IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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| **FIRST AMERICAN DEVELOPMENT GROUP/CARIB, LLC.,**<br><br>Plaintiff/Counterclaim Defendant,<br><br>vs.<br><br>**WESTLB AG, individually and as administrative agent for itself and other co-lenders,**<br><br>Defendant/Counterclaim Plaintiff,<br><br>vs.<br><br>**STONE MASONRY, INC., WILLIAM R. NASH, V.I., INC., SPRINGLINE ARCHITECTS, LLC, BIOIMPACT, INC., DEBRA GRAMMER d/b/a ST. JOHN CABINETS AND INTERIORS, MLC HOLDINGS, LLC d/b/a IMPORT SUPPLY, ASCF INTERNATIONAL, LLC, ALRICK S. PARIS d/b/a PARIS DUMP TRUCK SERVICES, WHARTON-SMITH, INC., MO STEEL FABRICATORS & ERECTORS INC., MICHAEL J. LANAHAN LUMBER COMPANY, INC., GRAYDAZE CONTRACTING, INC., SK TILE & PLASTER, LLC, WMK MECHANICAL GROUP, LLC, CAJUN INSTALLATION AND DISTRIBUTING INC., MSI BUILDING SUPPLIES, INC., STEPHEN M. SCHULER d/b/a STEVE SCHULER & SON CONSTRUCTION, ECLECTIC ELECTRIC, INC., R.F. LUSA & SONS SHEETMETAL, INC., KENT SCOTT, KRAUS-MANNING, INC., and MAYER ELECTRIC SUPPLY,**<br><br>Additional Counterclaim and Crossclaim Defendants,<br><br>vs.<br><br>**SB ARCHITECTS, INC., P.W.S. INTERNATIONAL INC., MCM MECHANICAL, RI-TECH** | **CIVIL NO: ST-09-CV-535**<br><br>ACTION FOR BREACH OF CONTRACT, BREACH OF GOOD FAITH AND FAIR DEALING, PROMISSORY ESTOPPEL, FRAUD, INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS AND PROSPECTIVE CONTRACTUAL RELATIONSHIPS, FORCE MAJEURE, IMPOSSIBILITY OF PERFORMANCE, INJUNCTIVERELIEF, AND PUNITIVE DAMAGES<br><br>**JURYTRIAL DEMANDED** |

**CONSTRUCTION, LLC, ISLAND TILE AND MARBLE, LLC, MICHAEL RAISER ASSOCIATES, INC., AUBERGE RESORTS, LLC, PAUL FERRARAS, DONALD BLUMENTHAL, and D&N ELECTRIC COMPANY,**

Additional Crossclaim Defendants.

## MEMORANDUM OPINION

**THIS MATTER** comes before the Court on Plaintiff First American Development Group, Carib LLC's Motion to Stay Execution of Judgment Pending Appeal, filed on March 30, 2012 and its Emergency Motion to Determine Amount of Supersedas Bond, filed on April 19, 2012.[1] The Motion requests that the Court stay all proceedings in this matter pending disposition of First American's appeal to the Supreme Court of the Virgin Islands. The Court will deny the Motion and allow the Marshal's Sale of the property at issue in this matter[2] to proceed on May 2, 2012. In addition, the Court will deny the Emergency Motion to Determine Amount of Supersedas Bond as moot, since it is denying the Motion for a stay.

## FACTS/PROCEDURAL HISTORY

The Court will bypass a recitation of the facts in this case because the procedural and factual history has been thoroughly discussed in previous opinions.[3] In its Memorandum Opinion dated August 24, 2011, the Court granted summary judgment in favor of WestLB on all claims. In addition, on that same date, the Court issued a Judgment and Order of Foreclosure in favor of WestLB against First American in the amount of seventy-three million one hundred forty-five thousand eight hundred sixty-nine dollars and eighty nine cents and further ordered that Defendant WestLB AG's first priority liens shall be foreclosed and the Property shall be sold by the Superior Court Marshal. Subsequently, on February 3, 2012, this Court certified the Judgment and Order of Foreclosure as a final judgment. With a final judgment rendered in the matter, on March 2, 2012, First American filed a notice of appeal with the Supreme Court of the Virgin Islands. First American now seeks a stay of the execution of the Court's judgment pending the appeal.

