FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
COMPLEX LITIGATION DIVISION

SAMUEL HOLLOWAY, Plaintiff, v. HESS OIL VIRGIN ISLANDS CORPORATION; HOVENSA, LLC; AMERADA HESS CORPORATION; ALLTITE GASKET COMPANY, INC.; LITWIN CORPORATION, individually and as successor-in interest to LITWIN PAN-AMERICAN CORPORATION; BIGELOW-LIPTAK; BORN, INC.; CHICAGO BRIDGE AND IRON COMPANY, N.V.; FLUOR ENGINEERS & CONSTRUCTORS, INC.; RIGGERS & ERECTORS INTERNATIONAL, INC.; RARITAN SUPPLY COMPANY, individually and as successor-in-interest to BRIDGE SUPPLY COMPANY; VIRGIN ISLANDS INDUSTRIAL MAINTENANCE CORPORATION; 3M a/k/a MINNESOTA MINING & MANUFACTURING COMPANY; CERTAINTEED PRODUCTS CORPORATION; CRANE CO.; FOSTER WHEELER CORPORATION; GARLOCK SEALING TECHONOLOGIES, LLC f/k/a GARLOCK, INC.; GENERAL ENGINEERING CORPORATION; INGERSOLL RAND CORPORATION; JOHN CRANE COMPANY; OPTIMIZED PROCESS FURNACES; PARSONS INFRASTRUCTURE AND TECHNOLOGY GROUP, INC., individually and as successor-in interest to THE RALPH M. PARSONS COMPANY; PORTILLA CORPORATION; RESAL, INC.; RUBBER & GASKET COMPANY OF PUERTO RICO; STUBBS OVERBECK, INC.; UNION CARBIDE CORPORATION; UNIVERSAL OIL PRODUCTS COMPANY; YARWAY CORPORATION; and JOHN DOE DEFENDANTS, Defendants.	)	CASE NO. SX-05-CV-877 ACTION FOR DAMAGES JURY TRIAL DEMANDED

Appearances:[1]

THEODORE H. HUGE, ESQ.
Harris & Huge, LLC
Charleston, SC 29403

[1] Because associations have changed over the years, current firms are listed as well as counsel who represent the same parties in other cases, notwithstanding any attorney's failure to withdraw or file notice of or revise their appearances.

For Plaintiffs

LEE J. ROHN, ESQ.
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For Plaintiffs

CARL A. BECKSTEDT, III, ESQ.
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For Hess Oil Virgin Islands Corporation, HOVENSA, LLC, and Amerada Hess Corporation

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For Litwin Corporation and John Crane Company.

JAMES L. HYMES, III, ESQ.
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For Riggers & Erectors International, Inc., Virgin Islands Industrial Maintenance Corporation, and Garlock Sealing Technologies, LLC

MEMORANDUM OPINION

MOLLOY, Judge

THIS MATTER is before the Court following a review of the file. For the reasons stated below, the Court finds that this matter remains pending between Samuel Holloway ("Holloway" or "the Plaintiff") and several defendants and between all defendants and Hess Oil Virgin Islands Corporation ("HOVIC") and Amerada Hess Corporation ("Hess") on their crossclaims, but only if the Plaintiff effected service of process on the other defendants. The Court had attempted to ascertain the status of this case, which culminated in a show cause order issued to Lee J. Rohn, Esq. ("Attorney

Rohn") because she responded to a prior order. The Court now finds that the show cause order must be vacated because Theodore H. Huge, Esq. ("Attorney Huge") appeared on behalf of Holloway and never moved to withdraw, notwithstanding his subsequent departure from the firm through which he appeared. As counsel for the Plaintiff, Attorney Huge must advise the Court of the status of this case and whether Holloway served the other defendants because Hess and HOVIC's crossclaims may not be properly before the Court if he did not.

I. PROCEDURAL BACKGROUND

On December 28, 2005, Samuel Holloway ("Holloway" or "the Plaintiff"), through Attorney Huge with Motley Rice, LLC, filed a complaint in the Superior Court of the Virgin Islands against twenty-nine companies and several unknown companies sued as John Doe defendants. Summons issued for many but not all the named defendants. Proof of service was never filed, however, and only Hess Oil Virgin Islands Corporation ("HOVIC"), Amerada Hess Corporation ("Hess"), and HOVENSA, LLC (collectively "Hess Defendants") appeared and answered the complaint. HOVIC and Hess further crossclaimed against all co-defendants for common law contribution, contractual indemnification, and breach of contract in their January 30, 2006 answer.

Approximately ten months later, on October 3, 2006, Holloway filed a notice of dismissal with respect to Born, Inc. ("Born"), Raritan Supply Company ("Raritan") CertainTeed Products Corporation ("CertainTeed") Crane, Co. ("Crane"), General Electric Corporation ("GEC"), Optimized Process Furnaces ("OPF"), and Universal Oil Products Company ("UOP") without prejudice. The same day, Holloway and the Hess Defendants filed a stipulation of dismissal with prejudice. Neither the notice nor the stipulation made mention of Hess and HOVIC's pending crossclaims, namely whether they were included in the stipulated dismissal.

