IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ALLENTON BROWNE, Defendant / Petitioner on Review,	)	**CASE NO. SX-10-CV-155**
v.	)	**PETITION FOR REVIEW**
LAURA L.Y. GORE, Plaintiff / Respondent on Review.	)	

MEMORANDUM

BEFORE THE COURT is Defendant / Petitioner Allenton Browne's Emergency Motion For Extension of Stay. (Browne Emerg. Mot., filed Feb. 16, 2011 (hereinafter "Instant Motion").) Browne sought an extension of a prior order of the Court staying, until February 14, 2011, execution of a Writ of Restitution that the Court had affirmed in a Memorandum Opinion. Plaintiff / Respondent Laura L.Y. Gore has not yet filed a response.[1] Given the urgency of this matter, the Court entered a Summary Order denying Browne's motion and noted that a subsequent memorandum would follow providing the Court's reasoning for denying the stay.[2] (Order, entered Feb. 16, 2011.) That memorandum now follows.

I. BACKGROUND

Gore initiated this action pursuant to the Virgin Islands forcible entry and detainer ("FED") statute, seeking to evict Browne from her property. (Compl., filed Apr. 9, 2010.)

[1] The Court acknowledges that Gore was only served with a copy of Browne's motion on Wednesday, February 16, 2011. (Instant Mot. 4.) Moreover, Browne served Gore by mail. Thus, Gore may not have received a copy of Browne's motion and may not have had occasion to reply. Nonetheless, the Court entered its Order denying a stay having deemed this an instance where ruling without a response or reply was appropriate. *See* LCRi 7.1(e)(3) (applicable via Super. Ct. R. 7).

[2] In the Summary Order, the Court inadvertently noted that a subsequent "order" would follow rather than a memorandum.

This matter came before the Magistrate Division four times between April 2010 and July 2010. (Mem. Op. 14, entered Jan. 28, 2011.) At the initial hearing, only Gore appeared; Browne had not yet been served. *Id.* at 3. At the second hearing, only Browne appeared and thus the Magistrate adjourned the hearing once again. *Id.* Only Gore appeared at the third hearing. *Id.* Based on Gore's testimony and Browne's absence, the Magistrate granted a Writ of Restitution of the property against Browne in favor of Gore. *Id.* The next day, both parties appeared before the Magistrate on a small-claims matter. The Magistrate then reopened the FED proceeding for a fourth time. *Id.* at 3-4. After taking testimony from both parties, the Magistrate found Gore more credible and affirmed restitution of the property to Gore. (Order, entered July 22, 2010.)

Once Browne failed to prevail at the FED proceeding below, he obtained counsel who moved for an emergency stay of enforcement of the judgment. *Id.* at 4. (*See also* Def. Emerg. Mot., filed July 27, 2010.) As basis for staying enforcement, Browne asserted that he had an oral agreement with Gore to purchase her property. (Mem. Op. 4-5.) The Magistrate denied a stay, finding that the arguments and documentation Browne attached to his emergency motion did not contradict the facts found at the FED hearing. Browne then filed a petition for review by a Judge of the Superior Court. After Browne posted a supersedeas bond, the Court conducted a review of facts and law and, in a subsequent Memorandum Opinion, affirmed the Writ of Restitution evicting Browne from the property.

A week after entry of the Memorandum Opinion, Browne filed a third emergency motion seeking a stay "of proceedings to enforce judgment . . . ."[3] (Browne Emerg. Mot. 1,

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[3] Browne's second emergency motion was to this Court seeking to stay enforcement of the Magistrate's decision pending review by this Court. The Court denied that emergency motion as moot since Browne posted the required bond. (Order, entered Jan. 28, 2011.)

