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 BRIEF

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STATEMENT OF JURISDICTION

The Superior Court has subject matter jurisdiction over Plaintiff-Appellant Great Bay Condominium Owners Association, Inc.'s civil action against The Neighborhood Association, Inc. (Civil No. ST-18-CV-768), pursuant to 4 V.I.C. § 76(a).

This Court has jurisdiction over "interlocutory orders of the Superior Court of the Virgin Islands … granting, continuing, modifying, refusing or dissolving injunctions," 4 V.I.C. § 33(b)(1); *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (2012). As this Court's precedents clearly establish, a temporary restraining order that is continued for a substantial length of time past the period typically permitted by statute or court rule transforms into an appealable preliminary injunction. *Crucians in Focus, Inc. v. VI 4D, LLLP*, 57 V.I. 529, 535 (2012) (collecting cases); *In re Najawicz*, 52 V.I. 311, 325 (2009)).

In holding that the temporary restraining order under review in *Crucians in Focus* had transformed into an appealable preliminary injunction, this Court stated:

> While [the defendant-appellee] correctly notes that Rule 65(b)(2) authorizes a trial judge to extend the TRO beyond the traditional 14 day period "for good cause," our *Najawicz* decision, as well as the decisions of federal appellate courts interpreting Rule 65, unquestionably hold that a TRO that has been in place for three months without the consent of the parties is no longer "temporary," but has transformed into an appealable injunction.

57 V.I. at 535 (citations omitted).

On November 12, 2021, the Superior Court issued a Temporary Restraining Order ("TRO") in favor of Defendant/Appellant the Neighborhood Association ("NA") pursuant to Rule 65(b) of the Virgin Islands Rules of Civil Procedure. JA 125-128. On November 15, 2021, Plaintiff/Appellee Great Bay Condominium Owners Association, Inc. ("GBCOA") filed a Motion to Dissolve the TRO. JA 129-512. On November 19, 2021, the Superior Court entered an order denying GBCOA's Motion to Dissolve the TRO and extending the TRO until the conclusion of the preliminary injunction hearing. JA 691-692. The hearing was conducted on November 19, 2021; December 8, 2021; December 9, 2021; and December 13, 2021.

On December 16, 2021, the Superior Court entered an order extending the TRO indefinitely, *i.e.*, "until the issuance of an Order of Preliminary Injunction," JA 1470, which the Superior Court stated it would issue "in the Spring." JA 1451-52. Pursuant to *Crucians in Focus*, this order transformed the TRO into an appealable preliminary injunction. GBCOA filed its Notice of Appeal within 30 days thereafter, on January 14, 2022.

ISSUES PRESENTED

1. Whether the Superior Court erred in granting Appellee's Motion for TRO and Preliminary Injunction in the absence of any counterclaim for injunctive relief or any other affirmative relief in Appellee's pleading.

2. Whether the Superior Court abused its discretion in granting a preliminary injunction to Appellant without stating the findings of fact and conclusions of law that support its actions.

STANDARD OF REVIEW

This Court reviews the Superior Court's decision to grant or deny a preliminary injunction for abuse of discretion. *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (2012). An abuse of discretion arises only when the decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact. *Id.*

This Court's review of the Superior Court's application of law is plenary, while findings of fact are reviewed for clear error. *In re Najawicz*, 52 V.I. 311, 327-328 (2009). A factual determination is clearly erroneous "if it is completely devoid of evidentiary support or bears no rational relationship to the supportive evidentiary data." *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 68 V.I. 584, 592 (2018).

STATEMENT OF RELATED CASES OR PROCEEDINGS

This appeal (SCT-CIV-0002) is consolidated with SCT-CIV-0024. The latter appeals from the Superior Court's Preliminary Injunction Order and Memorandum Opinion issued on April 11, 2022. Under the Scheduling Order issued in SCT-CIV-0024, Appellant's Opening Brief in that appeal is due on or before June 20, 2022.[1]

[1] This Court's Order of May 20, 2022 consolidating the appeals decreed that the Scheduling Order in this appeal (SCT-CIV-0002) shall remain in effect and left the Scheduling Order in SCT-CIV-0024 undisturbed.

