

FILED

December 30, 2022 12:15 PM

SCT-Civ-2022-0055

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

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.)

SUPPLEMENTAL APPENDIX

J. DARYL DODSON, ESQ.
MOORE DODSON RUSSELL & WILHITE, P.C.
5035 Norre Gade, Suite 201; P.O. Box 310
St. Thomas, V.I. 00804
Tel: (340) 777-5490
Fax: (340) 777-5498
Email: daryl@mdrvi.com
Attorneys for Appellees Sapphire Bay
Condominiums West

SUPPLEMENTAL APPENDIX
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FILED

April 03, 2020

TAMARA CHARLES
CLERK OF THE COURT

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

APR 02 2020
[Signature]

BART ENTERPRISES, LLC,)	
	)	Civil No. ST-20-cv-00075
Plaintiff,)	
	)	ACTION FOR BREACH OF
	)	CONTRACT
vs.)	
	)	JURY TRIAL DEMANDED
SAPPHIRE BAY CONDOMINIUMS)	
WEST,)	
)	
Defendants.)	
_____)	

**DEFENDANT SAPPHIRE BAY CONDOMINIUMS WEST'S
MOTION TO DISMISS PLAINTIFF BART ENTERPRISES, LLC'S COMPLAINT
AS PLAINTIFF IS NOT REPRESENTED BY AN ATTORNEY
BUT IS RATHER IMPERMISSIBLY REPRESENTING ITSELF**

COMES NOW, Defendant, Sapphire Bay Condominiums West ("SBCW"), and moves the Court to dismiss Plaintiff, BART Enterprises, LCC's ("BART") Complaint, as it was not filed by an attorney licensed to practice in the U.S. Virgin Islands and, in support, states as follows.

1. On February 13, 2020, BART filed its Complaint in this matter, which was executed on behalf of BART by Peter R. Najawicz as BART's self-identified "Project Manager." See Complaint at p. 2.¹

2. BART, according to the Complaint, and upon independent information and belief, is a U.S. Virgin Islands limited liability company.

3. Upon information and belief, Peter R. Najawicz is not an attorney licensed to practice in the U.S. Virgin Islands. See U.S. Virgin Islands Bar Association Website at the Member Search Function.

¹ SBCW was served with the Complaint and Summons on March 24, 2020.

4. Corporate entities may only be represented by an attorney in court. *See Lettsome v. VI Sea Tran*, 2009 WL 2584768, at * 112 (V.I. Super. Ct., Aug. 7, 2009) (“Generally, corporations who are parties in civil litigation must be represented by attorneys.”) (citing *Simbraw, Inc., v. United States*, 367 F.2d 373 (3rd Cir.1966) (holding that a corporation seeking to litigate in court could not represent itself through a corporate officer, but instead was required to hire an attorney to appear on its behalf)).

5. Accordingly, given that BART has not engaged an attorney to represent it in this matter, but instead is impermissibly attempting to proceed through its “Project Manager,” Peter R. Najawicz, its current complaint is properly dismissed.

WHEREFORE, on the basis of the foregoing, Defendant, Sapphire Bay Condominiums West, respectfully requests that the Court dismiss Plaintiff, BART Enterprises, LLC’s Complaint, and award Defendant other such other relief as the Court deems just and proper.

Respectfully submitted,

DUDLEY NEWMAN FEUERZEIG LLP

DATED: April 2, 2020

By: _____


Lisa Michelle Komives

VI Bar No. 1171

P.O. Box 756

St. Thomas, VI 00804-0756

Telephone: (340) 715-7740

lkomives@dnfvi.com

Counsel for Sapphire Bay Condominiums West

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2020, the foregoing, *DEFENDANT SAPHIRE BAY CONDOMINIUMS WEST'S MOTION TO DISMISS PLAINTIFF BART ENTERPRISES, LLC'S COMPLAINT AS PLAINTIFF IS NOT REPRESENTED BY AN ATTORNEY BUT IS RATHER IMPERMISSIBLY REPRESENTING ITSELF*, which complies with the page and word limitations set forth in Rule 6-1(e), was served via U.S. mail, postage prepaid, on the following:

Peter R. Najawicz
Project Manager
Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801-4295



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

BART ENTERPRISES, LLC,)	
	)	Civil No. ST-20-00075
Plaintiff,)	
	)	ACTION FOR BREACH OF
	)	CONTRACT
vs.)	
	)	JURY TRIAL DEMANDED
SAPPHIRE BAY CONDOMINIUMS)	
WEST,)	
)	
Defendants.)	
_____)	

ORDER

THIS MATTER, comes before the Court on Defendant, Sapphire Bay Condominiums West’s Motion to Dismiss Plaintiff’s Complaint (“Motion”), the premises being duly considered, it is hereby

ORDERED that the Motion is **GRANTED**; and it is further

ORDERED that Plaintiff’s Complaint is **DISMISSED**.

SO ORDERED this _____ day of April, 2020.

Hon. Renee Gumbs-Carty
Judge of the Superior Court
of the U.S. Virgin Islands

ATTEST:

Tamara Charles
Clerk of the Court

By _____

cc: Peter R. Najawicz
Lisa Michelle Kōmives, Esq.

FILED

April 27, 2020

TAMARA CHARLES
CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)	
)	
Plaintiff,	)	CASE NO. ST-20-CV-075
)	
v.)	
	)	ACTION FOR BREACH OF
SAPPHIRE BAY CONDOMINIUMS	)	CONTRACT
WEST,)	
)	
Defendant.	)	<u>JURY TRIAL DEMANDED</u>
_____)	

ORDER

THIS MATTER is before the Court upon “Defendant Sapphire Bay Condominiums West’s Motion to Dismiss Plaintiff Bart Enterprises, LLC’s Complaint as Plaintiff is not Represented by an Attorney but is Rather Impermissibly Representing Itself” filed on April 2, 2020. In support of the motion, Defendant asserts that the Complaint was not filed by an attorney licensed to practice in the U.S. Virgin Islands.

Title 4 V.I. C. §443(a) provides:

“Except as otherwise provided by law or rule of the Supreme Court, and excepting court personnel acting in the performance of their court duties, 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 another person, firm or corporation, before any court, referee, department, commission, board, judicial person or body authorized or constituted by law to determine any question of law or fact or to exercise any judicial power, or the preparation and/or filing of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the same.”¹

¹ V.I. CODE ANN. tit. 4, § 443(a); Unauthorized practice of law.

A review of the website of the Virgin Islands Bar Association² indicates that Peter R. Najawicz is not licensed to practice law in the U.S. Virgin Islands. Therefore, he has no authority to represent Plaintiff before this Court, and Plaintiff must retain an attorney licensed in the Virgin Islands to represent it in this action.

Generally, a submission by an unlicensed attorney is considered to be a nullity.³ And, if the rule is strictly applied here, this action would be subject to dismissal. However, other courts have not automatically applied the nullity rule to require dismissal of an improperly filed document when the purposes of the rule would not be served,⁴ or have rejected the rule because the jurisdiction favors decisions on the merits.⁵ The Court prefers the approach that allows a party to cure an improperly filed pleading because decisions on the merits are favored by courts of the Virgin Islands over dispositions on procedural issues or technicalities.⁶ Therefore, rather than dismiss this action, Plaintiff will receive some time to retain an authorized legal counsel to represent it in this litigation. The Court being satisfied in the premises, it is hereby

ORDERED that Plaintiff Bart Enterprises, LLC shall cause a licensed attorney to enter an appearance on its behalf within thirty (30) days of the date of entry of this Order, failing which this action may be dismissed; and it is further

² <http://www.vibar.org>.

³ E.g., *Posey v. St. Bernard's Healthcare, Inc.*, 226 S.W.3d 757, 761 (Ark. 2006); *Shipe v. Hunter*, 699 S.E.2d 519, 520 (Va. 2010).

⁴ *Applebaum v. Rush Univ. Medical Center*, 899 N.E.2d 262 (Ill. 2008) (declining to strictly apply the nullity rule because it causes harsh results and its purpose of protecting the public and the integrity of the court system would not be furthered under the facts of the case).

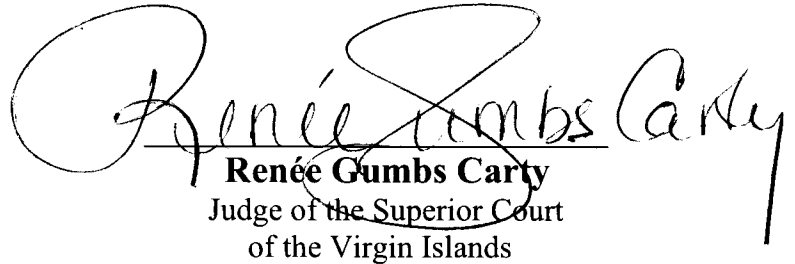
⁵ *Torrey v. Leesburg Regional Medical Center*, 769 So.2d 1040 (Fla. 2000) (rejecting the nullity rule because Florida favors decisions on the merits whenever possible and has a law permitting the timely amendment of defective pleadings).

⁶ See, *Byas v. Legislature of the Virgin Islands*, 50 V.I. 976, 980 (D.V.I. 2008) (denying motion to dismiss with prejudice based on discovery violations); *Gov't Ins. Fund v. Miller*, 21 V.I. 256, 259 (Terr. Ct. 1985) (noting that courts favor decisions on the merits rather than via the default procedure).

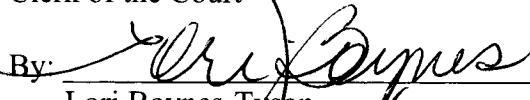
ORDERED that any motions for extension of time must conform to V.I. R. Civ. P. 6.2, any motions for continuance must conform to V.I. R. Civ. P. 6.3, and any non-conforming motions may be summarily denied; and it is further

ORDERED that a copy of this Order shall be directed to Bart Enterprises, LLC and Lisa Michelle Kömives, Esquire.

Dated: April 27, 2020


Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Tamara Charles
Clerk of the Court

By: 
Lori Boynes-Tyson
Chief Deputy Clerk 4/28/2020

FILED

June 02, 2020

TAMARA CHARLES
CLERK OF THE COURT

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

BART ENTERPRISES, LLC.

Plaintiff

v.

SAPPHIRE BAY CONDOMINIUMS WEST

Defendant.

CASE NO. ST-20-CV-075

ACTION FOR: BREACH OF CONTRACT

NOTICE OF APPEARANCE

PLEASE ENTER the appearance of Robert L. King, Esquire as the attorney for the Plaintiff Bart Enterprises, LLC. in the above entitled action. Counsel requests that copies of all documents related to said action be sent to him at the address indicated below.

Dated: June 2, 2020

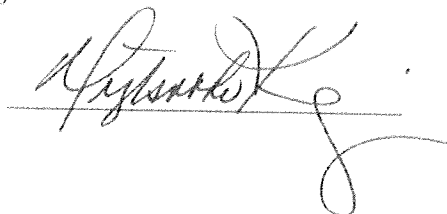


ROBERT L. KING, ESQ.
THE KING LAW FIRM, PC
1212 Bjerger Gade, Ste. 102, PO Box 9768
St. Thomas, VI 00801
340-776-1014
VI Bar No. 188
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd^h day of June, 2020, a true and exact copy of the foregoing NOTICE OF APPEARANCE was via email and U.S. mail postage prepaid to:

Lisa Komives
Dudley, Newman, Feuerzeig, LLP
1131 King Street
Christiansted, VI 00820



FILED

September 28, 2021 01:52 PM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)
)
Plaintiff,)
)
v.)
)
SAPPHIRE BAY CONDOMINIUMS)
WEST,)
)
Defendant.)

CASE NO. ST-20-CV-075

ACTION FOR BREACH OF
CONTRACT

JURY TRIAL DEMANDED

ORDER

THIS MATTER is before the Court upon “Defendant Sapphire Bay Condominiums West’s Motion to Amend Counterclaim” filed on August 19, 2021. The Plaintiff has not filed a response.

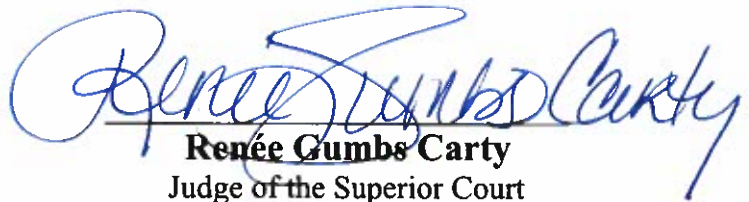
The premises considered and the Court being satisfied therein, it is hereby

ORDERED that the motion is **GRANTED**; and it is further

ORDERED that Defendant Sapphire Bay Condominiums West’s Answer, Affirmative Defense and First Amended Counterclaim filed on August 19, 2021, is **ACCEPTED** and deemed the Counterclaim in this matter; and it is further


ORDERED that a copy of this Order shall be directed to Robert L. King, Esquire and Lisa Michelle Kōmives, Esquire.

Dated: September 28, 2021


Renée Gumbs Carty

Judge of the Superior Court
of the Virgin Islands

ATTEST:
Tamara Charles
Clerk of the Court

By: 
Latoya Camacho
Court Clerk Supervisor 9.28.2021

FILED

December 06, 2021 04:22 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)	
	)	Civil No. ST-20-cv-00075
Plaintiff,)	
	)	ACTION FOR BREACH OF
	)	CONTRACT
vs.)	
	)	JURY TRIAL DEMANDED
SAPPHIRE BAY CONDOMINIUMS)	
WEST,)	
)	
Defendant.)	
_____)	

**DEFENDANT SAPPHIRE BAY CONDOMINIUMS WEST'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW, Defendant/Counter-Plaintiff, Sapphire Bay Condominiums West (“SBCW”), pursuant to Virgin Islands Rule of Civil Procedure 56(c), and hereby moves the Court for summary judgment on its slander of title claim against Plaintiff, BART Enterprises, LLC (“BART”) predicated on a defective April 9, 2021 Notice of Claim of Construction Lien and, in support, states as follows.

I. STATEMENT OF UNDISPUTED FACTS

1. On February 5, 2020, BART recorded a construction lien against SBCW, a condominium association. A copy of the February 5, 2020 lien is attached as **Exhibit 1**. This lien is properly admitted into evidence for the purposes of this motion for summary judgment pursuant to Virgin Islands Rules of Evidence 901(b)(7) and 803(14) and (15).

2. In February of 2020, BART filed its complaint to foreclose the February 5, 2020 construction lien. A copy of that complaint is attached as **Exhibit 2**. The court may take judicial notice of this adjudicative fact pursuant to Virgin Islands Rules of Evidence 201(b)(2) and (c)(2), as it can be ascertained from the court’s own records.

3. On April 9, 2021, BART recorded a second construction lien for the same amount it alleged it was owed pursuant the February 5, 2020 construction lien, allegedly for the same work at issue in the February 5, 2020 lien. However, the April 9, 2021 lien purported to encumber additional real property. A copy of the April 9, 2021 lien is attached as **Exhibit 3**. This lien is properly admitted into evidence for the purposes of this motion for summary judgment pursuant to Virgin Islands Rules of Evidence 901(b)(7) and 803(14) and (15).

4. BART has not sued to foreclose the April 9, 2021 lien, almost eight months after it was improperly recorded. The court may take judicial notice of this adjudicative fact pursuant to Virgin Islands Rules of Evidence 201(b)(2) and (c)(2), as it can be ascertained from the court's own records.

II. MEMORANDUM OF LAW¹

A. Legal Standard for a Motion for Summary Judgment

SBCW is entitled to summary judgment against BART pursuant to Virgin Islands Rule of Civil Procedure 56(c) which provides for summary judgment where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. V.I. R. Civ. P. 56(c). The burden of showing that there is no genuine issue of material fact lies with the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A party opposing the summary judgment motion may not rest upon the allegations or denials in his or her pleadings. *Id.* at 324. Rather, the non-moving party's responses must set forth specific facts showing that there is a genuine issue for trial. *Id.* A mere "scintilla" of evidence supporting the opposing party's

¹ SBCW notes that by moving for summary judgment on the basis set forth herein it does not waive any other bases for summary judgment against BART and specifically reserves the same.

position will not suffice; there must be enough of a showing that the jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

B. BART Did Not File to Foreclose the April 9, 2021 Lien Within 90 Days of Recording the Same as Required By Statute, Thus, It is Properly Released

The Virgin Islands Construction Lien Act (“VICLA”), 28 V.I.C. § 262, *et seq.* requires that a party recording a Notice of Claim Construction Lien sue to foreclose within ninety (90) days of the recording of the lien or the lien becomes invalid. *See* 28 V.I.C. § 271; *see also Roy v. Poleon*, Case No. ST-13-CV-525, 2016 WL 11723664, at *4 (V.I. Super. Dec. 12, 2016) (holding a “contractor may attach a lien to a parcel of property to secure payment by a property owner for improvements made to such property. A notice of construction lien lasts no longer than 90 days after recording notice of lien unless the lienholder commences suit.”) (citing *Merchs. Commer. Bank v. JFOV, LLC*, 2015 WL 6499842, *3, 2015 V.I. LEXIS 128, *7-8 (V.I. Super. Ct. Oct. 2, 2015) (“Defendants did not file suit — not within 90 days or ever — to foreclose the liens recorded on February 11, 2008 and April 4, 2008. Therefore, those two liens have also expired and no longer bind the property.”)).

C. The April 9, 2021 Lien Cannot Properly Amend the February 5, 2020 Lien

To the extent BART attempts to argue the April 9, 2021 construction lien properly amends the February 5, 2020 construction lien and, therefore, suit was timely brought, this argument fails because the VICLA requires that any proper amendment to a construction lien be filed within ninety (90) days of the initial recording of the lien. *See* 28 V.I.C. § 265(a) (“Any notice of lien may be amended . . . as provided in section 271 of this title by an additional recording at any time during the 90-day period following recording of the notice of lien.”). It is undisputable that April

9, 2021, is more than ninety (90) days after February 5, 2020; therefore, the April 9, 2021 lien cannot properly amend the February 5, 2020 lien.

III. CONCLUSION

Because BART did not sue to foreclose the April 9, 2021 lien within ninety (90) days of recording the same—and it was not a proper amendment to the February 5, 2020 lien, being recorded far longer than ninety (90) days after the February 5, 2021 lien was recorded—the April 9, 2021 lien must be released from improperly encumbering the title to the property it was improperly recorded against.

WHEREFORE, Defendant/Counter-Plaintiff, Sapphire Bay Condominiums West respectfully requests that the Court enter summary judgment in its favor on its slander of title claim and order that the April 9, 2021 lien recorded by Plaintiff/Counter-Defendant, BART Enterprises, LLC, be released, and award SBCW other such relief as the Court deems just and proper.

Respectfully submitted,

DUDLEY NEWMAN FEUERZEIG LLP

DATED: December 6, 2021

By: /s/ Lisa Michelle Kömives
Lisa Michelle Kömives
VI Bar No. 1171
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00804-0756
Telephone: (340) 715-7740
lkomives@dnfvi.com
Counsel for Sapphire Bay Condominiums West

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December 2021, the foregoing, *DEFENDANT SAPPHIRE BAY CONDOMINIUMS WEST'S MOTION FOR PARTIAL SUMMARY JUDGMENT*, which complies with the requirements of Rule 6(e), was served via the Superior Court of the Virgin Islands' electronic filing and service system on:

Robert L. King, Esq.
The King Law Firm, PC
1212 Bjerger Gade, Suite 102
P.O. Box 9768
St. Thomas, VI 00801

/s/ Lisa Michelle Kömives

FILED

December 06, 2021 04:22 PM

ST-2020-CV-00075

**TAMARA CHARLES
CLERK OF THE COURT**

EXHIBIT 1



OFFICE OF THE LIEUTENANT GOVERNOR
RECORDER OF DEEDS

1105 King Street • Christiansted, Virgin Islands 00820 • 340.773.6449 • Fax 340.719.2355
 5049 Kongens Gade • Charlotte Amalie, Virgin Islands 00802 • 340.776-8505 • Fax 340.779.7825

Doc # 2020000548
 02/05/2020 02:19 PM # Pages 10
 Official Records of ST THOMAS / ST JOHN
 ERICA DOVER M.P.A., RECORDER OF DEEDS
 Fees \$35.00

NOTICE OF CLAIM OF CONSTRUCTION LIEN
 Pursuant to 28 V.I.C. Chapter 12

Notice: No construction lien may be recorded against the Government of the Virgin Islands. Attention is directed to all provisions of the Virgin Islands Code relating to duration of liens, additional notices, and necessity for timely filing of suit. Failure to file suit within the applicable time period may result in the Recorder striking the construction lien from the public record.

