

Not For Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

**IN RE: GOVERNMENT OF THE VIRGIN
ISLANDS,**
Petitioner.

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) **S. Ct. Civ. No. 2011-0029**
) Re: Super. Ct. Civ. No. 346/2010
)
)
)

On Petition for Writ of Mandamus
Considered and Filed: May 18, 2011

BEFORE: RHYS S. HODGE, Chief Justice; **MARIA M. CABRET**, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

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St. Thomas, U.S.V.I.
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Attorney for Respondent Four Winds Plaza Corp.

OPINION OF THE COURT

PER CURIAM.

THIS MATTER is before the Court on a petition for writ of mandamus filed with this Court by the Government of the Virgin Islands on April 13, 2011, as well as the May 11, 2011 answer filed by the Nominal Respondent, a sitting judge of the Superior Court of the Virgin Islands, a May 9, 2011 opposition filed by Four Winds Plaza Corporation, the defendant in the

underlying Superior Court matter, and the Government's May 18, 2011 reply. For the reasons that follow, this Court grants the Government's petition and shall issue a writ of mandamus directing the Nominal Respondent to immediately issue an order either granting the Government's motion to vest title pursuant to section 421(a) of title 28 of the Virgin Islands Code or explaining why the requirements of section 421(a) have not been met.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2010, the Government filed a declaration of taking in the Superior Court, which was signed by the Governor of the Virgin Islands and stated that, pursuant to section 421 of title 28, the Government would immediately acquire a public utility easement on Parcel No. 392 Estate Anna's Retreat, No. 1 New Quarter, St. Thomas, U.S. Virgin Islands in order to facilitate construction of the St. Thomas Regional Library. In addition, the declaration of taking stated that \$9,917.36 represented just compensation for the property taken, and that a rounded-down sum of \$9,900.00 was deposited with the Superior Court along with the filing of the declaration. After the Nominal Respondent took no action with respect to the declaration, on July 30, 2010 the Government filed a motion for an order vesting title and to serve any unknown owners of the property by publication. The Superior Court, in a September 20, 2010 Order, denied the motion for service by publication without prejudice, but did not rule on the Government's motion for an order vesting title.

On September 20, 2010, the Government filed a "Second Expedited Motion for an Order Vesting Title." In this motion, the Government stated that its declaration of taking had been brought pursuant to section 421, and that the declaration had been filed because construction on the St. Thomas Regional Library had stopped on June 15, 2010 because the Government lacked authority to access Parcel No. 392 in order to install potable water and sanitary waste lines. In

addition, the Government's motion stated that its agreement with the contractor hired to construct the library requires payment of a daily penalty if construction is halted for any reason not attributable to the contractor, and that the cost of the penalty was far greater than the value of the public utility easement. The Government's motion concluded by requesting that the Nominal Respondent expeditiously issue an order vesting title in order to prevent the Government from incurring additional penalties. On September 24, 2010, the Government filed an amended motion for service by publication, and on October 26, 2010 Four Winds filed an answer and an opposition to the motion for order vesting title. In addition, the Government filed an "Amended Expedited Motion for Order Vesting Title" on October 28, 2010. The Nominal Respondent, however, took no action with respect to any of these filings. Thus, on January 11, 2011, the Government filed a "Renewed Amended Expedited Motion for Order Vesting Title."

Finally, on February 15, 2011, the Nominal Respondent entered an order allowing the Government to serve any unknown owners by publication. The Nominal Respondent, however, still failed to rule on any of the motions for an order vesting title. On April 13, 2011, the Government filed a petition for writ of mandamus with this Court, which requested that this Court issue a writ directing the Superior Court to issue an order vesting title because section 421 provides that "[u]pon *the filing* of [a] declaration of taking and deposit in the court . . . title to the property in fee simple absolute, or such less estate or interest therein as is specified in said declaration, *shall vest* in the Government of the Virgin Islands" 28 V.I.C. § 421(a) (emphases added). In other words, the Government contends that the Nominal Respondent is mandated to issue an order vesting title if the Government has complied with the requirements of section 421. This Court, in an April 20, 2011 Order, authorized the Nominal Respondent and Four Winds to file an answer to the Government's petition.

On April 26, 2011, the Nominal Respondent issued an order in the underlying Superior Court litigation requiring the Government to file proof of service by publication on or before May 2, 2011. Moreover, the April 26, 2011 Order stated that Rule 71.1 of the Federal Rules of Civil Procedure is applicable to the instant proceeding, and that the Government was responsible for the delays in the underlying litigation due to its failure to file proof of service by publication with the Superior Court. In their respective filings in this matter, both Four Winds and the Nominal Respondent re-iterated their argument that the Federal Rules of Civil Procedure apply to the underlying Superior Court matter. However, in his May 11, 2011 answer, the Nominal Respondent further elaborated that Rule 71A (now Rule 71.1) of the Federal Rules of Civil Procedure is applicable to all condemnation actions pursuant to section 416(b) of title 28, and that “[i]t would be a dereliction of duty . . . to sign an order vesting title to the real property when [the Nominal Respondent] has no proof that service by publication has been made on the unknown owners and all others claiming an interest in the real property.” The Nominal Respondent further stated that “[w]hen the statutorily required procedures have been met, [he] will consider the Government’s Motion for an Order Vesting Title.” (Ans. 6-7.)

