Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

GOURMET GALLERY CROWN BAY, INC., and ZARAKIA SUID, Appellants/Plaintiffs, v. **CROWN BAY MARINA, L.P.,** Appellee/Defendant.	**S. Ct. Civ. No. 2015-0123** Re: Super. Ct. Civ. No. 513/2014(STT)
IN RE: GOURMET GALLERY CROWN BAY, INC., and ZAKARIA SUID Petitioners.	**S. Ct. Civ. No. 2016-0022** Re: Super. Ct. Civ. No. 513/2014 (STT)

On Appeal from the Superior Court of the Virgin Islands and
Petition for Writ of Mandamus

Superior Court Judge: Hon. Denise M. Francois
Considered and Filed: July 24, 2017

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 the April 11, 2016 response filed by Gourmet Gallery Crown Bay, Inc. and Zarakia Suid's (hereinafter "Appellants" or "Petitioners") to the Court's April 6, 2016 Order requiring them to show cause why this appeal should not be dismissed for want of timely prosecution pursuant to V.I.R.APP.P. 35(e)[1] (hereinafter 'Show Cause Brief'). Also before the Court is the April 14, 2016 Response by Crown Bay Marina, L.P. (hereinafter "Crown Bay" or "Appellee") to Appellants' Show Cause Brief. Also before the Court are Crown Bay's Objections to Appellants' Main Brief and Appendix, and Crown Bay's Motion to Reject Oversized Brief, both filed on April 11, 2016.[2]

For the following reasons, the Court will not dismiss this case. The Court will reject Volume V of the Joint Appendix for failure to fully comply with Rules 15 and 24[3] and, for that

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[1] Pursuant to Promulgation Order No. 2017-004, effective March 1, 2017, Rule 1(a) was amended by striking the existing language in its entirety and replacing with:

> "Title and Citation. These rules shall be known as the Virgin Islands Rules of Appellate Procedure and may be cited in short-form as V.I.R.APP.P."

The Promulgation Order also includes several substantive amendments to the Virgin Islands Rules of Appellate Procedure.

[2] On April 19, 2016 the Court granted Appellants' April 11, 2016 and April 15, 2016 motions for permission to respond to Crown Bay's Response to their Show Cause Brief and to Crown Bay's Objections to Appellants' Brief. The Court ordered Appellants to file their responses in "one timely-filed response to Appellee's motion to reject Appellant's brief." Pursuant to V.I.S.CT.R. 21 this response was due on April 25, 2016. On April 26, 2016 Appellants filed an untimely response, without a motion for leave to file an untimely response. Approximately three hours prior to filing that response, appellants filed the Petition for Writ of Mandamus (totaling 26 pages, with 22 exhibits that total 194 pages). As discussed herein, this petition involves non-emergency discovery matters in this case. Accordingly, this response is rejected. Since a lack of response within fourteen days automatically results in a motion being deemed conceded, *see* V.I. R. APP. P. 21, Appellee's April 26, 2016 Motion to Deem Conceded will be granted.

[3] Promulgation Order No. 2017-004 did not affect Appellants' failure to comply with these rules.

reason, will reject Appellants' Brief due to its citations to Volume V. Also, since these matters were not addressed for some time, the Court will also allow Appellants to update their brief.

I. BACKGROUND

Appellants challenge a November 10, 2015 order denying their Motion for a Preliminary Injunction and a November 12, 2015 order denying their motion to put their rent in escrow pending the outcome of the litigation. Appellants filed a Notice of Appeal on December 10, 2015 and filed a Transcript Purchase Order Part I stating that no transcripts were necessary on December 28, 2016. Even though appeals of orders refusing to grant a preliminary injunction must be diligently prosecuted and even though Rule 6(b) requires parties that appeal an interlocutory order to file a motion to expedite the appeal within 14 days, Appellants never did so. Thus, the Court issued its Scheduling Order on December 30, 2015 requiring Appellants to file their Brief and the Joint Appendix on February 8, 2016.

On February 1, 2016, Appellants filed a motion for extension of time requesting forty additional days to file this brief and the joint appendix citing nothing other than counsel's additional work. This motion was granted and Appellants were required to file their brief and the joint appendix on or before March 18, 2016.