The following case pending in the Superior Court may be related to this case: *Great Bay Condominium Owners Association, Inc. v. The Neighborhood Association, Inc.*, ST-19-CV-650 (action for breach and debt). That case, like this one, involves a commercial condominium unit referred to as "CU-1," a food and beverage facility located in Building G at the Great Bay Condominium. GBCOA's Complaint in ST-19-CV-650 alleges claims for debt and breach of contract against NA. Count I seeks payment from NA (the corporate entity) for CU-1's share of the common annual maintenance expenses of Great Bay Condominium for 2017, 2018, and 2019. JA 468-469, 475, 477. Counts II and III seek certain settlement monies held by NA that are derived from litigation GBCOA and NA initiated against multiple defendants relating to defective design and construction of renovations to CU-1. JA 470-471. Count IV alleges breach of contract arising from a Ratification Agreement between GBCOA and NA, dealing with certain renovations to CU-1 affecting its appurtenant common areas. JA 471-472, 497-501.

STATEMENT OF THE CASE AND FACTS

The Ritz-Carlton Club, St. Thomas

In 2002, the owner of the Ritz-Carlton Hotel in St. Thomas, RC Hotels (Virgin Islands), Inc. (hereinafter "the Developer"), executed and recorded a *Declaration Establishing a Plan for Condominium Ownership* ("Declaration") that submitted several parcels adjacent to the hotel to the provisions of Chapter 33, Title 28, Virgin

Islands Code, known as the Condominium Act of the Virgin Islands (hereinafter "Condominium Act"). JA 259-305. The phased plan of development contemplated four buildings, designated A through D, containing approximately 80 residential condominium units. JA 263.

Only Building A was constructed at the time, containing 23 residential condominium units (the "Residences"). JA 263 (¶ 3). The other three buildings were planned for future phases of the development. *Id.*

Contemporaneously, the Developer filed a second declaration titled *Supplementary Declaration of Condominium for the Club at Great Bay Condominium* ("Club Declaration"). JA 389-439. This instrument created the interval form of ownership that characterizes the Ritz-Carlton Club by dividing each of the 23 "Residences" into twelve "Residence Interests," creating a total of 276 alienable property interests in Building A. JA 393 (art. 1.2; art. 1.3); JA 410 (art. XII); JA 417.

Each Residence Interest entitles the owner (also a Club "Member") to exclusive use of the Residence for twenty-one days of Reserved Allocation, subject to the Reservation Procedures. JA 399 (art. 2.40); JA 401-402 (art. V).

Both the Declaration and Club Declaration provide that operation of the condominium shall be by the Members Association (GBCOA), which is responsible for the maintenance, repair and replacement of the Common Elements and the

collection of assessments against each Member for the Common Expenses. JA 264 (art. 5(d)); JA 269 (art. 10); JA 279 (art. 18); JA 398 (art. II § 2.25); JA 404 (art. VII).

Both Declarations authorize the Members Association to contract for the management and operation of the Condominium and delegate to such contractor all powers and duties of the Members Association, except those specifically required by the condominium documents or applicable law to be exercised by the board of directors or members of the Members Association. JA 407 (art. IX); JA 270 (art. 10(d)).

The "Affiliation Agreement" attached as Exhibit B to the Club Declaration describes the various Ritz-Carlton affiliated entities involved in the management and operations of the Condominium and Club Membership Program, JA 438. These entities, many of whom share officers and employees, are owned under the corporate umbrella of Marriott International and collectively referred to as "the Management Company." JA 169 (¶ 10); JA 753-755, 1070.

Percentage Ownership Allocation

Section 905 of the Condominium Act provides that "[e]ach apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration" to be computed by taking as a basis the value of the apartment in relation to the value of the property. 28 V.I.C. § 905.

Section 909 of the Condominium Act provides that the common expenses of the condominium "shall be charged to" the unit owners "according to the percentage of the undivided interest in the common areas and facilities." 28 V.I.C. § 909.

In accordance with these statutes, the Declaration calculates the percentage ownership allocation of the 23 Residences in Building A, while the Club Declaration calculates the percentage ownership allocation of the 276 Residence Interests. JA 267 (art. 9); JA 288; JA 403 (art. VI); JA 416-417.

Buildings H and G
and Commercial Unit CU-1

After the original four phases of the development were completed (Buildings A-D), in 2005, the Developer decided to submit two additional buildings to the condominium regime, denoted as Building H and Building G. These two buildings contained "Two Bedroom Suites" that previously were used as accommodations for hotel guests desiring "Club Level" service, which included complimentary food and beverage services in a dedicated "Lounge" occupying the fifth floor of Building G. JA 898-899.

Building H was submitted first, through the recording of the *Fourth Amendment to Declaration* executed by the Developer on November 15, 2005 and recorded on December 9, 2005. JA 350-355. In anticipation of later submitting Building G and the Lounge, the Developer established rules relating to commercial

units generally, which are set out in Paragraph 5 of the *Fourth Amendment to Declaration*. JA 351 (¶ 5).

