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

CONSOLIDATED CASES:
SCT-CIV-2022-0002
SCT-CIV-2022-0024

GREAT BAY CONDOMINIUM OWNERS ASSOCIATION, INC.,
Appellant\Plaintiff,

v.

THE NEIGHBORHOOD ASSOCIATION, INC.,
Appellee\Defendant.

On Appeal from the Superior Court of the Virgin Islands
Civil Action No. 2018-CV-00768
(Honorable Rene Gumbs-Carty)

APPELLANT'S REPLY BRIEF

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REPLY

I. Appellee's "No Affirmative Claim Needed" Argument Fails

A. NA's Failure to Support Its Argument With Any Citations to Legal Authority Results in Waiver

As in the trial court, NA cites no legal authorities whatsoever to support its contention that the Superior Court had authority to grant injunctive and declaratory relief in the absence of any claim for injunctive relief – or any other claim for affirmative relief – in NA's pleading.

Instead, NA sets up a straw man in the first sentence of its argument by rephrasing GBCOA's assertion of error: "Appellant effectively contends that a defendant may not seek or obtain a TRO or preliminary injunction to preserve the status quo while a case is pending, Yet [sic] it cites not a single case from any jurisdiction so holding." *Appellee's Brief* at 13. NA then devotes its entire argument to knocking down this straw man argument and suggesting that its denials in its answer, as well as its "moving papers," somehow constitute a claim that is properly before the Superior Court. *Appellee's Brief* at 13-21.

This stratagem fails. As this Court has repeatedly emphasized, "The Rules of this Court require an Appellant's Brief to 'contain the contentions of the appellant with respect to each of the issues presented, and the reasons therefor, *with citations to the authorities, statutes,* and parts of the record relied on.'" *Davis v. Varlack*

Ventures, Inc., 59 V.I. 229, 239 (V.I. 2013) (emphasis in original) (quoting V.I.R.Sct.R. 22(a)(5) and collecting cases).[1] NA fails to cite a single legal authority to support its contentions that a claim for injunctive relief does not have to be set forth in a pleading, or that a party's denials in its answer can substitute for a pleaded claim. Consequently, this argument is waived. *Varlack*, 59 V.I. at 239; V.I.R.App.P. 22(m) (issues that are "unsupported by argument and citation to legal authority" are deemed waived for purposes of appeal); *accord St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 478 (V.I. 2014).

Moreover, NA utterly ignores the mandatory pleading rules set out in Rule 8 of the Virgin Islands Rules of Civil Procedure, which unambiguously requires "a pleading that states a claim for relief" to contain all of the following: (1) a "short and plain statement of the grounds for the court's jurisdiction"; (2) "a short and plain statement of the claim showing that the pleader is entitled to relief ... set forth in separate numbered paragraphs as provided in Rule 10(b), with separate designation of counts" for "each claim identified in the pleading"; and (3) "a demand for the relief sought." V.I.R.Civ.P. 8(a)(1)-(3). NA's failure to provide any response to this issue, which is plainly raised in GBCOA's Brief at p. 20, may properly be regarded

[1] Rule 22(a)(5) of the Virgin Islands Rules of Appellate Procedure (effective March 1, 2017) sets out the same requirements, which are made applicable to an Appellee's Brief by Rule 22(b). V.I.R.App.P. 22(a)(5) and 22(b).

as a "confession of error as to that issue, and the court may proceed to remedy that error." *Sam's Food Distributors, Inc. v. NNA&O, LLC*, 73 V.I. 453, 460 n.2 (V.I. 2020) (internal quotation marks and citation omitted).

B. NA's Argument Ignores This Court's Controlling Precedents

Even if not waived, NA's argument that its unpleaded claim for injunctive relief is properly before the Superior Court totally ignores this Court's controlling precedents. As discussed in GBCOA's opening brief, this Court in *Caribbean Healthways, Inc. v. James*, 55 V.I. 691 (V.I. 2011), unambiguously held that "a claim cannot be raised for the first time on a ... motion – it must be contained in the complaint." *Id.* at 698-99 (collecting cases). Unable to legitimately distinguish *Healthways*, NA resorts to mischaracterizing the quoted statement as "related to the fact that Plaintiff [sic] sought to present a defense to an injunction granted to the defendant, on the basis of an argument first raised in a motion – not included in their complaint – of a different legal right of ownership." *Appellee's Brief* at 14. This contention is bogus.

