Not For Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELEANOR CHAVAYEZ,	)	**S. Ct. Civ. No. 2007-060**
	)	Re: Super. Ct. Civ. No. 520/2000
Appellant/Plaintiff,	)	
	)	
v.	)	
	)	
SYDNEY BUHLER and JAMES S. ARMOUR,	)	
	)	
	)	
Appellees/Defendants.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Argued: December 20, 2007
Filed: June 25, 2009

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

APPEARANCES:

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Attorney for Appellant

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OPINION OF THE COURT

HODGE, Chief Justice.

Appellant Eleanor Chavayez (hereafter "Chavayez") appeals a March 28, 2007 Superior Court order denying her motion for relief from a June 17, 2002 judgment dismissing Chavayez's complaint against Appellees Sydney Buhler and James S. Armour (collectively "Appellees"). For the following reasons, we shall reverse the trial court's March 28, 2007 order and vacate its

June 17, 2002 judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 24, 1993, Chavayez entered into an installment contract with Virgin Tradewinds, a limited partnership, to purchase a plot of land, No. 181 Estate Morningstar in Christiansted, St. Croix ("the Property"). Virgin Tradewinds conveyed this property to Appellees on December 15, 1996, and, in accordance with the March 24, 1993 agreement, Appellees conveyed the Property to Chavayez by warranty deed on September 4, 1997. Unbeknownst to Chavayez, Irma Hodge (hereafter "Hodge") had filed suit alleging that her earlier contract to purchase the Property had been improperly voided, and recorded a notice of lis pendens against the Property on July 15, 1993. After this encumbrance prevented her from obtaining a construction loan to develop the Property, Chavayez initiated civil proceedings against Appellees in Superior Court on October 4, 2000. In her verified complaint, Chavayez requested that the court award her a judgment requiring Appellees to defend the claim contained in the notice of lis pendens, damages in an amount proven at trial, and her costs and attorney's fees. On May 24, 2002, after Appellees failed to respond to the complaint, Chavayez filed a motion for entry of default, which the trial court granted on May 29, 2002.

On June 12, 2002, Appellees moved to set aside the entry of default and dismiss the complaint. Appellees informed the trial court that the Hodge lawsuit had settled in January 2001, that the lis pendens was subsequently released, and that Chavayez now had clear title to the property. On June 17, 2002, the trial court set aside the default and, deeming Chavayez's claims as moot, dismissed the complaint. Chavayez filed a motion for relief from judgment on June 27, 2002, arguing that Appellees never served her with their motion to set aside the default and that the trial court prematurely ruled on the motion. The trial court denied Chavayez's

motion on March 28, 2007, and Chavayez filed her notice of appeal on April 26, 2007.

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees [and] final orders of the Superior Court . . . ." V.I. CODE. ANN. tit. 4, § 32(a). Since the Superior Court entered its order denying Chavayez's motion on March 28, 2007, and Chavayez's notice of appeal was filed on April 26, 2007, the notice of appeal was timely filed. *See* V.I.S.CT.R. 5(a)(1) ("[t]he notice of appeal required by Rule 4 shall be filed with the Clerk of the Superior Court within thirty days after the date of entry of the judgment or order appealed from . . ."). Because a motion to alter or amend a judgment brought pursuant to Superior Court Rule 50[1] filed within ten days of entry of that judgment stays the time to appeal the underlying judgment until the trial court rules on the motion, this Court may also review the trial court's June 17, 2002 judgment.[2] *See* V.I.S.CT.R. 5(a)(4).

Superior Court Rule 50 provides that a motion to set aside a judgment is governed by Rules 59 to 61 of the Federal Rules of Civil Procedure. Because Chavayez's motion for relief

[1] Although Chavayez styled her motion for relief from judgment as arising pursuant to Federal Rule of Civil Procedure 60(b), apparently based on the belief that neither Superior Court Rule 50 nor Federal Rule of Civil Procedure 59(e) applied to judgments entered without a hearing or trial, it is well established that the substance of a motion, and not its caption, shall determine under which rule that motion is construed. *Cf. Rance v. D.R. Horton, Inc.*, No. 08-10213, 2008 WL 3864285, at *3 (11th Cir. 2008) ("Any post-judgment motion to alter or amend the judgment served within ten days after entry of the judgment . . . is within the scope of Rule 59(e) regardless of its label."); *MLC Automotive, LLC v. Town of Southern Pines*, 532 F.3d 269, 277 (4th Cir. 2008); *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1242 (10th Cir. 2006); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 n.3 (5th Cir. 1991).

