FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

TOMAS ESPIRITUSANTO,	)	**CASE NO. SX-06-CV-618**
	)	
Plaintiff,	)	**COMPLEX LITIGATION DIVISION**
	)	
v.	)	**Coordinated Under:** ***In re: Refinery Dust***
	)	***Claims*****, Master Case No. SX-06-CV-078**
HESS OIL VIRGIN ISLANDS CORPORATION; AMERADA HESS CORPORATION; and SPX CORPORATION, as successor-in-interest to LITWIN CORPORATION,	)	
	)	
Defendants.	)	
	)	

Cite as: 2019 VI Super 168

Appearances:

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MEMORANDUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** is a withdrawal filed by the Plaintiff Tomas Espiritusanto ("Espiritusanto") of a motion to dismiss. Defendants Hess Oil Virgin Islands Corporation ("HOVIC") and Hess Corporation ("Hess") (collectively "Hess Defendants") oppose the withdrawal, arguing that the motion cannot be withdrawn because it was granted. For the reasons stated below, Espiritusanto's withdrawal, construed as a motion for relief from judgment, will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 Espiritusanto filed a complaint in the Superior Court of the Virgin Islands on October 13, 2006 against HOVIC, Hess, and SPX Corporation ("SPX"), claiming they were negligent in allowing him to be exposed to "mixed dusts" while he worked at the oil refinery HOVIC owned and operated on St. Croix. By "mixed dusts," Espiritusanto meant exposure to asbestos, silica dust, catalyst, and other toxic or dangerous dusts that resulted in him being "diagnosed with mixed dust pneumoconiosis . . . ." (Compl. ¶ 12.)

¶3 Hess and HOVIC both appeared on November 3, 2006 and answered the complaint. SPX also appeared but filed a motion to dismiss for lack of personal jurisdiction in which it acknowledged that it had been the "indirect" parent company of Litwin Corporation "[f]rom 1978 to 2001," and became the "ultimate parent of Litwin" "[o]n May 24, 2001," (Def. SPX Corp.'s Mot. to Dismiss for Lack of Pers. Jur. 2, filed Nov. 22, 2006), but argued that, unlike Litwin, it lacked any contacts with the Virgin Islands that would subject it to the personal jurisdiction of the Virgin Islands courts.

¶4 Rather than file a response to SPX's motion, Espiritusanto filed a notice on December 13, 2006, signed also by SPX, to voluntarily dismiss his claims with prejudice. The Court (Brady, J.) issued an order to the same effect on December 19, 2006, dismissing Espiritusanto's claims against SPX with prejudice.

¶5 In the interim, on November 16, 2006, counsel for Espiritusanto and seventy-three other individuals who filed similar lawsuits against the Hess Defendants filed a motion in *Cuthbert Anthony v. Hess Oil Virgin Islands Corporation, et al.*, but directed to the attention of the Presiding Judge, to request approval of a stipulated case management order and creation of a master case and docket under the caption *In re: Refinery Dust Claims* so discovery could be coordinated in the seventy-four cases.

¶6 Further background was detailed by the Court (Willocks, J.) in a May 3, 2016 Opinion issued in the master case:

