IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

BALBO CORPORATION DBA BALBO CONSTRUCTION CORP.	**Plaintiff**)	CASE NO. ST-09-CV-0000399
	)	ACTION FOR: DEBT AND FORECLOSURE
vs	)	
ENIGHED CONDOMINIUMS, LLC BP SIRENUSA SPV, INC. BANCO POPULAR DE PUERTO	)	
	Defendant	

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: CHARLES S. RUSSELL, JR., ESQ.
GREGORY HODGES, ESQ.

Please take notice that on February 09, 2011 a(n) MEMORANDUM OPINION AND ORDER dated February 07, 2011 was entered by the Clerk in the above-entitled matter.

Dated: February 09, 2011

Venetia H. Velazquez, Esq.
Clerk of the Court

Donna Donovan

DONNA DONOVAN
ACTING COURT CLERK SUPERVISOR

FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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BALBO CORPORATION d/b/a BALBO CONSTRUCTION CORPORATION, Plaintiff,	CIVIL NO. ST-09-CV-399
v.	ACTION FOR DEBT AND FORECLOSURE OF LIEN
ENIGHED CONDOMINIUMS, LLC, BP SIRENUSA SPV, BP SIRENUSA INTERNATIONAL, LLC, BANCO POPULAR DE PUERTO RICO, HULKE CONSTRUCTION COMPANY VI, LLC, FLAMBOYANT REALTY SERVICE, INC., WHITECAP INVESTMENT CORP. d/b/a PARADISE LUMBER, BOB'S ELECTRIC, INC., and FRANCIS S. WOODS, Defendants,	
v.	
WILLIAM R. NASH, V.I., INC., HI CONSTRUCTION, LLC, and KRAUS-MANNING, INC., Counterclaim and Cross-Claim Defendants.	

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CARROLL, Judge

MEMORANDUM OPINION

(Filed: February 7, 2011)

Defendant William R. Nash (V.I.), Inc.,[1] seeks discovery from Defendants BP Sirenusa SPV ("BP SPV") and BP Sirenusa International ("BP International") so that it may effectively oppose Defendant Banco Popular de Puerto Rico's Motion for Summary and Default Judgment. Banco Popular argues that Nash cannot obtain depositions of these entities without subpoenaing them, that the discovery deadlines have passed, and that Nash cannot seek discovery in order to pierce the corporate veil because Nash did not raise that as a claim. Because piercing the corporate veil is a remedy encompassed within Nash's affirmative defense of merger, and not a claim itself, it was properly raised in the Answer. The Court will extend the discovery deadlines and will grant Nash's Motion to Continue. However, because Nash must subpoena defaulted defendants, the Court will deny Nash's Motion to Compel.

RELEVANT PROCEDURAL HISTORY

This action originated as an action to foreclose a construction lien. Plaintiff Balbo Corporation d/b/a Balbo Construction Corporation[2] alleges that Defendant Enighed Condominiums[3] failed to pay it for the construction services it provided, and Balbo states that it has recorded a lien against the subject property. Banco Popular holds a mortgage on the subject property, and has counter- and cross-claimed for foreclosure. Nash also holds a construction lien on the property.

On April 27, 2010, Banco Popular filed a Motion for Summary and Default Judgment, which has not yet been decided. On May 27, 2010, Nash filed an Opposition to the Motion for Summary Judgment, arguing that Banco Popular's foreclosure claim is barred by the merger doctrine and requesting more time in which to complete discovery on this issue. By Order dated November 24, 2010, the Court construed that Motion as a Motion to Continue under Rule 56(f) of the Federal Rules of Civil Procedure.[4] In the same Order, the Court directed Nash to inform the Court whether the Motion to Continue was moot, as the discovery deadlines have now passed.

Nash complied with the Order, informing the Court on December 8, 2010, that the Motion to Continue was not, in fact, moot. Nash states that it has been unable to depose BP SPV and BP International and so, although the discovery deadlines have passed, it is unable to

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[1] Nash is represented in this action by Charles S. Russell Jr., Esq., of Moore Dodson & Russell, P.C. BP SPV and BP International have not appeared in this action. Banco Popular is represented by Gregory Hodges, Esq., of Dudley, Topper & Feuerzeig, LLP.

