For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

GOURMET GALLERY CROWN BAY, INC., and ZARAKIA SUID, Appellants/Plaintiffs, **v.** **CROWN BAY MARINA, L.P.** Appellee/Defendant.	**S. Ct. Civ. No. 2015-0123** Re: Super. Ct. Civ. No. 513/2014(STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: December 12, 2017
Filed: March 27, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

Gourmet Gallery and Zakaria Suid (collectively "Gourmet") appeal from two separate Superior Court orders, both entered on November 12, 2015, denying Gourmet's motions (1) to escrow rent pending litigation, and (2) for preliminary injunction. Because we conclude that this Court does not have jurisdiction over the Superior Court's order denying Gourmet's motion to escrow rent, we will deny review of that issue. On the remaining preliminary injunction matter, we conclude that the Superior Court did not abuse its discretion when it denied Gourmet's motion, and we will therefore affirm the Superior Court's denial of the preliminary injunction.

I. BACKGROUND

Zakaria Suid is the owner of Gourmet Gallery, a grocery store and delicatessen with two locations on St. Thomas—one at Havensight and another at Crown Bay Marina ("CBM"). Gourmet and CBM entered into a lease in 1991, which contained a restrictive covenant that, with some exceptions, gave Gourmet the exclusive right to sell certain items on CBM's property. Those items "include, but [are] not necessarily limited to, the following merchandise:"

- Gourmet cooking oil and spices
- Wine, beer, liquor, sodas
- Deli and bakery
- Fresh and frozen meat
- Tobacco products
- Magazines and news papers
- High quality canned and bottled products (e.g. gourmet jellies and vegetables)
- Fresh pastas
- Custom order department (i.e. charter yacht provisioning)[.]

(J.A. Vol. VI at 43.) The covenant continues:

> Tenant and Landlord hereby agree that Landlord is not providing Tenant with any exclusive right to the sale of the above described merchandise except that, as long as Tenant provides such goods and services with displays and inventories appropriate to Tenant's Crown Bay Marina Landlord agrees to not lease space in the marina for a store which shall carry groceries, liquor, produce, drugs, delicatessen, fish and meat or the items listed above.

(J.A. Vo. VI at 43.) Finally, the covenant provides three exceptions, which allow CBM to lease its property to the following:

> (a) a hotel operator that shall, as part of its services, sell food, sundries and bottled liquor to hotel guests for "in-room" consumption;
> (b) any tenant who shall operate its leased premises as a bar or restaurant; and
> (c) tenants that carry specialty packaged food products or liquor as novelty or gift items, so long as such products shall not represent a principal part (in excess of 30%) of its overall inventory.

(J.A. Vol. VI at 43.) The lease agreement does not define the terms "grocery," "groceries," "store," or "restaurant."

On September 1, 2014, Scoops and Brew ("S&B") entered a lease agreement with CBM to rent a 200-square foot Gazebo located approximately thirty feet from the front entrance of Gourmet Gallery. According to the lease, S&B's permitted use of the property is as an "ice cream parlor," selling "specialty coffee, logo merchandise, [and] prepared food items." (J.A. Vol. VI at 66.) Photographs attached to CBM's opposition to Gourmet's renewed motion for preliminary injunction detail some of the items S&B sells, including: milkshakes in at least six flavors, a variety of baked goods, boxes of brand-name tea, various snack bars, soft-serve ice cream, regular and vegan gelato, at least seven flavors of sorbet, and various brews of prepared coffee (*e.g.*, Americano, cappuccino, latte, mocha, chai tea, affogate.) Finally, S&B's business license

categorizes S&B as a "Coffee Shop & Ice Cream Parlor, Delicatessen, Tavern, and Tavernkeeper A." (J.A Vol. VI at 105.)

