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VERONICA HANDY, ESQUIRE  
CLERK OF THE COURT

**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

**BART ENTEPRISES, LLC**

**APPELLANT/PLAINTIFF**

**v.**

**SAPPHIRE BAY CONDOMINIUMS WEST**

**APPELLEE/DEFENDANT**

**S.Ct.Civ. No. 2022-0055**

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APPEAL FROM THE  
SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS & ST. JOHN  
Super. Ct. No. ST-2020-CV-00075 (Gumbs-Carty, J.)

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**BRIEF OF APPELLEE**

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## **STATEMENT OF JURISDICTION**

Appellee Sapphire Bay Condominiums West (“Sapphire” or “Appellee”) accepts the statement of Superior Court jurisdiction submitted by Appellant Bart Enterprises, LLC (“Bart” or “Appellant”). Sapphire provides the following in supplementation or correction of Bart’s statement regarding the jurisdiction of this Court.

Sapphire agrees with Bart that the Order dated September 23, 2022 (the “Dismissal Order,” App. 003)<sup>1</sup> that is the subject of this appeal expressly states that “this matter is DISMISSED,” and thus that the language used by the Court disposed, perhaps inadvertently, of all claims including the Sapphire’s Counterclaim (App. 008) and its Amended Counterclaim, filed on August 19, 2021. Sapphire affirmatively states that the motions that were granted by the Court, namely, Sapphire’s February 17, 2022 Motion to Dismiss Complaint (the “February Motion” Supp. 033) and its June 16, 2022 Supplement to Motion to Dismiss (the “June Supplement,” Supp. 038) did not directly address the Counterclaim or the Amended Counterclaim.

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<sup>1</sup> Sapphire has simultaneously filed a Motion for Leave to Submit Supplemental Appendix along with its Appellee’s Brief. References to the Appendix submitted by Bart will be designated “App.” References to the Supplemental Appendix will be designated “Supp.”

However, Sapphire is willing to accept the Court's dismissal of the Amended Counterclaim because the dismissal is without prejudice as provided in V.I.R.Civ.P. 41(a)(2), and Sapphire wishes this matter to be finally resolved. Neither Sapphire nor Bart has appealed the dismissal of the Amended Counterclaim, argued that it was ineffective or improper, or moved to dismiss for lack of finality. Accordingly, for purposes of this appeal, Sapphire agrees that this court has appellate jurisdiction pursuant to 4 V.I.C. §32(a) because the Dismissal Order was or is deemed to be a final order.

In the interests of full disclosure, Sapphire points out a certain filing made by Bart may affect finality. On October 18, 2022, Bart filed its *Motion to Reconsider Order of Dismissal or, in the Alternative, to Vacate Order of Dismissal* (the "Bart Reconsideration Motion," Supp. 071), asking the Superior Court to reconsider the Dismissal Order. As authority for reconsideration, Bart cited both V.I.R.Civ.P. 6-4(b)(3) and 60(b)(4) and (b)(6). The next day, Bart filed its *Motion for a Two-Day Extension of Time Nunc Pro Tunc to File Motion for Reconsideration of Order Entered on September 23, 2022* (the "Extension Motion," Supp. 090). In response, on November 8, 2022, Sapphire filed its *Combined Opposition of Sapphire Bay West Condominium to Motion to Reconsider and Motion For Extension of Time* (the "Combined Opposition," Supp. 093). In the Combined Opposition, Sapphire cited

substantive reasons for denying reconsideration and an extension of time. It also argued that the Extension Motion did not cite grounds that are cognizable under V.I.R.Civ.P. 60(b)(4) and (b)(6) and was untimely under V.I.R.Civ.P. 6-4(b)(3).

