

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**MIREYA ROBLES,**

**PLAINTIFF,**

**V.**

**OLIVIA JOSEPH; JOHN'S BAR AND  
RESTAURANT; JOHN FREDERICK  
INDIVIDUALLY AND OWNER OF JOHN'S BAR  
AND RESTAURANT,**

**DEFENDANTS.**

**SX-15-CV-348**

**ACTION FOR DAMAGES**

**JURY TRIAL DEMANDED**

**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** came before the Court on Plaintiff Mireya Robles' (hereinafter "Plaintiff") motion for reconsideration of order dismissing complaint, filed on August 29, 2017.

On August 24, 2017, the Court entered a memorandum opinion and order dismissing this matter without prejudice for failure to prosecute. This is a final order because it terminated the litigation. As such, Plaintiff should have moved for relief from a final order rather than for reconsideration.<sup>1</sup> See V.I. R. CIV. P. 6-4(a) ("Except as provided in Rules 59 and 60 relating to final orders or judgments, a party may file a motion asking the court to reconsider its order or decision within 14 days after the entry of the ruling, unless the time is extended by the court.") Accordingly, the Court will treat this instant motion for reconsideration as a motion for relief from a final order.

In her motion, Plaintiff indicated that she moved for reconsideration based on the need to correct clear error. (Motion, p. 1) Plaintiff argued that "[r]ather than dismissing the matter, the Court should have entered default against the defendants because defendants were properly served and have never answered or defended this matter." (Id.) Plaintiff further argued that she filed a

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<sup>1</sup> Plaintiff filed this instant motion within five days from the date of entry of the final order. Thus, the motion is timely whether it is treated as a motion for relief from a final order or a motion for reconsideration.

request for entry of default on March 22, 2017, and under Superior Court Rule 47 “[w]hen defendant did not respond to the Complaint when the request for entry of default [sic], the Court was required to enter a judgment of default.” (Id., at p. 2) Furthermore, Plaintiff asserted that “[t]he Court’s reliance on the case of *Halliday v. Footlocker*, 53 V.I. 505 (V.I. 2010), is misplaced” because unlike the defendants in *Halliday*, the defendants never answered the complaint in this matter. (Id.)

### **1. Motion for Relief from a Final Judgment**

Virgin Islands Rule of Civil Procedure 60(b) governs relief from a final judgment, order, or proceeding, which provides that:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that could not, with reasonable diligence, have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether in a form previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

While “the need to correct clear error” is not one of the grounds specifically listed above, the Court will construe this instant motion as Plaintiff moving for relief from a final order on the ground of mistake under Virgin Islands Rule of Civil Procedure 60(b)(1).

#### **A. Superior Court Rule 47 versus Virgin Islands Rule of Civil Procedure 55**

When Plaintiff filed her request for entry of default on March 22, 2017, Superior Court Rule 47 was in effect and governed request for entry of default. However, Virgin Islands Rules of Civil Procedure went into effect shortly after on March 31, 2017. Virgin Islands Rule of Civil Procedure 1-1 provides that “[t]hese rules, and subsequent amendments, govern:...(2) proceedings in any action pending on the effective date of the rules or amendments, unless: (A) the Supreme Court of the

Virgin Islands specifies otherwise by order; or (B) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.” V.I. R. CIV. P. 1-1(c)(2). Thus, when the Court reviewed Plaintiff’s request for entry of default on May 23, 2017, Virgin Islands Rule of Civil Procedure 55 governed unless the Supreme Court of the Virgin Islands specified otherwise by order, or unless the Court found the application of Virgin Islands Rule of Civil Procedure in this matter to be infeasible or would work an injustice.

Here, given that the Supreme Court of the Virgin Islands did not specify otherwise by order and the Court did not find the application of Virgin Islands Rule of Civil Procedure in this matter to be infeasible or would work an injustice, Virgin Islands Rule of Civil Procedure 55,<sup>2</sup> instead of Superior Court Rule 47,<sup>3</sup> was applicable. Plaintiff argued that the Court was required to enter a default against the defendants under Superior Court Rule 47 when she filed the request for entry of default. However, Plaintiff failed to acknowledge that she never submitted an affidavit stating that neither Defendant Olivia Joseph nor Defendant John Frederick was a minor, an incompetent person, nor a person subject to the provisions of the Servicemember’s Civil Relief Act of 2003, and thus, the Court could not ascertain whether service was perfected.<sup>4</sup> There are additional rules to serving a minor or an incompetent person,<sup>5</sup> and a person subject to the Servicemember’s Civil Relief Act of

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<sup>2</sup> Virgin Islands Rule of Civil Procedure 55 provides that “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the court or the clerk must enter the party’s default.”