> In February 2006, forty-three plaintiffs (hereinafter, "Group One") each filed a separate Complaint against . . . HOVIC, . . . Hess, and . . . Litwin Corporation (hereinafter, "Litwin"). The Group One plaintiffs sought damages for injuries sustained from alleged exposure to dangerous dust, including but not limited to, asbestos, catalyst, and silica, while working at . . . [the] refinery in St. Croix . . . .
>
> Subsequently . . . Litwin filed a Third-Party Complaint in each lawsuit in Group One in March 2006, and then an Amended Third-Party Complaint in April 2006, naming the following businesses as Third-Party Defendants: UOP, LLC (hereinafter, "UOP"), Shell Oil Corporation (hereinafter, "Shell"), Riggers and Erectors International, Inc. (hereinafter, "Riggers"), Communication Systems and Maintenance Corporation (hereinafter, "CSM"), Virgin Islands Industrial Maintenance Corporation (hereinafter, "IMC"), Chicago Bridge and Iron Company, N.V. (hereinafter, "CBI") (individually and as successor in interest to Chicago Bridge and Iron), and A.P. Green Services Inc. (hereinafter, "APG") (individually and as successor in interest to Bigelow-Liptak Corporation). In response . . . UOP, . . Shell, . . . IMC, . . . Riggers, and . . . CBI each filed a separate Answer to the Amended Third-Party Complaint. . . . CSM and . . . APG never filed an answer and Defendant Litwin took no further actions as to these two parties.
>
> In October 2006, thirty-one plaintiffs (hereinafter, "Group Two") each filed a separate Complaint against . . . HOVIC, . . . Hess, and . . . SPX Corporation . . . as successor-in-interest to Litwin . . . . The Group Two plaintiffs sought damages for injuries sustained from alleged exposure to dangerous dust, including but not limited to, asbestos, catalyst, and silica, while working at . . . [the] refinery in St. Croix . . . . Litwin was not named as a defendant by the Group Two plaintiffs, and thus . . . Litwin did not file a third-party complaint in any of the lawsuits in Group Two.
>
> In August 2007, the Court consolidated the Group One plaintiffs and the Group Two plaintiffs, and issued a Case Management Order which created a master case file and docket, captioned as *In Re: Refinery Dust Claims*, and used Plaintiff Cuthbert Anthony's case number, SX-06-CV-78, as the master docket number. The parties were ordered to file under the master docket only pleadings, motions, or other documents that applied to more than one plaintiff's case.

In re: Refinery Dust Claims, SX-06-CV-078, 2016 V.I. LEXIS 48, *1-5 (V.I. Super. Ct. May 3, 2016) (footnotes omitted).[1] Since Espiritusanto filed his complaint in October 2006, and sued SPX and not

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[1] For reasons unclear from the record, the November 16, 2006 motion to approve stipulated case management order was directed to the attention of "Rhys Hodge, Presiding Judge," (Pl.s Mot. to Approve Stip. Case Mgmt Order 2, filed Nov. 16, 2006, In re: Refinery Dust Claims, SX-06-CV-078), but ruled on by the judge assigned to *Anthony*, the Honorable Francis J. D'Eramo. Any error would have been cured when the Presiding Judge, the Honorable Darryl Dean Donohue,

Litwin, his case was part of Group Two.

¶7 Per the parties' stipulation, discovery proceeded in both sets of cases simultaneously, even though only the Hess Defendants remained in the Group Two cases, and no third-party litigation was involved. But on May 18, 2011, the Hess Defendants filed a motion in the master case to dismiss four plaintiff's cases—Leighton Burt, Tomas Espiritusanto, Michael Joseph, and Julian Registe—because they failed to appear for examinations the Hess Defendants and Litwin scheduled for "[t]he weeks of February 21, 2011 and March 28, 2011 . . . ." (Hess Defs.' Mot. to Dismiss 2, filed May 18, 2011, *In re: Refinery Dust Claims*, SX-06-CV-078.) Espiritusanto and Burt also "failed to respond to discovery served . . . on February 24, 2009." *Id.* at 1. The Hess Defendants asked that the Court compel the four Plaintiffs to attend and pay for their own Rule 35 exams or dismiss their complaints due to their "failure to comply with the discovery rules . . . ." *Id.* at 4 (citing *Island Trashmoval Serv., Inc. v. Gov't of the V.I.*, 24 V.I. 72, 73 (Terr. Ct. 1988)).

