

SUPERIOR COURT OF THE VIRGIN ISLANDS
APPELLATE DIVISION OF ST. CROIX

BAZILE CONCRETE,

PLAINTIFF /
RESPONDENT /
CROSS-PETITIONER
ON REVIEW,

v.

PRINCESS HASSAN,

DEFENDANT /
PETITIONER ON
REVIEW.

SX-2010-sm-559

ON PETITION FOR REVIEW FROM
THE MAGISTRATE DIVISION

ACTION FOR DEBT

MEMORANDUM OPINION

BEFORE THE COURT is Respondent / Cross-Petitioner Bazile Concrete's Request to Reopen filed on April 3, 2012. Petitioner Princess Hassan did not file a response. However, Bazile Concrete's Request, which the Court construes as a motion to set aside a dismissal order pursuant to Superior Court Rule 322.5(b)(2), does not state whether it served a copy of its Request on Hassan. For the reasons stated below, the Court must deny the request to reopen this internal appeal.

This matter began on October 5, 2010 when Bazile Concrete filed an action for debt in the Small Claims Division of the Superior Court. In its Complaint, Bazile Concrete requested judgment in the amount of \$2,436.50 from Princess Hassan for concrete as well as material delivered to Hassan's property in Estate Strawberry Hill, St. Croix, which Bazile Concrete alleged Hassan received but did not fully pay for. (*See generally* Compl., filed Oct. 5, 2010.) Hassan filed a Counterclaim on October 19, 2010, alleging that Bazile Concrete owed her \$10,000 because it had provided bad concrete, which delayed construction and caused her to have to hire additional workers and incur other expenses to make repairs. (*See* Countercl. at 3, filed Oct. 19, 2010.) The Magistrate Court heard testimony and received evidence at a bench trial held on December 14, 2010, but which was continued to February 2011 to allow Bazile Concrete time to obtain a sample of the concrete and then test it. (*See generally*

Order entered Jan. 10, 2011.) The trial resumed on February 11, 2011 and concluded with the Magistrate Court taking the matter under advisement. In an Order entered on September 1, 2011, the Magistrate Court found that Bazile Concrete had breached its contract with Hassan but that Hassan had only proven that she incurred \$360.00 to mitigate the damages from the breach. The court also denied Bazile Concrete's claims but did award it \$998.75 as reimbursement for the cost of the concrete testing. (See Order 8 entered Sept. 1, 2011.) Thus, Bazile Concrete essentially ended with a judgment of \$638.75 against Hassan.

Hassan subsequently sent a letter to the Superior Court, addressed to the "Internal Review Civil Small Case Division," which the Clerk's Office docketed on September 12, 2012 as a petition for review. See Super. Ct. R. 322.1(b)(1)(B). On September 20, 2011, Bazile Concrete, through its owner Reginald Bazile, filed a document titled "Notice of Appeal," which the Clerk's Office construed as a cross-appeal pursuant to Superior Court Rule 322.1(b)(4)(C). Although both parties paid the \$50.00 filing fee associated with their respective appeals, neither party made financial arrangements for obtaining a copy of the transcript of the proceedings before the Magistrate Court. As a result, this Court in two Orders entered on March 15, 2012, dismissed both petitions for review as required by Superior Court 322.1(h)(2)(B), which states that "[f]ailure to request the transcript and submit evidence of payment therefor . . . shall be cause for dismissal of the petition for review for failure to prosecute, without any further notice to the petitioner." Nineteen days later, on April 3, 2012, Bazile Concrete filed a document, again through its owner Reginald Bazile, titled "Request to Reopen," in which Bazile explained that because he "did not fully understand the laws, process, and procedures," he "assumed that the transcripts were for [his] own preparation as [he] g[ot] ready to defend the case" before the Appellate Court. (Req. to Reopen at 2, filed Apr. 3, 2012.) He concluded by asking the Court to "reopen the case," explaining that he would "request and pay for the transcript which will allow the case to proceed." *Id.* As noted earlier, Hassan did not respond to Bazile Concrete's Request, but the Request

also does not indicate whether she was served with a copy. Nothing further has occurred since Bazile Concrete filed its Request.

Although Bazile Concrete's April 3, 2012 Request did not cite any rule or any authority for its Request, it is clear that Superior Court Rule 322.5(b)(2) governs Bazile's Request because it asked the Court to reopen the case. Superior Court Rule 322.5(b)(2) directs that the Appellate Court may "consider a motion to set aside a dismissal order and reopen a matter that is dismissed." Since that Rule authorizes the Appellate Court on review of a decision of the Magistrate Court to set aside an order dismissing an internal appeal, it clearly governs Bazile Concrete's Request. *See, e.g., Fuller v. Brown* 59, V.I. 948, 953 (2013) ("when a Superior Court rule governs the same subject matter as a federal rule, the federal rule cannot apply to Superior Court proceedings pursuant to Superior Court Rule 7 because application of the federal rule would render the Superior Court rule wholly superfluous." (internal alterations, omissions quotation marks, and citation omitted)). Accordingly, the Court construes Bazile Concrete's Request as a motion brought pursuant to Rule 322.5(b)(2).