[2] We note that in her notice of appeal Chavayez only stated that she "hereby appeals that certain Judgment Order entered on March 28, 2007" and did not expressly designate the June 17, 2002 judgment as an order she wished this Court to review. However, when a notice of appeal seeks review only of an order denying a motion to alter or amend a judgment, the appellate court may nevertheless obtain jurisdiction over the underlying judgment if the motion to amend was filed within ten days of the judgment and the appellant's intent to appeal the judgment is clear. *See Brown v. French*, 147 F.3d 307, 310 (4th Cir. 1998) ("Every circuit court to address the question has held that designation of a postjudgment motion in the notice of appeal is adequate to support a review of the final judgment when the intent to do so is clear."); *see also* Moore's Federal Practice § 303.21[3][c][vii] at n. 61 (3d ed.1998) (collecting cases).

from judgment was filed within ten days of entry of that judgment, Rule 59(e) governs its disposition. *See Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991) ("If a motion is served within ten days of the rendition of judgment, the motion will fall under Rule 59(e). If the motion is served after that time it falls under Rule 60(b)") (internal citation omitted). A trial court's denial of a motion to alter or amend a judgment pursuant to Rule 59(e) is reviewed for abuse of discretion except for matters of law, in which case review is plenary. *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001). However, an order denying a Rule 59(e) motion shall not be disturbed if the error is harmless. *See* Fed. R. Civ. P. 61. When reviewing the denial of a timely filed Rule 59(e) motion, an appellate court may consider the correctness of the underlying judgment even if it is not expressly identified in the notice of appeal. *See Lolavar v. de Santibanes*, 430 F.3d 221, 224 (4th Cir. 2005); *see also* 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2818, at 192-93 & n.11 (2d ed. 1995) (collecting cases).

B. The Trial Court Erred in Dismissing Chavayez's Complaint on Mootness Grounds

Though Appellees did not particularly identify the grounds upon which they sought dismissal of Chavayez's complaint, the trial court, by dismissing the complaint on mootness grounds, treated Appellees' request as a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[3] *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 (11th Cir. 2007). While Appellees correctly note that Chavayez has not expressly raised the issue of mootness in her appellate brief, it is well established that a court

[3] In its March 28, 2007 order denying Chavayez's motion for relief from judgment, the trial court characterized Appellees' motion as one arising pursuant to Rule 12(b)(6). However, "when a [trial] court disposes of a case on justiciability (mootness) grounds we will treat the [trial] court's determination as if it was ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). . . ." *Sheely*, 505 F.3d at 1182.

may consider the issue of subject matter jurisdiction *sua sponte*. *See Employers Ins. of Wausau v. Crown Cork & Seal Co., Inc.*, 905 F.2d 42, 45 (3d Cir. 1990); *see also People v. Rios*, Crim No. 2007-112, slip. op. at 3 (V.I. Nov. 14, 2008) ("[T]his Court, as a court of limited jurisdiction, may raise the issue of appellate jurisdiction *sua sponte*.").

Both Appellees and the trial court are correct that the settlement of the Hodge lawsuit and removal of the lis pendens mooted Chavayez's request for a judgment compelling Appellees to defend the claim contained in the notice of lis pendens.[4] However, when a complaint contains several prayers for relief, a court "must still consider the viability of the remaining requests," even in the event that "one of these requests subsequently becomes moot. . . ." *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 40 (3d Cir. 1985). Here, Chavayez's complaint expressly contained additional prayers for "damages . . . in an amount as much as is proven at trial"[5] and "costs and attorney's fees associated with this matter." (Compl. At 2; J.A. at 8.) While Appellees describe this language as "vague," Chavayez has fulfilled the minimum pleading requirements for both general damages for breach of warranty and attorney's fees. *See Myers v. Derr*, Civ No. 2007-049, 2008 WL 4586721, at *6 (V.I. 2008). Accordingly, the trial court erred in dismissing Chavayez's entire complaint on mootness grounds.

C. The Trial Court Erred in Ruling on Appellees' Motion to Set Aside Entry of Default Without Affording Chavayez Sufficient Time to Respond

Chavayez argues that the trial court should not have ruled on Appellees' motion because the time for Chavayez to submit a response had not been triggered because Appellees never

[4] Although a release of the lis pendens was never produced to the trial court, Chavayez has not disputed Appellees' assertion that the lis pendens was released.

[5] Damages likely to be proven by Chavayez include, but are not necessarily limited to, those for loss of use of the Property as a residence, any increase in interest rate for the loan she sought to construct a building on the Property, and nominal damages. *See* Restatement (Second) of Contracts, §§ 346-48.

served her with their motion. Under then-Rule 7.1 of the Local Rules of Civil Procedure,[6] a litigant may respond to a dispositive motion[7] within twenty days after service of that motion. Here, Appellees filed their motion on June 12, 2002, and the trial court granted it five days later on June 17, 2002. Therefore, even if Appellees had served Chavayez with their motion on June 12, 2002, the trial court, in prematurely issuing its dismissal order, deprived Chavayez of fifteen days in which she was entitled to respond.[8] Because the trial court's error obviously prejudiced Chavayez and likely adversely affected her substantive rights, it cannot be characterized as harmless. *See English v. Cowell*, 10 F.3d 434, 438 (7th Cir. 1993) (holding that granting motion to dismiss complaint without providing plaintiff with opportunity to file a response does not constitute harmless error). Accordingly, the trial court erred when it ruled on Appellees' motion and denied Chavayez's motion for relief from the dismissal judgment.