¶8 Counsel for the four Plaintiffs responded on May 25, 2011, by filing a motion for a 30-day extension of time. In the motion, counsel explained that needed more time to "locat[e] these Plaintiffs who have either moved off-island or perhaps died." (Pls.' Mot. for Ext. of 30 Days to Resp. to Defs.' Mot. to Dismiss 1, filed May 25, 2011, In re: Refinery Dust Claims, SX-06-CV-078.) Counsel further represented that if he "cannot locate Plaintiffs or any one of them counsel will not oppose a dismissal and will otherwise make these remaining Plaintiffs available for a medical exam." *Id.*

¶9 On July 19, 2011, Burt, Espiritusanto, and Registe filed a joint stipulation in the master case with the Hess Defendants to dismiss their claims "WITH PREJUDICE, each party to bear their own costs and fees." (Stip. for Dismissal with Prejudice 1, filed July 19, 2011, *In re: Refinery Dust Claims*, SX-06-CV-078.) A proposed order was also submitted, which the Court (Willocks, J.) signed on August 9, 2011. And, even though the order was captioned *In re: Refinery Dust Claims / Cuthbert Anthony, et al. v. Hess Oil Virgin Islands Corp., et al.*, case number SX-06-CV-078, the Clerk's Office entered the order in the individual plaintiffs' cases. The August 9, 2011 Order was entered in this case on August 12, 2011.

¶10 On December 7, 2012, Espiritusanto, through counsel, filed a document in his individual case

Sr., issued an order on February 23, 2009 reassigning all cases grouped under the *Refinery Dust Claims* master case to Judge D'Eramo.

as well as the master case titled "Withdrawal of Motion for Dismissal," which explained that

> Plaintiff after filing his lawsuit in 2006 returned to the Dominican Republic. Efforts over the years were unavailing in trying to contact him and he never contacted the office. In 2011 Hovic scheduled a medical examination of Espritusanto [sic], however, we could not contact him. Therefore Hovic moved to dismiss his suit. We again tried to reach Espritusanto [sic] but were unsuccessful. Accordingly we entered into a joint stipulation to dismiss. On December 4, 2011 Espritusanto [sic] contacted this office by telephone from the Dominican Republic. In as much as our reason for entering into the stipulation of dismissal was based on our lack of contact and we now have contact we are withdrawing our stipulation.

(Pl.'s Withdrawal of Mot. for Dismissal 1, filed Dec. 7, 2012 (paragraph breaks omitted).)

¶11 The Hess Defendants responded on December 11, 2012, and opposed "Espiritusanto's request to withdraw his Motion to Dismiss because this Court . . . previously dismissed this matter with prejudice on August 9, 2011." (Hess Defs.' Opp'n to Pl.'s Withdrawal of Mot. for Dismissal 1, filed Dec. 11, 2012.) The Hess Defendants argued that Espiritusanto was "prohibited from reopening this action." *Id.* Espiritusanto did not reply to the Hess Defendants' response.

¶12 This case, along with the master case and the other individual cases grouped under the *Refinery Dust* master case, was designated complex and reassigned to the undersigned judicial officer by the Presiding Judge in September 2018.

II. DISCUSSION

¶13 Generally, "court approval is not required to withdraw a motion . . . ." *Albert v. Hess Oil V.I. Corp.*, 70 V.I. 316, 323 (Super. Ct. 2019); *accord Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 277 (Super. Ct. 2017) (collecting cases). *But cf., e.g., Cardenas v. Superior Court of L.A. Cty.*, 363 P.2d 889, 891 (Cal. 1961) ("If something had occurred to prejudice the opposing party by the motion's withdrawal, a different question would be presented . . . ."). But a motion cannot be withdrawn if the court has ruled on it. *Accord Griffin v. Kelly*, 162 F.R.D. 353, 354 (D. Kan. 1995) ("The motion cannot be withdrawn at this time since it has already been properly ruled on by the court."); *see also Wallace v. Ford*, 253 N.Y.S.2d 608, 610 (Sup. Ct. 1964) ("While a party has a right to withdraw a motion at any time before submission, once a motion has been 'submitted', it may not be withdrawn except by consent of the parties or by an order of the court upon such conditions as the court sees fit to impose. A motion has been 'submitted' to the court when the movant makes his oral argument or absent an oral argument when he presents his papers to the Clerk after the call of the case on the return day." (citations omitted)).

