

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

GREAT BAY CONDOMINIUM)
OWNERS ASSOCIATION, INC.,)
)
Plaintiff,)
)
v.)
)
JAN PASSARELLA, RITZ-CARLTON)
DEVELOPMENT COMPANY, INC.,)
)
Defendants.)
_____)

CASE NO. ST-13-CV-102

ACTION FOR DEBT
DECLARATORY JUDGMENT
RE LIEN PRIORITY

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Development Company, Inc.

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: December 16, 2014)

Before the Court is “[Defendant] Jan Passarella’s Motion to Set Aside Entry of Default” which Plaintiff Great Bay Condominium Owners Association, Inc. (the “GBCOA”) opposes. Defendant Ritz-Carlton Development Corporation, Inc. has not responded to said motion. For the reasons set forth below, Defendant Passarella’s motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Defendant Passarella is the owner of record of Residence Interest No. 6401, Weeks 07, 08, and 26, in the Club at the Great Bay Condominiums in St. Thomas, U.S. Virgin Islands (the “Subject Property”). The GBCOA filed this action on March 5, 2013, seeking a judgment against Defendant Passarella for debt and foreclosure on the aforementioned timeshare interests due to her failure to pay common charges and other assessments. Defendant Ritz-Carlton

Development Corporation, Inc. holds a first priority mortgage on the same timeshare units, and has filed a cross-claim for debt and foreclosure against Defendant Passarella.¹

On May 9, 2013, the GBCOA moved for the entry of default against Defendant Passarella. Appended to the motion was the affidavit of Terence Kelly, a process server in the State of New York. Mr. Kelly avers that he served the summons and complaint addressed to Defendant Passarella on a co-tenant of suitable age at the dwelling of said Defendant. The affidavit notes that the person served appeared to be approximately 50 years of age, but refused to give her name. The affidavit further states that service was completed on April 8, 2013. In view of this information, and because Defendant Passarella had not appeared, pleaded, or otherwise defended against the GBCOA's complaint, the Court entered default against her on May 24, 2013.²

On September 18, 2013, the Court received a letter dated September 13, 2013, from Defendant Passarella asking for time to locate an attorney in the Virgin Islands to represent her, and alleging that she only learned of the lawsuit four days earlier. Because the letter did not appear to have been served on the attorneys for the remaining parties, the Court issued an Order dated September 20, 2013, directing the Clerk of the Court to circulate copies of Defendant Passarella's letter to all counsel of record. On October 3, 2013, counsel entered an appearance on behalf of Defendant Passarella, and the instant motion was filed on November 4, 2013. The GBCOA filed its opposition on November 20, 2013.³

Defendant Passarella premises her motion on Rule 55(c) of the Federal Rules of Civil Procedure and contends that there is good cause to vacate the entry of default entered against her. She asserts that there is no prejudice to the GBCOA because its ability to pursue its claim has not been hindered by the loss of evidence, fraud, or reliance on a judgment. Next, Defendant Passarella claims that her failure to timely respond to the complaint was excusable because she was unaware of the lawsuit, as set forth in her September 13, 2013, letter to the Court. Finally, she argues that she has meritorious defenses because she was not served with process and that the GBCOA failed to give her notice that she was in default in paying her condominium dues.

The GBCOA counters that Defendant Passarella fails to present sufficient evidence to contest service of process, and that she made a voluntary appearance in this action which is the equivalent of service of process under Virgin Islands law. It further contends that Defendant Passarella cannot demonstrate any legal requirement that she receive notice of delinquency in the payment of the common charges for the timeshare interests at issue. Finally, the GBCOA argues that, in any event, there is no recognized legal defense to the obligation of unit owners to pay common charges.

¹ The Ritz-Carlton Development Company, Inc. has assigned its interest in the promissory note and mortgage to RC St. Thomas, LLC. The latter entity will be substituted as a defendant in this case in a separate order.

² The Entry of Default is dated May 23, 2013, and was entered by the Clerk of the Court on the following day.