III. CONCLUSION

For the above reasons, we find that the Superior Court erred when it dismissed Chavayez's complaint on mootness grounds. Likewise, we hold that the trial court prematurely

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[6] LRCi 7.1 was amended and renumbered as LRCi 12.1 on October 15, 2007. The Local Rules of the District Court of the Virgin Islands, to the extent they are not inconsistent, apply to Superior Court proceedings pursuant to Superior Court Rule 7.

[7] Appellees argue that their motion was not dispositive because they did not submit a memorandum of law in support of dismissal. (Appellees' Br. at 9.) However, in their motion Appellees clearly and unambiguously requested that "the case be dismissed with each side bearing their own costs and fees." (Mot. to Set Aside Entry of Default, June 12, 2002, at 3; J.A. at 16.) Accordingly, Appellees' motion was dispositive and Chavayez was entitled to twenty days to submit a response.

[8] We note that the current and former versions of LCRi 7.1, though not expressly relied upon by the trial court, provide that a judge may rule on a motion "without a response or reply when deemed appropriate." However, it is well established that a local rule of procedure must be "consistent with the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 646, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) (internal quotations omitted). Furthermore, a court may not invoke a local rule to dismiss a litigant's action if doing so intrudes upon the litigant's due process or other substantive rights. *Evitts v. Lucey*, 469 U.S. 387, 399, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Because we hold that dismissing Chavayez's complaint without providing her adequate time to submit a response to Appellees' dispositive motion likely violated her substantive rights, we likewise find that LCRi 7.1 cannot be applied to excuse the trial court's actions.

considered Appellees' motion and should not have denied Chavayez's motion to alter or amend the dismissal judgment. Accordingly, we reverse the trial court's March 28, 2007 order and vacate its June 17, 2002 judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

Dated this 25th day of June, 2009.

FOR THE COURT:

_____/s/_____
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

CONCURRING OPINION

SWAN, Associate Justice, concurring.

Sydney Buhler and James S. Armour ("Appellees") filed a motion to set aside the trial court's entry of default which was entered after they failed to respond or otherwise defend in this case filed against them by Eleanor Chaveyez ("Appellant"). Without affording Appellant an opportunity to respond to Appellees' motion, the trial court set aside its entry of default and simultaneously dismissed the case. Thereupon, Appellant filed a motion for relief from judgment which the trial court denied. I conclude that the trial court erred in dismissing Appellant's case; therefore, I will reverse the trial court's order of dismissal.

I. FACTS AND PROCEDURAL HISTORY

The facts are undisputed. Pursuant to the parties' contract of sale, Appellant purchased a parcel of land, Plot 181 Estate Morningstar on St. Croix ("the property"), from Appellees on September 4, 1997. Pursuant to the sales contract, Appellees signed a warranty deed transferring ownership of the property to Appellant.[1] In the deed, Appellees assured Appellant that they owned the property with a clear title and with good right to convey it, that she would quietly enjoy the property, that there were no encumbrances on the title to the property, that Appellees

[1] In the deed, Appellees or "grantors" specifically undertook the following:

> And the Grantors do hereby covenant and warrant as follows:
> FIRST: That Grantors are seized of the said premises in fee simple, and have good right to convey same;
> SECOND: That Grantee shall quietly enjoy said premises;
> THIRD: That the said premises are free from encumbrances, except as hereinafter indicated;
> FOURTH: That Grantors will execute or procure any further necessary assurances of the title to said premises; and
> FIFTH: That the Grantors will forever warrant and defend the title to said premises.

(Warranty Deed 1-2.)

would execute or procure any further assurances of title to the property, and that Appellees would clear any cloud that may exist upon the title of the property.

After Appellant commenced construction of her home on the property and applied for a construction loan, she was informed by a lender that there was an encumbrance or a lis pendens recorded against the title of the property. Consequently, on October 4, 2000, Appellant filed suit against Appellees, in the Superior Court of the Virgin Islands ("Superior Court"), complaining that Appellees breached both the terms of her warranty deed and the terms of the parties' contract of sale. The complaint alleges *inter alia* that Appellees warranted (1) "that [Appellant] would have quiet enjoyment of the said premises", (2) "that the property was free of all encumbrances", and (3) "that they would defend the title to the said premises." (Compl. 2.) The complaint further alleges that "[t]he property at Plot No. 181 Estate Morningstar is encumbered to the extent that there is a Notice of Lis Pendens recorded by an individual who has filed suit, claiming equitable title to Plot No. 181 Estate Morningstar."[2] (*Id.* 3.)