In Paragraph 6, the Developer established specific covenants relating to the Lounge in Building G, designated as "Commercial Unit CU-1." The Developer declared its intention that CU-1 would be (i) owned by NA; (ii) restricted to exclusive use of the occupants of the Two Bedroom Suites; and (iii) financially supported exclusively by the owners of the Two Bedroom Suites, who would be NA's mandatory members. JA 353 (¶ 6).

Seven months later, the Developer submitted Building G and the Commercial Unit CU-1 to the Condominium through the recording of the *Fifth Amendment to Declaration* on July 18, 2006. JA 186-206; JA 945. This instrument implemented the structure for ownership and operation of CU-1 contemplated in the prior amendment: exclusive ownership by NA, exclusive use by the occupants of the Two Bedroom Suites, and exclusive financial responsibility imposed on the owners of Residence Interests in the Two Bedroom Suites:

> All Owners of Residences that are designated as a Two Bedroom Suite shall ... be mandatory members of the Neighborhood Association whose ***sole purpose is to own and operate Commercial Unit CU-1,*** which ***shall be conveyed by Declarant to the Neighborhood Association*** and utilized for the ***exclusive benefit*** of the occupants ... of the Two Bedroom Suites .... ***Owners of Two Bedroom Suites are responsible for all costs and expenses of the ownership and operation of Commercial Unit CU-1***, including but ***not limited to*** any services that it may elect to provide.

JA 187 (¶ 5) (emphasis added).

Simultaneously, the Developer recorded the *Fourth Amendment to Supplementary [Club] Declaration*. JA 371-379. This instrument likewise declares that owners of Residence Interests in the Two Bedroom Suites are "responsible for all costs and expenses related to the ownership and operation of the Commercial Unit CU-1, including but not limited to any services that it may elect to provide." JA 373 (¶ 5). Exhibit A recalculates the percentage ownership allocation of each Residence Interest in the (now) six buildings, and that of CU-1. JA 372 (¶ 3); JA 377-379; JA 946-947.

CU-1's percentage ownership of the undivided interest in the common areas and facilities is 1.415112%. JA 379. This is equivalent to 18 Residence Interests. JA 1031. CU-1's ownership allocation determines its share of the annual common expenses of the Condominium including maintenance expenses. 28 V.I.C. § 909.

Developer's Conveyance of CU-1 to NA

On December 20, 2008, the Developer executed a Condominium Deed conveying CU-1 in fee simple absolute to NA. JA 381-382. During the intervening three-year period, in which the Developer retained fee simple ownership of CU-1, the owners of Residence Interests in the Two Bedroom Suites (NA's mandatory members) paid all costs and expenses relating to CU-1. JA 911-913, 919-920, 1009. This included both the cost of food and beverage services provided by CU-1, as well

as CU-1's share of the common annual maintenance expenses of the Condominium. JA 944, 947; JA 760-761, JA 1011.

Thus, NA's members paid two levels of annual assessments: first, their proportionate share of the common expenses paid by all members of GBCOA based on the percentage ownership allocation of their ownership interests; and second, their proportionate share of expenses relating to CU-1 including both the cost of food and beverage services and CU-1's share of the annual common maintenance expenses. JA 755-56, 910, 912-913, 944, 950.

As to CU-1's share of the common maintenance expenses, NA was a conduit. The Management Company calculated CU-1's share based on its percentage ownership allocation in the Declarations, and included this amount as a line item in GBCOA's Budget (as revenue) and in NA's Annual Budget (as an expense). JA 760-761, 950, 1019, 1307.

In sum, the evidence is uncontroverted that from 2006 through 2016, the owners of Residence Interests in the Two Bedroom Suites paid all costs and expenses relating to CU-1, including during the three years the Developer retained ownership of CU-1 (2006-2008). JA 944, 947, 1007-1009.

NA's Purported Conveyance of CU-1 to GBCOA

In 2016, GBCOA and NA were negotiating an agreement relating to the proposed transfer of ownership of CU-1; however, the parties did not agree on terms

and the agreement was never signed. JA 908-909. Nevertheless, on September 20, 2017,[2] NA officer Sal Cutrona executed a deed purporting to convey CU-1 to GBCOA. JA 447-448. At that time, CU-1's share of the common maintenance expenses for 2017 was not paid. JA 921; JA 469 (¶ 7). NA stopped providing food and beverage services to the occupants of the Two Bedroom Suites leaving CU-1 largely idle. JA 947-948.

NA also stopped assessing its members for CU-1's share of the common annual maintenance expenses of the Condominium property, which went unpaid. JA 948, 952.