The plaintiff in *Healthways* filed a **complaint** asserting **affirmative claims** for both declaratory judgment and injunctive relief. 55 V.I. at 692-93. In its claim for injunctive relief, Healthways sought "to have the court recognize an express easement granting a right to park forty foot trailers on Healthways' property in such a way that the trailer protruded into the shared right of way." 55 V.I. at 692-93. The

defendants filed a **counterclaim**, seeking an injunction to prevent the parking of trailers in the right of way. *Id.* at 693.

Both parties filed combined motions for summary judgment and permanent injunction; however, Healthways' motion asserted an implied easement, not an express one. *Id.* at 698. The Superior Court denied Healthways' motion and granted the defendant's motion for permanent injunction. *Id.* at 696. On appeal, this Court affirmed, concluding that since Healthways' complaint only alleged an express easement and Healthways never moved to amend the complaint, "the implied easement claim was never correctly before the Superior Court." *Id.* at 699 (collecting cases).

Since *Caribbean Healthways*, this Court has repeatedly affirmed this basic and fundamental rule that claims must be pleaded before the Superior Court may decide them. *See*, *e.g.*, *Monsanto v. Clarenbach*, 66 V.I. 366, 382 (V.I. 2017) (holding that Superior Court committed "plain error" by entering a declaratory judgment in favor of all defendants regarding their real property interests, where no defendant had pleaded a counterclaim seeking a declaratory judgment) (collecting cases); *Bryan v. Fawkes*, 61 V.I. 416, 444-45 (V.I. 2014) (holding that the District Court of the Virgin Islands lacked authority to invoke its supplemental jurisdiction to issue an injunction "when no such claim was actually raised in the complaints"); *cf Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 191 (V.I. 2009) (concluding

that Superior Court committed reversible error by ruling on a motion to dismiss that was not properly before it).

In *Bryan v. Fawkes*, this Court quoted the Circuit Court of Appeals for the Sixth Circuit in emphasizing the bedrock requirement that claims must be stated in a pleading:

> At oral argument, both the defendant and the plaintiff told this court that state law claims were "impliedly" pled (without citing a source in the complaint for such an implication), and that supplemental jurisdiction was proper for this reason. We disagree. Modern pleading rules may be lax, but they still require that a party plead a claim before the court decides it. Furthermore, Fed. R. Civ. P. 8 requires the complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends."

Fawkes, 61 V.I. at 445 (emphasis in original) (quoting *Musson Theatrical, Inc. v. Federal Exp. Corp.*, 89 F.3d 1244, 1253-54 (6th Cir. 1996)).[2]

In this case, it is beyond dispute that NA's "claim" for injunctive relief is not properly before the Superior Court. NA has never pleaded a claim for injunctive relief – or any other claim, for that matter. NA's only pleading is an answer, which is purely defensive. JA 456-466. NA's argument that its denials in its answer are sufficient to state a claim for injunctive relief is unsupported by any citations to legal

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[2] Rule 8 of the Virgin Islands Rules of Civil Procedure, like its federal counterpart, requires a pleading to contain "a short plain statement of the grounds for the court's jurisdiction"; (2) "a short and plain statement of the claim showing that the pleader is entitled to relief"; and (3) "a demand for the relief sought." V.I.R.Civ.P. 8(a)(1) and 8(a)(2).

authority; consequently, this argument is waived. *Varlack*, 59 V.I. at 239; *Shell Oil Co.*, 60 V.I. at 478; V.I.R.App.P. 22(m).

In sum, NA's argument that its denials in its answer are sufficient to plead a claim for injunctive relief as to conduct that occurred nearly three years after the answer was filed is waived, because it is not supported by any citations to legal authority. Furthermore, NA's failure to respond to GBCOA's argument regarding Rule 8's requirements for pleading a claim constitutes a confession of error, which this Court can and should remedy by reversing the preliminary injunction. Regardless of these deficiencies, NA's argument flies in the face of this Court's controlling precedents.

Finally, as set out in GBCOA's opening brief, the same grounds mandate reversal of the April 11, 2022 preliminary injunction order. NA's failure to respond to this argument constitutes a second confession of error, which this Court should remedy by reversing that order, as well.

II. NA's Refusal to Address the Glaring Errors in the Superior Court's April 11, 2022 Preliminary Injunction Order Cannot Save It From Reversal

NA argues that this Court may not undertake appellate review of the April 11, 2022 Preliminary Injunction Order because NA has moved to strike GBCOA's Brief in SCT-CIV-2022-0024. According to NA, it was somehow aggrieved because GBCOA interpreted this Court's order consolidating the appeals as requiring separate briefing.

