

Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

**JUAN R. CRISTOBAL and GOVERNMENT
OF THE VIRGIN ISLANDS,**
Appellants/Respondents,

v.

MERCHANTS MARKET, LLC,
Appellee/Petitioner.

S. Ct. Civ. No. 2017-0052

Re: Super. Ct. Civ. No. 340/2016 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Michael C. Dunston,

Considered and Filed: June 22, 2018

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

APPEARANCES:

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OPINION OF THE COURT

PER CURIAM.

THIS MATTER is before the Court on a Motion to Dismiss and Strike, filed on August 1, 2017, by Appellee Merchants Market LLC (“Merchants Market”), Oppositions filed by

Appellants Government of the Virgin Islands on August 8, 2017 and by Juan R. Cristobal on August 10, 2017, and Merchants Market's Reply filed on August 15, 2017. Merchants Market argues that this Court lacks jurisdiction over Cristobal's appeal because Cristobal is challenging an interlocutory order that does not fall under any of the statutory exceptions set forth in title 4 section 33 of the Virgin Islands Code, and does not meet the collateral order exception to the final judgment rule. Additionally, while the collateral order doctrine may apply to the Government, Merchants Market argues that the Government did not appeal the order. In response, the Government filed a Motion for Leave to File its Notice of Appeal Out of Time, which Merchants Market opposed.¹ For the foregoing reasons, the Court will deny the Government's Motion and will grant Merchants Market's Motion to Dismiss this appeal for lack of jurisdiction.²

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 2015 Merchants Market terminated Cristobal for insubordination. He filed a wrongful discharge action on October 6, 2015. On December 15, 2015, the Administrative Law Judge ("ALJ") for the Department of Labor ("DOL") issued a Notice of Preliminary Hearing and a Pre-hearing Conference, scheduled for 2:00 p.m. on December 29, 2015 at the Virgin Islands Department of Labor, 2353 Kronprindsens Gade, St. Thomas. Pursuant to 24 V.I.R&R § 77-25

Attendance at this preliminary hearing is mandatory for both the Complainant and the Respondent named in the complaint or a designee... The complaint of any Complainant who fails to appear within (30) minutes of the designated time will be dismissed. Judgement [sic] will be entered against any Respondent who fails to appear within thirty (30) minutes of the designated time unless the Complainant also fails to appear in which the complaint will be dismissed..."

¹ The Government simultaneously filed its Notice of Appeal, sixty-two days out of time. Pursuant to V.I.R.APP.P. 5(a)(3), the Government's deadline to file the Notice of Appeal was June 6, 2017 - 14 days from the date that Cristobal filed his notice of appeal.

² All other motions will be denied as moot.

Cristobal appeared at the scheduled hearing, but Merchants Market did not. The ALJ entered a default judgment against Merchant Market on December 30, 2015. On January 7, 2016, Merchants Market filed a Motion to Reconsider and Vacate the Default Judgment, stating that a miscommunication between its general manager and its in-house counsel resulted in its unintentional failure to appear. By order dated May 18, 2016, the ALJ denied motion, finding that it did not meet the grounds for reconsideration set forth in 24 V.I.R&R. § 77-71.³ Merchants Market then filed a Petition for Writ of Review on June 16, 2016, which was granted on June 20, 2016. The court reversed the default judgment and remanded the matter to the ALJ for further proceedings consistent with the accompanying opinion.

In the opinion, the court found that the DOL erroneously relied upon 24 V.I. R&R § 77-71 to deny Merchants' motion to reconsider a default judgment and should have applied the standard used in judicial proceedings for setting aside a default judgment. The court compared the standards under L.R.Civ.7.3 motion for reconsideration and FED. R. CIV. P. 60(b)⁴ for vacating a default judgment and found that, as a general rule, administrative proceedings must be conducted so as to achieve "substantial justice" as with small claims actions. *See Merchants Market, LLC v. Cristobal*

³ This section provides, in pertinent part:

Motions for Reconsideration will be considered only where based on 1) newly discovered evidence which in the exercise of due diligence could not have been discovered prior to the hearing and which is not merely cumulative and which would probably lead to judgment in the movant's favor or 2) other extraordinary circumstances justifying relief from the operation of the judgement [sic].