¶14 In this instance, however, Espiritusanto did not file a motion, at least not technically. Instead, Espiritusanto, jointly with the Hess Defendants, filed a stipulation for dismissal and "a stipulation of dismissal ordinarily is automatically effective and does not require the court's approval." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611 (2012) (citation omitted). In fact, "if a plaintiff effectuates an unconditional voluntary dismissal pursuant to . . . Rules 41(a)(1)(A)(i) or (ii), the action terminates immediately upon filing the appropriate notice with the Clerk of the Superior Court, and neither the judge nor the plaintiff will possess the ability to undo the dismissal." *Id.* To be self-executing, however, the stipulation must "contain the signatures of 'all parties who have appeared,'" *id.* at 613, "includ[ing] former or dismissed parties." *In re: Alumina Dust Claims*, 2019 VI Super 139 ¶ 17 (comma omitted).

¶15 Here, the July 19, 2011 stipulation was signed by counsel for Burt, Espiritusanto, and Registe as well as counsel for the Hess Defendants. Burt and Espiritusanto had also sued SPX; Registe had also sued Litwin. And Litwin filed a third-party complaint in every Group One case including Registe's. None of the other parties signed, however, and "*every* defendant who has appeared in a multi-defendant litigation, as well as any third-party defendants and intervenors" must sign the stipulation for dismissal for it to "quality for treatment as a unanimous instrument under . . . Rule 41(a)(1)(A)(ii)." *Island Tile & Marble, LLC*, 57 V.I at 613. Since the July 19, 2011 stipulation did not contain the signatures of all parties, it was not self-executing. Instead, it required the approval of the Superior Court to become effective, which means the July 19, 2011 stipulation was essentially a motion. *Cf. Island Tile & Marble, LLC*, 57 V.I. at 610 ("The label placed on the paper filed by the plaintiff is of no significance . . . ." (citation omitted)); *Theodule v. Hess Oil V.I. Corp.*, 69 V.I. 460, 468 (Super. Ct. 2018) ("'[W]hen court approval is required, a stipulation is akin to a motion . . . .'" (citation omitted)). Yet, even though the stipulation is akin to a motion, Espiritusanto's attempt to withdraw it is still ineffective.

¶16 The Hess Defendants contend that Espiritusanto's December 7, 2012 withdrawal is ineffective because he "is prohibited from reopening this action." (Hess Defs.' Opp'n 1.) And there is support for that position, namely *Island Tile & Marble, LLC* where the Supreme Court of the Virgin Islands held that "*neither the judge nor the plaintiff* will possess the ability to undo the [stipulated] dismissal." 57 V.I. at 611 (emphasis added). At first glance, *Island Tile* does appear to be dispositive. But the issue in *Island Tile* was whether the Superior Court has the authority to reconsider an order approving a stipulation for dismissal. *See id.* at 608. The Supreme Court concluded that the Superior Court does have the authority to set aside an order of dismissal, so long as the Superior Court had the authority to approve the stipulation in the first place. *See id.* at 613-14 ("Accordingly, because the Superior Court possessed the authority to enter an order granting or denying the stipulation, it also had the authority to modify or set aside the order prior to entry of a final judgment."). There is no question that the Court possessed the authority to approve the July 19, 2011 stipulation. But the Hess Defendants are still not correct that Espiritusanto is barred from reopening this action. He is not.[2] But his withdrawal is still ineffective. Two reasons compel this conclusion.

¶17 First, Espiritusanto filed his motion/stipulation jointly with the Hess Defendants. As it was not his alone, he cannot take it back unilaterally. Second, and more importantly, Espiritusanto cannot withdraw the stipulation/motion because the Court acted on it. By order dated August 9, 2011, the Court approved the July 19, 2011 stipulation and ordered "the following matter[] be dismissed, WITH PREJUDICE... Tomas Espiritusanto, Civil No. SX-06-CV-618...." (Order 1, entered Aug. 12, 2011.) Once SPX was dismissed in December 2006, only Hess and HOVIC remained. And once they were dismissed in August 2011, this case ended.[3] Thus, this case closed on August 12, 2011, when the Clerk's Office entered the August 9, 2011 Order.