The case laid dormant until August 16, 2010 when the Court (Donohue, P.J.) issued an order directing the parties to take appropriate measures to move the case forward within the next thirty days. The Court further directed that a copy of the August 16, 2010 Order "be directed to Elizabeth C. Ward, Esq. [hereinafter "Attorney Ward"] of Mottley [sic] Rice, LLC by certified mail." (Order 2, entered Aug. 17, 2010.) And in a footnote, the Court observed that Attorney Ward was to be served because she had "represented to the Court in other pending matters that Attorney Huge is no longer affiliated with Mottley [sic] Rice, LLC." *Id.* at 2 n.1. The Clerk's Office served a copy of the August 16, 2010 order on John H. Benham, Esq., Simone R.D. Francis, Esq., Maria T. Hodge, Esq., Bernard Pattie, Esq., Matthew J. Duensing, Esq., Douglas L. Capdeville, Esq., Wilfredo A. Geigel, Esq., Michael C. Dunston, Esq., Carol G. Hurst, Esq., James L. Hymes, III, Esq., Michael Sanford, Esq., George H. Logan, Esq., W. Mark Wilczynski, Esq., Richard Daley, Esq., Edward H. Jacobs, Esq., and Terri Griffiths, Esq. (hereinafter referred to as attorney and by last name) in addition to Attorney Ward, presumably based on one of the certificates of service appended to a filed document because, at that point, only two attorneys had appeared in the case: Attorney Huge and Britain H. Bryant, Esq. on behalf of the Hess Defendants, Attorney Huge was not served, however.

In response to the August 16, 2010 order, Riggers & Erectors International, Inc. ("R&E") and Virgin Islands Industrial Maintenance Corporation ("IMC") filed a stipulation for substitution of counsel, which the Court later approved. The Hess Defendants responded to alert the Court to the October 3, 2006 stipulation and to submit a proposed order of dismissal because "evidently [one] was inadvertently not filed at the time of the Stipulation of Dismissal, with respect to the refinery defendants." (Hess Defs.' Reply to Ct's Aug. 16, 2010 Order 2, filed Sept. 8, 2010.) Attorney Wilczynski responded next on behalf of Defendant John Crane ("John Crane") and, with Attorney

Hymes, on behalf of Litwin Corporation ("Litwin").[2] In both responses filed "as a courtesy," Attorney Wilczynski represented that, "[o]n August 3, 2006, Attorney Theodore H. Huge [had] notified counsel that the *Holloway* case would be dismissed as the Plaintiff had previously been awarded a settlement in a prior [r]efinery exposure case." (John Crane's Resp. to Ct.'s Aug. 17th Order 1, filed Sept. 10, 2010 (citing *Samuel Holloway v. Owens-Corning Fiberglass Corp., et al.*, DCVI-STX Civil No. 1990/308); *see also* Litwin's Resp. to Ct.'s Aug. 17th Order 1, filed Sept. 10, 2010 (same).) But according to Attorney Wilczynski, the dismissals were never filed.

Although she was not named on the notice of entry of the August 16, 2010 order, Attorney Rohn filed a motion on September 15, 2010 to request an extension of thirty days to comply with the August 16, 2010 order. In a footnote, Attorney Rohn explained that "[n]o current attorney at Motley Rice LLC has been admitted *pro hac vice* in this matter. Rohn and Carpenter are responding on behalf of Plaintiffs. [sic]." (Pl.'s Mot. for Extension of Time 2 n.1, filed Sept. 15, 2010 (italics added).) Consequently, she was requesting "an additional thirty (30) days to comply with the Court's requirements so that a complete review of the files and consultation with the Plaintiffs [sic] can be accomplished." *Id.* at 2.

Bruce Darwin Spector, Esq. filed responses on September 16, 2010 on behalf of R&E, IMC, and Defendant Garlock Sealing Technologies, LLC ("Garlock"), respectively. In each response, Attorney Spector acknowledged that Holloway had sued R&E, IMC, and Garlock, and that HOVIC and Hess had crossclaimed, but he represented that R&E, IMC, and Garlock, were "not properly served and ha[ve] not answered or otherwise plead in this matter." (R&E Resp. to Ct. Order Dated Aug. 16,

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[2] Out of an abundance of caution, the Court attributes the responses to counsel, not their clients, since service is in question. *But cf.* 5 V.I.C. § 115 ("A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him.").

2010 1, filed Sept. 16, 2010; *accord* Garlock Resp. to Ct Order Dated Aug. 16, 2010 1, filed Sept. 16, 2010; IMC Resp. to Ct Order Dated Aug. 16, 2010 1, filed Sept. 16, 2010.) Attorney Spector alerted the Court to the same information that Attorney Wilczynski had provided regarding the prior District Court action and qualified that the defendants responses were filed "in compliance with the Court's Order," but they were "not consent[ing] to jurisdiction in this matter." (R&E Resp. at 1; Garlock Resp. at 1; and IMC Resp. at 1.) Garlock also filed a suggestion of bankruptcy and a notice of automatic stay on August 16, 2010 due to a pending bankruptcy petition in the United States Bankruptcy Court for the Western District of North Carolina.

Attorney Ward responded on October 25, 2010 by filing a motion on behalf of Motley Rice to withdraw as counsel for Holloway. In her motion, Attorney Ward represented the following:

> Theodore Huge, Esq., formerly an attorney employed by Motley Rice LLC, was licensed to practice in . . . the Virgin Islands. Attorney Huge is no longer affiliated with Motley Rice LLC, thus leaving Motley Rice LLC without a licensed attorney on staff to assume the Plaintiff's case. In a letter to the Plaintiff dated September 21st, 2010, the Plaintiff was advised that Motley Rice would move to withdraw from his case. The Plaintiff signed for the letter on October 12th, 2010 . . . [and a] copy of this motion is contemporaneously being sent to Mr. Holloway at his current address. Upon the withdrawal of Motley Rice from this matter, the Plaintiff will still have effective representation by Attorney Lee Rohn at the Law Offices of Rohn & Carpenter LLC, located in the Virgin Islands.

(Motley Rice Mot. to Withdraw 1, filed Oct. 25, 2010 (paragraph breaks omitted.)