³ The GBCOA also filed a motion for default judgment against Defendant Passarella on October 28, 2013. The Court will address that motion separately.

II. LEGAL DISCUSSION.

a. The Legal Standard Applicable to Defendant Passarella's Motion to Set Aside Entry of Default.

The Court first notes that Defendant Passarella improperly relies upon Rule 55(c) of the Federal Rules of Civil Procedure. Those provisions apply in the Superior Court only where they are not in conflict with the rules of this tribunal.⁴ There is a specific Superior Court rule which governs Defendant Passarella's motion, and it provides "For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications."⁵ Under our Rule 50, if the motion seeking relief is filed within twenty eight (28) days of entry of the challenged order, Rule 59 of the Federal Rules of Civil Procedure applies.⁶ If the motion is filed thereafter, Rule 60 governs.⁷ In this matter, Rule 60 applies because default was entered against Defendant Passarella on May 24, 2013, and her motion was filed on November 4, 2013.

Based on the plain language of Rule 50 of the Superior Court Rules,⁸ a motion to set aside an entry of default and a motion to set aside a default judgment are governed by the same standards, and the pertinent legal issues are those identified and argued by both parties. On a motion to set aside a default judgment, the movant must demonstrate "(1) whether vacating the default [] will visit prejudice on the plaintiff, (2) whether the defendant has a meritorious defense, and (3) whether the default was the result of the defendant's culpable conduct."⁹ Because Virgin Islands judicial policy favors decisions on the merits of litigation, trial courts must be mindful that judgments by default are not favored.¹⁰

b. Defendant Passarella Has Not Presented a Meritorious Defense.

On a motion to vacate an entry of default, the most vital criterion for a movant to establish is the existence of a meritorious defense.¹¹ To meet her burden, Defendant Passarella

⁴ SUPER. CT. R. 7. See, *Corraspe v. People*, 53 V.I. 470, 480 (2010).

⁵ SUPER. CT. R. 50.

⁶ *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 714-15 (2010) (quoting *Ruiz v. Jung*, S. Ct. Civ. No. 2008-035, 2009 WL 3568182 at * 3 (V.I. Oct. 19, 2009)).

⁷ *Id.*

⁸ See, *In re Application of Shores*, 59 V.I. 994, 1001 n. 5 (V.I. Oct. 30, 2013) (citations omitted) (noting that principles of statutory construction apply to court procedural rules).

⁹ *Spencer v. Navarro*, S. Ct. Civ. No. 2007-69, 2009 WL 1078144 at * 2 (V.I. Apr. 8, 2009) (quoting *Harad v. Aetna Cas. and Sur. Co.*, 839 F.2d 979, 982 (3d Cir. 1988)). See also, *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 419-20 (3d Cir. 1987).

¹⁰ *Spencer v. Navarro*, 2009 WL 1078144 at * 2 (citing *Ryans Rest., Inc. v. Lewis*, 949 F. Supp. 380, 383 (D.V.I. App. Div. 1996)).

¹¹ *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984).

need not prove her defense at this stage.¹² However, she must present legal issues and supporting facts which, if established, would constitute a complete defense to the direct claims against her.¹³ The “[f]ailure to establish a meritorious defense weighs heavily against setting aside the default.”¹⁴ Defendant Passarella presents two potential defenses: 1) she was not served with process; and 2) GBCOA failed to provide her with a notice that she was delinquent in paying her common charges for the timeshare interests.

The asserted defense of service of process, fails for two reasons. First, Defendant Passarella’s attorney entered a notice of appearance on October 3, 2013.¹⁵ The notice did not refer to any challenge to service of process or the personal jurisdiction of the Court over this Defendant. Thus, Defendant’s attorney entered a general appearance and waived any ability to later challenge personal jurisdiction or service of process.¹⁶

Second, service of process in this Court is guided by the provisions of Rule 4 of the Federal Rules of Civil Procedure.¹⁷ Service of process on a person in a United States jurisdiction may be made by serving “an individual . . . in a judicial district of the United States by . . . leaving a copy of [the summons and of the complaint] at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there.”¹⁸

