IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ENID HENDRICKS,	)
	)
Plaintiff,	) CASE NO. ST-16-CV-147
	)
v.	) Cite as 19 V.I.Super. U___
	)
DENZIL CLYNE,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION

¶1. On August 21, 2018, Mediator David E. Nichols, Esq., filed a Mediation Report indicating that this case was "completely resolved" and informed the Court that "a formal closing would occur on or before November 28, 2018. One of the requirements for closing is the entry of a stipulated judgment to be entered by the Court. [sic] The parties are preparing the necessary documents and shall submit them to the Court." In accordance with the Mediation Report, the Court entered an Order on August 24, 2018, directing the parties to submit a fully executed Stipulation for Dismiss and a proposed Dismissal Order by November 21, 2018, or advise the Court why the parties were unable to do so.

¶2. On November 21, 2018, Plaintiff filed a Motion to Enter Judgment in Accord with Binding Mediation Settlement Agreement, representing that Plaintiff had fully performed or tendered performance of all requirements under the Settlement Agreement, but Defendant had failed to do so. Attached to the motion as an Exhibit was a Mediation Settlement Agreement signed by Plaintiff, Defendant, and counsel for both parties detailing the terms of the settlement reached in mediation, as well as a proposed Consent Judgment for execution by the Court and an Affirmation of Plaintiff's counsel supporting the proposed relief.

¶3. Also on November 21, 2018, Defendant filed a Motion to Rescind and/or Interpret Mediation Settlement Agreement and for Declaratory Relief, contending that the parties had "greatly different interpretations of their Mediation Settlement Agreement" and asking the Court to find that Plaintiff breached or repudiated the Mediation Settlement Agreement, rescind the agreement because of a mutual mistake of the parties, or interpret the agreement. Defendant's motion asserted that "there may[1] indeed have been no 'meeting of the minds' between the parties at all as to...essential terms of the Agreement".

¶4. When the case came on for a motions hearing on November 28, 2018, the Court heard the positions of the parties and directed them to return to mediation by January 15, 2019, in an attempt to resolve their differences without direct involvement by the Court. On January 15, 2019, Mediator Nichols filed another Mediation Report to which he attached a "Supplemental Report to Hendricks/Clyne Mediation" representing that the parties had appeared at the original mediation in good faith, were represented by "experienced and competent counsel", and many issues and options were explored at great length. The Supplemental Report indicated that neither party was under any apparent duress or undue pressure at the original mediation session, neither party requested additional time or expressed the need to review alternate drafts of the agreement, and the agreement was "negotiated at arms length." But, in summarizing the results of the second mediation session, the Mediator indicated, "The January 14, 2019, mediation settlement unfortunately resulted in no new agreement. Many ideas were explored, but no changes could be agreed upon."

¶5. Thereafter, Plaintiff filed a Supplement to Motion to Enter Judgment in Accord with Mediation Settlement Agreement on January 18, 2019, and Defendant filed a Supplement to

[1] (emphasis added).

Motion to Rescind and/or Interpret Mediation Settlement Agreement on January 25, 2019. On January 29, 2019, Plaintiff filed an Opposition to Defendant's Motion to Rescind.

STANDARD

¶6. Mediated settlement agreements, such as the one at issue here, are properly construed as contracts.[2] The Virgin Islands Supreme Court has held that a "mediated settlement agreement is an enforceable contract governed by basic contract principles."[3] "A settlement agreement once entered into, cannot be repudiated by either party and will be summarily enforced. To permit such behavior would undercut the strong policy of encouraging settlement agreements."[4]

¶7. If a contract is unambiguous, the meaning of its terms is a question of law,[5] and "contract construction, that is, the legal operation of the contract, is a question of law."[6] "[W]hen a court interprets a contract, its task is not to reveal the subjective intentions of the parties, but what their words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[7] Where the language of the contract is clear and unambiguous, the parties' intent must be derived from the plain meaning of the contract's terms.[8] [E]xpress language within an agreement that specifies the intent of the parties to limit their terms to the agreement must ultimately be given effect."[9]

