

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

PETER KOKINDA,

PLAINTIFF,

v.

WILLIAM THELUSMA,

DEFENDANT.

SX-13-CV-254

ACTION FOR DEBT

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiff Peter Kokinda's (hereinafter "Plaintiff") amended motion for default judgment against Defendant William Thelusma (hereinafter "Defendant"), filed on October 10, 2013 (hereinafter, "Motion").

BACKGROUND

On July 24, 2013, Plaintiff commenced an action for debt Defendant in connection with a residential lease agreement for Unit No. A-5 Questa Verde Condominium, Christiansted, U.S. Virgin Islands (hereinafter "Subject Property"). Plaintiff alleged the following in his complaint:

Plaintiff, the owner of the Subject Property, entered into a residential lease agreement with Defendant for \$1,200.00 a month plus utilities from April 1, 2013 to March 31, 2014. (Compl. ¶¶ 2-3) Under said lease agreement, Defendant agreed to pay \$60.00 per day if Defendant failed to pay the rent in full on or before the end of the 5th of each month. (Id., at ¶ 4) Defendant failed to pay any rent since May 2013. (Id.) As of the commencement of this lawsuit, Defendant failed to pay rent for June 2013 and July 2013, and owed Plaintiff a total amount of \$7,712.78—to wit: \$2,400.00 (rent for June and July 2013), plus \$1,198.92 (utilities fees for April, May, June and July 2013), plus \$453.86 (Dish cable fees for April, May, June and July 2013), plus \$3,660.00 (late fees at the rate of \$60.00 per day for 61 days)—plus prejudgment interest at the rate of 4% per annum from June 1, 2013. (Id., at ¶¶ 6-7) Plaintiff provided a notice to quit and vacate to Defendant on June 24, 2013 whereby Defendant was advised of his outstanding rent, etc. under the lease agreement and asked to vacate the Subject Property by August 1, 2013. (Id., at ¶ 7) If Defendant fails to vacate by August 1, 2013, then Defendant will also be liable for rent and utilities for August 2013. (Id., ¶ 7)

As such, Plaintiff sought to collect its debt from Defendant. Defendant was served with summons and complaint on July 25, 2013. When Defendant failed to file a response to Plaintiff's

complaint, Plaintiff filed a motion for an entry of default. The Court granted Plaintiff's request and an entry of default was entered against Defendant in this matter on September 19, 2013. On October 10, 2013, Plaintiff filed this instant Motion. To date, Defendant has not filed a response to Plaintiff's Motion or answered.

STANDARD OF REVIEW

Entry of default and default judgment are separate matters under Superior Court Rules 47 and 48. In *King v. Appleton*, 61 V.I. 339, 346 (V.I. 2014), the Supreme Court of the Virgin Islands (hereinafter, "Supreme Court") instructed that "after entering the default, the Superior Court must consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." (internal quotations omitted). The Supreme Court explained that a defendant, "by his default, admitted the plaintiff's well-pleaded allegations of fact, [he] is concluded on those facts by the judgment, and is barred from contesting the facts thus established." *Id.* In other words, a defendant's default does not in itself warrant the court to enter a default judgment. *Id.* ("the mere fact of [the defendant's] default did not entitle [the plaintiff] to the entry of a default judgment against [the defendant]; instead, [the defendant's] default only conceded the facts as alleged in [the plaintiff's] complaint"). Rather, "[t]here must be a sufficient basis in the pleadings for the judgment entered." *Id.* Thus, if the court finds the facts, as alleged in the plaintiff's complaint, constituted a valid cause of action under the Virgin Islands law, the court is to hold a hearing to establish the amount of damages. *Id.*; see also, *Appleton v. Harrigan*, 61 V.I. 262, 269 (V.I. 2014) (after entry of default, damages generally must be established in an evidentiary proceeding [where] the defendant is afforded the opportunity to contest the amount claimed) (internal quotations and citations omitted).

However, such a hearing is not required "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain." *Harrigan*, 61 V.I. at 270

(citing Super. Ct. R. 48(a)(1)). The Supreme Court explained that, “[a] claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant’s default.” (citation omitted). *Harrigan*, 61 V.I. at 270. In *Harrigan*, the Supreme Court found the damage claimed therein—namely, unpaid rent—did not qualify as a sum certain because sum certain for the purposes of Superior Court Rule 48 “contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments.” *Id.* (internal quotations and citation omitted).