GBCOA's Claims in ST-18-CV-00768

On December 5, 2018, GBCOA filed a complaint against NA in the Superior Court, Case No. ST-18-CV-00768, for declaratory judgment, to cancel deed and to quiet title (the "Deed case"). The complaint alleges that NA's attempted conveyance of CU-1 to GBCOA is in violation of the Declarations and void. Counts I through III seek cancellation of the deed; Count IV alleges a claim to quiet title; and Count V seeks a declaratory judgment that NA remains sole owner of CU-1. JA 328-342.

On January 19, 2019, NA filed its answer denying the material allegations of the complaint and asserting several affirmative defenses, each a single sentence

[2] This Court may take judicial notice of the fact that Hurricane Maria struck the Virgin Islands on September 19, 2017. V.I.R.E. Rule 201(b).

devoid of factual allegations. JA 456-466. This pleading asserts no counterclaim or any other claim for affirmative relief, whether on NA's own behalf or on behalf of the owners of the Residence Interests in the Two Bedroom Suites. *Id.*

GBCOA's Claims in ST-19-CV-650

On November 15, 2019, GBCOA filed a second action against NA in the Superior Court alleging claims for debt and breach of contract (the "Debt case"). Count I seeks payment from NA for CU-1's share of the common annual maintenance expenses of the Condominium for 2017, 2018 and 2019. JA 468-469; JA 475, 477.

Counts II and III seek certain settlement monies held by NA that are derived from litigation that GBCOA and NA initiated against multiple defendants relating to defective design and construction of renovations to CU-1. JA 470-471.

Count IV alleges a claim for breach of contract arising from a Ratification Agreement, which deals with certain renovations NA made to CU-1 affecting the appurtenant common areas. JA 471-472, 497-501.

Denial of Motion to Consolidate

GBCOA filed a Motion to Consolidate the two cases on December 23, 2019. NA filed an opposition objecting to consolidation on January 15, 2020, and GBCOA filed a Reply on January 29, 2020. JA 508. In denying consolidation, the Superior Court stated:

> Great Bay moves to consolidate this action with ST-19-CV-650, an action for debt involving the same parties. The two cases share common facts, but the legal issues are distinct. ... While the parties and property underlying the disputes are the same, there is no risk of conflicting judgments and the legal issues do not need to be considered simultaneously or by the same judge. JA 508-509.

October 2021 Assessments

In 2021, GBCOA was served with a Request for Admission in ST-19-CV-650 (the Debt case), which asked GBCOA to admit that if the Superior Court in that case deemed GBCOA to be the owner of CU-1, the cost of ownership, maintenance, repair and management of CU-1 should, in GBCOA's opinion, be treated as an ordinary common expense of all GBCOA members. JA 1641-1651. This prompted GBCOA to undertake a fresh review of the Declarations, which GBCOA concluded impose a personal obligation on the owners of the Residence Interests in the Two Bedroom Suites to pay all costs and expenses relating to CU-1, regardless of whether NA or GBCOA owned it. JA 1007-09, 1018, 1022-23, 1031-33.

By this time, CU-1's share of the common maintenance expenses had gone unpaid for five years, creating a $1 million shortfall. GBCOA decided it had the right and duty under the Declarations to invoice the owners of the Two Bedroom Suites for these expense. JA 1307-09. Broken down by Residence Interest, this amounted to $3,531 per owner. JA1309. [3]

[3] Of this total, $2,636 was for CU-1's share of the common annual maintenance expenses for 2017-2021; $402 was for late fees; and $493 was for interest. JA 1309.

As the invoices were being prepared, in mid-October 2021, GBCOA's attorneys discovered a document in NA's document production in ST-19-CV-650 (the Debt case): a letter written by Attorney Margaret Rolando, outside counsel to Marriott Vacation Club Trust Owners Association ("MVC TOA"), to NA's Board of Directors, dated September 19, 2019. JA 149-150 (¶¶ 2-3); JA 152-154, 156-165.

MVC TOA is the largest and most significant owner of Residence Interests in the Two Bedroom Suites. It and the Developer, combined, own 141 of the 288 total Residence Interests in the Two Bedroom Suites, comprising 49% of the voting interests in NA. JA 167-168 (¶¶ 4-6); JA 173.