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[2] *Govia v. Burnett*, 45 V.I. 235 (Terr. Ct. 2003).
[3] *Boynes v. Transportation Services of St. John, Inc.*, 60 V.I. 453, 459-60 (V.I. 2014) (relying on former Superior Court Rule 40(f)(2) and indicating that a signed mediated settlement agreement "is binding on both parties and one party cannot now refuse to be bound by the Agreement simply because it is no longer deemed beneficial to that party."
[4] *Id.*
[5] *United Corporation v. Tutu Park Limited,* 55 V.I. 702 (V.I. 2011).
[6] *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 624 (V.I. 2017).
[7] *Id.*, at 625.
[8] *Weary v. Long Reef Condo. Ass'n*, 57 V.I. 163, 169-170 (V.I. 2012).
[9] *Phillip*, at 626.

¶8. Under Rule 90(h)(3) of the Virgin Islands Rules of Civil Procedure, "In the event of any breach or failure to perform under the [mediated settlement] agreement, the court upon motion may impose sanctions...or other appropriate remedies, including entry of judgment on the agreement."

ANALYSIS

¶9. Plaintiff's Motion to Enter Judgment represents that she prepared and sent draft documents to Defendant's counsel to conclude the settlement according to the terms of the Mediation Settlement Agreement, but defense counsel insisted on changes or requirements that were not contained in the Agreement and unilaterally imposed pre-conditions to Defendant's performance. According to Plaintiff, Defendant sought to delay closing beyond the date expressed in the Agreement so that Defendant could obtain title to "neighboring" land, which the Court construes as a reference to Parcel 92 Cruz Bay, demanded that Plaintiff stop collecting rent on superficiary structures on that parcel, and refused to cooperate in preparation for and participation in closing, insisting instead that Defendant would file a motion for relief from his obligations or to reform the Agreement.

¶10. Plaintiff claims the Agreement evidenced the parties' "manifestation of mutual assent to the exchange" and cites *Green v. John H. Lewis & Co.*,[10] for the proposition that, "an agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court, and even in the absence of writing." Plaintiff then asserts that "the undisputed facts unequivocally show" that the parties mutually agreed to the terms of the Agreement in writing, with advice of counsel, and that the Mediated Settlement Agreement was based on consideration in the form of mutual agreement to release claims. Attaching the email exchange

[10] 436 F.2d 389, 390 (3rd. Cir. 1970).

between herself and counsel for Defendant, Plaintiff's counsel argues that Defendant changed his mind after the fact and demanded concessions that were never part of the Agreement, and that he cannot do so, citing *Govia* [*v. Burnett*][11] in stating, "Importantly, [Defendant] cannot unilaterally modify the terms of the mediation agreement, because [he] now considers the terms disadvantageous or unsatisfactory."

¶11. The Memorandum of Law submitted in support of Defendant's Motion to Rescind and/or Interpret Mediation Settlement Agreement and for Declaratory Relief contends that the Court possesses authority to grant Defendant the requested relief under the Virgin Islands Declaratory Judgment Act[12] and, alternatively, Rule 60(b)(6) of the Virgin Islands Rules of Civil Procedure. Given the disposition of these motions indicated in this Opinion, the Court does not reach the issue of whether those provisions empower the Court to provide Defendant with the relief he seeks at this stage of the litigation.