DISCUSSION

I. Whether Plaintiff is Entitled to a Judgment by Default

The Court will first determine whether the facts, as alleged in Plaintiff’s complaint, constitute a legitimate cause of action. According to Plaintiff’s complaint, Defendant and Plaintiff executed a residential lease agreement in connection with the Subject Property (hereinafter “Lease Agreement”) whereby Defendant agreed to pay \$1,200.00 a month from April 1, 2013 to March 31, 2014, plus utilities, plus \$60.00 per day if Defendant failed to pay the rent in full on or before the end of the 5th of each month. (*Id.*, at ¶ 4) Plaintiff alleged that Defendant failed to pay any rent since May 2013 (*Id.*) Plaintiff further alleged that, as of the commencement of this lawsuit, Defendant failed to pay rent for June 2013 and July 2013, and owed Plaintiff a total amount of \$7,712.78—to wit: \$2,400.00 (rent for June and July 2013), plus \$1,198.92 (utilities fees for April, May, June and July 2013), plus \$453.86 (Dish cable fees for April, May, June and July 2013), plus \$3,660.00 (late fees at the rate of \$60.00 per day for 61 days)—plus prejudgment interest at the rate of 4% per annum from June 1, 2013. (*Id.*, at ¶¶ 6-7) In support of his allegations, Plaintiff submitted: a copy of the executed Lease Agreement; a copy of the invoice to Defendant, dated July 17, 2013; and a copy of the notice to quit and vacate, dated June 25, 2013. Based on the foregoing, the Court finds that these unchallenged facts constitute a legitimate cause of action for debt.

The Court must now determine whether a hearing is necessary to establish the amount of damages. Here, Plaintiff submitted his affidavit in support of his motion for default judgment. Plaintiff noted in his affidavit that Defendant vacated the Subject Property on or about August 1, 2013,¹ and reiterated that, as of the commencement of this lawsuit, Defendant still owed Plaintiff a total amount of \$7,712.78. As noted above, in support of his allegations, Plaintiff submitted: a copy of the executed Lease Agreement; a copy of the invoice to Defendant, dated July 17, 2013; and a copy of the notice to quit and vacate, dated June 25, 2013. Based on the foregoing, the Court finds Plaintiff's claim for the total amount owed under the Lease Agreement qualifies as a sum certain because "there is no doubt as to the amount to which [Plaintiff] is entitled as a result of [Defendant's] default." *Harrigan*, 61 V.I. at 270. In other words, the Court finds that there can be no dispute as to the amount due under the Note. Thus, a hearing is not necessary to establish the amount of damages in this matter.

II. Whether Plaintiff is Entitled to Attorney's Fees and Costs

Plaintiff also filed an affidavit of its counsel, Attorney Britain H. Bryant of Bryant Barnes & Blair, LLP, for attorney's fees and costs, although no motion for the same appears in the record. In the affidavit of Attorney Britain H. Bryant, he asserted that Plaintiff incurred \$1,710.00 in attorney's fees, \$42.50 in paralegal's fees, and \$195.00 in costs in this matter. Itemization of the attorney's fees, paralegal's fees, and costs were included in the affidavit of Attorney Britain H. Bryant.

Title 5, Section 541 of the Virgin Islands Code² (hereinafter, "Section 541") governs the award of attorney's fees and costs in civil matters. The prevailing party routinely requests, and the

¹ Given that Defendant vacated the Subject Property on or about August 1, 2013, the Court will not include rent, utilities fees, and late charges for August 2013 in the total amount.