On September 17, 2014, Suid sent a letter to Dennis Kissman, President of CBM's Marina Management Services, expressing his opposition to S&B's lease. According to Suid, S&B's lease was in violation of the restrictive covenant in Gourmet's lease. Suid also emphasized an amendment to Gourmet's lease that he had signed with CBM the week prior, which required him to invest $500,000 in capital improvements as a condition of exercising his six-year option under the amendment. Suid noted that, during the amendment negotiations, and on three prior occasions, he had expressed his intention to establish a "full service coffee shop within Gourmet Gallery to serve a wide variety of premium coffee blends – just like [he has] done at [his] Havensight location." (J.A. Vol. VI at 55.) Finally, Suid reminded CBM that over the previous several months, he offered to take over the gazebo and to pay rent for the premises, and reiterated his offer in the letter. At the evidentiary hearing, however, Kosei Ohno, president of CBM, testified that part of the reason Suid and CBM negotiated the new amendment was because Suid had been delinquent for the previous three years, and had accumulated a rental arrearage balance of approximately $100,000.

CBM responded to Suid's letter through counsel by a letter dated October 8, 2014, claiming that S&B was not going to sell any items Gourmet currently offered, and that Gourmet did not have the exclusive right to sell the items S&B would offer. Soon thereafter, S&B sent a letter to the businesses operating at CBM, inviting employees to visit S&B on October 23, 2014 to enjoy a "sneak peek" of their ice cream desserts and coffee drinks, although S&B would not yet be open. (J.A. Vol. I at 131.)

On November 5, 2014, Gourmet filed a complaint with the Superior Court, alleging that it is entitled to: (1) a preliminary and permanent injunction either enjoining CBM from leasing to S&B, or requiring S&B to sell items other than those that Gourmet sells; (2) a declaratory judgment that CBM breached its lease with Gourmet and that Suid is not obligated to invest the $500,000 in capital investments previously agreed upon; (3) an order reforming or rescinding Suid's personal guarantee of the $500,000; (4) an order permitting Gourmet to escrow rent pending litigation; (5) a declaratory judgment, and a preliminary and permanent injunction allowing Gourmet to audit common area expenses and charges CBM imposed upon the store; and, (6) nominal, compensatory, and consequential damages. Following the Superior Court's request, the parties briefed whether S&B's joinder as a party was required. Both parties took the position that S&B's joinder was unnecessary, and thus, S&B was never made a party to this action.

The Superior Court held an evidentiary hearing on May 12-13, 2015. Suid testified that CBM had approached him in 1991 about opening a second Gourmet Gallery store at the Marina, and that the restrictive covenant was a condition upon which Suid agreed to sign the lease. Since Gourmet's lease does not define the relevant terms "grocery," "groceries," and "restaurant," both Suid and Ohno (CBM's only witness) gave conflicting testimony disputing whether S&B is a "restaurant," and whether the items S&B sells are "groceries," as contemplated within the contours of the restrictive covenant.

Suid testified that he could not quantify his alleged losses, nor had he attempted to survey the purported decrease in his customer base since S&B opened. Instead, Suid estimated his losses by observation. First, Suid testified that Gourmet now makes fewer pots of coffee, stating, "[w]e used to do, for example, thirty pots of coffee from 7:00 o'clock until 9:00 o'clock in the morning.

Now we do eleven, eight, seven." (J.A. Vol. IV at 188.) Second, Suid stated that he "lost a lot of [his] every day customer[s] who came[] just to drink coffee," saying that "they sit right across from [him at S&B]." (J.A. Vol. IV at 189.) Suid argued that it would be impossible to quantify Gourmet's total losses because the coffee is a loss-leader item that functions "just to attract the customer to see inside the store," where they will make further purchases. (J.A. Vol. IV at 188.) Moreover, Suid testified that he "didn't [calculate coffee sales] by the dollar," and that employees simply enter individual coffee purchases into the register as "groceries," or sometimes do not charge customers at all. (J.A. Vol. IV at 188.) Suid stated that he had not attempted to track or calculate a change in sales of ancillary items customers would purchase along with coffee, such as bakery and delicatessen goods. Instead, Suid supported this lost opportunity argument with two anecdotes: (1) a gentleman who stopped at Gourmet Gallery to buy a box of chocolate for his wife allegedly ended up purchasing $67,000 worth of wine; and, (2) tourists waiting in line for the ferry to the Westin Hotel have, in the past, entered Gourmet Gallery "[t]o pick up a bottle of water, to pick up a juice or a baby milk for their kid . . . [and] [t]hey end up walk[ing] out [having spent two to three hundred dollars.]" (J.A. Vol. IV at 132.) Lou Morrissette, owner of Tickles restaurant, which sits adjacent to Gourmet Gallery, corroborated Suid's contention that a coffee sale can turn into a larger impulse-sale of additional items. Unlike Suid, however, Morrissette testified that he is able to produce "documentation" of the ancillary items purchased with a cup of coffee. (J.A. Vol. III at 189.)