filed Feb. 4, 2011.) Browne based that motion on Federal Rule of Civil Procedure 62, citing Rules 62(a) and 62(b) in particular. *Id.* Rule 62(a) mandates an automatic fourteen-day stay of execution in all judgments. Fed. R. Civ. P. 62(a) (applicable via Super. Ct. R. 7). Rule 62(b) allows the Court to "stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any . . . motions." Fed. R. Civ. P. 62(b). As Browne had not filed any of the four motions authorized by Rule 62(b), the Court analyzed his motion pursuant to Rule 62(a). (*See* Order 1 n.1, entered Feb. 4, 2011.) The Court held that an automatic stay was applicable by statute to judgments of the Superior Court and ordered the Marshals Division to "refrain from enforcing the Writ of Restitution until Monday, February 14, 2011." *Id.* at 1-2.

On Friday, February 11, 2011, Browne filed notice with this Court of his appeal to the Supreme Court of the Virgin Islands. (Browne Appeal Not., filed Feb. 11, 2011.) On Monday, February 14, 2011, Browne filed with the Supreme Court an emergency motion to stay pending appeal. (*See* Order 1, *Browne v. Gore*, No. 2011-012 (V.I. Sup. Ct. Feb. 15, 2011).) On Tuesday, February 15, 2011, the Supreme Court denied without prejudice Browne's motion to stay. *Id.* at 2. (*See also* Instant Mot. 1 ("stay of the judgment or order of the Superior Court must be made in the first instance to the Superior Court."); V.I. Sup. Ct. R. 8(b).) Accordingly, on Wednesday, February 16, 2011, Browne filed the Instant Motion seeking "an extension of the Court's Order dated February 4, 2010 granting a stay . . . ." (Instant Mot. 1.) As noted, the Court denied that motion for the reasons stated below.

II. <u>ANALYSIS</u>

Practice in the Superior Court is governed in the first instance by the Rules of the Superior Court and then, to the extent not inconsistent therewith, the Federal Rules of Civil Procedure and the Local Rules of the District Court of the Virgin Islands. Super. Ct. R. 7. The

Superior Court Rules do not provide for a stay of execution of a judgment. Accordingly, the Court turns to the Federal Rules for that authority. Federal Rule of Civil Procedure 62 directs the instances when courts may stay enforcement of judgment. Five such instances are generally applicable to judgments of the Superior Court.[4]

First, as noted above, judgments in all matters except actions for injunctive relief or receivership are stayed automatically for fourteen days from the date of entry of the order. Fed. R. Civ. P. 62(a). Second, upon filing post-trial motions challenging judgment pursuant to Rules 50, 52(b), 59, or 60, the Court may stay enforcement but only "[o]n appropriate terms for the opposing party's security." Fed. R. Civ. P. 62(b). Third, the court may stay enforcement in appeals from the grant or denial of injunctive relief. Fed. R. Civ. P. 62(c). Fourth, in all other appeals, the court may stay enforcement only upon the posting of a supersedeas bond. Fed. R. Civ. P. 62(d). Finally, the court may stay enforcement in cases involving multiple claims or parties until judgment involving the remaining parties or claims. Fed. R. Civ. P. 62(h).

As noted, the Court's prior stay was granted per the fourteen day automatic requirement of Rule 62(a). In Instant Motion, Browne now "respectfully requests an extension of the Court's Order . . . granting a stay . . . ." (Instant Mot. 1.) Browne has not, however, indicated what authority the court has to grant another stay. Browne cited no authority for extending the "automatic stay" and case law appears to hold to the contrary. *See, e.g.*, *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 875 F. Supp. 165, 182 (S.D.N.Y. 1994) (denying request to extend automatic stay for twenty additional days) ("The reason defendants urge me to ignore the clear dictates of the Federal Rules is simply that they wish the timing for the posting of the

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[4] The other basis provided for by Rule 62 for staying enforcement of a judgment generally would not apply to cases brought before the Superior Court. *See* Fed. R. Civ. P. 62(e) (stay on appeal by United States); Fed. R. Civ. P. 62(f) (stays involving lien on debtor's property follow state court procedures). Rule 62(g) preserves the powers of appellate courts to stay proceedings pending appeals. Fed. R. Civ. P. 62(f).

supersedeas bond to coincide with the thirty days within which they may file their notice of appeal."); *United States v. One 1962 Ford Galaxie Sedan*, 41 F.R.D. 156, 158 (S.D.N.Y. 1966) ("The automatic stay becomes ineffective after 10 days from the entry of the judgment . . . ."). Accordingly, the Court cannot extend the length of the automatic stay.

