IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE WEST INDIAN COMPANY, LTD.,)
)
Plaintiff,) **CASE NO. ST-15-CV-25**
)
v.)
)
NEW IMAGE FOUNDATION CORP.,)
)
Defendant.)
)

MEMORANDUM OPINION

Pending before the Court is the January 12, 2016, request of Cynthia Jerry to set aside the Default Judgment and the Court's June 10, 2016, Order.[1] For the following reasons the request will be held in abeyance and the Court will amend its June 10, 2016, Order.

FACTUAL & PROCEDURAL HISTORY

On January 13, 2015, Plaintiff filed a Complaint against Defendant New Image Foundation Corp., for failure to pay rent in breach of a tenancy agreement between the parties. Plaintiff attempted to serve Cynthia Jerry, New Image's Resident Agent, on January 22, 2015, and on April 24, 2015. Personal service failed on both dates. After moving for substituted service by publication, Plaintiff served New Image by publication of the summons in The Virgin Islands Daily News from June 16, 2015, through July 7, 2015. After New Image failed to appear, plead, or otherwise defend, Plaintiff moved for entry of default against New Image and the Acting Clerk of the Court entered a default on August 26, 2015, under Super. Ct. R. 47. Consequently, when New Image still failed to move, answer, or otherwise respond, on October 13, 2015, Plaintiff

[1] Plaintiff responded on June 29, 2016, to which Cynthia Jerry replied on July 13, 2016.

moved for an entry of default judgment for a sum certain according to Superior Court Rule 48. On October 16, 2015, after finding that Defendant satisfactorily proved that New Image failed to pay rent, the Court entered default judgment against New Image for the recovery of rent and legal expenses in the amount of Four thousand four hundred and forty-seven dollars and eighty-nine cents ($4,447.89).

On January 12, 2016, Cynthia Jerry, the President and Resident Agent of New Image, sent a letter to the Court representing that she never received service of the Complaint and was only notified of the judgment entered against New Image on December 13, 2015. As a result, on June 10, 2016, the Court construed Ms. Jerry's letter as a motion to set aside the default Judgment and Order or for relief from the Judgment and Order, and directed Plaintiff to respond.

STANDARDS

I. Amending an Order

Absent any explicit statutory or constitutional authority to the contrary, the Superior Court possesses the authority to rescind or revise an interlocutory order at any time.[2] Additionally, under Federal Rule of Civil Procedure 60(a) the Court may correct clerical mistakes, or oversights and omissions in a judgment, order, or other part of the record.[3]

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[2] *See Island Tile & Marble, LLC v. Bertrand,* 57 V.I. 596, 609 (V.I. 2012) ("Therefore, so long as the Superior Court possesses the authority to issue an order granting or denying relief, it unquestionably possesses the authority to alter its decision prior to entry of judgment.").

[3] While Rule 137 of the Superior Court governs the correction of clerical mistakes in judgments, orders or other parts of the record, Rule 137 only applies in criminal proceedings and is inapplicable here. As a result, in the absence of a local statute, additional case law, or Superior Court of the Virgin Islands rule addressing the issue adequately, the Federal Rules of Civil Procedure are applicable to the Superior Court by Super. Ct. R. 7. *See Lembach v. Antilles Sch., Inc.*, 2015 V.I. LEXIS 35, *6, n. 18 (V.I. Super. Ct., Apr. 7, 2015); *First Am. Dev. Group v. West LB AG,* 2010 V.I. LEXIS 68, *3 (V.I. Super. Ct., Sept. 29, 2010) ("Rule 60(a) relief exists only to correct errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment." (internal quotation marks and citations omitted)); *Seales v. Seales*, 1990 V.I. LEXIS 9, *3 (V.I. Terr. Ct. Apr. 11, 1990) ("Rule 60(a) deals solely with corrections of clerical errors or mistakes which ensue from oversight or omission and not errors of a substantial nature.").

II. Vacating Default Judgment

According to Superior Court Rule 50, "[f]or good cause shown, the court, upon application and notice to the adverse party, may set aside…judgment by default…" with applications governed by Federal Rules of Civil Procedure 59-61.[4] Federal Rule of Civil Procedure 60(b) provides, in pertinent part, that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . (3) fraud . . . misrepresentation, or misconduct by an opposing party . . . or (6) any other reason that justifies relief."[5]

Further, in resolving most motions under Rule 60(b), the Court applies "a standard of 'liberality,' rather than 'strictness[,]' . . . [where] any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits."[6] And, if service of process was not properly executed, the default judgment is void for lack of personal jurisdiction, and no amount of time can render a void judgment valid.[7] In accordance with Superior Court

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[4] SUPER. CT. R. 50.