By orders dated March 6, 2012, entered March 8, 2012, the Court (Donohue, P.J.) approved the substitution filed by IMC and R&E for substitution of counsel, granted Motley Rice's motion to withdraw, granted Attorney Rohn's motion for an extension of time, and approved Holloway's stipulation to dismiss "the causes of action against" the Hess Defendants "with prejudice. (Order 1-2, entered Mar. 8, 2012.) For reasons unclear from the record, the Clerk's Office served Attorneys Logan, Sanford, Griffith, Hodge, Pattie, Geigel, Capdeville, Jacobs, Duensing, Wilczynski, Hurst, Benham, Francis, and Sunshine S. Benoit, Esq. (on behalf of the Hess Defendants), but not Attorneys Rohn, Huge, or Ward.

Approximately two weeks later, the Court (Donohue, P.J.) issued another order, which summarized the procedural history of this case, and then pointed out that

> Plaintiff [had] commenced this action on December 27, 2005 . . . and had 120 days, or until Wednesday, April 26, 2006, to serve Defendants. [But w]hile summons issued to a few Defendants . . . [n]o affidavits of service or proof of service were filed as required. Plaintiffs also did not move for an extension of time to effect service. Only the Hess Defendants answered the Complaint and no co-Defendant answered the Hess Defendants' [sic] Cross-Claims. Moreover, when the Court ordered the parties to provide a status update [on August 16, 2010], Defendants Litwin Corporation, John Crane, Co., Riggers & Erectors, Inc., V.I. Industrial Maintenance Corporation, and Garlock Sealing Technologies, LLC each stated that they were never served.

(Order 3-4, entered March 21, 2012 (record citations omitted).) The Court "notified" Holloway that his case "may be subject to dismissal for failure to timely serve." *Id.* at 4; *see also id.* at 3 ("Notice to the plaintiff that dismissal is imminent is required before the Court may dismiss a party." (citing *Petrucelli v. Bohringer and Ratzinger, GMBH*, 46 F.3d 1298, 1305 (3d Cir. 1995), and Fed. R. Civ. P. 4(m)). Holloway was ordered to file proof of service "as to all" defendants within twenty-eight days. *Id.* "Failure to do so will result in dismissal of this matter against the remaining Defendants for failure to timely serve," the Court warned. *Id.*

Attorney Rohn responded to the March 19, 2012 order by filing a motion on May 4, 2012 for an extension of time to comply, which the Court granted by order dated May 12, 2012, entered May 15, 2012, giving her to May 23, 2012 to comply. However, once again, for reasons unclear from the record, the Clerk's Office did not serve the May 12, 2012 order on Attorney Rohn.

Three years later, this Court issued an order on July 9, 2015 because Holloway still had not filed proof of service as directed. The Court further noted, however, that

> certain defendants may have entered a voluntary appearance despite not having been served. Specifically, John Crane Company and Litwin Corporation filed responses to an order entered August 17, 2010 directing the parties to take steps to move this matter forward after a lengthy delay. Likewise, Riggers & Erectors International, Inc. and Virgin Islands Industrial Maintenance Corporation filed a joint stipulation for substitution of counsel, which the Court granted by order entered March 8, 2012. Moreover, section 113 of title 5 of the Virgin Islands Code allows the plaintiff to proceed against fewer than all defendants if only some have been served.

(Order 2, entered July 13, 2015 (citation omitted).) After noting that "the length of time this matter ha[d] remained dormant [wa]s not acceptable," *id.*, the Court directed "counsel for Plaintiff Samuel Holloway" to comply with the March 19, 2012 and May 12, 2012 orders, failing which this case could be dismissed. *Id.* The Clerk's Office was directed to serve Attorneys Rohn, Wilczynski, Sanford, Spector, and Benoit. No one responded.

On August 23, 2016, the Court ordered Attorney Rohn to show cause in writing within fourteen days from the date of entry of the order "why she should not be held in contempt for failure to respond to the Court's prior orders." (Order 2, entered Aug. 23, 2016.) Attorney Rohn filed three responses to that order: on September 7, 2016, on September 22, 2016, and on June 13, 2017.

In her first response, Attorney Rohn provided the following background information regarding the prior orders, explaining that

> [w]hen the Court's Order of March 21, 2012 was received, it apparently was sent to Ted Huge, who was the stateside counsel, also licensed in the Virgin Islands that was handing the case to inquire as to the status. It appears that despite several inquiries, no response was ever received. It also appears that in 2013, the file was administratively closed in the undersigned's office as a result of failure of Ted Huge to respond to inquiries as to the status of the case and his client. Thus, when the Order of July 13, 2015 came in, it was not assigned to any attorney to respond to as it was thought to be in error. Counsel apologizes for the oversight of the office in not calling the Court to determine if the case was actually an active case and determining that the Order was not a mistake. Undersigned counsel has no direct contact for Samuel Holloway, as his actual counsel was Ted Huge and he was to have provided counsel with papers to have him substituted as counsel. In fact, it was Huge who prepared documents to dismiss some of the Defendants (**Ex 1**). Plaintiff's counsel has made

> repeated calls to Ted Huge's office and received no response. Counsel has sent Attorney Huge a certified letter to ask him to please notify counsel if he still represents Mr. Holloway, and if so, what is the status of the matter and if it should be dismissed.