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[2] Although not directly raised, several courts have held that relief from self-executing stipulations for dismissal can be granted. *Cf. Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1327-28 (11th Cir. 2017) (Anderson, J. concurring) ("And it is broadly accepted that courts retain jurisdiction to consider motions to reopen the judgment under Rule 60(b) after a Rule 41(a)(1) dismissal." (citing *Yesh Music v. Lakewood Church*, 727 F.3d 356, 363 (5th Cir. 2013)); *accord Yesh Music*, 727 F.3d at 361 ("'Rule 60(b) speaks of relief from a final proceeding as well as a final judgment or order. The dismissal of the suit was, in our view, a proceeding, and it was clearly final. In sum, the court had the power to reopen the dismissed suit.'" (quoting *Williams v. Frey*, 551 F.2d 932, 934-35 (3d Cir. 1977)); *see also In re: Brewer*, 863 F.3d 861, 869 (D.C. Cir. 2017) ("In our view, a stipulated dismissal, aside from its immediate effectiveness, is no different in jurisdictional effect from a dismissal by court order: Each resolves all claims before the court, leaving it without a live Article III case or controversy."). Thus, even if the July 19, 2011 stipulation did not require the signature of SPX to be self-executing as to Espiritusanto's and Burt's cases, the Court would still be able to grant relief if warranted.

[3] Technically, the Clerk's Office did not close this case or remove it from the master case. Assuming, *arguendo*, that noting on the docket that the case is closed or removing an individual case from the master case are required tasks, neither task would have kept this case open. *Accord Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) ("Put simply, an otherwise nonfinal order does not become final because the district court administratively closed the case after issuing the order. . . . 'An order administratively closing a case is a docket management tool that has no jurisdictional effect.'" (quoting *Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005)). *See also George v. Hess Oil V.I. Corp.*, 2019 VI Super 150 ¶ 16 ("Ancillary issues would not keep a case open....").

¶18 Since the July 19, 2011 stipulation/motion was acted on by the Court, Espiritusanto cannot withdraw it. Thus, despite its label, the December 7, 2012 "withdrawal" is also a motion. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 129 (Super. Ct. 2016) ("'A motion is an application, oral or written, addressed to a court or a judge, by a party to an action or proceeding, or by one interested therein, asking the court or judge to make an order in such action or proceeding.'" (citation omitted)); *see Island Tile & Marble, LLC*, 57 V.I. at 612 ("'[T]he substance of a motion, and not its caption, shall determine under which rule that motion is construed.'" (citation omitted)). Additionally, since the August 9, 2011 Order resolved all of Espiritusanto's remaining claims, it constitutes the final order in this case. *Cf. State Nat'l Ins. Co. v. Cty. of Camden*, 824 F.3d 399, 408 n.31 (3d Cir. 2016) ("[A] voluntary dismissal with prejudice constitutes a final order, thereby making interlocutory orders appealable."). *Accord Yearwood Enters., Inc. v. Antilles Gas Corp.*, 69 V.I. 863, 870 (Super. Ct. 2018) (recognizing that "a final order" may be "in the form of voluntary dismissal or otherwise . . . ."). As a result, the December 7, 2012 withdrawal/motion must be construed as a motion for relief from judgment since Espiritusanto seeks to withdraw, or undo, the dismissal and can continue his claims against the Hess Defendants.

¶19 At the time when Espiritusanto filed his motion, a party could obtain relief from a judgment or final order "'for good cause shown . . . .'" *Walters v. Parrott*, 58 V.I. 391, 412 (2013) (quoting Super. Ct. R. 50). Rules 59, 60, and 61 of the Federal Rules of Civil Procedure governed such "applications" to "set aside . . . judgment . . . ." *Id.* at 412-13 (quoting Super. Ct. R. 50). Relief under Rule 59 was limited to no more than ten days after the judgment, however. *See id.* at 413. The August 9, 2011 Order which approved the July 19, 2011 stipulation was entered on August 12, 2011. Espiritusanto filed his withdrawal motion on December 7, 2012, approximately a year and four months later. Clearly, Espiritusanto filed his motion after the 10-day deadline expired and cannot obtain relief under Rule 59.