[5] Because SUPER. CT. R. 50 instructs the Court to apply FED. R. CIV. P. 60, the Court will consider the doctrines developed under this rule by federal courts in addition to the precedent delineated in this jurisdiction under SUPER. CT. R. 50. While not binding, the federal precedent is particularly persuasive on this issue given the explicit instruction of SUPER. CT. R. 50 to apply the specific provisions of the Federal Rules of Civil Procedure when addressing motions to set aside default judgments. *See Ernest v. Morris*, S. Ct. Civil No. 2013-0065 ___ V.I. ___, ___, 2016 V.I. Supreme LEXIS 18, at *14-16 n.7 (V.I. May 18, 2016) ("Federal Rule of Civil Procedure 60 applied to this proceeding through Superior Court Rule 50….").

[6] *Bazzar v. Salem*, 2015 V.I. LEXIS 125, *8-9 (V.I. Super. Ct., Oct. 8, 2015) (citing *Medunic v. Lederer*, 533 F.2d 891, 893-94 (3d Cir. 1976)); *See Spencer v. Navarro*, 2009 V.I. Supreme LEXIS 25, *4 (V.I. 2009) (unpublished) ("In assessing a trial court's decision, we are cognizant that default judgments are not the favored means of resolving civil actions, that doubtful cases should be decided on their merits…") (citing *United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 194-195 (3d. Cir. 1983)); *Cohen v. Gabriel Enterprises, Inc.*, 2013 U.S. Dist. LEXIS 39407, *21 (D.V.I. Mar. 21, 2013) ("The Court is nevertheless cognizant of the Third Circuit's 'policy disfavoring default judgments and encouraging decisions on the merits'") (citing *Harad v. Aetna Casualty & Surety Co.*, 839 F.2d 979, 982 (3d Cir. Pa. 1988)).

[7] *Ernest*, 2016 V.I. Supreme LEXIS 18.

Rule 50, the Court must then set the judgment aside if good cause is shown and notice has been given to all adverse parties.[8]

ANALYSIS

Plaintiff alleges that the January 12, 2016, letter is not the proper vehicle to challenge default judgment because Jerry wrote the letter on her personal stationery and fails to indicate the authority by which she is acting on behalf of Defendant.[9] The Court agrees. While ordinarily courts in this jurisdiction have adopted a policy which offers "*pro se* litigants greater leeway in dealing with matters of procedure and pleading,"[10] here, the named Defendant is not Jerry, but an artificial legal entity. A corporation is not a "natural" person and is unable to adopt *pro se* status because, when named in a civil action, the corporation can only act through its agents. With limited exceptions, the agent must be an attorney at law.[11] Under 4 V.I.C. § 443,

> the unauthorized practice of law shall be deemed to mean the doing of any act by a person who is not a member in good standing of the Virgin Islands Bar Association for another person usually done by attorneys-at-law in the course of their profession, and shall include but not be limited to...the appearance, acting as the attorney-at-law, or representative of [a] corporation, before any court...."[12]

This holds true even though Jerry is both the Resident Agent and President of New Image because the representation of an entity by a non-attorney, is considered the unauthorized practice of law.[13]

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[8] *Id.* at *19, *28.
[9] In the January 12, 2016, letter Ms. Jerry states, "[t]his letter is written in order to present discrepancies in the documentation leading to the Notice of Entry of Judgment & Order dated October 16, 2015 to Sharmane Davis-Brathwaite, Esquire."
[10] *Appleton v. Harrigan*, 61 V.I. 262, 267 (V.I. 2014) (citing *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011)).
[11] *See* 4 V.I.C. § 112 (In small claims cases, "[n]either party may be represented by counsel and parties shall in all cases appear in person except for corporate parties, associations and partnerships which may appear by a personal representative.").
[12] 4 V.I.C. § 443.
[13] *See Lettsome v. VI Sea Trans,* 52 V.I. 109, 112 (V.I. Super. Ct. 2009) (citing *Simbraw, Inc., v. United States*, 367 F.2d 373 (3rd Cir. 1966)).

Although the Court indicated in its June 10, 2016, Order, that it would treat Jerry's letter as a motion to set aside the entry of default judgment and instructed Plaintiff to respond accordingly, the Court acknowledges its oversight in applying inappropriate liberality by construing the letter as a motion. While the Court will not strike the letter from the record, it will not consider the substance of the letter until a formal motion is filed on behalf of Defendant by an attorney licensed to practice in this jurisdiction, and the Court will revise its Order to indicate that Jerry is not acting on behalf of Defendant. While the Court previously entered default judgment, the Court finds the June 10, 2016, Order was not a final judgment, but an interlocutory order, because it did not substantively change or replace the previous judgment. Therefore, the Court has discretion to amend its Order.

