Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SBRMCOA, LLC, ET AL., Appellants/Plaintiffs, v. **BEACHSIDE ASSOCIATES, LLC,** Appellee/Defendant.	)	**S. Ct. Civ. No. 2015-0053** Re: Super. Ct. Civ. No. 570/2013 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Adam G. Christian

Considered and Filed: December 28, 2015

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

APPEARANCES:

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Attorney for Appellants,

Gregory H. Hodges, Esq.
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Attorney for Appellee.

OPINION OF THE COURT

PER CURIAM.

SBRMCOA, LLC, moves this Court to partially stay the Superior Court's June 8, 2015 judgment pending appeal, which remanded certain issues for further consideration by an arbitrator. For the reasons that follow, we dismiss this appeal and cross-appeal for lack of jurisdiction and deny the motion as moot.

I. BACKGROUND

Based on the limited record before us,[1] it appears that SBRMCOA serves as an agent for the Sapphire Beach Resort and Marina Condominiums Resort Association, while Beachside Associates, LLC, is a successor in interest to the original sponsors of the Sapphire Beach Resort and Marina. The parties purportedly entered into an agreement on September 25, 2008, in which Beachside Associates agreed to operate a wastewater treatment plant in exchange for certain payments and services from SBRMCOA. The agreement apparently provided that any disputes relating to charges assessed by Beachside Associates would be subject to arbitration.

After such a dispute occurred, the parties entered into arbitration, and the arbitrator issued a partial decision on June 19, 2013. As summarized by the Superior Court, the arbitrator

> described in general terms what charges would be deemed valid and which ones were not. He awarded interest per Title 11 Virgin Islands Code, Section 951(a) from April 30, 2009 going forward, as well as overhead on all sums at ten percent (10%), operating sum at ten percent (10%) with certain exceptions. In the Partial Award, the arbitrator did not set a sum certain.
>
> Beachside was to continue to operate the facility and the parties were directed to meet and confer about certain maintenance issues that were required for the facility and several issues numbered A through M inclusive as to how some sort of plan going forward as to the facility could be consummated.

(June 4, 2015 H'rg Tr. 7-8.) After considering the parties submissions, the arbitrator issued a final award on October 10, 2013, that awarded $1,042,516 in damages to Beachside Associates—plus interest—and established two plans for operating the facility going forward, depending on whether SBRMCOA elected to take control of the facility from Beachside

[1] Because this matter has not yet been fully briefed on the merits, the parties have not yet filed a joint appendix. Consequently, the movant—in this case, SBRMCOA—was required to provide this Court with all relevant parts of the record with its motion. V.I.S.CT.R. 11(d). SBRMCOA did not do so; in fact, SBRMCOA has not even submitted copies of the arbitration agreement or the arbitrator's decision. Under these circumstances, we assume, for purposes of considering SBRMCOA's motion, that the facts found by the Superior Court were not clearly erroneous. *Thomas v. Cannonier*, S. Ct. Civ. No. 2007-0042, 2009 V.I. Supreme LEXIS 33, at *4 (V.I. Apr. 7, 2009) (unpublished).

Associates.

On October 31, 2013, SBRMCOA moved the Superior Court to vacate in part and confirm in part the arbitration award. Subsequently, on December 4, 2013, Beachside Associates filed a counterclaim that also sought to vacate in part and confirm in part. The Superior Court initially granted a temporary restraining order preventing Beachside Associates from terminating its services, but later denied a preliminary injunction and dissolved the temporary restraining order. After holding several hearings, the Superior Court issued oral findings of fact and conclusions of law on June 4, 2015, which affirmed the arbitrator's award as to the payments and interest owed to Beachside Associates, but vacated several other aspects of the arbitration award after concluding that the arbitrator exceeded his powers. However, the Superior Court remanded the matter to the arbitrator to clarify the terms of a five-year payment plan with respect to the monies owed to Beachside Associates.