For Appellees' alleged breach of the covenant in the warranty deed and breach of the terms of the contract of sale, Appellant sought judgment requiring: (1) Appellees to defend the claim embodied in the Notice of Lis Pendens or reimburse Appellant for the purchase price plus interest from the date Appellant paid for the property, (2) to pay Appellant "damages to be

[2] Irma Hodge ("Hodge"), erstwhile purchaser, filed the encumbrance, a notice of lis pendens against the property, on July 15, 1993, with the office of the recorder of deeds. On January 12, 1989, prior to the contract of sale involving Appellant, Virgin Islands Tradewinds Limited Partnership ("Tradewinds") and Hodge entered into a contract for Hodge to purchase the same property. Thereafter, Tradewinds determined that Hodge defaulted on the contract and declared it null and void on March 24, 1993. About July 28, 1993, Hodge filed suit in the Superior Court against Tradewinds, alleging that her contract was improperly voided. Thereafter, she filed the encumbrance in the nature of a notice of lis pendens. Hodge's lawsuit against Tradewinds was subsequently settled on January 31, 2001. (J.A. 16 n.3.) Tradewinds is not a party to this action because it conveyed its interest by warranty deed to Appellees on December 15th, 1996. After Hodge's lawsuit was settled, a Notice of Release of Lis Pendens was prepared but Appellee neglected to file it with the office of the recorder of deeds. *Id*.

proved at trial," (3) to pay "costs and [Appellant's] attorney's fees associated with this matter" and (4) "other relief that the trial court would deem fit." (*Id*.)

After service of process upon them, Appellees failed to plead or otherwise defend Appellant's lawsuit. Therefore, the Superior Court entered Appellees' default on May 29, 2002. On June 12, 2002, Appellees filed a Motion to Set Aside Entry of Default, together with their Joint Answer. In their Motion, Appellees argued that they successfully defended the title of Appellant's property; therefore, the case is moot. Also, Appellees filed a Proposed Order with their Motion to Set Aside Entry of Default. On June 17, 2002, the trial court signed Appellees' Proposed Order, which set aside Appellees' default and simultaneously dismissed the case. (Order Setting Aside Default & Dismissing Compl., June 17, 2002.)[3] Specifically, the trial court ordered "that the complaint be dismissed as moot."

On June 27, 2002,[4] or within ten days of the trial court's dismissal of her case, but relying upon the Federal Rules of Civil Procedure Rule 60(b)(3), (4) and (6), Appellant filed a Motion

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[3] At oral arguments, Appellees stated that a copy of the notice of release of lis pendens was attached to their Motion to Set Aside Default. But this document is not before this Court and the trial court's Order does not mention it. (*See* Order Setting Aside Default & Dismissing Compl. June 17, 2002.)

[4] Rule 60 provides:

> Relief from a Judgment or Order
> (a) . . . .
> (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, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether 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.

The Federal Rules of Civil Procedure are applicable to the Superior Court pursuant to Rule 7 of the Rules of the Superior Court which provides that "[t]he practice and procedure in the Superior Court

for Relief from Judgment and a Memorandum of Law in support of her Motion.[5] In the Memorandum of Law, Appellant complained that she was denied due process of law, because the court's Dismissal Order was entered prior to the expiration of time afforded her to oppose Appellees' Motion pursuant to Rule 7 of the Superior Court Rules and Rules 7.1 of the Local Rules of Civil Procedure of the District Court of the Virgin Islands. (LRCi).[6] Appellant also asserted that she was never served with Appellee's June 12, 2002 Motion to Set Aside Default.[7]

The trial court denied Appellant's Motion for Relief from Judgment on March 26, 2007. In reciting the factual bases for its Order, the trial court stated that "Defendants filed a Motion to Set Aside Default and Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules."[8] The trial court further noted that "[o]n June 17, 2002, Plaintiff was yet to respond and, therefore, the Court issued an Order granting the Motion." (Order of Super. Ct., March 26, 2007 at 2.) However, in the Motion for Relief from Judgment, Appellant asserted that the Motion is "pursuant to Rule 60(b), (3), (4), and (6)." In its March 26, 2007 Order, the trial court denied Appellant's Motion for Relief from Judgment, asserting that "Plaintiff has not established that such relief is warranted under Rule 60(b)(6)." Therefore, this appeal ensued.

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shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure . . . ."

[5] Appellant's Motion was signed a day earlier, June 26, 2002. However, the civil docket of the Superior Court reflects a June 27, 2002 filing. (Super. Ct. of V.I., Civil Action Docket, April 30, 2007.)

[6] LRCi 7.1 (f) provides:

> (f) RESPONSE AND BRIEF. If the respondent opposes a motion, he shall file his response, including brief and such supporting documents as are then available, within (10) ten days after service of the motion. The time period for any response and reply to a dispositive motion filed under Civil Rule 12(b) and (c) shall be provided in LRCi 56.1. . . . Nothing herein shall prohibit a district judge or magistrate judge from ruling without a response or reply when deemed appropriate.

[7] The Motion was dated June 10, 2002.

[8] There is no document titled "Motion to Set Aside Default and Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules" filed by any party.

THE COURT'S JURISDICTION

Pursuant to section 32(a), title 4 of the Virgin Islands Code, we have "jurisdiction over all appeals arising from final judgments, final decrees or final orders, or as otherwise provided by law." This appeal emanated from the trial court's final Order of March 26, 2007. Therefore, we have jurisdiction to adjudicate the issues arising from the Order.

ISSUE PRESENTED

The issue is whether the trial court erred in dismissing the case and subsequently denying Appellant's Motion for Relief from Judgment.