NAME OF LIEN FILER: Bart Enterprises, LLC	
ADDRESS OF LIEN FILER: 7411 Estate Bolongo, 2-2-2 Estate Bovoni, St. Thomas, USVI 00802	
NAME OF PERSON WITH WHOM LIEN FILER HAS A CONSTRUCTION CONTRACT:(please provide evidence of the contract): Sapphire Bay Condominiums West	
ADDRESS OF THE PROPERTY AGAINST WHICH LIEN IS FILED: Parcel No. 11 Smith Bay, Quarter Numbers 1, 2 & 3, East End Quarter St. Thomas, United States Virgin Islands	
IS THIS THE SAME ADDRESS WHERE SERVICES WERE RENDERED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
NAME OF THE PROPERTY OWNER AGAINST WHOM LIEN IS BEING FILED: Sapphire Bay Condominiums West	
DATE THE CONTRACT COMMENCED: <u>August 15, 2018</u> DATE THE LAST SERVICES PERFORMED: <u>February 5, 2020</u>	
TOTAL VALUE OF THE CONTRACT: <u>\$1,293,600.</u> HOW MUCH MONEY REMAINS UNPAID: <u>\$265,296.98</u>	
DESCRIBE MATERIALS FURNISHED OR CONSTRUCTION SERVICES PERFORMED: Construction services including carpentry, plumbing, solar and sheet metal work. Labor and materials, including lumber, steel, aluminum, insulation, plywood, Green Board, and TPO roofing. Equipment including power and hand tools, material handling equipment, and specialty heat welders.	
Lien is Claimed Pursuant to 1. ___ Notice of Commencement filed on _____, Recorder Doc. No. _____ 2. <input checked="" type="checkbox"/> On the basis of unpaid moneys due Lien Filer which became due as of <u>January 25, 2020</u> 3. ___ Payment bond filed with _____	

Under penalty of perjury Lien Filer certifies that all information contained herein is accurate, and that a copy of the foregoing Notice of Claim of Construction Lien was served by PERSONAL DELIVERY or CERTIFIED MAIL (check all that apply) to person against whose interest lien is claimed on this 5th day of February 2020. Please provide proof of service.

Signature of Lien Filer

sworn to before me this 5 day of February, 2020

Signature of Notary Public:
 Marlene H. Harris
 No. NP-105-18
 Commission Expires January 18, 2022
 St. Thomas/St. John, U.S.V.I.



Doc # 2020000548

FILED

December 06, 2021 04:22 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

EXHIBIT 2

FILED

February 13, 2020

TAMARA CHARLES
CLERK OF THE COURT

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

20 FEB 13 PM 3:43

SUPERIOR COURT

5

BART ENTERPRISES, LLC

Plaintiff,

Vs.

**SAPPHIRE BAY CONDOMINIUMS
WEST**

Defendants.

CIVIL NO. SF-2020-CV-00075

**ACTION FOR BREACH OF
CONTRACT**

JURY TRIAL DEMANDED

COMPLAINT

PLAINTIFF, BART ENTERPRISES, LLC, by and through undersigned counsel, alleges a Complaint as follows:

1. This court has jurisdiction pursuant to 4 V.I.C. §76.
2. Plaintiff, Bart Enterprises, LLC, ("Bart") is a business registered with the Office of the Lieutenant Governor in the United States Virgin Islands s residing in St. Thomas, and requests trial by jury of the within action.
3. Defendants Sapphire Bay Condominiums West ("SBW").
4. That on or about August 15, 2018 Defendant contracted with Plaintiff Bart for a construction project at Defendant SBW property located at Parcel No. 11 Smith Bay Quarter, Quarter numbers 1, 2 & 3, East End Quarter, United States Virgin Islands.
5. That on or about January 29, 2020 Plaintiff Bart served a Demand Letter and Invoice for the past due balance of \$265,296.98 on Defendant SBW's construction project through January 25, 2020.

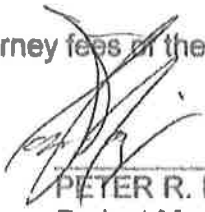
6. That on or about February 5, 2020 Plaintiff Bart served a NOTICE OF CONSTRUCTION LIEN for the past due balance of \$265,296.98 on Defendant SBW's construction project through January 25, 2020.

7. As a direct and proximate result of the Defendant's SBW failure to compensate the Plaintiff Bart for the past due balance of Defendant SBW's construction project, the Defendant SBW has breached its contract with the Defendant.

WHEREFORE, Plaintiff Bart prays judgment to be entered against the Defendant SBW:

- a. For full compensation for NOTICE OF CONSTRUCTION LIEN.
- b. For such other and further relief, at law or in equity, to which plaintiff may be justly entitled.
- c. Awarding cost and attorney fees of the action.

DATED: 2/13/2020



PETER R. NAJAWICZ
Project Manager
Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801-4295
(340) 201-9788



January 29, 2020

Jack Green
President
Sapphire Bay West Condominiums
6345 Smith Bay Road
St. Thomas, Virgin Islands 00802

RE: Demand Letter – Roof Project:

Dear Jack,

Attached please find an invoice for additional costs associated with the above referenced project. As you are aware through the enclosed emails from our project manager the project had cost overruns due to design changes requested by Sapphire Bay West Condominiums.

If you have any questions please do not hesitate to call me at (340) 513-2507 or email me at julie@bartvi.com.

Sincerely,

Julie Najawicz
Owner-Manager



Bart Enterprises
P.O. Box 11295
St. Thomas, VI 00801
Phone # 340-513-2507

Date: 1-29-2020
Project: Sapphire Bay West
PO #: Solar, Coping & Drainage
Engineer: Jack Green
Contractor: Pete Najawicz

Invoice # 4596: Roof Replacement Project

Balance due for cost overruns due to owner directed design changes from inception of project to January 26, 2020. Project consists of approximately 52,000 square feet of mechanically fastened and fully adhered TPO roof installation with customized crickets and architectural metal details over 28 individual roofs. In addition, customized solar arrays with structural support hardware are included in this project. Current project is inconsistent with original scope of work agreed upon by contractor and owners representative.

Scope of Work:

- Pressure wash and seal each roof with silicone roof coating;
- Remove existing crickets and install perimeter lumber around each roof;
- Remove existing solar angles on roof;
- Structurally fasten new lumber to receive solar stand-offs to support racking and solar panels;
- Waterproof 504 stand-offs with custom fabricated TPO accessory;
- Mechanically fasten tapered insulation and coverboard to existing roofs;
- Construct a custom valley from striated plywood for roof drainage to collection box;
- Waterproof over 350 plumbing and mechanical roof penetrations with custom fabricated TPO boots;
- Fully adhere Carlisle Fleeceback TPO;
- Install lumber on exterior walls;
- Custom fabricate aluminum metal copings and collection boxes, install the same; and
- Remove all debris

Includes Labor, Insurance, Overhead, and Profit.

Total (See Attached Break-Down) \$265,296.98



OFFICE OF THE LIEUTENANT GOVERNOR
RECORDER OF DEEDS

1105 King Street • Christonstad, Virgin Islands 00820 • 340.778.6449 • Fax 340.719.2955
 5049 Kongens Gade • Charlotte Amalie, Virgin Islands 00802 • 340.776-8505 • Fax 340.779.7825

Doc # 202000548
 02/05/2020 02:19 PM 11 Pages 10
 Official Records of ST THOMAS / ST JOHN
 ERICA DOVER M.P.A., RECORDER OF DEEDS
 Fees \$35.00

NOTICE OF CLAIM OF CONSTRUCTION LIEN
 Pursuant to 28 V.I.C, Chapter 12

Notice: No construction lien may be recorded against the Government of the Virgin Islands. Attention is directed to all provisions of the Virgin Islands Code relating to duration of liens, additional notices, and necessity for timely filing of suit. Failure to file suit within the applicable time period may result in the Recorder striking the construction lien from the public record.


NAME OF LIEN FILER: Bart Enterprises, LLC	
ADDRESS OF LIEN FILER: 7411 Estate Bolongo, 2-2-2 Estate Bovoni, St. Thomas, USVI 00802	
NAME OF PERSON WITH WHOM LIEN FILER HAS A CONSTRUCTION CONTRACT:(please provide evidence of the contract): Sapphire Bay Condominiums West	
ADDRESS OF THE PROPERTY AGAINST WHICH LIEN IS FILED: Parcel No. 11 Smith Bay, Quarter Numbers 1, 2 & 3, East End Quarter St. Thomas, United States Virgin Islands	
IS THIS THE SAME ADDRESS WHERE SERVICES WERE RENDERED?	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
NAME OF THE PROPERTY OWNER AGAINST WHOM LIEN IS BEING FILED: Sapphire Bay Condominiums West	
DATE THE CONTRACT COMMENCED: <u>August 15, 2018</u>	DATE THE LAST SERVICES PERFORMED: <u>February 5, 2020</u>
TOTAL VALUE OF THE CONTRACT: <u>\$1,293,600.</u> HOW MUCH MONEY REMAINS UNPAID: <u>\$265,296.98</u>	
DESCRIBE MATERIALS FURNISHED OR CONSTRUCTION SERVICES PERFORMED: Construction services including carpentry, plumbing, solar and sheet metal work. Labor and materials, including lumber, steel, aluminum, insulation, plywood, Green Board, and TPO roofing. Equipment including power and hand tools, material handling equipment, and specialty heat welders.	
Lien is Claimed Pursuant to	
1. ___ Notice of Commencement filed on _____, Recorder Doc. No. _____	
2. <input checked="" type="checkbox"/> On the basis of unpaid moneys due Lien Filer which became due as of <u>January 25, 2020</u>	
3. ___ Payment bond filed with _____	

Under penalty of perjury Lien Filer certifies that all information contained herein is accurate, and that a copy of the foregoing Notice of Claim of Construction Lien was served by PERSONAL DELIVERY or CERTIFIED MAIL (check all that apply) to person against whose interest lien is claimed on this 5th day of February, 2020. Please provide proof of service.


 Signature of Lien Filer

sworn to before me this 5 day of February, 2020

Signature of Notary Public:


 Marlene H. Harris
 No. NP-105-18

Commission Expires January 18, 2022
 St. Thomas/St. John, U.S.V.I.



Doc # 202000548

FILED

December 06, 2021 04:22 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

EXHIBIT 3



OFFICE OF THE LIEUTENANT GOVERNOR RECORDER OF DEEDS

1105 King Street • Christiansted, Virgin Islands 00820 • 340.773.6449 • Fax 340.719.2355
5049 Kongens Gade • Charlotte Amalie, Virgin Islands 00802 • 340.776-8505 • Fax 340.779.7825

Notice: No construction lien may be recorded against the Government of the Virgin Islands. Attention is directed to all provisions of the Virgin Islands Code relating to duration of liens, additional notices, and necessity for timely filing of suit. Failure to file suit within the applicable time period may result in the Recorder striking the construction lien from the public record.

NAME OF LIEN FILER:	Bart Enterprises, LLC	
ADDRESS OF LIEN FILER:	7411 Estate Bolongo, 2-2-2 Estate Bovoni, St. Thomas, VI 00802	
NAME OF PERSON WITH WHOM LIEN FILER HAS A CONSTRUCTION CONTRACT:(please provide evidence of the contract):	Sapphire Bay Condominium West (see Lien filed 2/5/20 DOC # 2020000548)	
ADDRESS OF THE PROPERTY AGAINST WHICH LIEN IS FILED:	Quarter / Condo: Sapphire Bay West	
IS THIS THE SAME ADDRESS WHERE SERVICES WERE RENDERED?	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO
NAME OF THE PROPERTY OWNER AGAINST WHOM LIEN IS BEING FILED:	Quarter / Condo: Sapphire Bay West	
DATE THE CONTRACT COMMENCED:	August 15, 2018	DATE THE LAST SERVICES PERFORMED: February 5, 2020
TOTAL VALUE OF THE CONTRACT:	\$1,293,600	HOW MUCH MONEY REMAINS UNPAID: \$265,296.98
DESCRIBE MATERIALS FURNISHED OR CONSTRUCTION SERVICES PERFORMED:	Construction services including: carpentry, plumbing, solar and sheet metal work. Labor and materials, including: lumber, steel, aluminum, insulation, plywood, Green Board and TPO roofing. Equipment including: power and hand tools, material handling equipment and specialty heat welders.	
Lien is Claimed Pursuant to	1. <input checked="" type="checkbox"/> Notice of Commencement filed on February 20, 2020, Recorder Doc. No. ST-20-CV-00075 2. <input type="checkbox"/> On the basis of unpaid moneys due Lien Filer which became due as of _____ 3. <input type="checkbox"/> Payment bond filed with _____	

Under penalty of perjury Lien Filer certifies that all information contained herein is accurate, and that a copy of the foregoing Notice of Claim of Construction Lien was served by PERSONAL DELIVERY or CERTIFIED MAIL (check all that apply) to person against whose interest lien is claimed on this 21st day of April 2021. Please provide proof of service.

Signature of Lien Filer

Subscribed and sworn to before me this 21st day of April 2021

Signature of Notary Public:

Doc # 2021001979
04/09/2021 03:50 PM # Pages 2
Official Records of ST THOMAS / ST JOHN
ERICA DOWER M.P.A., RECORDER OF DEEDS
Fees \$37.50

Supp024

AIR MASTER Acknowledgement Quote Order

WINDOWS AND DOORS

airmasterpr.com

1-787-623-1800

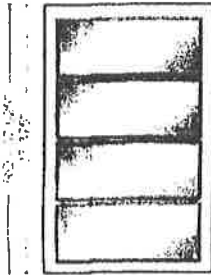
8089

8/25/2020 12:12 PM



Image	Line	QTY	Description	Unit Price	Ext. Net	Installation	Inst. Net
	100-2	1	Awning, Louver, 24" x 37 3/8"	\$127.60	\$127.60		

FOD:
48.5" X 37 5/8"



RO - 42.5

***** Marking *****

Marking = Cottage 1

***** Dimensions *****

Call Width = Custom

Call Height = 37 3/8

Frame Width 24

Frame Height 37 3/8

***** Unit Type *****

Unit Type = Complete Unit - Including Frame

***** Frame *****

Jamb Type = Regular Jamb

***** Leaf Design *****

Style = Full

Unit 1 Opening: Material Type = Louver Insert

***** Color *****

Color = Bronze

***** Glass *****

Louver Glass Tint = Clear

Louver Glass Thickness = 1/4"

Louver Glass Strength = Annealed

***** Glass *****

Louver Glass Tint = Clear

Louver Glass Thickness = 1/4"

Louver Glass Strength = Annealed

***** Hardware *****

Unit 1:1 Opening Insert: Security Bars = Yes

Unit 1 Opening: Operator Position = Right (1 operator

Operator Type = Crank

Operator Shipping = Included with Unit

***** Screen *****

Unit 1: Screen Option = Yes

Screen Mesh Color = Gray

Screen Shipping = Shipped Separate

Unit 1 Opening Insert: Screen Option = Yes

Screen Mesh Color = Gray

Screen Shipping = Shipped Separate

***** Additional Options *****

Shipping Method = Fully Assembled

Installation = No Installation

APPROVAL OF ORDER/ CUSTOMER SIGNATURE

DATE

8/25/2020

Openings should be ready for installation. Air Master is not responsible for manufacturing openings, movement of furniture, floor arrangements in door areas; doors, windows and/or fence removals; construction or demolition of concrete curbs.

Project
Quote

Doc # 2021001979

FILED

December 10, 2021 12:05 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

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

BART ENTERPRISES, LLC,

PLAINTIFF,

V.

SAPPHIRE BAY CONDOMINIUMS
WEST,

DEFENDANT.

CASE NO.: ST-2020-CV-00075

**ACTION FOR BREACH OF
CONTRACT**

MOTION TO WITHDRAW AS COUNSEL

King & King Law Firm, counsel for Plaintiff, Bart Enterprises, LLC, and respectfully requests that this Court allows its withdrawal as counsel for the Plaintiff in this matter pursuant to Virgin Islands Rule of Civil Procedure 6-5 and V.I.S.C.T.R. 211.1.16. The undersigned submits that there is good cause to withdraw since the King & King Law Firm has represented Peter Najawicz and Bart Enterprises, LLC since the year 2008 on the *Hospital Executive* trials, this instant matter, and other numerous civil matters and has outstanding bills with our firm in excess of one million dollars (\$1,000,000.00). As such, King & King Law Firm can no longer represent Peter Najawicz and Bart Enterprises, LLC. The undersigned cites the following in support of this motion:

DISCUSSION

V.I.S.C.T.R. 211.1.16 governs when an attorney must, and when an attorney may withdraw from representing a client and provides in pertinent part,

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing the interests of the client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- ...or
- (7) other good cause for withdrawal exists.

MOTION TO WITHDRAW AS COUNSEL

Page 2

V.I.S.C.T.R. 211.1.16 (c). The rule further requires the lawyer to “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation”. “All motions for withdrawal as counsel shall include a verified statement as to contact with or attempts to contact the client concerning such withdrawal, an indication of service upon or efforts to serve the client with the moving papers, and updated civil litigant data forms for each client, which forms shall include the client's last known address and telephone number.” V.I. R.CIV.P.Rule6-5.

The Virgin Islands courts have not articulated a standard or test to be applied in considering a motion to withdraw as counsel. *In re Tutu Wells Contamination Litig.*, 164 F.R.D. 41, 44 (1995). Other courts in the Third Circuit, however, have articulated a four prong test to guide the Court’s exercise of discretion: 1) the reason withdrawal is sought; 2) the prejudice withdrawal may cause to other litigants; 3) the harm withdrawal may cause to the administration of justice; and 4) the degree to which withdrawal may delay the resolution of this case. *Haines v. Liggett Group*, 814 F.Supp. 414, 423 (D.N.J. 1993).

The undersigned submits that good cause exist for the counsel’s withdrawal as Peter Najawicz and Bart Enterprises, LLC have failed to meet the financial obligations per executed retainer agreements.

The undersigned has complied with the requirement of both subsection (b) and (c) of V.I.S.C.T.R. 211.1.16 as she has provided reasonable warning to Peter Najawicz and Bart Enterprises, LLC of his intent to withdraw and seeks permission from this Court to terminate his representation of Peter Najawicz and Bart Enterprises, LLC. The undersigned has also complied with subsection (d) as he is also prepared to transmit the file for this matter to Peter Najawicz and Bart Enterprises, LLC and requests the Court give Peter Najawicz and Bart Enterprises, LLC ten (10) days to secure new counsel, if necessary. A proposed Order is submitted concurrently herewith.

MOTION TO WITHDRAW AS COUNSEL

Page 3

WHEREFORE, and for the foregoing reasons, the undersigned counsel respectfully requests that the motion to withdraw as counsel be **GRANTED**.

Respectfully Submitted,

Dated: December 10, 2021

KING & KING LAW P.C.

1212 Bjerge Gade, Suite 102
St. Thomas, Virgin Islands 00801
Telephone: (340) 776-1014
Facsimile: (340) 774-5299

By: */s/ Robert L. King, Esq.*

ROBERT L. KING, ESQUIRE

Primary e-mail: rlking@attyking.com

Secondary Email: mytsooko@attyking.com

V.I. BAR NO. 188

NICOLE-LYNN KING-RICHARDSON, ESQ.