The Superior Court issued a written judgment on June 8, 2015, which set forth no new findings but simply adopted by reference the oral findings made at the June 4, 2015 hearing. SBRMCOA filed its notice of appeal with this Court on the following day. On July 8, 2015, Beachside Associates filed a notice of cross-appeal. This Court, in a July 9, 2015 order, noted that the Superior Court's judgment appeared interlocutory—in that it ordered a remand to the arbitrator—and directed the parties to brief the issue of this Court's appellate jurisdiction. After the parties filed their jurisdictional briefs, SBRMCOA filed a motion for a stay pending appeal with the Superior Court—which was denied—and ultimately with this Court. In its motion, which had been filed with this Court on October 9, 2015, SBRMCOA requested that this Court enjoin the remand to the arbitrator based on a theory that the arbitrator lacked jurisdiction to act on the matters referred to him by the Superior Court. SBRMCOA, however, only provided this

Court with copies of the Superior Court's June 8, 2015 judgment, and its order denying its motion for a stay pending appeal. Notably, SBRMCOA did not provide this Court with copies of any of the pertinent transcripts—including the record of the June 4, 2015 hearing at which the Superior Court announced its findings of fact and conclusions of law—or even copies of the underlying arbitration agreement or the arbitrator's decisions. Beachside Associates opposed the motion on October 23, 2015, but also failed to provide this Court with any of the relevant documents.

Because the Superior Court's June 8, 2015 judgment contained no factual findings or legal conclusions, this Court requested that the Clerk of the Superior Court transmit a copy of the transcript of the June 4, 2015 hearing so that this Court could meaningfully consider the question of its appellate jurisdiction. V.I.S.CT.R. 11(c) ("[T]he Supreme Court may request electronic or physical transmission of part or all of the record by the Clerk of the Superior Court in order to address a motion or the issues on appeal."). On December 7, 2015, SBRMCOA filed a renewed motion for a stay pending appeal, which contained no new legal argument, but enclosed a December 4, 2015 order from the arbitrator establishing briefing deadlines. Beachside Associates opposed the renewed motion on December 16, 2015.[2] On December 9, 2015, the Clerk of the Superior Court filed the June 4, 2015 transcript with this Court.

II. JURISDICTION

Because a court that lacks jurisdiction does not have the authority to grant a stay, we

[2] On December 21, 2015, Beachside Associates filed an "informational motion" with this Court stating that SBRMCOA had filed a memorandum with the arbitrator by the deadline established in the arbitrator's briefing schedule, implying that SBRMCOA's motion for a stay pending appeal had been rendered moot. In a December 23, 2015 reply, SBRMCOA describes Beachside Associates' filing as "both procedurally improper and substantively false," (SBRMCOA Reply to Inform. Mot. 1), and contends that filing a brief with the arbitrator should not be construed as a withdrawal of its motion to stay those arbitration proceedings pending appeal. Because we dismiss this appeal for lack of jurisdiction and thus deny SBRMCOA's stay motion as moot, we decline to consider the effect—if any—of SBRMCOA's compliance with the briefing deadlines set by the arbitrator.

must first consider whether we possess appellate jurisdiction over this matter. *V.I. Gov't Hosp. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276, 279 (V.I. 2008); *United States v. Carroll*, No. 10-1400, 2012 WL 1570386, at *1 (6th Cir. Apr. 27, 2012) (unpublished) (granting a stay when court lacks jurisdiction would be equivalent "to retain[ing] power over a matter we had no business handling in the first place."). Ordinarily, this Court may only hear an appeal from a final judgment of the Superior Court. 4 V.I.C. § 32(a). This Court, in its July 9, 2015 order, questioned the finality of the Superior Court's June 8, 2015 judgment because it remanded certain issues to the arbitrator for further consideration. Although both parties filed supplemental briefs arguing in support of this Court's jurisdiction over their respective appeal and cross-appeal, this cannot be dispositive, for "it is well established that parties may not stipulate to either the presence or absence of subject matter jurisdiction." *Williams v. People*, 58 V.I. 341, 346 n.4 (V.I. 2013) (citing *H&H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 460 (V.I. 2009)).