[2] Balbo is represented in this action by Stylish Willis, Esq.

[3] The Clerk entered Enighed's default on November 9, 2009.

[4] The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure apply to matters before this Court whenever they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

respond to the Motion for Summary Judgment. On January 5, 2011, Nash filed a Renewed Motion to Compel[5] the depositions of BP SPV and BP International, and included within that Motion a request to extend the deadline for fact witness depositions.

Banco Popular opposes the Motion to Compel, raising a number of arguments. First, Banco Popular notes that the parties are beyond the deadline for all discovery.[6] In addition, it states that BP SPV and BP International have effectively defaulted. Therefore, it argues, Nash cannot simply notice them, but instead must subpoena them in order to obtain their depositions, just as it would with a non-party. Finally, Banco Popular argues that Nash may not obtain discovery necessary to bolster its request that the Court pierce the corporate veil because Nash did not raise a veil-piercing claim in its Answer or in any cross-claim.

DISCUSSION

I. NASH NEED NOT ALLEGE "PIERCING THE CORPORATE VEIL" AS A SEPARATE CLAIM.

Banco Popular argues in its Opposition to Nash's Renewed Motion to Compel that the discovery Nash seeks is irrelevant to the claims and defenses raised in the pleadings. Banco Popular is correct that Rule 26(b)(1) of the Federal Rules of Civil Procedure permits discovery only on those matters that are "relevant to any party's claim or defense." In this case, however, the Court finds that the discovery sought is relevant.

In Nash's Answer to Banco Popular's Cross-Claim, Nash raises a number of defenses, including that Banco Popular's cross-claim for foreclosure is barred "by the doctrine of merger,"[7] and "by the maxims of equity, including but not limited to the doctrines of unclean hands, laches, waiver and estoppel." To prove that Banco Popular's claim is barred by the doctrine of merger, Nash states that it must obtain discovery to prove that Banco Popular is only nominally a separate entity from BP International, an entity of which Banco Popular is the sole member.[8] Banco Popular states that this veil-piercing request should have been raised as a claim when Nash filed its Answer. However, piercing the corporate veil, in the specific context of this case, is not a separate claim for relief. Instead, it is a remedy encompassed within Nash's merger and equity defenses.

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[5] The Court denied Nash's earlier Motion to Compel on November 22, 2010, because Nash had failed to document the parties' efforts to meet and confer, as required by the Local Rules. Nash has now complied.

[6] According to the Court's January 26, 2010 Order, the parties were to complete all discovery on or before October 15, 2010.

[7] According to Nash's merger defense, BP International, which holds title in fee simple to the property, is an entity only nominally separate from Banco Popular. Nash intends to request that the Court pierce the corporate veil and find that they are one entity. If the Court were to find that Banco Popular and BP International are not separate entities, Nash argues, that would cause Banco Popular's first priority mortgage to merge into the title in fee simple held by BP International.

[8] According to Banco Popular, BP SPV has merged into and with BP International.

Piercing the corporate veil "is 'an equitable remedy whereby a court disregards the existence of the corporation.'"[9] "[U]nder both state and federal common law, abuse of the corporate form will allow courts to employ the 'tool of equity' known as veil-piercing, i.e. disregarding the corporate entity to impose liability on the corporation's shareholders."[10] Piercing the corporate veil, while sometimes raised as a claim in a complaint, "is not technically a mechanism for imposing 'legal' liability, but for remedying the 'fundamental unfairness [that] will result from a failure to disregard the corporate form."[11]

In this case, Nash is not seeking to hold Banco Popular liable, but rather to defend against what it alleges would be an injustice should Banco Popular proceed with its foreclosure claim. Piercing the corporate veil is not, in and of itself, a defense. Therefore, it need not have been raised in the Answer. Instead it is an equitable tool with which Nash will seek to prove its affirmative defenses of merger and equity.

