

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

LUCAN CORPORATION, INC., d/b/a,)
LUCAN'S GIFT SHOP, LUCILLA) S. Ct. Civ. No. 2007-15
POSADA and RUDOLFO POSADA) Re: Super. Ct. Civ. No. 641-2000
Appellants/Plaintiffs)
v.)
ROBERT L. MERWIN & CO., INC.,)
ROBERT L. MERWIN and COLOMBIA)
EMERALDS INTERNATIONAL)
PROPERTIES, INC.,)
Appellees/Defendants.)
_____)

NOTICE OF ENTRY OF JUDGMENT/ORDER AND MEMORANUM OPINION

TO: Justices of the Supreme Court	Judges of the Superior Court
Eszart A. Wynter, Esquire	Eric S. Chancellor, Esquire
Venetia H. Velazquez, Esquire Clerk of the Supreme Court	Denise D. Abramsen Clerk of the Superior Court
Supreme Court Law Clerks	Ms. Janiese Kelly
Jacqueline Reovan	Arlene Sutton

Please take notice that on January 7, 2008, a(n) **JUDGMENT/ORDER and MEMORANDUM OPINION** dated January 3, 2008, was entered by the Clerk in the above-entitled matter.

Dated: January 7, 2008

VENETIA H. VELÁZQUEZ, ESQ.
Clerk of the Court

By: 
TICEY A. THOMAS
Deputy Clerk II

Not For Publication

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EMERALDS INTERNATIONAL)	
PROPERTIES, INC.)	
)	
Appellees/Defendants.)	

On Appeal from the Superior Court of the Virgin Islands
Considered: September 24, 2007
Filed: January 3, 2008

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

APPEARANCES:

Eszart A. Wynter, Sr., P.C.
St. Croix, U.S.V.I.
Attorney for Appellants

Eric S. Chancellor, Esq.
St. Croix, U.S.V.I.
Attorney for Appellees

JUDGMENT ORDER OF THE COURT

PER CURIAM.

In accordance with the premises considered and the memorandum opinion of even date, it
is hereby

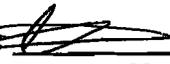
ORDERED that the Order of Dismissal is **DISMISSED** for lack of jurisdiction; and it is further

ORDERED that the denial of the Motion for Reconsideration is **REVERSED** and **REMANDED**; and it is further

ORDERED that copies of this order be directed to the parties.

SO ORDERED this 3rd day of January, 2008.

ATTEST:
VENETIA HARVEY VELAZQUEZ, Esq.
Clerk of the Court

By: 
Deputy Clerk
1/7/08

CERTIFIED A TRUE COPY
Date: January 7, 2008

VENETIA H. VELAZQUEZ
Clerk of the Court
BY: 
Deputy Clerk

Copies (with accompanying memorandum) to:
Justices of the Supreme Court
Judges of the Superior Court
Eszart A. Wynter, Sr., Esq.
Eric S. Chancellor, Esq.
Venetia H. Velazquez, Esq., Clerk of the Supreme Court
Denise D. Abramsen, Clerk of the Superior Court
Supreme Court Law Clerks
Janiese Kelly
Jacqueline Reovan
Arlene Sutton
Order Book
1/7/08
f.l.

Not For Publication

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Eszart A. Wynter, Sr., P.C.

St. Croix, U.S.V.I.

Attorney for Appellants

Eric S. Chancellor, Esq.

St. Croix, U.S.V.I.

Attorney for Appellees

MEMORANDUM OPINION

PER CURIAM.

Appellants Lucan Corporation, Inc. doing business as Lucan's Gift Shop, Lucilla Posada and Rudolfo Posada (collectively "Appellants") challenge the Superior Court order dismissing

their claim for failure to prosecute and the denial of their motion to reconsider the dismissal order. For the reasons stated below, we lack jurisdiction to consider the appeal of the order of dismissal. However, upon consideration of the denial of the motion to reconsider, we reverse and remand.