In support of its default request the GBCOA filed a sworn affidavit of a process server.¹⁹ The process server noted that the individual he served declined to identify herself, but advised him that she was a co-tenant. The affidavit further described the person as a female caucasian with blonde hair and approximately 50 years of age. In addition, the affidavit noted that “Jane Doe” was between 5 feet four inches and 5 feet 8 inches in height, and weighed between 131 and 160 pounds. As the GBCOA has submitted a sworn affidavit of service which stated that the person served resided at the abode of Defendant Passarella, was of suitable age, and, in the view of the process server, was of suitable discretion, service of process was proper. Thus, there is a presumption that Defendant Passarella was properly served which can be rebutted only by very convincing competent evidence.²⁰

¹² *State Farm Auto. Ins. Co. v. Cohan*, 409 F. App’x 453, 456 (2d Cir. 2011) (citation omitted).

¹³ *Id.* See, also, *World Entm’t, Inc. v. Brown*, 487 F. App’x 758, 761 (3d Cir. 2012) (citations omitted).

¹⁴ *World Entm’t, Inc. v. Brown*, 487 F. App’x at 761.

¹⁵ Although Defendant Passarella filed a *pro se* letter on September 13, 2013, as discussed below, because it is not sworn it cannot refute the affidavit of process server Terrance Kelly.

¹⁶ V.I. CODE ANN. tit. 5, § 115 (1997). See also, *In re Najawicz*, 52 V.I. 311, 338-39 (2009) (collecting cases).

¹⁷ SUPER. CT. R. 27(b).

¹⁸ FED. R. CIV. P. 4(e)(2)(B).

¹⁹ The sworn statement of the process server is proper proof of service under Virgin Islands law and the Federal Rules of Civil Procedure. 5 V.I.C. § 114(a)(2) (1997); FED. R. CIV. P. 4(f).

²⁰ See, *People’s United Equip. Fin. Corp. v. Hartmann*, 447 F. App’x 522, 524 (5th Cir. 2011) (citations omitted) (stating that the evidence required to counter a sworn affidavit of service must be “clear and convincing”); *O’Brien v. R.J. O’Brien & Assocs., Inc.*, 998 F.2d 1394, 1398 (7th Cir. 1993) (citations omitted) (“strong and convincing” evidence is required to refute a process server’s sworn affidavit).

In support of her claim, Defendant Passarella relies on the contents of her September 13, 2013, letter to this Court. The letter simply states that she was not aware of the lawsuit until she received an envelope from co-Defendant Ritz-Carlton Development Company, Inc. In addition, her missive is not sworn. Defendant Passarella does not counter the process server's sworn affidavit stating that Jane Doe resided at Defendant Passarella's usual place of abode, or that Jane Doe was of suitable age and discretion when the process server completed service. She also does not contend that no one who resides with her fits the description of Jane Doe in the process server's affidavit. Nor does she challenge that the address on the process server's affidavit is her abode. Because Defendant has not provided any facts under oath which counter the specifics set out in the process server's affidavit, she has not rebutted the presumption that she was properly served with process.²¹ Therefore, the purported affirmative defense of lack of service of process cannot be viewed as a meritorious.

Defendant Passarella's second defense, that the GBCOA failed to notify her that she was delinquent in the payment of the common charges for her timeshare interests, fares no better than the first. In support of its motion for default judgment, which was served on Defendant Passarella, the GBCOA submits the affidavit of Marsha Leighton-Herrman, who is responsible for maintaining the accounts for the GBCOA members. Ms. Leighton-Herrman specifically avers under oath that Defendant Passarella was provided with an accounting for all charges assessed against her timeshare interests which was sent to her last known address. Notably, the address for Defendant Passarella on the authenticated statement attached to the aforesaid affidavit is the same address set forth on the affidavit of the process server.