This argument fails. Even if the Court were to strike GBCOA's Brief in SCT-CIV-2022-0024, appellate review of the Superior Court's errors would still be appropriate, because the singular error identified above requires reversal of both preliminary injunction orders and the errors are likely to persist on remand. As this Court stated in *Cascen v. Gov't of the Virgin Islands*, 74 V.I. 512, 523 (V.I. 2021):

> It is well settled that an appellate court, when ordering a remand to a trial court for further proceedings based on its disposition of one issue may, in the interests of judicial economy, nevertheless consider other issues that, while no longer affecting the outcome of the instant appeal, are likely to recur on remand.

(Internal quotation marks omitted) (quoting *Smith v. Turnbull*, 54 V.I. 369, 374 (V.I. 2010)).

Further, since NA relies exclusively on the April 11, 2022 Preliminary Injunction Order in its response brief, which NA filed after seeing GBCOA's assignments of error relating to that order, the rationale underpinning the general rule against a party "first raising" an issue in a reply brief does not apply. *See Cascen*, 74 V.I. at 523 n.7. Moreover, GBCOA properly raised these errors in the trial court, and the errors relating to lack of jurisdiction and standing may be raised at any time pursuant to this Court's controlling precedents, as demonstrated below.

A. The Superior Court Lacks Jurisdiction to Adjudicate Rights and Obligations of Nonparties with Respect to Servitudes Created by the Condominium Declarations

NA's unpleaded claim is essentially an *in rem* action seeking a declaratory judgment and injunction affecting the rights, obligations, and other legal relations of nonparties concerning real property interests created by the condominium declarations. Since the persons holding the affected real property interests are not before the Superior Court, the court cannot grant such relief. *Streibich v. Underwood*, 74 V.I. 488, 500 n. 7 (V.I. 2021); *Clarenbach*, 66 V.I. at 383 (holding that "it is not possible" to grant declaratory relief concerning real property interests "when all parties having an interest in [the] property have not been served with notice of the lawsuit.").[3]

The Declaration creating Great Bay Condominium expressly provides that its provisions are "covenants running with the land." JA 272 (¶ 15). Likewise, the Supplementary Declaration, which created the interval form of ownership by dividing the Residences into 12 "Residence Interests,"[4] expressly provides that all

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[3] The Court in *Clarenbach* invoked the plain error doctrine to reach this issue, even though it had not been preserved for appeal, because it "affected substantial rights" and had "the potential to damage the public reputation of judicial proceedings." *Clarenbach*, 66 V.I. at 383-384.

[4] Each "Residence Interest" entitles the owner thereof to exclusive use of the Residence for twenty-one days of Reserved Allocation. JA 393 (art. 1.2; art. 1.3; art. 2.4); JA 401-402 (art. V).

provisions of both sets of declarations are enforceable servitudes of a permanent nature, which "run with the land and shall be effective until this Condominium is terminated." JA 411 (art. 14.1).

As this Court has implicitly recognized, a "servitude" is the same thing as a restrictive covenant. *Pavel v. Estates of Judith's Fancy Owners' Ass'n, Inc.*, 71 V.I. 691, 694-95 (V.I. 2019) (using "servitude" and "restrictive covenant" interchangeably in construing declarations of common-interest community); *see* Restatement (Third) of Property: Servitudes, §1.3(1) ("A covenant is a servitude if either the benefit or the burden runs with the land. A covenant that is a servitude 'runs with the land.'").

The *Fifth Amendment to Declaration* creates two servitudes relating to CU-1: (1) a restrictive covenant limited CU-1's use to the occupants of the Two Bedroom Suites;[5] and (2) an affirmative covenant requiring the owners of Two Bedroom Suites to pay all costs and expenses relating to CU-1. JA 187 (¶ 5). The *Fourth Amendment to Supplementary Declaration*, filed on the same date, creates the same servitudes with respect to the Residence Interests created by that instrument. JA 373 (¶ 5).

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[5] "Two Bedroom Suites" refers to the residential condominium units ("Residences") in Buildings G and H. JA 187 (¶ 2); JA 351 (¶ 2).

NA's Articles of Incorporation provide that "membership" in the Neighborhood Association – which, as demonstrated, is the legal status that confers responsibility for all costs and expenses of CU-1 – is appurtenant to and inseparable from ownership of a "Suite Interest," defined as an "interval ownership interest in condominium units in Buildings G and H." JA 344 (art. IIIA); JA 345 (Section 4). Thus, NA's members are "responsible for all costs and expenses related to the ownership and operation of" CU-1, and that obligation is appurtenant to the Suite Interests owned by NA's members. JA 344 (art. IIIA); JA 373 at ¶ 5.