On March 11, 2016 Appellants filed another motion for an extension of time requesting three additional weeks in which counsel states that he "expects to be in a position to finalize and file the Joint Appendix by the current deadline of March 18, 2016 … However, Appellants have decided to retain additional counsel… to assist in the analysis of the issues presented by this appeal. . . ." Mot at 1. In light of the significant amount of time they had already been granted, Appellants

were given an additional two weeks and were advised that failure to file the brief and the joint appendix by March 30, 2016 could result in the dismissal of this appeal for failure to prosecute.

On March 23, 2016 Appellants conventionally filed physical copies of a six – volume joint appendix. On March 27, 2016 Appellants filed a Motion to Permit Filing of Oversized Brief. Then, on March 29, 2016 they filed a "Motion . . . to Allow Three (3) Additional Business Days for the Filing of Appellants' Main Brief" in which they promised that "[n]o further requests for enlargement of time will be made, excepting for Acts of God, serious illness, or death." See March 29, 2016 Mot. at 1.

In the April 4, 2016 Order addressing the March 27 and 29, 2016 motions the Court first called Appellants' attention to the fact that their submission of hard copies of a joint appendix does not constitute "filing" the joint appendix as documents are only "filed" with this Court when they are electronically transmitted through VISCEFS to the VIACMS, pursuant to Rule 40.3. The Order next granted Appellants' motion for three additional business days to electronically file their brief and a joint appendix but stated that "[g]iven the amount of time Appellants have been given to brief this appeal, Appellants are advised that their failure to electronically file their brief and the joint appendix by 11:59 p.m. A.S.T. on Monday April 4, 2016 may result in the dismissal of this appeal for failure to prosecute pursuant to Supreme Court Rule 35(e)."

Finally, the Court granted Appellants' Motion to Permit the Filing of an Oversized Brief due to the question regarding this Court's jurisdiction to consider the appeal of the published Memorandum Opinion denying Appellants' motion to put their rent in escrow pending the outcome of the litigation. In light of Appellee's argument that Appellants were attempting to include issues and proceedings that are unrelated to the two interlocutory orders being appealed the Court required "Appellee to fully review Appellants' brief and the joint appendix and file any

objections as to relevance to the issues presented in the Notice of Appeal within seven (7) days of the date that these documents are filed."

Nevertheless, despite this Court's clear Order requiring Appellants to file their brief **and** the joint appendix no later than 11:59 p.m. A.S.T on April 4, 2016, Appellants did not file the entire joint appendix until 10:01 p.m. on April 5, 2016 and they never filed a motion to file the joint appendix out of time.[4] In light of this clear violation of the Court's April 4, 2016 Order, the specific warning that this case could be dismissed for failure to prosecute in the event that Appellants did not comply with the April 4, 2016 Order, and the complete absence of any explanation for this violation, on April 6, 2016, the Court issued a *sua sponte* order requiring Appellants to show cause, on or before April 11, 2016, why this Court should not proceed with the dismissal of this appeal pursuant to Rule 35(e). The Court allowed Crown Bay to respond to Appellant's Show Cause brief on or before April 14, 2016.

Appellants filed two responses to the Show Cause Order. The first being a Motion to Deem the Joint Appendix as Having Been Timely Filed on April 4, 2016 at 11:49 p.m. and the second being the Show Cause Brief which incorporated the motion.[5]

In the Show Cause Brief, Appellants' counsel[6] states that he successfully e-filed the brief around 11:49 p.m., then attempted to e-file the Joint Appendix. He states that "Volumes I-VI of

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[4] Appellants filed Volume V at 12:17 a.m. They filed all other volumes at 10:01 p.m.

[5] On April 19, 2016 the Court denied Appellants' Motion to Deem the Joint Appendix as Having Been Timely Filed.

[6] At all times referenced in this Opinion, Appellants only had one attorney. Subsequently three more attorneys – two of which were from one law firm - filed Notices of Appearance on behalf of Appellants. After that, the three subsequent attorneys filed a Stipulation of Substitution, signed by Appellant Suid, on his own behalf and on behalf of Gourmet Gallery Crown Bay Inc., in which they state that two law firms are sufficient for this appeal.

the Joint Appendix had previously been scanned, and thus had been 'in the system' as of March 25, 2016. Volume VII had also been previously scanned, on or around March 31st, and thus that Volume also was 'in the system' prior to April 4th." Show Cause Br. at 2.[7] Counsel also inexplicably continues to emphasize that his conventional filing of an incomplete joint appendix without a brief – in violation of Rule 24(a) – shows good cause for his violation of the April 4, 2016 order.[8] Finally, he states that the Court's finding that the absence of any page numbers after the first 39 pages of Volume V did not violate Rule 15(a) because "there is a lavender-colored sheet of paper which physically and visually divides those first 39 pages of Volume V from the transcript of the oral argument . . . the pages of which are also clearly and sequentially numbered. All references in the main Brief to the oral argument on August 19th are references to the transcript within Volume V. . . No confusion is realistically likely." Show Cause Br. at 4.