Primary e-mail: nicole-lynn@attyking.com

V.I. BAR NO. R-2035

Attorney for Bart Enterprises, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the December 10, 2021, I electronically filed the **MOTION TO WITHDRAW AS COUNSEL** with the Clerk of the Court using the VIJEFS system, which will send a notification of such filing to the following:

Lisa Michelle Komives, Esq.

V.I. Bar No. 1171

P.O. Box 756

St. Thomas, VI 00804-0756

Telephone: (340) 715-7740

Email: lkomives@dnfvi.com

/s/ Robert L. King, Esq.

FILED

December 17, 2021 09:20 AM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)
)
Plaintiff,)
)
v.)
)
SAPPHIRE BAY CONDOMINIUMS)
WEST,)
)
Defendant.)
_____)

CASE NO. ST-20-CV-075

ACTION FOR BREACH OF
CONTRACT

JURY TRIAL DEMANDED

ORDER

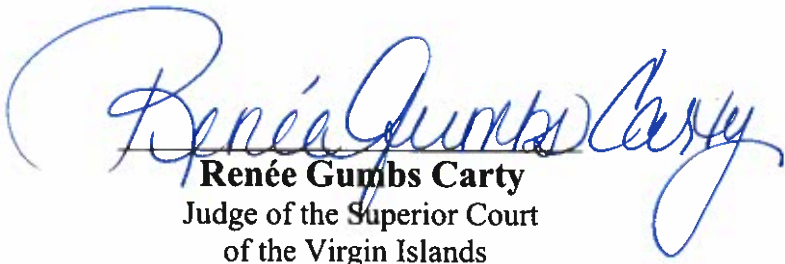
THIS MATTER is before the Court upon Plaintiff's "Motion to Withdraw as Counsel" filed on December 10, 2021. The premises considered, it is hereby

ORDERED that the motion is **GRANTED**; and it is further

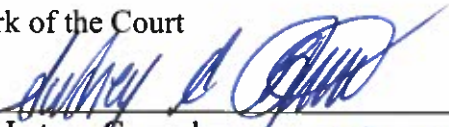
ORDERED that Plaintiff shall cause new counsel to file a notice of appearance within forty-five (45) days of the date of this Order; and it is further

ORDERED that a copy of this Order shall be directed to Robert L. King, Esquire, Lisa Michelle Kömives, Esquire, and Bart Enterprises, LLC (P.O. Box 11295, St. Thomas, V.I. 00801-4295).

Dated: December 17, 2021


Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Tamara Charles
Clerk of the Court

By: 
Latoya Camacho
Court Clerk Supervisor 12 21 2021

FILED

January 11, 2022 11:10 AM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC)

Plaintiff,)

v.)

) Case ST-2020-CV-00075

SAPPHIRE BAY CONDOMINIUMS WEST)

Defendant.)

STIPULATION FOR SUBSTITUTION OF COUNSEL

IT IS HEREBY STIPULATED by and between the undersigned, that MOORE, DODSON, RUSSELL & WILHITE, P.C., through J. Daryl Dodson, Esq., hereby substitutes in as counsel of record for the Defendant, SAPPHIRE BAY CONDOMINIUMS WEST, in substitution for Lisa Michelle K mives of DUDLEY NEWMAN FEUERZEIG, LLP. Accordingly, the Clerk and all parties are requested to forward all future notices regarding this case to J. Daryl Dodson, Esq., P.O. Box 310, St. Thomas, U.S. Virgin Islands 00804, email daryl@mdrvi.com.

Respectfully submitted,

DATED: January 3, 2022

MOORE, DODSON & RUSSELL, P.C.

/s/ J. Daryl Dodson

J. Daryl Dodson Esq.

VI Bar No. 241

5035 Norre Gade, Suite 201

P.O. Box 310

St. Thomas, U.S.V.I. 00804

Telephone: (340) 777-5490

Email: daryl@mdrvi.com

Counsel for Sapphire Bay Condominiums West

DUDLEY NEWMAN FEUERZEIG LLP

DATED: January 3, 2022

By: /s/ Lisa Michelle Kömives
Lisa Michelle Kömives
VI Bar No. 1171
P.O. Box 756
St. Thomas, VI 00804-0756
Telephone: (340) 715-7740
Email: lkomives@dnfvi.com
Counsel for Sapphire Bay Condominiums West

ORDER

The Court having reviewed the foregoing Stipulation for Substitution of Counsel and being satisfied in the premises, IT IS HEREWITH ORDERED that the substitution of counsel is APPROVED and that Lisa Michelle Kömives, Esq. and the firm of Dudley Newman Feuerzeig LLP are relieved of further responsibility for representation of the defendant Sapphire Bay Condominiums West in this matter.

Dated

January 11, 2022

Renee Gumbs Cartwright
THE HONORABLE RENEE GUMBS CARTY
JUDGE OF THE SUPERIOR
COURT OF THE VIRGIN ISLANDS

Tamara Charles,
Clerk of the Court

[Signature]

for By: Latoya Camacho
Court Clerk Supervisor 1 / 10 / 2022

FILED

January 12, 2022 11:11 AM
ST-2020-CV-00075
TAMARA CHARLES
CLERK OF THE COURT

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
District of St. Thomas/St. John

BART ENTERPRISES, LLC,
Plaintiff

Case Number: **ST-2020-CV-00075**
Action: **Breach of Contract**

v.

SAPPHIRE BAY CONDOMINIUMS WEST,
Defendant.

NOTICE of ENTRY
of
ORDER

To: Robert L. King, Esquire

J. Daryl Dodson, Esquire

Lisa M. Komives, Esquire

Please take notice that on January 12, 2022

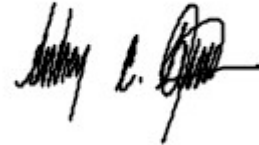
a(n) _____ **ORDER**

dated January 11, 2022 was entered
by the Clerk in the above-titled matter.

Dated: January 12, 2022

Tamara Charles
Clerk of the Court

By:



Audrey C. Brin
Court Clerk II

FILED

February 17, 2022 05:43 PM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC)

Plaintiff,)

v.)

SAPPHIRE BAY CONDOMINIUMS WEST)

Defendant.)

) Case ST-2020-CV-00075

MOTION TO DISMISS COMPLAINT

The Defendant Sapphire Bay Condominiums West (“Sapphire”) herewith moves this Court to strike or dismiss the Complaint, filed by Plaintiff Bart Enterprises, LLC (“Bart”) on February 13, 2020. This Complaint is a legal nullity because it was signed by Peter R. Najawicz (“Najawicz”), an individual who is not an attorney and is not licensed to practice law in the U.S. Virgin Islands. Bart has ignored this Court’s order, dated December 17, 2021, requiring it to retain counsel to represent it in this matter. Accordingly, this Court should enter an order recognizing the status of the Complaint as a legal nullity and dismissing it with prejudice.

As explained more fully in Sapphire’s Answer, Affirmative Defenses, and First Amended Counterclaim, dated August 19, 2021 (“Counterclaim”), Bart agreed pursuant to a contract dated August 21, 2018 (the “Contract”) to re-roof four buildings located at Sapphire Bay Condominiums West in St. Thomas. The total contract price, after agreed change orders, was \$1,058,425.39.¹ Sapphire paid Bart pursuant to a series of 24 payment requests, created by Bart itself on American

¹ Counterclaim, ¶ 14.

Institute of Architects (“AIA”) forms. As Bart’s own document, its payment request No. 25² admits, as of January 31, 2020, Sapphire had paid Bart \$910,885.27, with a balance of work of \$147,540.12 left to finish.³

However, Bart owes Sapphire at least \$115,890.22 for defective work that had to be remedied, the repair of damages to units when Bart failed to secure the roof against rain during the course of the work, and other credits.⁴ In addition, Bart failed to pay St. Thomas Cargo and Ship Services, Inc. (“STT Cargo”), for shipping charges for materials that, STT Cargo claims, were incorporated by Bart into work done under the Contract. STT Cargo has sued Sapphire in this Court, in Civil Action No. ST-19-cv-00485, for the \$85,347.50 remaining unpaid by Bart.⁵ Bart is obligated, under the Contract, to indemnify Sapphire for any settlement or judgment in favor of STT Cargo.

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.⁶ 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 Najawicz, who claimed to be, not a member or manager of Bart, but a “project manager.”

² *Id.*, Exhibit 2.

³ *Id.* ¶ 17.

⁴ *Id.* ¶ 16.

⁵ *Id.* ¶ 27-28.

⁶ This document is an unnumbered exhibit to the Complaint.

On April 3, 2020, Sapphire filed a Motion to Dismiss 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 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 this same Order, the Court determined not to “automatically” apply the rule in this case, but instead to grant Bart “some time to retain authorized legal counsel to represent it in this litigation.” It provided thirty days for Bart to retain an attorney. 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, under the provisions of V.I.R.Civ.P 11, by him. The Complaint that constituted a legal nullity remained as the sole enunciation of Bart’s claim against Sapphire.

On April 9, 2021, in another filing signed solely by Peter Najawicz, Bart filed a second Notice of Claim of Construction Lien.⁷ 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 also a legal nullity, Sapphire asked the Court, in the SJ Motion, to order it released. Bart failed to oppose the SJ Motion within the 30 days allowed under V.I.R.Civ.P. 56(c)(2)(A).

⁷ Sapphire’s Motion for Partial Summary Judgment, filed December 6, 2021 (the “SJ Motion”), Exhibit 3.

Apparently in response to this filing, Attorney King filed, on December 10, 2021, his Motion to Withdraw, on grounds 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. This order required Bart to cause new counsel to enter an appearance within 45 days, or by January 31, 2022. Bart has not responded to this order in any way.

In short, the Complaint filed by Bart, under the law of the case as reflected in this Court's order of April 27, 2020, stands as a legal nullity. It was not signed by an attorney authorized to represent an entity such as Bart in this Court. This Court has been very lenient and tolerant towards Bart and has exercised forbearance by allowing it time to remedy its filing deficiencies, not just once but twice. However, at some point, this Court's tolerance must reach its limits.

In consideration of the foregoing, Sapphire moves this Court to strike Bart's Complaint, and to order it dismissed with prejudice. A form of order is submitted herewith.

Respectfully submitted,

DATED: February 17, 2022

MOORE, DODSON & RUSSELL, P.C.

/s/ J. Daryl Dodson

J. Daryl Dodson Esq.

VI Bar No. 241

5035 Norre Gade, Suite 201

P.O. Box 310

St. Thomas, U.S.V.I. 00804

Telephone: (340) 777-5490

Email: daryl@mdrvi.com

Counsel for Sapphire Bay Condominiums West

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2022, I caused a true and exact copy of the foregoing Notice of Appearance, to be mailed to the following:

Julie Najawicz
Resident agent, Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801

/s/ J. Daryl Dodson

FILED

June 16, 2022 06:38 PM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC)

Plaintiff,)

v.)

SAPPHIRE BAY CONDOMINIUMS WEST)

Defendant.)

) Case ST-2020-CV-00075

SUPPLEMENT TO MOTION TO DISMISS COMPLAINT

The Defendant Sapphire Bay Condominiums West (“SBWC”) herewith supplements its *Motion to Dismiss Complaint* (the “2022 Motion”), filed on February 17, 2022, with new, recently-decided authority from the Supreme Court of the Virgin Islands. Also, SBWC herewith clarifies that the 2022 Motion was not an untimely filed motion to dismiss but was a renewal of its previous *Motion to Dismiss Plaintiff Bart Enterprises LLC’s Complaint as Plaintiff is not Represented by an Attorney but is Rather Impermissibly Representing Itself* (the “2020 Motion”) filed on April 2, 2020 and seeking the same relief on the same grounds.

First, as to the new authority, SBWC respectfully calls the Court’s attention to *Murphy Rigging & Erecting, Inc. v. Virgin Islands Water & Power Auth.*, 2022 WL 843385, 2022 VI 5, ¶¶ 17-18 (V.I. Mar. 22, 2022). In this case, 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 D. Thomas Griepe (“Griepe”), the Chief Financial Officer of Murphy and was accompanied by a cover letter signed

by Timothy J. Grande (“Grande”), a Minnesota lawyer not admitted to practice in the Virgin Islands.

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. Murphy appealed. Neither party raised, in the Superior Court, or before the Virgin Islands Supreme Court, that the petition was signed and filed on behalf of a corporation by an individual who was not authorized to practice law in this territory. 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 Gripe and Grande 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.¹

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

¹ *Id.*

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.²

The same is true here. The Complaint filed by Bart was signed by Peter Najawicz, an individual who is not an attorney and is not admitted to represent clients before the Courts of the Virgin Islands. This Court should declare the Complaint a legal nullity and dismiss this action without further proceedings.

In addition, SBWC wishes to clarify that the 2022 Motion was not a motion to dismiss filed years after the Complaint was filed. It is a renewal of the 2020 Motion, which was timely filed, and asserted the same grounds for relief.

Respectfully submitted,

DATED: June 16, 2022

MOORE, DODSON & RUSSELL, P.C.

/s/ J. Daryl Dodson

J. Daryl Dodson Esq.

VI Bar No. 241

5035 Norre Gade, Suite 201

P.O. Box 310

St. Thomas, U.S.V.I. 00804

Telephone: (340) 777-5490

Email: daryl@mdrvi.com

Counsel for Sapphire Bay Condominiums West

² *Id.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2022, I caused a true and exact copy of the foregoing Supplement to Motion to Dismiss Complaint, to be mailed to the following:

Julie Najawicz
Resident agent, Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801

/s/ J. Daryl Dodson

FILED

June 24, 2022 08:26 AM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)
)
Plaintiff,)
)
v.)
)
SAPPHIRE BAY CONDOMINIUMS)
WEST,)
)
Defendant.)
_____)

CASE NO. ST-20-CV-075

ACTION FOR BREACH OF
CONTRACT

JURY TRIAL DEMANDED

ORDER

THIS MATTER is before the Court upon Defendant Sapphire Bay Condominiums West's "Motion to Dismiss Complaint" filed on February 17, 2022, and its supplement filed on June 16, 2022. The premises considered, it is hereby

ORDERED that Plaintiff Bart Enterprises, LLC shall, through counsel, file a response to the motion and its supplement by **Monday, July 25, 2022**, failing which the matter may be dismissed for failure to prosecute; and it is further

ORDERED that a copy of this Order shall be directed to Julie Najawicz, Resident Agent, Bart Enterprises, LLC, P.O. Box 11295, St. Thomas, Virgin Islands 00801, and J. Daryl Dodson, Esquire.

Dated: June 24, 2022

ATTEST:
Tamara Charles
Clerk of the Court

By: [Signature]
for Latoya Camacho
Court Clerk Supervisor 06 / 28 / 22

[Signature]
Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

FILED

July 06, 2022 03:15 PM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC)

Plaintiff,)

v.)

SAPPHIRE BAY CONDOMINIUMS WEST)

Defendant.)

) Case ST-2020-CV-00075

MOTION TO DISMISS FOR LAC OF PROSECUTION

The Defendant Sapphire Bay Condominiums West (“Sapphire”) herewith moves this Court to dismiss all claims asserted in this matter by the Plaintiff Bart Enterprises, LLC (“Bart”) for lack of prosecution. This motion is filed out of an abundance of caution, in response to this Court’s order of June 24, 2022, regarding Sapphire’s February 17, 2022 Motion to Dismiss, as supplemented by Supplement to Motion to Dismiss, filed on June 16, 2022. The Order stated that if Bart failed to respond by July 25, 2022, the Court might dismiss the case for lack of prosecution.

The basis for the Motion to Dismiss was not lack of prosecution, but the status of the Complaint filed by Bart as a legal nullity, because it was signed by Peter Najawicz and not by an attorney admitted to practice before the Courts of the U.S. Virgin Islands. In order to dismiss for lack of prosecution the Court must explicitly consider and make findings on all six factors enunciated in *alliday v. ootloc er Specialty, Inc.*, 53 V.I. 505 (V.I.2010). In *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 185 87 (V.I. Jan. 9, 2012), the Court ruled that a decision that considers less than all six factors, or fails to make findings on each *alliday* factor, cannot be sustained.

The six *alliday* factors are the following:

(1) the extent of the party's personal responsibility (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery (3) a history of dilatoriness (4) whether the conduct of the party or the attorney was willful or in bad faith (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions and (6) the meritoriousness of the claim or defense.¹

The Court should expressly rule that all six factors are satisfied in this case. As for the first factor, Bart's "project manager," Peter Najawicz, was personally responsible for the filing of the complaint that is a legal nullity in this matter, as he improperly signed it on behalf of his limited liability company, Bart. It was Bart, and Mr. Najawicz, who failed to respond to this Court's order of December 17, 2021, allowing Attorney Robert [redacted] to withdraw from representing Bart, and requiring Bart to cause new counsel to enter an appearance within 45 days of the Order. It is also Bart that has failed to respond to the Motion for Partial Summary Judgment filed in this matter on December 6, 2021, or to the Motion to Dismiss or the Supplement to Motion to Dismiss that were the subject of this Court's order.

As for the second factor, Sapphire has been prejudiced in its ability to defend against Bart's claims by the delays experienced in this case. Due to intervening changes in the membership of the board and the identity of the officers of this unincorporated association, run by a volunteer directors and officers, and the exodus of the personnel involved in Bart's building project, it has been extraordinarily difficult for undersigned counsel to obtain and assemble the documents and emails needed to mount a defense to these claims.

On the third factor, Bart has compiled an impressive history of delay in this case, failing to respond to this Court's order of December 17, 2021, and the filings made on February 17 and June

¹ *Molloy, supra*, at 186, quoting *Poulis v. State Arm & Cas. Co.*, 747 F.2d 863, 868 (3d Cir.1984). The Supreme Court of the Virgin Islands adopted these six factors in *alliday, supra*.

16, 2022 in this matter. Presumably, it will also fail to respond to this Court's order of June 26, 2022.

Fourth, Bart's failure to respond has been willful and in bad faith. It has been served at the post office box address listed on its Complaint, which is also the official address for its resident agent for service of process as reflected in the records of the Division of Corporations, Office of the Lieutenant Governor of the U.S. Virgin Islands.

Fifth, there is no reason to believe alternative sanctions would be effective. Bart filed a defective complaint which was a legal nullity and has simply failed to respond to any of the recent filings and orders in this matter. It has simply withdrawn from prosecuting this case, and there is no reason to believe that imposing fines or making further threats of consequences would elicit a response.

Sixth, there is no merit to Bart's claims. As explained more fully in Sapphire's Answer, Affirmative Defenses, and First Amended Counterclaim, dated August 19, 2021 ("Counterclaim") Bart agreed pursuant to a written contract dated August 21, 2018 to re-roof four buildings located at Sapphire Bay Condominiums West in St. Thomas. A copy of this contract was attached to the Counterclaim. Sapphire paid Bart pursuant to a series of 25 payment requests, created by Bart itself on American Institute of Architects ("AIA") forms. As Bart's own document, its payment request No. 25² admits, as of January 31, 2020, Sapphire had paid Bart 910,885.27, with a balance of work of 147,540.12 left to finish, and only 10,000.18 due at that time. Rather than completing its work under the Contract, almost immediately after issuing its payment request No. 25, and being paid pursuant to that request, Bart walked off the job. On February 13, 2020, Bart filed the

² Attached hereto as Exhibit A.

Complaint commencing this action, claiming that an additional 265,296.98 was due. That claim is inconsistent with the documents that Bart itself signed.

The Complaint in this matter should be dismissed with prejudice as a legal nullity as previously requested by Sapphire. It should also be dismissed for failure to prosecute. A form of order is submitted herewith.

Respectfully submitted,

DATED: July 6, 2022

MOORE DODSON RUSSELL & WILHITE, P.C.