NA's Motion for TRO and Preliminary Injunction does not request a declaratory judgment as to whether its purported conveyance of CU-1 to GBCOA extinguished or had any effect on these servitudes. Regardless, any such request would be ineffective to place the issue before the Superior Court, since a cause of action for declaratory judgment cannot be asserted in a motion; it must be stated in a pleading. *Clarenbach*, 66 V.I. at 382; V.I.R.Civ.P. 8(a)(1) and 8(a)(2).

Nevertheless, the Superior Court's April 11, 2022 Preliminary Injunction Order improperly undertakes an analysis regarding the legal effect of the purported conveyance of CU-1 on the servitudes created by the declarations. JA 1558-1590. If allowed to become permanent, the declaratory judgment and injunction would extinguish the obligation of NA's members to pay all expenses relating to CU-1, and the membership at large will assume responsibility for such costs and expenses.

Likewise, the restrictive covenant limiting CU-1 use to the occupants of the Two Bedroom Suites would be extinguished.

However, the owners of the Suite Interests in Buildings G and H are not parties to this case. GBCOA's complaint names only a single defendant, The Neighborhood Association, Inc., a corporation. JA 330 (¶ 4). In the trial court, NA made it clear it was not seeking relief on behalf of "this particular institutional member," but rather on behalf of its "individual members" who "lack the massive wealth and power" of MVC Trust. JA 539; *see also* JA 540 (referring to MVC Trust as a "non-party"). NA further admitted it was not seeking relief on behalf of the Developer, who paid the October 2021 assessments before NA filed its motion. JA 540 n.1.

Thus, the Superior Court "is without jurisdiction to issue an injunction which would interfere with the rights" of MVC Trust and the Developer, both of whom **admit** their continuing liability to pay CU-1's expenses regardless of whether NA's purported conveyance to GBCOA is or is not valid. *Streibich*, 74 V.I. at 500 n. 7; *see* JA 149-150 (¶¶ 2-3); JA 152-154; JA 156-165.

NA's supercilious remarks about Attorney Rolando in footnote 3 of its Appellate Brief miss the point. If MVC Trust becomes a party to this case or the Debt Action, which will be necessary before the Superior Court may adjudicate its rights and obligations with respect to the servitudes appurtenant to its Suite Interests,

Attorney Rolando's statements will be admissible as the statements of a party, which are not hearsay. V.I.R.Evid. 801(d)(2). NA's failure to actually plead its claim and join the corporate entities owning 49% of the affected property interests, and then using that failure to object to those entities' admissions about the rights and obligations that are the subject of NA's unpleaded claim, cannot be countenanced.

B. The Superior Court Erred by Issuing Injunctive and Declaratory Relief Concerning Issues That, if Properly Raised at All, Are Before Another Judge of the Superior Court

As it did in the trial court, NA fails to respond to GBCOA's argument that to the extent the liability of NA's members for CU-1 expenses has been raised it all, that issue is before another judge of the Superior Court. GBCOA raised this issue in its Motion to Dissolve the TRO. JA 142. NA's response fails to address this issue. JA 539-550. The Superior Court, likewise, fails to address this issue anywhere in its 31-page Memorandum Opinion – although the judge *did* cite to GBCOA's Complaint in the Debt Action when describing the issues raised on NA's Motion for TRO and Preliminary Injunction.[6] *See*, *e.g.*, JA 1559 (¶ 3 n.2); JA 1567 (¶ 20 n.16); JA 1574 (¶ 31 n.33).

As this Court noted in *Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 574 (V.I. 2015), "[I]t is the responsibility of the Presiding Judge of the Superior

[6] GBCOA attached its Complaint in the Debt Action as Exhibit 13 to its Motion to Dissolve the TRO. JA 468-504.

Court to 'divide the business and assign the cases among all the judges of the court" and no judge may "essentially ignore the Presiding Judge's assignment by issuing an order in a case assigned to another judge." The Superior Court below denied GBCOA's Motion to Consolidate the two cases, ruling that "the legal issues are distinct" and that "there is no risk of conflicting judgments." JA 508-509. The latter conclusion is not correct, since the complaint in the Debt Action seeks payment from NA (the corporate entity) for CU-1's share of the common expenses of Great Bay Condominium for 2017, 2018 and 2019. JA 468-469, 475, 477. The Superior Court's Opinion acknowledges that NA's Motion for Injunctive Relief addresses this exact subject, JA 1562-63 (¶ 10), and purports to adjudicate liability (albeit "temporarily") for these expenses.