The Superior Court denied Gourmet's preliminary injunction motion, finding that, although Gourmet was able to demonstrate its likelihood of success on the merits, it was not in danger of irreparable harm, and the public interest would be best served by allowing S&B to

remain open pending litigation. Additionally, after conducting a *Banks* analysis[1] affirmatively answering the question of whether a commercial tenant can deposit rent in escrow pending litigation, the Superior Court denied Gourmet's motion because there had been no finding that CBM had breached the lease's restrictive use clause. On December 11, 2015, Gourmet filed a timely notice of appeal with this Court. V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

Before considering the merits of this appeal, we must first determine if this Court has appellate jurisdiction over both orders from which Gourmet appeals. *See Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 598 (V.I. 2012).

i. Order Denying Preliminary Injunction

[1] A "*Banks* analysis" refers to "the three-part analysis provided for in *Banks v. Int'l Rental & Leasing Co.*, 55 VI. 967 (V.I. 2011)." As the Court has explained,

> The first step in the [*Banks*] analysis — whether any Virgin Islands courts have previously adopted a particular rule — requires a court to ascertain whether any other local courts have considered the issue and rendered any reasoned decisions upon which litigants may have grown to rely. The second step — determining the position taken by a majority of courts from other jurisdictions — directs the court to consider all potential sides of an issue by viewing the potentially different ways that other states and territories have resolved a particular question. Finally, the third step . . . — identifying the best rule for the Virgin Islands — mandates that the court weigh all persuasive authority both within and outside the Virgin Islands, and determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands.

Sarauw v. Fawkes, 66 V.I. 253, 260-61 (2017) (brackets omitted) (quoting *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603-04 (V.I. 2014)).

This Court has jurisdiction over "[i]nterlocutory orders of the Superior Court of the Virgin Islands . . . granting, continuing, modifying, refusing or dissolving injunctions," 4 V.I.C. § 33(b)(1), and "we may review the Superior Court's denial of the preliminary injunction even as the underlying action remains pending in the Superior Court." *3RC & Co. v. Boynes Trucking Sys., Inc.*, 63 V.I. 544, 549 (V.I. 2015). Because Gourmet filed its notice of appeal from the Superior Court's November 12, 2015 order denying its motion for preliminary injunction within the thirty days required by 4 V.I.C. § 33(d)(5), we have jurisdiction over that portion of the appeal. *Id*. at 549-50.

This Court reviews the Superior Court's denial of a motion for preliminary injunctions for abuse of discretion, and we review factual determinations for clear error. *See Yusuf v Hamed*, 59 V.I. 841, 848 (V.I. 2013). Because clear error is a very deferential standard, this Court will "only reverse a factual determination as being clearly erroneous if it is completely devoid of minimum evidentiary support or bears no rational relationship to the supportive evidentiary data." *In re Estate of Small*, 57 V.I. 416, 428 (V.I. 2012). Therefore, so long as "a rational person could agree with the assessment of the [Superior Court]," we will not overturn its factual determination. *Moore v. Walters*, 61 V.I. 502, 508 (V.I. 2014).

ii. Order Denying Motion to Escrow Rent Pending Litigation

To be appealable as of right, the Superior Court's order denying Gourmet Gallery's motion to escrow rent "must either be a final order, or must fall within one or more of the categories of interlocutory orders for which a right of appeal is specified in 4 V.I.C. Sections 33(b) and (c)." V.I. R. APP. P. 5(a)(2). The order denying Gourmet's motion to escrow rent neither falls within the bounds of section 33(b)(2), which permits appellate review of interlocutory orders appointing

receivers or refusing to wind up receiverships, nor does it meet the criteria of 4 V.I.C. § 33(c), which states,

> 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 the 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 the application is made to it within ten days after the entry of the order[.]