Certain post-trial motions suspend the finality of a judgment. Under V.I.R.App.P. 5(a)(4), those include “a motion ... (if filed within 28 days) for relief from the judgment or order.”<sup>2</sup> Because the Reconsideration Motion relied, in part, on Rule 60, captioned “Relief from Judgment or Order,” it could possibly be deemed one of the motions that suspended the finality of the Dismissal Order.<sup>3</sup>

However, any doubts about finality will soon be resolved. The Bart Reconsideration Motion was filed on October 18, 2022. If not previously acted upon, the Reconsideration Motion will be deemed denied pursuant to V.I.R.App.P. 5(a)(4), and thus the Dismissal Order deemed final, 120 days later, on February 15,

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<sup>2</sup> This rule reads in relevant part: “(4) If any party timely files in the Superior Court a motion for judgment as a matter of law; to amend findings or make additional findings; for a new trial; to alter or amend the judgment or order; or (if filed within 28 days) for relief from the judgment or order, the time for filing the notice of appeal for all parties is extended until 30 days after entry of an order disposing of the last such motion; provided, however, that the failure to dispose of any motion by order entered upon the record within 120 days after the date the motion was filed shall constitute a denial of the motion for purposes of appeal.”

<sup>3</sup> Should Bart file an amendment to its Notice of Appeal, as discussed *infra* at pp. 19-20 n. 5, *Sapphire* reserves all rights to assert, as stated in the Combined Opposition, that the Bart Reconsideration Motion was untimely and/or failed to allege cognizable grounds for relief under Rule 60(b)(4) and (b)(6).

2023. After that date, all doubts about whether the Dismissal Order constitutes a final order will be resolved. All such doubts will be resolved less than thirty days after Bart's reply brief is due in this proceeding. Accordingly, Sapphire proposes that this Court allow briefing to be completed and to decide this appeal after the February 15, 2023 date when doubts about finality will be resolved.

### **STATEMENT OF ISSUES ON APPEAL**

1. Whether the Superior Court of the Virgin Islands' ("Superior Court") properly dismissed all claims asserted in Bart's Complaint because that Complaint by Peter Najawicz, an individual not authorized to represent a limited liability company before the courts of the U.S. Virgin Islands. The status of such a complaint as a legal nullity, under *Murphy Rigging & Erecting, Inc. v. Virgin Islands Water & Power Auth.*, 2022 WL 843385, 76 V.I. 480, (V.I. Mar. 22, 2022) is an issue of law reviewed *de novo*.

2. Whether the Dismissal Order purported to dismiss Bart's claims for lack of prosecution, as urged by Bart, rather than the Motion to Dismiss, Supplement, and the Sapphire Reconsideration Motion, as stated in that Order, is an issue of law reviewed *de novo*.

### **RELATED CASES**

In *St. Thomas Cargo & Ship Services, Inc. v. Bart Enterprises, LLC and*

*Sapphire Bay Condominiums West*, Case No. ST-2019-cv-486, Superior Court of the Virgin Islands, the plaintiff seeks to recover a money judgment against Bart and Sapphire, representing charges for the transportation of construction materials that were incurred but not paid by Bart. The claim against Sapphire is that it was somehow unjustly enriched by Bart's failure to pay its shipping charges. That case is currently in the fact discovery phase.

### **STATEMENT OF THE CASE**

Bart commenced this action by filing its Complaint on February 13, 2020 (App. 012). However, although Bart is a Virgin Islands limited liability company, and not an individual with the capacity to represent itself *pro se*, the Complaint was not signed by an attorney admitted to practice in the courts of this territory. It was signed by Peter Najawicz ("Najawicz"), who claimed to be, not a member or manager of Bart, but a "project manager."

On April 3, 2020, Sapphire filed a Motion to Dismiss (the "First Motion to Dismiss") (Supp. 001) on grounds that the Complaint was not signed and filed by an attorney admitted to practice before this Court. Bart did not oppose this motion. On April 27, 2020, the Court entered an Order (the "April 2020 Order," Supp. 005) that required Bart to retain a licensed attorney to represent it in this action. On June 2, 2020, Robert L. King, Esq. entered his appearance. However,



Attorney King never filed an amended complaint or submitted a version of the Complaint signed by him. On June 23, 2020, Sapphire filed its Answer, Affirmative Defenses, and Counterclaim (App. 00017), to which Bart replied on July 20, 2020 (App. 0047). By Order entered on September 28, 2021 (Supp. 009), the Court accepted, and deemed filed, Sapphire's Answer, Affirmative Defenses, and First Amended Counterclaim the latter adding a second claim for slander of title based on a second Notice of Claim of Construction Lien recorded by Bart. Bart never responded to the First Amended Counterclaim.