In her letter, Attorney Rolando advised NA's Board of Directors of her client's position regarding liability for CU-1 expenses following NA's attempted conveyance of CU-1 to GBCOA:

> The Declaration of Condominium creating the Great Bay Condominium and the Supplementary Declaration of Condominium for The Club at Great Bay, as well as other documents include multiple references to the rights and obligations of [NA]. These Declarations are covenants running with the land and impose on the Suite owners the obligation to pay assessments to support CU-1 regardless of whether [NA] or another entity owns it. In order to eliminate the liability of the Suite owners for payment of the costs associated with the operation, maintenance, management and repair of CU-1 or spread such costs to all of the owners of Great Bay Condominium, these documents must be amended. The Company cannot unilaterally amend these documents. Furthermore, the revised documents must be filed with various regulatory authorities.
>
> Although [NA] attempted to convey CU-1 to GBCOA, such a transfer does not terminate the obligation of the Suites and Suite owners to pay

> assessments for ownership, management, operation and maintenance of CU-1. In fact, by virtue of such transfer, the Company loses control of the operation of the facility while the members retain the liability.

JA 153 (¶ 2).

The assessments for CU-1's unpaid share of maintenance expenses for 2017 through 2021 were issued to the owners of Residence Interests in the Two Bedroom Suites on October 20, 2021. JA 30 (¶ 7); JA 40. The "Due Date" shown on the invoices was November 22, 2021. *Id.* A notation indicated that 50% of the late fees and interest would be waived if payment was received before November 9, 2021. *Id.*

Accompanying the invoices was a memorandum from GBCOA's Board of Directors explaining the basis for its conclusion that the owners of Residence Interests in the Two Bedroom Suites were responsible for payment of expenses relating to CU-1 regardless of which association owned the property. JA 42-45.

On November 12, 2021, the Developer paid its invoice for the CU-1 assessments without objection. JA 169 (¶¶ 10-12); JA 176.

TRO and Preliminary Injunction Hearing

On the same day the Developer paid the CU-1 invoices, NA filed its Ex Parte Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction. JA 1-124. The motion asked the Superior Court to restrain GBCOA from "taking any steps to enforce or collect any invoice for dues or common charges for CU-1 ... to any member of NA, or to take any steps to obstruct, impair, or preclude full use and

occupancy by NA members of their residences at the Ritz-Carlton for a period of fourteen (14) days, and thereafter if the Court should so order." JA 2.

The Superior Court granted the motion the same day, signing the proposed order tendered by NA without changes. JA 125-128; *compare* JA 4-6. On November 15, 2021, GBCOA filed a Motion to Dissolve or Modify the TRO. JA 129-512. In the alternative to dissolution, this motion requested an order vacating the portion of the TRO directing GBCOA to "rescind" the invoices and requiring NA to post a bond in accordance with V.I.R.Civ.P. 65(c). JA 131, 144-145.

On November 19, 2021, the Superior Court entered an order denying GBCOA's Motion to Dissolve the TRO, denying the request for a bond, and extending the TRO "to the conclusion of the preliminary injunction hearing." JA 691-692. The hearing was conducted on November 19, 2021; December 8, 2021; December 9, 2021; and December 13, 2021.

At the conclusion of the Preliminary Injunction Hearing, the Superior Court stated on the record:

> So clearly there are a number of issues here that the Court has to address.
>
> I'm going to continue the temporary restraining order. I am also – I also believe however, that the defendants, that NA has provided sufficient testimony to meet the factors, all four factors actually, in this matter.
>
> The Court therefore is going to grant that motion for the preliminary injunction. The injunction is instituted until the case makes the ultimate decision with respect to the deed in this matter.

> So, the Court rules in favor at this point with respect to the plaintiffs – I'm sorry, with respect to the defendants, NA, Neighborhood Association.
>
> I will reduce my order to writing to be issued sometime in the Spring of 2022, but that's the order of the Court.

JA 1451-52.

On December 16, 2021, the Superior Court entered an order finding "that the preliminary injunction is appropriate and should be granted" and extending the TRO "until the issuance of an Order of Preliminary Injunction." JA 1470.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN GRANTING A PRELMINARY INJUNCTION

A. *The Superior Court Erred in Granting Injunctive Relief in the Absence of Any Claim for Relief in Appellee's Pleading*

It is a fundamental principle of jurisprudence that "the court cannot provide a remedy, even if one is demanded, when plaintiff has failed to set out a claim for relief." *USX Corp. v. Barnhart*, 395 F.3d 161, 166 (3d Cir. 2004) (quoting 10 C. Wright & A. Miller, Federal Practice and Procedure § 2664 (3d ed. 1998)); *see* 10 J. Moore, Moore's Federal Practice § 54.72(2), at 54-137 (3d ed. 2004); *see also Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 699 (2011) ("A claim cannot be raised for the first time on a ... motion – it must be contained in the complaint.") (collecting cases).