/s/ J. Daryl Dodson

J. Daryl Dodson Esq.

VI Bar No. 241

5035 Norre Gade, Suite 201

P.O. Box 310

St. Thomas, U.S.V.I. 00804

Telephone: (340) 777-5490

Email: daryl@mdrvi.com

Counsel for Sapphire Bay Condominiums West

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2022, I caused a true and exact copy of the foregoing Motion to Dismiss, to be mailed to the following:

Julie Najawicz
Resident agent, Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801

/s/ J. Daryl Dodson

FILED

July 06, 2022 03:15 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

EXHIBIT A

APPLICATION AND CERTIFICATION FOR PAYMENT

TO OWNER: Sapphire Bay West
6345 Smith Bay Road
St. Thomas, VI 00802

FROM CONTRACTOR: Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801

CONTRACT FOR: Roof Replacement

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment as shown below in connection with the Contract
Continuation Sheet: Addendum 0703 is attached


1.	Original Contract Sum	\$	1,299,600.00
2.	Net Change by Change Order	\$	(235,174.61)
3.	Contract Sum to Date (1 + 2)	\$	1,064,425.39
4.	TOTAL COMPLETED & STORED TO DATE: (column G on G703 Pg.2)	\$	978,634.10
5.	RETAINAGE:		
a.	5% % of completed work (column D+E on G703 Pg.2)	\$	67,748.83
b.	Total in Column I of G703 Pg.2	\$	910,885.27
6.	TOTAL EARNED LESS RETAINAGE (line 4 - line 5)	\$	900,885.13
7.	LESS PREVIOUS CERTIFICATES FOR PAYMENT	\$	10,000.14
8.	CURRENT PAYMENT DUE	\$	147,540.12
9.	BALANCE TO FINISH, INCLUDING RETAINAGE (line 3 - line 6)	\$	147,540.12

#	CHANGE ORDER SUMMARY:	ADDITIONS	DEDUCTIONS
1	Change order approved by Owner:		
1	Dated: Sept. 2018		
2	Oct-18		
3	Feb-19		
4	East end Lumber Feb-19 (2x8x16)		
5	Home Depot P.R. Apr-19 (1" ins)		
6	East end lumber Apr-19 (2" 2x8x16)		
7	MSI 4-26-19(2" 2x8x16)		
8	PVC Pipe & Vent Repairs (B Bid) 50% allocation		
9	Adjustment for Overpayment on A148		
10	MSI 7-18-19 (100 2x4x16, 100 2x8x16)		
11	MSI 7-21-19(154 2x8x16)		
12	Spec order dated 7/23/19 (less shipping & fuel/screws \$40,794)		
13	Spec order dated 8/01/19 (Woodace fasteners & rivets)		
14	MSI 8-15-19 (100 2x4x16)		
15	Misc. CO (Direct payment to Progressive Heavy Equipment)(1085)		
16	MSI 11-15-19 (100 2x8x16, 34 2x4x16)		
17	MSI 12/3-19 (Inv. 37193, 12/6/20: 2x8x16)		
18	Screencal (232 sheets 4x8x10 - 40ga White aluminum)		
19	Paint Depot (12/2 & 12/7)		
20	Just Plastics (pvc pipes & connectors D Bid.)		
21	MSI (34 2x6x16, 6 2x8x16 Inv. 39370, 12-19-19)		
22	Paint Depot (12/19)		
23	Spec (plates, screws, #507581)		
24	Spec (45691383,509169)		
25	MSI (20 2x6x16 #405710)		
26	Misc. CO (Direct payment to Progressive Heavy Equipment)(xxx)		
2A	Additional CO #142, 443 - \$6,400 Pd.		
c/o	Additional Change for Custom Metal work (A,B,C,D Bldg dated 12-17-19)		
TOTALS		\$ 166,043.20	\$ (401,217.81)

APPLICATION NO: 25
PERIOD TO: 1/31/2020
PROJECT NOS:
CONTRACT DATE: 08/21/18

Distribution to:
 OWNER
 ARCHITECT
 CONTRACTOR

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and permitted to be used from the date of, and that current payment shown herein is true and correct.

CONTRACTOR: 
By: Jerry G. J. Verghisades Date: 1/31/20
Subscribed and sworn to before me this _____ day of _____, 20____
My Commission expires _____
Contract of St. Thomas, St. John

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on the site observations and the data comprising the application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed so and such that the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED: \$ 10,000.14

(Attach explanation if amount certified differs from amount applied. Initial all figures on this Application and on the Continuation Sheet that are changed to conform with the amount certified.)
ARCHITECT: _____ Date: _____
By: _____

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

CONTINUATION SHEET

AIA DOCUMENT G703

AIA Document G702, APPLICATION AND CERTIFICATION FOR PAYMENT, containing Contractor's signed certification is attached. In tabulations below, amounts are stated to the nearest dollar. Use Column I on Contracts where variable retainage for the line items may apply.

APPLICATION NO: 25
 APPLICATION DATE: 1/31/2020
 PERIOD TO: 1/31/2020
 CONTRACTOR'S PROJECT NO:

ITEM NO.	Description of Work	SCHEDULED VALUE	Work Completed		Materials Presently Stored (Not In D or E)	Total Completed and Stored (D+E+F)	% G/C	Balance to Finish (C-G)	Retainage %
			Previous (D-E)	Current					
ADMINISTRATIVE BUILDING									
1	Pressure Wash & Air and Water Seal Existing Roof	\$ 26,448.00	\$ 26,448.00	\$ -		\$ 26,448.00	100%	\$ -	\$ 1,322.40
Building A: 5 Pods									
1	Mobilization	\$ 20,364.94	\$ 20,364.94	\$ -		\$ 20,364.94	100%	\$ -	\$ 1,018.25
2	Pressure Wash & Air and Water Seal Existing Roof	\$ 41,861.27	\$ 41,861.27	\$ -		\$ 41,861.27	100%	\$ -	\$ 2,093.06
3	Construct Curbs and Install EPS Insulation System (5@30 182.47)	\$ 50,912.36	\$ 50,912.36	\$ -		\$ 50,912.36	100%	\$ -	\$ 2,545.62
4	TPO Membrane & 2001 Company System (5@12,445.24)	\$ 62,226.22	\$ 62,226.22	\$ -		\$ 62,226.22	100%	\$ -	\$ 3,111.31
5	Install Metal Flashings and Gutters	\$ 28,284.64	\$ 28,284.64	\$ -		\$ 28,284.64	89%	\$ 3,084.64	\$ 1,260.00
6	Close Out & Convey Manufacturer and 2001 Co. Warranty & Wind Rider	\$ 22,627.71	\$ 20,100.00	\$ -		\$ 20,100.00	89%	\$ 2,527.71	\$ 1,005.00
c/o	Remove Original Solar Mounts & relocate with new lumber & Waterproof (\$1600ea.) (3)	\$ 4,800.00	\$ 4,800.00	\$ -		\$ 4,800.00	100%	\$ -	\$ 240.00
c/o	Install New Solar Standoffs @ \$4.00 ea. (84)	\$ 336.00	\$ 336.00	\$ -		\$ 336.00	100%	\$ -	\$ 16.80
c/o	Demo existing Metal track parapit & install new plate (front Pods) \$500ea. (Bal.2)	\$ 1,000.00	\$ 1,000.00	\$ -		\$ 1,000.00	100%	\$ -	\$ 50.00
c/o	Remove Crickets & install new Plywood slope with glued TPO \$2500ea(3) Bal.2	\$ 5,410.20	\$ 5,410.20	\$ -		\$ 5,410.20	100%	\$ -	\$ 375.00
c/o	Add 1" insulation & additional 2x6 blocking \$1082.04 ea. (5) Bal.2	\$ 5,410.20	\$ 5,410.20	\$ -		\$ 5,410.20	100%	\$ -	\$ 270.51
c/o	TPO Termination covering 2x6 blocking (existing contract) \$321.43ea. (5)	\$ 1,607.15	\$ 1,607.15	\$ -		\$ 1,607.15	100%	\$ -	\$ 80.36
c/o	Add 2x4 to outside perimeter blocking above current stucco termination point \$216.43 (5)	\$ 1,082.15	\$ 1,082.15	\$ -		\$ 1,082.15	100%	\$ -	\$ 54.11
c/o	Build new 6"x6" fascia (plywood box) and attached to front then wrap with Metal \$952.50 (5)	\$ 4,762.50	\$ -	\$ -		\$ -	0%	\$ 4,762.50	\$ -
Building B: 5 Pods									
1	Mobilization	\$ 20,364.94	\$ 20,364.94	\$ -		\$ 20,364.94	100%	\$ -	\$ 1,018.25
2	Pressure Wash & Air and Water Seal Existing Roof	\$ 41,861.27	\$ 41,861.27	\$ -		\$ 41,861.27	100%	\$ -	\$ 2,093.06
3	Construct Curbs and Install EPS Insulation System	\$ 50,912.36	\$ 50,912.36	\$ -		\$ 50,912.36	100%	\$ -	\$ 2,545.62
4	TPO Membrane & 2001 Company System	\$ 62,226.22	\$ 62,226.22	\$ -		\$ 62,226.22	100%	\$ -	\$ 3,111.31
5	Install Metal Flashings and Gutters	\$ 28,284.64	\$ 28,284.64	\$ -		\$ 28,284.64	90%	\$ 2,784.00	\$ 1,275.03
6	Close Out & Convey Manufacturer and 2001 Co. Warranty & Wind Rider	\$ 22,627.71	\$ 19,500.00	\$ -		\$ 19,500.00	86%	\$ 3,127.71	\$ 975.00
c/o	Remove Original Solar Mounts & relocate with new lumber & Waterproof (4)	\$ 448.00	\$ 448.00	\$ -		\$ 448.00	0%	\$ -	\$ -
c/o	4 Arrays were Paid under Bart Invoice Inv.#45964 on 2-15-19 SBCW/CHR1021	\$ 1,000.00	\$ 1,000.00	\$ -		\$ 1,000.00	100%	\$ -	\$ 22.40
c/o	Install New Solar Standoffs @ \$4.00 ea. (112)	\$ 7,500.00	\$ 7,500.00	\$ -		\$ 7,500.00	100%	\$ -	\$ 50.00
c/o	Demo existing Metal track parapit & install new plate (front Pods) \$500ea. (2)	\$ 5,410.20	\$ 5,410.20	\$ -		\$ 5,410.20	100%	\$ -	\$ 375.00
c/o	Add 1" insulation & additional 2x6 blocking \$1082.04 ea. (5)	\$ 5,410.20	\$ 5,410.20	\$ -		\$ 5,410.20	100%	\$ -	\$ 270.51
c/o	TPO Termination covering 2x6 blocking (existing contract) \$321.43ea. (5)	\$ 1,607.15	\$ 1,607.15	\$ -		\$ 1,607.15	100%	\$ -	\$ 80.36
c/o	Add 2x4 to outside perimeter blocking above current stucco termination point \$216.43 (5)	\$ 1,082.15	\$ 1,082.15	\$ -		\$ 1,082.15	100%	\$ -	\$ 54.11
c/o	Build new 6"x6" fascia (plywood box) and attached to front then wrap with Metal \$952.50 (5)	\$ 4,762.50	\$ -	\$ -		\$ -	0%	\$ 4,762.50	\$ -

Building C: 9 Pods

Line Item	Description	Quantity	Unit	Unit Price	Amount	Estimate	Actual	Change	Percentage	Contract	Balance
1	Mobilization				\$ 36,656.90	\$ 36,656.90			100%	\$ -	\$ 1,832.85
2	Pressure Wash & Air and Water Seal Existing Roof				\$ 75,350.29	\$ 75,350.29			100%	\$ -	\$ 3,267.51
3	Construct Curbs and Install EPS Insulation System (10192.471 / pod) 9				\$ 91,642.24	\$ 91,642.24			100%	\$ -	\$ 4,582.11
4	TPO Membrane & 2001 Company System (12445.249 / pod) 9				\$ 112,007.19	\$ 112,007.19			100%	\$ -	\$ 5,600.36
5	Install Metal Flashings and Gutters				\$ 50,912.36	\$ 45,600.00	\$ 5,312.36		90%	\$ 5,312.36	\$ 2,280.00
6	Close Out & Convey Manufacturer and 2001 Co. Warranty & Wind Rider				\$ 40,729.89	\$ 35,000.00	\$ 5,729.89		86%	\$ 5,729.89	\$ 1,750.00
c/o	Remove Original Solar Mounts & relocate with new lumber & Waterproof (\$1600ea.)				\$ 4,800.00	\$ 4,800.00			100%	\$ -	\$ 240.00
c/o	Install New Solar Standoffs @ \$4.00 ea. (196)				\$ 784.00	\$ 784.00			100%	\$ -	\$ 39.20
c/o	Demo existing Metal track parapit & install new plate (front Pods) \$500ea.(4) 4				\$ 2,000.00	\$ 2,000.00			100%	\$ -	\$ 100.00
c/o	Add 1" Insulation & additional 2x6 blocking \$1082.04 ea. (9)				\$ 12,500.00	\$ 12,500.00			100%	\$ -	\$ 625.00
c/o	TPO Termination covering 2x6 blocking (existing contact) \$321.43ea.(9)				\$ 9,738.36	\$ 9,738.36			100%	\$ -	\$ 486.92
c/o	Add 2x4 to outside perimeter blocking above current stucco termination point \$216.43 (9)				\$ 2,892.87	\$ 2,892.87			100%	\$ -	\$ 144.64
c/o	Build new 6"x6" Fascia (plywood box) and attached to front then wrap with Metal \$952.50 (9)				\$ 1,947.87	\$ 1,947.87			100%	\$ -	\$ 97.39
	Building D: 9 Pods				\$ 8,572.50	\$ 8,572.50			0%	\$ 8,572.50	\$ -
1	Mobilization				\$ 36,656.90	\$ 36,656.90			100%	\$ -	\$ 1,832.85
2	Pressure Wash & Air and Water Seal Existing Roof				\$ 75,350.29	\$ 75,350.29			100%	\$ -	\$ 3,267.51
3	Construct Curbs and Install EPS Insulation System				\$ 91,642.24	\$ 91,642.24			100%	\$ -	\$ 4,582.11
4	TPO Membrane & 2001 Company System				\$ 112,007.19	\$ 112,007.19			100%	\$ -	\$ 5,600.36
5	Install Metal Flashings and Gutters				\$ 50,912.36	\$ 45,600.00	\$ 5,312.36		90%	\$ 5,312.36	\$ 2,280.00
6	Close Out & Convey Manufacturer and 2001 Co. Warranty & Wind Rider				\$ 40,729.89	\$ 35,000.00	\$ 5,729.89		86%	\$ 5,729.89	\$ 1,750.00
c/o	Remove Original Solar Mounts & relocate with new lumber & Waterproof (\$1600ea.)(9)				\$ 6,400.00	\$ 6,400.00			100%	\$ -	\$ 320.00
c/o	Install New Solar Standoffs @ \$4.00 ea. (112)				\$ 448.00	\$ 448.00			100%	\$ -	\$ 22.40
c/o	Demo existing Metal track parapit & install new plate (front Pods) \$500ea. (4)				\$ 2,000.00	\$ 2,000.00			100%	\$ -	\$ 100.00
c/o	Remove Crickets & install new Plywood slope with glued TPO \$2500ea.(5)				\$ 12,500.00	\$ 12,500.00			100%	\$ -	\$ 625.00
c/o	Add 1" Insulation & additional 2x6 blocking \$1082.04 ea. (9)				\$ 9,738.36	\$ 9,738.36			100%	\$ -	\$ 486.92
c/o	TPO Termination covering 2x6 blocking (existing contact) \$321.43ea.(9)				\$ 2,892.87	\$ 2,892.87			100%	\$ -	\$ 144.64
c/o	Add 2x4 to outside perimeter blocking above current stucco termination point \$216.43 (9)				\$ 1,947.87	\$ 1,947.87			100%	\$ -	\$ 97.39
c/o	Build new 6"x6" Fascia (plywood box) and attached to front then wrap with Metal \$952.50 (9)				\$ 8,572.50	\$ 8,572.50			0%	\$ 8,572.50	\$ -
2A	CHANGE ORDERS:										
15	Misc. C (Direct Payment to Progressive Heavy Equipment #1085)				\$ 30,000.00	\$ 20,000.00	\$ 10,000.00		67%	\$ 10,000.00	\$ 1,000.00
26	Misc. C (Direct Payment to Progressive Heavy Equipment #1085)				\$ (9,000.00)	\$ (9,000.00)	\$ -		100.00%	\$ -	\$ -
1	Direct purchases - September 2018				\$ (4,500.00)	\$ (4,500.00)	\$ -		100.00%	\$ -	\$ -
2	Direct purchases - October (\$9314.92 / Pod)				\$ (25,070.00)	\$ (25,070.00)	\$ -		100.00%	\$ -	\$ -
3	Direct purchases - February 2019 (Spec dated 2-19-19) (\$1516.79/pod)				\$ (260,817.69)	\$ (250,872.15)	\$ (9,945.54)		99.23%	\$ (2,000.00)	\$ -
4	Direct purchases - April 2019 (East End Lumber 2x8x16 CR#7032) (8 Bldg.)				\$ (42,470.02)	\$ (39,436.54)	\$ (3,033.48)		95.29%	\$ (2,000.00)	\$ -
5	Direct purchases - April 2019 (Home Depot 1" Insulation CR#1035)(\$351.36 / pod Bal.2)				\$ (752.30)	\$ (752.30)	\$ -		100.00%	\$ -	\$ -
6	Direct purchases - April 17 2019 (East End Lumber & MSI 2x8x16) (C Bldg)				\$ (8,784.01)	\$ (8,432.65)	\$ (351.36)		100.00%	\$ -	\$ -
7	Direct purchases - April 26 2019 (MSI 2x8x16) (C Bldg)				\$ (1,133.00)	\$ (1,133.00)	\$ -		100.00%	\$ -	\$ -
8	PVC pipe & Vent Pipe Repairs (8 Bldg.) Total \$9,500.00% allocation)				\$ (686.40)	\$ (686.40)	\$ -		100.00%	\$ -	\$ -
9	Direct Purchases - June 26 2019 (MSI 40 ea. 2x4x16&2x4x16) (4pods @5103.14)				\$ (1,444.00)	\$ (1,444.00)	\$ -		100.00%	\$ -	\$ -
10	Direct Purchases - July 18 2019 (MSI 100 ea. 2x4x16&2x4x16) (4pods @5301.25)				\$ (3,615.00)	\$ (3,615.00)	\$ -		100.00%	\$ -	\$ -
11	Direct Purchases - July 21 2019 (MSI 54 2x8x16) (4pods @517.60)				\$ (1,544.40)	\$ (1,544.40)	\$ -		100.00%	\$ -	\$ -
12	Direct Purchases - SPEC- 7-23-19 (less shipping/deliv. screws & plates \$4079.4) (2 pods \$824.30)				\$ (7,418.70)	\$ (5,770.10)	\$ (1,648.60)		100.00%	\$ -	\$ -
13	Direct Purchases - SPEC- 8-01-19 (Screws & Rivets) (2 Bldgs @351.50 ea.)				\$ (1,406.00)	\$ (1,054.50)	\$ (351.50)		100.00%	\$ -	\$ -
14	Direct Purchases - Aug. 15 2019 (MSI 100 2x4x16) (6pods @597)				\$ (1,455.00)	\$ (1,455.00)	\$ -		100.00%	\$ -	\$ -
16	Direct Purchases - Nov. 15 2019 (MSI 24 2x4x16 - 100 2x6x16) (4pods @8260.33)				\$ (2,343.00)	\$ (2,343.00)	\$ -		100.00%	\$ -	\$ -
17	Direct Purchases - Dec. 3 2019 (MSI 60 2x6x20 - 20 2x8x16) (2pods @5509)				\$ (13,920.00)	\$ (13,920.00)	\$ -		100.00%	\$ -	\$ -
18	Direct Purchases - Dec. 6 2019 (Sennometal) 533 sheets white aluminum (22pods @3662.85)				\$ (2,100.00)	\$ (2,100.00)	\$ -		100.00%	\$ -	\$ -
19	Direct Purchases - Dec. 2 & 7 2019 (Paint Depot) (4pods @525)				\$ (81.80)	\$ (81.80)	\$ -		100.00%	\$ -	\$ -
20	Direct Purchases - Dec. 10 2019 (Just Plastics) (4pods @385.76)				\$ (771.90)	\$ (771.90)	\$ -		100.00%	\$ -	\$ -
21	Direct Purchases - Dec. 19 2019 (MSI 34 2x6x16 & 2x8x16) (2pods @5420.90)				\$ (886.00)	\$ (886.00)	\$ -		100.00%	\$ -	\$ -
22	Direct Purchases - SPEC- 12-19-19 (456758) (Plates & screws) (2 pods \$965.95 ea.)				\$ (4,057.38)	\$ (4,057.38)	\$ -		100.00%	\$ -	\$ -
23	Direct Purchases - SPEC- 12-23-19 (\$569138 & 569168)				\$ (407.00)	\$ (407.00)	\$ -		100.00%	\$ -	\$ -
24	Direct Purchases - Dec. 29 2019 (MSI 20 2x6x16) (2pods @5203.50)				\$ (351.36)	\$ (351.36)	\$ -		100.00%	\$ -	\$ -
25	Adjustment for Overpayment on A148				\$ (351.36)	\$ (351.36)	\$ -		100.00%	\$ -	\$ -

NET CHANGES BY CHANGE ORDER: \$ (23,5174.61)



Monique Harry <sbcwgm@gmail.com>

Fwd: AIA#25 including direct Pmt. to Progressive Equipment


3 messages

Jack R Green - gmail <jackrg@jackgreenrealty.com>
To: Monique Harry <sbcwgm@gmail.com>

Fri, Jan 31, 2020 at 2:58 PM

Please make a check to Bart and have him sign that this is for the finishing of last pod,

*excluding ~~metal~~
metal. Includes
TPO installation and valley*



Begin forwarded message:

From: James Wozniak <jkwoz@hotmail.com>
Subject: AIA#25 including direct Pmt. to Progressive Equipment
Date: January 31, 2020 at 1:49:01 PM EST
To: Jack Green <jackrg@jackgreenrealty.com>
Cc: James Wozniak <jkwoz@hotmail.com>


Jack,

As discussed attached is AIA#25. This includes a direct payment to Progressive equipment for \$4,500

and the balance to Bart for \$10,000.14 as approved by you and I. Let me know if you need anything else.