² Title 5, Section 541 of the Virgin Islands Code provides:

- (a) Costs which may be allowed in a civil action include:
 - (1) Fees of officers, witnesses, and jurors;
 - (2) Necessary expenses of taking depositions which were reasonably necessary in the action;
 - (3) Expenses of publication of the summons or notices, and the postage when they are served by mail;

Court often grants, an award for attorney's fees and costs, so long as they are provided for within the confines of the Section 541. The language of Section 541 and case law are clear that the decision to award attorney's fees and costs, and the amount to be awarded, is within the Court's discretion. Title 5 V.I.C. § 541; *Kaloo v. Estate of Small*, 62 V.I. 571, 584 n. 11 (V.I. 2015) (noting that a trial judge has discretion in determining reasonable attorney's fees and costs); *see also, Pedro v. Huggins*, SX-98-CV-792, 53 V.I. 98, 105-06 (Super. Ct. Mar. 5, 2010) (unpublished). In *Kaloo*, the Supreme Court pointed out that the "attorney's fees awards should represent a 'fair and *reasonable* portion of... [the] attorney's fees incurred in the prosecution or defense of the action, and not [necessarily] the whole amount charged by the attorney.'" 62 V.I. at 584 fn. 11 (quoting *Estien v. Christian*, 11 V.I. 464 (3d Cir. 1975) (applying the "lodestar" test in determining the reasonableness of attorney's fees under Section 541)) (emphasis in original). In considering the reasonableness of the attorney's fees, the Supreme Court found guidance in the factors discussed by the Appellate Division of the District Court of the Virgin Islands in *Andrew Evans v. R&G Mortgage Corp.*, D.C. Civ. App. No. 2003/126 (D.V.I. App. Jan. 10, 2007)—namely:

the time and labor required, the novelty and difficulty of the issues involved, the level of skill needed to properly conduct the case, the customary charges of the bar for similar services, the amount involved in the controversy, the benefits resulting to the client from the services, and the contingency or certainty of compensation. *Judi's of St. Croix Car Rental v. Weston*, 2008 V.I. Supreme LEXIS 21,*3 (V.I. 2008).³

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- (4) Compensation of a master as provided in Rule 53 of the Federal Rules of Civil Procedure;
 - (5) Necessary expense of copying any public record, book, or document used as evidence on the trial; and
 - (6) Attorney's fees as provided in subsection (b) of this section.

(b) The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto; provided, however, the award of attorney's fees in personal injury cases is prohibited unless the court finds that the complaint filed or the defense is frivolous.

(c) For the purposes of this section, "frivolous" means:

- (i) without legal or factual merit; or
- (ii) for the purpose of causing unnecessary delay; or
- (iii) for the purpose of harassing an opposing party.

³ While the Supreme Court in *Judi's* addressed the reasonableness of the attorney's fees requested under Supreme Court Rule 30, the Court nevertheless finds the factors considered therein to be helpful in this instance. Thus, the Court is guided by the same factors the Supreme Court considered in *Judi's*.

Here, Plaintiff sought recovery of \$1,710.00 in attorney's fees, accounting for 5.70 hours of work performed at the hourly rate of \$300.00, and \$42.50 in paralegal's fees, accounting for 0.50 hour of work performed at the hourly rate of \$85.00. Plaintiff also sought recovery of \$195.00 in costs.

The Court notes at the outset that Plaintiff is the prevailing party in this matter based on the Court's finding above that Plaintiff is entitled to a judgment by default. The Court further notes that this is not a frivolous personal injury action. Thus, Section 541 is applicable. Since Section 541 does not permit the recovery of paralegal's fees, the Court will deny Plaintiff's request for paralegal's fees and only address whether the attorney's fees and costs requested falls within the confines of Section 541.

a. Attorney's Fees

First, the Court reviews the time and labor expended in this matter. According to Attorney Britain H. Bryant's affidavit, 5.70 hours were spent on document review, telephonic conferences with the client, legal research and motion preparations. The Court finds the services rendered and the time spent by Attorney Britain H. Bryant to be reasonable. Second, the Court evaluates the novelty and difficulty of the issues involved. The Court finds that the issues involved herein is neither novel nor complex, given that it is a straightforward collection's case and that the record in this case is minimal. Third, the Court evaluates the level of skill required of counsel to properly conduct the case. As the Court just noted, this matter is a straightforward collection's case. This means that counsel was only required to have a basic understanding of the Superior Court Rules and some basic drafting skills to properly conduct this case. Here, all the documents prepared and filed are brief and straightforward, without the need for any complex legal research or analysis. The Court finds that this matter did not require a high degree of skill by counsel. Fourth, the Court compares the hourly rate charged in this matter with the customary charges of Virgin Islands attorneys. The