On December 6, 2021, Sapphire filed its Motion for Partial Summary Judgment (Supp. 010), seeking partial summary judgment on its slander of title claim based on the second of two Notices of Claim of Construction Lien filed by Bart, as well as release and expungement of that second recorded notice. Bart has not opposed this motion. However, apparently in response to this filing, and four days after it was filed, Attorney King filed, on December 10, 2021, his Motion to Withdraw (Supp. 026). The grounds were that Bart and Najawicz had outstanding and unpaid bills from his firm in excess of \$1,000,000.00. The Court granted this motion by Order dated December 17, 2021 (Supp. 029). This order required Bart to cause new counsel to enter an appearance within 45 days, or by January 31, 2022. Bart did not respond to this order in any way.

On January 3, 2022, undersigned counsel substituted into this case as counsel for Sapphire (Supp. 030). On February 17, 2022, Sapphire filed its renewed *Motion to Dismiss* (the “Renewed Motion,” Supp. 033), on grounds that the Complaint in this matter stood as the sole enunciation of the claims of Bart in this matter and, because it was not signed by a Virgin Islands-licensed attorney, was a legal nullity. Bart has never responded to this motion in any way.

On June 16, 2022, Sapphire filed its *Supplement to Motion to Dismiss Complaint* (the “Supplement,” Supp. 038). The Supplement called to the Court’s attention the newly-decided *Murphy Rigging, supra*, and again asked the Court to dismiss the Complaint as a legal nullity. By Order entered on June 24, 2022 (the “June Order,” Supp. 042), the Court once again ordered Bart to retain counsel and file a response to the Renewed Motion and the Supplement by July 25, 2022. However, in that Order, the Court inadvertently mischaracterized the relief requested in those filings, and stated that if there was no response this matter “may be dismissed for failure to prosecute.”

In order to provide the Court with basis for dismissal for lack of prosecution if indeed it decided to proceed in this manner, Sapphire filed, on July 6, 2022, a *Motion to Dismiss for Lack of Prosecution* (Supp. 043). Bart failed to file a timely response, and Court has never acted on that motion.

On August 30, 2022, the Court entered an Order (the “August Order,” Supp. 060) granting Bart’s request for an extension of time to retain counsel. This request (Supp. 059), which had not been previously placed on the public docket of the Court or served on Sapphire, turned out to be a *pro se* letter signed by another non-attorney, Julie Najawicz, resident agent for Bart, dated July 25, 2022. In this letter, Bart sought an additional sixty days to retain counsel and respond to pending motions. In response to this letter, the August Order refused the request for sixty days, but gave Bart 21 days, or until September 20, 2022 to retain counsel and respond to pending motions.

Bart complied with part of that order. On September 1, 2022, Kye Walker, Esq. entered an appearance for Bart (Supp. 062). However, new counsel did not respond to any of the pending motions by the September 20, 2022 deadline, or seek additional time to do so. On September 12, 2022, Sapphire filed the Sapphire Reconsideration Motion (Supp. 064). This asked the Court to reconsider its decision to grant additional time for Bart to locate counsel and to respond to pending motions and instead to grant the relief requested in the Renewed Motion and the Supplement. The Superior Court never acted on the Sapphire Reconsideration Motion, and it became moot when Bart allowed the September 20,

2022 deadline to pass without filing any of the motion responses that the August Order authorized.

On September 23, 2022, three days after the deadline for motion responses, the Court entered an Order (the “Dismissal Order,” App. 003) dismissing this matter. This order does not mention, much less grant, Sapphire’s *Motion to Dismiss for Lack of Prosecution*. Neither does it mention, much less grant, the Sapphire Reconsideration Motion. The Dismissal Order acts only upon the Renewed Motion and the Supplement.

The fourteen working days allowed by V.I.R.Civ.P. 6-4(a) for moving to reconsider the Dismissal Order expired on Friday, October 14, 2022. On October 18, 2022, four days after that deadline, Bart filed its Bart Reconsideration Motion (Supp. 071). On the fifth day after that deadline, on October 19, 2022, Bart filed its Extension Motion (Supp. 080), seeking what it characterized as a “two-day extension,” but was in fact four calendar days. Sapphire opposed both motions in its *Combined Opposition of Sapphire Bay West Condominium to Motion to Reconsider and Motion for Extension of Time* (the “Combined Opposition,” Supp. 093), filed on November 9, 2022. Bart filed no reply to the Combined Opposition.