Jim

IMPORTANT NOTICE: Never trust wiring instructions sent via email. Cybercriminals are hacking email accounts and sending emails with fake wiring instructions. These emails are convincing and sophisticated. Always independently confirm wiring instructions in person or via a telephone call to a trusted and verified phone number. Never wire money without double-checking that the wiring instructions are correct.

 **AIA Doc#25 SBCW.xlsx**
31K

Monique Harry <sbcwgm@gmail.com>
To: sbwcoffice@gmail.com

Fri, Jan 31, 2020 at 3:17 PM


Sent from my iPhone

Begin forwarded message:

From: Jack R Green - gmail <jackrg@jackgreenrealty.com>
Date: January 31, 2020 at 2:58:45 PM AST
To: Monique Harry <sbcwgm@gmail.com>
Subject: Fwd: AIA#25 including direct Pmt. to Progressive Equipment

Please make a check to Bart and have him sign that this is for the finishing of last pod.

[Quoted text hidden]

 **AIA Doc#25 SBCW.xlsx**
31K

Monique Harry <sbwgm@gmail.com>
To: Tablet <sbwoffice@gmail.com>


Fri, Jan 31, 2020 at 3:19 PM

Sent from my iPhone

Begin forwarded message:

From: Jack R Green - gmail <jackrg@jackgreenrealty.com>
Date: January 31, 2020 at 2:58:45 PM AST
To: Monique Harry <sbwgm@gmail.com>
Subject: Fwd: **AIA#25 including direct Pmt. to Progressive Equipment**

Please make a check to Bart and have him sign that this is for the finishing of last pod.
[Quoted text hidden]

 **AIA Doc#25 SBCW.xlsx**
31K

AFFIDAVIT, RELEASE OF LIENS AND GENERAL RELEASE

TERRITORY OF THE VIRGIN ISLAND
ST. THOMAS/ ST. JOHN

TO WHOM IT MAY CONCERN:

WHEREAS, Bart Enterprises, LLC is a trade contractor to Sapphire Bay Condominiums West (the "Owner") for the construction of or providing goods, materials, or services to the projects located at 6345 Smith Bay, St. Thomas, VI, and is being paid **One Million Two Hundred Ninety Three Thousand Six Hundred dollars (\$1,293,600.00)** and other valuable considerations therefor, receipt whereof is hereby acknowledged;

NOW, THEREFORE, in consideration thereof the Supplier hereby:

1. Sells, assigns, and sets over to the Owner all right title and interest it can or may have in any of the materials covered by its contract or covered by this requisition which are being provided to or incorporated into this project,
2. Certifies that it has paid all applicable taxes which are due to date and for which it would be liable, but which are not yet due.
3. Certifies that all subcontractors or suppliers of materials, equipment, labor or services used or employed by it for the project to date have been fully paid with respect to the materials, equipment, labor and services which they have furnished except the following:

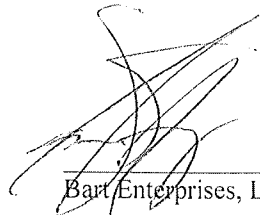
NAME OF CREDITOR	AMOUNT	NATURE
------------------	--------	--------

4. Further certifies that:

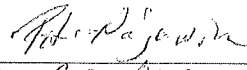
The total amount of said contract/purchase order is:	\$ 1,072,695.32
The amount received to date is:	\$ 900,885.13
The amount owed on the current requisition or is:	\$ 10,000.14
The amount to be paid as retainage on this requisition at the time of final payment is:	\$ 67,748.83

In consideration of the payment indicated above, the receipt of which is hereby acknowledged, the undersigned does hereby waive and release any and all liens, claims or rights of lien on or against said construction or improvements, for and on account of the services, materials and/or work provided to the Owner or the project covered by this payment for all costs, labor, equipment or materials contained in the payment owed indicated above and furnished by the undersigned to the project and all claims relating to that payment and all other claims whether in tort or contract which can or could be made among the parties relating to the project.

Dated this 31th day of January 2020.



Bart Enterprises, LLC



By: *Pro, My*
Its *1/31/20*

SUBSCRIBED and sworn to before me this day of 2020.

Notary Public
My Commission Expires:

Req. #25

Monique Harry <sbwgm@gmail.com>

Fwd: AIA#25 including direct Pmt. to Progressive Equipment

3 messages

COPY

Jack R Green - gmail <jackrg@jackgreenrealty.com>
To: Monique Harry <sbwgm@gmail.com>

Fri, Jan 31, 2020 at 2:58 PM

Please make a check to Bart and have him sign that this is for the finishing of last pod, *excluding ~~metal~~ metal. Includes 700 installations and valley*

Begin forwarded message:


From: James Wozniak <jkwoz@hotmail.com>
Subject: AIA#25 including direct Pmt. to Progressive Equipment
Date: January 31, 2020 at 1:49:01 PM EST
To: Jack Green <jackrg@jackgreenrealty.com>
Cc: James Wozniak <jkwoz@hotmail.com>

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Jim

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 **AIA Doc#25 SBCW.xlsx**
31K

Monique Harry <sbwgm@gmail.com>
To: sbwcoffice@gmail.com


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Sent from my iPhone

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[Quoted text hidden]

 **AIA Doc#25 SBCW.xlsx**
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Monique Harry <sbwgm@gmail.com>
To: Tablet <sbwoffice@gmail.com>


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Please make a check to Bart and have him sign that this is for the finishing of last pod.
[Quoted text hidden]

 **AIA Doc#25 SBCW.xlsx**
31K

Bart Enterprises, LLC
P.O. Box 11295
St. Thomas, VI 00801

July 25, 2022

Renee Gumbs-Carty
Judge of the Superior Court of the Virgin Islands
Superior Court of the Virgin Islands
Alexander A. Farrelly Justice Center
5400 Veteran's Drive
St. Thomas, USVI 00802

RECEIVED: CLERK'S DIVISION
2022 JUL 25 PM3:27

RE: CASE NO. ST-20-CV-075
Request for Extension of Time

Dear Judge, Gumbs-Carty,

Bart Enterprises is requesting an extension of time of sixty days to retain legal counsel. This should allow adequate time to review the case history and recent motions filed by opposing counsel.

Sincerely,


Julie Majawicz
Resident Agent

Supp059

FILED

August 30, 2022 04:25 PM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)	
)	
Plaintiff,	)	CASE NO. ST-20-CV-075
)	
v.)	
	)	ACTION FOR BREACH OF
SAPPHIRE BAY CONDOMINIUMS	)	CONTRACT
WEST,)	
)	
Defendant.	)	<u>JURY TRIAL DEMANDED</u>
_____)	

ORDER

THIS MATTER is before the Court upon the Defendant’s “Motion to Dismiss for Lack of Prosecution” filed on July 6, 2022. Plaintiff responded with a “Request for Extension of Time” filed on July 25, 2022, seeking an additional sixty (60) days to retain legal counsel. Notwithstanding two (2) Orders have been previously issued granting Plaintiff ample time to secure new counsel and file appropriate responses, the Court will grant this request in part.¹ The premises considered, it is hereby

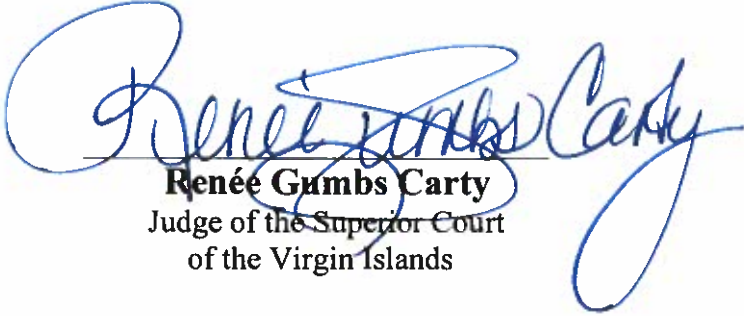
ORDERED that Plaintiff’s request for extension of time is **GRANTED in part**; and it is further

ORDERED that Plaintiff shall cause new counsel to file a Notice of Appearance within twenty-one (21) days of the date of entry of this Order and respond to the Complaint and motion, failing which the matter will be promptly dismissed; and it is further

¹ Attached are the December 17, 2021, and June 24, 2022 Orders granting Plaintiff time to secure new counsel. “It is axiomatic that, as a matter of law, trial judges have the inherent power ‘to control the disposition of the causes on [the court’s] docket with economy of time and effort for itself, for counsel, and for litigants.’” *Pedro v. Ranger American of the Virgin Islands, Inc.*, 62 V.I.511, 527 (V.I. 2015) (Gomez, J., dissenting in part) (citing *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

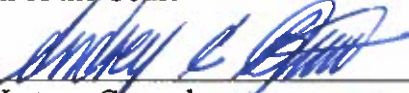
ORDERED that a copy of this Order shall be directed to Julie Najawicz, Resident Agent, Bart Enterprises, LLC, P.O. Box 11295, St. Thomas, Virgin Islands 00801, and J. Daryl Dodson, Esquire.

Dated: August 30, 2022



Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Tamara Charles
Clerk of the Court

By: 
Latoya Camacho
Court Clerk Supervisor 8 | 30 | 2022

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

BART ENTERPRISES, LLC,

Plaintiff,

v.

SAPPHIRE BAY CONDOMINIUMS
WEST,

Defendant.

CIVIL NO. ST-2020-CV-00075

**ACTION FOR BREACH OF
CONTRACT**

NOTICE OF APPEARANCE

COMES NOW Kye Walker, Esq., of The Walker Legal Group, and herewith enters her appearance on behalf of the Plaintiff, Bart Enterprises, LLC, in the above-captioned matter. Please direct copies of all future proceedings, pleadings, correspondence, and other papers filed in this matter both prior to and subsequent to this date to undersigned counsel at 2201 Church Street, Suite 16AB, Christiansted, VI 00820.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Attorney for Plaintiff

DATED: September 1, 2022

BY: /s/ Kye Walker, Esq.

Kye Walker, Esq.

VI Bar No. 995

2201 Church Street, Ste. 16AB, 2nd Fl.
Christiansted, St. Croix

U.S. Virgin Islands 00820

Telephone: (340) 773-0601

Fax: (888) 231-0601

kye@thewalkerlegallgroup.com



The Walker Legal Group
2201 Church St.
Ste. 16AB, 2nd Floor
Christiansted, St. Croix
USVI 00820
Tel: 340-773-0601
Fax: 888-231-0601

kye@thewalkerlegallgroup.com

Supp062

NOTICE OF APPEARANCE

Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 1, 2022, I electronically filed the foregoing with the Clerk of the Court using the Virgin Islands Judiciary Branch C-Track E-filing System, which will send a notification of such filing (NEF) to all parties and/or their counsel of record as follows:

Lisa Michelle Komives, Esq.
Dudley Newman Feuerzeig LLP
P.O. Box 756
St. Thomas, VI 00804-0756
Telephone: (340) 715-7740
lkomives@dnfvi.com

This document complies with the page or word limitation set forth in Rule 6-1(e).

BY: /s/ Kye Walker, Esq.

FILED

September 12, 2022 11:46 AM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC)

Plaintiff,)

v.)

SAPPHIRE BAY CONDOMINIUMS WEST)

Defendant.)

) Case ST-2020-CV-00075

MOTION TO RECONSIDER

The Defendant Sapphire Bay Condominiums West (“Sapphire”) herewith moves this Court pursuant to V.I.R Civ.P. 6-4 to reconsider its August 30, 2022 Order (the “August 30 Order”) granting the plaintiff Bart Enterprises, LLC (“Bart”) an additional 21 days in which to retain counsel and respond to the pending Motion to Dismiss. This was plain error since *Murphy Rigging & Erecting, Inc. v. Virgin Islands Water & Power Auth.*, 2022 WL 843385, 2022 VI 5, ¶¶ 17-18 (V.I. Mar. 22, 2022) dictates that the Court was required to dismiss the Complaint in this matter, and all claims asserted therein, *sua sponte*, and without further ado. This Complaint is a legal nullity because it was signed and filed on behalf of a limited liability company by an individual who not only was not admitted to practice law in the U.S. Virgin Islands but was and is not even an attorney.

The captioned action was initiated when Peter R. Najawicz (“Najawicz”) signed and filed the Complaint dated February 13, 2020 on behalf of his limited liability company Bart Enterprises, LLC (“Bart”) on February 13, 2020. Najawicz is not an attorney and certainly is not admitted to practice law in this territory.

On April 3, 2020, Sapphire filed its *Motion to Dismiss Plaintiff Bart Enterprises LLC's Complaint as Plaintiff is not Represented by an Attorney but is Rather Impermissibly Representing Itself* (the "2020 Motion"). Bart did not oppose this motion. On April 27, 2020, the Court entered an Order 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 this same Order, the Court determined not to "automatically" apply the rule in this case, but instead to grant Bart "some time to retain authorized legal counsel to represent it in this litigation." It provided thirty days for Bart to retain an attorney. 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, under the provisions of V.I.R.Civ.P 11, by him. The Complaint that constituted a legal nullity remained as the sole enunciation of Bart's claim against Sapphire.

The Complaint sought to foreclose a Notice of Claim of Construction Lien recorded on February 5, 2020, for \$265,296.98 allegedly due for work performed at the condominium development managed by Sapphire. On April 9, 2021, in another filing signed solely by Peter Najawicz, Bart recorded a second Notice of Claim of Construction Lien.¹ 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

¹ The relevant documents are attached as Exhibits to Sapphire's Motion for Partial Summary Judgment, filed December 6, 2021 (the "SJ Motion").

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 also a legal nullity, Sapphire asked the Court, in the SJ Motion, to order it released. 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, Attorney King filed, on December 10, 2021, his Motion to Withdraw, on grounds 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. This order required Bart to cause new counsel to enter an appearance within 45 days, or by January 31, 2022. Bart failed to comply with this order.

On February 17, 2022, Sapphire filed its Motion to Dismiss the Complaint (the “2022 Motion”) on grounds that the Complaint was a legal nullity because it was not signed and filed by an attorney authorized to represent an entity such as Bart in this Court. On June 16, 2022, Sapphire filed a Supplement to Motion to Dismiss (the “Supplement”), calling the Court’s attention to the recently decided *Murphy Rigging* case. The Supplement pointed out that, in *Murphy Rigging*, the Supreme Court of the Virgin Islands raised, *sua sponte*, the fact that the complaint in that matter was signed and filed by two individuals who were not authorized to represent parties in the courts of this territory. In a stinging rebuke to the lower court, the Supreme Court held that the Court should have dismissed the complaint, *sua sponte*, without the need for a motion from any party, because it was a legal nullity. The Supplement pointed out that, under the authority of *Murphy Riggings*, the Court should dismiss all claims asserted by Bart in this action.

Instead, on June 24, 2022, the Court entered an order giving Bart even more time to respond. It ordered Bart, “through counsel, file a response to the motion and its supplement by Monday, July 25, 2022.” It added that upon failure to respond the matter may be dismissed for failure to prosecute. Bart failed to comply with this order.

On August 30, 2022, undersigned counsel was served with the August 30 Order through the Court’s e-filing system. It referred to a “Request for Extension of Time” allegedly filed by Bart on July 25, 2022 and seeking an additional sixty days to retain counsel. However, no such request was served on undersigned counsel, and none was posted to the electronic docket of this case. Calls to the court produced a copy of this letter-request, which is signed by Julie Najawicz, another non-attorney and person who is not authorized to represent clients before this Court. This request was granted before Sapphire ever saw it, and certainly before it had a chance to respond.

Virgin Islands Rule of Civil Procedure 6.4, “Motions for Reconsideration,” provides as follows:

(a) **Timing.** Except as provided in Rules 59 and 60 relating to final orders or judgments, a party may file a motion asking the court to reconsider its order or decision within 14 days after the entry of the ruling, unless the time is extended by the court. Extensions will only be granted for good cause shown.

(b) **Grounds.** A motion to reconsider must be based on:

- (1) intervening change in controlling law;
- (2) availability of new evidence;
- (3) the need to correct clear error of law; or
- (4) failure of the court to address an issue specifically raised prior to the court’s ruling.

Where ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court.

Reconsideration should be granted under Sections (b)(3) and (b)(4) of this rule. The status of this action, and the Complaint initiating it, as a legal nullity, was raised by Sapphire in its 2020 Motion, its 2022 motion, and the Supplement. 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*. If Bart wishes to proceed with new counsel, it must do so by filing a new civil action.

In the interim, Sapphire moves this Court to reconsider its decision in the August 30 Order, and instead to dismiss all claims asserted by Bart in this matter without further ado.

Respectfully submitted,

DATED: September 12, 2022

MOORE, DODSON & RUSSELL, P.C.

/s/ J. Daryl Dodson
J. Daryl Dodson Esq.
VI Bar No. 241
5035 Norre Gade, Suite 201
P.O. Box 310
St. Thomas, U.S.V.I. 00804
Telephone: (340) 777-5490
Email: daryl@mdrvi.com
Counsel for Sapphire Bay Condominiums West

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document complies with the page/word limitations of Rule 6-1(e) and that on this 12th day of September, 2022, I caused a true and exact copy of the foregoing *Motion*, to be filed electronically with the Clerk of the Court using the VIJEFS system, which will send notification of such filing to the following:

Kye Walker, Esq.
2201 Church Street, Suite 16AB
Christiansted, St. Croix
U.S. Virgin Islands 00820
Email: kye@thewalkerlegalgroup.com

/s/ J. Daryl Dodson

FILED

September 23, 2022 02:49 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

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

BART ENTERPRISES, LLC,)
)
Plaintiff,)
)
v.)
)
SAPPHIRE BAY CONDOMINIUMS)
WEST,)
)
Defendant.)
_____)

CASE NO. ST-20-CV-075

ACTION FOR BREACH OF
CONTRACT

JURY TRIAL DEMANDED

ORDER

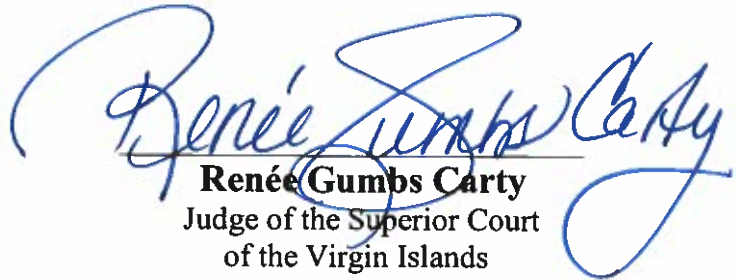
THIS MATTER is before the Court on the “Motion to Reconsider” its August 30, 2022 Order filed by Defendant Sapphire Bay Condominiums West (“Sapphire”) on September 12, 2022. This Order provided Plaintiff Bart Enterprises, LLC (“Bart”) with additional time to retain counsel and to respond to Sapphire’s “Motion to Dismiss Complaint” filed on February 17, 2022, and to the “Supplement to Motion to Dismiss Complaint” filed on June 16, 2022. 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**; and it is further

ORDERED that a copy of this Order shall be directed to Kye Walker, Esquire and J. Daryl Dodson, Esquire.

