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IN THE SUPREME COURT OF THE VIRGIN ISLANDS

CARL SIMON, Appellant/Petitioner, v. **THE WARDEN OF THE BUREAU OF CORRECTIONS, CALVIN HERBERT.** Appellee/Respondent.	)	**S. Ct. Civ. No. 2017-0077** Re: Super. Ct. Civ. No. 348/2005 (STX)

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

Considered: October 9, 2018
Filed: December 24, 2018

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

APPEARANCES:

Carl Simon
Lecanto, FL
Pro se,

Andrea Jeanette Gosine, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶1 Appellant Carl Simon appeals from the Superior Court's March 11, 2015 opinion and order denying his petition for writ of mandamus, as well as its August 2, 2017 order denying his motion for relief from judgment. For the reasons that follow, we affirm.

I. BACKGROUND

¶2 On June 1, 2005, Simon filed with the Superior Court a *pro se* document, captioned as a petition for writ of mandamus, which sought back wages from the Bureau of Corrections for work he performed as an inmate at the Golden Grove Adult Correctional Facility. The Superior Court consolidated Simon's petition with similar petitions filed by four other inmates, (J.A. 6 n.2), and after other proceedings not relevant to this appeal, issued a March 4, 2015 opinion and order dismissing all of the petitions on the grounds that none of the inmates met their burden of establishing a lack of other adequate means to obtain release of the funds, and that the amount of compensation they sought was not clear and indisputable. (J.A. 10, 12.) The March 4, 2015 opinion and order were entered one week later, on March 11, 2015. (J.A. 1).

¶3 Nearly four months after the Superior Court entered its dismissal order, Simon filed a motion for relief from judgment on July 27, 2015. In his motion, Simon primarily argued that even though he captioned his filing as a petition for writ of mandamus, the Superior Court should have construed it as a civil action for debt or breach of contract. Almost a year later, on May 16, 2016, Simon filed a motion for a hearing on his motion for relief from judgment.

¶4 In an August 2, 2017 order, the Superior Court construed both motions as a motion under Rule 60(b) of the Virgin Islands Rules of Civil Procedure. However, the Superior Court did not rule on the motion, but instead held that Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure divested it of authority to do so. Simon filed a notice of appeal with this Court on August 31, 2017. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶5 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all

appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's August 2, 2017 order resolved all of the claims in the underlying matter, it is a final judgment within the meaning of section 32(a). *Joseph v. Daily News Publishing Co.*, 57 V.I. 566, 578 (V.I. 2012).

¶6 This Court exercises plenary review of the Superior Court's application of law. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)).

B. Denial of Mandamus Petition

¶7 In his appellate brief, Simon renews his argument that the Superior Court committed error when it construed his June 1, 2005 document as a petition for writ of mandamus instead of *sua sponte* treating it as an action for debt or breach of contract. Simon concedes in his brief that he titled his document "Petition for Writ of Mandamus." (Appellant's Br. 11). Nevertheless, he relies on numerous precedents from both this Court and the Supreme Court of the United States that stand for the proposition that *pro se* pleadings must be held to less stringent standards, and that the substance rather than the caption should govern. *See Moorhead v. Mapp*, 62 V.I. 595, 601 (V.I. 2015); *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

¶8 As a threshold matter, we note that Simon did not file his motion for relief from judgment until July 27, 2015—nearly four months after the Superior Court issued its dismissal order, which was entered on March 11, 2015. Rule 5 of the Virgin Islands Rules of Appellate Procedure provides that the filing of certain post-judgment motions tolls the time for a litigant to file a notice

of appeal, including the filing of a motion for relief from judgment. V.I. R. APP. P. 5(a)(4). However, Rule 5 expressly provides that the time for filing the notice of appeal is tolled by the pendency of a motion for relief from judgment only "if filed within 28 days" after the entry of such judgment. *Id.* Because Simon did not file his motion within 28 days, the filing of the July 27, 2015 motion would have been ineffective to toll the time to appeal from the March 11, 2015 opinion and order; consequently, any such notice of appeal should have been filed on or before May 11, 2015. *See* V.I. R. APP. P. 5(a)(1) (providing that a notice of appeal in a civil case must be filed within 60 days if the government is a party).

¶9 Nevertheless, the Government does not argue in its appellate brief that Simon's challenge to the March 11, 2015 opinion and order is untimely; rather, the Bureau of Corrections responds to that portion of Simon's brief entirely on the merits. (*See* Appellee's Br. 8-12.) Because the timeliness requirement is a non-jurisdictional claims-processing rule, and the Bureau of Corrections has elected to address Simon's argument on the merits, we decline to dismiss this portion of Simon's appeal as untimely. *Etienne v. Etienne*, 56 V.I. 686, 690 n.4 (V.I. 2012).