<sup>3</sup> Superior Court Rule 47 provides that “[w]hen a party against whom affirmative relief is sought has failed to appear, plead or otherwise defend as provided by law or these rules, or has failed to appear at the time fixed for trial, the clerk shall enter his default.”

<sup>4</sup> *Supra* nn 2-3. While the language used in Superior Court Rule 47 differs from the language used in Virgin Islands Rule of Civil Procedure 55—to wit, Superior Court Rule 47 does not explicitly require an affidavit—both rules require service to be perfected upon the party whom the plaintiff is seeking for an entry of default before the court or the clerk can enter the party’s default.

<sup>5</sup> Title 5 V.I.C. § 111 provides:

§ 111. SERVICE ON INFANT OR INCOMPETENT PERSON. In the cases referred to in Rule 4(d)(2) of the Federal Rules of Civil Procedure, service shall be made as follows:

(1) Upon an infant, by delivering a copy of the summons and of the complaint to the infant personally, and also to his father, mother, or guardian, or if there is none within the Virgin Islands then to any person having the care or control of such infant, or with whom he resides, or in whose service he is employed.

2003 is protected from being sued while in active military service.<sup>6</sup> Although the Court gave Plaintiff an opportunity to remedy the deficiency by ordering Plaintiff to file an affidavit to supplement her request for entry of default within four weeks, Plaintiff never complied. A few more months passed thereafter without Plaintiff taking any action to move this case forward. As such, on August 24, 2017, the Court entered a memorandum opinion and order dismissing this matter for failure to prosecute.

### **B. Failure to Prosecute**

Here, the Court's reliance on *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010), is not misplaced, as argued by Plaintiff in her motion. In *Halliday*, the Supreme Court of the Virgin Islands instructed that, in determining whether to dismiss an action for failure to prosecute, the Superior Court must examine the following six *Poulis* factors.<sup>7</sup> 53 V.I. at 511; *see also*, *Molloy v. Independence Blue Cross*, 56 V.I. 155, \*184-85 (V.I. 2012). In its August 24, 2017 memorandum opinion, the Court examined the six *Poulis* factors and concluded that four factors weighed in favor of dismissal (with two factors—the prejudice to the adversary and a history of dilatoriness—weighing strongly in favor of dismissal) and the remaining two factors weighed against dismissal. “[A] trial court is not required to find that all the factors weigh in favor of dismissal to warrant dismissal of the claim.” *Molly*, 56 V.I. at \*186. As such, the Court found the *Poulis* factors

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(2) Upon a person judicially declared to be of unsound mind or incapable of conducting his own affairs for whom a guardian has been appointed, by delivering a copy of the summons and of the complaint to the defendant personally and also to such guardian.

<sup>6</sup> The Servicemember's Civil Relief Act of 2003, formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940, is a federal law that gives all military members some important rights as they enter active duty, including but not limited to protection from being sued while in active military service of their country.

<sup>7</sup> The six *Poulis* factors include:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary cause by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the meritoriousness of the claim or defense; and (6) the effectiveness of sanctions that serve as an alternative to dismissing the case. *Molloy*, 56 V.I. at \*184-85 (*citing Poulis*, 747 F.2d at 868).

warranted the extreme sanction of dismissal and thus, ordered the dismissal of this matter for failure to prosecute.

Based on the foregoing, the Court will deny Plaintiff's motion for relief from a final order pursuant to Virgin Islands Rule of Civil Procedure 60(b)(1). Accordingly, it is hereby:

**ORDERED** that Plaintiff's motion for relief from a final order dismissing complaint, filed on August 29, 2017, is **DENIED**.

DONE and so ORDERED this 8<sup>th</sup> day of December, 2017.

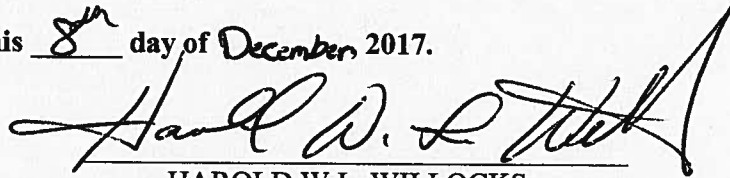
ATTEST:

Estrella H. George  
Clerk of the Court

By:

  
Court Clerk Supervisor

Dated: 12/8/17



HAROLD W.L. WILLOCKS  
Administrative Judge of the Superior Court