In its May 18, 2011 reply, the Government concedes that Rule 71.1 applies to the underlying proceeding, but states that nothing in Rule 71.1 or any other provision of title 28 conditions issuance of an order vesting title pursuant to section 421(a) on service by publication. Rather, the Government contends that Rule 71.1 merely provides “that until all appropriate known parties are added to the action, a just compensation hearing may not be held.” (Resp. 2.) In other words, it is the Government’s position that “[s]ervice by [p]ublication has no bearing on whether the trial court will issue an Order Vesting Title pursuant to section 421(a) of Title 28 of the Virgin Islands [Code].” (*Id.*)

II. DISCUSSION

Pursuant to title 4, section 32(b) of the Virgin Islands Code, this Court has jurisdiction over original proceedings for mandamus. However, a writ of mandamus is a drastic remedy which should be granted only in extraordinary circumstances. *In re LeBlanc*, 49 V.I. 508, 516 (V.I. 2008)). To obtain a writ of mandamus, the Government must establish that its right to the writ is clear and indisputable and that it has no other adequate means to attain the desired relief. *Id.* at 517. Furthermore, “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367, 380-81, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). For the reasons that follow, we hold that the Government has met its burden of demonstrating that it is entitled to mandamus relief.

A. The Government Possesses No Adequate Means, Other than a Writ of Mandamus, to Obtain the Desired Relief

It is well established that petitions for writ of mandamus cannot substitute for the regular appeals process. *See LeBlanc*, 49 V.I. at 517 (quoting *Cheney*, 542 U.S. at 380-81). Accordingly, “a petitioner cannot claim the lack of other means to relief, if an appeal taken in due course after entry of a final judgment would provide an adequate alternative to review by mandamus.” *Id.* (quoting *In re Briscoe*, 448 F.2d 201, 212 (3d Cir. 2001)). Moreover, “[w]here there are practical avenues for seeking relief that are untried, this Court will ordinarily deny a petition for mandamus.” *Id.* (quoting *In re Patenaude*, 210 F.2d 135, 141 (3d Cir. 2000)). As a threshold matter, we note that the breach of ministerial duty the Government alleges in its petition is one that, by its very nature, this Court cannot adequately review on direct appeal. *See In re Elliot*, S.Ct Civ. No. 2010-0004, 2010 WL 4962814, at *2 (V.I. Sept. 24, 2010). Both the

Nominal Respondent and Four Winds, however, contend that an alternate means of obtaining the requested relief exists, in that the Government can submit proof of service by publication pursuant to Rule 71.1 as mandated by the Nominal Respondent's April 26, 2011 Order.

We disagree. Importantly, we note that unlike the circumstances presented in *Elliot*, the Government is not merely alleging that the Nominal Respondent has a ministerial duty to timely rule on its motions, but that the Nominal Respondent possesses a ministerial duty to immediately grant those motions and issue an order vesting title if the requirements of section 421 have been met. In other words, the Government is, in part, seeking mandamus on the basis that conditioning an order vesting title on submission of proof of service by publication is itself a breach of the Nominal Respondent's ministerial duty. Moreover, the Nominal Respondent's answer only states that he will "consider" the motions after proof of service by publication is filed, that the Nominal Respondent "must ensure that the substantive and procedural requirements are fully complied with before he signs an order vesting title in the Government," and that this is required by due process. (Ans. 7-9 (emphasis in original).) Given this broad statement, it is possible that, even if proof of service is submitted, the Nominal Respondent may impose additional conditions on the Government beyond those enumerated in section 421. Finally, this Court also cannot ignore the delays in the underlying Superior Court matter, such as the nearly five months that passed between the filing of the Government's amended motion for service by publication and the Nominal Respondent's order authorizing service by publication. Accordingly, we hold that the Government has met its burden of establishing that it has no other adequate means to obtain its desired relief other than through a writ of mandamus.

B. The Government Possesses a Clear and Indisputable Right to Have the Superior Court Enter an Order Vesting Title Pursuant to 28 V.I.C. § 421, Conditioned Only on its Compliance with the Terms of Section 421(a)

“A party possesses a ‘clear and indisputable’ right when the relief sought constitutes a ‘specific, ministerial act, devoid of the exercise of judgment or discretion.’” *In re People*, 51 V.I. 374, 387 (V.I. 2009), *cert. denied*, No. 09-3492, slip op. at 1 (3d Cir. 2009) (quoting *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997)). According to the Government, section 421 of title 28 mandates that the Nominal Respondent issue an order vesting title. This provision provides, in pertinent part, as follows:

Notwithstanding the provisions of sections 415 or 420 of this chapter, in any proceeding . . . for the condemnation of any property or any permanent or temporary interest or easement therein, the Government of the United States Virgin Islands . . . may file in the cause, with the petition or any time before judgment, a declaration of taking for the acquisition and physical delivery of the property sought to be condemned, signed by the person or entity empowered by law to acquire the property described in the petition. Said declaration of taking and physical delivery shall contain or have annexed thereto:

- (1) A statement of the authority under which and the public use for which said property is taken.
- (2) A description of the property taken sufficient for the identification thereof.
- (3) A statement of the estate or interest in the property taken for public use.
- (4) A plan of the property taken, in cases where the property can be so represented.
- (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the property taken.