Dated: September 23, 2022


Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Tamara Charles
Clerk of the Court

By: 
Latoya Camacho
Court Clerk Supervisor 9 23 2022

FILED

October 18, 2022 10:32 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

BART ENTERPRISES, LLC,

Plaintiff,

v.

SAPPHIRE BAY CONDOMINIUMS
WEST,

Defendant.

CIVIL NO. ST-2020-CV-00075

**ACTION FOR BREACH OF
CONTRACT**

**MOTION TO RECONSIDER ORDER OF DISMISSAL OR, IN THE
ALTERNATIVE, TO VACATE ORDER OF DISMISSAL**

On September 23, 2022, the Court granted Defendant Sapphire Bay Condominiums West's motion to reconsider the Court's Order of August 30, 2022 ("the dismissal order"), and dismissed the instant matter, without allowing Plaintiff, Bart Enterprises, LLC, an opportunity to respond to the motion to reconsider and eliminating any opportunity for Bart to prosecute this matter after it secured counsel. *See generally, Chavayez v. Buhler*, S.Ct.Civ.No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *9-10 (V.I. June 25, 2009)("[t]he trial court, in prematurely issuing its dismissal order, deprived Chavayez of fifteen days in which she was entitled to respond."). Moreover, the Court's three (3) sentence order ("the dismissal order") contains no analysis of the requisite *Halliday* factors although the Court premised its dismissal on Bart's failure to respond to the pending motions to dismiss. *See, Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511-512 (V.I. 2010)("Here, it is readily apparent that the Superior Court's April 24, 2009 Order did not consider – let alone weigh – any of these



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six factors. Significantly, the April 24, 2009 Order consists of a total of three sentences, and only references the fact that Appellant’s counsel was required to submit a memorandum, but had failed to do so, without making any findings with respect to Appellant’s personal responsibility, prejudice to any of the defendants, whether Appellants’ counsel’s conduct was willful or in bad faith, the effectiveness of alternative sanctions, and the meritoriousness of Appellants’ claims. Accordingly, because the Superior Court dismissed Appellants’ action without performing the appropriate balancing test, this Court reverses the Superior Court’s April 24, 2009 Order.”). Finally, the Court dismissed this matter while motions were pending. *Kuykendall v. Hart*, 70 V.I. 574, 581 (Super. Ct. 2019)(citing *Albert v. Hess Oil V.I. Corp.*, 70 V.I. 316, 331 (Super. Ct. 2019)(“This Court recently recognized that dismissing a case for failure to prosecute is not proper when motions are pending.”).

Bart moves to reconsider the order of dismissal dated September 23, 2022, under Virgin Islands Rule of Civil Procedure 6-4(b)(3) or, in the alternative, moves to vacate the dismissal order pursuant to Rule 60(b)(4) and (6). In support of this motion, Bart asserts three arguments: 1) the Court erred when it failed to apply the *Halliday* factors; 2) dismissal of the case was not proper as motions were pending; and 3) the Court violated Bart’s due process when it granted Defendant’s motion to reconsider without allowing Bart the opportunity to respond to the motion. Bart relies upon Rule 6-4(b)(3), Rule 60(b)(4) and (6), and *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010) and its progeny and cites the following points and authorities in support of this motion to reconsider or vacate the Court’s dismissal order.

BACKGROUND AND PROCEDURAL HISTORY

Bart filed the instant breach of contract action *pro se* through one of its principals, Peter R. Najawicz, on February 13, 2020. Bart, a small Virgin Islands business, seeks payment of an outstanding invoice in the amount of \$265,296.98. *See*, Complaint dated February 13, 2020. Attached to the Complaint is the subject contract, Bart's demand for payment, and Notice of the Construction Lien filed by Bart against the Defendant's property. Defendant answered the Complaint on June 23, 2020, and also filed a counterclaim. Bart responded to the counterclaim on July 20, 2020 thereby indicating its intent to both prosecute and defend this action.

It is clear from the inception of the matter that Bart struggled to find counsel to prosecute this case. On April 3, 2020, Defendant moved to dismiss the action because Bart was not represented by counsel. The Court agreed that Bart needed to be represented by counsel and ordered Bart to have counsel enter an appearance within thirty (30) days of the Court's order of April 28, 2020. Unfortunately, Bart was unable to secure counsel within the thirty (30) day deadline. Ultimately, Attorney Robert King entered an appearance on behalf of Bart shortly after the Court's deadline and on June 2, 2020.

Attorney King moved to withdraw his appearance on December 10, 2021. The Court granted leave for Attorney King to withdraw on December 17, 2021, and gave Bart forty-five (45) days to have new counsel enter an appearance on its behalf.

Prior to Attorney King's withdrawal and during the time King represented Bart, Defendant filed a Motion to Amend Counterclaim on August 19, 2021, and a Motion for

Partial Summary Judgment on December 6, 2021. Bart, while represented by counsel, did not respond to either motion. The Court granted the Motion to Amend Counterclaim on September 28, 2021. The Motion for Partial Summary Judgment remains pending before the Court.

Bart was unable to secure counsel by the Court's forty-five (45) day deadline, which deadline expired on January 31, 2022. While Bart was unrepresented by counsel, the Defendant filed the following motions:

- Motion for Partial Summary Judgment on December 6, 2021;
- Motion to Dismiss Complaint on February 17, 2022, with a Supplement to Motion to Dismiss Complaint on June 16, 2022;
- Motion to Dismiss for Lack of Prosecution on July 6, 2022; and
- request to consolidate the instant matter with *St. Thomas Cargo & Ship Services, Inc. v. Bart* on September 11, 2022.

On July 5, 2022, Bart responded to the Motion to Dismiss for Lack of Prosecution by requesting sixty (60) days to find new counsel. On August 30, 2022, the Court denied Bart's request in part and gave Bart twenty-one (21) days to secure new counsel and to respond to the "Complaint and motion", such that the deadline set by the Court for new counsel to enter his or her appearance was September 20, 2022. It is not clear why Bart would be required to respond to a Complaint when it initiated the Complaint.

The undersigned entered her appearance on behalf of Bart on September 1, 2022. At the time the undersigned entered her appearance, four (4) motions were pending.

On September 12, 2022, Defendant moved for reconsideration of the Court's August 30, 2022, Order and requested the Court dismiss the case. The deadline for Bart's response to the Motion to Reconsider was September 30, 2022. On September 23, 2022, a week before the deadline of Bart's response, the Court granted the Motion to Reconsider and dismissed this case for Bart's failure to respond to the motions to dismiss within twenty-one (21) days of the Court's August 30, 2022, Order.

The Court granted the Motion to Reconsider without allowing Bart the opportunity to respond to the Motion to Reconsider, just twenty-two (22) days after the undersigned entered her appearance, and just two (2) days after the deadline it set for response to the pending motions to dismiss.

At the time the Court dismissed this matter, there were at least four (4) pending motions, including a motion to consolidate filed by Defendant.

Although this matter was not stayed pending resolution of the motion to dismiss or the motion to consolidate, the Court never entered a scheduling order providing for the advancement of this matter past the initial pleading stage.

STANDARD

Motion to Reconsider Under Rule 6-4(b)(3)

Rule 6-4 governs motions for reconsideration filed in the Superior Court and provides in pertinent part that "a party may file a motion asking the court to reconsider its order or decision within 14 days after the entry of the ruling, unless the time is extended by the Court." V.I. R. CIV. P. 6-4(a). A motion to reconsider may be based on the need to correct clear error of law. *Id.*, at 6-4(b)(3). Further, when

analyzing a motion to reconsider based on “the need to correct clear error of law”, Virgin Islands courts have determined that granting a reconsideration motion is appropriate when the court’s “prior decision applied an incorrect legal precept or failed to conduct proper legal analysis using the correct legal precept.” *Cipriani v. Cipriani*, 74 V.I. 3, 13 (Super. Ct. 2021)(cited in *Smith v. West Indian Company, Ltd.*, Case No. ST-18-CV-138, 2022 V.I. LEXIS 54, at *6 (Super. Ct. July 11, 2022). When relying on Rule 6-4(b)(3), “[t]he moving party is expected to offer the specific legal authority it claims the Court failed to apply or incorrectly applied in its original decision.” *Smith*, at *6 (citing *Cipriani*, at *13).

Motion to Vacate Under Rule 60(b)(6)

Bart seeks alternative relief under Rule 60(b)(4) and (b)(6). Rule 60(b)(4) and (b)(6) motions do not have the same fourteen (14) day time limitation as a Rule 6-4 motion. Instead, those motions are subjected to a “reasonable time” standard, which “reasonable time” is to be decided under the circumstances of each case. V.I.R.CIV.P. 60(c)(1). *Lucan Corp v. Robert L. Merwin & Co.*, S.Ct.Civ.No. 2007-15, 2008 V.I. Supreme LEXIS 19, at *8 (V.I. January 3, 2008)(citing *Delzona Corp v. Sacks*, 265 F.2d 157, 159 (3d Cir. 1959). In the *Lucan* matter, the Supreme Court found that a motion for reconsideration filed sixteen (16) days after the underlying order was not unreasonable and that “[t]here is no precedent that treats sixteen days as unreasonable.” *Id.*, at *9 (citing *Rice v. Ford Motor Co.*, 88 F.3d 914 (11th Cir. 1996)(finding that filing a motion to reconsider less than thirty days from the underlying order was unreasonable.)

Here, the instant motion to reconsider is filed just seventeen (17) days after the dismissal order and is therefore timely.¹

Rule 60(b)(4) allows a judgment to be voided if the Court acted in a manner inconsistent with due process of law, which due process violation deprives a party of notice or the opportunity to be heard. *Edney v. Edney*, Case No. SX-05-DI-104, 2014 V.I. LEXIS 98, at *10 (Super. Ct. October 7, 2014); *see also, A.H. Riise Gift Shops v. Government of the Virgin Islands*, Case No. ST-00-CV-420, 2013 V.I. LEXIS 4, at *9 (Super. Ct. January 14, 2013).

Meanwhile, Rule 60(b)(6) provides 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 . . . any . . . reason that justifies relief.” The Rule allows the Court to vacate its order in the interest of justice. *Blossom Corp. v. Spinale*, Civ. No. ST-09-CV-424, 2012 V.I. LEXIS 136, at *11 (Super. Ct. November 16, 2012). It is considered “a grand reservoir of equitable power to do justice in a particular case.” *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977)(citing 7 J Moore, FEDERAL PRACTICE ¶ 60.27[2] at 375 (2d ed. 1975)). Relief should be awarded under extraordinary and special circumstances only. *A.H. Riise Gift Shops*, at *10-11. In considering a Rule 60(b)(6) motion, the Court should also be guided by Supreme Court precedent which favors resolving cases on their merits. *St. Thomas & St. John Police Benevolent Ass’n v. Virgin Islands Police Department*, Case No. ST-15-CV-115, 2016

¹ This motion is filed seventeen (17) days after the entry of the dismissal order if counting pursuant to Rule 6(a)(1)(B) and twenty-five days of 25 calendar days.

V.I. LEXIS 132, at *10 (Super. Ct. August 31, 2016)(“. . . this jurisdiction has a particularly strong policy against the dismissal of actions prior to a trial on the merits.”); *see also, Adams v. North West Co., Inc.*, 63 V.I. 427, 2015 V.I. LEXIS 123, *18-19 (Super. Ct. October 6, 2015)(“Both this Court and the United States Supreme Court have recognized that there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow procedural rules.”)

Bart has the burden to present clear and convincing evidence establishing the existence of extraordinary and special circumstances justifying relief under Rule 60(b)(6).

ANALYSIS

A. The Court failed to apply the *Halliday* factors.

In *Halliday*, the Supreme Court of the Virgin Islands held that the Superior Court may not dismiss an action for failure to prosecute unless an analysis of the six “Poulis factors” weigh strongly in favor of dismissal. *Halliday*, at 511. Those factors, now known in Virgin Islands courts as the *Halliday* factors, required this Court to consider:

1. the extent of the party’s personal responsibility; 2. the prejudice, if any, to the other parties in the litigation; 3. whether the plaintiff has demonstrated a history of dilatoriness; 4. whether the plaintiff or attorney’s conduct was willful or in bad faith; 5. the effectiveness of sanctions other than dismissal; and 6. the meritoriousness of plaintiff’s claim.

Id.; *see also, Watts v Two Plus Two, Inc.*, 54 V.I. 286, 290 (V.I. 2010). The Supreme Court explained that “[b]ecause dismissal for failure to prosecute constitutes an

extreme sanction, the Superior Court may not order it” unless it has considered all the factors and found that those factors weigh strongly in favor of dismissal. *Watts*, at *6.

In this instance, the Court failed to consider the factors and therefore did not determine whether analysis of the factors favored dismissal. The Court’s failure is grounds for immediate reversal on appeal and, in the interest of justice and judicial efficiency, should be reconsidered and corrected at this juncture. *Hamed v. Yusuf*, Civ. No. SX-12-CV-370, 2014 V.I. LEXIS 133, at *2 (Super. Ct. December 5, 2014)(“The purpose of a motion to reconsider is to allow the Court to correct its own errors, sparing parties and appellate courts the burden of unnecessary proceedings.”); *see also*, *Halliday*, at 512 (“ . . . because the Superior Court dismissed Appellant’s action without performing the appropriate balancing test, this Court reverses the Superior Court’s April 24, 2009 Order.”) and *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 291 (V.I. 2010)(“Accordingly, since the record contains no evidence indicating that the Superior Court even considered any of these six factors – let alone weighed them – with respect to Bell, this Court reverses the October 19, 2007 Order as it pertains to dismissal of Watt’s action against Bell.”).

In this instance, even the most cursory review of the factors reveals that dismissal was not warranted.

1. Bart’s personal responsibility is minimal.

The Court must determine to what degree Bart, as opposed to his counsel, bears responsibility for the lack of prosecution. *Ventura*, at *14.

In *Kuykendall*, the Court found that this factor weighed against dismissal

MOTION TO RECONSIDER ORDER OF DISMISSAL OR, IN THE ALTERNATIVE, TO VACATE ORDER OF DISMISSAL

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because the Court had not entered a scheduling order such that “some of the history of delay is attributable to the Superior Court.” *Kuykendall*, at *10. While Bart bears some responsibility for the delay due to his failure to secure counsel by some of the deadlines imposed by the Court, he responded to the Motion to Dismiss for Failure to Prosecute by requesting additional time to secure counsel. Moreover, while Bart’s failure to secure counsel resulted in his inability to respond to the Defendant’s numerous motions, it did not inhibit discovery or prevent the Court from entering a scheduling order. Significantly, the Court never entered a scheduling order or even conduct a scheduling conference during the year and a half that Bart was represented by Attorney King. In the absence of a scheduling order, Bart could not have failed to prosecute this action.

This factor weighs against dismissal.

2. There is no prejudice to Defendant.

“Prejudice to the opposing party is generally demonstrated by either increased expense to the opposing party in the form of extra costs incurred relative to responding to the dilatory party’s behavior, or by the increased difficulty experienced by the opposing party in presenting or defending the claims in issue due to the improper behavior and delays.” *Ventura*, at *17. Examples of prejudice include “the irretrievable loss of evidence, the inevitable dimming of witnesses’ memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party.” *Wells v. VI Source, Inc.*, Civ. No. ST-07-CV-324, 2014 V.I. LEXIS 158, at *4 (Super. Ct. November 7, 2014)(citing *Adams v. Trustees of New Jersey Brewery Employees’ Pension*

MOTION TO RECONSIDER ORDER OF DISMISSAL OR, IN THE ALTERNATIVE, TO VACATE ORDER OF DISMISSAL

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Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994)). Prejudice could also include “deprivation of information through non-cooperation with discovery, and costs expended obtaining court orders to force compliance with discovery.” *Wells*, at *4 (citing *Adams*, at 874).

The Court must determine the extent of prejudice, if any, to determine how heavily to weigh the factor in its analysis. *Watts*, at 292.

Regarding prejudice, Defendant argues an inability to defend against the case due to delays and intervening changes in board membership. These arguments do not constitute prejudice.

First, Defendant can hardly argue an inability to defend against the case when it has filed three (3) motions to dismiss and one summary judgment motion. Defendant has not sought to meet and confer regarding discovery, has not requested the Court enter a scheduling order, and has not taken any steps other than to rush this matter to resolution through the filing of several dispositive motions. Moreover, a change in board membership does not render witnesses unavailable. This is not a personal injury action, but rather a breach of contract action and is more akin to a business dispute than a personal injury dispute where witness memory is paramount. A board presumably maintains minutes, notes, communications, and document transactions. There is no allegation of witness unavailability or memory loss to support a claim of prejudice. *See, Watts*, at 292 (“ . . . Two Plus Two never alleged in its July 16, 2007 motion or at the September 18, 2007 hearing that any witnesses had actually become unavailable or had forgotten about the incident . . .”).

Finally, there is no prejudice as it pertains to discovery as the Court has not

MOTION TO RECONSIDER ORDER OF DISMISSAL OR, IN THE ALTERNATIVE, TO VACATE ORDER OF DISMISSAL

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entered a scheduling order or even ordered the parties' to meet and confer regarding discovery. In *Kuykendall*, the Court concluded that no prejudice existed to support dismissal as there was no order for the exchange of discovery. *Kuykendall*, at *12 (“Here, the Superior Court shares in some of the blame because, to date, no scheduling order has issued.”). Importantly, Virgin Islands Rule of Civil Procedure 26(f) provides that “the parties must confer as soon as practicable – and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).” Rule 16(b)(2) provides that “[t]he judge must issue a scheduling order as soon as practicable . . . within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.” Meanwhile, Rule 16(b)(1) requires the Court to enter a scheduling order after receiving the parties' report under Rule 26(f) or consulting with the parties and any self-represented parties at a scheduling conference.

In this instance, no scheduling conference was conducted nor was a scheduling order entered. Moreover, the Defendant has not requested discovery or any information from Bart such that Bart cannot be considered uncooperative in the provision of information. Most significantly, in the absence of a scheduling order, there is simply no failure to prosecute. At best, Bart failed to respond to motions. However, as explained below, a party's failure to respond to pending motions does not authorize dismissal by the Court. Rather, the Court is duty-bound to consider the motions to ensure that the moving party is entitled to the relief requested. The Court did not do so here. Instead, it summarily dismissed this action without analysis and as an

extreme sanction for Bart’s failure to respond to the pending motions to dismiss. That dismissal was erroneous.

Analysis of the second factor weighs against dismissal.

3. There is minimal history of dilatoriness.

A history of dilatoriness means “extensive or repeated delay or delinquency that constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders.” *Ventura*, at *20 (citing *Adams*, at 874). “Conduct that merely occurs once or twice does not demonstrate a history of dilatoriness.” *Id.* (citing *Briscoe v. Klaus*, 538 F.3d 252, 261 (3d Cir. 2008)). The Court should also consider Bart’s compliance with its orders. *Watts*, at 293.