In *Caribbean Healthways*, the dispute concerned the parties' use of a jointly owned right of way that provided access to each party's respective business. The plaintiff's complaint included claims for declaratory judgment and injunctive relief, seeking to have the court recognize an express easement granting a right to park forty foot trailers on its property in such a way that they protruded into the right of way. The defendant filed a counterclaim, seeking an injunction to prevent the parking of trailers in the shared right of way. 55 V.I. at 692-93.

After the Superior Court entered temporary restraining orders against both parties, both parties filed motions for permanent injunctions. The plaintiff's motion sought recognition of an implied easement which gave it the right to park trailers at the loading ramp even if they remained in the right of way. 55 V.I. at 695-96. After a hearing, the Superior Court found that the plaintiff did not have a right to park trailers within the right of way and entered a permanent injunction. *Id.* at 696.

On appeal, the plaintiff argued, among other things, that the trial court erred by failing to recognize their implied easement over the right of way. *Id.* Observing that this argument was "based on the assumption that the question of the implied easement was correctly before the Superior Court in the first place," this Court concluded that it was not:

> The complaint only alleged the existence of an "*express easement* reserved by Warranty Deed in Parcel No. 14D." According to the record, Healthways first raised the issue of an implied easement in their combined motion for a permanent injunction and summary judgment.

> A claim cannot be raised for the first time on a summary judgment motion – it must be contained in the complaint.

55 V.I. at 698-99 (emphasis by the Court) (internal record citations omitted) (collecting cases). Going further, this Court also observed:

> The Superior Court's docket reveals that Healthways never moved to amend the complaint to include a claim for an implied easement over the right of way, and could not have amended the complaint at that point of the litigation without the permission of the court. *See* SUPER. CT. R. 8; *Harvey v. Christopher*, S. Ct. Viv. No. 2007-0115, 55 V.I. 565, 2011 V.I. Supreme LEXIS 18, *22, [WL], at *6 (V.I. July 19, 2011) (holding that an amendment under Superior Court Rule 8 is not as of right, but instead "vested in the sound discretion of the Superior Court.").

55 V.I. at 699. This Court concluded that, "Therefore the implied easement claim was never correctly before the Superior Court to decide." *Id.*; *see also Phillip v. Marsh Monsanto*, 66 V.I. 612, 622-23 (2017) ("The court may not assume the role of advocate or rewrite pleadings to include claims that were never presented.") (quotation marks, brackets, and citations omitted); *Tires v. Gov't of Virgin Islands*, 68 V.I. 241 (Super. Ct. Feb. 26, 2018) (in deciding petition for preliminary injunction to require Department of Property & Procurement to reopen bidding process, Superior Court found that plaintiff was not likely to succeed on the merits because its complaint stated only a debt claim).

In this case, Appellee did not merely seek injunctive relief in its motion based on a claim that was different from the claim asserted in its pleading; Appellee has not asserted *any claim* in its pleading. Appellee's sole pleading is an answer, which

is purely defensive. It sets forth no counterclaim or other affirmative claim for relief and alleges no facts showing entitlement to the relief requested in its Motion for TRO and Preliminary Injunction. JA 456-466.

In granting Appellee's Motion for TRO and Preliminary Injunction, the Superior Court ignored not only this Court's holding in *Caribbean Healthways*,[4] but also fundamental requirements relating to pleadings set out in the Virgin Islands Rules of Civil Procedure. Rule 8 provides that "a pleading that states a claim for relief must contain" all of the following: (1) a "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" with "separate designation of counts ... for each claim identified"; and (3) "a demand for the relief sought". V.I.R.Civ.P. Rule 8. Here, NA's pleading satisfies none of these requirements and thus is insufficient to state a claim for relief pertaining to the October 2021 assessments, which are the sole subject of NA's Motion for TRO and Preliminary Injunction.

Furthermore, the lack of any pleading that satisfies Rule 8's requirements precludes either GBCOA or the court from properly analyzing issues relating to

[4] Appellant's Motion to Dissolve TRO and Preliminary Injunction specifically asserted that neither the question of the Two Bedroom Suite owners' personal obligation to pay expenses relating to CU-1, nor the question of those persons' liability for the October 2021 assessments was properly before the court, citing *Caribbean Healthways* and many other authorities. JA 141-143; JA 590-594.

jurisdiction or required joinder of parties pursuant to V.I.R.Civ.P. Rule 19. As noted, NA's two largest members, MVC TOA and the Developer, who together own 49% of the Residence Interests in the Two Bedroom Suites, ***have admitted their liability*** for assessments relating to CU-1, regardless of who owns the unit. MVC TOA admitted this in a letter from its outside legal counsel to NA's Board of Directors, while the Developer admitted it (at least tacitly) by paying its invoices relating to the October 2021 assessments without objection.