(Resp. to Order to Show Cause 1-2, filed Sept. 7, 2016 (paragraph breaks omitted).) In her second response, Attorney Rohn attached an email sent to her by Attorney Huge, which reads as follows:

> Lee,
>
> I just received your letter re Samuel Holloway. I apologize for our not getting back to you earlier.
>
> After reviewing the file I have from my MR days, I would say dismiss this case. There's nothing left in it worth pursuing in my opinion. The Hess defendants were dismissed per the attached dismissal. I don't have a court-stamped copy of the attached, but it appears from the Judge Donohue order you sent me that somebody entered the attached as an order dated March 2012.
>
> As background on Holloway, we found out during our investigation of Mr. Holloway's potential claim that he had already had an asbestos case in the mid-90s that was settled by Alkon et al. He signed one of those sweeping releases we saw years ago that included other dusts (e.g. silica), cancer etc. in the future. He also got paid his share from the various bankruptcies etc (e.g. Owens-Corning). So imho there's nothing left to do for him. He appears to be one of the few cases MR filed without knowing beforehand that he had had a prior case (and Bryant's firm didn't pick up on it either or just wanted to play it out for billing). I have not seen any diagnosis for him beyond the non-malignant diagnosis that my old MR records indicate. In any event, I would say dismiss it. Please call if you'd like to discuss further. Best regards,
>
> Ted

(Email from T. Huge to L. Rohn (Sept. 12, 2016) (hereinafter "Huge-Rohn Email"), attached to Not. of Filing Add'l Supp. in Opp'n to Mot. [sic] to Show Cause, filed Sept. 22, 2016.) And in her last response, Attorney Rohn stated that

> [t]he undersigned has no active file on this matter. It was originally brought to the Motley Rice Law Firm in South Carolina. Ted Huge was the attorney with that firm that worked on the case and it is believed he became licensed. When HOVIC and Hovensa brought Motions to Disqualify undersigned and Judge Donohue granted some of them, undersigned withdrew from all such asbestos cases and Ted Huge

> became sole counsel for them. In August 2016, this court issued a show cause order why a 2012 order had not been responded to, that is because this office has no record of ever receiving that order. **See Exhibit 1**. The undersigned has no information about this case and believes that Ted Huge should be contacted regarding the same. Undersigned has left repeated messages with him in the states but has had no replies.

(Notice to the Ct. 1, filed June 13, 2017 (paragraph breaks omitted).)

Attorney Rohn served each response on Attorneys Sanford, Spector, Benoit, and Wilczynski, but not Attorney Huge. None responded, and nothing further has occurred to date in this case except that the Presiding Judge of the Superior Court issued an order on August 30, 2018, transferring this matter to the newly-established Complex Litigation Division. The order has not been entered yet, however.

II. DISCUSSION

Three issues surface from this review that must be addressed: who represents Holloway, what is the status of his claims as well as Hess and HOVIC's crossclaims, and whether the show cause order should be enforced or vacated. Because the last two depend on the first, the Court turns to the status of this case first.

A. Status of the Case

a. Holloway's Claims

Holloway filed his complaint on December 28, 2005 but then filed a notice of dismissal and a stipulation of dismissal on October 3, 2006. The notice dismissed his claims without prejudice against Born, Raritan, CertainTeed, Crane, GEC, OPF, and UOP, while the stipulation dismissed his claims with prejudice against the Hess Defendants. Ordinarily, when "a plaintiff effectuates an unconditional voluntary dismissal . . . the action terminates immediately upon filing the appropriate notice with the Clerk of the Superior Court, and neither the judge nor the plaintiff will possess the ability to undo the dismissal." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611 (V.I. 2012). In other words, it is the "[f]iling of the notice of dismissal [that] automatically terminates the suit and itself closes the file." *Id.* at 610 (citation omitted). And whether titled as a notice, a stipulation, or a motion, the effect is the same: the suit is no longer pending. *See id.* ("The label placed on the paper filed by the plaintiff is of no significance." (citation omitted)). In fact, "[t]he plaintiff need not even serve or otherwise notify the defendant of the filing of the notice of dismissal in order to make it effective" and "[a]ny further action or order by the court is neither necessary nor of any effect." *Id.* (citation omitted). Even "the filing of an amended notice of dismissal is ineffective to undo the original dismissal" because the "suit is no longer *pending*," *Id.* (citation omitted). "The only function that a court might perform . . . is to determine, should the question arise, whether an answer or motion for summary judgment has in fact been filed prior to the filing of a notice of dismissal." *Id.* (citation omitted). And, unless the document states differently, a voluntary dismissal is "without prejudice" "as to all defendants." *Id.* (citation omitted).

Here, nine months before stipulating with Holloway, the Hess Defendants, on January 31, 2006, had filed their answer in which HOVIC and Hess both asserted crossclaims. So, the question becomes what impact Holloway's dismissals had on this case. His October 3, 2060 notice was without prejudice and limited to certain defendants, none of whom had not appeared, whereas the October 3, 2006 stipulation concerned defendants who had appeared and crossclaimed but was prejudice. The labels (notice and stipulation) placed on the two documents is not relevant except that, because the Hess Defendants had answered, they had to agree to the dismissal for it to be effective without court approval. *See id.* at 613 ("Rule 41(a)(1)(A)(ii) requires that a stipulation contain the signatures of 'all parties who have appeared.' By its own terms, this requires the signature of every defendant *who has appeared* in a multi-defendant litigation, as well as any third party defendants and intervenors." (emphasis added) (citation omitted)). Since the Hess Defendants were the only parties to appear, and because they agreed to Holloway's dismissal, the October 3, 2006 stipulation was effective when it was filed with the Clerk's office. Consequently, the Order "granting" or "approving" the dismissal 2012 was a nullity. It will be vacated by separate order of even date.

