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RESPONSIVE STATEMENT TO SUBJECT MATTER JURISDICTION

“The Supreme Court has jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law.” 4 V.I.C. § 32(a) (Supp.2008); *Bradford v. Cramer*, 2011 WL 1304616, at *1 (V.I. Mar. 18, 2011). Appellant’s (also referred herein as “Appellant”, “Agueda” and “Mr. Agueda”) and Appellee’s (also referred herein as “Appellee”, “Marcano” and “Ms. Marcano”) issues on appeal emanate from the Superior Court’s final judgment and findings of facts and conclusions of law transcribed on April 24, 2020.

COUNTER-STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellant Agueda relies upon his Statement of Related Cases and Proceedings as stated in his Appellate Brief filed on December 28, 2020.

COUNTER STATEMENT OF ISSUE PRESENTED BY APPELLEE

A. Is the Trial Court’s finding of \$283,945.00 owed to Ms. Marcano by Mr. Agueda is supported by substantial evidence on the record establishing that Ms. Marcano breached the agreement between her and Mr. Agueda when she failed to clear title in order to allow Mr. Agueda to secure financing and close on the property?

Inasmuch as the two issues raised by Ms. Marcano are intertwined, Mr. Agueda responds to both issues simultaneously within the body of his argument.

STANDARD OF REVIEW

The issues raised in Ms. Marcano's Brief implicates the clearly erroneous standard. Under the "clearly erroneous" standard, great deference is given to the trial court. *Dowdye v. People*, 2014 WL 2703240, at *3 (V.I. June 13, 2014). The appellate court "must accept the factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Bradford v. Cramer*, 2011 WL 1304616, at *2 (V.I. Mar. 18, 2011). Essentially, the Supreme Court should not "substitute [its] own credibility determinations for those of ... [the trial court]." *Mosley v. Penn*, 2016 WL 4702427, at *1 (V.I. Super. Sept. 7, 2016).

To the extent that the issues of fact implicate questions of law, the court's review is plenary. "Plenary review means applying the same legal standard as the trial court to the same record." *Henry v. Dennerly*, 55 V.I. 986, 991 (V.I. 2011). *Mosley v. Penn*, 2016 WL 4702427, at *1.

COUNTER-STATEMENT OF FACTS

Mr. Agueda relies upon his Statement of Facts in his Appellate Brief filed on or about December 28, 2020, and further adds as follows:

1. Marcano had notice that Agueda had obtained a loan to pay off the balance of the purchase price, and that she had to clear title for a closing to occur. (Appx 1342; 1351 (19-25); 1352 (1-13); 1362 (23-25).
2. Marcano failed to clear title for the properties. Appx 1362 (23-25).
3. First Bank issued a letter withdrawing its approval of the loan in October 2013, after title could not be cleared.
4. The trial court found that Marcano knew of the loan between June and October 2013, but she failed to make arrangement to clear title to the properties so that the sale could close. (Appx 1362-1363 /FFCL 29:19-30:7)
5. The trial court found that Agueda made “substantial and significant improvements to that property, increasing its value resulting in the property’s ability to collect and increase in rental proceeds.” (Appx 1350)

COUNTER-STATEMENT OF CASE

Trial Court’s finding does not support an award of \$283,945.00 to Ms. Marcano on Ms. Marcano’s action for debt as a matter of contract law

principles. The record supports that Ms. Marcano breached the contract in October 2013 when she failed to clear title to all nine properties: Plots No. 6, 7, 8A, 8B, 8C, 8D, 9, 9A and 15, Western Suburb. At that point, Mr. Agueda owed no further obligations under the parties' agreement, regardless of which contract is enforceable. At the time of the breach, the balance that would have been owed under the 2010 agreement was \$112,545.00. Similarly, at the time of the breach, the balance that would have been owed under the 2011 document was \$112,545.00 plus any of rent from May 2011 to October 2013. The record shows that Mr. Agueda made no further payments after the breach and withdrawal of the loan approval, indicating by conduct an intent not to continue under its terms. Ms. Marcano made no claim or argument for restitution of the property. Her complaint was only to recover a debt.