The Notice of Appeal was filed on October 20, 2022 (App. 001). The Bart Reconsideration Motion will be deemed denied, pursuant to V.I.R.App.P. 5(a)(4), on February 15, 2023.

### **STATEMENT OF FACTS**

As detailed in Sapphire's Counterclaim (App. 0019-20, Supp. 033-34), Bart agreed pursuant to a contract dated August 21, 2018 to re-roof four buildings located at Sapphire Bay Condominiums West in St. Thomas. The total contract price, after agreed change orders, was \$1,058,425.39. *Id.* Sapphire paid Bart pursuant to a series of 24 payment requests, created by Bart itself on American Institute of Architects ("AIA") forms. As Bart's own document, its payment request No. 25 (App. 0039-43, Supp. 048-52) admits, as of January 31, 2020, Sapphire had paid Bart \$900,885.13, with a balance of work of \$147,540.12 left to finish.

Rather than completing its work under the Contract, almost immediately after issuing its payment request No. 25, Bart walked off the job. On February 5, 2020, Bart recorded a Notice of Claim of Construction lien for sums allegedly due under the Contract. (App. 0016, Supp. 022) On February 13, 2020, Bart filed the Complaint commencing this action.

However, although Bart is a limited liability company, and not an individual with the capacity to represent itself *pro se*, the Complaint was not signed by an attorney admitted to practice in the courts of this territory. It was signed by Peter Najawicz (“Najawicz”) (App. 0013, Supp. 019), who claimed to be, not a member or manager of Bart, but a “project manager.”

On April 3, 2020, Sapphire filed a Motion to Dismiss (Supp. 001) on grounds that the Complaint was not signed and filed by an attorney admitted to practice before this Court. Bart did not oppose this motion. On April 27, 2020, the Court entered an Order (the “April 2020 Order,” Supp. 005) requiring Bart to retain a licensed attorney to represent it in this action. In findings that are now law of the case, the Court found that “Generally, a submission by an unlicensed attorney is considered to be a nullity. And if the rule is strictly applied here, the action would be subject to dismissal.”

However, in the April 2020 Order, the Court noted that such a submission is considered to be a nullity, but determined not to “automatically” apply the nullity rule in this case. Instead, it granted Bart “some time to retain authorized legal counsel to represent it in this litigation.” (Supp. 006). It provided thirty days for Bart to retain an attorney. Bart failed to comply with this deadline. On June 2, 2020, Robert L. King, Esq. entered his appearance. However, Attorney King never

filed an amended complaint or submitted a version of the Complaint signed by him. The Complaint that constituted a legal nullity continues to stand as the sole enunciation of Bart's claim against Sapphire.

On April 9, 2021, in another filing signed solely by Najawicz, Bart filed a second, time-barred Notice of Claim of Construction Lien. (Supp. 024.) This filing claimed the same amount due as in the first lien filing, but sought to add additional property to the scope of the lien. This filing admitted that work was last done more than ninety days prior to filing, namely on February 5, 2020. This filing did not purport to be, and did not qualify as, an amendment of the initial lien because it was made after more than the ninety days allowed by 28 V.I.C. § 265(a). Because the second lien was therefore time-barred, Sapphire asked the Court, in its SJ Motion,<sup>4</sup> to order it released. *Id.* Bart failed to oppose the SJ Motion within the 30 days allowed under V.I.R.Civ.P. 56(c)(2)(A).

Apparently in response to this filing, and four days after it was filed, Attorney King filed, on December 10, 2021, his Motion to Withdraw (Supp. 026). The grounds were that Bart and Najawicz had outstanding and unpaid bills from his firm in excess of \$1,000,000.00. The Court granted this motion by Order

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<sup>4</sup> Sapphire's Motion for Partial Summary Judgment, filed December 6, 2021 (the "SJ Motion," Supp. 021).

dated December 17, 2021 (Supp. 029). This order required Bart to cause new counsel to enter an appearance within 45 days, or by January 31, 2022. Bart did not respond to this order in any way.