Accordingly, the Superior Court overstepped its authority by deciding issues that, if properly raised at all, are before another judge of the Superior Court. This mandates reversal of the preliminary injunction.[7] *Vanterpool*, 63 V.I. at 575 (noting the Court "would ordinarily be required to vacate the ... opinion and order and remand for the judge assigned to the case" to consider and decide). At the very least,

[7] To be clear, it is GBCOA's position that even in the Debt case, the issue of NA's members' personal liability for CU-1's unpaid share of the annual common maintenance expenses, as distinct from NA's joint and several liability for those expenses, is not properly at issue. However, it is for the judge in the Debt Action to decide, in the first instance, the extent to which the pleadings in that case properly raise these issues, and whether the individual owners of the Suite Interests are necessary parties under V.I.R.Civ.P. 19.

the Superior Court's failure to address this issue in its Memorandum Opinion mandates reversal. *People v. Armstrong*, 64 V.I. 528, 534 (V.I. 2012) ("[W]hen parties properly raise an issue during the course of Superior Court proceedings, the Superior Court possesses an obligation to explain the reasons for its decision in order to enable effective appellate review by this Court. This principle is particularly true when ... a party maintains the Superior Court lacks the authority to rule on a matter.") (internal quotation marks and citation omitted).

C. The Superior Court Improperly Failed to Consider and Address Other Issues Raised by Appellant

"This Court is one of review, not first instance." *Vanterpool*, 63 V.I. at 586 (citation, internal quotation marks, and alteration omitted). Further, this Court has repeatedly emphasized, "meaningful appellate review is not possible where the trial court fails to sufficiently explain its reasoning, and such failure of explanation itself constitutes reversible error." *Lewis v. Rogers*, 73 V.I. 592, 596 (V.I. 2020) (citing *Slack v. Slack*, 69 V.I. 567, 572 (V.I. 2018) (collecting cases).

GBCOA repeatedly argued that NA's request for injunctive relief was not properly before the Superior Court for multiple reasons, including that NA's pleading failed to state a claim for declaratory judgment or request injunctive relief, and that NA failed to show it had standing to seek an injunction on behalf of nonparties including MVC Trust and the Developer, who admit liability for the

assessments (and the Developer actually paid the assessments without objection). JA 129-146; JA 525, 526-527, 535-536; JA 590-594.

GBCOA also argued that the declarations created restrictive covenants imposing on NA's members the obligation to pay CU-1 expenses regardless of who owns CU-1, that these covenants run with the land (*i.e.*, the Suite Interests), and that the post-conveyance status of the restrictive covenants is governed by common law principles of Property Law, which NA failed to present to the Superior Court. JA 1387-93, 1398-99. Notably, Section 5.1 of the Restatement (Third) of Property (Servitudes) provides that, "An appurtenant benefit or burden transferable under the rules stated in §§ 4.6 and 4.7 passes automatically with the property interest to which it is appurtenant." *See also Terryhill Enter. VI, LLC v. Daly*, ST-01-CV-165, 2015 V.I. LEXIS 160, *13-14 (Super. Ct. Apr. 13, 2015) (adopting § 5.1 as the soundest rule for the Virgin Islands insofar as it provides that an easement (a kind of servitude) runs with the land).

Finally, GBCOA argued that under the express language of the declarations, "No member may withhold payment of any regular or special assessment or any portion thereof because of any dispute which may exist between that Member and the Members Association ... but rather each Member shall pay all expenses when due pending resolution of any dispute." JA 139-140 (quoting section 9 of the Declaration (JA 269)); *see also* JA 1400-1401. The Superior Court acknowledges

this argument and the relevant language of the Declaration but concludes, without explanation or analysis, that "CU-1 assessments are separate and apart from the annual assessments which follow the 'pay now, dispute later' process allowed for in the Declaration." JA 1575 (¶ 32). This conclusion finds no support in the controlling language of the Declaration, which on its face applies to "any regular or special assessment or any portion thereof." JA 269 (¶ 9).

In sum, the Superior Court's opinion inexplicably fails to consider and substantively address numerous issues properly raised by GBCOA. This failure precludes effective appellate review, which itself constitutes reversible error. *Rogers*, 73 V.I. at 596.

CONCLUSION

For the foregoing reasons, this Court should vacate both the December 16, 2021 and April 11, 2022 Preliminary Injunction Orders and remand.

Respectfully submitted,

DATED: July 11, 2022

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CORPORATE DISCLOSURE PURSUANT TO V.I.R.App. P. 18

Great Bay Condominium Owners Association, Inc., is a not-for-profit Virgin Islands corporation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief was served via the Court's electronic filing system upon the following counsel of record:

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July 11, 2022

/s/ W. Mark Wilczynski
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CERTIFICATE OF LENGTH

I hereby certify that the length of this brief complies with V.I.R. App. P. 22(f). The word count for this brief is approximately 3,817 words.

July 11, 2022 __*/s/ W. Mark Wilczynski*