

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

ALBERT LINDQVIST,

Plaintiff,

SX-12-CV-295

v.

**ACTION FOR DEBT AND BREACH
OF CONTRACT**

THEODORE COHEN,

Defendant.

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Theodore Cohen's (hereinafter "Cohen" or "Defendant") Motion for Judgment on the Pleadings (hereinafter "Motion") filed on April 22, 2013. Plaintiff Albert Lindqvist (hereinafter "Lindqvist" or "Plaintiff") filed his opposition on April 30, 2013. Cohen filed a reply on May 3, 2013. For the following reasons, the Court will reserve its ruling on the Motion and grant the parties leave to file supplemental motions.

BACKGROUND

On August 26, 2003, Cohen allegedly executed a promissory note (hereinafter "Note") in the principal amount of \$140,000 payable to Lindqvist and secured by Lindqvist's property described as Plot 1-L and Plot 1-K of Estate Diamond and Plot 1-B of Estate Catherine's Rest, St. Croix, Virgin Islands (hereinafter "Property").¹ However, Lindqvist alleges that he only borrowed \$110,000 from Cohen.² On or about June 5, 2005, Lindqvist allegedly paid Cohen

¹ Compl. ¶¶ 5-7.

² Compl. ¶8.

\$15,000.³ Subsequently, Cohen allegedly released the mortgage on the Property and reduced the Note to \$95,000.⁴

In 2004, Cohen filed an action for debt and foreclosure against Lindqvist in which Cohen alleged that Lindqvist owed him \$140,000.⁵ Lindqvist alleges that as a result of the misrepresentations made by Cohen in 2004 case, Cohen obtained a Default Judgment in May 2005 and acquired Plot 1-B Estate Catherine's Rest (hereinafter "Plot 1-B") by foreclosure.⁶

Furthermore, Lindqvist alleges that in 2007, he located a purchaser for Plot 1-B and, in connection with this sale transaction, Cohen agreed to pay Lindqvist the difference between the actual amount owed by the Lindqvist on the Note (\$95,000 plus costs and interest accrued through the foreclosure sale) and the net proceeds that Cohen was to receive from the sale of Plot 1-B.⁷ As a result of the sale of Plot 1-B for a sale price of \$175,000 and the \$15,000 payment on the Note, Cohen allegedly received a return of approximately \$190,000 from the \$110,000 actually loaned to Lindqvist.⁸ Cohen allegedly agreed to pay Lindqvist the \$80,000 owed less the interest accrued on the \$110,000 loan and Lindqvist's foreclosure costs.⁹ This agreement was allegedly witnessed by at least two independent parties.¹⁰ Lindqvist filed the instant action on August 2, 2012 alleging debt and breach of contract.¹¹

³ Compl. ¶ 9.

⁴ Id.

⁵ Compl. ¶ 11.

⁶ Compl. ¶ 12.

⁷ Compl. ¶ 13.

⁸ Compl. ¶ 14.

⁹ Compl. ¶ 16.

¹⁰ Compl. ¶ 15.

¹¹ Compl. ¶¶ 19-24.

DISCUSSION

Cohen argues that “[b]oth of Lindqvist’s claims are rooted in the assertion that the amount of the judgment received by Cohen was incorrect due to Cohen’s misrepresentation,” and if Cohen prevailed on his claims, the court would have “to set aside the Judgment entered in favor of Cohen in May of 2005.”¹² The gravamen of Cohen’s argument is that judgment on the pleadings should be granted because “Lindqvist’s complaint [] seeks to set aside Cohen’s 2005 judgment and relitigate the amount of debt owed to Cohen.”¹³ Furthermore, Cohen asserts that “Lindqvist is not entitled to relief under any provision of Federal Rule of Civil Procedure 60(b).”¹⁴ In his Opposition, without citing any binding authority, Lindqvist argues that Cohen is not entitled to judgment as a matter of law on the debt and breach of contract claims.¹⁵

Although Cohen’s Motion is styled as a motion for judgment on the pleadings, “it is well established that the substance of a motion, and not its caption, shall determine under which rule that motion is construed.”¹⁶ For the following reasons, Cohen’s Motion should be construed as a motion to dismiss on grounds of res judicata and collateral estoppel. Cohen’s “citation to the incorrect statute or court rule, without more, cannot serve as a bar to him obtaining the relief he desires.”¹⁷

¹² Mot. ¶¶11,12.

¹³ Mot. at 3.

¹⁴ Mot. ¶14.

¹⁵ “By presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances... *that the applicable Virgin Islands law has been cited, including authority for and against the positions being advocated by the party.*” V.I. R. Civ. P. 11(b)(5) (emphasis added).

¹⁶ See *Chavayez v. Buhler*, No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *3 n.1 (June 25, 2009); *c.f.* *Bryan v. Fawkes*, 61 V.I. 416, 467 n.30 (2014) (“the substance of a motion, and not its caption, shall determine under which rule that motion is construed”).