Likewise, Rule 62(h) is inapplicable here because this matter does not involve multiple parties or multiple claims but was instead brought by one party against another as a summary proceeding. So Rule 62(h) would not authorize the Court to grant the Instant Motion.

In addition, Rule 62(b) is inapplicable here. "[T]he court may stay execution of a judgment—or any proceeding to enforce it—pending disposition of any . . . motion[]." Fed. R. Civ. P. 62(b). Here Browne has not filed any motions to alter or amend the Court's judgment, pursuant to Rule 59, for example, or for relief from judgment, pursuant to Rule 60. *See* Fed. R. Civ. P. 62(b). Browne did state in his motion that he "intends to exercise his right to address . . . discrepancies which would require the filing of various motions." (Instant Mot. 3.) This is his second motion asserting that basis and yet no motion has been filed. (*See* Browne Emerg. Mot. 3, filed Feb. 4, 2011 ("Brown [sic] intends to exercise his right to address these discrepancies which would require the filing of various motions.").) Stays pursuant to Rule 62(b) are not automatic but rather discretionary with the Court and require the posting of security. Browne has neither posted security nor filed a motion. Accordingly, a stay may not be granted pursuant to Rule 62(b).

As Browne has filed notice of appeal, Rule 62(d) would apply here. Rule 62(d) states: "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." Fed. R. Civ. P. 62(d). "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." *Id.*

Again, however, Browne has not posted a bond. Thus, the Court grant Browne a stay pursuant to Rule 62(d). Instead, it appears that Browne is seeking to enjoin enforcement of judgment pursuant to Rule 62(c).[5]

Rule 62(c) provides that, "[w]hile an *appeal is pending from* an interlocutory order or final *judgment that grants, dissolves, or denies an injunction*, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c) (emphasis added). Neither the Magistrate nor this Court granted an injunction or denied an injunction in this matter. Moreover, Browne has not moved for an injunction against enforcement of the writ of restitution. Nevertheless, the relief he requests here accords more so with a motion to enjoin enforcement of the writ of restitution. "[T]he

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[5] The Court notes a lack of clarity as to which subsection of Rule 62 would apply here. The only clearly applicable subsection here is Rule 62(d) since Browne filed the Instant Motion subsequent to filing a notice of appeal. Browne did not post a bond, however, and to summarily deny his motion on that basis would have been to ignore the substance of his arguments and the reality of the circumstances at hand. When Browne filed the Instant Motion, the Marshals were at the property executing the Writ of Restitution, a stay from the Supreme Court having been denied. Accordingly, the Court finds that Browne appeared to be requesting an injunction rather than a stay, per se. Although Rule 62(c) by its terms applies only to the grant or denial of injunctive relief, a few courts have analyzed motions to stay as a motion for an injunction pursuant to Rule 65(c). *See, e.g., Thomas v. Phila. Hous. Auth.*, 875 F. Supp. 272 (E.D. Pa 1995) (citing Rule 62(c) and balancing injunctive relief factors in an appeal of an eviction proceeding). In addition, a few courts have held that the posting of a monetary bond under Rule 65(d) would be inadequate where a stay would result in a property being further deprived of possession pending the appeal.