4 V.I.C. § 33(c). The order in question is un-appealable under section 33(c) because the question was never certified by the trial judge for immediate appeal and, in any event, Gourmet would have forfeited its right to an appeal by not filing within ten days after entry of the order.[2]

The final codified exception to the final judgment rule, 4 V.I.C § 33(b)(1), is similarly inapplicable because the order denying the motion to escrow rent does not "grant[], continu[e], modify[], refus[e] or dissolve[e] [an] injunction." Specifically, under this Court's own precedent, this order (denying the rental escrow) is not an injunction, and therefore cannot fall within the section 33(b)(1) exception. *See Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 316 (V.I. 2007) (applying the Third Circuit's three-part test to determine whether an interlocutory order is injunctive and, therefore, subject to immediate appeal).

As we clarified in *Enrietto*, an interlocutory order is an injunction if it is "(1) directed at a party; (2) enforceable by contempt; and (3) 'designed to accord or protect some or all of the substantive relief sought by a complaint in more than a temporary fashion.'" *Id*. (quoting *Santana Products, Inc. v. Compression Polymers, Inc.*, 8 F.3d 152, 154 (3d Cir. 1993)). The order in

[2] Gourmet filed its notice of appeal for both orders with this Court on December 11, 2015. (J.A. Vol. I at 7.)

question satisfies the first definitional element because it is directed at Gourmet. It also satisfies the second element because the Superior Court may enforce the order by contempt. *See* 14 V.I.C. § 581(3) ("Every court of the Virgin Islands shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as . . . (3) disobedience or resistance to its lawful writ, process, *order*, rule, decree, or command.") (Emphasis added). The order ultimately fails this test, however, because it is not designed to accord or protect some or all of the substantive relief sought by the complaint for breach of contract; rent Gourmet has paid CBM since the time of the alleged breach is recoverable as damages irrespective of the motion's outcome. *Cf. Hilder v. St. Peter*, 478 A.2d 202, 211 (Vt. 1984) (finding no error where lower court awarded tenant damages in the amount of rent paid during landlord's continued breach of the warranty of habitability); *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973) (stating that "a tenant may initiate an action against his landlord to recover . . . rent paid . . . where he alleges that the lessor has broken his covenant to maintain the premises in a habitable condition").

Unlike injunctions, which generally "command or forbid" an action, this order denies Gourmet permission to place rent in escrow pending resolution of litigation, rather than paying rent to CBM. Thus the order, if granted, would effectively allow Gourmet to temporarily breach its obligations under the contract. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "injunction"). We find that "the order at issue is more appropriately characterized as a 'restraint or direction concerning the conduct of the parties . . . unrelated to the substantive relief sought.'" *Enrietto*, 49 V.I. at 317 (quoting *In re Pressman-Gutman Co.*, 459 F.3d 383, 393 (3d Cir. 2006)) (alterations omitted). While a denial of permission to take an action could be construed as forbidding that action, this Court has cautioned that "the provision for interlocutory review of injunctive orders should be construed narrowly so as not to swallow the final-judgment rule."

Enrietto, 49 V.I. at 316. Therefore, a narrow interpretation of the interlocutory review provided by section 33(b)(1) comports with our own cautionary precedent, leaving this Court without statutorily based jurisdiction to review this portion of Gourmet's appeal.

Nevertheless, Gourmet argues that we have jurisdiction to review the Superior Court's denial of its motion to escrow rent under the collateral order doctrine, which this Court adopted in *Enrietto*.[3] "To fall within the [collateral order doctrine] exception, an order must at minimum satisfy three conditions . . . First, it must conclusively determine the disputed question; second it must resolve an important issue completely separate from the merits of the action; and third, it must be effectively unreviewable on appeal from a final judgment." *Enrietto*, 49 V.I. at 319 (internal quotation marks omitted); *see also In re Holcombe*, 63 V.I. 800, 815 (V.I. 2015). Given the doctrine's narrow scope as a limited exception to the final judgment rule, all three conditions require stringent application. *See Enrietto*, 49 V.I. at 319.

