relevant order must first be a final judgment in the sense that it ultimately disposes of an individual claim [or party] brought as part of a multiple claim [or party] action. Second, an immediate appeal must foster efficiency and equitable concerns." *Newfound Mgmt. Corp. v. Lewis*, 37 V.I. 612, 619 (3d Cir. 1997). Granting Defendant Ellick's motion for summary judgment is a final disposition of the claim against her. As there are multiple Defendants remaining in this case of which if the summary judgment is overturned Ellick and the other defendants would share numerous defenses and rulings in the case [sic] would apply to Ellick this Court will certify the case for interlocutory appeal.

(J.A. at 419.) The language used by the trial court indicates that it only determined that the grant of summary judgment disposed of the claim against the Ellick Appellees, and that all Appellees would share numerous defenses and rulings in the case. This Court "will . . . not accord

deference to the [trial c]ourt where it has not announced that there is 'no just cause for delay' and did not consider those factors relevant to this inquiry." *Berckeley I*, 259 F.3d at 145.[5]

The trial court's February 7, 2007 certification order failed to make an express determination that there was no just reason for delay, and failed to demonstrate a clear intent to certify the summary judgment order as final pursuant to Rule 54(b). In order for Rule 54(b) to be applicable, the intent of the trial court must be clear. *See* 10 Charles A. Wright et al., at § 2660. "[T]here should be no doubt as to the [trial] court's intention to certify." *Id.*; *see Berckeley I*, 259 F.3d at 142 ("only one [circuit] court [of appeals] has held that a district court's failure to state expressly that there was 'no just cause for delay' permits the exercise of jurisdiction by the court of appeals."). Accordingly, in the absence of a determination that there is no just reason for delay, "even if only because of oversight or a failure to appreciate that the case is one that is within Rule 54(b), an appeal should be dismissed with leave to seek another appeal should proper certification subsequently be granted by the lower court." 10 Charles A. Wright et al., at § 2660. Because the trial court failed to expressly direct the entry of judgment, and expressly determine that there was no just reason for delay or consider the factors relevant to that inquiry, the instant appeal will be dismissed for lack of jurisdiction.[6] This Court, however,

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[5] The Fifth Circuit Court of Appeals has held that "[i]f the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the [trial] court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words 'no just reason for delay.'" *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990). However, "[e]ven the Fifth Circuit has recognized that the absence of an express determination of no just cause for delay cannot be excused where it is unclear whether the [trial] court intended to enter a partial final judgment under Rule 54(b)." *Berckeley I*, 259 F.3d at 144.

[6] The trial court denied the Ellick Appellees' Motion for Reconsideration of the Rule 54(b) certification due to a lack of jurisdiction. (J.A. at 454.) The court noted, however, that if it had jurisdiction to consider the Ellick Appellees' Motion for Reconsideration of the certification, it would have granted the motion. *Id.* The trial court agreed with the Appellate Division of the District Court's reasoning in *Frederick* that "resolving this appeal would place [the appellate court] in the undesirable position of resolving identical factual and legal issues remaining before the trial

expresses no opinion as to whether certification pursuant to Rule 54(b) is appropriate in the instant matter since certification is a discretionary decision for the trial court judge. *See id.*

III. CONCLUSION

The Superior Court failed to properly certify the December 8, 2006 summary judgment order pursuant to Rule 54(b). Consequently, this Court does not have jurisdiction to consider the instant appeal. Accordingly, this appeal will be dismissed for lack of jurisdiction.

Dated this 28th day of December, 2007.

FOR THE COURT:

MARIA M. CABRET
ASSOCIATE JUSTICE

ATTEST:

VENETIA HARVEY VELAZQUEZ, ESQ.
Clerk of the Court

By: _____
Deputy Clerk
12/28/07

court and which have not yet been decided, thereby impacting the resolution of the remaining claim." *Id.* (citing *Frederick*, 47 V.I. at 483).