These admissions raise another critical question: on whose behalf NA seeks the injunctive relief requested in its Motion for TRO and Preliminary Injunction. NA's responsive pleading on file in ST-18-CIV-768 provides no indication whatsoever that its appearance is on behalf of anyone other than itself, the corporate entity. Since GBCOA's Complaint alleges claims only against NA, the corporate entity, and not against any of NA's dozens of individual members, the clear inference is that NA <u>has not</u> appeared on behalf of MVC TOA or the Developer. If this had been made clear in a pleading that complies with Rule 8, GBCOA could have evaluated the availability of motions under Rule 12, available affirmative defenses, and other legal and procedural questions relevant to NA's Request for Injunctive Relief. Because NA has pleaded no claim, GBCOA has had no such opportunity.

Additionally, Rule 15 of the Virgin Islands Rules of Civil Procedure requires a party to obtain "the opposing party's written consent or the court's leave" to amend

its pleading, since the period allowed for NA to amend its pleading as of right has long expired. V.I.R.Civ.P. 15(a)(1); *see Caribbean Healthways*, 55 V.I. at 699 n. 4 (noting the appellant was required to seek leave to amend its complaint asserting the claim for implied easement on which its Motion for Permanent Injunction was based). Here, Appellee never sought to amend its Answer to assert a counterclaim or other affirmative claim for relief, whether on its own behalf or on behalf of its members.

Moreover, this Court has recognized that, "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *3RC & Co., Inc. v. Boynes Trucking Systems, Inc.*, 63 V.I. 544, 559 (2015) (citing and quoting Weisshaar, 65 Vand. L. Rev. at 1018). In this case, the determination to be made on the merits relates exclusively to *ownership* of the Commercial Unit CU-1: whether GBCOA is entitled to cancellation of the deed, to quiet title, and for declaratory judgment that NA is the owner of CU-1.

NA has not asserted a claim that, if granted, would entitle it to "rescission" of the October 2021 invoices, or for declaratory judgment (or any other relief) on the question of its members' personal obligation under the Declarations to pay all expenses relating to ownership and operation of CU. NA's pleading does not seek declaratory judgment on the question of whether its officer's execution of a deed purporting to convey CU-1 to GBCOA in September 2021, in and of itself,

eliminates or has any effect on the covenants in the Declarations restricting CU-1's use to the occupants of the Two Bedroom Suites, or its covenants imposing responsibility on the owners of the Residence Interests for all expenses relating to ownership and operation of CU-1.

Therefore, the Superior Court's Order Granting Preliminary Injunction does not preserve the status quo between the parties pending a final determination on the merits. *Cf Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 317 (2007) ("[T]o be considered an injunction ... the trial court's order must adjudicate some of the relief sought in the *complaint*.") (emphasis in original)); *see also Pacific Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 P.2d 631 (9th Cir. 2015) (holding that absent a clear nexus between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint, "the court lacks authority to grant the relief requested") (collecting cases).

Beyond the foregoing authorities, as this Court has expressly held, "Without actual success on the merits there can be no [permanent] injunction." *Streibich v. Underwood*, 74 V.I. 488, 500 (2021). NA cannot obtain actual success on the merits in the Superior Court, because it has not asserted any claims.

In opposing GBCOA's Motion to Dissolve the TRO and Preliminary Injunction, NA argued that "[w]hile preliminary injunction relief is usually requested in the complaint, it may also be requested by a motion or by an order to

show cause." JA 540. The sole authority NA cites for this proposition is a generic reference to "*Moore's Fed. Practice*, 65.21[1]." JA 540. The cited sentence in Moore's states in full: "Preliminary injunctive relief usually is requested in the complaint but may also be made by motion, or by an order to show cause." 13 Moore's Federal Practice – Civil § 65.21. In the footnote after the word "motion" in that sentence, the following citation is found:

> "*See James Luterbach Constr. Co. v. Adamkus*, 781 F.2d 599, 603 n. 1 (7th Cir. 1986) ("As a matter of professional practice, counsel seeking temporary relief should make motion for preliminary injunction separate from prayer for relief in complaint").

Id.