¶12. Defendant asks the Court to declare the Agreement invalid for lack of a "meeting of the minds" or to rescind the Agreement due to Plaintiff's anticipatory breach, to order that Defendant not be forced to vacate Parcel 91 until Plaintiff has complied with the Agreement in all respects, to revise the Agreement to require Plaintiff's payment obligations to be recorded against Parcel 91, and to order Plaintiff to stop collecting rent and remove tenants from Parcel 92, claiming that continued rental collections are a breach of the provision of the Agreement prohibiting Plaintiff from interfering with the undertaking of Defendant to purchase that parcel. Defendant characterizes Plaintiff's assertion that she can continue to collect rents from Parcel 92 as an attempt to "have her cake and eat it too" by continuing to claim ownership rights over both parcels, in

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[11] *Supra,* at 242.
[12] 5 V.I.C. § 1261 *et seq.*

breach of the Agreement. Defendant claims that, at a minimum, the Court should interpret the Agreement to find that Defendant's interpretations are more reasonable than Plaintiff's.

¶13. Defendant then presents an extensive recitation of the dealings of the parties and their predecessors in interest, which Defendant characterizes as "a long-standing mutual mistake concerning the ownership of two adjacent parcels of land on St. John...Parcels 91 and 92 Cruz Bay." While useful in understanding the parties' positions and the situation that led to the initiation of this litigation, that history is not determinative of any issues before the Court.

¶14. The Court recognizes that the mediation process is confidential and is loathe to violate that protection, viewing it not only as desirable, but also as essential to the mediation process. The Court was not privy to the positions taken by the parties at the mediation and has no insight into their representations to the mediator except to the extent that the parties have disclosed those arguments in their moving papers. However, in order to determine the issues before it, the Court must necessarily review the Mediated Settlement Agreement and discuss its terms.

¶15. In summary, the Mediated Settlement Agreement requires:

1. [13]Plaintiff to pay Defendant the sum of $475,000 in 10 annual installments of $47,500,
2. Defendant to pay all outstanding property taxes on Parcel 91 Cruz Bay to and including tax year 2018,
3. Defendant to stipulate to the entry of a final judgment in favor of Plaintiff, confirming that she has sole title to Parcel 91 and all improvements thereon free and clear of all claims by Defendant,
4. Defendant to dismiss all claims in Parcel 91 in a form satisfactory to Plaintiff, and pay all applicable recording fees,
5. Plaintiff to execute a quitclaim deed in favor of Defendant to Parcel 92 Cruz Bay, including Plaintiff's rights in all superficiary houses on the parcel, to be held in escrow by the Mediator until Defendant secures title to Parcel 92.

[13] The paragraphs of the Mediated Settlement Agreement, which consists of ten substantive paragraphs, are not numbered.

6. Plaintiff not to interfere with Defendant's purchase of Parcel 92 and not assert a claim for adverse possession to that parcel,
7. Plaintiff to cause tenants on Parcel 92 to remove the encroachment of the superficiary structure on Parcel 92 onto Parcel 91,
8. Plaintiff to forego rent from Defendant for Defendant's use and occupancy of Parcel 91 to the date of closing on the settlement,
9. The parties to deliver the enumerated documents at a closing on or before November 21, 2018,
10. Defendant to vacate Parcel 91 by the closing,
11. Defendant to remove furniture, refrigerators, and all cars on Parcel 91 at or before closing, leaving the premises in the same condition as of the date of the Agreement, and
12. The parties to exchange mutual releases at closing except for obligations under the Agreement and stipulate to the entry of judgment in favor of Plaintiff dismissing all claims against Plaintiff with prejudice, with each party to bear its own attorney's fees and costs.

¶16. Against the framework of the Mediated Settlement Agreement, the Court will examine each of Defendant's contentions in turn. Initially, citing the third paragraph of the Agreement, which reads:

> Defendant shall stipulate to entry of a final judgment in favor of plaintiff, confirming that she has sole title to Parcel 91 Cruz Bay, including full title to all improvements thereof, free and clear of any claim thereto on part of defendant, and dismissing all of defendant's claims in the property at parcel 91, in form satisfactory to plaintiff, and defendant shall pay all applicable recording fees related to recording the aforesaid adjudication[,]