The order here satisfies the first requirement of the collateral order doctrine because it conclusively determines the disputed question of whether a commercial tenant can escrow rent pending litigation. Gourmet argues that the order satisfies the second requirement because the fact that the question is a matter of first impression means that it is *per se* important. Whether this Court agrees with this contention is not dispositive, however, because the order "involve[s] considerations that [are] enmeshed in the factual and legal issues comprising [plaintiffs'] cause of

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[3] Gourmet also argues that we have jurisdiction under the doctrine of pendent appellate jurisdiction, recognized by this Court in *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 603-04 (V.I. 2012). As we discussed in *Simpson*, an appellate court can review an otherwise un-appealable issue if the issue is "inextricably intertwined" with an independently appealable issue such that the latter cannot be resolved without reference to the former. *Id*. Because this Court could review an appeal from a final judgment in the underlying breach of contract claim—as well as the corresponding interlocutory appeal from the Superior Court's denial of Gourmet's preliminary injunction motion—without reference to the motion to escrow rent, this argument is meritless.

action." *Delta Traffic Serv., Inc. v. Occidental Chem. Corp.*, 846 F.2d 911, 914 (3d Cir. 1988) (citations and internal quotation marks omitted). If we accept the Superior Court's suggested rule for the Virgin Islands, whether a commercial tenant can escrow rent pending litigation *depends* on the merits of the underlying claim.[4] Indeed, a court order that allows a plaintiff to break its end of a contract prior to a jury verdict on the plaintiff's breach of contract claim should require a showing on the merits to avoid court-sanctioned harm to a potentially non-culpable defendant. Because we conclude that the order here is not completely separate from the merits of the underlying claim, it fails to satisfy the second requirement of the collateral order doctrine and is therefore un-appealable under that doctrine. *See id.* (finding a lower court order not immediately appealable under a statute providing for appeal of interlocutory orders concerning injunctions, where the lower court could not issue the order without first evaluating the underlying claim and defenses).

Finally, even if the order satisfied the second requirement of the collateral order doctrine test, it would still fail the third requirement as it is reviewable on appeal from a final judgment. Although the question of whether a commercial tenant can escrow rent pending litigation would not be appealable from a final judgment in this case, the underlying effect of the order would be. *See, e.g.*, *In re People of the V.I.*, 51 V.I. 374, 383 (V.I. 2009) ("Appellate courts have consistently held that the determination of whether a particular order is appealable rests on its content and substance, not its form or title."). Gourmet's motion sought court permission to breach its obligations under the lease with CBM because Gourmet believes that CBM has not upheld its side of the bargain. The Superior Court's denial of the motion simply maintains the status quo; Gourmet

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[4] Since we conclude that this Court is without jurisdiction to review the Superior Court's denial of Gourmet's motion to escrow rent, we have no occasion to address the Superior Court's holding on the legality of a commercial tenant's right to escrow rent pending litigation.

Gallery must continue making its contractually obligated rent payments pending a final decision on the merits. If Gourmet loses the final judgment after having continued to make rent payments uninterrupted, it could appeal the judgment and, if successful, demand the return of rent payments as damages. If Gourmet prevails in the final judgment, the rent from the time of breach may be recoverable as part of its damages, which CBM could appeal. Given that the order does not meet the second or third requirements of the collateral order test—which requires a showing that all three requirements have been satisfied—this Court cannot review the escrow order for lack of jurisdiction. *Accord Enrietto*, 49 V.I. at 319-20 ("[F]ailure to meet even one of the three factors renders the [collateral order] doctrine inapplicable as a basis for appeal, no matter how compelling the other factors may be."); *Gov't of the V.I. v. Hodge*, 359 F.3d 312, 320 (3d Cir. 2004) (concluding that the Third Circuit did not have appellate jurisdiction to hear appeal under the collateral order doctrine where the relevant factors "range from inconclusive to strongly disfavoring appealability").