Since Jerry is unable to represent Defendant in this action without violating 4 V.I.C. § 443, the Court will consider Jerry's letter as an attempted appearance by Defendant. A party "appears" in an action by making a written submission in which the party acquiesces to the jurisdiction of the Court with an intent to defend against the civil action.[14] Traditionally an appearance is made "before the clerk or by filing an answer with the clerk within 20 days after service of the summons and complaint,"[15] but a voluntary appearance by a defendant is considered the equivalent to personal service of the summons.[16] Although the letter does not meet the technical standards under the Rules of this Court, it purported to raise defenses regarding proper service of process, thus

[14] *See Lettsome*, 52 V.I. at 115; *see also James v. Williams*, 26 V.I. 20, 22 (V.I. Terr. Ct. 1990) ("An appearance is a formal proceeding by which the defendant submits himself to the jurisdiction of the court."); *Enterprise Assets, LLC v. Pinnacle Development & Investments, LLC*, 2016 V.I. LEXIS 29, *3 (V.I. Super. Ct., Mar. 29, 2016); *Seashells Holding, LLC v. Camilo*, S. Ct. Civ. No. 2011-01, (V.I. Feb. 22, 2011) (unpublished).
[15] SUPER. CT. R. 32.
[16] 5 V.I.C. § 115.

indicating a clear intention on the part of New Image to defend this lawsuit. Therefore, the Court finds that Defendant has appeared, but not in a timely fashion.[17]

Nonetheless, since Jerry is authorized to act as the Resident Agent for Defendant, the Court will consider her letter as one from an interested party and treat her assertions as expressing factual disputes over the service of process. The Court will also consider Plaintiff's opposition. Since a default judgment is void for lack of personal jurisdiction if service of process was not properly executed, the Court must determine as a matter of law whether the Court properly exercised personal jurisdiction over Defendant for entry of default judgment.

Virgin Islands law requires every corporation to maintain "a principal office or place of business in the United States Virgin Islands and [to] have a resident agent…on whom service of legal process against the corporation can be made."[18] A corporation may be served by "delivering a copy of the summons and of the complaint to…an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process…."[19] To change the location of the business or resident agent, a proper resolution must be filed with the Lieutenant Governor.[20]

Personal service upon Defendant was attempted through Jerry as the Resident Agent, on January 22, 2015, at 6300 Tara Way, Number 22, St. Thomas, and on April 24, 2015, at Industrious

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[17] *Lettsome,* 52 V.I. at 116 ("The Court views the pro se defendant's failure to have an attorney submit an answer on its behalf in a similar vein. Although the Answer to Complaint filed by Smith was not acceptable under the Rules of this Court, it purported to deny the bulk of the allegations of the Complaint and to raise several affirmative defenses on behalf of Sea Trans, thus indicating a clear intention on the part of Sea Trans to defend this lawsuit on the merits. Despite Defendant's technical noncompliance with the rules of pleading, Court does not find that Sea Trans has failed to appear, plead or otherwise defend.").
[18] 13 V.I.C. § 51.
[19] *See* 5 V.I.C. § 112 ("When service of the summons cannot be made as prescribed in Rule 4 of the Federal Rules of Civil Procedure…"); FED. R. CIV. P. 4(h).
[20] 13 V.I.C. § 53.

Park, Building 4, Sub-Base, St. Thomas.[21] The Marshal, acting as the process server, failed to locate Jerry at either location. Plaintiff was originally represented by the Law Offices of Hodge & Hodge, which obtained the original summons to be served at 6300 Tara Way, but it is unclear to the Court why this address was used. On April 14, 2015, Dudley Rich Davis, LLP, and Hodge & Hodge stipulated for the former's substitution into the litigation as Plaintiff's counsel.[22] Plaintiff claims the physical address used the second time service was attempted, at Industrious Park, was on file with the Division of Corporations for a different business owned by Ms. Jerry known as "TIV." The Corporations Division identified TIV as a "stateside company with the main office in Washington, DC."[23]

On June 3, 2015, Plaintiff moved for substituted service by publication. Under 5 V.I.C. § 112(a)(2), publication is permitted in a newspaper of general circulation in the Virgin Islands when defendant "has departed therefrom with intent to defraud his creditors or to avoid the service of the summons, or with like intent keeps himself concealed therein, or has departed from the Virgin Islands and remained absent therefrom six consecutive weeks."[24] The Court granted Plaintiff's motion on June 5, 2016, and directed publication of the summons once a week for four (4) consecutive weeks. In accordance with the Order, Plaintiff published the summons in The Virgin Islands Daily News beginning June 16, 2015, and ending July 7, 2015.[25]