Defendant submits that Plaintiff has breached and repudiated the Agreement by asserting that her 10-year payment obligation for Parcel 91 should not be included in the confirming adjudication to be recorded against title to the Parcel. Defendant contends that he understood that Plaintiff's payment obligation would be recorded on the Parcel 91 title and would run with the land in order to be binding on heirs and transferees of Parcel 91, indicating that the language "embodies the intention to have the adjudication recorded to address all matters covered by the agreement". Defendant also asserts that he "reasonably understood" at the time of the Agreement that security

for the parties' obligations would be covered in the closing documents, referring to the first sentence of paragraph 10 of the Agreement. The tenth paragraph of the Agreement states:

> The parties will exchange mutual releases except for the obligations under this settlement. The parties will submit a stipulation for entry of the judgment in favor of plaintiff, dismissing all claims against plaintiff with prejudice, each party to bear their own legal fees and costs in the litigation, the same to be signed and delivered at closing.

¶17. Defendant indicates that a recording requirement regarding Plaintiff's payment obligation is "the most reasonable interpretation of the MSA language requiring recording of the adjudication on Parcel 91and that the indication that Plaintiff's title would be "free and clear of any claim thereto on the part of defendant" should be understood to include an implied term like "subject to Plaintiff's payment obligation".

¶18. While the Court agrees that the requirement of inclusion of language setting forth the payment obligations of Plaintiff in the judgment would be a reasonable matter for inclusion in a settlement agreement, the Court disagrees that the Agreement here under consideration includes a term indicating Plaintiff is required to stipulate to such a provision. Rather than Defendant's indication of his "reasonable understanding" of what the Agreement implied or, in hindsight, should have included, the Court must be guided by the language of the Agreement itself. The third paragraph of the Agreement recites, exclusively, obligations to be fulfilled by Defendant: (a) to stipulate to entry of a final judgment in favor of Plaintiff confirming that she has sole title to Parcel 91 Cruz Bay and title to all improvements thereon, free and clear of any claim thereto by Defendant, (b) to dismiss all of Defendant's claims in Parcel 91 "in form satisfactory to plaintiff", and (c) to pay all applicable recording fees related to recording the adjudication. Nowhere does the plaint language of third paragraph of the Agreement require Plaintiff to do anything.

¶19. Further, the tenth paragraph speaks to mutual obligations of the parties to exchange releases "except for the obligations under this settlement" and to stipulate to the entry of a judgment in favor of Plaintiff, with each party to bear its own attorney's fees and costs. While this language can reasonably be read to permit inclusion of an exception for Plaintiff's 10-year payment obligations in Defendant's release, it cannot be read to require inclusion of a similar provision in the final judgment or in the dismissal of Defendant's claims.

¶20. Thus, it follows that Plaintiff's refusal to agree to language in the judgment or dismissal of Defendant's claims making them subject to Plaintiff's Parcel 91 payment obligations cannot be a breach or repudiation of a Mediated Settlement Agreement that does not include those terms. Simply put, the Agreement does not require of Plaintiff the concessions Defendant seeks. As a result, Defendant's first argument is unpersuasive.

¶21. Next, relying on the fifth paragraph of the Agreement, which reads, "Plaintiff agrees not to interfere with the undertaking of the Defendant to purchase Parcel 92 from the Estate of Cassilda Battiste, and will not assert any claim of adverse possession to Parcel 92 in connection with Defendant's purchase thereof", Defendant claims that Plaintiff has breached or repudiated the Agreement by refusing to remove the tenants from the superficiary structures on that property. Defendant claims this restricts Clyne's continuation of residential and parking uses contained in Section 6 of his Ground Lease with Battiste because the superficiary structures cover the bulk of the property. Certainly, Plaintiff has agreed not to interfere with "the undertaking of the Defendant to purchase Parcel 92" and to forego any adverse possession claim to that parcel. But, the fifth paragraph of the Agreement makes no reference to the superficiary structures and its language cannot be reasonably read to address them. Nor is specific reference made to any provision of Clyne's Ground Lease with the Battiste Estate which would compel the Court to go beyond the four

corners of the Mediated Settlement Agreement and incorporate Defendant's lease and purchase agreements into the Agreement.