II. STANDARDS OF REVIEW

It is noteworthy that although the facts of this case are uncomplicated, the plethora of procedural rules implicated by the facts merits an extensive analysis. Moreover, the trial court's decisions and its reasons enumerated in two pertinent orders are crucial to my analysis and in arriving at my decision. Special attention is afforded the linkage between the Superior Court Rules and the Federal Rules of Civil Procedure. The reason is that a review of the Superior Court's Order, denying Appellant's Motion for Relief from Judgment, requires me to consider Superior Court Rule 50[9], which incorporates the following Federal Rules of Civil Procedure: Rule 59[10], Rule 60[11], and Rule 61.[12] ("Rule 59, Rule 60, Rule 61")

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[9] Superior Court Rule 50 states: "[f]or good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment of default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications." Thus, Rules 59 to 61 are applicable to the Superior Court pursuant to Superior Court Rule 50.

[10] Rule 59(e) states: "Motion to Alter or Amend a Judgment**.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment."

[11] *Supra*, note 3. Appellant filed her Motion for Relief from Judgment pursuant to subsections of Rule 60(b) because she believed that "there was no trial and Rule 59(b) would not apply."(Appellant's Br.16).

To undertake my Rule 59 review, I must also review Rule 12(b)(1)[13], because it concerns that part of the trial court's underlying Order dismissing Appellant's case. *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995) ("[B]ecause an appeal from a denial of a [Rule 59(e)] [m]otion . . . brings up the underlying judgment for review, the standard of review varies with the nature of the underlying judgment.") (quoting *McAlister v. Sentry Ins. Co.*, 958 F.2d 550, 552-53 (3d Cir.1992)). My Rule 50 review further encompasses whether the trial court's error is harmless, as Rule 61 of the Federal Rules of Civil Procedure requires.

A. Rule 59(e) of the Federal Rules of Civil Procedure

"[I]n reviewing an order denying a motion to alter or amend a judgment filed pursuant to [Rule] 59(e) [of the Federal Rules of Civil Procedure], the appropriate scope of review over matters committed to the discretion of the [trial] court is abuse of discretion, but over matters of law the court of appeals has plenary review." *Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984). Whether a matter is in the trial court's discretion or is a matter of law depends on the

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[12] Rule 61 provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

[13] Mootness, which implicates our jurisdiction, and a complaint's failure to state a claim, are both proper bases for dismissing a complaint. *See infra* IV (A) & (B). Federal Rules of Civil Procedure Rule 12(b)(1) provides in pertinent part:

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
> (1) lack of subject-matter jurisdiction;
> . . .
> (6) failure to state a claim upon which relief can be granted . . .
> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion
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> Fed. R. Civ. P. 12(b)(1)

underlying basis for the trial court's decision. *North River Ins. Co.,* 52 F.3d at 1218. "Where a [trial] court's denial of a motion to reconsider is based upon the interpretation of legal precepts . . . our review of the lower court's decision is plenary." *Id.* at 1203. Therefore, as the following discussion further illuminates, I reviewed de novo the trial court's denial of Appellant's Motion for Relief from Judgment.

I also reviewed de novo the trial court's Rule 12(b)(1) decision that an action has become moot. *Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Kelly*, 815 F.2d 912, 914 (3d Cir. 1987); *Ammex, Inc. v. Cox*, 351 F.3d 697, 704 (6th Cir. 2003). "Mootness is a jurisdictional matter." *Clark v. K-Mart Corp*., 979 F.2d 965, 967 (3d Cir. 1992). Federal Rule of Civil Procedure 12(b)(1) provides that a party may bring a motion to dismiss for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Therefore, dismissal on grounds of mootness is properly considered pursuant to Rule 12(b)(1). *See Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007).

B. Rule 60(b) of the Federal Rules of Civil Procedure

I reviewed the denial of a Rule 60(b) motion for abuse of discretion. *See Coltec Indus. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002). "Rule 60(b) provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances." *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co*., 239 F.2d 815, 817 (3d Cir. 1956).

C. Rule 61 of the Federal Rules of Civil Procedure

Rule 61 explicitly instructs that no harmless error by the court or any party may provide the basis for disturbing a judgment or order of the trial court. "An error will be deemed harmless only if it is 'highly probable' that the error did not affect the outcome of the case." *Forrest v. Beloit Corp.,* 424 F.3d 344, 349 (3d Cir. 2005) (citing *McQueeney v. Wilmington Trust Co.,* 779

F.2d 916, 924 (3d Cir. 1985)); *Hill v. Reederei F. Laeisz G.M.B.H., Rostock*, 435 F.3d 404, 411 (3d Cir. 2006). In *V.I. v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976), the court explicated that in reviewing harmlessness:

> The reviewing court might affirm if it believes: (a) that it is *more probable than not* that the error did not affect the judgment, (b) that it is *highly probable* that the error did not contribute to the judgment, or (c) that it is *almost certain* that the error did not taint the judgment.

Toto, 529 F.2d at 284[14] *see also McQueeney*, 779 F.2d at 924. These standards also apply to the trial court in its review of a motion for relief from judgment.[15]

I examined the standards of review for Rule 50 of the Superior Court and its constituent Federal Rules of Civil Procedure; namely, Rules 59, 60 and 61. Because a Rule 59 review requires an examination of the underlying rule, I discuss our standards for reviewing mootness or Rule 12(b)(1), the ground upon which the trial court dismissed Appellant's case. Next, I will discuss each of these provisions and expound on why the trial court's decision should be vacated.