Jerry, as the Resident Agent, maintains that, while she received the initial Notice to Quit the premises, she never received notice or service of the Complaint against Defendant until after the entry of default judgment. According to her letter, she received a copy of the Judgment and

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[21] *See* Pl.'s June 29, 2016, Opp., Ex. 2.
[22] Approved by Order on April 16, 2015.
[23] *See* Pl.'s June 3, 2015, Mot. For Substituted Service by Publication, Ex. A.
[24] 5 V.I.C. § 112(a)(2).
[25] Pl.'s July 30, 2015, Notice of Filing Proof of Service by Publication.

Order via regular mail on December 13, 2015. Further, she maintains that she does not regularly read The Daily News and that WICO has her cell phone number, email address, and P.O. Box mailing address on file, but failed to contact her by any of those methods to request a physical address or to give her notice of the suit. Additionally, Jerry believes that, if Plaintiff's attorney had conducted further inquiry at the Division of Corporations, her P.O. Box address would have been discovered.[26]

Here, while Plaintiff properly moved for service by publication under 5 V.I.C. § 112(a)(2), and published the summons in The Daily News, § 112 also requires a plaintiff to exercise due diligence in locating the defendant.[27] At the time the Court granted the motion for service by publication it appeared Defendant did not wish to be found. However, based on the forgoing, it seems that factual questions exist as to whether Plaintiff exercised due diligence in locating Defendant for service.[28]

"Generally, whether to hold a hearing on a motion for relief from judgment is within the discretion of the Superior Court."[29] However, "[w]hether a basis exists for vacating a default judgment because service was improper concerns factual questions that can only be resolved by

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[26] Plaintiff alleges that a resident agent cannot list a Post Office box, but fails to cite any binding authority supporting this claim.

[27] 5 V.I.C. § 112.

[28] In *Ernest v. Morris*, the Supreme Court remanded the case back to the Superior Court for an evidentiary hearing after the court determined there was a basis for a hearing to resolve factual questions relating to effective service after Defendant, by letter, informed the court that he never received notice of the case or default judgment against him. In his letter Defendant asserted that to his knowledge Plaintiff's attorney first attempted to serve him by mail to an outdated post office box, then by publication, but that he moved from St. Thomas to New York and had not resided in St. Thomas for decades. The Supreme Court found that "even though none of the parties dispute that the Morrises effected service by publication, what is in dispute is whether publication in a St. Thomas newspaper, rather than a New York newspaper, was the jurisdiction most likely to give notice to Ernest of the pending 1998 action." *Ernest v. Morris*, 2016 V.I. Supreme LEXIS at *26-27.

[29] *Id.* at *23.

an evidentiary hearing."[30] Here, the Court finds that factual questions exist regarding service, and the Court will schedule an evidentiary hearing. The Court strongly cautions Defendant that, if the corporation fails to obtain counsel, the Court may exercise its authority to strike all filings made by a non-attorney on Defendant's behalf.[31]

CONCLUSION

For the forgoing reasons, the request to set aside the Default Judgment will be held in abeyance and the Court's June 10, 2016, Order will be amended in accordance with this Opinion.

An Order consistent with this Memorandum Opinion shall issue.

Dated: July 22, 2016

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Acting Clerk of Court __/__/__
by: ______
Lori Boynes-Tyson
Court Clerk Supervisor 7/26/2016

CERTIFIED A TRUE COPY
DATE: 7-26-16
ESTRELLA H. GEORGE
Acting Clerk of the Court
By: ______
Cameil A. Clarke
Court Clerk II

[30] *Id.* at *26-27 (citing *3RC & Co. v. Boynes Trucking Sys., Inc.*, S. Ct. Civ. No. 2015-0016, ___ V.I. ___, 2015 V.I. Supreme LEXIS 22, at *19 (V.I. July 23, 2015) (stating that the Superior Court is "require[d] … to hold an evidentiary hearing" before making findings of fact); *Boynes v. Transp. Servs. of St. John, Inc.*, 60 V.I. 453, 465 (V.I. 2014) ("If there is a factual dispute … then the court must conduct a plenary evidentiary hearing in order to resolve that dispute." (citation and internal quotation marks omitted))).

[31] The Court will consider striking Jerry's July 13, 2016, reply from the record.