¶22. The only references in the Mediated Settlement Agreement to the superficiary structures are contained in its fourth and sixth paragraphs. The fourth paragraph indicates:

> Plaintiff will execute a quitclaim deed including plaintiff's right to any and all superficiary houses on parcel 92 Cruz Bay, in favor of defendant, which will be delivered to David Nichols to hold in escrow and to deliver to Defendant at such time, if any, as Defendant secures title to Parcel 92 Cruz Bay from the Estate of Cassilda Battiste.

And, the sixth paragraph provides merely, "Plaintiff will arrange to have the encroachment of the superficiary structure on parcel 92 onto parcel 91 removed by the tenants at parcel 92."

¶23. Contrary to the contention of Defendant, both these sections reasonably appear to contemplate the continuation of the superficiary structures on Parcel 92, at least until Defendant obtains title to Parcel 92. This is particularly true because of the provision requiring inclusion of Plaintiff's right to "any and all superficiary houses" as part of her interests being quitclaimed to Defendant regarding Parcel 92. There would be no need for such a provision had the parties agreed that the superficiary structures would be immediately removed. Similarly, there would be no need for Plaintiff to address an encroachment of a superficiary structure upon Parcel 91 if the parties contemplated that the structure would be demolished. Moreover, the Court is persuaded that the parties understood that Defendant's acquisition of title to Parcel 92 was, at a minimum, contingent, since the Agreement provides for escrow of the quitclaim deed until "such time, if any, as Defendant secures title". If immediate destruction of the superficiary structures was anticipated, the parties could have specifically so provided in the Agreement. Nothing in the language of the Agreement requires the Court to conclude the parties so agreed, and Plaintiff represents that she has

prepared and delivered the quitclaim deed as required, such that the Court also cannot find that Plaintiff's refusal to remove the structures is a breach or repudiation of the Agreement.

¶24. Defendant then claims that Plaintiff repudiated the Agreement in emails to Defendant on September 21, 2018, and November 16, 2018, and that those emails constitute anticipatory breaches of the Agreement's terms. This argument is simply a repackaging of those previously rejected by the Court, since the alleged breaches Defendant details are Plaintiff's denial that a recitation of her payment obligations were to be a part of the documents recorded on Parcel 91 and her refusal to remove her tenants or stop collecting rent from the superficiary structures. Defendant again contends that Plaintiff's refusals "interfere with the undertaking of the Defendant to purchase Parcel 92", an argument that the Court finds unpersuasive. After citing cases defining repudiation and its elements, Defendant asserts that "there can be little doubt that Plaintiff's statements in her emails (Exhibit D) constitute an absolute and unequivocal refusal to perform. While the Court agrees with that limited contention, as the Court has explained, Plaintiff's refusal to perform acts that are not required of her under the Agreement does not constitute a repudiation of the Agreement. Thus, emails expressing Plaintiff's lack of any obligation under the Agreement to perform extra-Agreement acts as demanded by Defendant are neither an anticipatory breach or a repudiation of the Agreement.

¶25. Without referring to specific statements in the emails, but citing Plaintiff's "advanced age", Defendant asserts that Plaintiff's emails also "appear to undercut any sense of security that Plaintiff will actually fulfill her payment obligations, contending that Defendant's "suspicion" entitles him to demand assurances of Plaintiff's intent and ability to perform. The Court has read the September 21, 2018, and November 16, 2018, emails and does not draw the same conclusion. While Plaintiff's counsel specifically indicated that the parties had not reached an agreement regarding any mortgage

in favor of Defendant and made a representation that Defendant had not requested a mortgage during mediation, there is no discussion at all of Plaintiff's payment obligations to Defendant. The absence of any reference to the payments militates against a conclusion that Defendant could reasonably draw cause for uncertainty from the emails as alleged.

