

Not for Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: THE BANK OF NOVA SCOTIA,
Petitioner.

)
) **S. Ct. Civ. No. 2013-0033**
) Re: Super. Ct. Civ. No. 82/2010 (STT)
)
)
)

On Petition for Writ of Mandamus

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

ATTORNEYS:

Matthew J. Duensing, Esq.
Law Offices of Duensing, Casner, Dollison & Fitzsimmons
St. Thomas, U.S.V.I.
Attorney for Petitioner.

OPINION OF THE COURT

PER CURIAM.

This matter is before the Court on a petition for writ of mandamus filed by The Bank of Nova Scotia, which requests that this Court direct the Nominal Respondent—the Superior Court judge presiding over *The Bank of Nova Scotia v. Thomas, et al.*, Super. Ct. Civ. No. 82/2010 (STT)—“to [either] rule on [its] pending proposed Judgment and Order of Foreclosure or explain why the requirements of FED. R. CIV. P. 55 and Title 28, Section 531 of the Virgin Islands Code have not been met.” (Pet. 1.) For the reasons that follow, we deny the petition.

I. PROCEDURAL HISTORY

On February 12, 2010, the Bank filed an action for debt and foreclosure of real property against Richard and Kenneth Thomas, who mortgaged real property that they owned as tenants-in-common. When Kenneth failed to respond to the complaint, the Clerk of the Superior Court

entered his default on March 25, 2011. Although Richard timely filed an answer through his counsel, he died while the litigation remained ongoing. Upon discovering that Richard was deceased and a probate estate not yet opened, the Bank moved to amend the complaint to identify his unknown heirs as defendants, which the Superior Court ultimately granted. The Bank completed service of the unknown heirs by publication on October 22, 2012, and when none appeared in the action the Clerk of the Superior Court entered their default on December 13, 2012. A little over one month later, the Bank filed a motion for a default judgment against Kenneth, as well as Richard's unknown heirs.

The Nominal Respondent held a hearing on the Bank's motion on March 15, 2013. At the hearing, Richard's former attorney appeared and stated that, other than Kenneth, Richard had two surviving heirs: an 82-year old woman who did not appear because she was "very, very ill," (Tr. 9, 19), and the other a minor who "labor[s] under a mental handicap," "has no individual capacity to comprehend these proceedings," and "would necessitate the appointment of a guardian" were he to "appear before this Court." (Tr. 16.) After considering arguments from the Bank, the Nominal Respondent announced that he would defer a decision as to the propriety of entering a default judgment against the allegedly handicapped minor. (Tr. 26-27.) On April 10, 2013, the Nominal Respondent memorialized that decision in a written order. Two weeks later, the Bank filed its petition for writ of mandamus with this Court.

II. JURISDICTION AND LEGAL STANDARD

This Court possesses jurisdiction over original proceedings for extraordinary writs, such as a writ of mandamus. *See* 4 V.I.C. § 32(b). To obtain a writ of mandamus, "a petitioner must establish that it has no other adequate means to attain the desired relief and that its right to the writ is clear and indisputable." *In re People of the V.I.*, 51 V.I. 374, 382 (V.I. 2009) (citing *In re*

LeBlanc, 49 V.I. 508, 517 (V.I. 2008)). However, “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.” *In re Joseph*, S. Ct. Civ. No. 2013-0015, 2013 WL 1401217, at *3 (V.I. Apr. 5, 2013) (unpublished) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004)).

III. DISCUSSION

“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 Elliot*, 54 V.I. 423, 429 (V.I. 2010) (quoting *In re People*, 51 V.I. at 387). Given the language in its petition, it is not fully clear whether the Bank seeks an order requiring the Nominal Respondent to grant its motion for default judgment, or to merely issue a ruling. To the extent the Bank requests this Court to compel the Nominal Respondent to grant its motion, the first prerequisite for mandamus relief is not satisfied, for if the Nominal Respondent ultimately denies its motion, the Bank may appeal that decision to this Court upon entry of a final judgment. *See In re LeBlanc*, 49 V.I. at 517 (“[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.”) (quoting *In re Briscoe*, 448 F.3d 201, 212 (3d Cir. 2006)).

If, as we suspect, the Bank simply requests a ruling on its motion, the ordinary appeals process would not represent a practical avenue for obtaining comparable relief, since a failure to rule—by its very nature—“would preclude entry of an appealable final judgment” that is a prerequisite to an eventual direct appeal. *In re Elliot*, 54 V.I. at 428. However, “not all failures to rule, even if for an extended period of time, qualify for mandamus relief.” *In re Fleming*, 56 V.I. 460, 465 (V.I. 2012). Rather, since “the manner in which a court disposes of cases on its

docket is within its discretion,’ a trial court’s delay in ruling on a motion will generally not warrant mandamus relief” unless its “undue delay is tantamount to a failure to exercise jurisdiction.”” *In re Elliot*, 54 V.I. at 429 (quoting *In re Robinson*, 336 Fed. Appx. 171, 172 (3d Cir. 2009)).

Here, we cannot say that the Nominal Respondent has engaged in any undue delay, let alone failed to exercise jurisdiction. The Nominal Respondent held a hearing on the motion for default judgment within two months of the date the Bank filed the motion with the Superior Court. Upon being advised, for the first time, that one of Richard’s heirs may be a mentally handicapped minor, the Nominal Respondent clearly struggled with the implications of this information—including whether he could even rely on the unsworn representations of Richard’s former attorney¹—and concluded that an immediate oral ruling from the bench was not appropriate. And the Nominal Respondent’s representations at the conclusion of the March 15, 2013 hearing, as well as those in the April 10, 2013 Order, clearly demonstrate that he intends to rule on the Bank’s motion. In light of these circumstances, we cannot say that the Nominal Respondent has breached his duty to rule on the Bank’s motion within a reasonable time. *See In re Elliot*, 54 V.I. at 430 (noting that, in the failure to rule context, “[e]ach situation must be considered on its own facts,’ with this Court giving primary consideration to the reason for the delay.”) (quoting *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990)).

IV. CONCLUSION

For the foregoing reasons, we hold that the Bank failed to meet its burden of establishing

¹ Shortly before adjourning the hearing, the Nominal Respondent, alluding to this Court’s decision in *Henry v. Denny*, 55 V.I. 986, 994 (V.I. 2011), noted that “the V.I. Supreme Court has said the statements of counsel made in argument are not evidence.” (Tr. 25.) Because the issue is not properly before us in this original proceeding, we express no opinion as to whether the Nominal Respondent could consider the unsworn representations of Richard’s former attorney.

its entitlement to a writ of mandamus. Accordingly, we deny its petition.

Dated this 13th day of September, 2013.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court