B. Preliminary Injunction

"An extraordinary and drastic remedy," a preliminary injunction is "never awarded as of right," but only "upon a clear showing that the plaintiff is entitled to such relief." *Yusuf*, 59 V.I. at 847. The four injunction factors to be considered are: "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary injunction relief will result in even greater harm to the nonmoving party; and, (4) whether granting the preliminary relief will be in the public interest." *3RC & Co.*, 63 V.I. at 550. To prevail on a motion for preliminary injunction, the moving party bears the burden of "making some showing on all four injunction factors," which the Superior

Court must evaluate "under a sliding-scale standard." *Id*. at 557. Because neither party contests the Superior Court's finding that Gourmet adequately demonstrated its reasonable likelihood of success on the merits, we will only address the remaining three factors.[5]

i. Irreparable Harm

"Irreparable harm is certain and imminent harm for which a monetary award does not adequately compensate." *Yusuf*, 59 V.I. at 854 (citations and internal quotation marks omitted). A moving party will satisfy this test if it can demonstrate that its monetary damages are either "difficult to ascertain or are inadequate." *Id*. (quoting *Danielson v. Local 275, Laborers Int'l Union of N. Am., AFL-CIO*, 479 F.2d 1033, 1037 (2d Cir. 1973)). Accordingly, when "the record indicates that [a moving party's loss] is a matter of simple mathematic calculation, a plaintiff fails to establish irreparable injury for preliminary injunction purposes." *Yusuf*, 59 V.I. at 854 (citations and internal quotation marks omitted). Here, Gourmet argues that it has suffered, and will continue to suffer, irreparable harm because the monetary amount of its lost coffee sales and lost opportunity for customer impulse purchases is unascertainable. The Superior Court disagreed, finding that such losses were calculable, and that they were only unascertainable because Suid did not attempt to track the change in Gourmet's sales from the time S&B opened. We agree.

Suid appears to confuse his lack of evidence of a calculable harm with an inability to ascertain that numerical value. As the Superior Court noted, Suid's testimony suggests that he has the ability to enter individual coffee sales into Gourmet's registers in a trackable manner. Even if

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[5] Our decision not to address this uncontested portion of the preliminary injunction test should not be regarded to mean that we agree that Gourmet is likely to succeed on the merits. Similarly, CBM's failure to contest this portion of the Superior Court's inquiry on appeal does not necessarily constitute an admission by CBM that Gourmet is entitled to a favorable judgment on the merits.

that were not true, Suid's observation—that the number of pots of coffee Gourmet makes each morning has diminished by somewhere between nineteen and twenty-three pots since S&B opened—provides the necessary variables to calculate the lost coffee sales: namely, the subtotal of the number of cups of coffee in one pot multiplied by the difference between the number of pots made before and after S&B opened, which is then multiplied by the price per cup of coffee. Therefore, as far as the coffee sales are concerned, the record indicates that Gourmet's loss is a matter of simple mathematical calculation, and is rectifiable with a monetary award. *Id*.

Gourmet relies upon *Tip Top Construction* for the proposition that its lost opportunity for impulse purchases attendant to its alleged lost coffee sales is irreparable. *See Tip Top Construction v. Gov't of the V.I.*, 60 V.I. 724, 731 (V.I. 2014). *Tip Top*, which involved an evaluation committee's rejection of a contractor's bid for a government road construction contract, is not, however, instructive here. In *Tip Top*, this Court only addressed the question of whether the movant demonstrated its likelihood of success on the merits, and did not resolve the issue whether it suffered irreparable harm from the resulting lost opportunity. *Id*. at 732 ("[T]he sole issue before this Court is whether the Superior Court correctly held that Tip Top is unlikely to succeed on the merits because the Government properly rejected its bid as being mathematically unbalanced.").

Gourmet's conclusion that its lost sales opportunity is monetarily un-rectifiable is underdeveloped, and in any event it is contradicted by the record evidence. Morrissette, Gourmet's own witness, testified that he "can show that just with a cup of coffee all the ancillary items that are purchased with a cup of coffee [at Tickles]," suggesting that it is possible to identify the items Gourmet regularly sells with coffee purchases, and calculate the change in those sales since S&B's opening. (J.A. Vol. III at 189.) As Suid stated in his own testimony, in addition to not attempting

to calculate his lost coffee sales, he did not attempt to calculate any additional loss with respect to other items that S&B sells. Without any documented evidence of a change in Gourmet's sales since S&B's opening—apart from Suid's estimation about the diminished pots of coffee—it is impossible to know whether S&B's operation has even caused a net *loss* to Gourmet. Indeed, as Suid stated at the evidentiary hearing, Tickles' proximity to Gourmet Gallery "will draw people to [Gourmet Gallery] because of where [Tickles is] located," explaining that—if a man wants a drink—he may sit at the bar while his wife goes shopping at a nearby establishment, such that the two businesses "complement each other." (J.A. Vol. IV at 296.) It is equally likely that S&B has a similar symbiotic relationship with Gourmet, drawing customers to the area for coffee or ice cream who then end up shopping at Gourmet Gallery.