> Courts which have restricted rule 62(d) to money judgments recognize that the purpose behind the posting of a bond is to protect[ ] the prevailing plaintiff from the risk of a later uncollectible judgment and compensate[ ] him for delay in entry of the final judgment. In the non-money judgment context, the posting of "a bond may not adequately compensate a non-appealing party for loss incurred as a result of the stay of a non-money judgment. For example, one court found that a supersedeas money bond would not ensure adequate compensation to the prevailing party for the lost use and lost income derived from a seized fishing vessel. Similarly, the posting of mere money by Hyatt in this case cannot ensure that 35 Acres would be adequately compensated for the lost possession and use of its property and lost income from operation of the Hotel during the pendency of an appeal.

Gov't Guar. Fund of the Republic of Finland v. Hyatt Corp., 167 F.R.D. 399, 400-01 (D.V.I. 1996) (quotations and citations omitted) (alterations in original). Accordingly, the Court views Browne's motion to stay as seeking an injunction on appeal pursuant to Rule 62(c), analysis for which incorporates the balancing of the factors required for issuance of an injunction under Rule 65.

function of the motion, not the caption, dictates which Rule applies." *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988) (citation omitted). Accordingly, though not so styled, the Court finds that Browne appears to be moving for a stay pursuant to Rule 62(c). *See, e.g.*, *In re Lewis Jones, Inc.*, 369 F. Supp. 111, 115-16 (E.D. Pa 1973) ("a party seeking to avoid any impairment in its ability to realize the benefit of a successful appeal relating to the disposition of a subsidiary portion of the proceedings before the Court must seek to stay the progress of the proceedings by obtaining a stay or injunction pending appeal."). For the reasons below, however, the Court does not find that Browne satisfies the requirements for a stay.

"A stay pending appeal has been described as an extraordinary remedy." *Berne Corp. v. Gov't of the Virgin Islands*, No. 2000-141, 2008 WL 4371518, *2 (D.V.I. Sept. 18, 2008) (citing *United States v. Cianfrani*, 573 F.2d 835, 846 (3d Cir. 1978)) (remaining citations omitted). To determine whether to grant a stay pending appeal, the Court must weigh four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured 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.

Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991) (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). *Accord Rojas v. Two/Morrow Ideas Enterprises, Inc.*, No. 2008-071, 2009 WL 321347, *2 (V.I. Sup. Ct. Jan. 22, 2009) (unpub.) (citing *Hilton*).

a. Success on the Merits

In the present motion, and in addition to reasserting his likelihood of success on the underlying merits of this case, Browne asserts at four new grounds[6] upon which he expects to prevail on appeal: 1) *pro se* status prior to filing his petition for review of the Magistrate's decision; 2) absence at the FED hearing when the Writ of Restitution was granted; 3) lack of advance notice that the FED proceeding would be reopened when he appeared in Court the next day; 4) denial of due process when this Court entered its Memorandum Opinion without allowing him the "benefit of briefing and presenting the issues being appealed . . . ." (Instant Mot. 2.) The Court will consider each basis below.

i. Pro se Status

As noted above, this action was brought as an FED proceeding. *See generally* V.I. Code Ann tit. 28, § 781 et. seq. (1996). "FED complaints are summary actions to determine rights of peaceable possession of real property." *Estate of Thomas Mall, Inc. v. Terr. Ct. of the V.I.*, 923 F.2d 258, 264 (3d Cir. 1991). The scope is "very limited." *Id.* Because of their summary nature, FED proceedings are now heard by the Magistrate Division of the Superior Court. *See* V.I. Code Ann. tit. 4, § 123(a)(6) (Supp. 2010). Unlike matters in the small claims division, representation by counsel is permitted in FED proceedings. Here both parties proceeded *pro se* below, however. Browne now alludes to his *pro se* status as a basis for relief. (Instant Mot. 2. (Browne "was not represented by Counsel during either the pendency of the FED summary action for eviction or the action for debt filed by [Gore].").) Therefore, "[u]nder the circumstances, [Browne] intends to exercise his right to address these discrepancies which