Eighty-seven percent (87%) of the negotiated price for the nine lots was paid for, while Ms. Marcano only had authority (as of the date of trial- not the date of breach) to transfer title to seven. Mr. Agueda maintains that she was fully paid for her lots, and a transfer of title for those lots should be the equitable result. Until title is cleared on Plots 8C and 8D, Ms. Marcano has no standing to enforce the contract as to those lots. The weight of the evidence also supports such a finding.

Finally, the trial court's finding of an exchange of bargained for promises to support consideration is not supported by the record. The court's finding is limited to an exchange to Ms. Marcano's benefit.

ARGUMENT

1. The Trial Court's Finding of \$283,945.00 Owed to Ms. Marcano by Mr. Agueda Is Not Supported by Substantial Evidence on the Record Establishing That Ms. Marcano Breached the Agreement Between Her and Agueda When She Failed to Clear Title in Order to Allow Agueda to Secure Financing and Close on the Property.

On Ms. Marcano's debt claim, the trial court's decision relied upon the case of *Carlos Warehouse v. Thomas*, 64 V.I. 173, where it held that "a party need only show that a defendant is obligated to pay an amount". (Appx 1344) This holding, however, necessarily relies upon the finding of a valid agreement and a violation of that agreement. Hence contract principles must be applied in the court's analysis.

After employing a *Bank's* analysis, the Supreme Court of the Virgin Islands resolved that the historical approach to analyzing breach of contract claims in the Virgin Islands is the best rule of law, and the court's analysis must recognize four elements underlying a claim for breach of contract: (1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages. *Phillip v. Marsh-Monsanto*, 2015-0040, 2017 WL 2334248, at *4 (V.I. May 30, 2017). With these elements,

this appellate court must evaluate the merits of Ms. Marcano's appeal, with the ultimate question bearing on the enforceability of the April 14, 2011 document.

The trial court found that Mr. Agueda met his burden of proof in establishing a breach of contract by failure of Appellee Marcano to clear title, thereby causing Agueda to lose the loan. The court further found that Marcano was aware that she had to clear title. (Appx 1342, 1351 (19-25); 1352 (1-13); 1362 (23-25) Mr. Agueda testified to delivering notice to Marcano in June 2013. Coupled with her several visits to the bank to learn of the status of the loan, it is evident that four months later, Marcano had more than a reasonable notice of Agueda's intent to make final payment through First Bank, in compliance with the Eighth provision of the 2011 document (assuming it is enforceable).

In February 2013 Agueda began the process of trying to secure a loan to pay off Marcano. (Appx 0155 (2-6)) As he admitted, he did not believe he owed Marcano anything further, but agreed to pay her what she claimed simply to close on the transaction. In June 2013, Agueda received notice of having secured a \$350,000.00 loan with First Bank (Appx 0156 (3-8); Defendant's Trial Exhibit B) and notified Marcano that title need to be cleared. (Appx 00158 (23) – 00160 (2-5)) In response, Marcano retained counsel and sought to evict him. The case was

dismissed in October 2013. Marcano also visited the bank several times to inquire on Agueda's progress with the loan. (Appx 00484 (10-12); 00485 (2-3)) In October 2013, the bank withdrew its approval of the loan when, after over four months, evidence that title was cleared and marketable could not be presented prior to closing. (Appx 0336 (16-17)) Even as of trial, Marcano did not have title to the nine properties. In short, the trial court was clearly confronted with substantial evidence upon which to find a breach by Appellee Marcano.

Ms. Marcano is not entitled to payment for properties for which she is not prepared to convey title. The record is clear that Ms. Marcano did not, at the time of trial, own Plots 8C and 8D Western Suburb. As the Title Report (Exhibit GG) admitted into record shows, those lots were owned by third parties (Appx 0780) Neither Rosalina Marcano, Hernan Claudius nor United Development Corporation appeared as owning any interest in the properties. Clearly, even were Mr. Agueda to pay the entire of the \$850,000 Marcano could not transfer title, and to order that Mr. Agueda pay the full contract amount without the benefit of titles to all nine properties would be inequitable and unfair.