The scope of Holloway's October 3, 2006 notice of voluntary dismissal is less clear because the Hess Defendants did not join in that dismissal. Whether they had to is unclear. Federal Rule of Civil Procedure 41 governed voluntary dismissals in the Superior Court at that time. *Cf. id.* at 604 n.3. And Federal Rule 41(a)(1) provided that "*an action* may be dismissed by the plaintiff without order of court." Fed. R. Civ. P. 41(a)(1) (2006 ed.) (emphasis added). In other words, a Rule 41(a) dismissal dismisses the entire action, not a party or a claim. Some federal courts "have taken the position that a plaintiff cannot voluntarily dismiss as against fewer than all of the defendants, but must . . . obtain court approval to drop such defendants." 27A Tracy Bateman, *et al.*, *Federal Procedure, Lawyers Edition* § 62:480 (2017) (footnotes omitted). Other federal courts have "taken the position that the plaintiff in such a situation should proceed under either . . . [Rule] 15(a) or the court's inherent power." *Id.* (footnote omitted). "Still other courts have construed the word 'action' to mean all of the claims against any one defendant and not necessarily all of the claims against all of the defendants." *Id.* (footnote omitted). Clearly, federal courts are divided on the question. *Cf. Pedrina v. Chun*, 987 F.2d 608, 609 (9th Cir. 1993) ("The question presented by this appeal is whether Rule 41(a)(1) allows a plaintiff to dismiss without a court order fewer than all of the named defendants, or whether the Rule is limited to dismissals of the plaintiff's entire case. The answer to this question turns on our interpretation of the word 'action' in Rule 41(a)(1), and whether it refers to the entire controversy against all the defendants, or to the entirety of claims against any single defendant. Other circuits are divided on the question." (collecting cases)); *Sudnick v. Dep't of Def.*, 474 F. Supp. 2d 91, 95 (D.D.C. 2007) ("Rule 41(a)(1)(i), which permits the voluntary dismissal of 'an *action*,' cannot be invoked to eliminate 'fewer than all of the *claims* against any particular defendant.'" (quoting 8 *Moore's Federal Practice* § 41.21[1] (3d ed.1997)); *Broadway & Ninety-Sixth St Realty Corp v. Loew's, Inc.*, 23 F.R.D. 9, 11 (S.D.N.Y. 1958) ("There is a conflict in the cases as to the authority for dropping a party as distinguished from dismissing the entire action." (citing *Young v. Wilky Carrier Corp.*, 150 F.2d 764 (3d Cir. 1945); *Harvey Aluminum*, 203 F.2d 105; *Kerr v. Compagnie De Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958)); *Neiman-Marcus Co. v. Lait*, 14 F.R.D. 159, 160–61 (S.D.N.Y. 1953) ("A partial dismissal cannot be effected by mere notice.").

The concerns that could arise depending on how the rule is construed are numerous. *Cf.* 9 Charles Alan Wright, Arthur R. Miller, *et al.*, *Federal Practice and Procedure* § 2367 (3d ed. 2008) ("When fewer than all defendants are dismissed voluntarily . . . the court retains plenary power to reinstate those defendants until the claim has been adjudicated as to the remaining defendants." (footnote omitted)). Crossclaims and counterclaim could be implicitly dismissed if a voluntary dismissal dismisses the entire action rather than specific parties. *Cf. Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 479 F.3d 1330, 1335 (Fed. Cir. 2007) ("In this case, the district court's order granting the motion for voluntary dismissal states that the 'action' was dismissed, not simply the complaint. The term 'action' encompasses the entire proceedings in the district court, signifying that the order of dismissal terminated USI's counterclaims." (citation omitted)). And appellate rights can be implicated. *See, e.g.*, *Senisch v. Tractor Supply Co.*, No. 18-1265, 2018 WL

3933746, *1 (3d Cir. Apr. 23, 2018) ("[A]lthough appellants and defendant . . . signed a stipulation in which appellants agreed to dismiss their claims against that defendant with prejudice, it remains unclear whether the agreement required an order from the District Court to effect the dismissal. Therefore, this Court does not have jurisdiction to hear this appeal." (quotation marks and citations omitted)); *Anderson-Tully Co. v. Fed. Ins. Co.*, 347 F. App'x 171, 176 (6th Cir. 2009) ("[F]or purposes of Rule 41(a)(1)(A)(ii), which is clearly one means of crossing the threshold between the two stages, the appeal-stage side of the threshold clearly favors our construing the phrase 'all parties who have appeared' (and the word 'parties' in particular) as including both current and former parties.").

The question may be particularly relevant in federal court because the presence or absence of certain parties and claims could determine whether the court has jurisdiction. *Cf. Robertson v. Limestone Mfg. Co.*, 20 F.R.D. 365, 370 (W.D.S.C. 1957) ("The only reason advanced for taking a nonsuit as to Holcombe or dropping him as a party is that by doing so, plaintiffs expect to retain jurisdiction of the action in this Court, or rather, they hope to confer upon this Court a jurisdiction which it did not possess at the time the action was instituted. Although plaintiffs designated their procedure in eliminating Holcombe as a notice of dismissal under Rule 41, it is more appropriate to consider the matter under Rule 21,"). One learned treatise argues that "the sounder view and the weight of judicial authority," 9 Wright & Miller, *Federal Practice & Procedure* § 2362 (footnote omitted), holds that it is not "'material whether the court acts under Rule 15(a) . . . or Rule 21 . . . or Rule 41(a)(2),'" since "[t]he power to drop some plaintiffs or some defendants from the suit plainly exists," *Id.* (footnote omitted) (quoting *Johnson v. Cartwright*, 355 F.2d 32, 39 (8th Cir. 1966)).

But the point that "'the better view,'" 355 F.2d at 39 (quoting 5 *Moore's Federal Practice*, ¶ 41.06-1, p. 1087 (2d ed. 1964)), overlooks is that the concern is not whether the trial court has authority to dismiss a defendant. *Cf. Broadway & Ninety-Sixth St Realty Corp v. Loew's, Inc.*, 23 F.R.D. 9, 11 (S.D.N.Y. 1958) ("I refuse to believe that the court lacks power to dismiss a case as to less than all the defendants."). Courts have authority to dismiss one, some, or all defendants, voluntarily or involuntarily, because the complaint fails to state a claim for relief, or because the court lacks personal jurisdiction, or because the plaintiff fails to prosecute his case. Courts can dismiss parties. That is not the question. Rather, the question is, can a plaintiff effectuate an unconditional voluntary dismissal of fewer than all defendants by notice or stipulation, notwithstanding that the *action* is supposed to terminate immediately once "the appropriate notice [is filed] with the Clerk . . . neither the judge nor the plaintiff will possess the ability to undo" it. *Island Tile & Marble, LLC*, 57 V.I. at 611.