I. BACKGROUND

Appellants filed suit against Robert L. Merwin & Co., Inc., Robert L. Merwin and Colombia Emeralds International Properties, Inc. (collectively “Appellees”) for breach of contract, fraud and misrepresentation. Following two years of inactivity, the Superior Court, on October 7, 2006, ordered the parties to move the case forward within thirty days, “failing which the matter [would] be dismissed.” (App. at 3.) Neither party responded to the order. Subsequently, on November 28, 2006, the Superior Court dismissed the case for lack of prosecution. A motion for reconsideration of the dismissal was filed on December 14, 2006 by Appellants, and denied as untimely on January 30, 2007, pursuant to LRCi 7.4. Notices of appeal from the dismissal and the denial of the motion to reconsider were filed on February 12, 2007.

II. DISCUSSION

A. Jurisdiction Over the Dismissal

Appellants seek reversal of the Superior Court’s order dismissing the case for lack of prosecution and the order denying the motion for reconsideration of the dismissal order. This Court has jurisdiction over appeals from final Superior Court orders pursuant to V.I. CODE ANN. tit. 4, § 32(a). Timeliness of an appeal is determined by V.I.S.CT.R. 5(a) which provides in part:

(1) In a civil case in which an appeal is permitted by law as of right from the Superior Court to the Supreme Court, the notice of appeal required by Rule 4 shall be filed with the Clerk of the Superior Court within thirty days after the date of entry of the judgment or order appealed from

(4) If any party makes a timely motion of a type specified immediately below within ten days after entry of judgment . . . the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a motion:

(vi) for relief under Fed. R. CIV. P. 60 if the motion is filed within ten days after entry of judgment.

In the instant matter, the trial court entered its dismissal order on November 28, 2006. Appellants' notice of appeal was not filed within thirty days as required under VISCR 5(a)(1). In order to stay the time to file an appeal from that order, Appellants were required to file their motion for reconsideration within ten days. The motion for reconsideration, however, was filed on December 14, 2006, two days too late to stay the time to appeal.¹ Accordingly, Appellants were required to file their notice of appeal of the dismissal by December 28, 2006. Appellants' notice of appeal was filed on February 12, 2007, more than thirty days beyond the deadline. Consequently, this Court lacks jurisdiction to consider the appeal of the dismissal order. *See* VISCR 5(a)(1); *Plant Econ., Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir. 1962) (where a party has not timely appealed the trial court's original rulings, the appellate court has no jurisdiction to entertain an appeal of those rulings).

B. Jurisdiction Over the Motion for Reconsideration

The denial of the motion for reconsideration was entered on January 30, 2007. The notice of appeal from the order denying this relief was timely filed on February 12, 2007, within thirty days as required by VISCR 5(a)(1). Therefore, this Court has jurisdiction to review the denial of the motion for reconsideration but not the underlying motion. *See* VISCR 5(a)(1); *Dickerson v. Board of Educ. of Ford Heights, Ill.*, 32 F.3d 1114 (7th Cir. 1994); *Martinez-McBean v. Gov't of the V.I.*, 562 F.2d 908, 911 (3d Cir. 1977); *Browder v. Dir., Dept. of Dept. of*

¹ When a period of time is less than eleven days, weekends and holidays are not included in the computation of time. Super. Ct. R. 9.

Corrs. Of Ill., 434 U.S. 257, 263 n. 7, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978).

C. The Motion for Reconsideration

The appropriate standard of review for the denial of a motion to reconsider is generally abuse of discretion but, if the trial court's denial was based upon the interpretation or application of a legal precept, then review is plenary. *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3d Cir. 1985). “An appeal from the denial of a motion for reconsideration does not . . . trigger appellate review of the merits of the underlying judgment. Rather, the circumstances of the underlying dismissal are examined for the limited purpose of determining whether there is a substantial danger that the dismissal was fundamentally unjust.” *Dickerson*, 32 F.3d at 1117.