¶26. Further, a review of the Real Estate Sales Contract reveals that nowhere does it contain any statement that Defendant is entitled to use Parcel 92 until closing on the sale. It is only Defendant's 2005 Ground Lease Agreement that provides a basis for Defendant's contention that he is entitled to use Parcel 92. Assuming the continued validity of that Lease,[14] the terms of these documents add further support to the Court's conclusion that Plaintiff's failure to perform as Defendant demands does not interfere with his "undertaking of Defendant to purchase Parcel 92", since any right Defendant has to use the property until closing is derived not from the Real Estate Sales Contract, but instead from the Ground Lease Agreement, which predated the Sales Contract by several years. While Defendant might argue that Plaintiff's refusal to perform as demanded potentially interferes with this right to use Parcel 92 under the Ground Lease Agreement, the Mediated Settlement Agreement obligates Plaintiff only to refrain from interfering with Defendants "purchase" of Parcel 92, and Plaintiff's emails do not do so.

¶27. Defendant next attempts to avoid this conclusion by positing that, since the Ground Lease Agreement grants him an option to purchase Parcel 92, Plaintiff's collection of rent from the tenants of the superficiary structures violates the Mediated Settlement Agreement because

[14] The Court notes that the term stated in Article 2 of the Ground Lease Agreement ends August 31, 2007, and Article 3 indicates that Clyne has a right to "successive extensions for a period of one (1) years" [sic], subject to approval of the "Territorial Court". Defendant makes no representations concerning the renewal of the Ground Lease Agreement or its approval by the Court. Moreover, the option to purchase in the Ground Lease Agreement expires, among other reasons, upon the expiration or earlier termination of the Lease. Nonetheless, for the purpose of this Opinion the Court assumes that the Ground Lease Agreement is still in effect.

Defendant's right to use the property prior to receiving title is "essential" to the purchase. This argument is undercut by a failure of the parties to make any specific reference to the Ground Lease Agreement in the Mediated Settlement Agreement.

¶28. Again mindful of the confidentiality of mediation discussions, but because Defendant has asked the Court to examine Plaintiff's emails, the Court notes that Plaintiff contends that Defendant said during the course of mediation that he did not need to use Parcel 92 since he had other property he could use for his car rental operation. And, Defendant claims that his construction of a building on Parcel 91 somehow demonstrates that his need to use Parcel 92 is essential to his purchase. Nonetheless, the Court has already determined that the Agreement does not require Plaintiff to remove the superficiary structures or cease collecting rent, and this additional "bootstrapping" argument does not change the Court's conclusion regarding what the Agreement requires. The requirement of the Agreement that Plaintiff deliver a quitclaim deed from escrow "at such time, if any, as Defendant secures title to Parcel 92" and the lack of any specific reference in the Agreement to Defendant's immediate possession of Parcel 92 belie Defendant's contention that his immediate use of Parcel 92 was contemplated in the Agreement.

¶29. Defendant then goes on to contend that Plaintiff's breaches of the Agreement entitle him to terminate the Agreement or suspend his performance under it. The Court having already determined that Plaintiff is not in breach of the Agreement, it follows that Defendant is not entitled to an alternate remedy based upon the "non-breach". The Court declines Defendant's invitation to "find...that the [Agreement] is unenforceable and/or terminated, while requiring the parties to reach a new agreement or continue to trial." Were the Court to adopt the position espoused by Defendant, it would yield an absurd result.