[1] Susan Bruch Moorehead, Esq., of Smock & Moorehead, is counsel for Plaintiff First American Development Group/Carib LLC. Gregory Hodges, Esq., of Dudley, Topper & Feuerzeig, LLP, is counsel for Defendant WestLB AG.

[2] The properties that are set to be sold at the Marshal's Sale on May 2, 2012 are Parcel Nos. 488D, 488E and 488F Estate Chocolate Hole No. 11, Cruz Bay Quarter, as shown on PWD No. D9-5072-T91 and Parcel Nos. 126 and 272 Estate Chocolate Hole No. 11, Cruz Bay Quarter, as shown on PWD No. A9-72-T67, together with the permanent non-exclusive roadway easement of ingress and egress cited in Roads Easements dated June 29, 1970, recorded June 29, 1970 in Book 11-Y, page 365, no. 4945 and contained in deed dated March 3, 1983, recorded March 23, 1983 in Book 24-J, page 1, no. 976.

[3] *See, e.g., First American Development Group/ Carib, LLC v. WestLB AG*, 2010 WL 155320, (V.I. Super. Ct. March 30, 2010) and *First American Development Group/ Carib, LLC v. WestLB AG*, 2011 WL 3044517, (V.I. Super Ct. June 03, 2011).

## LEGAL STANDARD

A Motion for a Stay of Execution Pending Appeal is governed by Federal Rule of Civil Procedure 62(d). Rule 62(d) states that "If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond."[4]

With respect to the supersedeas bond, the Courts have discretionary power in setting the amount of the bond.[5] Rule 62 does not prevent the Court from issuing an unsecured stay, requiring a partial bond, or some different form of security.[6] A supersedeas bond is normally required where there is some reasonable likelihood of a judgment debtor's inability or unwillingness to satisfy the judgment if affirmed on appeal and where posting adequate security is practicable.[7] It is the "long standing practice" of the Superior Court however, to require the posting of a supersedeas bond in an amount from which a prevailing appellee could recover his or her total judgment, including any costs and fees awarded, plus interest at the legal rate from the date of judgment until the date it is finally paid to him or her."[8]

When evaluating a Motion for Stay Pending Appeal under Rule 62(d), the Court considers four factors. Those factors are (1) whether the stay applicant makes a strong showing that he is likely to succeed on the merits; (2) whether the applicant will suffer irreparable injury absent a stay (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[9]

## DISCUSSION

### A. Likelihood of Success on the Merits

The first factor that the Court must consider is whether the stay applicant makes a strong showing that he is likely to succeed on the merits. First American argues that it can demonstrate a substantial case on the merits of its appeal with the Supreme Court since this Court erred by first finding that First American failed to show a genuine issue of material fact in its complaint against WestLB and by later granting summary judgment in favor of WestLB.

First American contends that it demonstrated a genuine issue of material fact with respect

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[4] Federal Rule of Civil Procedure 62(d); Superior Court Rule 7 states that "the 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."
[5] *James v. Antilles Ins., Inc.*, 27 V.I. 55, 58 (Terr. Ct. 1992).
[6] *Id.* at 58.
[7] *Id.*
[8] *Joseph v. Guardian Ins. Co.*, 32 V.I. 49, 53-54 (Terr. Ct. 1995)
[9] *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Republic of Phillipines v. Westinghouse Elec. Corp.*, 949 F. 2d 653, 658 (3d Cir. 1991).

to the breach of contract claim by showing that WestLB breached its loan agreement with First American by proceeding to advance the funds that were requested by First American, even though certain provisions that were required as a condition precedent prior to making the advances under the loan agreement had not been met. This claim is problematic however, because as was correctly pointed out by WestLB, this claim does not appear in First American's complaint and as a result was not considered by the Court in its August 24, 2011 memorandum opinion granting summary judgment in favor of WestLB that First American is now appealing.