¶20 Rule 60 also authorizes relief from judgment. Specifically, Rule 60(b)(1) provides for relief based on "mistake, inadvertence, surprise, or excusable neglect . . . ." *Id.* (quoting Fed. R. Civ. P. 60(b)). Espiritusanto's motion could fall under Rule 60(b)(1) insofar as counsel had represented to the Court, in the May 25, 2011 motion for a 30-day extension of time, that Espiritusanto may have moved back to the Dominican Republic. Clearly, counsel lost contact with his client. *Contra In re:*

Rogers, 56 V.I. 325, 331 n.15 (2012) ("Rule 1.4 of the ABA Rules of Professional Conduct—adopted by this Court in Rule 203(a) of the Supreme Court Rules—requires attorneys to maintain contact with their clients and keep them 'reasonably informed about the status of the matter.'" (referring to rules in effect at the time)). And "it is the client, and not the lawyer, that is vested with the ultimate decision of whether to settle a civil claim . . . ." *In re: Suspension of Welcome*, 58 V.I. 236, 250 (2013) (*per curiam*). It appears now that counsel agreed to dismiss Espiritusanto's claims only because he assumed Espiritusanto had abandoned this case. (*Cf.* Pl's Withdrawal of Mot. to Dismiss 1 ("In as much as our reason for entering into the stipulation of dismissal was based on our lack of contact and we now have contact we are withdrawing our stipulation.").) But counsel should seek leave to withdraw if contact with the client is lost, not enter into a stipulation to dismiss the client's case. *Cf. Carling v. Mode a Porter, Ltd.*, No. 88 Civ. 2864 (PKL), 1989 U.S. Dist. LEXIS 9833, *5 (S.D.N.Y. Aug. 18, 1989) (granting leave to withdraw) ("It is fundamental that an attorney who cannot contact his client cannot properly represent that client's interests."). Nonetheless, courts have suggested that relief could be available under Rule 60(b)(1) if counsel lacks authority to dismiss his client's claims. *Cf. Webb v. City of N.Y.*, No. 08-CV-5145(CBA)(JO), 2010 U.S. Dist. LEXIS 86234,*9 (E.D.N.Y. Aug. 20, 2010) (citing *Nemaizer v. Baker*, 793 F.2d 56, 62 (2d Cir. 1986), and explaining that dicta "suggest[s] that an allegation 'that former counsel lacked authority to enter into a stipulation' dismissing claims with prejudice might provide an avenue for relief under Rule 60(b)(1)." (brackets omitted))

¶21 But relief under Rule 60(b)(1) is limited to a year after entry of the final order. *See* Fed. R. Civ. P. 60(c) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."), *reprinted in* V.I. Ct. Rules Ann. 633 (2013 ed.). *See also* V.I. R. Civ. P. 6(b)(2) ("A court may not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)."). Thus, Espiritusanto cannot obtain relief under Rule 60(b)(1). Clearly, Espiritusanto also cannot obtain relief under Rule 60(b)(2) or (3).

¶22 Relief could be available under Rule 60(b)(6). *Cf. United States v. Gelb*, No. 86 Civ. 1552 (CSH), 1991 U.S. Dist. LEXIS 1507, *8 n.7 (S.D.N.Y. Feb. 4, 1991). But only if relief would not have been available under Rule 60(b)(1). *See id.* at *11 ("Defendant cannot use 60(b)(6) to make an end run around the strictures of 60(b)(1)." (citing *United States v. Erdoss*, 440 F.2d 1221, 1223 (2d Cir.

