For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ZUBAIR KAZI and KAZI FAMILY, LLC, Appellants/Defendants, v. **COLONIAL PACIFIC LEASING CORP., and G.E. CAPITAL COMMERCIAL, INC.** Appellees/Plaintiffs.	)))))))))	**S. Ct. Civ. No. 2017-0080** Re: Super. Ct. Civ. No. 238/2012 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: June 12, 2018
Filed: November 16, 2018

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

APPEARANCES:

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Attorney for Appellants,

Christopher Allen Kroblin, Esq. (Argued)
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Attorneys for Appellees.

OPINION OF THE COURT

HODGE, Chief Justice.

Zubair Kazi and Kazi Family, LLC appeal the Superior Court's orders denying their motion to vacate a foreign judgment and striking their counterclaim. We affirm.

I. BACKGROUND

Kazi and Kazi Family, LLC own several Kentucky Fried Chicken franchises throughout the United States, including franchises in Florida, New York, Michigan, and Maryland.[1] To fund these ventures, Kazi and his entities borrowed monies from Colonial Pacific Leasing Corp., and G.E. Capital Commercial, Inc. (jointly "the Creditors"). Both Kazi, in his personal capacity, and his corporate entities guaranteed payment of the loans. Kazi borrowed 12 million dollars from Citicorp Leasing, Inc. in 1999 to acquire KFC franchises in Maryland. Kazi Family LLC and Kazi Foods of Annapolis, Inc. ("Kazi Annapolis") guaranteed payment of the loan. Five years later, Kazi Foods of Florida, Inc. borrowed between 4 to 6 million dollars[2] from Citicorp Leasing, Inc. to purchase entity real estate. Kazi and Khatija Kazi, his wife, personally guaranteed the loan obligations for up to 30 percent of the debt. Then, in June 2006, Citicorp loaned Kazi Foods of New York, Inc. between 33.5 to 37 million dollars[3] for the acquisition of fifty KFC franchises located in New York and New Jersey. Kazi personally guaranteed the loan for up to 5.5 million dollars of the obligation, and Kazi Family LLC and Kazi Annapolis jointly guaranteed the loan for up to 5.6 million dollars. Later that year, Citicorp and Kazi Foods of Michigan entered into a loan agreement under which Kazi Michigan borrowed 29 million dollars[4] from Citicorp to purchase twenty-nine KFC restaurants in Michigan. Kazi guaranteed the loan for up to 4.35 million dollars. GE later acquired the commercial lending division of Citicorp and became entitled to the loan

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[1] Only Kazi's motion mentions the Maryland ownership.

[2] The record does not contain the loan agreement and the parties seem to disagree on this amount. The Appellants quote the amount as being 6.5 million dollars, while the Appellees quote the amount as being 4.954 million dollars.

[3] The record lacks the actual loan agreement and the parties seem to disagree on the amount borrowed. The Appellant alleges the amount is 33.5 million dollars while the Appellees allege that the amount is 37 million dollars.

[4] The parties agree on this amount.

payments.

Kazi and his various entities defaulted on repayment of the loans and, as a result, the Creditors accelerated the repayment of the loans. Consequently, on April 5, 2010, the Creditors filed lawsuits in the Supreme Court of the State of New York, County of New York, for recovery of each debt separately. Subsequently, the New York court consolidated the cases. The parties stipulated to dismiss the case as to the Maryland loan. All the remaining Kazi entities (New York, Florida, and Annapolis) filed for Chapter 11 Bankruptcy protection in the U.S. Bankruptcy Court for the Eastern District of Michigan. As a result, the New York Supreme Court stayed proceedings in the debt action for the Chapter 11-filing entities but continued the suit as to Kazi and Kazi Family LLC (jointly, the "Debtors"). The Creditors moved for summary judgment as to the consolidated cases. On November 30, 2011, the New York court entered a judgment as follows:

> Colonial shall recover from Zubair the sum of $1,573,666 on account of the Florida Loan Guaranty, plus post-judgment interest;
>
> GECC shall recover from Zubair the sum of $5,550,000 on account of the Kazi New York Loan Guaranty, plus post-judgment interest;
>
> GECC shall recover from Kazi Family the sum of $5,600,000 on account of the Kazi Family Guaranty, plus post-judgment interest; and
>
> GECC shall recover from Kazi the sum of $4,350,000 on account of the Michigan Loan Guaranty, plus post-judgment interest.