⁴The Virgin Islands Rules of Civil Procedure went into effect on March 31, 2017, *see* Promulgation Order No. 2017-0001 (Apr.3, 2017). Thus, to the extent V.I.SUPER.CT.R. 7 (upon which the Superior Court's reliance upon L.R.CIV.P. 7.3 was based) was applicable, it has been repealed, *see* Promulgation Order No. 2017-0001(Apr.3, 2017). Nevertheless, V.I.R.CIV.P. 6.4-b includes all grounds set forth in L.R.CIV.P. 7.3

et al., 2017 WL 1180144, *2 (V.I. Super. Ct. Mar. 24, 2017). The court then extended the “logic and holding of *Spencer v Navarro* [2009 WL 1078144 (V.I. Apr. 8, 2009) (unpublished)]”, (*id.* at *3), to apply to administrative proceedings and, additionally, found that an ALJ must conduct an analysis using the tripartite test when reviewing a motion to set aside a default judgment in an administrative proceeding. The order addressed the third prong of the tripartite test, concluding that Merchants Market’s failure to appear amounted to simple negligence, but did not determine whether the negligence was excusable, nor were there findings of fact concerning whether Merchants Market has a meritorious defense and whether Cristobal would be prejudiced by vacating the default judgment. On May 23, 2017 Cristobal filed a notice of appeal and served Merchants Market and the Virgin Islands Department of Justice.

Although the Government never filed a Notice of Appeal, it did file an Appellant’s Brief on July 5, 2017.⁵ Merchants Market then filed this motion to dismiss for lack of jurisdiction, arguing that the Superior Court’s remand was a non-appealable interlocutory order and this Court does not have jurisdiction pursuant to the collateral order doctrine. Three days later, Merchant’s Market filed its Appellee’s Brief in which it repeats its argument and addresses the merits of the Superior Court’s order.

II. DISCUSSION

“[I]t is well established that ‘remands to administrative agencies are not ordinarily appealable’ as a final judgment on the merits.” *Hard Rock Café v. Lee*, 54 V.I. 622, 627 (V.I. 2011) (quotation and other citations omitted). Additionally, “courts have held that litigants may

⁵ Notably, the Government’s brief cited the joint appendix, which must be prepared by all parties. See V.I.R.APP.P. 24(A). Cristobal filed his brief one day later. Because it was filed out of time, Merchants Market’s Motion to Dismiss also requests that the Court strike Cristobal’s brief.

generally not appeal agency remands pursuant to the collateral order doctrine because in most circumstances the trial court's decision will, at some point, become reviewable on appeal, *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329–30 (D.C.Cir.1989) (collecting cases) However, “most circuits have also made an exception to this blanket rule when it is the ... agency itself that brings an appeal ... because the agency is bound on remand by the standard articulated by the [trial] court and so would not have a chance to appeal from any further judgment, making the [trial] court's determination effectively unreviewable by the agency on remand.” *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 251 (V.I. 2010) (*declined to follow on other grounds, Brooks v. Gov't of the V.I.* 58 V.I. 417, 424 (V.I. 2013)). This exception led to Merchants Market's argument that this Court lacks jurisdiction because (1) the Government did not file a notice of appeal and (2) the collateral order doctrine does not apply to Cristobal's appeal. And this argument led to the Government's Motion for Leave to File its Appeal out of time. Thus, the Court will now consider both issues.

A. The collateral order doctrine does not apply to Cristobal's appeal because it is effectively reviewable after a final order is entered.

While litigants may generally not appeal agency remands, this Court has adopted the collateral order doctrine exception where the trial court remands a matter to an administrative agency based on due process violations. *Hard Rock Café* at 629. In *Hard Rock Café* the Court discussed *AJA Assoc. v. Army Corps of Engineers*, 817 F.2d 1070, 3d Cir 1987, in which the district court determined that the due process rights of a permit applicant were violated by the denial of an Army Corps of Engineers permit without a hearing. The Third Circuit considered the issue resolved to be important because it was

an issue of wide-reaching impact, even though the lower court carefully confined its decision to the facts of this case. The decision opens up for all applicants the

argument, raised after permit denial, that due process requires a hearing in their particular cases. This important decision cannot receive later appellate review. If on remand the Corps grants AJA a permit, the case will never return to the courts. If the Corps again denies the permit after a hearing, judicial review sought by AJA will not allow consideration of the right-to-hearing issue, because the issue will have become moot. We conclude that the appeal presents a final order within the meaning of 28 U.S.C. § 1291 as it has been interpreted in this circuit.