II. DISCUSSION

A. Despite counsel's conduct, the Court will not dismiss this appeal for want of timely prosecution.

First, the Court notes that Appellants' counsel's actions and statements throughout this appeal demonstrate a lack of effort to comply with this Court's rules and Orders. But more specifically regarding the joint appendix, Rule 15(a) clearly states that "[a]ll pages of the joint appendix shall be clearly and sequentially numbered." In other words, if a page is numbered "39" the next page must be numbered "40" and the page after that must be numbered "41" and so forth.

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[7] Appellants provide absolutely no explanation for their statement that these documents were "previously scanned" and "in the system."

[8] "Appellant shall file the appendix with the Clerk of the Supreme Court at the time appellant's briefs are filed." V.I.R.APP.P. 24(a)

Moreover, not only does Rule 24(c) also instruct parties that "[t]he pages of the appendix shall be clearly and sequentially numbered" it specifically states that "the page numbers within the original transcript may **also** appear on the page."(emphasis added).[9]

Nevertheless, despite all the foregoing actions, the Court will not prejudice Appellants by dismissing this case for want of timely prosecution solely due to their counsel's conduct, because they are appealing, *inter alia*, a published opinion that conducted an extensive *Banks* analysis regarding an issue of first impression. Moreover, this is an issue capable of repetition in numerous other cases. However, the Court strongly advises Appellants' counsels to fully comply with all of this Court's rules and Orders in the future. Failure to do so may result in sanctions, including - but not limited to - referral to the Disciplinary Counsel for further investigation. Because this matter will not be dismissed, the Court will reject Volume V of the Joint Appendix and require Appellant to submit a new Volume V that fully complies with Rules 15 and 24.

B. Crown Bay's objections can be addressed by the Rules of Appellate Procedure.

In its April 11, 2016 Objections, Crown Bay advances two objections to Appellants' Brief and the Joint Appendix. It first argues that "the Court should strike any reference to or argument concerning denial of Appellants' motion to deposit rent into the court registry because appeal of that order "is improper as a matter of law under VISCR 5, 4 VIC 33(b) and (c) as well as the Collateral Order Doctrine and the Doctrine of Pendent Appellate Jurisdiction." However, Crown Bay had notice that this Order was being appealed, since it was referenced in – and attached to – the Notice of Appeal. Moreover, this Court had already advised Appellants to fully address its

[9] Appellants point out that Volumes III and IV also only include the transcript page numbers. However, unlike Volume V, those Volumes only include the transcripts. Therefore, those Volumes are, indeed, sequentially numbered.

jurisdiction over the order denying their motion to deposit rent into the court registry. Therefore, Crown Bay should make all arguments regarding jurisdiction in its brief.

Crown Bay also argues that "Appellants' seven volume Appendix contains an extensive record of other civil proceedings involving the same parties that are wholly immaterial to the actual issues presented in this interlocutory appeal" Apr. 11, 2016 Objection at 2. However, Rule 24(d) provides the remedy of sanctions for "any party [that] has unreasonably or vexatiously caused the inclusion of materials in the appendix that are unnecessary for the determination of the issues presented on appeal." Thus, the Court will accept the Appellants' brief totaling no more than 10,800 words[10]- excluding the table of contents, table of authorities and certificates - but will reject the brief filed on April 4, 2016 since the Court is requiring Appellants to renumber Volume V of the Joint Appendix. Both the Amended Brief and the Corrected Volume V of the Joint Appendix must be filed within seven (7) days of the date of entry of this Order.[11] Appellants may also factually and substantively update the brief with any subsequent legal authority, but may not present new legal arguments or any legal authority that was available prior to April 4, 2016.