¶10 Turning to the merits, our ability to consider Simon's claim is severely impaired—if not made impossible—by his failure to include a copy of his June 1, 2005 filing in the Joint Appendix. It is so obvious as to not require citation that this Court cannot determine whether the Superior Court erred in construing the June 1, 2005 document as a petition for writ of mandamus without actually seeing the document. Because Simon bore the burden to provide this Court with a copy of the June 1, 2005 document, *see* V.I. R. APP. P. 24(a), his failure to do so requires this Court to presume that the Superior Court acted correctly when it construed the June 1, 2005 document as a mandamus petition. *See Thomas v. Cannonier*, S. Ct. Civ. No. 2007-0042, 2009 V.I. Supreme LEXIS 33, at *4-5 (V.I. Apr. 7, 2009) (unpublished) (collecting cases).

¶11 Nevertheless, even if we were inclined to overlook this failure, the portions of the record that have been provided to us demonstrate that the Superior Court did not commit error in construing Simon's action as one for mandamus. "Although we have traditionally given *pro se* litigants greater leeway where they have not followed the technical rules of pleading and procedure, self-representation is not a license [excusing compliance] with relevant rules of procedural and substantive law." *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) (internal citations and quotation marks omitted). While this Court has instructed the Superior Court to look beyond the caption of a filing when construing *pro se* pleadings, it has repeatedly cautioned that "it is the substance [of the filing] that controls the legal standard that the Court should apply." *Anthony v. FirstBank V.I.*, 58 V.I. 224, 228 n.5 (V.I. 2013).

¶12 While Simon did not provide this Court with a copy of his June 1, 2005 filing, he did include in the Joint Appendix a document filed on December 23, 2008, titled "Petitioner's Supplemental Response to Respondent's Motion to Dismiss." In that filing, Simon not only again referenced the matter as one for "Writ of Mandamus" in the caption, but more importantly, he expressly stated that

> Petitioner notifies [the] Court, that the instant petition is a request for this honorable [C]ourt to compel government official(s) to perform mandatory or ministerial duties to pay petitioner for work performed by him for [his] employer[, the] Bureau of Corrections.

(J.A. 14.) As this Court has repeatedly held, the very purpose of a mandamus petition is to compel performance of a ministerial duty. *See, e.g.*, *Smith v. Bureau of Corr.*, 64 V.I. 383, 386 (V.I. 2016); *Moorhead*, 62 V.I. at 602; *In re Morton*, 56 V.I. 313, 320 (V.I. 2012). Given this statement in his December 23, 2008 filing, it is clear that the Superior Court did not simply construe Simon's claim as one for mandamus based on the caption he chose, but also looked to the substance of his filing,

which clearly and unambiguously stated that the purpose of his petition was to compel performance of a ministerial duty by the Bureau of Corrections. Consequently, the Superior Court committed no error when it construed the December 1, 2005 filing as initiating an action for writ of mandamus.

C. Denial of Motion for Relief from Judgment

¶13 Simon further argues that the Superior Court erred when it held that Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure divested it of its authority to rule on his motion for relief from judgment under Rule 60(b) of the Virgin Islands Rules of Civil Procedure. Appellate Rule 5(a)(4) provides, in pertinent part, that

> If any party timely files in the Superior Court a motion for judgment as a matter of law; to amend findings or make additional findings; for a new trial; to alter or amend the judgment or order; or (if filed within 28 days) for relief from the judgment or order, the time for filing the notice of appeal for all parties is extended until 30 days after entry of an order disposing of the last such motion; provided, however, that the failure to dispose of any motion by order entered upon the record within 120 days after the date the motion was filed shall constitute a denial of the motion for purposes of appeal.

Both the Superior Court in its August 2, 2017 order, and the Bureau of Corrections in its appellate brief, maintain that denial of Simon's Rule 60(b) motion was compelled by this Court's decision in *Companion Assurance Co. v. Smith*, 66 V.I. 562 (V.I. 2017). In that case, this Court held that, because of Appellate Rule 5(a)(4), timely-filed post-judgment motions for new trial and judgment as a matter of law had been denied by operation of law when the Superior Court failed to rule on them within 120 days of their filing, and that a notice of appeal filed 118 days after the date that those post-judgment motions were "deemed denied for purposes of appeal" was untimely. *Id.* at 570.

¶14 We disagree that Appellate Rule 5(a)(4), as interpreted by *Companion Assurance*, compelled the Superior Court to deny Simon's Rule 60(b) motion; in fact, Simon's motion does not come within the purview of Appellate Rule 5(a)(4) at all. As the Superior Court correctly recognized in its August 2, 2017 order, a motion arising under Rule 60(b) of the Virgin Islands Rules of Civil Procedure is a motion for relief from judgment. (J.A. 34.) However, the plain text of Appellate Rule 5(a)(4) provides, as to motions "for relief from judgment or order," that the motion be "filed within 28 days" to come within the purview of the rule. Moreover, Rule 5(a)(4) does not state that a motion is denied for all purposes after 120 days, but that the Superior Court's failure to rule "shall constitute a denial of the motion for purposes of appeal." Thus, the clear intent of Rule 5(a)(4) is to expedite the appellate process by placing an absolute time limit on the Superior Court's consideration of post-judgment motions that toll the time to take an appeal to this Court.[1]