III. DISCUSSION

This appeal involves the trial court's dismissal of the complaint and denial of Appellant's Motion for Relief from the Judgment of Dismissal. Rule 50 of the Superior Court requires that a trial court confronted with a motion for relief from judgment must consider Rules 59, 60, and 61 of the Federal Rules of Civil Procedure. The application of either Rule 59 or 60 is a search for errors in the underlying decision, whereas the application of Rule 61 involves an assessment of the harmlessness of any error produced by the search. *See* Fed. R. Civ. P. 59, 60 & 61. In this

[14] The *Toto* court also relied on these three options, which were suggested by Roger J. Traynor, the distinguished former Chief Justice of the Supreme Court of California, and endorsed Justice Traynor's conclusion that '[u]nless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse.' *Id* at 284. (quoting R. Traynor, The Riddle of Harmless Error 35 (1970)).

[15] "Although . . . we . . . speak of the appellate court's standard of review, our discussion is also relevant to the trial court's harmless error analysis on consideration of post-trial motions." *McQueeney*, 779 F.2d at 924 n.10.

case, the basis of my error search is the trial court's June 17, 2002 Order, dismissing Appellant's complaint as moot, and thus precipitating Appellant's Motion for Relief from Judgment.

I will reverse the trial court for the following reasons. First, Federal Rule of Civil Procedure 59(e) is the correct basis for evaluating Appellant's Motion for Relief from Judgment filed within ten (10) days of the trial court's Order. Therefore, although the trial court correctly rejected Appellant's Rule 60(b) arguments, the trial court erred in not evaluating the Motion pursuant to Rule 59(e) and in not assessing harmlessness under Rule 61 as Superior Court Rule 50 requires. Second, in applying Rule 59(e), I conclude that pursuant to Federal Rule of Civil Procedure 12(b)(1), Chavayez's complaint was not moot for lack of subject matter jurisdiction. Consequently, the trial court erred in dismissing the complaint and denying Appellant the opportunity to respond to Appellee's Motion to Set Aside Entry of Default. Finally, I conclude that the trial court's errors deprived Appellant of her substantial right to a hearing; therefore, the trial court's errors were not harmless. I first address why Rule 59(e) is the applicable rule.

A. Federal Rule of Civil Procedure 59(e) Applies to the Trial Court's Denial of Appellant's Motion for Relief from Judgment

A motion for relief from judgment is tantamount to a motion for reconsideration. However, the Federal Rules of Civil Procedure do not explicitly provide for motions for reconsideration. *See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1296 n.3 (10th Cir. 2002); *Bass v. U.S. Dept. of Agric.*, 211 F.3d 959.962 (5th Cir. 2000). Nevertheless, motions to reconsider are treated as motions to alter or amend a judgment under Rule 59(e) or motions for relief from judgments or orders under Rule 60(b). Whether a motion for reconsideration is governed by Rule 59(e) or Rule 60(b) will depend on the date it is filed. If

it is filed within the ten day period set for Rule 59(e) motions, reconsideration will be addressed under Rule 59(e). *See, e.g., Global Naps, Inc. v. Verizon New England, Inc*., 489 F.3d 13, 25 (1st Cir. 2007); *Allender v. Raytheon Aircraft Co.,* 439 F.3d 1236, 1242 (10th Cir. 2006).

Appellant's June 26, 2002 Motion for Relief from Judgment followed the trial court's June 17, 2002 Order setting aside the default and dismissing the case. Accordingly, Appellant's Motion was filed within the jurisdictional ten days required for consideration of a Rule 59(e) motion.[16]

I conclude that Superior Court Rule 50 applies to the facts of this case, thereby implicating Rules 59 through 61 of the Federal Rules of Civil Procedure in the resolution of Appellant's Motion. Superior Court Rule 50 states: "for good cause shown, the court upon application and notice to the adverse party, may set aside an entry of default, judgment of default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications."[17] Super. Ct. R. 50. A literal reading of this rule could lead one to conclude, as Appellant apparently did, that except for setting aside default entries and judgments, it applies only to setting aside judgments entered by the court *sua sponte* or upon motion without hearing. The rule is entitled "Setting aside defaults or judgments; new trials." It does not indicate an intention to limit the relief from judgments entered only after a trial or hearing. Furthermore, it would be illogical to interpret Rule 50 as affording an adverse party the right to motion the trial court to have a judgment set aside when the trial court has conducted a trial or hearing but precludes a party from motioning the trial court for the same

[16] Fed. R. Civ. P. 59 is also applicable to the trial court through Super. Ct. R. 7 and 54. *See Hodge v. Hodge*, 16 V.I. 399 n.1 (D.V.I. 1979).

[17] Super. Ct. R. 50 titled "Setting aside defaults or judgments; new trial," states in its entirety: "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."

relief where the trial court entered judgment sua sponte or on a motion without hearing. Accordingly, I would hold that Rule 50 allows any party adversely affected by a judgment or entry of default to move the trial court to have the judgment vacated or the entry of default set aside.