The Court need not determine at this time whether it will pierce the corporate veil. Instead, it only decides that the discovery sought by Nash to bolster its veil-piercing request is relevant to its defenses of merger and equity.

II. NASH'S RENEWED MOTION TO COMPEL WILL NOT BE GRANTED BECAUSE NASH HAS FAILED TO SUBPOENA THE INTENDED DEPONENTS.

Although Nash's intended discovery is relevant to its defenses, Nash cannot obtain those depositions simply by noticing BP SPV and BP International. Both parties have effectively defaulted. Therefore, Nash must subpoena those entities if it wishes to take their depositions.

Banco Popular refers to several cases on this point that the Court finds persuasive. In *Balzac v. Capital Recovery Associates, Inc.*,[12] the court observed that few cases have addressed the question of how to seek discovery from defaulted parties. It decided that defaulted parties must be treated as non-parties for the purposes of discovery because defaulting parties "can reasonably be regarded as having given up most of the benefits that status as a party confers."[13] Regardless of the reason why a party would decide to choose this path, "it would not seem fair to force such defendant to participate in an action to a greater degree than could be required of

[9] *Matheson v. Virgin Islands Cmty. Bank, Corp.*, 297 F. Supp. 2d 819 (D.V.I. 2003) (quoting *Trs. of the Nat'l Elevator Indus. v. Lutyk*, 332 F.3d 188, 192 (3d Cir. 2003)); *see also People v. AlKhatib*, ST-09-CR-462, -495, 2010 WL 1552060 (V.I. Super. Ct. April 7, 2010).

[10] *Pearson v. Component Tech. Corp.*, 247 F.3d 471 (3d Cir. 2001).

[11] *Trs. of the Nat'l Elevator Indus.*, 332 F.3d at 193, n.6; *see also RCO Int'l Corp. v. Clevenger*, 904 N.E.2d 941 (Ohio App. 2008) ("'Piercing the corporate veil is not a claim, it is a remedy encompassed within a claim.'" (quoting *Geier v. Nat'l GG Indus., Inc.*, Lake App. No. 98-L-172, 1999 WL 1313640 (Ohio App. Dec. 23, 1999))).

[12] 222 F.R.D. 360 (E.D. Wisc. 2004).

[13] *Id.* at 361.

other non-parties."[14] The Ninth Circuit Court of Appeals agrees. In *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, the Ninth Circuit noted that if a defendant gives up the right to respond to the factual allegations by defaulting, it cannot then respond to discovery requests.

The Court finds this analysis persuasive and holds that defaulted parties should be treated as non-parties for the purposes of discovery. Should the defaulted parties refuse to appear at a noticed deposition, Nash should proceed to subpoena them.[15]

Neither BP SPV nor BP International has been defaulted yet. In fact, no motion has been made by any party to enter their defaults. However, because BP International has not filed an appearance, answer or any responsive pleading, the Court will direct the Clerk of the Court to enter its default.[16] BP SPV has also failed to answer or otherwise appear, but Banco Popular has raised a question regarding the sufficiency of Nash's service of process on BP SPV. Therefore, the Court is not yet prepared to enter BP SPV's default. However, the Court will direct Nash to proceed against both parties by subpoena. Regardless of whether BP SPV is a served-and-defaulted defendant, or a non-party who has not been properly served, in either case Nash must proceed by subpoena.

III. THE COURT WILL GRANT AN EXTENSION OF TIME IN WHICH TO COMPLETE DISCOVERY.

The discovery deadlines have now passed. Nash has not filed a motion for an extension of those deadlines. However, the Court will interpret Nash's Renewed Motion to Compel as a Motion for Extension of Time to Complete Fact Witness Depositions. The Court will grant this construed motion. Although the Court previously disapproved a stipulation as to discovery deadlines proposed by the parties, it did so only because—as stated in the Order—parties cannot stipulate to extensions of discovery deadlines but must instead make a motion, which must be supported by good cause.[17] The parties' previous Stipulation did not provide any reason, let alone good cause, to approve the extension. However, the Court now finds good cause to extend the deadlines so that Nash can obtain the discovery it says it needs to fully and effectively respond to Banco Popular's Motion for Summary and Default Judgment.