[6] The Court will discuss in detail here only those arguments Browne asserts for the first time this motion and declines, then, to re-review extensively those arguments previously addressed in the Memorandum Opinion.

would require the filing of various motions." *Id.* at 3. Browne has not presented to the Court, however, any explanation how his *pro se* status at the FED hearing mitigates in favor of him prevailing on appeal. Browne has not, for example, claimed disadvantage in his own self-representation in comparison to Gore. Browne has not alleged that Gore, for example, was an attorney or well-versed in the law and therefore he was on unequal footing at the hearing. Moreover, Browne has not alleged bias of the Magistrate. Courts must do substantial justice particularly where *pro se* litigants are involved. *See, e.g.*, Fed. R. Civ. P. 8(e); Super. Ct. R. 62(c). Therefore, courts construe *pro se* pleadings and their arguments liberally, "apply[ing] the applicable law, irrespective of whether the pro se litigant has mentioned it by name." *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003) (citation omitted). Accordingly, the Court cannot conclude that Browne is likely to succeed on the merits of this argument.

ii. Absence at FED Hearing

Next Browne argues that he "was not present at the eviction hearing in which the Magistrate entered the Order of eviction against him." (Instant Mot. 2.) This argument too fails because it is foreclosed by statute. The FED statute authorizes that, "[i]n the event of the failure of the defendant to appear and show cause, *judgment shall be rendered against him by default*." V.I. Code Ann. tit. 28, § 785 (1996) (emphasis added). Here Browne "had notice of the first court date because he sent a letter . . . to the Magistrate requesting a continuance because he was off-island at the time." (Mem. Op. 3 n.3.) When Browne appeared at the second court date, the Magistrate informed him that the FED hearing would be adjourned until July 20, 2011. *Id.* at 3. Thus, Browne had notice of the date and time for the third FED hearing. His absence at that hearing was sufficient, in and of itself, to grant a writ of restitution of the property to Gore. "It is well settled in this Circuit that entry of a default judgment is left primarily to the discretion of the [trial] court." *Hritz v. Woma Corp.*, 732 F.2d 1178, 1180 (3d Cir. 1984). Whenever possible, however, cases should be disposed of on the merits. *Id.* at 1181. (citations omitted). Accordingly, the next day when Browne appeared in Court, the Magistrate vacated default and reopened the FED proceeding. Thus, the Court cannot find that Browne was prejudiced when default was vacated. Accordingly, the Court finds Browne is unlikely to succeed on this basis as well.

iii. Lack of Notice of Reopening of FED Hearing

Next, Browne claims that he was disadvantaged when, "[w]ithout prior notice, the FED summary action for eviction was revisited by the [Magistrate] during the [small-claims] action for debt." (Instant Mot. 2.) Browne also asserts that the Magistrate reopened the FED action only "to accommodate [Gore] who apparently resides off island." *Id.* In the Order affirming the Writ of Restitution, the Magistrate did indicate she had "re-open[ed] the matter since [Gore] resides on the mainland and would be prejudiced if she had to return." (Order 1, entered July 22, 2010.) However, when the parties appeared in Court on July 21st for the small-claims matter, [7] the Magistrate inquired into Browne's absence at the FED proceeding the day before. Browne had telephoned the court to explain that an emergency delayed his attendance. (Order 1, entered July 22, 2010.) When Browne appeared in court the next day, the Magistrate informed Browne that Marshals had seen him at court before the FED hearing was called, yet Browne then absented himself. Eventually, Browne begrudgingly admitted to having been at court, but claimed automobile difficulties caused him to arrived after the FED proceeding concluded. The Magistrate disbelieved him, instead suspecting an attempting to delay eviction.

[7] While a formal transcript was not prepared nor requested by either the party prior to the notice of appeal being filed, the Court previously listened to the recordings of the four hearings in this matter. The Court is unable, however, to provide citations a written transcript at this time.