In this case, the trial court denied the motion for reconsideration because the motion was not filed within ten days of the dismissal order as required by Rule 7.4 of the Local Rules of Civil Procedure of the District Court of the Virgin Islands.² While Appellants titled their motion a “Motion for Reconsideration,” and LRCi 7.4 governs motions for reconsideration, the motion itself clearly requested relief pursuant to Rule 60(b)(6). (App. at 11.) “[T]he function of the motion, not the caption, dictates which rule applies.” *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir.1988). We must determine if the “motion for reconsideration” not only possessed all the formal trappings of a Rule 60(b)(6) motion, but served the purpose of the rule as well. *See id.* (“motion not only possessed all the formal trappings of a Rule 59(e) motion, but served the purpose of one as well.”).

Rule 60(b)(6) provides, in pertinent part: “On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any other reason justifying relief from the

² “The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.” Super. Ct. R. 7.

operation of the judgment.” Fed.R.Civ.P. 60(b). The movant must show extraordinary and special circumstances justifying relief under Rule 60(b)(6). *See Page v. Schweiker*, 786 F.2d 150, 158 (3d Cir. 1986). Rule 60(b)(6) relief is not a substitute for appeal. *See Martinez-McBean*, 562 F.2d at 911.

The underlying matter was dismissed for lack of prosecution. Appellants argued in their motion for reconsideration that steps were taken to move the case forward, such as hiring an expert and holding a conference with Appellees’ attorney to discuss settlement and mediation. Appellants admitted that they failed to inform the trial court of this movement, but noted that the order to move the case forward did not order the parties to inform the court of such movement. Appellants’ explanation alleged special circumstances and, therefore, satisfied the formal trappings of a Rule 60(b)(6) motion. A previously undisclosed fact, such as the fact that steps had been taken, must be timely presented if it is to justify reconsideration under Rule 60(b)(6). *See Moolenaar v. Gov’t of Virgin Islands*, 822 F.2d 1342, 1348 (3d Cir. 1987). While determination of whether this excuse qualifies as extraordinary and special circumstances in order to justify Rule 60(b)(6) relief is reserved for the trial court, we are satisfied that Appellants did allege facts sufficient to warrant Rule 60(b)(6) review.

Unlike Rule 7.4 of the Local Rules of Civil Procedure, Rule 60(b)(6) does not apply a ten-day filing requirement, rather it applies a reasonable time standard. *See Fed.R.Civ.P. 60(b)(6); Moolenaar*, 822 F.2d at 1346; *Martinez-McBean*, 562 F.2d at 913. “What constitutes a ‘reasonable time’ under Rule 60(b) is to be decided under the circumstances of each case.” *Delzona Corp. v. Sacks*, 265 F.2d 157, 159 (3d Cir. 1959). A reasonable time determination is reviewed for abuse of discretion. *See Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999). In the instant matter the “motion for reconsideration” was filed sixteen days after the underlying

order was entered. There is no precedent that treats sixteen days as unreasonable. *See Planet Corp. v. Sullivan*, 702 F.2d 123 (7th Cir. 1983) (reasonableness is fact specific); *see Rice v. Ford Motor Co.*, 88 F.3d 914 (11th Cir. 1996) (finding less than thirty days reasonable). The trial court abused its discretion in denying the motion to reconsider as untimely when it was filed just sixteen days after the entry of the underlying order. Because the trial court did not undertake the necessary Rule 60(b)(6) review of the motion for reconsideration, we will vacate the order denying reconsideration and remand this matter for such a review.

III. CONCLUSION

The appeal of the dismissal order will be dismissed for lack of jurisdiction as the appeal was not filed within thirty days of the order, and the motion for reconsideration did not toll the time to file the appeal. The trial court abused its discretion when it applied the ten-day filing requirement in Rule 7.4 of the Local Rules of Civil Procedure to a Rule 60(b)(6) motion. Accordingly, the denial of the motion for reconsideration will be remanded to the trial court for a proper Rule 60(b)(6) review.

ATTEST:

VENETIA HARVEY VELAZQUEZ, Esq.
Clerk of the Court

By: 

1/7/08 Deputy Clerk

CERTIFIED A TRUE COPY

Date: January 7, 2008

VENETIA H. VELAZQUEZ
Clerk of the Court

BY: 

Deputy Clerk