The Court will also grant Nash's Rule 56(f) Motion to Continue. Rule 56(f) motions serve to permit parties to obtain the evidence needed to respond to a motion for summary judgment. The Rule provides a "safety valve" to "'safeguard against judges swinging the summary judgment axe too hastily.'"[18] Because summary judgment motions "presuppose[] the existence of an adequate record," upon a properly supported motion, the Court "'is obliged to

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[14] *Id.*
[15] FED. R. CIV. P. 45.
[16] SUPER. CT. R. 47.
[17] FED. R. CIV. P. 16(b)(4).
[18] *Rivera-Torres v. Rey-Hernandez*, 502 F.3d 7, 7, 10 (1st Cir. 2007) (quoting *Resolution Trust Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994))

give [the movant] an adequate opportunity to obtain discovery.'"[19] Generally speaking, courts grant Rule 56(f) motions "as a matter of course."[20]

In this case, Nash has proceeded in a good faith—though unsuccessful—effort to obtain the discovery it needs to fully respond to the Motion for Summary Judgment. The Court generally avoids ruling on motions for summary judgment until such time as the record is sufficiently complete. This case is no exception. Therefore, the Court will grant Nash's Motion to Continue, and its renewed response to Banco Popular's Motion for Summary Judgment will be due thirty (30) days after the fact witness deposition deadline.

CONCLUSION

Nash moves this Court to compel the deposition of two entities that have effectively defaulted. Although the discovery Nash seeks is relevant to its defenses of merger and equity, the Court will not grant the Motion to Compel because Nash must proceed against defaulted parties as if they were non-parties. The Court will give all parties an extension of time in which to complete fact witness depositions and will grant Nash's Rule 56(f) Motion to Continue the deadline for its opposition to the Motion for Summary Judgment. A separate Order will issue today.

DATED: February 7, 2011

James S. Carroll III

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

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

BY: Donna D. Donovan
DONNA DONOVAN
Acting Court Clerk Supervisor 2/9/11

[19] *Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007) (quoting *Dowling v. City of Phila.*, 855 F.2d 136, 139 (3d Cir. 1988)).
[20] *Abington Friends School*, 480 F.3d at 257.

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BALBO CORPORATION d/b/a BALBO CONSTRUCTION CORPORATION, Plaintiff, v. **ENIGHED CONDOMINIUMS, LLC, BP SIRENUSA SPV, BP SIRENUSA INTERNATIONAL, LLC, BANCO POPULAR DE PUERTO RICO, HULKE CONSTRUCTION COMPANY VI, LLC, FLAMBOYANT REALTY SERVICE, INC., WHITECAP INVESTMENT CORP. d/b/a PARADISE LUMBER, BOB'S ELECTRIC, INC., and FRANCIS S. WOODS,** Defendants, v. **WILLIAM R. NASH, V.I., INC., HI CONSTRUCTION, LLC, and KRAUS-MANNING, INC.,** Counterclaim and Cross-Claim Defendants.	)	CIVIL NO. ST-09-CV-399 ACTION FOR DEBT AND FORECLOSURE OF LIEN

ORDER

AND NOW, pursuant to the Memorandum Opinion issued on today's date, it is hereby

ORDERED that the deadline for fact witness depositions is **EXTENDED** and fact witness depositions shall be completed within **forty-five (45) days** of entry of this Order; and it is further

ORDERED that Defendant William R. Nash (V.I.), Inc.'s construed Rule 56(f) Motion to Continue is **GRANTED**; and it is further

ORDERED that Defendant William R. Nash (V.I.), Inc., shall file its renewed response to Banco Popular's April 27, 2010 Motion for Summary Judgment within **thirty (30) days** of the deadline for fact witness depositions; and it is further

ORDERED that Defendant William R. Nash (V.I.), Inc.'s Motion to Compel is **DENIED**; and it is further

ORDERED that copies of this Order shall be directed to counsel of record.

DATED: February 7, 2011

James S. Carroll III

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

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

BY: Donna D. Donovan
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Acting Court Clerk Supervisor 2/9/11