1971)); *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986)). "'Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive, such that any conduct which generally falls under the former cannot stand as a ground for relief under the latter.'" *Appleton v. Harrigan*, 61 V.I. 262, 269 n.7 (2014). However, "Rule 60(b)(6) 'provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances.'" *Gould v. Salem*, S. Ct. Civ. No. 2010-0098, 2012 V.I. Supreme LEXIS 47, *10 (V.I. May 31, 2012). "'[A]lthough exceedingly rare, it is not impossible for a lawyer's failures to constitute 'extraordinary circumstances.'" *Webb*, 2010 U.S. Dist. LEXIS 86234 at * 11 (quoting *Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004)). *Cf. Gelb*, 1991 U.S. Dist. LEXIS 1507 at *8 n.7. But most courts refuse to grant relief under Rule 60(b)(6) if an attorney lacked actual authority to settle his clients' claims.

¶23 Having appeared for Espiritusanto, counsel had apparent authority to enter into the July 19, 2011 stipulation. Although counsel did alert the Court that Espiritusanto may have moved off-island and that he needed some time to get in touch with him, the stipulation did not provide any reasons for the dismissal. "'Normally a party is bound by his stipulations as a stipulation is akin to a contract.'" *United States v. Morales*, 684 F.3d 749, 755 (8th Cir. 2012) (ellipsis omitted) (quoting *Rathborne Land Co., L.L.C. v. Ascent Energy, Inc.*, 610 F.3d 249, 262 (5th Cir. 2010)). Virgin Islands law at the time recognized that "enforcing settlement agreements on the basis of apparent authority is consistent with the principles of agency law, the policies favoring settlements generally, and the notions of fairness to the parties in the adjudicatory process." *Edwards v. Born, Inc.*, 792 F.2d 387, 390 (3d Cir. 1986); *accord Scott v. Burns Int'l Sec. Servs.*, 165 F. Supp. 2d 1133, 1139 n.5 (D. Haw. 2001) ("An attorney can bind his client to a settlement without express consent if he has apparent authority."); *see also, e.g., Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989) ("[I]f an attorney has apparent authority to settle a case, and the opposing counsel has no reason to doubt that authority, the settlement will be upheld." (citing *Int'l Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 55 (2d Cir. 1979)). Espiritusanto, HOVIC, and Hess, through counsel, entered into a stipulation in July 2011 to dismiss Espiritusanto's claims with prejudice. That stipulation is binding on Espiritusanto.

¶24 One final point bears mentioning. Counsel for Espiritusanto appears to have been unaware that the July 19, 2011 stipulation was approved. In his December 7, 2012 withdrawal motion, Espiritusanto states that "[t]h[e] stipulation has not yet been acted upon by the court." (Pl.'s Withdrawal of Mot. to Dismiss 1.) Clearly, that was incorrect and counsel for the Hess Defendants, in their December 11, 2012 opposition, attached a copy of the August 9, 2011 Order and the August 19, 2011 Notice of Entry to show that the stipulation had been acted on by the Court. Even assuming, *arguendo*, that Espiritusanto was unaware that his claims had been dismissed in 2011 when he filed his withdrawal motion, he became aware on December 11, 2012 when the Hess Defendants served him with a copy of the order. He did not reply. Moreover, Espiritusanto "contacted this office," meaning his attorney's office, "by telephone from the Dominican Republic" "[o]n December 4, 2011." (Pl.'s Withdrawal of Mot. to Dismiss 1, filed Dec. 7, 2012). Yet, he waited until three days shy of a year—from December 4, 2011, when he phoned his attorney, to December 7, 2012, when his attorney filed the withdrawal motion—to attempt to withdraw his stipulation and, when the Hess Defendants said it was too late, he failed to reply. As the Supreme Court of Hawai'i reasoned, "'any failure on the part of the client to object to an unauthorized act within a reasonable time after becoming aware of it will be construed as a ratification of it.'" *Hawai'i Hous. Auth. v. Uyehara*, 883 P.2d 65, 72, 77 (Hawai'i 1994) (citation omitted)).

III. CONCLUSION

¶25 For the reasons stated above, Espiritusanto's withdrawal, construed as a motion for relief from judgment, must be denied. An appropriate order follows.

Date: December 6, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: ______________________
Court Clerk

Dated: 12/6/2019