However, the split of authority among the federal courts, while instructive, is not dispositive here because "'any authority the federal rules have over territorial courts is a function of territorial law,' not federal law." *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 418-19 (V.I. 2016) (brackets omitted) (quoting *In re: Richards*, 42 V.I. 469, 486 n.4 (3d Cir. 2000)). In other words, even though "the body of case law construing th[e federal] rule[s] may properly be considered in construing [the Virgin Islands rules]," *Slack v. Slack*, S. Ct. Civ. No. 2017-0033, 69 V.I. ____, _____; 2018 V.I. Supreme LEXIS 17, *8 (V.I. July 5, 2018) (citations omitted), it is not binding. And this Court cannot overlook that the practice in Virgin Islands courts has been for parties to dismiss all claims against fewer than all defendants either voluntarily by notice or by stipulation signed by all parties who have appeared. This custom is instructive. And *Island Tile* is as well. In *Island Tile*, the plaintiff stipulated to dismiss one defendant based on employer immunity and then "[f]or the following year . . . continued to actively litigate the matter with respect to the remaining defendants." 57 V.I. at 604. The Virgin Islands Supreme Court did not conclude in *Island Tile* that the entire action was dismissed once the plaintiff agreed to dismiss one defendant. The reason why is because an action cannot terminate when other claims remain pending. *Cf. Davis v. Allied Mortg. Capital Corp.*, 53 V.I. 490, 498-99 (2010) (appeal dismissed for lack of jurisdiction because counterclaim remained pending) ("[A] trial court's failure to expressly address a counterclaim will not render an order non-final if (1) the language of the judgment indicates that the court implicitly ruled on the counterclaim, (2) the judgment in the primary action rendered the counterclaim moot, or (3) procedural or jurisdictional defects that rendered the counterclaim a nullity or otherwise prevented the counterclaim from ever being properly before the trial court," (citations omitted)); *see also ECASH Techs., Inc. v. Guagliardo*, 35 F. App'x 498, 499 (9th Cir. 2002) ("Rule 15(a) was the proper mechanism by which appellant could have sought to amend his pleading to drop some, but not all, counterclaims against appellant. [sic] Appellant did not properly file a motion to amend, however, prior to the district court's order dismissing the state law counterclaims at issue with prejudice. Consequently, those counterclaims remained in the action at the time the district court issued its decision." (footnote and citations omitted).

Accordingly, this Court holds that a "voluntary dismissal of an action by the plaintiff, either by notice [or stipulation] or by leave of court can be effective against fewer than all of the defendants," so long as "all of the claims against [that] one defendant," even if "not necessarily all of the claims against all of the defendants," are dismissed. Binder, *et al.*, 27A *Federal Practice, Lawyer's Edition* § 62:480 (footnotes omitted). Therefore, Holloway voluntarily dismissed his own claims against Born, Raritan, CertainTeed, Crane, GEC, OPF, and UOP on October 3, 2006, even though the Hess Defendants did not sign off on their dismissal. Neither Born, Raritan, CertainTeed, Crane, GEC, OPF, nor UOP had answered or moved for summary judgment. Thus, an order was not required. *Cf.*

Island Tile & Marble, LLC, 57 V.I. at 610 ("Any further action or order by the court is neither necessary nor of any effect." (citation omitted)). For this reason, the October 3, 2006 notice qualifies as an unconditional instrument that terminated Holloway's claims against the defendants named therein on the date it was filed.

With Holloway's claims against Born, Raritan, CertainTeed, Crane, GEC, OPF, and UOP dismissed without prejudice and his claims against the Hess Defendants dismissed with prejudice, what remains are his claims against Alltite Gasket Company, Litwin, Bigelow-Liptak, Chicago Bridge & Iron Company, N.V. ("CBINV"), Fluor Engineers & Constructors, Inc. ("Fluor"), R&E, IMC, 3M, Foster Wheeler Corporation, Ingersoll Rand Corporation, John Crane, Parsons Infrastructure & Technology Group, Inc. ("PITGI"), Portilla Corporation, Resal, Rubber & Gasket Company of Puerto Rico ("R&G"), Stubbs-Overbeck, Union Carbide Corporation, and Yarway Corporation as well as the John Doe defendants.[3] Holloway's claims against Garlock are stayed because Garlock filed for bankruptcy. The remaining defendants never answered the complaint or formally appeared through counsel, except that R&E and IMC asked the Court to approve a stipulation for substitution counsel, which would constitute a "voluntary appearance." 5 V.I.C. § 115. And Litwin, John Crane, IMC, and R&E also filed responses to the August 16, 2010 order, purportedly without submitting to the Court's jurisdiction. *But cf. In re: Najawicz*, 52 V.I. 311, 338 (V.I. 2009) ("[N]o specific authority to enter a general appearance is necessary, and . . . a client may be bound by his or her attorney's general appearance although the authority actually granted was to make only a special appearance." (quotation marks and citation omitted)).

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[3] Holloway must also address his claims against the John Doe defendants. *Cf. Theodule v. Hess Oil V.I. Corp.*, SX-04-CV-604, 69 V.I. ___, ___; 2018 V.I. LEXIS 113, *14-16 (V.I. Super. Ct. Oct. 24, 2018) (discussing same).