[10] Pursuant to Promulgation Order 2017-004, Rule of Appellate Procedure 22(f) was amended by striking the phrase "30 pages" and "15 pages" and inserting in their place "7,800 words" and "3,900 words". Prior to this amendment, Appellants had been granted leave to exceed the page limit by 10 pages. Since one page is deemed equivalent to 260 words, (*see* V.I.R.APP.P. 15(h)), the ten additional pages total 2,600 additional words.

[11] Because Appellants now have two attorneys, the Court will not grant any extensions of time unless both can show good cause why neither can comply with this Order. For the purposes of this Order, "good cause" means serious illness, pre-arranged travel, pre-ordered court appearances, personal or family emergency, death or similar circumstances. The Court will not consider a motion for extension of time based on other work or other court deadlines.

C. The petition for writ of mandamus will be denied.

As previously indicated, while this Court was considering whether to dismiss this appeal pursuant to Rule 35(e), Appellants filed an extensive petition for writ of mandamus to direct the Nominal Respondent, the trial judge in this matter, to vacate four discovery orders- three of which were issued over a year prior to this petition- and to require the trial judge to either hold an evidentiary hearing or allow further briefing on the motions resolved in the orders. The first order, issued on April 1, 2015, granted Crown Bay's Motion for Extension of Time to Provide Fact Discovery. The second order, issued on April 22, 2015, denied Appellants' Motion to Vacate the April 1, 2015 Order. The third order, also issued on April 22, 2015, denied Appellants' Motion to Strike Exhibit E to [Crown Bay]'s Opposition to [their] Renewed Motion for Preliminary Injunction and their Motion to Strike Paragraph 15 of the Dennis Kissman Affidavit, Dated February 13, 2015. And the fourth order, issued on January 15, 2016, granted Crown Bay's *ex parte* motion to quash 6 subpoenas and reserved ruling on the other 4 subpoenas. This petition will be denied.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *In re Le Blanc*, 49 V.I. 508, 516 (V.I. 2008) (quoting *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976)). Even if Appellants/Petitioners can demonstrate that their right to a writ is clear and indisputable and that they have no other adequate means to obtain relief, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In Re Le Blanc*, 49 V.I. at 517 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004)). Limiting the granting of a writ of mandamus to extraordinary circumstances "is particularly salient in the discovery context because the courts of appeals cannot afford to become involved with the daily details of discovery[.]" *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir

2011). Thus, courts generally do not exercise mandamus jurisdiction over discovery orders unless there are issues of first impression, judicial usurpation of power, a clear abuse of discretion resulting in a manifest injustice or particularly important interests are at stake. *See* 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §3935.3 (2d ed. 2009).[12] *See also Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) ("[T]he petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context."); *See also, Mohawk Industries, Inc. v. Carpenter* 558 U.S. 100, 111 (2009) ("[I]n extraordinary circumstances – i.e. when a disclosure order amounts to a judicial usurpation of power or a clear abuse of discretion or otherwise works a manifest injustice – a party may petition the court of appeals for a writ of mandamus.") (internal quotation marks omitted). In particular, the mandamus remedy is frequently considered where the discovery orders mandate the disclosure of allegedly privileged information. *See In re City of New York* 607 F.3d 923, 939 (2d Cir. 2010) ("Although we have 'expressed reluctance' to issue writs of mandamus to overturn discovery rulings, we have recognized that when a discovery question 'is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment,'

[12] Like the federal All Writs Act, section 32(b) of title 4 of the Virgin Islands Code provides broadly that this Court has "all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under the laws of the Virgin Islands." 4 V.I.C. § 32(b). "[W]hen the Virgin Islands Legislature models a local statute after a statute adopted by another jurisdiction, 'judicial decisions interpreting [that] statute shall assist this Court in interpreting the same clause found in our local statute,' " and therefore the federal authority relying on the All Writs Act to issue supervisory writs is particularly persuasive in our interpretation of section 32(b). *Haynes*, 61 V.I. at 568 (quoting *People v. Pratt*, 50 V.I. 318, 322 (V.I. 2008)).