For the purposes of a preliminary injunction, harm must be *certain* to be irreparable. *Yusuf*, 59 V.I. at 854. Here, it is unclear whether S&B's operation has actually harmed Gourmet, or to what extent. This lack of certainty is not because the alleged harm is incalculable, but because Gourmet has not adequately attempted to ascertain it. A moving party cannot support the argument that its loss is unrecoverable by a monetary award by simply not attempting to calculate damages. *See Nutrition 21 v. United States*, 930 F.2d 867, 871 (Fed. Cir. 1991) ("[N]either the difficulty of calculating losses . . . nor speculation that such losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial."); *see also Lyden v. Adidas Am., Inc.*, No. 3:14-CV-01586-MO, 2015 WL 758642, *3 (D. Or. Feb. 20, 2015) (unpublished) (noting that "[a]lthough lost business opportunities can at times be irreparable" the moving party does not satisfy its burden by "merely recit[ing] [the] legal conclusion that the[] alleged lost opportunities are irreparable[]"). Therefore, because the Superior Court's conclusion

that Gourmet failed to demonstrate that it would face irreparable harm without injunctive relief bears a rational relationship to the supportive evidentiary data, Gourmet has failed to establish the element of irreparable harm. *In re Small*, 57 V.I. at 428.

ii. Balancing of the Harms

The third element of the preliminary injunction test is whether and to what extent the nonmoving party will suffer irreparable harm if the injunction is granted. *See Yusuf*, 59 V.I. at 856. In the proceeding below, both parties erroneously focused their arguments on the effect the injunction would have on S&B. The Superior Court explained that both parties mischaracterized the nature of this inquiry by focusing on the effect it would have on a non-party, a consideration limited to the public interest portion of the preliminary injunction test. Finding that Gourmet failed to carry its burden to produce evidence that a denial of the injunction would harm Gourmet more than a grant of the injunction would injure CBM, the Superior Court held that this element of the test did not favor injunction.

On this appeal, Gourmet contends that this Court should revisit the issue of which party bears the burden of establishing the likelihood of harm to the nonmoving party. This Court has already definitively answered this question in *3RC & Co.*, however, "hold[ing] that *the moving party* . . . has the burden of making some showing on *all four* injunction factors," 63 V.I. at 557 (emphasis added), and Gourmet fails to present a valid reason to revisit this recent holding. *See Bryan v. Fawkes*, 61 V.I. 201, 226 (V.I. 2014) (finding no reason to depart from our ample precedent and apply anything other than a plenary standard of review to issues of law).

Gourmet also argues, as it did below, that the balance of the hardships test is inapplicable to this case because CBM and S&B acted at their own risk by knowingly violating Gourmet's contractual rights. Offering only a three-sentence *Banks* analysis, Gourmet argues in a perfunctory

manner that this Court should follow the Appellate Division of the District Court's *Enfield Green* opinion, which stated that a balancing of the harms test is "improper" if the offending party "is said to have acted at [its] own peril." *Estates of Enfield Green Owners' Ass'n v. Francis*, 1995 WL 78297, *2 (D.V.I. 1995) (unpublished). Pursuant to Rule 22(m) of the Virgin Islands Rules of Appellate Procedure, Gourmet has waived this argument. V.I. R. APP. P. 22(m)(3) ("Issues that . . . are only adverted to in a perfunctory manner . . . are deemed waived for purposes of appeal[.]"). Moreover, this argument is untenable because it conclusively assumes wrongdoing and punishes a party's alleged wrongdoing prior to a hearing on the merits, and is inconsistent with this Court's precedent holding that "the Superior Court must make findings on *each* of the four factors to determine whether . . . the moving party has made a clear showing that it is entitled to injunctive relief." *3RC & Co.*, 63 V.I. at 557 (alterations, citations, and internal quotation marks omitted) (emphasis added).