AJA Assoc., 817 F.2d at 1073. While the Superior Court's finding that the ALJ used the wrong standard of review in its consideration of the motion to set aside the default judgment does not implicate the parties' due process rights, this Court has never stated that due process violations are the *only* exception to the lack of jurisdiction over a remand order. Rather, this exception can apply to any important issue that is effectively unreviewable on appeal on the merits.

An order interpreting the Virgin Islands Code judicial standard for small claims cases as applicable to all administrative agencies and requiring all agencies to apply that standard of review when considering whether to set aside a default judgment can potentially have a wide-reaching impact. However, this issue is clearly reviewable on appeal. If Merchants Market appeals an adverse final order, then Cristobal can cross appeal this interlocutory order setting aside this default judgment. If Cristobal appeals an adverse final order, then Cristobal can include this interlocutory order in its appeal. And while the Court recognizes that reviewing this order now may result in an unnecessary administrative procedure being averted,

this alone is insufficient reason to permit review. As the Third Circuit observed in *Bachowski v. Usery*, 545 F.2d 363, 373 (3d Cir. 1976) when dismissing an appeal from a district court order remanding to the Secretary of Labor for further proceedings, "the wisdom of the final judgment rule lies in its insistence that we focus on systemic, as well as particularistic impacts." To reason out to decide the merits of an interlocutory order just because the reversal of an erroneous interlocutory ruling would expedite a particular litigants' case would, in the long run, undermine the final judgment rule and open the door to piecemeal litigation and its concomitant delay, costs, and burdens.

Mall Properties, Inc. v. Marsh, 841 F.2d 440, 443-444 (1st Cir. 1988). Moreover, the Virgin Islands Code provides the clear means for requesting a review of interlocutory orders of this nature. *See* 4 V.I.C. § 33(c). Thus, Cristobal’s appeal does not fall within the collateral order exception to the final judgment rule.

B. The Government does not provide any extenuating circumstances for the Court to waive Virgin Islands Rule of Appellate Procedure 5(a)(3).

As all parties recognize, “Rule 5 is a claims-processing rule—and that we could exercise our discretion to hear [an] untimely appeal, *see Gov’t of the V.I. v. Crooke*, 54 V.I. 237, 254 (V.I. 2010).” However, when an Appellee challenges the timeliness of an appeal, this Court has repeatedly enforced Rule 5, because “relaxing the requirements of Rule 5 under normal circumstances would severely undermine and weaken the rule’s purpose, and diminish society’s legitimate interest in the finality of a judgment that has been perfected by the expiration of the time allowed for direct review.” *Peters v. People* 60 V.I. 479, 484 (V.I. 2014) (citations, internal quotation marks and brackets omitted).

However, the timeliness of an appeal filed pursuant to Rule 5(a)(3) - where another party has already timely filed a notice of appeal - may not present the same concerns related to judicial economy and finality and this Court has not considered waiver of the timeliness requirement set forth in Rule 5(a)(3). In *Matthias v. Superintendent Frackville SCI*, 876 F.3d 462, 4670-473 (3d Cir. 2017), the Third Circuit analyzed the timeliness requirement in Federal Rule of Appellate Procedure 4(a)(3) – which is virtually identical to Virgin Islands Rule of Appellate Procedure

5(a)(3).⁶ After examining its opinions, those of other federal appellate courts, and “the analogous standard of setting aside default judgments” the Third Circuit determined that

the factors informing when waiver of Rule 4(a)(3) is appropriate in the interest of justice, include prejudice, merits, willfulness, and extraordinary circumstance. That is, we ask whether any party will be adversely and unfairly affected if the cross-appeal is not allowed; whether the issues substantially overlap such that severance may be inefficient or create an absurd result; whether good reason exists for the delay in filing; and whether there are extenuating circumstances present in the case that otherwise warrant relief. These considerations, taken as a group, encapsulate the issues courts find most significant when decided whether to waive Rule 4(a)(3) and, applied with diligence, will maintain a high standard that safeguards the orderly and efficient administration of justice while keeping a level focus on fairness.