However, the Court need not decide at this juncture whether any defendant's response should "be equivalent to personal service of the summons," *id.*, because Attorney Huge has represented, albeit indirectly through the email Attorney Rohn attached to her September 22, 2016 notice, that Holloway's remaining claims may have to be dismissed. But whether Holloway's District Court case bars this case from going forward is not for this Court to decide *sua sponte*. *Cf. Malloy v. Reyes*, 61 V.I. 163, 175 n.9 (V.I. 2014) ("It is unquestionably error for the Superior Court to raise an affirmative defense *sua sponte* on behalf of a defending party where that party has waived the issue by failing to raise it or support it with evidence." (citation omitted)); *see Gumbs v. Koopmans*, 66 V.I. 429, 432 (V.I. 2017) ("res judicata is an affirmative defense that is ordinarily lost if not timely raised." (quotation marks, brackets, and citations omitted)).

b. Hess and HOVC's Crossclaims

The status of Hess and HOVIC's crossclaims is even less clear than the status of Holloway's claims. It is beyond question that a court must have personal jurisdiction over the parties. *Cf. Estate of Skepple v. Bank of Nova Scotia*, S. Ct. Civ. No. 2014-0050, 69 V.I. ___, ____; 2018 V.I. Supreme LEXIS 24, *20 (V.I. Aug. 17, 2018) ("[T]he issuance of a judgment by a court that *has not* obtained personal jurisdiction over a defendant is not a valid exercise of judicial power, and the judgment is premised on a fundamental error." (emphasis added) (citation omitted)). "Because a court cannot have jurisdiction over a defendant unless that defendant was served with process," *id.* at ___; 2018 V.I. Supreme LEXIS 24 at *25, and because a "defendant must either have consented to the particular method of service utilized or be served with process by a method that is authorized by law," *id.* at ____; 2018 V.I. Supreme LEXIS 24 at *22 (citing *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 580 n.4 (V.I. 2012)), the status of Hess and HOVIC's crossclaims may depend in part on whether Holloway served any of the defendants. According to the certificate of service the Hess Defendants' attached to their answer, they served all the defendants. None responded, however. *Cf.* Fed. R. Civ. P. 7(a) (2006 ed.) (requiring "an answer to a cross-claim, if the answer contains a cross-claim.") (applicable via Super. Ct. R. 7).

Assuming, *arguendo*, that Holloway did perfect service on the defendants, the October 3, 2006 stipulation dismissing his claims against the Hess Defendants with prejudice would not have automatically dismissed Hess and HOVIC's crossclaims against their co-defendants. *Cf. Davis*, 53 V.I. at 498-99; *see also* Fed. R. Civ. P. 41(c) (2006 ed.) (authorizing dismissal of crossclaims, counterclaims, and third-party claims). Hess and HOVIC crossclaimed for contribution, indemnification, and breach of contract. It is for them to decide, not this Court, whether they want to proceed with their crossclaims. If Hess and HOVIC assumed that the October 3, 2006 stipulation automatically terminated their crossclaims too, that was in error. *Cf. Theodule v. Hess Oil V.I. Corp.*, SX-04-CV-604, 69 V.I. ____, ____; 2018 V.I. LEXIS 113, *11 (V.I. Super. Ct. Oct. 24, 2018) ("[W]hen counterclaims, crossclaims, and third-party claims are filed, the action remains pending, notwithstanding the termination of the plaintiff's case, unless resolution of the primary action renders the other claims in the case moot or procedural or jurisdictional defects preclude the other claims from being properly before the court." (quotation marks, brackets, and citations omitted)). Of course, whether Hess and HOVIC can proceed depends in part, on whether Holloway effected service on any defendants other than the Hess Defendants. Answering that question requires knowing who represents him.

B. Who Represents the Plaintiff

Ascertaining the status of this claims in this case begs the question who represents the

Plaintiff. The Court believes that Attorney Huge does. Admittedly, however, that is not clear. Local Rule of Civil Procedure 5.2, promulgated by the District Court of the Virgin Islands, governed practice in the Superior Court of the Virgin Islands on December 28, 2005 when Attorney Huge filed Holloway's complaint. That rule provided that "[n]o *attorney* may withdraw his appearance except with leave of court after notice to his client." D.V.I. Local R. Civ. P. 5.2(b) (hereinafter "LRCi") (emphasis added), *reprinted in* V.I. Ct. Rules Ann. 438 (2006 ed.). This rule speaks of attorneys not law firms, and an attorney is defined as

> a lawyer or an attorney-at-law. The definition of lawyer is a person whose profession is to represent clients in a court of law or to advise or act for them in other legal matters. And the definition of attorney-at-law is an officer of the court authorized to appear before it as a representative of a party to a legal controversy.

Fraser Trebilcock Davis & Dunlap PC v. Boyce Tr. 2350, 870 N.W.2d 494, 497-98 (Mich. 2015) (quotation marks and citations omitted); *cf. Pavelic & LeFlore v. Marvel Entm't Grp., Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989) ("It has long been thought the better practice for the attorney complying with Rule 11 not to sign for his firm, but to sign in his individual name and on his own behalf, with the name of his firm beneath." (citation omitted)), *superseded on other grounds by Amendments to Fed. R. Civ. Pro.*, 145 F.R.D. 401 (U.S. Apr. 22, 1993).

Some courts have questioned whether the individual attorney or the law firm enters an appearance on behalf of a party to litigation. *Cf. Gonzales v. State*, 970 A.2d 908, 920 n.12 (Md. 2009) (finding support in rules for "the notion that individuals rather than law firms appear on behalf of parties."). *But cf. In re: Kiley*, 947 N.E.2d 1, 5–6 (Mass. 2011) ("Where . . . the client enters into a representation agreement with a law firm rather than a sole practitioner, the law firm may not terminate the agreement simply because the attorney who had been handling the case has died, left the practice of law, or moved to a different firm. While the departure of the responsible attorney may cause the client to leave the firm, it may not cause the firm to leave the client if withdrawal will have a material adverse effect on the client's interests and none of the circumstances requiring or permitting withdrawal is present."). It suffices to say that Attorney Huge's appearance on behalf of Holloway on December 28, 2005 is in question, notwithstanding the March 6, 2012 order granting Motley Rice's motion to withdraw. As the Supreme Judicial Court of Massachusetts held in *Kiley*:

> When an attorney who is a partner, shareholder, or employee of a law firm enters an appearance in a civil case, the appearance binds both the individual attorney and that law firm to appear on behalf of the client. . . . Where an attorney leaves a law firm and moves to withdraw, and where successor counsel from another law firm does not file an appearance, a judge is entitled to expect that another attorney from the law firm will enter an appearance and continue to represent the client. In such circumstances, unless specified in the order, the allowance by a judge of a departing attorney's motion to withdraw does not also permit the law firm to withdraw its representation in the case. A judge may allow the attorney's motion but require the law firm to select another attorney to enter an appearance and continue the representation. A judge may not, however, select the attorney in the law firm who will enter the appearance; the law firm may select the appropriate attorney.

