Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

VIRGIN ISLANDS CONSERVATION SOCIETY, INC., Appellant/Plaintiff, **v.** **GOLDEN RESORTS, LLLP,** Appellee/Defendant.	**S. Ct. Civ. No. 2009-0026** Re: Super. Ct. Civ. No. 027/2009

On Appeal from the Superior Court of the Virgin Islands
Argued: March 3, 2010
Filed: June 23, 2010

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **JULIO A. BRADY**, Designated Justice.[1]

ATTORNEYS:

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OPINION OF THE COURT

Hodge, Chief Justice.

Appellant, Virgin Islands Conservation Society, Inc. ("VICS"), appeals from the Superior Court's February 25, 2009 order, which dismissed VICS's action for injunctive relief against Appellee, Golden Resorts, LLLP ("Golden"). VICS asks this Court to hold that the Superior

[1] Associate Justice Maria M. Cabret has been recused from this matter. The Honorable Julio A. Brady, a Judge of the Superior Court, sits in her place by designation pursuant to 4 V.I.C. § 24(a).

Court erred when it: dismissed VICS's action for lack of jurisdiction on grounds that VICS had failed to exhaust all administrative remedies before seeking relief in the trial court; required VICS to pursue a writ of review rather than an action for injunctive relief; and refused to convert VICS's motion for injunctive relief into a petition for writ of review. For the reasons which follow, we will hold this appeal in abeyance until such time as there is a final resolution as to the validity of the initial permit issued by default.

I. FACTUAL AND PROCEDURAL BACKGROUND

This procedurally complex appeal arises from a heavily-litigated dispute over Golden's proposed development of certain wetlands in St. Croix. On September 5, 2003, Golden filed an application for a major coastal zone permit ("permit") with the Department of Planning and Natural Resources ("DPNR") in order to develop several parcels of wetlands for the purpose of building a 605-room hotel resort with a casino and convention center. Unable to amass a quorum to consider Golden's application, the St. Croix Committee on Coastal Zone Management ("CZM Committee") failed to conduct a public meeting on Golden's application within thirty days as required by V.I. CODE ANN. tit. 12 § 910(d)(4). As a result, the CZM Committee ruled at a May 26, 2004 public hearing that Golden's permit had been granted by default. However, at a July 1, 2004 meeting scheduled to discuss the conditions that would be attached to Golden's permit, the CZM Committee ultimately rescinded the default permit that had been granted at the prior hearing.

On July 30, 2004, Golden appealed the CZM Committee's decision to the Virgin Islands Board of Land Use Appeals ("BLUA"). Finding that Golden was entitled to a permit by default, the BLUA issued Golden a permit on January 12, 2005. The terms of the permit specified that, unless an extension is granted by the BLUA or the Commissioner of the DPNR ("the

Commissioner"), the permit would terminate automatically and become null and void if Golden did not commence construction within twelve months of the permit's effective date. VICS subsequently filed a petition for writ of review in the Superior Court challenging the BLUA's issuance of the default permit, but the Superior Court affirmed the BLUA's determination that Golden was entitled to a permit by default. *See Virgin Islands Conservation Society, Inc. v. Board of Land Use Appeals*, No. 83/2005 (V.I. Super. Ct May 25, 2006). Although VICS's petition for writ of review raised other issues, including the lack of sufficient findings concerning the environmental impact of the proposed construction, the Superior Court declined to address those issues because they had not been raised before the BLUA.

On appeal to the Appellate Division of the District Court, the Superior Court's determination that Golden was entitled to a permit by default was affirmed. *See Virgin Islands Conservation Soc'y, Inc. v. Virgin Islands Bd. of Land Use Appeals, et al.*, 49 V.I. 581, 601 (D.V.I. App. Div. 2007). However, the Appellate Division held that VICS was unable to properly raise its other issues before the BLUA because the BLUA had acted as an agency by originally granting the permit, rather than as an appellate body reviewing the CZM Committee's decision. Concluding that the lack of a sufficiently-developed agency record made it impossible to review the propriety of the permit on the other grounds raised by VICS, the Appellate Division ultimately remanded the matter to the Superior Court with instructions to remand to the appropriate CZM Committee for further factual consideration. Following the Appellate Division's remand, VICS appealed to the Third Circuit Court of Appeals, which dismissed the appeal on grounds that the Appellate Division's decision "[did] not resolve an important legal issue and denial of [the] appeal [would] not foreclose future appellate review as a practical matter." *Virgin Islands Conservation Soc'y, Inc. v. Virgin Islands Bd. of Land Use Appeals, et*

al., No. 08-1047, slip op. at 2 (3d Cir. Mar. 14, 2008). At present, VICS's appeal concerning the validity of the original permit remains pending in the Appellate Division.