Court finds the \$300.00 hourly rate charged by Attorney Britain H. Bryant to be consistent with the customary and prevailing market rates attorneys charge in the U.S. Virgin Islands. *See, e.g., Garvey v. Estate of Moorhead*, SX-13-CV-210, 2016 V.I. LEXIS 107, *11 (Super. Ct. Aug. 1, 2016) (unpublished) (“Here, without any proffer of its reasonableness from Petitioner, the Court finds the claimed hourly rate of \$400 to be excessive, and will assign as reasonable an hourly rate of \$300.”); *Chapa v. Sepe*, ST-12-CV-504, 2013 V.I. LEXIS 72, *2 (Super. Ct. June 3, 2013) (unpublished) (“While Three hundred and ninety-five dollars (\$395.00) is at the high end of the customary and prevailing market rates attorneys charge in the Virgin Islands, a majority of the hours billed were at a rate of Two hundred ninety-five dollars (\$295.00), which is a moderate hourly rate as compared to what other attorneys charge in the Virgin Islands.”); *Interocean Ins. Agency v. Joseph*, SX-06-CV-177, 2014 V.I. LEXIS 73, *10 (V.I. Super. Ct. Sep. 12, 2014) (unpublished) (the court accepted the attorney’s hourly rates of \$350.00 for in-court services and \$300.00 for other services as “fair and reasonable for an attorney with his experience and record”). Fifth, the Court considers the amount in controversy and the attorney’s fees requested. In *Judi*’s, the Supreme Court found that the attorney’s fees is unlikely to be reasonable when the attorney’s fees requested was almost four times the amount in controversy. 2008 V.I. Supreme LEXIS 21 at *3. Here, the amount in controversy was \$7,712.50 and the attorney’s fees requested was \$1,710.00. The Court finds that the relationship between the amount in controversy and the attorney’s fees requested to be within reason. Sixth, the Court considers the benefits resulting to Plaintiff from the services. Here, as the result of the services rendered by Attorney Britain H. Bryant, Plaintiff obtained a favorable outcome—namely, a default judgment against Defendant for the amount he owes Plaintiff pursuant to the Lease Agreement. The Court finds that Plaintiff benefited from the service of his counsel. Lastly, the Court considers the contingency or certainty of compensation. According to Attorney Britain H. Bryant’s affidavit, Plaintiff retained Bryant Barnes & Blair, LLP at the hourly rate of \$300.00. Thus,

it appears that Plaintiff and Bryant Barnes & Blair, LLP did not have a contingency fee agreement.

Based on the foregoing, the Court finds the attorney's fees sought by Plaintiff to be reasonable.

b. Costs

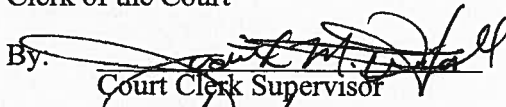
According to Attorney Britain H. Bryant's affidavit, Plaintiff was billed for filing fee (\$75.00), process service fee on July 30, 2013 (\$60.00) and process service fee on August 6, 2013 (\$60.00). Section 541 only permits the recovery of certain costs.⁴ Filing fee and process service fee do not appear to fall under the allowable costs of Section 541. Thus, the Court will not grant any costs here.

CONCLUSION

Based on the foregoing reasons, the Court will grant Plaintiff's Motion and enter a default judgment against Defendant. Given that the Court finds that there can be no dispute as to the amount of damages due in this matter, it is not necessary to hold a hearing to establish the amount of damages. Furthermore, the Court will grant Plaintiff's request for attorney's fees but deny Plaintiff's request for paralegal's fees and costs. An Order consistent with this Memorandum Opinion will follow.

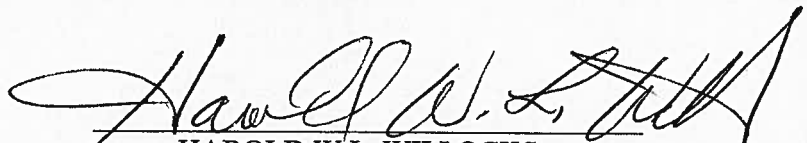
DONE and so ORDERED this 18th day of August, 2017.

ATTEST:
Estrella H. George
Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/21/17


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

⁴ *Supra*, fn. 2.