947 N.E.2d at 7–8. If a court may allow an individual attorney to withdraw but require his former law firm to have another attorney appear, it might also follow that a court can deny the individual attorney's motion to withdraw, notwithstanding that he has left his former firm.

According to the record before the Court, Attorney Huge still has at least a copy of Holloway's file from his time working for Motley Rice. (*Cf.* Huge-Rohn Email ("After reviewing the file I have from my MR days, I would say dismiss this case.").) And Attorney Huge purportedly is making or recommending decisions regarding how the case should proceed, notwithstanding that "it is the client, *and not the lawyer*, that is vested with the ultimate decision of whether to settle" or dismiss a case. *In re: Suspension of Welcome*, 58 V.I. 236, 250 (V.I. 2013) (*per curiam*) (citing ABA Model R. of Prof'l Cond. 1.2 cmt 1). Nevertheless, the Court does acknowledge that it is Attorney Rohn who placed the information on record about Attorney Huge, and without notifying (or without serving) him, and in response to the threat of being held in contempt. Fairness demands that Attorney Huge be given a chance to respond. Further considering that, despite having appeared by filing Holloway's complaint, the Clerk's Office never served any orders on him, the Court will grant him leave to respond to the prior orders issued in this case.

C. Whether to Vacate the Show Cause Order

The final question to be answered is whether the Court should vacate the August 23, 2016 order to show cause. The answer to that question is yes.

"[A]n order to show cause is a firmly entrenched procedural tool that the Superior Court may employ to enforce its own jurisdiction and orders." *Port Auth. of Guam v. Civil Serv. Comm'n*, 2018 Guam 1, ¶ 22 (citations omitted); *accord Molloy v. Indep. Blue Cross*, 56 V.I. 155, 191 n.11 (V.I. 2012) ("The failure to follow a Superior Court order can be the grounds for sanctions against the party or its attorney." (citations omitted)). The earlier discussion puts it beyond doubt that this case is still pending in some fashion. Prior orders inquiring about the status of this case were validly issued and "the authority of a court to enforce its prior order[s] is inherent." *People v. Rivera*, 68 V.I. 393, 415 (Super. Ct. 2018." (citations omitted). It follows that the August 23, 2016 show cause order was a proper attempt by the Court to enforce prior orders directing the Plaintiff to file proof of service and advise the Court overall about the status of this case and his desire to proceed.

However, the concern is that, according to the record, Attorney Rohn was not served with the August 16, 2010 order (even though she later filed a response to that order and filed the September 15, 2010 motion for an extension of time) or with the March 6, 2012 orders, one of which granted her September 15, 2010 motion. When an attorney is listed on a notice of entry of an order, it creates a presumption that the attorney was served with the accompanying order. *Cf. In re: Rogers*, 56 V.I. 325, 329-332 nn. 6, 13 & 19 (V.I. 2012) (order issued to attorney because his name was listed on the notice of entry). Here, however, the notices show the opposite, that Attorney Rohn received some but not all orders after she appeared on Holloway's behalf. Having considered her responses to the show cause order, and mindful that she continued to provide additional information, the Court must vacate the show cause order. But the Court must also caution that counsel should contact the Clerk's Office for clarification rather than assume an order was issued to them by mistake.

CONCLUSION

For the reasons stated above, the Court finds that Holloway's claims are still pending against certain defendants, despite the dismissal of other defendants, but only if Holloway served the defendants or if they voluntarily appeared. The Court finds that Hess and HOVIC's crossclaims may also be pending, but again, only if Holloway served the defendants Hess and HOVIC crossclaimed against. Since Attorney Huge filed the complaint and did not move to withdraw as counsel, the Court will direct him to file proof of service and advise whether Holloway will pursue any claims against the remaining defendants. The Court will direct counsel for HOVIC and Hess to do the same as to their crossclaims. Lastly, the Court must vacate the show cause order because the record supports Attorney Rohn's representations that her office never received certain orders and to now find her in contempt for not following those orders would be improper. An appropriate order follows.

Date: October 30, 2018

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ______________________
Court Clerk Supervisor
Dated: 10/30/18

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

SAMUEL HOLLOWAY,	)	**CASE NO. SX-05-CV-877**
	)	
Plaintiff,	)	**COMPLEX LITIGATION DIVISION**
	)	
v.	)	**JURY TRIAL DEMANDED**
	)	
HESS OIL VIRGIN ISLANDS CORPORATION, et al,	)	
	)	
Defendants.	)	
	)	

ERRATA ORDER

COMES NOW the Court, *sua sponte*, to correct the following scrivener's errors in the Memorandum Opinion dated October 30, 2018:

On page 11, seven lines from the bottom of the page, replace "2060" with "2006"; six lines from the bottom of the page, delete the word "not" after "had" and before "appeared"; and five lines from the bottom of the page insert the word "with" after "but" and before "was";

On page 18, two lines from the top of the page, delete "*id.*," and replace it with "5 V.I.C. § 115,"

DONE AND SO ORDERED.

Date: January 31, 2019.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By:
Court Clerk Supervisor
Dated: 1/31/2019