Defendant Passarella does not provide a counter-affidavit to refute the sworn statements of Marsha Leighton-Herrman. Rather, her defense is a single sentence contained in her instant motion. The arguments and unsworn statements of attorneys are not evidence on which a court can rely when deciding motions.²² Defendant Passarella also does not point to any provisions in the Declaration and Bylaws of the GBCOA or the Virgin Islands Condominium Act to support her purported defense. Finally, as the GBCOA correctly notes, under Virgin Islands law, a condominium, or in this case timeshare, owner's duty to pay assessed common charges is absolute and there is no defense to that obligation.²³ For these reasons, the Court concludes that the lack-of-notice claim of Defendant Passarella does not constitute a meritorious defense.

c. Defendant Passarella Has Not Demonstrated That Her Conduct Was Excusable, and There Will Be Prejudice to GBCOA if the Entry of Default is Vacated.

Consideration of the two remaining factors reveals that they also disfavor Defendant Passarella. Her claim of excusable conduct is premised on the same circumstances underlying

²¹ *Old Republic Ins. Co. v. Pac. Fin. Servs. of Am., Inc.*, 301 F.3d 54, 57-58 (2d Cir. 2002) ("A defendant's sworn denial of receipt of service, however, rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing. But no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits.").

²² *Henry v. Dennery*, 55 V.I. 986, 994 (2011).

²³ *Weary v. Long Reef Condo. Ass'n*, 57 V.I. 163, 172 (2012); *Towers Condo. Ass'n v. Lawrence*, 32 V.I. 185, 187-89 (Terr. Ct. 1995).

her claim of a lack of service of process. However, the Court already found service of process was proper based upon the discussion above. In the absence of any sworn explanation from her, the Court cannot conclude that Defendant Passarella's failure to timely respond to the GBCOA's complaint was excusable.

Finally, the Court concludes that there would be prejudice to the GBCOA if the entry of default were vacated. Defendant Passarella has not presented any meritorious defense to the claims brought by the GBCOA. In fact, Virgin Islands law specifically declares that there is no defense to an action by a condominium association against a unit owner for unpaid common charges.²⁴ If the default were lifted, the GBCOA would be forced to endure further litigation on her liability for a claim that Defendant Passarella cannot legally contest. This result would be contrary to the Court's policy of guarding against unnecessary expense in litigation.²⁵

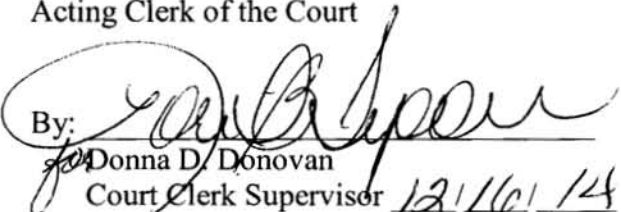
III. CONCLUSION.

As discussed above, Defendant Passarella has failed to prevail on any of the three elements necessary for this Court to set aside the entry of default against her. Therefore, the Court will issue an appropriate order of even date denying her motion to set aside the entry of default.

Dated: December 16, 2014

ATTEST:
Estrella George
Acting Clerk of the Court

By:


Donna D. Donovan
Court Clerk Supervisor 12/16/14


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

²⁴ The Court recognizes that Defendant Passarella may contest the total amount of common charges sought by an association. Even when in default a defendant may challenge the amount of damages sought by a plaintiff. *See, King v. Appleton*, S. Ct. Civ. No. 2012-0138, 2014 WL 4968290 at * 2-3 (V.I. Oct. 6, 2014) (citations omitted). *See also, Tabos Colon v. Diaz-Gonzalez*, Civil No. 04-2371, 2009 WL 249364 at * 3 (D.P.R. Jan. 23, 2009) ("However, albeit a defendant on default has no standing to contest the factual allegations of plaintiff's claim for relief, he does not waive his right to question the extent of the damages suffered by the plaintiff.") Therefore, the mere fact that there may be a dispute as to the amount of the common charges does not weigh in favor of lifting a default which only precludes a challenge to liability. In any event, as of today, Defendant Passarella has not submitted any documents contesting the amount of common charges sought by GBCOA.

²⁵ *See, SUPER. CT. R. 1.*