In its memorandum opinion granting summary judgment in favor of WestLB, the Court considered the breach of contract claim as was stated in First American's Complaint. The Complaint alleges breach of contract, stating that WestLB "retained loan proceeds for its own use and delayed and/or did not pay Plaintiff its draws owed under the loan documents." With respect to this claim, the Court found that First American had not shown a genuine issue of material fact as WestLB had shown that it had disbursed all of the funds agreed to in the loan agreement and First American had failed to provide any evidence that WestLB owed it a duty to loan funds beyond the sixty-one million dollars agreed to. The Court still considers the evidence for this claim as lacking. Accordingly, the Court does not believe that First American has made a strong showing that it will succeed on the merits of whether this Court erred in finding that no material issue of genuine fact existed as to the breach of contract claim regarding whether WestLB paid out the loan proceeds as agreed to under the loan agreement; or the other breach of contract claim regarding whether WestLB breached the loan agreement by advancing loan proceeds without certain conditions precedent being met.

In regard to First American's claim that it indeed established a genuine issue of material fact with respect to its breach of the implied duty of good faith and fair dealing against WestLB, the Court is convinced that there is not a strong possibility that this claim will succeed on the merits on appeal. First American argues that WestLB did not use good faith discretion when deciding not to extend additional financing to First American. As the Court alluded to in its memorandum opinion, WestLB fully disbursed funds that it had agreed to disburse under the loan agreement, and it had the right but not an obligation, to disburse additional funds to First American if it so desired. The Negotiation Agreement that First American and WestLB entered into in June of 2009 further underscores this point, stating that WestLB "had no obligation to discuss, negotiate or to agree to any restructuring . . . or to forbear or refrain from exercising or enforcing" its rights and remedies.[10] Accordingly, First American has not shown a strong showing that it is likely to succeed on the merits in its appeal.

With respect to First American's claim that the Court erred in granting summary judgment in favor of WestLB on the foreclosure claim, First American has again not shown a strong showing that it is likely to succeed on the merits on appeal. First American argues that the Court erred in rejecting its impossibility of performance defense, since the deep global recession and resulting crash of the fractional timeshare market was an unforeseen event making First American's performance commercially impracticable. The Court does not foresee a strong likelihood of success on the merits with respect to this claim because as it pointed out in its memorandum opinion, an economic downturn is not an excuse for nonperformance and First

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[10] The Negotiation Agreement, dated June 1, 2009, was offered as Exhibit J to WestLB's July 27, 2010 Motion for Summary Judgment.

American did not, in its Opposition to the Motion for Summary Judgment, properly refer the Court to evidence regarding the impossibility of performance. After having considered the likelihood of success on the merits of the appeal, the Court concludes that this factor weighs in favor of denying the stay.

**B. Irreparable Injury Absent A Stay**

The second factor that the Court must consider is whether the applicant will suffer an irreparable injury absent a stay. First American argues that it will face irreparable injury if WestLB forecloses on the property while its appeal is pending since First American, along with its equity partner, has invested over 30 million dollars in the project. Furthermore, First American cites *Thompson v. Florida Wood Treaters*, standing for the proposition that real estate is considered a unique asset for which money damages are sometimes inadequate; thus, even if the applicant's appeal is unlikely to be successful on the merits, a stay can still be imposed if a supersedeas bond is posted.[11] WestLB argues that First American will not be irreparably harmed if a stay is not issued since First American can prevent the loss of its property by paying the amount owed under the judgment or paying the amount owed under the judgment within six months after confirmation of the sale. The Court agrees with First American that having its rights and interests foreclosed upon a unique asset such as real property could result in an injury that money damages may not compensate for. Accordingly, this factor favors a stay.