Upon the filing of said declaration of taking and deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the property in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the Government of the United States Virgin Islands, or in the department, agency, bureau or instrumentality thereof, which may have been authorized to seek the condemnation, and such property shall be deemed condemned and taken for the use of the Government of the United States Virgin Islands . . . and the right to just compensation for the same shall vest in the persons entitled thereto. . . .

28 V.I.C. § 421(a) (emphases added).

We agree with the Government that, pursuant to the plain text of section 421, it has

possessed a clear and indisputable right to immediately receive an order vesting title ever since it filed its declaration of taking and deposited estimated just compensation, provided that the requirements of section 421(a) were satisfied. Although the Nominal Respondent is correct that “[e]xcept as provided in this chapter, the procedure in [condemnation] actions is governed by Rule 71A of the Federal Rules of Civil Procedure,” 28 V.I.C. § 416(b), section 421—by its own terms—mandates that title vest in the Government immediately “[u]pon the filing of said declaration of taking and deposit in the court,” 28 V.I.C. § 421(a), without listing service as a prerequisite to the vesting of title. Importantly, section 421(a) only concerns transfer of title prior to final judgment, and thus the Government would remain required to serve the appropriate parties pursuant to applicable procedural rules. Moreover, other provisions in section 421 provide the Superior Court with discretion over other matters, such as when a party in possession of the property would be required to surrender possession to the Government. *See, e.g.*, 28 V.I.C. § 421(c). Finally, we note that there is nothing in section 421 that would prohibit a party, once served, from challenging the legality of any transfer of title effectuated pursuant to section 421(a). *See, e.g., Gov’t v. Approx. 21.5969 Acres of Land*, 47 V.I. 356, 368-72 (V.I. Super. Ct. 2006) (holding a “quick take” null and void for various constitutional and statutory violations). Consequently, we hold that, to the extent the Government (1) filed a declaration of taking that contains the materials enumerated in section 421(a)(1)-(5), and (2) actually deposited the estimated just compensation in the manner required by section 421(a); the Government is entitled an order vesting title *nunc pro tunc* to the date those requirements were satisfied, without entry of that order being conditioned on compliance with Rule 71.1 or any other requirements.

C. A Writ of Mandamus is Appropriate Under the Circumstances

Although the Government has met its burden of showing that there is no other adequate

means to obtain the relief sought and that its right to that relief is clear and indisputable, the decision to issue a writ of mandamus nevertheless rests in the discretion of this Court. *See LeBlanc*, 49 V.I. at 517. “To determine whether a writ of mandamus is appropriate under the circumstances, we consider factors including, but not limited to, the public interest, the importance or unimportance of the question presented, and equity and justice.” *In re People*, 51 V.I. at 393 (collecting cases).

Applying this standard, this Court finds that mandamus relief is appropriate in this case. Because the clear legislative purpose in enacting section 421 is to establish a “quick take” procedure where title passes to the Government immediately upon filing of a declaration of taking and depositing of estimated just compensation, issuing a writ of mandamus would effectuate the intent of the Legislature. *See Elliot*, 2010 WL 4962814, at *4. Moreover, if the representations in the Government’s September 20, 2010 motion are accurate, a decision not to issue a writ of mandamus would cause the Government to continue to incur additional daily penalties, which would certainly not further the public interest. Therefore, this Court exercises its discretion to grant the Government’s petition for writ of mandamus.¹

III. CONCLUSION

Because of the nature of the Nominal Respondent’s breach of duty, the Government does not have an adequate means of obtaining redress other than through a petition for writ of mandamus. Additionally, the Government has met its burden of demonstrating that it has a clear and indisputable right to have the Nominal Respondent issue an order vesting title if the

¹ In his answer, the Nominal Respondent contends that “the Government should be sanctioned for filing the petition for writ of mandamus because such action was disingenuous,” since “it filed the Petition as if it had satisfied all of the procedural requirements to take the real property by eminent domain. . . .” (Ans. at 10.) However, in light of this Court’s decision to grant the Government’s petition, this Court finds that sanctions are clearly not warranted in this matter.

requirements of section 421(a) have been met, without regard to whether the Government has yet effectuated service on any known or unknown owners. Accordingly, because the public interest and other considerations strongly support mandamus relief, this Court will issue a writ of mandamus directing the Nominal Respondent to immediately review the Government's declaration of taking and related documents to determine (1) if the declaration of taking contains the materials enumerated in section 421(a)(1)-(5), and (2) if the Government actually deposited the estimated just compensation in the manner required by section 421(a); and, within fourteen days of entry of this Opinion, to issue an order either vesting title pursuant to section 421(a) or explaining how the Government has not met these requirements.

Dated this 18th day of May, 2011.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court