Appellant filed her Motion under Rule 60, believing that Rule 59 did not apply, because there was no trial or hearing pursuant to Superior Court Rule 50. As stated in the above discussion of Rule 50, however, her interpretation of the rule is erroneous. Rule 59 applies to orders made prior to a trial on the merits. *See Torockio v. Chamberlain Mfg*., 456 F.2d 1084 (3d Cir. 1972). Even if a motion is titled as arising under Rule 60, it is "the function of the motion, not the caption, [that] dictates which Rule applies[.]" *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988) (citing *Turner v. Evers*, 726 F.2d 112, 114 (3d Cir. 1984)).

"A proper motion to alter or amend judgment must rely on one of three major grounds: (1) an intervening change in controlling law; (2) the availability of new evidence not available previously; or (3) the need to correct clear error of law or prevent manifest injustice." *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995) (internal alterations omitted). Specifically, Rule 59(e) provides the trial court with a mechanism to correct its own clear legal errors. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *Zinkand v. Brown*, 478 F.3d 634, 636-37 (4th Cir. 2007); *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006); *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) ("[W]e agree with our sister circuits that [trial] courts may alter or amend judgment to correct a clear error of law or prevent manifest injustice") (internal quotation marks omitted). However, I am mindful that disagreement with the Superior Court's ruling is not a ground for Rule 59(e)

relief. *See, e.g., United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002).

Appellant's Motion for Relief from Judgment was properly filed within ten days of the judgment sought to be reviewed. Although Appellant's Motion was designated as arising under Rule 60(b), it bears the unmistakable components of a Rule 59(e) motion, which is a motion to alter or amend a judgment. To emphasize, while one of Appellant's claims became moot when Appellees caused the lis pendens to be removed from the property's title, the trial court erred in dismissing the case, because Appellant still had other viable claims against Appellees which obviated dismissal of the case. Nonetheless, pursuant to Rule 61, only an error that affects Appellant's substantial rights will cause us to disturb the trial court's decision.

My review under Rule 59(e) requires me to review each issue raised before the trial court, i.e., mootness and failure to state a claim, before I can assess the substantiality of an error. *See Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984). A legal error by a court is not harmless if it affects the judgment in a manner detrimental to Appellant's rights. Fed. R. Civ. P. 61. In determining whether the trial court's errors were harmless, I reviewed the nature of the errors contained in its mootness-and-failure-to-state-a-claim decisions. I would conclude that the trial court's errors were not harmless, because they denied Appellant a substantial right, which is the right to be heard on her damages and costs claims.

B. Rule 60(b) of The Federal Rules of Civil Procedure is Inapplicable

"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." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d at 271 (ellipsis omitted) (quoting *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978)). Rule 60(b) provides five specified grounds, and

one unspecified catch-all ground, upon which relief may be granted. The United States Court of Appeals for the Third Circuit ("Third Circuit") has ruled that no Rule 60(b) ground applies to a timely filed motion for relief from judgment challenging the legal reasoning of a trial court. *See Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988) (Rule 60(b) is an inappropriate basis for a motion that solely alleges legal error and relitigates the original claims). I am persuaded by the Third Circuit's pronouncement on this issue. *See Judi's of St. Croix Car Rental et. al v. Weston*, 49 V.I. 396, 405 (V.I. 2008)(breach of settlement agreement does not justify Rule 60(b) relief to relitigate claims.)

Accordingly, I agree with the trial court that in this case Appellant was not entitled to relief under Rule 60(b)(3) or (4) based upon the expressed language in those rules and the decisions of the Third Circuit. Rule 60(b)(3) addresses fraud, misrepresentation, and misconduct by the opposing party. Rule 60(b)(4) addresses void judgments. Therefore, the subjects of subsections (3) and (4) are patently absent in the issue of this case. Further, I agree with the trial court that Rule 60(b)(6), which addresses any other reason that justifies relief, may not be utilized to circumvent the clear time limitations imposed by 60(b)(1)-(3), and that Rule 60(b)(6) is available only for extraordinary circumstances not available within Rule 60(b)(1)-(5). *Landano v. Rafferty,* 897 F.2d 661, 682 (3d Cir. 1990) ("Generally [Rule 60(b)(6)] requires that the petitioners make a more compelling showing of inequity or hardship than normally would be required to reopen a case under subsections (1) through (5).") (internal quotations omitted); *Kock v. V.I.*, 811 F.2d 240, 246 (3d Cir. 1987) ("[Rule 60(b)(6)] is intended to be a means for accomplishing justice in extraordinary situations"). Of course, I am mindful that a "Rule 60(b) motion may not be used as a substitute for appeal, and legal error, without more, cannot justify granting a Rule 60(b) motion." *Smith*, 853 F.2d at 158. *See also, Martinez-McBean v. V.I.*, 562

F.2d 908, 912 (3d Cir. 1977) ("Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)(6)").