In addition to providing a basis for setting aside a dismissal order, Rule 322.5(b)(2) also states that a motion to set aside and reopen must be filed "within five (5) days after the date of entry of such dismissal" order. According to Superior Court Rule 322.1(j), "[a]ll deadlines and computations of time" in the rules governing internal appeals, otherwise referred to as petitions for review, "are governed by Superior Court Rule 9." Superior Court Rule 9 in turn directs that any deadline less than eleven days—which includes the five-day deadline under Rule 322.5(b)(2) for filing a motion to set aside and reopen—excludes intervening Saturdays, Sundays, and holidays. In other words, if a deadline is less than eleven days, Rule 9 directs that only business days are counted.

Here, the Orders dismissing both parties' petitions for review were entered on Thursday, March 15, 2012. Bazile Concrete filed its Request nineteen calendar days later on Tuesday, April 3, 2012. Because Rule 322.5(b)(2)'s five-day deadline is less than eleven days, only business days count. Five

business days later, excluding intervening Saturdays and Sundays, was Thursday, March 22, 2012. Thus, both Bazile Concrete and Hassan had until then to file a Rule 322.5(b)(2) motion to set aside and reopen. Bazile Concrete's Request was filed thirteen business days later, on April 3, 2012. Therefore it was untimely and must be denied.¹ *Accord* Super. Ct. R. 922.1(j) ("All deadlines are to be strictly construed.").

Lastly, the Court is not unmindful that because of the delay in addressing Bazile Concrete's Request, Bazile Concrete would have benefited from an intervening change in law if his Request had been timely filed. Superior Court 322.1(h)(2)(B) states that "[f]ailure to request the transcript and submit evidence of payment therefor . . . shall be cause for dismissal of the petition for review for failure to prosecute, without any further notice to the petitioner" and it was this Rule the Court relied upon to dismiss both parties' respective petitions for review in the March 15, 2012 Orders. Since then, however, the Supreme Court of the Virgin Islands held that the Clerk's Office must first give written notice to the petitioner, as stated in Superior Court Rule 322.5(b)(2), before the Appellate Division can dismiss an internal appeal for failure to follow the rules regarding filing all documents, such as transcripts or briefs, related to that appeals. *See Fuller*, 59 V.I. at 955 ("we conclude that Rule 322.5(b)(2) modifies Rule 322.1(h)(2)(B), and that the Appellate Division therefore committed error by *sua sponte* dismissing Fuller's appeal without first providing him with an opportunity to remedy the deficiency.") Thus, because dismissal for violating Superior Court Rule 322.1(h)(2)(B) can only occur now after the Appellate Division has given the petitioner a warning and an opportunity to remedy any deficiency, the March 15, 2012 Orders—had they been entered after *Fuller*—would have to be set aside. But more importantly, Bazile Concrete's Request would still have been untimely even if it had been filed after *Fuller* because it was filed thirteen business days after the March 15, 2012 Orders were

¹ The Court notes that between Thursday, March 15, 2012 when the Orders were entered and Tuesday, April 3, 2012 when Bazile Concrete filed its Request, only one holiday, Transfer Day, intervened, which is observed each year on the 31st of March. *See* 1 V.I.C. § 171(a). March 31, 2012 was already beyond Rule 322.5(b)(2)'s five-day deadline. Moreover, because Transfer Day fell on a Sunday in 2012, the Superior Court would have already been closed.

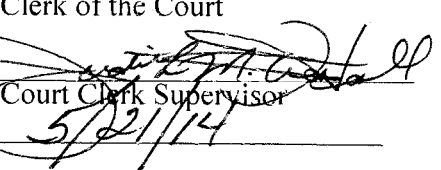
entered, which is eight business days after the five-day deadline had passed.

Just as the filing of a petition for review implicates “judicial interests beyond those of the parties,” *Mustafa v. Camacho*, 59 V.I. 566, 571 n.2 (2013) (internal quotation marks and citation omitted), so does the timely filing of a motion to set aside a dismissal order. In other words, the “administrative and institutional interests in enforcing appellate deadlines” regarding whether a petition for review is timely filed in the Appellate Division, *see id.* (quoting parenthetically *Long v. Atlantic City Police Dep’t*, 670 F.3d 436, 448 n.18 (3d Cir. 2012), apply equally to timely filing a motion to reopen a dismissed petition for review. Even though Bazile Concrete only filed its Request eight business days after the initial five-day deadline had passed, that five-day deadline is one that applies equally to all parties on appeal. And such deadlines must be “strictly construed.” Super. Ct. R. 322.1(j). It is not for a single Appellate Court judge to set such validly-adopted rules. *Accord Henry v. Denmery*, S. Ct. Civ. No. 2012-0130, 2013 V.I. Supreme LEXIS 4, *5-6 (V.I. Jan. 11, 2013) (unpublished) (“The fact that the Appellate Division believed that proceeding in derogation of Rule 322 in this case would somehow benefit both parties by providing them with additional due process rights is simply no excuse for a single judge setting aside a mandatory court rule that was validly adopted by the Superior Court pursuant to its rulemaking authority.” (footnote omitted)). For this reason, Bazile Concrete’s Request must be denied.

ATTEST:

Estrella H. George
Acting Clerk of the Court

By:


Court Clerk Supervisor

Dated:

5/21/14


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