¶15 In this case, Simon filed his motion for relief from judgment well outside of the 28-day period prescribed in Appellate Rule 5(a)(4). Simon was under no obligation to file his motion for relief from judgment within 28 days, since Rule 60(c) of the Virgin Islands Rules of Civil

[1] This conclusion is further bolstered by the provisions of Rule 5(a)(5) of the Virgin Islands Rules of Appellate Procedure, which provides, in pertinent part:

> The Superior Court shall, if a notice of appeal has been filed, have no authority to grant motions specified in Rule 5(a)(4) that have either been untimely filed or have been deemed denied due to the expiration of the 120-day period provided, but may notify the Supreme Court of its intent to grant such a motion.

V.I. R. APP. P. 5(a)(5) (emphases added). That Appellate Rule 5(a)(5) only states that a Superior Court lacks authority to grant a motion deemed denied due to expiration of the 120-day period "if a notice of appeal has been filed" is impressive evidence that Appellate Rule 5(a)(4) was not intended to preclude the Superior Court from granting such a motion after the 120-day period if a notice of appeal had not been filed.

Procedure provide that such motions "must be made within a reasonable time" or "no more than a year after the entry of the judgment," depending on the reason relief from judgment is sought. However, by choosing to file the motion after 28 days, Simon lost the right to have his motion automatically toll the time to file a notice of appeal from the March 11, 2015 opinion and order pursuant to Appellate Rule 5(a)(4); rather, such tolling became contingent on the Bureau of Corrections electing to waive its timeliness defense, which it ultimately did in this case. Nevertheless, because he filed the motion outside of the 28-day period, the 120-day limit set forth in Appellate Rule 5(a)(4) also did not apply to the motion. Consequently, the Superior Court erred when it held that Appellate Rule 5(a)(4) and *Companion Assurance* precluded it from ruling on Simon's motion for relief from judgment, when such motion was filed beyond 28 days after the entry of the underlying March 11, 2015 opinion and order and therefore was not subject to Appellate Rule 5(a)(4).

¶16 Nevertheless, that the Superior Court erred in this regard does not automatically compel reversal, for "[n]o error or defect in any ruling or order or in anything done or omitted by the Superior Court . . . is ground for granting relief or reversal on appeal where its probable impact, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." V.I. R. APP. P. 4(i). When the Superior Court erroneously denies a motion for relief from judgment on procedural grounds, the denial will nevertheless be harmless if "the Superior Court could have properly denied [the] motion on the merits even if it had not erroneously denied it [on procedural grounds]." *Harris v. Garcia*, S. Ct. Civ. No. 2008-0082, 2010 V.I. Supreme LEXIS 3, at *12 (V.I. Jan. 14, 2010) (unpublished).

¶17 As the Superior Court recognized in its August 2, 2017 order, "Simon is requesting relief from a final order and contending that the Court made a mistake in construing his original petition

as a petition for writ of mandamus." (J.A. 34.) This is precisely the same issue that Simon has raised in this appeal with respect to the March 11, 2015 opinion and order, and which this Court has rejected on the merits for the reasons given earlier. Because a Rule 60(b) motion is construed under a more stringent legal standard than a direct appeal, *accord*, *Ruiz v. Jung*, S. Ct. Civ. No. 2008-0035, 2009 V.I. Supreme LEXIS 43, at *13-14 (V.I. Oct. 19, 2009) (unpublished), a decision of this Court rejecting the same claim on appeal will necessarily compel that a Rule 60(b) motion premised on completely identical grounds also be denied. *Accord, In re L.O.F.*, 62 V.I. 655, 659 n.5 (V.I. 2015) (collecting cases). Therefore, we hold that the Superior Court's error in denying the Rule 60(b) motion pursuant to Appellate Rule 5(a)(4) is harmless.

III. CONCLUSION

¶18 Because the Bureau of Corrections failed to assert that Simon's appeal of the Superior Court's March 11, 2015 opinion and order was untimely, and the time limit imposed by Rule 5(a) of the Virgin Islands Rules of Appellate Procedure is a non-jurisdictional claims-processing rule, any defect as to timeliness has been waived, and this Court may reach the merits. However, because Simon has not provided a copy of his June 1, 2005 filing, and the only relevant document he included in the Joint Appendix supports the Superior Court's decision to treat his action as one for a writ of mandamus, the Superior Court committed no error when it failed to *sua sponte* treat his action as one for debt or breach of contract. And while the Superior Court misinterpreted Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure when it held that it lacked the authority to rule on Simon's motion for relief from judgment even though it had been filed outside of the 28-day period prescribed by Appellate Rule 5(a)(4), the error is ultimately harmless since the motion would have nevertheless properly been denied on the merits. Accordingly, we affirm the Superior Court's March 11, 2015 opinion and order denying Simon's mandamus petition, as well

as its August 2, 2017 order denying his motion for relief from judgment.

Dated this 24th day of December, 2018.

BY THE COURT:

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

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