There are undoubtedly instances where Bart failed to comply with court orders as to securing new counsel and responding to motions. However, there are also instances of compliance with orders to secure counsel and responsiveness to the Defendant’s counterclaim.²

In light of the history of both compliance and non-compliance, this factor is neutral and does not favor any party.

4. Neither Bart’s conduct or its counsel’s conduct was in willful or in bad faith.

“Willfulness involves intentional or self-serving behavior” and there must be “[s]pecific evidence in the record [to] justify a determination of willfulness or bad faith.” *Ventura*, at *23. The Court cannot presume willfulness. *Molloy v. Independence Blue*

² The Court’s dismissal order did not address the pending counterclaim such that there is a question as to whether the Court’s order effectively dismissed the entire case or just Bart’s Complaint.

Cross, 56 V.I. 155, 192 (VI 2012).

There is no evidence of willfulness or bad faith on the part of Bart. Rather, simply appears to be unable to afford or otherwise have difficulty securing counsel. In his motion to withdraw, Attorney King explained that Bart's principal was the subject of a trial or series of trials and has incurred substantial legal fees as a result. Presumably, that circumstance created hardship for Bart's principal such that Bart struggled to secure counsel. Despite this difficulty, Bart has secured counsel on two (2) occasions in an attempt to comply with the Court's orders and has also responded to the Defendant's counterclaim.

In the absence of any evidence of willfulness or bad faith, this factor weighs against dismissal.

5. Alternative lesser sanctions were available to the Court.

"Dismissal is a sanction of last resort, and courts must look to effective alternative methods of sanctioning dilatory litigants before ordering dismissal for failure to prosecute." *Ventura*, at *25. The Court is required to consider whether a lesser sanction would best serve the interests of justice." *Id.*

Bart submits that no sanction is warranted in this matter as it has not failed to prosecute the case. While Bart has failed to respond to certain motions and experienced gaps in being represented by counsel, those gaps in representation and non-responsiveness to motions have not unreasonably delayed this action. As no scheduling order has been entered in this case, Bart has not failed to engage in discovery or otherwise failed to prosecute this matter.

In *Ventura*, the Court considered and selected as a lesser sanction, “the imposition of specific timelines and conditions leading to the conclusion of the litigation.” The Court reasoned:

[h]ere, where Plaintiffs actively resist Defendants’ Motion to Dismiss and vigorously if not wholly convincingly, argue that they have not failed to prosecute their claims, the Court is loath to deprive Plaintiff of their day in court if there are appropriate alternate sanctions or other conditions that may be imposed to make certain that all delays have concluded and there will be no more resulting prejudice to Defendants. While the imposition of monetary sanctions against Plaintiffs or their counsel is neither sought nor helpful, it does appear that by the imposition of specific timelines and conditions leading to the conclusion of the litigation the goals of a merits-based determination without further unwarranted delay can be achieved.

Bart submits that the Court should consider the analysis in *Ventura*. Bart has secured counsel and this matter is in its infancy as no scheduling order has been entered. The imposition of a scheduling order is a duty of the Court and should result in the imposition of specific timelines to advance this matter to resolution.

This factor weighs against dismissal.

6. Plaintiff’s claim has merit.

“A claim, or defense, will be deemed meritorious when the allegation of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense.” *Ventura*, at *28. Application of the summary judgment standard is not appropriate here. *Id.*

Bart’s breach of contract claim is meritorious. Elements of a breach of contract

claim are: 1) the existence of an agreement; 2) a duty created by that agreement; 3) Breach of that duty; and 4) Damages. *Phillips v. Marsh-Monsanto*, 66 V.I. 612, 620 (VI 20170). Here, Bart alleges the existence of a contract and attached the contract to his complaint. Complaint, at ¶4. Bart further alleges that Defendant had a duty to pay him. *Id.*, at ¶5. Further, Bart alleges Defendant breached that duty and that Bart suffered damages as a result. Complaint, at ¶7 and prayer for relief. See generally, *Callwood*, at *15-16 (“In his Complaint, Plaintiff alleges that Defendants never paid him for the work he performed on its facilities. If established at trial, Plaintiff’s breach of contract and unjust enrichment claims would support recovery.”).

This factor weighs against dismissal.

B. The Court improperly dismissed the case while motions were pending.

“Courts have unanimously held that dismissing a case for failure to prosecute is not proper when motions are pending.” *Albert v. Hess Oil Corp.*, 70 V.I. 316, 331 (Super. Ct. 2019)(citations omitted)(cited in *Kuykendall*, at 581).

Notably, there were four (4) pending motions at the time this case was dismissed. The motions included dispositive motions and a motion to consolidate. A scheduling order was never entered and there were no pending discovery requests. As such, this case was ultimately dismissed because Bart failed to respond to the motions to dismiss and not due to an actual failure to prosecute.

The Court’s dismissal of this action as a sanction for failing to respond to a motion to dismiss is particularly erroneous as the Court is duty bound to determine whether the moving party is actually entitled to the relief requested. *Halliday*, at n. 11

(a party's failure to respond to a dispositive authorize the Court to deem the motion conceded, rather the Court is still required to perform its own independent legal analysis.). In this instance the Court's dismissal of this matter is tantamount to deeming motions to dismiss as conceded and, as such, was erroneous.

C. The Court violated Bart's due process when it granted the motion to reconsider without providing Bart an opportunity to respond.

Under Rule 60(b)(4) and arguably under Rule 6-4(b)(3), a judgment can be voided if the Court "acted in a manner inconsistent with due process of law." *Edney v. Edney*, Case No. SX-05-DI-104, 2014 V.I. LEXIS 98, at *10 (Super. Ct. October 7, 2014)(citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010)); see also, *A.H. Risse Gift Shops v. Government of the Virgin Islands*, Case No. ST-00-CV-420, 2013 V.I. LEXIS 4, at *9 (Super. Ct. January 14, 2013)(citing *Espinosa*, at 130)("[R]ule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.")

In *Chavayez v. Buhler*, S.Ct.Civ.No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *9-10 (V.I. June 25, 2009), the Supreme Court held that the lower court erred when it ruled on the Appellee's motion to set aside entry of default and to dismiss without affording the appellee sufficient time to respond. *Id.*, at *9-10. Specifically, the appellees moved to set aside an entry of default and to dismiss the complaint on June 12, 2002. Five days later, on June 17, 2022, the court granted the appellees' motion to dismiss thereby depriving her of the twenty (20) day time-period to respond to the

motion to dismiss. *Id.*, at *2-3. The Supreme Court held that:

[t]he trial court, in prematurely issuing its dismissal order, deprived Chavayez of fifteen days in which she was entitled to respond. Because the trial court's error obviously prejudiced Chavayez and likely adversely affected her substantive rights it cannot be characterized as harmless.

Id., at 9-10.

Similarly here, the Court deprived Bart of the opportunity to respond to the Motion to Reconsider by seven (7) days. In doing so, it dismissed the case through the granting of the Motion to Reconsider without the benefit of a response to the Motion to Reconsider. The alacrity by which the Court acted on the Motion to Reconsider is particularly troubling as Bart had finally been able to secure counsel and, for the first time since December 2021, had a real opportunity to engage in motion practice, to include responding the motion to reconsider.

CONCLUSION

“Dismissal for failure to prosecute is a serious sanction, which is reserved for extreme cases.” *Ventura v. Virgin Islands Hospital & Health Facilities Corp.*, Case No. SX-2010-CV-453, 2021 V.I. LEXIS 72, at *13 (Super. Ct. August 30, 2021). This matter is in its infancy and the Court has not yet entered a scheduling order. The delay that resulted from Bart's efforts to secure counsel does not warrant the extreme sanction of dismissal, particularly as there was no actual failure to prosecute.

WHEREFORE, and for the foregoing reasons, Bart's Motion to Reconsider the Order of Dismissal or, in the alternative, Motion to Vacate Order of Dismissal must be

GRANTED and Bart should be allowed thirty (30) days to respond to all pending motions in this matter.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Attorney for Plaintiff

DATED: October 18, 2022

BY: /s/ Kye Walker, Esq.
Kye Walker, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2022, I electronically filed the foregoing with the Clerk of the Court using the Virgin Islands Judiciary Branch C-Track E-filing System, which will send a notification of such filing (NEF) to all parties and/or their counsel of record as follows:

J. Daryl Dodson, Esq.
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This document complies with the page or word limitation set forth in Rule 6-1(e).

BY: /s/ Kye Walker, Esq.

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

BART ENTERPRISES, LLC,

Plaintiff,

v.

SAPPHIRE BAY CONDOMINIUMS
WEST,

Defendant.

CIVIL NO. ST-2020-CV-00075

**ACTION FOR BREACH OF
CONTRACT**

**MOTION FOR TWO-DAY EXTENSION OF TIME *NUNC PRO TUNC* TO FILE
MOTION FOR RECONSIDERATION OF ORDER ENTERED
SEPTEMBER 23, 2022**

COMES NOW Plaintiff Bart Enterprises, LLC, by and through its undersigned counsel, Kye Walker, Esq., and, pursuant to V.I. Rules of Civil Procedure 6(b), respectfully requests as follows:

The Court entered an Order dismissing this matter on September 23, 2022. Undersigned recently returned to the island after being out of the country from September 30, 2022, to October 9, 2022, and was severely ill upon her return such that undersigned did not have an opportunity to review her upcoming deadlines or her calendar in order to prepare a motion to reconsider the Order. Due to her illness, undersigned counsel was actually out of the office for two (2) weeks straight and unable to perform any work duties or meet any deadlines whatsoever.

Virgin Islands Rule of Civil Procedure 6(b) provides that:

[w]hen an act is required or allowed to be done by or within a specified period, the court may upon a showing of good cause or excusable neglect, extend the date for doing the act.



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MOTION FOR TWO-DAY EXTENSION OF TIME NUNC PRO TUNC TO FILE MOTION FOR RECONSIDERATION OF ORDER ENTERED SEPTEMBER 23, 2022

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V.I. R. CIV. P. 6(b).

Even though the undersigned is filing this request for a two-day extension after the October 14, 2022, deadline, she has demonstrated excusable neglect to allow for the late filing of her motion for reconsideration. *People of the Virgin Islands v. Rivera*, 54 V.I. 116, 119 (Super. Ct. 2010). With regard to the excusable neglect standard, the Superior Court has explained:

[t]he determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances surrounding the omission . . . including . . . the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

This request is not being made for any dilatory purpose or other reason for delay but only to allow Plaintiff an opportunity to fully prosecute this matter on the merits.

Counsel for Defendant was emailed to determine whether or not he had any objection to this extension, but he has not responded to the request as of the time of filing this motion.

WHEREFORE, Plaintiff requests that his Motion for Two-Day Extension of Time *Nunc Pro Tunc* to File Motion for Reconsideration of Order Entered September 23, 2022, be **GRANTED**.

MOTION FOR TWO-DAY EXTENSION OF TIME NUNC PRO TUNC TO FILE MOTION FOR RECONSIDERATION OF ORDER ENTERED SEPTEMBER 23, 2022

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Respectfully Submitted,

THE WALKER LEGAL GROUP
Attorney for Plaintiff

DATED: October 19, 2022

BY: /s/ Kye Walker, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 19, 2022, I electronically filed the foregoing with the Clerk of the Court using the Virgin Islands Judiciary Branch C-Track E-filing System, which will send a notification of such filing (NEF) to all parties and/or their counsel of record as follows:

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This document complies with the page or word limitation set forth in Rule 6-1(e).

BY: /s/ Kye Walker, Esq.

FILED

November 08, 2022 03:33 PM

ST-2020-CV-00075

TAMARA CHARLES

CLERK OF THE COURT

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

BART ENTERPRISES, LLC)

Plaintiff,)

v.)

SAPPHIRE BAY WEST CONDOMINIUMS)

Defendant.)

) Case ST-2020-CV-00075

COMBINED OPPOSITION OF SAPPHIRE BAY WEST CONDOMINIUM TO MOTION
TO RECONSIDER AND MOTION FOR EXTENSION OF TIME

The Defendant Sapphire Bay West Condominiums (“Sapphire”) herewith submits this opposition to two motions filed by the Plaintiff Bart Enterprises, LLC (“Bart”). The first, filed on September 18, 2022, is *Bart’s Motion to Reconsider Order of Dismissal or, in the Alternative, to Vacate Order of Dismissal* (the “Bart Reconsideration Motion”). This motion is premised on a faulty notion, that the Court dismissed this matter for failure to prosecute. In fact, the Court dismissed it because the original Complaint was nullity, as it was filed on behalf of a limited liability company by an individual who was not even an attorney, much less licensed to represent clients in the U.S. Virgin Islands. The Motion to Reconsider devotes all of its energies to attacking this straw man, does not address the actual reason for dismissal, and therefore must be denied.

The second is Bart’s *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”). This motion submits no declaration or other evidence showing “excusable neglect,” and claims that counsel “was actually out of the office for two (2) weeks straight and unable to perform any work

duties or meet any deadlines whatsoever.”¹ In fact, filings made by counsel in other cases during this very period demonstrate that the “unable to perform work duties” representation is simply false.

I. FACTUAL AND PROCEDURAL BACKGROUND.

As explained in prior filings,² Bart agreed pursuant to a contract dated August 21, 2018 (the “Contract”) to re-roof four buildings located at Sapphire Bay Condominiums West in St. Thomas. The total contract price, after agreed change orders, was \$1,058,425.39.³ 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. 25⁴ admits, as of January 31, 2020, Sapphire had paid Bart \$910,885.27, with a balance of work of \$147,540.12 left to finish.⁵

However, Bart owes Sapphire at least \$115,890.22 for defective work that had to be remedied, the repair of damages to units when Bart failed to secure the roof against rain during the course of the work, and other credits.⁶ In addition, Bart failed to pay St. Thomas Cargo and Ship Services, Inc. (“STT Cargo”), for shipping charges for materials that, STT Cargo claims, were incorporated by Bart into work done under the Contract. STT Cargo has sued Sapphire in this Court, in Civil Action No. ST-19-cv-00485, for the \$85,347.50 remaining unpaid by Bart.⁷ Bart is

¹ Bart Reconsideration Motion, at 1.

² See, e.g. Sapphire’s Motion to Reconsider (the “Sapphire Reconsideration Motion”), filed September 18, 2022.

³ Counterclaim, ¶ 14.

⁴ *Id.*, Exhibit 2.

⁵ *Id.* ¶ 17.

⁶ *Id.* ¶ 16.

⁷ *Id.* ¶ 27-28.

obligated, under the Contract, to indemnify Sapphire for any settlement or judgment in favor of STT Cargo.

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.⁸ 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”), 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”) 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 Order”) 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 this same Order, the Court determined not to “automatically” apply the rule in this case, but instead to grant Bart “some time to retain authorized legal counsel to represent it in this litigation.” 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

⁸ This document is an unnumbered exhibit to the Complaint.

never filed an amended complaint or submitted a version of the Complaint signed, under the provisions of V.I.R.Civ.P 11, by him. The Complaint that constituted a legal nullity remained 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.⁹ 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 also a legal nullity, Sapphire asked the Court, in the SJ Motion, to order it released. 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. 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. 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 2, 2022, undersigned counsel substituted into this case as counsel for Sapphire. On February 17, 2021, Sapphire filed its renewed Motion to Dismiss (the "Renewed Motion"), on grounds that the Complaint in this matter stood as the sole enunciation of the claims of Bart in this

⁹ Sapphire's Motion for Partial Summary Judgment, filed December 6, 2021 (the "SJ Motion"), Exhibit 3.

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.

In the April Order, 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 handed down a case making it clear that that the Superior Court must apply the nullity rule without leniency or exception, and without the need for a motion requesting its application. In *Murphy Rigging & Erecting, Inc. v. Virgin Islands Water & Power Auth.*, 2022 WL 843385, 2022 VI 5, ¶¶ 17-18 (V.I. Mar. 22, 2022). 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. 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.

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. Murphy appealed. Neither party raised, in the Superior Court, or before 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. 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 Griep 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.¹⁰

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.¹¹

On June 16, 2022, Sapphire filed its Supplement to Motion to Dismiss Complaint. (the “Supplement”), 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.” By Order entered on June 24, 2022, the Court 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

¹⁰ *Id.*

¹¹ *Id.*

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. Since this is not a motion under Rules 12 or 56, a response was due within 14 days, or by July 26, 2022. 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 was surprised to receive an Order (the “August Order”) 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. 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.

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 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. 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. 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*.

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 its current 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 an Order (the “Dismissal Order”) 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. 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 ...

The fourteen working days allowed by V.I.R.Civ.P. 6-4 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. On the fifth day after entry of that order, on October 19, 2022, Bart filed its Extension Motion, seeking what it characterized as a "two-day extension," but was in fact four calendar days.¹²

In Extension Motion, Bart, without any supporting declaration under oath, states as follows:

Undersigned recently returned to the island after being out of the country from September 20, 2022 to October 9, 2022, and was severely ill upon her return such that undersigned did not have an opportunity to review her upcoming deadlines or her calendar in order to prepare a motion to reconsider the [Dismissal Order]. Due to her illness, undersigned counsel was actually out of the office for two (2) weeks straight and unable to perform any work duties or meet any deadlines whatsoever.

What this representation does not point out is that the September 20, 2022 deadline for responding to pending motions expired nineteen days after counsel entered her appearance, and ten days before she says she left the country.

Even taking these representations at face value, though, the bulk of that two week period, from September 30 to October 9, 2022 was when counsel was "out of the country" at an unspecified location on an unspecified mission. In this modern era, a mobile phone and data signal is available all the way to the summit of Mt. Kilimanjaro,¹³ and broadband internet is

¹² An extension to respond to a September 23, 2022 order on October 18, 2022, would be an extension to allow 25 calendar days. V.I.R.Civ.P. 6(a)(1)(B) provides that every day, including intermediate weekend days and holidays, is to be counted for period of 15 days or more.

¹³ See, e.g. <https://mountkilimanjaroroutes.com/mobile-phones-on-mount-kilimanjaro-is-there-network-signal/>, accessed on November 8, 2022.

available even in the most underdeveloped countries. Being “out of the country” does not mean that nothing, including a motion for extension, could have been filed during that period. Indeed, on October 7, 2022, while out of the country, counsel filed the attached *Unopposed Joint Motion Requesting the October 20, 2022 Hearing be Conducted Virtually in United States of America v. Nikunj Kumar Patel*, District Court Crim. No. 1:21-CR-00016 (Exhibit A). The representation that counsel was “unable to perform any work duties” during this period is demonstrably false.

For the balance of that two-week period, counsel makes the unspecific and unsubstantiated claim that she was too sick during the period of October 9 to October 14, 2022 to file for a motion for extension. Although the Extension Motion claims otherwise, counsel did indeed have “an opportunity to review her upcoming deadlines or her calendar” during these six days in at least one case. On October 14, 2022, counsel filed a Motion for Extension of Time in *Detective Moses President v. Government of the Virgin Islands et al.*, District Court Civil No. 1:17-cv-00046 (Exhibit B).

Both in its Bart Reconsideration Motion, and the Notice of Appeal filed in the Supreme Court of the Virgin Islands (attached as Exhibit C), 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.

II. NO RESPONSE IS REQUIRED TO THE SUBSTANTIVE POINTS MADE IN THE BART RECONSIDERATION MOTION BECAUSE THE COURT NEVER RULED ON THE MOTION TO DISMISS FOR LACK OF PROSECUTION.

Pages 8-16 of the Bart Reconsideration Motion address the so-called *Halliday* factors. Under *Halliday v. Footlocker Specialty, Inc.* 53 V.I. 505, 511-12 (V.I. 2010), those are the factors

that the Superior Court must consider when deciding whether an action should be dismissed due to lack of prosecution by the plaintiff. The Court did not dismiss this action on that ground, and so no further comment on those factors is necessary or appropriate.

III. BART DOES NOT DISPUTE THAT THIS MATTER WAS PROPERLY DISMISSED UNDER THE AUTHORITY OF MURPHY RIGGING BECAUSE THE COMPLAINT IN THIS MATTER WAS A LEGAL NULLITY.