While VICS's petition for writ of review was still pending in the Superior Court, VICS learned that Golden intended to seek an extension of the permit. In a letter dated December 27, 2005—sixteen days before the default permit was due to expire because Golden had not yet begun construction, VICS notified Golden that, although the permit purported to allow the BLUA to grant an extension, the Coastal Zone Management Act ("CZMA") provides that an extension may be granted only by the CZM Committee or the Commissioner. Thereafter, by letter dated January 4, 2006, Golden requested an extension of the permit from the CZM Committee. Soon thereafter, Golden also requested an extension from the BLUA. On March 21, 2006, the BLUA voted to approve Golden's request for an extension for a period of one year following the date on which the Superior Court ultimately ruled on VICS's petition for writ of review. After the Superior Court's May 25, 2006 decision affirming the grant of the permit by default, the BLUA issued a written decision extending the permit for one year.

Subsequently, on April 23, 2007—one month before the one-year extension would automatically expire if Golden had not commenced construction—Golden requested a second extension from the BLUA. The BLUA held a hearing on July 6, 2007 and voted to grant the second extension in accordance with the terms stated in Golden's April 23, 2007 letter, which had requested that the permit be extended for a period of one year following the Appellate Division's ruling on VICS's appeal.[2] However, on January 15, 2008—five months after the hearing—the BLUA issued a written decision which extended the permit for a period of one year

[2] At the BLUA hearing, the Chairman of the BLUA discussed the propriety of extending the permit until after an appeal to the Third Circuit Court of Appeals was sought, but several members of the BLUA stated that they were voting only to extend the permit for the period requested in Golden's letter.

following the latest of three dates: (a) the date of the final decision of the Appellate Division, (b) the date of the final decision of any appeal to the Third Circuit, or (c) the date of the Superior Court's final decision in the related matter of *Traxco, Inc. v. Gov't of the Virgin Islands*, No. 602/2006.

On January 21, 2009, after apparently learning that Golden intended to begin construction, VICS filed in the Superior Court a Motion for Temporary Restraining Order and Preliminary Injunction pursuant to 12 V.I.C. § 913(b)(1). In support of its motion for injunctive relief, VICS contended that Golden's construction would be a violation of the CZMA because the initial permit had expired. The Superior Court initially denied the motion for a temporary restraining order ("TRO"), finding that construction did not appear imminent. However, after VICS asserted that Golden had brought earth-moving equipment to the construction site, the trial court issued a TRO.

On February 20, 2009, a hearing was held to determine whether further injunctive relief was appropriate. Five days later, the trial court denied VICS's motion for injunctive relief and granted Golden's request for dismissal of the action. In its February 25, 2009 order, the trial court concluded that VICS was attempting to challenge the propriety of the BLUA's extensions and that a petition for writ of review under 12 V.I.C. § 913(d), rather than a motion for injunctive relief under 12 V.I.C. § 913(b)(1), was the proper vehicle for such a challenge. As a consequence, the trial court held that it lacked jurisdiction over the matter because VICS had failed to exhaust its administrative remedies by not seeking judicial review of the BLUA's decision. Additionally, the trial court declined VICS's request to convert its motion for injunctive relief into a petition for writ of review, finding that VICS's filings did not comport with the requirements for maintaining a writ of review and that VICS would suffer no prejudice

if the court failed to convert the motion.

On March 26, 2009, VICS filed a notice of appeal, seeking to appeal the Superior Court's February 25, 2009 order to this Court.

II. DISCUSSION

Before this Court can reach the merits of an appeal, we must first determine whether we have jurisdiction over a particular matter. *See Virgin Islands Gov't Hosps. and Health Corp. v. Gov't, et al.*, 50 V.I. 276, 279 (V.I. 2008). "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees [and] final orders of the Superior Court." 4 V.I.C. § 32(a) (Supp. 2008). Golden contends that this Court lacks jurisdiction over this appeal because the Superior Court's February 25, 2009 is not a final order. Specifically, Golden argues that the trial court's order dismissing VICS's action for injunctive relief is not final because VICS's appeal from the grant of the initial permit is still pending in the Appellate Division. However, "a final judgment, decision, or order is one that 'ends the litigation on the merits and leaves nothing . . . to do but execute the judgment.'" *Id.* (quoting *Gov't of the Virgin Islands v. Rivera*, 333 F.3d 143, 150 (3d Cir. 2003). In this case, the trial court's order dismissed VICS's action for injunctive relief with prejudice. Thus, the order appealed herein is clearly a final order because it ended the matter on the merits.