On January 12, 2022, undersigned counsel substituted into this case as counsel for Sapphire (Supp. 030). On February 17, 2022, Sapphire filed its Renewed Motion, seeking dismissal on grounds that the Complaint in this matter stood as the sole enunciation of the claims of Bart in this matter and, because it was not signed by a Virgin Islands-licensed attorney, was a legal nullity. Bart has never responded to this motion in any way.

On June 16, 2022, Sapphire filed its Supplement (Supp. 078), attaching a copy of this decision. The Supplement pointed out that, under the newly-issued authority of *Murphy Rigging*, the Court had no discretion to continue to allow Bart to continue with this civil action. It asked the Court to declare the Complaint to be a legal nullity and to dismiss this matter “without further proceedings.” On June 24, 2022, the Court entered the June Order (Supp. 042), which commanded Bart to retain counsel and file a response to the Renewed Motion and the Supplement by July 25, 2022. However, in that Order, the Court inadvertently mischaracterized the relief requested in those filings, and stated that if there was no response this matter “may be dismissed for failure to prosecute.”



Sapphire had never requested the Court to dismiss for failure to prosecute. Clearly, what the Court meant to say was that if there was no response by July 25, 2022, the Court might grant the relief sought in the Motion and Supplement, namely, dismissal of the Complaint and this action as a legal nullity, under the authority of *Murphy Rigging, supra*. However, out of an abundance of caution, and in order to provide the Court with basis for dismissal for lack of prosecution if indeed it decided to dismiss on this basis, Sapphire filed, on July 6, 2022, a Motion to Dismiss for Lack of Prosecution (Supp. 043). Bart has never responded to this motion, except to the extent that it does so in its Motion to Reconsider. The Court has never acted on it.

On August 30, 2022, undersigned counsel received an Order (the “August Order,” Supp. 060) granting Bart’s request for an extension of time to retain counsel. Counsel had never seen such a request from Bart. Investigation revealed that the August Order was in response to a letter signed by Julie Najawicz, resident agent for Bart, dated July 25, 2022 (Supp. 059). This had not been served on undersigned counsel and was not on the electronic docket of this case. It was placed on the electronic docket of this Court only after undersigned counsel’s staff called the Court to inquire about it (Supp. 067).

Once again, Bart had made a filing by an individual not licensed to practice law in this territory. In this letter, Bart sought an additional sixty days to retain counsel and respond to pending motions. In response to this letter, the August Order (Supp. 060) refused the request for sixty days, but gave Bart twenty-one days, or until September 20, 2022 to retain counsel and respond to pending motions.

Bart complied with part of that order. On September 1, 2022, Kye Walker, Esq. entered an appearance for Bart (Supp. 062). However, new counsel did not respond to any of the pending motions by the September 20, 2022 deadline, or seek additional time to do so. On September 12, 2022, Sapphire filed the Sapphire Reconsideration Motion (Supp. 064). This asked the Court to reconsider its decision to grant additional time for Bart to locate counsel and to respond to pending motions. The Sapphire Reconsideration Motion stated as follows:

It was a clear error of law to fail to apply the holding of *Murphy Rigging*, and dismiss this action rather than granting yet another extension of time to retain counsel. Nothing filed by such new counsel will be able to cure the original defect in this proceeding, namely that its initiation was a legal nullity. If this matter proceeds to a conclusion, and then is appealed, it will meet the same fate as the complaint in *Murphy Rigging*: dismissal by the Supreme Court of Virgin Islands *sua sponte*. (Supp. 068)

However, the filing of that motion did not extend the time for Bart to respond to the Renewed Motion and the Supplement. The August 30 Order set a firm

deadline for response: September 20, 2022. Bart failed to oppose the Renewed Motion or to seek additional time to do so by that deadline. In the Bart Reconsideration Motion, it offers no explanation or excuse for its failure to do so.

The Court waited three additional days and then, on September 23, 2022, entered the Dismissal Order (App. 003). This order does not mention, much less grant, Sapphire's Motion to Dismiss for Lack of Prosecution. Neither does it mention, much less grant, the Sapphire Reconsideration Motion. The Dismissal Order acts only upon the Renewed Motion and the Supplement.