¶30. Thereafter, Defendant expostulates that Plaintiff's alleged breaches infringe on the property rights of the Battiste Estate. In support of this argument, Defendant advances the questionable proposition that the Estate must somehow be "joined" to the Mediated Settlement Agreement "via a renegotiated agreement from the parties' re-mediation of it, or as it may be reformed by the Court", suggesting that all parties affected by a contract must be joined to it under the principle of privity. Curiously, Defendant goes on to state, "Obviously, Battiste is not in privity with either of the parties to the [Agreement] which argues against any interpretation of the agreement that impacts on its property rights in Parcel 92." Defendant then repeats his calls for the Court to rescind the Agreement due to lack of "meeting of the minds" and failure to include appropriate parties. Earlier in this litigation, the Court specifically rejected Defendant's efforts to join the Estate of Cassilda Battiste as a party, and the Court is not persuaded that its prior decision should now be overturned because of a dispute regarding a Mediated Settlement Agreement that the Estate of Cassilda Battist neither signed nor negotiated.

¶31. Applying different clothing to the lack of a "meeting of the minds" line of reasoning, Defendant also urges the Court to rescind the Agreement on the grounds of mutual mistake or unilateral mistake. Defendant first asserts the parties were "mistaken – on both the use of Parcel 92 and the recordation of the payment terms" and that the Court should void the Agreement based on mutual mistake. The Court has already rejected this contention, but it bears repeating that the four corners of the Agreement do not reflect a "mistake" regarding terms that are not contained in it.

¶32. Apparently realizing that fact, Defendant then claims he is entitled to rescission based on his reasonable unilateral mistake regarding his use of Parcel 92 and the need for payment assurances. But, while relying on Section 153 of the Restatement (Second) of Contracts, Defendant fails to demonstrate either that enforcement of the Agreement would be unconscionable or that

Plaintiff had reason to know of the mistake or caused it, as that section requires. Defendant attempts to impute to Plaintiff an understanding that Defendant's continued use of Parcel 92 was somehow essential to the Agreement despite Plaintiff's rejection of Defendant's insistence during the mediation or drafting of the Agreement that such a provision be included. There is no basis for so concluding. And, Defendant's assertion that he will "lose his life savings investment" without the use of Parcel 92 rings hollow given that he has somehow endured a delay of over 8 years in closing on the Real Estate Sale Contract while still operating his business. And, the validity of Defendant's assertion is further eroded by his alleged representation during mediation that he did not need to operate his business on Parcel 92.

¶33. Finally, Defendant turns to general principles of equity, claiming that Plaintiff's unclean hands require deferral of Clyne's obligations under the Agreement "until Plaintiff is in compliance with the [Agreement]. At the risk of being repetitious, the Court has already determined that Plaintiff is in compliance with the Agreement and, therefore, concludes Plaintiff does not have unclean hands.

¶34. Here, Plaintiff conflates the parties' original, longstanding "mutual mistake" with regard to their ownership of the Parcels with a mistake regarding the terms of the Mediated Settlement Agreement. He concedes that Plaintiff "almost certainly did not know the true state of ownership of the two parcels before 2013, but, "for the sake of argument", asserts that, if she did know, her intentional use of the property to Defendant's disadvantage is the wrongful cause of Defendant's error. Nothing in the record suggests that Plaintiff somehow "schemed" to get both parcels for herself. On the contrary, she is required to escrow a quitclaim deed to Parcel 92 at closing. And, the Agreement's recognition of, and prohibition against interference with, Defendant's efforts to obtain Parcel 92 clearly demonstrate otherwise. Nor does the Court accept Defendant's contention

that the duty of good faith and fair dealing somehow requires the Court to look behind a Mediated Settlement Agreement that is clear and unambiguous on its face.

¶35. Contrary to the contention of Defendant, nothing in the language of the Mediation Agreement provides a valid basis for the Court to rescind, reform, or otherwise reject the terms the parties negotiated and placed in an Agreement that both parties and their counsel voluntarily signed. The Court agrees that terms could have been included in the Mediated Settlement Agreement that addressed the objections raised by Defendant and that it would perhaps even have been advisable to do so. However, there is no indication in the record that the parties were under any duress or time pressure to prepare the Mediated Settlement Agreement, or that they prepared it in an incomplete or vague form, particularly since both were represented by able and experienced counsel who were intimately familiar with the history of this dispute and the contentions and rights of the parties. The Agreement is clear and unambiguous, and nothing in its language compels the relief Defendant seeks. Defendant's attempt to have the Court read additional, even if desirable, terms into the Agreement after the fact is not persuasive and flies in the face of the finality intrinsic to mediated settlements.