Nevertheless, the finality of an order is not the only relevant consideration when determining our jurisdiction. Rather, we must consider other jurisdictional doctrines including the doctrine of ripeness. *See, e.g., Virgin Islands Gov't Hospitals*, 50 V.I. at 280; *see also Harvey v. Christopher*, Civ. No. 2007-115, 2009 WL 331304, at *2-3 (V.I. Jan. 22, 2009) (unpublished). "Ripeness concerns whether the legal issue at the time presented in a court is sufficiently concrete for decision." *U.S. ex rel. Ricketts v. Lightcap*, 567 F.2d 1226, 1231 (3d

Cir. 1977) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-54, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). "Courts will not decide abstract legal issues posed by two parties; the issue in controversy must have a practical impact on the litigants." *Id.* As our recitation of the complex factual and procedural background of this matter demonstrates, there are currently two appeals pending which involve the same parties and the same underlying dispute. In addition to the appeal presently before this Court, VICS's appeal from the Superior Court's affirmance of the BLUA's grant of the original default permit remains pending in the Appellate Division. *See Virgin Islands Conservation Soc'y, Inc.*, 49 V.I. at 601 (remanding to the Superior Court with instructions to remand to the CZM Committee for further factual consideration).

Both parties agree that the issue of whether the initial permit was properly granted by the BLUA has not yet been resolved by the Appellate Division. Nevertheless, the parties contend that the issues presented in that appeal are distinct from the issues presented in this appeal because this Court is asked to address the validity of the BLUA's extensions, not the validity of the initial permit. It is evident, however, that each of the issues raised before this Court would be directly impacted by the Appellate Division's ultimate holding concerning the validity of the initial permit. Specifically, the parties ask us determine in this appeal: whether the BLUA had statutory authority to extend the initial permit, whether VICS was required to exhaust administrative remedies before filing its motion for injunctive relief in the Superior Court, and whether the Superior Court should have converted VICS's motion into a petition for writ of review. Should the Appellate Division ultimately hold that the BLUA erred in granting the initial default permit,[3] any decision by this Court with respect to the validity of the extensions

[3] We note that the Superior Court docket entries for case number SX-05-CV-0000083—the separate but related case that was appealed to the Appellate Division—indicate that the CZM Committee has submitted factual findings to the

would have no practical impact on the particular litigants in this case because all issues concerning the extensions of an invalid permit would be rendered moot. As such, we conclude that the issues presented in this appeal are not sufficiently concrete at this time, and we decline to address these issues in the abstract. Therefore, we hold that this appeal is not yet ripe for adjudication by this Court.

Finally, we must determine whether to dismiss this appeal for lack of ripeness or to hold the appeal in abeyance until the issues become ripe for review by this Court. *Compare V.I. Gov't Hosp. and Health Facilities Corp.*, 50 V.I. at 281 (dismissing appeal for lack of ripeness), *with Harvey*, 2009 WL 331304, at *1 (unpublished) (holding appeal in abeyance until ripe for review). In considering whether to dismiss this appeal, we note that a final decision by the Appellate Division or the Third Circuit Court of Appeals affirming the issuance of the original permit would ripen the issues presented herein for a determination on the merits. However, the time to appeal from the Superior Court's February 25, 2009 order would have long expired. *See* V.I.S.CT.R. 5(a)(1) ("the notice of appeal required by Rule 4 shall be filed . . . within thirty days after the date of entry of the judgment or order appealed from . . ."). Thus, a dismissal at this time would foreclose future appellate review of the issues raised by VICS in the instant appeal. Accordingly, this Court will hold this appeal in abeyance until such time as there is a final resolution by the Appellate Division or the Third Circuit Court of Appeals as to the validity of the initial default permit granted by the BLUA.

III. CONCLUSION

This Court holds that, because the validity of the initial default permit is an issue that is

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Superior Court with a recommendation that the initial permit be denied because Golden's proposed construction is not consistent with the CZMA.

currently pending in the Appellate Division of the District Court, the issues presented in this appeal are not yet ripe for adjudication. Accordingly, we will hold this appeal in abeyance until such time as the parties notify this Court that there has been a final resolution by the Appellate Division or the Third Circuit Court of Appeals as to the validity of the initial default permit.

Dated this 23rd day of June, 2010.

FOR THE COURT:

_____/s/_____
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court