**C. Substantial Injuries to Other Parties Interested in the Proceeding**

The third factor that the Court must consider is whether the issuance of the stay will substantially affect the other parties interested in the proceeding. WestLB argues that it will be injured if a stay is imposed because it is expending several thousand dollars per day in maintaining the receivership and paying post judgment interest. First American counters that its posting of a supersedes bond in this matter will secure WestLBs interest.

It is the "long standing practice" of the Superior Court, to require the posting of a supersedeas bond in an amount from which a prevailing appellee could recover his or her total judgment, including any costs and fees awarded, plus interest at the legal rate from the date of judgment until the date it is finally paid to him or her. Here, the Court issued a total judgment in this matter of $73,145,869.89 in favor of WestLB, against First American. According to WestLB, the total amount of any supersedes bond would be $89,334,699.33 once post judgment interest, attorney's fees, and other fees are factored in. First American argues that the 89 million dollar figure is excessive and requests that the Court set a bond in an amount equal to the market value in the foreclosure action, and approve the real property as sufficient security for the bond. Such an arrangement is appropriate, First American reasons, since WestLB's recovery in this action will ultimately be the market value of the property that the property sells for at the Marshal's sale.

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[11] *See Thompson v. Florida Wood Treaters*, 2010 U.S. Dist. LEXIS 82520, * 5 (D.V.I. 2010) ("While the Court finds the Thompsons'appeal to be unlikely to succeed on the merits, the Thompsons do face irreparable injury from a foreclosure sale. Additionally, Wood Treaters' interests can be protected by requiring the Thompsons to file a supersedeas bond. Accordingly, the Court will grant the Thompsons' motion for a stay . . . ."

The Court agrees with WestLB that it will be substantially injured if the Court issues a stay since WestLB will incur several million in additional receivership fees as a result of the continuation of the receivership. The receivership fees in this matter would continue to accrue during the duration of First American's appeal, but would end immediately if the Court did not grant a stay. If the Court granted the stay, in the event that the Supreme Court denied First American's appeal, WestLB would ultimately have to pay for the additional receivership expenses out of the proceeds from the sale of the property. For that reason, this factor favors not granting a stay.

### D. Where the Public Interest Lies

The fourth factor that the Court must consider is where the public interest lies. The Court has stated throughout this Opinion its position that First American will likely not succeed on the merits of its appeal. Accordingly, the Court believes that the public interest is against the granting of a stay since the public does not benefit from a Court system that is backlogged with appeals that lack merit. The public also does not benefit from a property remaining in limbo that could otherwise be placed into the stream of commerce. This factor favors not granting a stay.

## CONCLUSION

After a consideration of the four factors that the Court must consider when deciding whether to grant a stay pending appeal, the Court finds that the majority of the factors weigh against granting a stay. Accordingly, the Court will deny the Motion and allow the Marshal's Sale of the property at issue in this matter to proceed on May 2, 2012. In addition, the Court will deny the Emergency Motion to Determine Amount of Supersedas Bond as moot, since it is denying the Motion for a stay.

DATED: April 30, 2012

**JAMES S. CARROLL III**
Judge of the Superior Court
of the Virgin Islands

**ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE**
Clerk of the Court

**BY:**
**LORI BOYNES-TYSON**
Court Clerk Supervisor 4/30/2012

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Additional Crossclaim Defendants. )

## ORDER

**AND NOW**, consistent with the Court's Memorandum Opinion of the same date, it is hereby

**ORDERED** that Plaintiff First American Development Group, Carib LLC's Motion to Stay Execution of Judgment Pending Appeal is **DENIED**; and it is further

**ORDERED** that Plaintiff First American Development Group, Carib LLC's Emergency Motion to Determine Amount of Supersedas Bond is **DENIED** as moot; and it is further

**ORDERED** that a copy of this Order shall be directed to counsel of record.

DATED: April 30, 2012

**JAMES S. CARROLL III**
Judge of the Superior Court
of the Virgin Islands

**ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE**
Clerk of the Court

**BY:**
**LORI BOYNES-TYSON**
Court Clerk Supervisor 4/30/2012