We conclude that the June 8, 2015 judgment is not final within the meaning of section 32(a). A Superior Court decision is final if it ends the litigation on the merits, "leaving nothing else for the court to do except execute the judgment." *Allen v. People*, 59 V.I. 631, 634 (V.I. 2013) (citing *Ramirez v. People*, 56 V.I. 409, 416 (V.I. 2012)). This Court has previously held that Superior Court judgments that remand a case to an administrative agency are ordinarily not appealable to this Court as final judgments because in most circumstances the case would return to the Superior Court after agency proceedings and become reviewable on appeal. *Hard Rock Café v. Lee*, 54 V.I. 622, 627-28 (V.I. 2011) (citing *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 245 (V.I. 2010)); *Callwood v. People ex rel. Callwood*, S. Ct. Civ. No. 2009-0119, 2010 V.I. Supreme LEXIS 76, at *5-6 & n.4 (V.I. Nov. 23, 2010) (unpublished) (citing *United States v. Spears*, 859 F.2d 284, 286-87 (3d Cir. 1988)). Numerous courts have extended this same rule to

cases where a trial court remands the matter for an arbitrator to clarify an existing award. *See, e.g.*, *Murchison Capital Partners, L.P. v. Nuance Communications, Inc.*, 760 F.3d 418, 423 (5th Cir. 2014); *Jay Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20, AFL-CIO*, 208 F.3d 610, 613 (7th Cir. 2000); *V.I. Housing Auth. v. Coastal Gen. Constr. Servs. Corp.,* 27 F.3d 911, 913-14 (3d Cir. 1994); *Landy Michaels Realty Corp. v. Local 32B-32J, Servs. Emps. Int'l Union, AFL-CIO*, 954 F.2d 794, 797 (2d Cir. 1992); *Bison Bldg. Mat'ls, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012).

In its brief on jurisdiction, SBRMCOA cites to section 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16, for the proposition that a party may take an interlocutory appeal of an order vacating an arbitration award. SBRMCOA, however, fails to cite to this Court's prior precedent in which it expressly determined that section 16 of the FAA does not preempt 4 V.I.C. § 32(a) or otherwise apply to Virgin Islands courts:

> We cannot conclude that Congress intended section 16 of the FAA to preempt [4 V.I.C. § 32(a)]. While Congress, in enacting the FAA, has clearly adopted a policy favoring arbitration, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules." *Toler's Cove Homeowners v. Trident Constr.*, 586 S.E.2d 581, 584 (S.C. 2003). Thus, we agree with the other state appellate courts that have considered this question, which have consistently held that section 16 of the FAA is applicable only to federal courts and does not preempt state or local statutes that provide for a greater or lesser degree of appellate review. *See, e.g.*, *Kremer v. Rural Community Ins. Co.*, 788 N.W.2d 538, 547 (Neb. 2010); *Clayco Const. Co. v. THF Carondelet Dev.*, 105 S.W.3d 518 (Mo. Ct. App. 2003); *Toler's Cove Homeowners*, 586 S.E.2d at 584; *Muao v. Grosvenor Properties Ltd.*, 122 Cal.Rptr.2d 131, 136-37 (Cal. Ct. App. 2002); *Simmons v. Deutsche Financial Services*, 532 S.E.2d 436 (Ga. Ct. App. 2000); *Wells v. Chevy Chase Bank*, 768 A.2d 620 (Md. 2000); *So. Cal. Edison Co. v. Peabody Western Coal*, 977 P.2d 769 (Ariz. 1999); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647 (N.D. 1998).

World Fresh Mkt. v. P.D.C.M. Assocs., S.E., S. Ct. Civ. No. 2011-0051, 2011 V.I. Supreme LEXIS 29, at *6-7 (V.I. Aug. 25, 2011) (unpublished). We see no reason to revisit our prior

holding as part of this appeal.[3] *Williams v. People*, 58 V.I. 341, 352 (V.I. 2013) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 985 & n.10 (V.I. 2011)).