Interestingly, Ms. Marcano's argument that her claim for debt is supported with clear evidence of Mr. Agueda's material breach by his failure to make payments contradicts the weight of the evidence. It is true

that the record reflects numerous late payments toward the purchase of the properties. But, it is equally true that Marcano accepted each payment thereby modifying the terms of the contract. (Appx 00161 (7-9)) At no time did Marcano provide notice of default (Appx 00161 (2-6)) and continued to demand payment under the contract as late as June 2013.

Moreover, Ms. Marcano argues that Mr. Agueda breached the contract by making late payments. Ms. Marcano's argument is filled with unsupported statements that "Appellee has established her claim for debt with clear evidence of Appellant's material breach of the agreement" (page 14) and then jumps to Ms. Marcano's right as the injured party to elect the remedy to be pursued, *citing, Action Engineering v. Martin Marietta Alumina*, 18 V.I. 485, 496 (D.V.I. 1981)". (See, Appellee's Brief, p.14-15) Ms. Marcano argues for full payment on the agreement, ignoring completely that she (1) does not have full title to convey title to all nine properties under their agreement; and (2) has presented no evidence that she has commenced the process of clearing title for all nine properties. In fact, the evidence presented is limited to seven lots, and comprised of executed unrecorded deeds dated in 2015 which were stipulated to. (App. 00314 4-8) No evidence was presented showing that Ms. Marcano either owned or had the ability to transfer Plots 8a and 7 either in 2013 or at any time thereafter.

Ms. Marcano adds to her argument by stating that Mr. Agueda knew of the clouds on the title to the properties sometime before seeking a loan, somehow inferring that Ms. Marcano should be excused from having to transfer clear, unencumbered title to each lot. There is no legal support for this position. It is nonetheless a preposterous argument. While it is correct that all loans recorded against the subject properties would have to be satisfied prior to closing, what is even more important is that the seller needed to have the ability to actually transfer her title to the property. As the trial court found, "Mr. Agueda was prepared to pay off the purchase price once he received the loan in June of 2013 from First Bank and all that was needed was for Ms. Marcano to obtain clear and marketable title to transfer to Mr. Agueda—Ms. Marcano knew of the loan between June 2013 and October 2013, sometime between that period, and she did not make the proper arrangements to clear title for the property resulting in Mr. Agueda not being able to close on the loan. (Appx 001363 (19-25)-Appx 001364 (1-3)) Had Mr. Agueda been able to close on the loan he would not.... he would have received the funds from the bank, paid off Ms. Marcano the balance of the purchase price and then no longer be indebted to her." (Appx 001363 (4-7)) Sadly, the fact is that in 2013, she was not the titled owner of all nine plots, and so could not provide clear and marketable title was a closing on the approved loan had. She only

had title to 2 lots and a probability of obtaining title to five more from her daughter and late husband which she made no effort to clear until 2015.

In addition to finding that Ms. Marciano breached the contract by failing to clear title, the court found that Ms. Marciano breached the duty of good faith and fair dealing when she interfered with Mr. Agueda's contract interest in collecting rent from the tenants. With this finding, supported by Ms. Marciano's testimony (Appx 00376 (20) – Appx 00377 (9)), the court ordered that as a result of the breaches, Mr. Agueda was not obligated to pay the rent of \$5,000.00 per month since the contract terms were no longer in effect. Mr. Agueda argues that similarly, Appellant should not have to pay any further funds to Ms. Marciano on a breached agreement to sell property.

