

Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SONIA BRIGHT,)
)
 Appellant/Plaintiff,) **S. Ct. Civ. No. 2007-080**
) Re: Super. Ct. Civ. No. 506/2004
 v.)
)
 UNITED CORP., d/b/a PLAZA EXTRA,)
)
 Appellee/Defendant.)
)
 _____)

On Appeal from the Superior Court of the Virgin Islands
Considered and Filed: January 28, 2009

BEFORE: **RHYS S. HODGE**, Chief Justice; and **IVE ARLINGTON SWAN**, Associate Justice; and **EDGAR D. ROSS**, Designated Justice.¹

ORDER OF THE COURT

PER CURIAM.

THIS MATTER is before the Court on the January 9, 2009 Motion for Recall and Stay of Mandate Pending Application of Writ of Certiorari filed by Appellee United Corporation d/b/a Plaza Extra (“Plaza”). In an opinion and accompanying order entered on July 22, 2008, this Court vacated the Superior Court’s order granting summary judgment to Plaza and remanded the matter for trial. This Court issued its mandate on October 23, 2008. On October 19, 2008, Plaza timely filed a petition for writ of certiorari with the United States Court of Appeals for the Third

¹ Associate Justice Maria M. Cabret is recused from this matter. Designated Justice Edgar D. Ross, a retired judge of the Superior Court, has been designated in her place pursuant to title 4, section 24(a) of the Virgin Islands Code. However, having returned to private practice during pendency of this motion for recall and stay of mandate matter, Designated Justice Ross took no part in the decision herein.

Circuit (“Third Circuit”).² On November 12, 2008, the Superior Court denied Plaza’s motion for a stay of proceedings pending disposition of its petition for writ of certiorari. In its January 9, 2009 motion before this Court, Plaza requests a recall of our October 23, 2008 mandate and, upon re-assumption of jurisdiction from the Superior Court, a stay of the trial court proceedings.

A mandate brings the proceedings in a case on appeal to a close and removes it from the jurisdiction of the appellate court, returning it to the trial court. *See United States v. Riviera*, 844 F.2d 916, 921 (2d Cir. 1988); *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 591 S.E.2d 728, 734 (W.Va. 2003). Once an appellate court has issued its mandate in a matter, it lacks jurisdiction to consider subsequently filed motions or requests. *See Pacific Amusement, Inc. v. Villanueva*, 2006 MP 8, 2006 WL 995292, at *10 (N. Mar. I. 2006). Although this Court’s Rules of Appellate Procedure are silent as to whether and how a mandate may be recalled after its issuance, the United States Supreme Court has held that “courts of appeals . . . have an inherent power to recall their mandates,” but “[i]n light of the ‘profound interests in repose’ attaching to the mandate of a court of appeals . . . the power can be exercised *only in extraordinary circumstances*,” and “is one of last resort, to be held in reserve against *grave, unforeseen contingencies*.” *Calderon v. Thompson*, 523 U.S. 538, 549-50, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (quoting 16C Charles A. Wright et al., *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)) (emphasis added). Courts have interpreted “extraordinary circumstances” and “grave, unforeseen contingencies” to include clerical errors, *Kinnear-Weed Corp. v. Humble Oil*, 296 F.2d 215, 215 (5th Cir. 1961), judicial misconduct or fraud on the court, *Cord v. Smith*, 370 F.2d 418, 423 (9th Cir. 1966), and avoidance of an unconscionable injustice. *Pacific*

² Pursuant to Third Circuit Local Rule 112.2, a petition for writ of certiorari must be filed “within sixty (60) days from the entry of judgment sought to be reviewed on the docket of the Supreme Court of the Virgin Islands.” However, the Third Circuit granted Plaza an extension of time to file its petition until October 20, 2008.

Amusement, Inc., 2006 MP 8, 2006 WL 995292, at *10.

We find that extraordinary circumstances are not present here. Plaza's sole reason for a recall of this Court's mandate is that recalling the mandate would enable this Court to consider Plaza's motion for a stay of mandate pending application for certiorari. However, this Court's issuance of a mandate is not an "unforeseen contingency." Supreme Court Rule 32(a) expressly states that this Court shall issue its mandate at least twenty-one days after entry of judgment, and that application for a writ of certiorari to the Third Circuit does not automatically stay issuance of the mandate. Here, this Court entered its judgment on July 22, 2008, and issued its mandate on October 23, 2008. Although aware that this Court could, in the absence of a petition for rehearing, issue its mandate at any time after twenty-one days from entry of judgment had elapsed, Plaza made no attempt to stay this Court's mandate until January 9, 2009, more than five months after entry of the July 22, 2008 judgment and two months after the mandate was actually issued.³ Because Plaza's dilatory conduct does not constitute extraordinary circumstances and Plaza has failed to otherwise explain how a recall of mandate will result in an unconscionable injustice, it is hereby

ORDERED that Plaza's Motion for Recall of Mandate and Stay of Mandate Pending Application of Writ of Certiorari is **DENIED**; and it is further

ORDERED that copies of this Order be served on the Clerk of the Superior Court and the parties' counsel.

³ This Court notes that Plaza filed with the Superior Court a motion for stay of proceedings pending resolution of petition for certiorari on September 2, 2008. However, unlike Supreme Court Rule 8(b), which requires that a litigant file a motion for stay pending appeal of a Superior Court order with the trial court prior to requesting this Court for a stay, Supreme Court Rule 32(b)—which governs the stay of this Court's mandate—does not require a litigant to first move the Superior Court for a stay. In fact, the Superior Court would lack jurisdiction to stay the issuance of this Court's mandate.

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SO ORDERED this 28th day of January, 2009.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court