¶36. In the Supplemental Report submitted with the January 15, 2019, Mediation Report, the Mediator made the following sage observations that eloquently explain the public policy considerations behind the Court's decision:

> In reviewing the Mediated Settlement Agreement (after the passage of several months), and being mindful of all the discussions which culminated in that Agreement, it is clear to the Mediator, for whatever it is worth, that the Agreement is straightforward and free of any ambiguities. It is written in plain English and the intent of the deadlines is clear. The Mediator was not a scribe. Could additional terms have been included or even desirable? Certainly. Always. But in hindsight, were any additional terms essential or fatal to the implementation of the Agreement as contemplated by the parties?

> Inconvenient, perhaps, but doubtfully essential or fatal. Obviously, it will be up to the Court to determine this issue.
>
> That said, the Mediator respectfully submits that the Court is being asked to set a very dangerous precedent. Absent very compelling circumstances, the parties, their counsel, the Court, mediators and the judicial system as a whole need to be able to rely on the finality and enforceability of mediated settlement agreements. The process works and it is very successful. However, it only works if the parties know with certainty that by signing a final agreement, the case really is over. Many parties settle simply to stop the bleeding of runaway fees and expenses, to remove the stress, and most importantly, to obtain closure. The word "closure" is one upon which no dollar value can be placed. Mediators and counsel for the parties need to be able to look the parties in their eyes and assure them that if an agreement is reached, even if it does not make either party particularly happy, then the case will end and all the perjorative adjectives which can be attached to litigation will go away, including importantly stress and the expenditure of additional funds. If post-mediation and post-agreement, either party can change its mind and challenge the final agreement, then those assurances cannot be given in good faith and the promises will be hollow. The process will no longer be trusted and it is a very important process.

Those words express more ably than this Court could why enforcement of the Mediated Settlement Agreement is required in this instance.

¶37. Last, the Court must address Plaintiff's January 18, 2018, Attorney's Affirmation Regarding Fees and Costs seeking recovery of fees and costs incurred in the "post-mediation period". Plaintiff asserts these fees and costs, which include Plaintiff's ½ share of the fees for the second, Court ordered mediation, were incurred "as a result of the defendant's repudiation of the Mediated Settlement Agreement. The Court directed the parties to return to mediation not because of the position taken by either of them, but because they both disagreed on the contents and interpretation of the Mediated Settlement Agreement, and the Court wished to give the parties an opportunity to informally resolve those differences if possible. Although renewed mediation was not effective, it was at the Court's insistence that the parties were compelled to renew negotiation. Under those circumstances, the Court does not believe it fair and equitable to punish Defendant by requiring

him to bear the burden of the entire mediation fee. Similarly, with regard to the other attorney's fees and costs Plaintiff has incurred since the intial mediation, while Defendant's contentions have been rejected by Court, they were merely unpersuasive, not frivolous. Over the course of two and a half years of litigation, both parties have incurred substantial fees and costs. The parties recognized this by including in the Mediated Settlement Agreement a provision that they would bear their own fees and costs. And, while the Court has rejected Defendant's objections to enforcement of the Agreement, the Court does not consider Plaintiff to be a "prevailing party", since this case has been settled. An agreement for both parties to be responsible for their own fees and costs was specifically included in the Mediated Settlement Agreement. While enforcing the other terms of that Agreement, the Court will not simultaneously ignore its "fees and costs" provision through an award to Plaintiff.

¶38. A Judgment and Order consistent with this Opinion shall issue.

Dated: February 8, 2019.

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Clerk of the Court ___/___/_____

by: _____ 2/12/19
Lori Boynes-Tyson
Court Clerk Supervisor ____/____/_____