The Magistrate expressed concern that Browne might wait until Gore returned to the mainland before attempting to vacate default. Accordingly, the Magistrate decided to reopen the FED proceeding to allow Browne an opportunity to be heard even though he had not taken any steps to vacate default. When Browne objected, claiming to be unprepared to address the FED matter, the Magistrate noted that Browne would have had to have been prepared to proceed the day prior—if he was, in fact, delayed. Thus, his documentation and materials would already be assembled. Thus, in fairness to Browne, the Magistrate adjourned reopening the FED matter until that afternoon to allow Browne time to retrieve his documentation.

The Court cannot conclude that the actions of the Magistrate here denied Browne any opportunity to be heard or to prepare a defense. "[J]udges have no obligation to act as counsel or paralegal to *pro se* litigants." *Pliler v. Ford*, 542 U.S. 225, 231 (2004). Moreover, "the Constitution [does not] require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course." *Id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183-84 (1984)). Browne had prior knowledge of the FED hearing scheduled for July 20th and the small-claims matter scheduled for July 21st. It's not unreasonable to expect Browne to come to Court prepared to discuss the related FED proceeding he missed the day before. Browne is not claiming he happened to be in Court at the same time and at the same place as Gore and the Magistrate forced them to re-litigate the FED proceeding. Here Browne knew he had to appear on Gore's small claims action for debt. Thus, the Court cannot conclude—particularly without any showing from Browne—that by reopening the FED proceeding in the afternoon session, a day after the scheduled date for the FED hearing, the Magistrate did not do substantial justice by both parties. Accordingly, the Court does not believe that Browne will succeed on this basis.

iv. Violation of Procedural Due Process

Next, Browne argues that he was prejudiced by the Court failing to provide a briefing schedule before considering his petition for review. In essence what Browne asserts here is a violation of his procedural due process rights. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1914)). "It is axiomatic[, however,] that the degree of procedural protection required by the Due Process Clause is proportional to the extent of the deprivation." *Cinea v. Certo*, 84 F.3d 117, 121 (3d Cir. 1996).

At the time Browne petitioned for review of the Magistrate's Order, the Superior Court had not adopted procedures for review of magistrate decisions. *See In re: Amend. to R. of Super. Ct.*, SX-09-MC-029, entered Dec. 31, 2009 (leaving Rule 322 "Review of Magistrate Decisions / Appeals" intentionally blank). Instead the Court adopted interim procedures but did not provide specific steps governing the review process. *See In re: Order Establishing Interim Pro. For Review of Magis. Decisions*, SX-09-MC-030, entered Dec. 31, 2009. On November 23, 2010, after Browne had filed his notice of appeal of the Magistrate's Order, the Superior Court amended Rule 322 to provide procedures for reviewing decisions of the Magistrate Division. *See In re: Order Amend. Rules Governing Rev. of Magis. Decisions*, SX-10-MC-030, entered Nov. 23, 2010. Neither the interim procedures adopted nor current Rule 322 mandate filing a brief on appeal. "[A]n individual's due process right to an opportunity to be heard can be preserved by courts or administrative bodies in many different ways. The constitutional requirements of due process are not technical, nor is any particular form of procedure always necessary to provide due process." *Elliot v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996). Thus, the Court may now "waive the need for briefs or excuse any party from filing briefs . . . if the issue presented for review is an issue of law . . . and the issues may be determined based on the case record." Super. Ct. R. 322(i)(B). Without citing supporting authority, Browne now argues that he was denied due process when the Court decided his petition for review without allowing opportunity to brief the issues.