mandamus can serve as a legitimate 'escape hatch[ ] from the finality rule.'"); *Westinghouse Elec. Corp. v. Republic of Philippines* 951 F.2d 1414, 1422 (3d Cir. 1991) (Westinghouse's petition falls "within the line of cases recognizing that mandamus may properly be used as a means of immediate appellate review of orders compelling the production of documents claimed to be protected by privilege or other interests in confidentiality. We also hold, however, that mandamus is not the appropriate avenue to review the district court's order upholding the work-product doctrine as applied to the documents the Republic shared with the DOJ. Unlike an order compelling disclosure, the effect of which is irrevocable, an order denying discovery may be reviewed on appeal from the final judgment, and, if erroneous, may be remedied by granting a new trial.") (internal quotation marks omitted); *U.S. ex rel. Chandler v. Cook Cnty.*, 277 F.3d 969, 982 (7th Cir. 2002) ("[T]he circumstances here present the necessary predicate for such an extraordinary [mandamus] remedy. The district court's discovery order implicates regulations protecting the confidentiality and integrity of federally-funded substance abuse programs."); *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987) ("[T]he district court's holding in extending the 'fairness doctrine' to extrajudicial disclosures raises an issue which . . . has not been previously litigated in this Circuit . . . . it went on further to hold that communications between von Bulow and all of his trial and appellate counsel were similarly unprivileged. In our view, mandamus properly lies to review these issues of first impression. ").

Unlike the cases considering whether to grant a writ of mandamus in the discovery context, none of the orders challenged in this matter involve an issue of first impression, nor have Appellants/Petitioners shown that they constitute a judicial usurpation of power, a clear abuse of discretion, or a manifest injustice. The only legal issue presented is "[w]hether the three ex parte Orders . . . are in violation of the Petitioners' Constitutional right to Due Process of law, i.e., the

right to be heard in a timely and meaningful manner."[13] (*See* Petition at 23.) In support of their argument that the trial judge has deprived them of their lives, liberty or property without due process of law, Appellants/Petitioners perfunctorily cite *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), *Armstrong v. Manzo*, 380 U.S. 545 (1965) and *In re Murchison*, 349 U.S. 133 (1955). They do not discuss – and this Court cannot discern - how these cases apply to this matter.[14] Nor can the Court determine how granting a motion for extension of time to provide

[13] The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend XIV § 1; see also Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561, reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 86 (1995) (preceding V.I. CODE ANN. tit. 1). Thus, while Petitioners correctly define "due process of law" the violation of a *constitutional right* to due process of law requires the deprivation of life, liberty or property.

[14] *Mullane c*oncerned the constitutional sufficiency of notice by publication to beneficiaries of a judicial settlement of accounts by the trustee of a common trust fund. As to the Due Process Clause, the Court stated that:

> [m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property be adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
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> In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

339 U.S. at 312-13. In *Armstrong v. Manzo*, the Supreme Court held that the failure of a child's mother and the mother's new husband to notify the child's father of the adoption proceedings deprived the father of due process so as to render the adoption decree constitutionally invalid, stating that "as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies." 380 U.S. at 550. *In re Murchison* concerned the nature of a trial and conviction before a 'one judge grand jury' for contempt of court under Michigan law. As to the constitutional right of due process, the Supreme Court stated that "a fair trial in a fair tribunal is a

discovery, denying a motion to vacate that order, denying a motion to strike exhibits from a motion and paragraphs from an affidavit and granting a motion to quash subpoenas deprived Appellants/Petitioners of their lives, liberty or property. Thus, this Court finds that exercising its jurisdiction to consider a writ of mandamus for these discovery orders is not appropriate under the circumstances of this case.[15]

III. CONCLUSION

Based on the foregoing, the petition for writ of mandamus will be denied. In their appeal, due to Appellants' failure to comply with Rules 15 and 24 the Court will reject the Joint Appendix Volume V and will *sua sponte* reject their Brief due to its citations to Joint Appendix Volume V. The Court will require Appellants to file a corrected Volume V and an amended brief correcting the page numbers cited in the appendix. The Court will also allow Appellants to factually and substantively update the arguments in their brief. The substantive update must only include legal authority issued after April 4, 2016. The brief must comply with the Virgin Islands Rules of Appellate Procedure effective March 1, 2017 and must total no more than 10,400 words exclusive of the table of contents, table of authorities and certifications and cannot include any new arguments. Failure to fully comply with the accompanying Order may result in sanctions imposed upon all of Appellants' counsels.

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basic requirement of due process. Fairness of course requires and absence of actual bias in the trial of cases." *Murchison*, 349 U.S. at 136.

[15] This cannot be construed as a finding that Appellants/Petitioners have established that they have no alternative means to obtain the relief they seek or that they are indisputably entitled to the writ.

Dated this 24th day of July, 2017

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court