Ms. Marciano also introduces a new argument not earlier raised at trial. The argument relies upon the language in Paragraph Twelfth of the April 14, 2011 document: namely, that that Mr. Agueda's remedy is limited to a refund of his deposit "in full". If this argument were to be followed, it would mean that Ms. Marciano should be ordered to reimburse all funds deposited toward the purchase of the property, less rent. Ms. Marciano appears to be arguing that she should be ordered to refund the funds deposited with her toward the purchase price. If that is correct, then this argument is being raised for the first time. Nonetheless, such an

argument does not take into consideration the windfall that would result to Ms. Marciano with a substantially improved property. As the Trial Court found, Agueda made "substantial and significant improvements to that property, increasing its value resulting in the properties ability to collect and increase in rental proceeds. "(Appx 1350) The court precluded Ms. Marciano from presenting testimony on the actual value of Ms. Marciano's investments. (Appx 00863-00874)

Ms. Marciano also argues that Mr. Agueda's witness Lennox Joseph, CPA/CFF testified to Agueda owing \$317,545.00 on the contract. That is not accurate. Lennox Joseph testifies that at the breach, the balance that would have been owed under the 2010 agreement was \$112,545.00, less \$36,000 credit for rent that charged to Ms. Marciano for a total of \$76,545 owed to Marciano. At the breach, the balance that would have been owed under the 2011 document was \$112,545.00 on the sale contract (Appx 00734) The trial court, apparently, placed minimal weight on Mr. Joseph's testimony and report as it made its own independent findings of facts, based on the evidence before it. Its only weight given was to acknowledge that Mr. Joseph, Agueda's witness, agrees that Agueda owed money, though the Trial Court's findings differed with his.

Finally, Ms. Marcano argues that Mr. Agueda failed to show that he suffered damages as a result of the breach of contract. She argues without evidence, that Mr. Agueda continues to realize a profit while in possession of the income properties while Ms. Marcano suffers from loss of use and profits. The evidence in the case is that when Mr. Agueda assumed possession and control of the property in 2009, there were only 2 habitable commercial spaces of six, which number was increased to eight; and six habitable and occupied residential spaces. (Appx 0092 (12-14)) The structures on the properties were described as “abandoned” as was testified to by retired police officer Augustin Encarnacion; he also testified that the structures used to hide criminal activities. (Appx 00518 (12-18) – 00519 (2-4)). First Bank Loan Officer Calvin Morris testified that a visiting senior manager of the bank visited the Western Suburbs property with him relative to granting the loan to Agueda, and the manager described “was impressed with the improvements that Agueda made. (Appx 00320 (5-7)) The nine properties substantially improved in value since coming into Mr. Agueda’s possession, resulting in 15 habitable residential units and 8 habitable commercial units by the time Ms. Marcano breached the parties’ agreement to purchase/sell the nine lots. During this period, Ms. Marcano was paid (\$737,455.00) 87% of the sale price of \$850,000.00. (Appx 00732 (20-25).

Improvements made were described by the contractor (Borques) as, "Here in Exhibit N, there were eight divisions made: two bathrooms, two bathrooms with sinks, repairs to eh ceiling, galvanize was replace and it was painted with Hypalon, cabinets were replaced, about eight faucets in the kitchen, windows were installed, iron doors were put to the front and a lot of electrical wiring were done." (Appx 00858 (12-18) Buildings were also remodeled. (Appx 00854 (22)) Improvements included "Downstairs the tiles were changed, the glass doors were changed because they were cracked, glass doors, revisions were made for an exchange office to change – to send moneys. In the four [commercial] unites all tiles were changed, sheet rock was replaced for new ones, electricity was also changed, outlets were changed. Where we go upstairs, tiles and windows were change in the second building. Holes were done to put in bigger windows. Downstairs, electricity was fixed, cabinets—cabinets and tiles were replaced..." (Appx 00861 (2-12). See also, Appx 00862 (19-23))

Mr. Agueda's improvements to the properties were verified by the bank's loan officer who visited the site. (Appx 00858 (12-18); 00861 (2-13, 25); Appx 0089 (1-4), (17-25); Appx 00863 (1-8)) Mr. Agueda also committed himself to the Government of the Virgin Islands to satisfy real property taxes dating back to 2004 in order to avoid a tax sale of the properties. Mr. Agueda urged the trial court to consider the equities, given

the investments of Mr. Agueda, since he clearly had a claim based on an equitable interest in the properties. The Trial Court decided not to consider restitution of the property to Marciano since it was not before the court in the Mr. Agueda's complaint. (Appx 00873) Whether or not Mr. Agueda is ordered to make any payment to Ms. Marciano, Mr. Agueda posits that the trial court should have included the transfer of title to those lots over which she is able to give the sum already paid, on equity grounds, for a judgment simply ordering that Mr. Agueda pay additional sums, if any, without a balancing of the equities would result in a windfall to the plaintiff, who would still own nine properties although having recovered substantially.