(J.A. 6-7.) Additionally, the clerk of the court entered an award of costs to the Creditors in the sum of $550.

On May 11, 2012, the Creditors petitioned the Superior Court of the Virgin Islands to domesticate and enforce the New York judgment in the Virgin Islands. The Superior Court granted the petition, and ordered that the Creditors notify the court upon any satisfaction of the judgment. The Creditors intended to use the Debtors' Virgin Islands assets and property to satisfy the judgment, but they successfully satisfied the New York judgment with assets located elsewhere.

As a result, on July 10, 2013, the Creditors notified the Superior Court and the Debtors that the Debtors fully satisfied that judgment.

The Debtors assert that they made requests to the Creditors for calculations and summaries of their indebtedness in each of the loan transactions, to which the Creditors responded that they would not honor that request because they had accelerated the loans. The Debtors also claim that the Creditors failed to account for payments that they previously made to the Creditors, and that the Creditors had inflated the amounts owed, resulting in overpayment to the Creditors.[5] Based on these claims, the Debtors moved the Superior Court for relief from the domesticated judgment under then-applicable Superior Court Rule 50.[6] The Superior Court denied the motion on April 9,

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[5] The Debtors maintain that they made payments to the Creditors in the following amounts:

> • $56,220,000.00 pursuant to the 2012 Asset Purchase Agreement entered into through the bankruptcy action.
> • $19,227,568.42 in payments preceding the bankruptcy filing;
> • $14,585,693.74 in the benefit of a 'carve-out' from certain collateral which was a voluntary payment which operated to extinguish liability under the various loan guaranties;
> • $11,226,211.21 by way of a 2013 payment by Zubair Kazi to the lenders.
> • $7,249,000.00 for the transfer of certain real property by Zubair Kazi and Kazi-Family to the Plaintiffs;
> • $4,060,493.66 in payments by the Chief Restructuring Officer ("CRO") of the bankruptcy filers
> $3,558,511.58 in payments by the CRO for the sale of certain properties;
> • $1,362,562.83 by contribution of a new tax refund paid by the Internal Revenue Service;
> • $863,554.00 in the benefit of assets transferred to the Liquidation Trust which operated to extinguish liability under the various loan guaranties; and
> • $600,000.00 from the proceeds from the sale of a condominium property.

(J.A. 73.) They also maintain that they paid $118,953,595.44 to the Creditors, a sum they claim is "$33,760,489.26 more than the total secured liabilities owed by the debtors." (J.A. 73.)

[6] Although the Superior Court resolved the motion approximately one week after the March 31, 2017 effective date of the Virgin Islands Rules of Civil Procedure, the Superior Court nevertheless

2017. Additionally, on December 18, 2014, the Debtors filed and served a counterclaim on the Creditors in the domesticated case, asserting causes of action for "Accounting," "Unjust Enrichment," "Assumpsit – Monies Had and Received," "Conversion," "Negligent Administration and Collection of Loan," and "Slander of Title." On February 18, 2015, the Creditors moved to strike the counterclaim pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. The Superior Court granted the motion to strike on August 3, 2017, after additional briefing by the parties. On September 5, 2017, the Debtors filed a timely appeal in this Court asserting that the Superior Court erred in denying their motion for relief from judgment and in striking their counterclaim. *See* V.I. R. APP. P. 5(a)(1).[7]

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction over "all appeals from the [final] decisions of the courts of the Virgin Islands established by local law." 48 U.S.C. § 1613a(d); 4 V.I.C. § 32(a). The Superior Court's orders denying the motion to vacate the New York judgment and striking the counterclaims are final orders over which this Court has appellate jurisdiction. *See Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013). We typically review an order denying relief from judgment for abuse of discretion, but we exercise plenary review "to the extent that the ruling was based on an interpretation and application of a legal precept." *Gould v. Salem*, 59 V.I. 813, 817 (V.I. 2013) (quoting *In re Infant Sherman*, 49 V.I. 452, 456 (V.I. 2008)).

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applied the procedural rules that were in effect at the time the parties briefed the motion. *See* V.I. R. CIV. P. 1-1(c)(2)(B).

[7] Thirty days after the judgment fell on Saturday, September 2, 2017 and the following Monday was a holiday, and thus filing on September 5, 2017 was timely. *See* V.I. R. APP. P. 16(b).