SBRMCOA and Beachside Associates—in defense of its cross-appeal—also maintain that this Court should exercise jurisdiction under the practical finality rule, which this Court recognized in *Gov't of the V.I. v. Seafarers Int'l Union*, 57 V.I. 649, 654 (V.I. 2012). The practical finality rule "permits an appellate court to review an order 'that is not technically final but resolves all issues that are not purely ministerial.'" *Id*. (quoting *Marshak v. Treadwell*, 240 F.3d 184, 190 (3d Cir. 2001)). But the determination the Superior Court ordered on remand—establishing the terms of the five-year payment plan provided for in the original arbitration award—cannot be characterized as "purely ministerial"; the facts that the arbitrator has ordered briefing from the parties, and that SBRMCOA has filed a motion to stay further proceedings before the arbitrator, constitute powerful evidence that the arbitrator has not been charged with "a purely mechanical task" on remand.[4] *Id.* Consequently, we conclude that we lack

[3] Moreover, even if section 16 of the FAA had any applicability to this matter, federal courts of appeals have repeatedly construed that provision as only authorizing an interlocutory appeal if the trial court ordered an entirely new arbitration on remand, as opposed to directing the arbitrator to clarify, or make further factual findings with respect to, the original arbitration award. *See, e.g.*, *Jay Foods*, 208 F.3d at 613 (explaining that a district court's order remanding a case to the arbitration panel was not appealable under section 16 when "the purpose of the remand was merely to enable the arbitrator to clarify his decision in order to set the stage for informed appellate review." (internal citation omitted)); *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020 n.1 (5th Cir. 1990) ("Had the district court remanded to the same arbitration panel for clarification of its award, the policies disfavoring partial resolution by arbitration would preclude appellate intrusion until the arbitration was complete.") (citing *Hanford Atomic Metal Trades Council, AFL-CIO v. General Elec. Co.*, 353 F.2d 302, 307-08 (9th Cir. 1965)). In this case, the Superior Court expressly held that the purpose of the remand was for the arbitrator to "spell out" the terms of the five-year payment plan that had been ordered as part of the original arbitration award. (June 4, 2015 H'rg Tr. 26.)

[4] In its discussion of the practical finality rule, SBRMCOA emphasizes the "additional expense and wasted time, at the expense of both sides to simply get to the same point where they are today" that will result if an immediate appeal is not permitted. (SBRMCOA Juris. Br. 7.) SBRMCOA, however, has cited to no authority—and this Court can find none—for the proposition that an appellate court may disregard the statutory limits on its jurisdiction simply because an immediate appeal would be more convenient for the parties. Moreover, the Legislature has already put in place a procedure for interlocutory orders that are otherwise not appealable as of right to be certified to this Court for immediate appeal, yet the parties did not make use of this procedure in this case. *See* 4 V.I.C. §

jurisdiction over the parties' appeal and cross-appeal.[5]

III. CONCLUSION

For the foregoing reasons, we dismiss SBRMCOA's appeal, as well as the cross-appeal by Beachside Associates, for lack of jurisdiction, and consequently deny SBRMCOA's motion for a stay pending appeal as moot.

Dated this 28th day of December, 2015.

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

33(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.").

[5] In its jurisdictional brief, SBRMCOA requests that, in the event we conclude we lack jurisdiction over its appeal, we convert its notice of appeal into a petition for a writ of mandamus. However, such a writ would necessarily be a traditional writ of mandamus, rather than a supervisory writ. *See In re Holcombe*, S. Ct. Civ. No. 2015-0007, __ V.I. __, 2015 V.I. Supreme LEXIS 39, at *29-30 (V.I. Nov. 25, 2015) (outlining differences between a traditional writ of mandamus and a supervisory writ of mandamus). To obtain a traditional writ of mandamus, a party must establish that its right to the writ is clear and indisputable, that it has no other adequate means to attain the desired relief, and that the writ is appropriate under the circumstances. *In re LeBlanc*, 49 V.I. 508, 516-17 (V.I. 2008). Because SBRMCOA can simply appeal the Superior Court's June 8, 2015 judgment after entry of a final judgment, it has other adequate means to attain its desired relief. *Id*. at 517 ("[A] petitioner cannot claim the lack of other means to relief[] if an appeal taken in due course after entry of a final judgment would provide an adequate alternative to review by mandamus.") (quoting *In re Briscoe*, 448 F.3d 201, 212 (3d Cir. 2006)).