It is correct that the Court never waived filing of briefs in this matter. But it is also correct that the Court never required filing of briefs either. It is also correct that after instituting this appeal, Browne, now represented by counsel, took no steps to prosecute his appeal other than objecting to, and then later posting, a supersedeas bond. Browne's attorney would have had notice of the Superior Court's adoption of Rule 322, yet approximately sixty days passed between adoption of Rule 322 and entry of the Court's Memorandum Opinion. Browne never moved for a briefing schedule or contacted the Court regarding his appeal. Instead Browne now alleges for the first time denial of procedural due process. The irony of that statement is belied by the almost excessive amount of letters, faxes, replies, responses, and telephone calls from Gore, a *pro se* litigant, inquiring into this matter. "An individual's due process right to an opportunity to be heard does not ensure a hearing in all contexts. To so require would grind judicial and administrative gears to a screeching halt." *Elliot*, 98 F.3d at 60.

The Court acknowledges its omission, once Rule 322 went into effect, in not providing the parties with a briefing schedule. However, the Court finds that that error was harmless here. Browne is not arguing for a reversal or modification of existing law. His claims do not involve complicated questions of law. In sum, Browne asserted on appeal, and again in this motion for stay, that the Magistrate erred below by not transferring this issue to the civil docket "'since in summary proceedings under forcible entry and detainer statutes, the issues are restricted to disputes that do not raise a colorable claim of rights under a lease agreement . . . .'" (Instant Mot. 3 (quoting *Floyd v. Hoheb*, 38 V.I. 62, 64 (Terr. Ct. 1997)).) The Court cannot find that Browne was prejudiced by the lack of a briefing schedule. What's more, Browne is not asserting that he was forbidden from filing a brief. Instead Browne overlooks those motions he did file to the Magistrate and then to this Court wherein he argued the substance of his position. (*See, e.g.*, Browne Waive Supersedeas Bond Mot., filed Sept. 29, 2010; Browne Emerg. Mot. Pending App., filed Aug. 10, 2010; Browne Reconsideration Mot., filed Aug. 2, 2010; Browne Emerg. Mot., filed July 27, 2010.) Thus, the Court cannot find that Browne was denied procedural due process here. Accordingly, Browne is unlikely to succeed on this basis as well.

v. Success on Underlying Merits

Lastly, Browne notes again in the Instant Motion his likelihood of prevailing on the substantive merits initially appealed from. In its Memorandum Opinion, however, the Court extensively examined those arguments. (*See generally* Mem. Op. 8-14.) The Court does note, however, that Browne mostly disregards that analysis, as well as binding Virgin Islands Supreme Court precedent that holds that "jurisdiction of a [FED] proceeding is not, apart from statute, ousted by a *mere averment* . . . of ownership of the land . . . . The [magistrate] may proceed until it appears that the question involved is in fact one of title or a complicated case of the right to possession." *V.I. Port Auth. v. Joseph*, 49 V.I. 424, 430-31 (2008) (emphasis added) (alterations in original) (quoting *C.M.L., Inc. v. Dunagan*, 904 F.2d 189, 191 (3d Cir.

1990)). Instead, Browne merely avers once more that he has a colorable claim and cites to persuasive authority which notes the disallowance of colorable defenses in FED proceedings. (Instant Mot. 3 (citing *Floyd v. Hoheb*, 38 V.I. 62 (Terr. Ct. 1992).) In *Floyd*, however, "[t]he question presented in [that] action for injunctive relief [wa]s whether a property owner of temporary emergency housing facilities may disregard the housing laws and evict an occupant by self-help." *Floyd*, 38 V.I. at 63. *Floyd* is not analogous here and is trumped by binding precedent from our Supreme Court which required the Magistrate to "hear[] evidence in the FED action until [the Magistrate] determined whether [Browne's] defenses were bona fide or colorable." *V.I. Port Auth*, 49 V.I. at 430. Browne has not shown how the Magistrate failed in her adherence to that duty. Instead he again disagrees with the Magistrate's findings of fact. If "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C*, 470 U.S. 564, 574 (1985). No appellate court can "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court." *Id.* at 573. Accordingly, based on the foregoing discussion, the Court cannot find that Browne is likely to succeed on the merits on appeal.