Both in its Bart Reconsideration Motion (Supp. 071), and the Notice of Appeal (App. 001), Bart does not mention Sapphire's Renewed Motion and Supplement, or the actual grounds for dismissal: under the authority of *Murphy Rigging*, the Complaint is a legal nullity, and the Court is required to dismiss this action without further proceedings. The Superior Court has not acted on either Reconsideration Motion.

### **ARGUMENT**

This appeal is based on two misconceptions. The first is that the Superior Court, in entering the Dismissal Order, granted Bart's Motion to Dismiss for Lack of Prosecution. However, this is simply wrong. The Dismissal Order clearly states that it is granting Bart's Renewed Motion and Supplement, namely those seeking

dismissal on grounds that the Complaint, signed by Peter Najawicz, is a legal nullity because Mr. Najawicz is not an attorney and is not admitted to represent clients before the Superior Court. The second misconception is that the Court granted Bart's Reconsideration Motion without providing Bart with the full 14 working days to respond. However, this too is flatly wrong. The Dismissal Order did not mention or pass on the Bart Reconsideration Motion. It simply granted the Renewed Motion and Supplement, not only because the Court lacked discretion to deny them, but because Bart failed to oppose them by the extended September 20, 2022 date set by the Court.

**I. ALL OF BART'S STATED GROUNDS FOR APPEAL LACK MERIT BECAUSE THE SUPERIOR COURT DID NOT DISMISS BART'S CLAIMS FOR FAILURE TO PROSECUTE.**

For reasons unknown, Bart has based the current appeal, and its Bart Reconsideration Motion before the Superior Court, on the notion that the Court dismissed its claims for lack of prosecution. However, this is patently incorrect. The Dismissal Order does not mention, much less grant, Sapphire's Motion to Dismiss for Lack of Prosecution. Neither does it mention, much less grant, the Sapphire Reconsideration Motion. The Dismissal Order acts only upon the Renewed Motion and the Supplement. It states as follows:

This Order [the August Order] provided [Bart] with additional time to retain counsel and to respond to Sapphire’s “Motion to Dismiss Complaint” filed on February 17, 2022 [*i.e.* the Renewed Motion] and to the “Supplement to Motion to Dismiss Complaint” filed on June 16, 2022 [*i.e.* the Supplement]. Responses were due within twenty-one (21) days of the date of entry of the Order advising the parties the matter will be promptly dismissed for failure to respond. Seeing no response by the Plaintiff, it is hereby ORDERED that Sapphire’s Motion is GRANTED; and it is further ORDERED that this matter is DISMISSED ... (App. 70).

Neither the Renewed Motion nor the Supplement mentioned dismissal for lack of prosecution. Those filings request dismissal because the initial Complaint filed by Bart was a legal nullity. Accordingly, none of the three grounds for appeal cited by Bart can provide a basis for reversal.

First, Bart claims that the Court failed to apply the *Halliday* factors, namely those set forth in *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511-512 (V.I. 2010). *Opening Brief of Appellant* (“Bart Brief”) at 6. However, the *Halliday* factors apply only to a dismissal for lack of prosecution. The Dismissal Order was not such an order.

Second, citing *Albert v. Hess Oil Virgin Islands Corp.*, 70 V.I. 316, 331 (V.I. Super. Mar. 27, 2019), Bart claims that dismissal was improper because six motions were pending at the time of the dismissal order. Bart Brief at 16. Again, this principle is applicable only to dismissal for lack of prosecution. *Albert*, and the six cases that it cites, simply holds that the trial court may not dismiss for lack of

prosecution where the delay is attributable to the failure of the Court to rule on pending motions. *Albert, supra*, 70 V.I. at 331. This principle has no relevance where the dismissal had nothing to do with the failure of the plaintiff to achieve progress in the case it filed.

Third, Bart claims that the Dismissal Order granted the Sapphire Reconsideration Motion without giving Bart a chance to respond. Bart Brief at 17. However, the Dismissal Order did not mention, much less grant, the Sapphire Reconsideration Motion. It addressed only the Renewed Motion and the Supplement, noted that Bart failed to respond to those motions by the September 20, 2022 deadline set by the August Order, and granted those motions. (App 0003).