B. Motion for Relief from Judgment

Former Superior Court Rule 50 provided that:

> For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications.

The Debtors argue that the Superior Court's denial of their motion under Superior Court Rule 50 renders 5 V.I.C. § 553 ineffective because "the [j]udgment was not allowed the same procedures, defenses, and proceedings to reopen, vacate or stay the . . . judgment as if it was a judgment of the Superior Court." (Appellant's Br. 19.) They also argue that it was unnecessary for the Superior Court to consider the Full Faith and Credit clause because "the language of [5 V.I.C. § 553] already incorporates [it]."[8] (Appellant's Br. 19.)

This case however, does not require us to delve into the Debtors' arguments because a motion for relief from judgment is not the appropriate mechanism to obtain a refund of excess sums paid to satisfy a judgment. Former Superior Court Rule 50 incorporated Rule 60(b) of the Federal Rules of Civil Procedure, which allows a party to seek relief from a judgment or order based on several reasons, such as newly discovered evidence. Logically, for Federal Rule 60(b) to be an effective instrument, a party must seek relief from the result set out in the judgment or order. *See generally*

[8] Under 5 V.I.C. § 553 of the Virgin Islands Uniform Enforcement of Foreign Judgments Act ("UEFJA"), 5 V.I.C. § 551, *et seq.*:

> A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of the United States Virgin Islands may be filed in the Office of the Clerk of the Superior Court. <u>The Clerk shall treat the foreign judgment in the same manner as a judgment of the Superior Court of the Virgin Islands. A judgment so filed shall have the same effect and shall be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the Superior Court of the Virgin Islands and may be enforced or satisfied in like manner.</u>

5 V.I.C. § 553 (emphasis added).

FED. R. CIV. P. 60 (b). "The general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Charter Twp. of Muskegon v. City of Muskegon*, 303 F.3d 755, 760 (6th Cir. 2002) (internal quotation marks omitted). It follows that a court need not serve that purpose when an issue was not litigated and did not result in a decision contained in the judgment from which a party seeks relief. *See generally id.*

Here, the Debtors do not dispute that they owed the Creditors. Instead, they argue that they over-satisfied the judgment and that they were entitled to accounting as well as other forms of relief. The Creditors agree that the Debtors satisfied the judgment but disagree that the Debtors overpaid them. The foreign judgment from which the Debtors requested relief made no ruling on the overpayment of funds, but rather, ruled on the Debtors' obligations to the Creditors. Under these circumstances, we agree with the courts that have held that a motion for relief from judgment is not the appropriate mechanism to recover excess amounts paid to satisfy a judgment; rather, the party seeking a refund should instead commence a new action to recover the alleged excess amounts.[9] *See McGee v. Burlington Northern, Inc.*, 585 P.2d 1296 (Mont. 1978) (interpreting a rule with language similar to Federal Rule 60(b) as providing "that a satisfaction of judgment could not be set aside by a motion under this rule" but instead "may be vacated by appropriate proceedings for proper cause"). As a result, the Superior Court appropriately denied the Debtors' Rule 60(b) motion.

C. The UEFJA and Counterclaims

The Debtors argue that the Superior Court erred in striking their counterclaims contending

[9] The Debtors in fact filed a new action seeking such relief in the Superior Court, which the Creditors subsequently removed to the United States District Court of the Virgin Islands.

that a defendant need not assert their counterclaims in an answer to a pleading when an action is brought under the UEFJA. They also argue that the Virgin Islands Rules of Civil Procedure apply to their counterclaims and that the Superior Court should have ordered the parties to further brief the matter under the Virgin Islands Rules of Civil Procedure once they went into effect, as the briefing of the counterclaim issue was done before the March 31, 2017 effective date of the new rules.

Although the Virgin Islands Rules of Civil Procedure went into effect on March 31, 2017, they allow the Superior Court to apply a prior rule to a case that is pending on the effective date of the new rule if the 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)(B). Here, the Superior Court expressly made such a finding:

> For this matter, the Court determines not applying the Superior Court Rules would be unjust. The Virgin Islands Rules of Civil Procedure do not specify that counterclaims must be asserted in an answer to a complaint. Considering the parties' arguments were made pursuant to the Superior Court Rules, the Court finds it would be unfair to apply the new procedural rules and nullify the parties' pleadings.

(J.A. 212, n.5.) Consequently, the Superior Court committed no error when it exercised its discretion to apply the Superior Court Rules to this matter rather than the newly-enacted Virgin Islands Rules of Civil Procedure.