For purposes of clarification, Mr. Agueda's claims at trial were based upon a breach of contract and breach of a duty of good faith and fair dealing. All other claims were voluntarily dismissed, including the negligence claim. (Appx 1343 (22-23)) Hence, Ms. Marciano's statement and related argument on a counterclaim based on negligence is misplaced and irrelevant to the issues before the court.

**REPLY TO APPELLEE'S RESPONSE TO APPELLANT'S
ARGUMENT REGARDING CONSIDERATION**

1. The April 14, 2011 document fails for lack of consideration.

"A valid contract for the sale of land must ... set forth the terms of the agreement with sufficient certainty and definiteness, specifying the

identities of the parties and their mutual assent, the property which is the subject of the contract, the price of such property, and the consideration (emphasis added) *Phillip v. Marsh-Monsanto*, 2017 WL 2334248, at *7. The trial court properly cites to the Restatement (Second) of Contracts, Section 71, stating that “the consideration is bargained for if it is sought by the promisor in exchange for its promise and given to the promisee in exchange for that promise.” (emphasis added) (Appx 01346 (1-5)) The trial court then finds that consideration was given to Ms. Marcano. (Appx 01346 (14-17) There is, however, no bargained for exchange of consideration from Ms. Marcano, other than what Ms. Marcano previously promised in the 2010 agreement.

Instead, Ms. Marcano argues that there was more than adequate consideration, and yet fails to clearly identify any consideration from the record that was not intertwine with a prior binding agreement. Instead, Ms. Marcano seems to imply that using an attorney to “have the contract placed in a more formal writing”, Ms. Marcano’s acceptance of each late payment on the parties’ agreement prior to the 2011 document and after, and the parties’ dispute as to the amount owed on the contract were sufficient to find consideration. However, this argument fails when the April 14, 2011 document fails to state any of those points as consideration. The April 14, 2011 document recites what the parties were previously obligated to perform on the sale of the land: same purchase price for the

same nine lots, payable monthly. It imposes additional obligation on Mr. Agueda but recites no consideration for those additional obligations other than what was previously contracted to exchange.

In short, there is not clearly stated, separate consideration to support the new obligations imposed upon Mr. Agueda. Accordingly, the 2011 document must fail as a contract and be voided, and the 2010 agreement remain in place, as this agreement was not specifically cancelled in the 2011 document.

CONCLUSION

Mr. Agueda respectfully request that this Honorable Court upholds the trial court's finding that Ms. Marcano breached the agreement between the parties for the sale of the properties when, upon notice that Mr. Agueda was approved for a loan to pay off for the properties and close on the agreement, failed to clear title to the properties thereby resulting in the withdrawal of the loan; and that Ms. Marcano breached the duty of good faith and fair dealing when she interfered with Ms. Marcano's management of the tenants and collection of rent. Mr. Agueda requests that this Honorable Court reversed the trial court's finding and find that the April 14, 2011 contract fails for lack of consideration; (2) that the 2010 written agreement governs the parties' agreement to sell the nine properties for \$850,000.00; (3) that Ms. Marcano breached that

agreement when she failed to clear title thereby allowing the loan to close;
(4) that Mr. Agueda owes no rent to Ms. Marciano; (3) that Ms. Marciano received 87% of the purchase price and is ordered to transfer title to those seven Plots (Plots No. 6, 7, 8A, 8B, 8C, 8D, 9, 9A and 15, Western Suburb) to Mr. Agueda; and that Mr. Agueda owes no further funds to Ms. Marciano based upon a breach of contract and Seller's inability to transfer title.

Respectfully Submitted,

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