Bart plainly had, and neglected to take advantage of, an opportunity to respond to the motions that were granted. Bart does not claim that it sought or received an extension of that September 20, 2022 deadline, or that this deadline gave it insufficient time to respond. It does not claim that the filing of the Sapphire Reconsideration Motion somehow worked an automatic, retroactive extension of its response time. This ground for appeal is a makeweight.<sup>5</sup>

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<sup>5</sup> Bart also seems to argue that the Court should have granted its Bart Reconsideration Motion, although it does not include that motion in its Appendix, its list of pending motions, or in its statement of issues presented for review. Bart Brief at 1-2, 4-5. Nevertheless, Bart argues that relief should be granted under V.I.R.Civ.P. 60(b)(4), as argued in the Bart Reconsideration Motion, because it

## **II. THE SUPERIOR COURT PROPERLY DISMISSED BART’S CLAIMS BECAUSE ITS COMPLAINT, SIGNED BY A NON-ATTORNEY, WAS A LEGAL NULLITY.**

In its Dismissal Order, the Court ruled that Bart’s Complaint was a legal nullity and the claims asserted it must be dismissed, under the authority of *Murphy Rigging, supra*. This decision must be affirmed, because *Murphy Rigging* made it clear that the Court was required to dismiss *sua sponte*, even if no party requested dismissal. In any event, Bart failed to oppose dismissal on those grounds, and thereby failed to preserve any objections that it had to dismissal.

On February 17, 2022, when Bart filed its Renewed Motion, seeking dismissal on “legal nullity” grounds, this Court had not yet decided *Murphy Rigging*. In the April 2020 Order (Supp. 005), in footnotes, the Court had cited cases from other jurisdictions that rejected or declined to apply the “nullity rule.” After Sapphire filed the Renewed Motion, the Supreme Court of the Virgin Islands ruled that this jurisdiction would not follow those holdings. Instead, *Murphy Rigging* made it clear that the Superior Court must apply the nullity rule without leniency or exception,

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had insufficient time to respond to the Sapphire Reconsideration Motion. *Id.* at 17. The Bart Reconsideration Motion is not yet deemed denied, and the Rule 60(b) relief it requests is not properly before the Court for consideration. After this motion is deemed denied, if Bart amends its Notice of Appeal as provided in V.I.R.App.P. 5(a)(4), and supplemental briefing is ordered, Sapphire will address this issue.

and without the need for a motion requesting its application. In *Murphy Rigging*, the plaintiff-appellant, Murphy Rigging & Erecting, Inc. (“Murphy”), filed a petition in the Superior Court for domestication of a judgment it obtained from a state court in its home state of Minnesota. The petition was signed by the Chief Financial Officer of Murphy and was accompanied by a cover letter signed by a Minnesota lawyer not admitted to practice in the Virgin Islands. *Murphy Rigging, supra*, 480 V.I. at 483. There as here, a licensed Virgin Islands attorney, in that case, Karin Bentz, Esq., subsequently entered an appearance for and took over the representation of the plaintiff. *Id.*, at 484.

The Superior Court granted the petition but declined to issue a writ of execution on grounds that the assets of the defendant, the Virgin Islands Water and Power Authority, were exempt from execution. *Id.* Murphy appealed. Neither party raised, in the Superior Court, or in their briefs filed with the Virgin Islands Supreme Court, that the original Complaint was signed and filed on behalf of a corporation by an individual who was not authorized to practice law in this territory. *Id.*, at 488. The V.I. Supreme Court, *sua sponte*, raised the issue. In a stinging rebuke to the Superior Court, the Court found that the filing of the petition for domestication was a nullity and that the Superior Court erred in not dismissing it, without the need for a request from a party, as a legal nullity.



The Court held as follows:

For these reasons, we hold that the domestication petition filed with the Superior Court on December 2, 2019, purportedly on behalf of Murphy, was a nullity with no legal effect whatsoever because it was signed and filed by individuals who lacked the authority to practice law in the Virgin Islands. When it recognized that the petition sought to vindicate the rights of a corporation but had not been filed by a licensed Virgin Islands attorney, the Superior Court was obligated to treat the petition as a nullity, which would require dismissing the case. Consequently, we vacate the Superior Court's March 13, 2020 order granting the void petition, as well as the subsequent August 31, 2021 order which would not have been entered had the domestication petition been dismissed, and further direct the Superior Court on remand to dismiss the domestication petition. We also refer Griepe and Grande [the C.F.O. and Minnesota attorney who submitted the Complaint] to the Office of Disciplinary Counsel, the Board on Professional Responsibility, the Board on the Unauthorized Practice of Law, and the Virgin Islands Department of Justice, for such entities to take any appropriate further action.<sup>6</sup>