Our consideration of the third element of the preliminary injunction test is therefore brief. Because Gourmet did not establish that denial of the preliminary injunction would cause it irreparable harm, there is no injury to balance against the harm a preliminary injunction would cause CBM. And, because Gourmet did not address the potential harm the injunction would cause CBM in the trial court—instead focusing only on the impact to S&B—Gourmet has not met its burden. *See id*. Since this portion of the preliminary injunction test balances the harms between the *parties*, we find that the Superior Court did not err when it concluded that Gourmet did not demonstrate that the balance of hardships favored the issuance of an injunction.

iii. Public Interest

Finally, Gourmet contends that the Superior Court erred when it held that granting injunctive relief that would effectively shut down S&B pending litigation was against the public interest. Specifically, Gourmet argues that the Superior Court should not have considered the impact the injunction would have on S&B when evaluating whether granting the injunction would be in the public interest. As Gourmet correctly notes, the main purpose of a preliminary injunction is "to maintain the status quo, defined as 'the last, peaceable, non-contested status of the parties.'" *Kos Pharms., Inc. v. Andrx Corp.,* 369 F.3d 700, 708 (3d Cir. 2004). Here, the last peaceable, non-contested status of the parties—whether defined as the moment before CBM allegedly breached, or the moment when Suid made his opposition to S&B's lease known to CBM—was before S&B opened its doors.

While Gourmet's argument that the Superior Court should have limited its inquiry to the last peaceable moment between the parties is correct when applied to the balancing of the harms portion of the preliminary injunction test, public interest considerations extend to the time the trial court considers the motion. *See Kos Pharms.*, 369 F.3d at 730-32 (considering the effect granting a preliminary injunction would have on current customers of an anti-cholesterol drug, rather than looking back to the last peaceable time between the parties, which was before the drug was on the market); *see also Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197-98 (3d Cir. 1990) (considering the last peaceable time between the parties when evaluating the balance of the harms, but not when evaluating the effect an injunction would have on current consumers). This is because, while the balancing of the harms pertains to the relationship between parties, the public

interest pertains to the relationship between the parties and the general public, including interested third parties like S&B.

Despite recognizing the value in Gourmet's argument that the public interest favors the enforcement of bargained-for restrictive covenants, the Superior Court ultimately concluded that rigid enforcement of private agreements that threaten the interests of third parties—in this case S&B, its employees, and patrons—is against public policy. Gourmet argues that allowing S&B to continue its operations is against public policy due to S&B's alleged violations of the Department of Planning and Natural Resources regulations. Not only is this argument immaterial, it also appears that Gourmet is simply asking this Court to afford greater credence to its interpretation of the public interest, than is accorded to that of the Superior Court. Such is not the nature of our review. Even if, *arguendo*, this Court would have drawn an alternate conclusion had it been in the Superior Court's position, so long as the Superior Court's assessment of the facts bears a rational relationship to the supportive evidence, we cannot replace it with our own. *Moore*, 61 V.I. at 508; *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985) ("If the [trial] court's account of evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."). We therefore accept the Superior Court's conclusion that granting Gourmet's preliminary injunction would not be in the public interest. *See Yusuf*, 59 V.I. at 857-58 ("In considering the public interest, courts should seek to prevent the parties from halting 'specific acts presumptively benefiting the public . . . until the merits [can] be reached and determinations made as to what justice require[s].") (quoting *Cont'l Grp., Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 358 (3d Cir. 1980)).

III. CONCLUSION

Because we find that the Superior Court's denial of Gourmet's motion to escrow rent pending litigation is not an appealable interlocutory order under both 4 V.I.C. §§ 33(b)-(c) and the collateral order doctrine, we conclude that we do not have jurisdiction to review it. On the remaining order, we find that the Superior Court did not abuse its discretion when it denied Gourmet's preliminary judgment motion, and we affirm that portion of the judgment in this appeal. This matter is therefore remanded for further proceedings in accordance with this opinion.

Dated this 27th day of March 2018.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court