Bart does not address the Court’s clearly stated reason for dismissal: that the Complaint is and was a legal nullity and should have been dismissed, *sua sponte*, immediately upon its filing. Because Bart has failed to raise this issue in its Bart Reconsideration Motion, it may not “sandbag” Sapphire by raising those issues in its reply.¹⁴

III. EVEN IF BART HAD SOUND SUBSTANTIVE GROUNDS FOR RECONSIDERATION, THE MOTION IS UNTIMELY AND THE EXTENSION MOTION SHOULD BE DENIED.

Before the Court may consider the Bart Reconsideration Motion, it first should address the fact that, by Bart’s own admission, this motion was not timely filed. It was due on October 14, 2022 and was not filed until four days later. Bart concedes that it has the burden to demonstrate excusable neglect, and cites the four factors that the Court should take into account in determining whether the neglect was excusable.¹⁵ However, Bart fails to note that, of those several factors, one is of paramount importance: the reason for the delay.

However, “the reason for the delay is the most important of [these] factors,” and “[e]ven where there is no prejudice, impact on judicial proceedings, or trace of bad faith, the

¹⁴ 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 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.”)

¹⁵ Extension Motion at 2, citing *People of the Virgin Islands v. Rivera*, 54 V.I. 116, 119 (Super.Ct. 2010).

favorable juxtaposition of these factors does not excuse the delay where the proffered reason is insufficient.” *In re Sheedy*, 875 F.3d 740, 744 (1st Cir. 2017) (collecting cases) (internal quotation marks omitted).¹⁶

Here the proffered reason for the delay is insufficient. Counsel entered an appearance on September 1, 2022. Responses to all pending motions were due on September 20, 2022. Counsel makes no excuse for failure to respond to the Renewed Motion by that deadline. There are no grounds for reconsidering the Court’s grant of that unopposed motion.

Moreover, there was nothing to impede Bart from filing its Bart Reconsideration Motion at any time during the seven days from the time the Dismissal Order was entered, on September 23, 2022, until counsel allegedly went out of the country on September 30, 2022. The decision to delay working on the motion until her return on October 9, 2022 does not constitute excusable neglect. Neither does absence from this territory during the period September 30 to October 9, 2022. Counsel was able to make a filing in another case during this period, and could have at least moved for an extension of time before the time expired.

The same is true for the October 9-14 period when counsel says she was too ill to work. However, severe illness did not prevent the filing of a motion to extend time in a District Court case on October 14, 2022, which was also the deadline for filing the Bart Reconsideration Motion. Counsel’s failure to move to extend the deadline before that deadline expired is fatal. As stated in *McGary v. J.S. Carambola, L.L.P.*, 69 V.I. 72, 77–78 (V.I. Super. Oct. 7, 2016):

Even if Plaintiff's inability to timely draft and file her Opposition was outside of her control—in that Defendant's failure to cite current and binding legal authority necessitated extension of the twenty day period within which to respond to the dispositive Motion—her failure to timely file her Motion for Extension of Time was not. Plaintiff has offered no justification or excuse for her failure to file her Motion for Extension prior to

¹⁶ *Montgomery v. Virgin Grand Villas St. John Owners' Assn.*, 71 V.I. 1119, 1127 (V.I. July 17, 2019).

the expiration of the deadline to respond. Therefore, the Court cannot find that this failure was the result of excusable neglect, and under Rule 10(a)(2), the Court will not exercise its discretion to extend the deadline for the submission of Plaintiff's Response to the Motion. Accordingly, Plaintiff's Motion for Extension of Time will be denied.

The Bart Reconsideration Motion is untimely, and Bart has not shown that its delay in filing that motion was the product of excusable neglect. This alone is sufficient grounds for denial.

IV. BART CANNOT SEEK RELIEF FROM ITS FAILURE TO FILE A TIMELY MOTION FOR RECONSIDERATION BY ATTEMPTING TO RECHARACTERIZE IT AS ONE UNDER RULES 60(b)(4) or (b)(6).

Bart's efforts to recharacterize its motion for reconsideration, brought under V.I.R.Civ.P. 6-4(b)(3) as one for relief from judgment under Rules 60(b)(4) and (b)(4) must fail because Bart has failed to allege any "special circumstances" justifying such relief.

We have consistently held that a motion under Rule 60(b) is not a substitute for appeal. *Marshall v. Board of Education, Bergenfield, New Jersey*, 575 F.2d 417, 424 (3d Cir.1979); *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir.1977); see also *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir.1971); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864, at 214–15; 7 J. Moore & J. Lucas, Moore's Federal Practice, para. 60.27[2], at 60–274 (1985). The remedy provided by Rule 60(b) is extraordinary, and special circumstances must justify granting relief under it. See *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir.1977); *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir.1977); *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir.1975); see also *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950); *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir.1979).¹⁷

Bart concedes that a showing of such "special circumstances" is required,¹⁸ but fails to make such a showing.

¹⁷ *Page v. Schweiker*, 786 F.2d 150, 158 (3d Cir. 1986).

¹⁸ Bart Reconsideration Motion at 7.

Certainly, relief is not available under Rule 60(b)(4), which is applicable only where a judgment is “void.” The very case cited by Bart in support of Rule 60(b)(4) relief¹⁹ not only denied the motion but emphasized its strict requirements and limits.

Fed.R.Civ.P. 60(b)(4) allows a court to relieve a party from a final judgment if “the judgment is void.” A judgment can be voided if the court lacked personal or subject matter jurisdiction, or if it acted in a manner inconsistent with due process of law. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010). There is an exacting burden on the moving party to present clear and convincing evidence establishing the requisite exceptional situation justifying such rare relief. (*A.H. Riise Gift Shops, Inc. v. Government of the Virgin Islands*, 2013 WL 412860 (V.I. Super., 2013); *United Student Aid Funds, Inc.*, 559 U.S. at 271. *See also: Moolenaar v. Gov't of the V.I.*, 822 F.2d 1342, 1347 (3d Cir. 1987)).²⁰

The term “void” has a very limited and specific meaning.

The Government first argues that the order of dismissal and settlement agreement are void and relief should be granted per Fed.R.Civ.P. 60(b)(4). However, the Government misapprehends the term “void” as used in the rule. For purposes of Rule 60(b), a judgment is void only under very limited circumstances. As the United States Supreme Court has declared,

“A judgment is not void, for example, simply because it is or may have been erroneous. Similarly, a motion under Rule 60(b)(4) is not a substitute for a timely appeal. Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.”²¹

¹⁹ *Id.* The case cited within this quote for the notion that a denial of due process, through failure to follow procedural rules, can justify Rule 60(b)(4) relief turns out to hold the opposite: “We are not persuaded that a failure to find undue hardship in accordance with § 523(a)(8) [of the U.S. Bankruptcy Code] is on par with the jurisdictional and notice failings that define void judgments that qualify for relief under Rule 60(b)(4).” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 273 (2010).

²⁰ *Edney v. Edney*, SX-05-DI-104, 2014 WL 5904728, at *4 (V.I. Super. Oct. 7, 2014), order withdrawn, SX-05-DI-104, 2014 WL 7698445 (V.I. Super. Nov. 20, 2014).

²¹ *A.H. Riise Gift Shops, Inc. v. Govt. of the Virgin Islands*, ST-00-CV-420, 2013 WL 412860, at *3–4 (V.I. Super. Jan. 14, 2013), quoting *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1377 (2010) (quotations and citations omitted).

Since there is no allegation that the Court lacked personal or subject matter jurisdiction over Bart, nor could there be in this suit filed by Bart, there is no basis for Rule 60(b)(4) relief.

Similarly, no relief is available under the catch-all “any other reason that justifies relief” provisions of Rule 60(b)(6). The Dismissal Order granted relief based on Bart’s undisputed failure to submit an opposition to the Renewed Motion, or the Supplement, within 14 days of their filing. Bart failed to oppose this motion again when the Court further extended the time for response until September 20, 2022. Bart’s true but unexpressed grounds for relief are excusable neglect: that its newly-retained counsel should be relieved from the consequences of failing either to oppose the motion or submit a motion for continuance *before* the Court entered the Dismissal Order on September 23, 2022. Such a motion would be brought under Rule 60(b)(1). This permits relief for “excusable neglect.”

However, for obvious tactical reasons, counsel has not brought such a motion. The law is clear that relief cannot be obtained under the catch-all Rule 60(b)(6) on grounds that would support relief under Rules 60(b)(1), (b)(2) or (b)(3).²² Furthermore, mere legal error cannot justify Rule 60(b)(6) relief.

[L]egal error does not by itself warrant the application of Rule 60(b)... Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)(6)... [O]nly extraordinary, and special circumstances justify relief under Rule 60(b)(6). In addition, there is an exacting burden on the moving party to present clear and convincing evidence establishing the requisite exceptional situation justifying such relief. The averments of counsel in briefs cannot sustain the movant's burden under Rule 60(b)(6).²³

²² *A.P. v. Virgin Islands ex rel. C.C.*, 36 V.I. 158, 161 961 F. Supp. 122 (D.V.I. 1997).

²³ *A.H. Riise Gift Shops, Inc.*, *supra*, at *3–4 (V.I. Super. Jan. 14, 2013) (internal citations and quotation marks omitted).

Bart's submissions consist solely of allegations of counsel, not evidentiary material, and certainly nothing rising to the level of clear and convincing evidence. Its allegations of legal error can be resolved in its pending appeal to the Supreme Court of the Virgin Islands. Bart's request for relief under Rule 60 must be rejected.

V. CONCLUSION.

The command of *Murphy Rigging* is clear: a case filed on behalf of a corporation or limited liability company by anyone other than an attorney admitted to practice in the courts of the U.S. Virgin Islands is a nullity. Such a case must be dismissed immediately, without further proceedings. The "nullity" status of the filing is not somehow magically erased if properly-admitted counsel subsequently enters an appearance. Regardless whether the case has proceeded for three weeks, three months or three years, it must be dismissed forthwith.

The Court's Dismissal Order could not be clearer. It did not rule upon the Motion to Dismiss for Lack of Prosecution or, for that matter, the Sapphire Reconsideration Motion. It left intact the September 20, 2022 deadline for responding to the Renewed Motion and Supplement, and correctly found that Bart had failed to file a timely opposition.

No doubt, Bart and its counsel considered and rejected the possibility of filing an untimely opposition to the Renewed Motion and Supplement, along with a motion to accept late filing. However, Bart surely recognized that such a strategy, in the face of *Murphy Rigging*, would be futile, even if the untimely filing were accepted. Instead, Bart has attempted to create a diversion by setting up and knocking down a straw man: the notion that the Court actually dismissed for lack of prosecution. The Court should reject this tactic and deny both the Extension Motion and the Bart Reconsideration Motion.

Respectfully submitted,

DATED: November 8, 2022

MOORE DODSON RUSSELL & WILHITE, P.C.

/s/ J. Daryl Dodson

J. Daryl Dodson Esq.

VI Bar No. 241

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Telephone: (340) 777-5490

Email: daryl@mdrvi.com

Counsel for Sapphire Bay West Condominiums

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document complies with the page/word limitations of Rule 6-1(e) and that on this 8th day of November, 2022, I caused a true and exact copy of the foregoing *Combined Opposition*, to be filed electronically with the Clerk of the Court using the VIJEFS system, which will send notification of such filing to the following:

Kye Walker, Esq.

2201 Church Street, Suite 16AB

Christiansted, St. Croix

U.S. Virgin Islands 00820

Email: kye@thewalkerlegalgroup.com

/s/ J. Daryl Dodson

FILED

November 08, 2022 03:33 PM

ST-2020-CV-00075

TAMARA CHARLES
CLERK OF THE COURT

EXHIBIT A

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,

Plaintiff,

v.

NIKUNJKUMAR PATEL, et al.

Defendants.

CRIM. NO. 1:21-CR-00016

**UNOPPOSED JOINT MOTION REQUESTING THE OCTOBER 20, 2022,
HEARING BE CONDUCTED VIRTUALLY**

COME NOW the Defendants, by and through their respective undersigned counsel, and respectfully request as follows:

A hearing is scheduled in this matter for October 20, 2022. The NEF scheduling this hearing states that the hearing is scheduled to be held in Courtroom 3 at the District Court. Since two Defendants are currently located in New York and one Defendant currently located in Chicago, counsel request this Honorable Court to allow the hearing to be conducted with all Defendants and counsel present virtually in order to reduce the costs of travel to St. Croix and for Defendants' boarding during their stay.

Since the Court would provide a translator at the October 20th hearing, the parties request that the Court make arrangements for the translator to also be on the videoconferencing as all Defendants require the use of a translator.

Counsel for the United States of America stated that he did not have any objection to this request.

United States of America v. Nikunj Kumar Patel, et al.; Criminal No.: 1:21-CR-00016-2

UNOPPOSED JOINT MOTION REQUESTING THE OCTOBER 20, 2022, HEARING BE CONDUCTED VIRTUALLY

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WHEREFORE, Defendants request that their Unopposed Joint Motion Requesting the October 20, 2022, Hearing be Conducted Virtually be **GRANTED**.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Attorney for Defendant Nikunj Kumar Patel

DATED: October 7, 2022

BY: /s/ Kye Walker
Kye Walker, Esq.
VI Bar No. 995
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Christiansted, St. Croix
U.S. Virgin Islands 00820-4611
Telephone: (340) 773-0601
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kye@thewalkerlegalgroup.com

LAW OFFICES OF PAMELA L. COLON
Attorney for Defendant Krishnaben Nikunj Kumar Patel

DATED: October 7, 2022

BY: /s/ Pamela L. Colon, Esq.
Pamela Colon, Esq.
27 & 28 King Cross Street, 1st Floor
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pamelalcolon@msn.com

RENEE D. DOWLING, ESQ.
Attorney for Ashokkumar Prahladbhai Patel

DATED: October 7, 2022

BY: /s/ Renee Dowling, Esq.
Renee Dowling, Esq.
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United States of America v. Nikunj Kumar Patel, et al.; Criminal No.: 1:21-CR-00016-2

UNOPPOSED JOINT MOTION REQUESTING THE OCTOBER 20, 2022, HEARING BE CONDUCTED VIRTUALLY

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 7, 2022, I electronically filed the foregoing **UNOPPOSED JOINT MOTION REQUESTING THE OCTOBER 20, 2022, HEARING BE CONDUCTED VIRTUALLY** with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to all parties of record, as follows:

Daniel H. Huston, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
1108 King Street, Ste. 201
Christiansted, VI 00820
daniel.huston@usdoj.gov

BY: /s/ Kye Walker, Esq.

FILED

November 08, 2022 03:33 PM

ST-2020-CV-00075

**TAMARA CHARLES
CLERK OF THE COURT**

EXHIBIT B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

DETECTIVE MOSES PRESIDENT,

Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS, UNITED STATES VIRGIN ISLANDS POLICE DEPARTMENT, VIRGIN ISLANDS TERRITORIAL AND EMERGENCY MANAGEMENT AGENCY, POLICE OFFICER SHONNETH GITTENS, POLICE OFFICER D'NEICIA JACOBS, POLICE OFFICER ALMONT KING, AND A'KEYMA BARTHLETT,

Defendants.

CIVIL NO. 1:17-cv-00046

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MOTION FOR EXTENSION OF TIME

COMES NOW Plaintiff, Detective Moses President, by and through the undersigned counsel, Kye Walker, Esq., and, pursuant to Federal Rule of Civil Procedure 6(b)(1)(B), hereby requests an extension of time until October 19, 2022, to file Plaintiff's responses/replies to Defendants' filings made on September 28, 2022, and in support thereof, Plaintiff states the following in support of this motion:

On September 28, 2022, Defendants filed the following documents in the instant matter:

Defendant Barthlett's Opposition to Plaintiff's Motion to Amend Complaint;
Defendants' Gittens and Jacobs Motion to Strike First Amended Complaint;
Defendants' Gittens and Jacobs Opposition to Plaintiff's Motion for Leave to Amend;
Defendant King's Motion to Strike First Amended Complaint;



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President v. Government of the Virgin Islands, et al., No. 1:17-cv-00046

MOTION FOR EXTENSION OF TIME

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Defendant King's Opposition to Plaintiff's Motion for Leave to File Amended Complaint.

The deadline to respond to these documents was October 12, 2022. However, undersigned had been out of the country from September 30, 2022, and returned to the island on October 9th very ill and unable to attend to any business whatsoever or to even review her calendar due to the severity of her illness to determine if there were any pressing deadlines.

Undersigned has attempted to determine from Defendants' counsel if they had any objection to this request for extension. However, the email to Attorney Timmons returned an automatic reply advising that Attorney Timmons was out of the office from October 12th through October 14th and would attend to his messages next week. A response from counsel for Defendant King has not been received at the time of this writing. Counsel for Defendant Barthlett has no objection to this request. Rather than delay this request any further, undersigned is filing this extension request without awaiting a response from those counsel.

Federal Rules of Civil Procedure 6(b)(1)(B) states:

[w]hen an act may or must be done within a specified time, the court may, for good cause, extend that time:

...

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Since Plaintiff is filing this request to extend the deadline to file these responses and/or replies after the October 12, 2022, deadline, undersigned has demonstrated excusable neglect to allow for the late filing of these response and/or replies.

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MOTION FOR EXTENSION OF TIME

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The determination of what type of neglect would be considered “excusable” was an equitable one, taking account of all relevant circumstances surrounding a party’s omission. These included the danger of prejudice to debtor, the length of delay and its potential impact on judicial proceedings, the reason for delay, including whether it was within the reasonable control of movant, and whether movant acted in good faith.

Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380.

In this instance, the brief extension will not prejudice the Defendants or the judicial proceedings as discovery has not yet commenced nor has there been a Scheduling Order entered in this matter, and the length of this extension request is a mere seven (7) days. Further, undersigned had no control for this delay as her illness happened unexpectedly and was certainly not foreseen.

The undersigned has demonstrated good cause for the extension. Further, this motion is made in good faith and not for purposes of delay.

WHEREFORE, Plaintiff requests that his Motion for Extension of Time be **GRANTED**.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Attorney for Plaintiff

DATED: October 14, 2022

BY: /s/ Kye Walker, Esq.
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President v. Government of the Virgin Islands, et al., No. 1:17-cv-00046

MOTION FOR EXTENSION OF TIME

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 14, 2022, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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Counsel for Jacobs and Gittens

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Counsel for Barthlett

BY: s/ Kye Walker, Esq.

FILED

November 08, 2022 03:33 PM

ST-2020-CV-00075

**TAMARA CHARLES
CLERK OF THE COURT**

EXHIBIT C

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS

BART ENTERPRISES, LLC,

Appellant/Plaintiff,

v.

SAPPHIRE BAY CONDOMINIUMS
WEST,

Appellee/Defendant.

No. S. Ct. Civ. No. 2022-_____

Super. Ct. No. ST-2020-CV-00075

NOTICE OF APPEAL

COME NOW Appellant/Plaintiff, Bart Enterprises, LLC, by and through its undersigned counsel, Kye Walker, Esq., pursuant to Virgin Islands Rule of Appellate Procedure 4(a), and hereby files this Notice of Appeal of the Superior Court's Order entered on September 23, 2022. The Order being appealed is attached hereto and marked as **Exhibit "A"**. The issues to be presented on appeal include: 1) whether the Court erred when it failed to apply the six factor analysis announced by the Supreme Court in *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010); 2) whether dismissal of the action was proper when motions were pending and Defendant/Appellee had pending counterclaims; and 3) whether the Court violated Appellant/Plaintiff's due process right when it granted

Appellee/Defendant's Motion to Reconsider without allowing Appellant/Plaintiff



NOTICE OF APPEAL

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the opportunity to respond to the Motion to Reconsider.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Attorney for Appellant/Plaintiff

DATED: October 19, 2022

BY: /s/ Kye Walker, Esq.
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kye@thewalkerlegalgroup.com

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 19, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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Counsel for Defendant/Appellee

BY: /s/ Kye Walker, Esq.