Luterbach does not even remotely support the proposition that injunctive relief may be sought in a motion in the absence of a claim for injunctive relief in the complaint. It supports the opposite conclusion. In that case, the EPA awarded the Village of East Troy, Wisconsin, a grant for 75% of the construction cost of a wastewater treatment facility. After the EPA rejected Luterbach's bid and awarded the contract to someone else, Luterbach sued the EPA and Village. 781 F.2d at 601. "In its complaint Luterbach sought a declaratory judgment that it should be awarded the contract, and requested ***preliminary and permanent injunctions*** enjoining the award of the contract and the payment of any public funds to" the competitor. 781 F.2d at 601 (emphasis supplied).

However, because Luterbach never moved for preliminary relief or brought its claims for preliminary and permanent injunctions to the district court's attention, until after the wastewater plant was fully constructed and brought online, the Seventh Circuit held that Luterbach's claims for injunctive relief were moot. 781 F.2d at 602-603. Obviously, *Luterbach* provides no support whatsoever for the proposition that a party may seek injunctive relief in a motion in the absence of any claim for injunctive relief or any other claim in the party's pleading.

In sum, the Superior Court erred in granting NA's Motion for TRO and Preliminary Injunction because neither the validity of the October 2021 assessments nor the question of the personal liability of the owners who were assessed to pay expenses relating to CU-1 was properly before the court. As in *Caribbean Healthways*, NA was required to, and could have, sought leave to amend its pleading to include a claim that placed these matters at issue. 55 V.I. at 699 n. 4. The Superior Court's order of December 16, 2021, granting a preliminary injunction must be vacated.

The exact same analysis applies to the Superior Court's order of April 11, 2022. JA 1638. NA never sought leave to amend its pleading during the preliminary injunction proceedings, including in the four months intervening between the Superior Court's December 16, 2021 order granting preliminary injunction and its April 11, 2022 order granting preliminary injunction. As noted, GBCOA's initial

brief in Appeal No. SCT-CIV-2022-0024 is due on June 20, 2022. However, this Court would be well within its discretion to vacate and remand the preliminary injunction order on review in that appeal without the need for full briefing.

B. The Superior Court Abused Its Discretion By Granting A Preliminary Injunction Without Complying With Rules 52 and 65

Rule 52(a)(2) of the Virgin Islands Rules of Civil Procedure states that, "[i]n granting or refusing an interlocutory injunction, the court must ... state the findings and conclusions that support its action." V.I.R.Civ.P. 52(a)(2). " 'As many courts have made clear: a full and fair compliance with this requirement is of the highest importance to a proper appellate review of the grant or denial of a preliminary injunction.'" *Wessinger v. Wessinger*, 56 V.I. 481, 487 (2012) (quoting 9C Charles Alan Wright & Arthur Miller, Federal Practice and Procedure Civil 3d § 2576 (3d ed. 2008)). Accordingly, pursuant to this rule, "the Superior Court was required to make findings of fact when it imposed the injunction, and it abused its discretion by failing to do so." *Wessinger*, 56 V.I. at 488.

Similarly, Rule 65 of the Virgin Islands Rules of Civil Procedure provides that, "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it was issued; (B) state its terms specifically; and (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required. V.I.R.Civ.P. Rule 65(c); *see Streibach v. Underwood*, 74 V.I. 488, 500 (2021) ("Similar to the failure to comply with Rule 65, the Superior

Court's failure to address every injunction factor is typically an abuse of discretion."); *Sarauw v. Fawkes*, 66 V.I. 253, 272-73 (2017) ("[T]his Court has held that the Superior Court must make findings on every injunction factor."); *3RC & Co. v. Boynes*, 63 V.I. 544, 557 (2015) ("[I]n considering whether to grant or deny the preliminary injunction, the Superior Court must evaluate the moving party's showing on all four factors").

Here, the Superior Court made no findings of fact or conclusions of law in granting a preliminary injunction to NA. JA 1470, 1451-52. Therefore, it abused its discretion in granting the preliminary injunction and its order of December 16, 2021 must be vacated.

CONCLUSION

For the foregoing reasons this Court should vacate the December 16, 2021 Preliminary Injunction and Remand.

Respectfully submitted,

DATED: May 27, 2022

/s/ W. Mark Wilczynski

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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 BAR MEMBERSHIP

I hereby certify that the following counsel of record for Appellants Great Bay Condominium Owners Association, Inc. is a member in good standing of the Virgin Islands Bar of the United States Virgin Islands Supreme Court:

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May 27, 2022

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CERTIFICATE OF COMPLIANCE

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 **6,678** words.

May 27, 2022 */s/ W. Mark Wilczynski*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPELLANT'S BRIEF** was served via the Court's electronic filing system upon the following counsel of record:

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