Because Rule 4(a)(3) is identical to Rule 5(a)(3) the Court finds this analysis persuasive.

See Ottley v. Estate of Bell, 61 V.I. 480, 494 n.10 (V.I. 2014) (“[w]hen statutes from other jurisdictions are substantially similar to a Virgin Islands statute, this Court may look for guidance at how that jurisdiction's courts have interpreted the similar statute.” (citations omitted)).⁷

⁶ Compare FED .R.APP.P. 4(a)(3) (“If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period is later”) to V.I.R.APP.P. 5(a)(3) (“If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by statute or by this Rule, whichever period last expires.”).

⁷ Moreover, this standard reflects the Court’s findings on waiver of the deadline to file a notice of appeal set by Rule 5(a)(4): *See, e.g. Companion Assurance v. Smith* 66 V.I. 562, 571 (V.I. 2017) “Because Companion and Fournier have failed to give any substantial reason why this Court should relax the requirements of . . . Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure, we dismiss this appeal as untimely.” *Simpson v. Golden*, 56 V.I. 272, 279 (V.I. 2012) (“Simpson does not address the timeliness issue, either in his main or reply brief. Therefore, because Simpson failed to appeal his claim on the merits in a timely fashion, any claim that the April 19, 2005 order was invalid is time-barred and we may not consider it”; *Simpson v. Bd. Of Directors of Sapphire Bay Condominiums West*, 62 V.I. 728, 732 (V.I. 2015) (“Because Simpson presented no grounds demonstrating that this is one of those rare cases where this Court should overlook its own rules to hear this appeal, we dismiss Simpson's appeal as untimely.”)

The parties to this case will not be adversely affected by enforcement of Rule 5(a)(3). Moreover, as indicated earlier, the order appealed is interlocutory and, thus, the issue may still be presented in an appeal of the final order. Additionally, the Government only states that it “inadvertently failed to file the notice of appeal” without stating why this shows good cause or excusable neglect to accept this appeal out of time. Mot. to File Not. of Appeal Out of Time at 1. Thus, the question of waiving the 14-day requirement in Rule 5(a)(3) turns on whether there are extenuating circumstances that otherwise warrant relief.⁸

The Government presents no such circumstances. It only states that this Court should grant its motion for leave to file out of time because “the subject matter of the Order on Appeal would instill upon all Virgin Islands Governmental Agencies a new and burdensome standard of review in default actions.” But the Government does not explain this argument. The order appealed does not require consideration of substantial justice prior to entering a default; it only directs the agencies to apply the substantial justice doctrine “when reviewing a motion to set aside a default judgment in an administrative proceeding.” *Merchants Market*, 2017 WL 1180144, at *3. The Government does not discuss how using this new standard would be burdensome when it only applies when deciding pending motions. Based on the foregoing the Government has not shown that, once invoked, this Court should waive the Rule 5(a)(3) timeliness requirement in the interest of justice based on prejudice, merits, willfulness, and extraordinary circumstances.

⁸ In *Matthias*, the Third Circuit waived the timeliness requirement. The court found that the dismissal of the cross appeal as untimely would result in a bar on a successive habeas corpus petition. The Government would not suffer prejudice by opposing the cross-appeal while litigating its own appeal since the claims overlapped. And, at the time, Matthias was proceeding pro se and may not have understood that he would raise issues through a cross appeal. But once counsel was appointed, the newly-appointed counsel promptly filed the cross appeal. Based on these findings, the court found no need to consider extraordinary circumstances and waived Rule 4(a)(3).

III. CONCLUSION

The Government of the Virgin Islands did not file a notice of appeal and has not shown that this Court should accept its notice of appeal 62 days out of time. Moreover, the collateral order doctrine does not apply to Juan Cristobal's appeal of the Superior Court's interlocutory order remanding this case to the administrative judge for further proceedings. Thus, this matter will be dismissed for lack of appellate jurisdiction.

Dated this 22nd day of June 2018.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court