We now address the purported counterclaim. Former Superior Court Rule 34 provided that:

> All claims in the nature of recoupment, set-off, cross-action, or any other claim for relief, except a complaint or a third-party complaint, shall be asserted in an answer as a counterclaim, and not otherwise, and shall be served and filed within the time limited for answering.

In striking the Debtors' counterclaim, the Superior Court focused on the language providing that a counterclaim "shall be asserted in an answer . . . and not otherwise," and reasoned that the pleading the Debtors filed was not an answer and thus could not be a counterclaim under former Superior Court Rule 34. Here, the Debtors' "counterclaim" appears to proffer a defense to the recognition of the New York domesticated judgment. In their "counterclaim," the Debtors argued that the Superior Court should not recognize the foreign judgment because they satisfied the debt beyond the amounts owed. But asserting a counterclaim to a recognized foreign judgment is procedurally improper, except in those limited circumstances where the counterclaims attack the validity of a judgment. *See, e.g.*, *Hammette v. Eickemeyer,* 416 S.E.2d 824, 825 (Ga. Ct. App. 1992) (collecting cases)*; Gibson v. Epps*, 352 S.W.2d 45, 49 (Mo. Ct. App. 1961) (holding that an appellant could not retry a case by "filing a counterclaim which goes to the merits of the action" because the "only defenses that the judgment debtor can impose are jurisdiction over the subject matter, failure to give legal notice to the defendant and fraud"). "Other jurisdictions faced with this issue have deemed the assertion of counterclaims inconsistent with the summary nature of [the UEFJA] and the purpose of the law, which is to expedite the recognition and enforcement of foreign judgments" in which "[t]he debtor should have the opportunity to present defenses for the purpose of impeaching the validity of the judgment, but . . . end[ing] the inquiry there." *Hammette,* 416 S.E.2d at 825; *see also Archbold Health Servs. v. Future Tech Bus. Sys.*, 659 So.2d 1204, 1206 (Fla. Dist. Ct. App. 1995) (noting the purpose of the UEFJA is to afford parties a quick and simple way to recognize a foreign judgment, and that judgment creditors may seek to domesticate "a foreign judgment without the further cost and harassment often incurred when an entirely new and

separate action on the foreign judgment is required for enforcement").[10] Thus, given the summary nature of the recognition of a foreign judgment and that former Rule 34 required a party to file counterclaims in an answer, the Superior Court correctly struck the Debtors' counterclaim.[11]

III. CONCLUSION

For the reasons above, we affirm the Superior Court's orders denying the Debtors' motion to vacate the foreign judgment and striking the Debtors' counterclaim.

Dated this 16th day of November, 2018.

BY THE COURT:
/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

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[10] The Debtors cite *Gilbert v. Gibbs*, 7 V.I. 375 (V.I. Super. Ct. 1969) to support their proposition that they may file a counterclaim in response to a motion for recognition of a foreign judgment under the UEFJA. However, not only is this trial court decision not binding on this Court, but it appears that case began with a complaint. *See Gilbert*, 7 V.I. at 378 ("The plaintiff . . . instituted suit in this Court on January 14, 1969 based on a judgment against the defendant in the Civil Court of the City of New York.").

[11] The Debtors also argue that if their pleading was invalid under former Superior Court Rule 34, then the petition to enforce the foreign judgment was invalid, since it was not filed in accordance with former Superior Court Rule 22, which provides that a civil action begins by filing a complaint with the court. However, the Debtors ignore this Court's precedent providing that in the event of a conflict between procedural rules enacted by the Legislature and procedural rules promulgated by the Superior Court—as opposed to those promulgated by this Court—it is the procedural rules enacted by the Legislature that must prevail. *See Gerace v. Bentley*, 65 V.I. 289, 306-07 (V.I. 2016). Title 5, section 553 of the Virgin Islands Code sets out the procedure a party must follow to request the recognition of a foreign judgment: "A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of the United States Virgin Islands may be filed in the Office of the Clerk of the Superior Court." 5 V.I.C. § 553. Or, in the alternative, a party may proceed in an ordinary suit. *See* 5 V.I.C. § 557 ("The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this subchapter remains unimpaired."). Thus, unlike a civil action filed on the merits, the procedure for recognizing a foreign judgment does not require the filing of a complaint. *See id.*