b. Irreparable Harm to Browne / Substantial Injury to Gore

In addition to demonstrating success on the merits, Browne must show irreparable harm. "Certainly the fact that the decision on the stay may be dispositive of the appeal in some cases is a factor that an appellate court must consider, but that alone does not justify pretermitting an examination of the nature of the irreparable injury alleged and the particular harm that will befall the appellant should the stay not be granted." *Republic of the Philippines*, 949 F.2d at 658. The Court is not heartless to the stress, anxiety, and utter disruption attendant to an eviction. Clearly Browne's eviction would visit harm, but that harm is not irreparable. Irreparable harm refers to injuries "that cannot be adequately measured or compensated by money . . . ." Black's Law Dictionary 856 (9th ed. 2009). Should Browne succeed on appeal, this matter would be remanded for further findings of fact. Assuming, *arguendo*, Browne could establish a colorable claim to possession of the property, he could also seek restoration to the premises, damages for wrongful eviction, and commence his own action to quiet title.

In contrast, however, Gore stands to suffer substantially here. She commenced this FED action in April 2010. Gore recently informed the Court that "Browne has refused to make any payments since his last payment on July 20, 2010 . . . . As a result of his failure to pay, I am forced to pay two mortgages, which greatly handicaps my ability to take care of my family and meet my day-to-day living expenses—not to mention the irreparable harm to my credit." (Gore Appeal Notice Resp. 1, filed Feb. 14, 2011.) Here almost seven months have passed since Browne appealed the Magistrate's decision. Browne now seeks to stay this matter even longer for an unspecified length of time, and without even proffering any form of security. Whether one considers it a lease purchase agreement, a quasi-mortgage, or rent, it is disingenuous for Browne or any person to remain in possession of someone else's property without tendering payment for the use of that property. Browne's failure to make any sort of payment, even a nominal one, throughout the pendency of this petition for review belies any assertion of injury and underscores the harm to Gore. Moreover, "the posting of mere money by [Browne] in this case cannot ensure that [Gore] would be adequately compensated for the lost possession and use of [her] property and lost income from operation of the [property] during the pendency of an appeal." *Gov't Guar. Fund of the Republic of Finland v. Hyatt*

Corp., 167 F.R.D. 399, 401 (D.V.I. 1996). Accordingly, balancing the harms here, the Court finds the injury to Gore substantially outweighs any harm to Browne.

c. *Interest of the Public*

Here the Court finds that public interest favors possessors of property paying for use of property and owners of homes paying their mortgages. In a response to Browne's notice of appeal, Gore noted that she is now paying on two mortgages and expressed concern that Browne's appeal might force her into foreclosure. (Gore Appeal Not. Resp. 2.) Neither Gore nor Browne would be served by the property going into foreclosure due to Browne's failure to pay Gore and Gore's income being stretched too thin. Furthermore, the mortgage lender for the property at issue here would also not be served by a foreclosure. Foreclosures are costly measures of last resort required because of a home owner's inability or unwillingness to pay. Foreclosures also consume limited judicial resources. Additionally, the public interest is not served by home owners being deprived of her property, or losing property in foreclosure, because of the pendency of civil action. Accordingly, the Court finds that public interest, given the facts of this matter, weighs in favor of denying the stay.

III. CONCLUSION

For the reasons stated above, the Court finds that Browne is unlikely to succeed on any of the grounds asserted in his motion. In addition, the Court finds that Browne is unlikely to succeed on the merits of his appeal. Furthermore, the Court finds the balance of the harms here weighs in favor of Gore and against Browne and therefore against granting the stay. Lastly, given Browne's refusal to continue to pay for his use of the property and the strain on Gore, as well as her assertion of a risk of foreclosure, the Court finds that the public interest weighs against granting a stay. Accordingly, the Court entered an Order on February 16, 2011, denying a stay on appeal.

DONE AND SO ORDERED this 18th day of February, 2011.

DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: ______
Court Clerk Supervisor

Dated: 2/18/11