The Court went on to reiterate:

Because the petition was a legal nullity, the Superior Court's March 13, 2020 order purporting to grant the petition, as well as all other documents filed and orders entered in the proceeding, were also nullities without any legal effect. Accordingly, we vacate the March 13, 2020 order as well as the later August 30, 2021 order as nullities and direct the Superior Court on remand to dismiss the petition for domestication.<sup>7</sup>

This case is on all fours with *Murphy Rigging*. In each case, proceedings began with the filing of a complaint signed by an individual who was not admitted to practice law in this Territory and not authorized to represent third parties, such as

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<sup>6</sup> *Id.*, at 490.

<sup>7</sup> *Id.*

corporations or limited liability companies, in civil proceedings. In each case, a duly-admitted attorney *subsequently* entered an appearance for the plaintiff, but that did not cure the original defect. Under the clear holding of *Murphy Rigging*, the Court lacked discretion to allow Bart’s claims to continue. Even if Sapphire had never sought dismissal or raised the defect in the Complaint, the Court was obligated, *sua sponte*, to dismiss Bart’s claims since the Complaint asserting them was a legal nullity.

In the Dismissal Order, the Superior Court so properly ruled. In any event, Bart did not object below to dismissal on legal nullity grounds. It has raised no objections in its current Bart Brief. As such, any objections to dismissal on these grounds have been waived through failure to assert them before the Superior Court.<sup>8</sup> And even if they had not been waived for this reason, they are waived through failure to address them in the opening brief, and may not be asserted in a reply brief.<sup>9</sup>

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<sup>8</sup> V.I.R.App.P. 20(m) (issues that were not raised or objected to, or raised in only a perfunctory manner, are deemed waived for purposes of appeal); *see also, e.g. Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 566–67 (V.I. Apr. 12, 2012)(“Furthermore, on appeal to this Court, the scope of our review is restricted to those questions that were properly preserved for review in the trial court and further raised on appeal according to the rules of this Court.”)

<sup>9</sup> Any arguments not raised in the initial brief are waived and may not be considered in a reply brief. *See, e.g. Browne v. Virgin Islands*, 55 V.I. 931, 933 (V.I. Nov. 18, 2011), quoting *Dowdye v. People*, S.Ct.Crim. No.2007–0067, 2011 WL 4402787, at \*5 n. 13 (V.I. Sept. 14, 2011) (“an appellant [must] raise an issue in his opening brief or else waive the issue on appeal.”); *Christopher v. People*, 57

### III. CONCLUSION.

The Superior Court did not dismiss Bart’s claims for lack of prosecution. It dismissed them on “legal nullity” grounds. Under the authority of *Murphy Rigging*, the Superior Court lacked discretion to allow Bart to continue to assert those claims in this proceeding. Bart has never contended to the contrary. The Dismissal Order should be affirmed.

Respectfully submitted,

Dated: December 30, 2022

/s/ J. Daryl Dodson

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V.I. 500, 513 n.7 (V.I.2012) (“[a]ny argument that is raised for the first time in a reply brief is considered waived, because the [opposing party] will not receive a chance to respond.”)

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief of Appellee does not exceed 7,800 words, and has 5213 words exclusive of the cover page, table of contents and table of authorities, certifications of admission and service of service, and that on December 30, 2022, I caused a true and exact copy of the foregoing *Brief of Appellee, along with the Supplemental Appendix*, to be filed electronically with the Clerk of the Court using the VIJEFS system, which will send notification of such filing to the following:

/s/ J. Daryl Dodson

## **CERTIFICATE OF ADMISSION**

Counsel for Appellee hereby certifies pursuant to V.I.R.App.P 22(1) that he is a member in good standing of the Virgin Islands Bar Association, admitted to practice law before the Courts of the U.S. Virgin Islands on June 12, 1989, and is a member of the bar of the V.I Supreme Court.

/s/ J. Daryl Dodson

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