¹⁷ See *id.* (citing *Anthony v. FirstBank Virgin Islands*, 58 V.I. 224, 228 n.5 (V.I. 2013) (quoting *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611-12 (V.I. 2012)).

“[R]es judicata [is] an affirmative defense [that is] ordinarily lost if not timely raised.”¹⁸

“[N]ormally res judicata is deemed waived unless raised in the answer.”¹⁹ Here, Cohen timely pled in his Answer that “Plaintiff’s claims are barred by the doctrines of collateral estoppel [sic] and *res judicata*.”²⁰ Ergo, Cohen’s motion to dismiss on grounds of res judicata and collateral estoppel is proper.

In *Stewart v. V.I. Bd. of Land Use Appeals*, 66 V.I. 522, 533 (2017), the Supreme Court of the Virgin Islands (hereinafter “Supreme Court”) held that the common law doctrines of res judicata and collateral estoppel “represent[] the soundest rules for the Virgin Islands because [they] protect[] litigants ‘from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.’”

“[T]o bar the relitigation of a claim under the doctrine of res judicata, an asserting party must demonstrate: (1) the prior judgment was valid, final, and on the merits; (2) the parties in the subsequent action are identical to or in privity with the parties in the prior action; and (3) the claims in the subsequent action arise out of the same transaction or occurrence as those in the prior action.”²¹

“[T]o bar relitigation of an issue under the doctrine of collateral estoppel, an asserting party must demonstrate: (1) the issue to be barred is identical to an issue actually and necessarily decided in the prior action; (2) the prior action was adjudicated in a decision that was final, valid, and on the merits; (3) the party against whom the doctrine is asserted was a party or in

¹⁸ *Gumbs v. Koopmans*, 66 V.I. 429, 432 (2017).

¹⁹ *Id.* (citations omitted). See V.I. R. Civ. P. (8)(c)(1).

²⁰ Answer ¶6.

²¹ See *Stewart*, 66 V.I. at 533 (citing *Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247, 255 (2014))

privity with a party to the prior action; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.”²²

In the case at bar, Cohen asserts that “the substance of Lindqvists’ debt claim is that the [May 2005] judgment received by Cohen in the debt action against Lindqvist was incorrect because of Cohen’s misrepresentation of the amount ow[ed] to him, and that Lindqvist actually owed Cohen less than the \$140,000 stated in the judgment.”²³ Consequently, “[b]oth of Lindqvist’s claims are rooted in the assertion that the amount of the [May 2005] judgment was incorrect due to Cohen’s misrepresentation.”²⁴ Essentially, Cohen argues that the current action is an attempt to relitigate the 2005 matter or improperly obtain relief from May 2005 judgment.²⁵

In light of *Gumbs*, this Court cannot *sua sponte* decide Cohen’s motion to dismiss on grounds of res judicata and/or collateral estoppel without providing Lindqvist with “an opportunity to present evidence and arguments against dismissal.”²⁶ As such, the Court will *sua sponte* grant both parties leave to supplement their motions.

CONCLUSION

Based on the foregoing analysis, the Court will reserve its ruling on Cohen’s motion to dismiss. The parties will be granted leave to file supplemental motions on whether the case should be dismissed on grounds of res judicata and/or collateral estoppel.²⁷ The Court will enter an Order consistent with this Memorandum Opinion.

²² See *id.* at 549-50 (citations omitted).

²³ Mot. ¶8.

²⁴ Mot. ¶11.

²⁵ Mot. at 3-4.

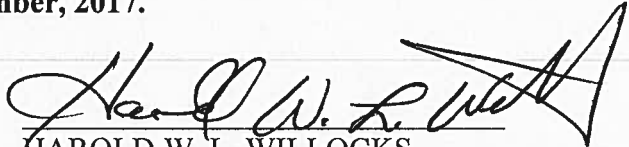
²⁶ See *Gumbs*, 66 V.I. at 432 (the Superior Court erred by *sua sponte* dismissing the complaint on res judicata grounds without providing Gumbs with an opportunity to present evidence and arguments against dismissal).

²⁷ “By presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or self-represented party certifies that to the best of the person’s knowledge,

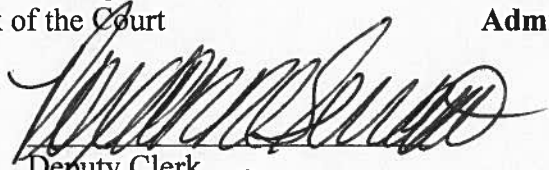
DATED this 28 day of November, 2017.

ATTEST:

Estrella George
Clerk of the Court


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

By:


Deputy Clerk

Dated:

12/4/17

information, and belief, formed after an inquiry reasonable under the circumstances... *that the applicable Virgin Islands law has been cited, including authority for and against the positions being advocated by the party.*" V.I. R. Civ. P. 11(b)(5) (emphasis added).