Superior Court Rule 50 instructs that Rules 59 through 61 of the "Federal Rules of Civil Procedure shall govern . . . applications" made for relief from a judgment of the Superior Court. I would hold that a motion for relief from judgment, filed within ten days of the judgment, must first be reviewed pursuant to Rules 59(e) and 61, and not pursuant to Rule 60, of the Federal Rules of Civil Procedure. Accordingly, the trial court erred because it did not consider Appellant's Motion pursuant to Rule 59(e) and Rule 61, as the unambiguous language of Superior Court Rule 50 mandates. Next, I address whether Appellant's claims are moot and conclude that they are not.

C. Appellant's Claims were not Moot

Despite Appellees' successful defense of the property's title, all of Appellant's claims are not moot. I must, however, detain further discussion to assess our jurisdiction, because Appellees contend that the issue of mootness is not before us, since it was not raised in Appellant's brief.[18] I note at the onset that a party's failure to raise an important issue will not bar our review.[19] Moreover, because mootness implicates our jurisdiction, it is an important issue, which cannot be waived by Appellant.

"[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1946). *See also Ehleiter v. Grapetree Shores*,

[18] (Appellee's Br. 6.)

[19] *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp*., 510 U.S. 27, 32 (1993) ("[United States Supreme Court] Rule 14.1(a), of course, is prudential; it 'does not limit our power to decide important questions not raised by the parties.'") (quoting *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320, n. 6 (1971)). Our Court does not have a rule restricting our ability to review an issue not raised in the parties' briefs, which is, of course, not the case here.

Inc., 482 F.3d 207, 211 (3d Cir. 2007) (this Court "has both the inherent authority and a continuing obligation to assess whether it has jurisdiction over a case or controversy before rendering a decision on the merits."). Therefore, when there is no issue between parties that can be resolved by the court, the doctrine of mootness bars the court's exercise of its jurisdiction. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287 (2000) ("[a] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."). ("If developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *Blanciak v. Allegheny Ludlum Corp*., 77 F.3d 690, 698-699 (3d Cir. 1996). *See also Ballentine,* 486 F.3d at 810 (Rule 12(b)(1) is the appropriate basis for dismissals for lack of jurisdiction.).

I reiterate that because the trial court dismissed Appellant's case on the ground of mootness, I must review the trial court's dismissal for mootness as a dismissal for lack of jurisdiction under Rule 12 (b)(1). *See supra* V (A); *see also United States v. Al-Arian,* 514 F.3d 1184, 1189 (11th Cir. 2008) ("Thus, mootness is jurisdictional, and the court must resolve any question of mootness before it assumes jurisdiction."). In reviewing mootness, I assess "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Jersey Cent. Power & Light Co. v. N.J.,* 772 F.2d 35, 39 (3d Cir. 1985); *see also Blanciak,* 77 F.3d at 698-699.

It is incontestable that Appellees entered into a contract for the sale of the same property to a third party, while simultaneously executing a warranty deed granting Appellant ownership to the property. Appellant commenced construction on the property. The resultant delay in the completion of Appellant's construction project was caused by Appellant's inability to obtain a

construction loan, because of the notice of lis pendens recorded against her property. Therefore, any damages to Appellant proximately caused by the delay in constructing her home makes Appellees blameworthy for the delay in construction and responsible for any damages Appellant suffered as a result of the delay. The above circumstances prolonged the time in which Appellant could not rent her home to another person or live on the property. (*See* Contract of Sale & Warranty Deed, *passim*, Sept. 4, 1997.)

Appellees argued that because the encumbrance on the property was subsequently removed upon their successful defense of the property's title, Appellant's case is moot, notwithstanding the other claims in the complaint. Appellees' contention is fallacious. A well pleaded complaint, seeking damages and costs, is not mooted by such post-complaint change in circumstances. *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 261 (3d Cir. 2007) ("compensatory damages and attorney fees, however, are not moot. I thus will allow . . . claims . . . only insofar as they are claims for compensatory damages and attorney fees."); *Donovan*, 336 F.3d at 218 ("[plaintiff's] claim for declaratory and injunctive relief is moot, [but] her damages and attorney's fees claims continue to present a live controversy."); *Jersey Cent. Power & Light Co. v. N.J.*, 772 F.2d at 41 ("the availability of damages or other monetary relief almost always avoids mootness.") (citing *Ellis v. Bhd. of R.R. Airline & Steamship Clerks*, 466 U.S. 435, 442 (1984)). When a complaint contains several prayers of relief, "even if one of these requests subsequently becomes moot, this [c]ourt must still consider the viability of the remaining requests." 772 F.2d at 40. "Damages should be denied on the merits, not on the grounds of mootness." *Id.* 41.

Undeniably, Appellees' successful defense of the property's title moots Appellant's first cause of action for return of the payments made towards the purchase price, plus the accrued

interest. However, Appellant's claims for damages and attorney's fees were never resolved by the trial court. Essentially, the trial court simply eschewed resolving the merit of Appellant's other claims. To claim damages, "general factual allegations of injury resulting from the defendant's conduct may suffice, because in considering a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Additionally, Rule 8(a)(3) of the Federal Rules of Civil Procedure requires only "a demand for the relief sought," after making a short and plain statement of a claim showing that the pleader is entitled to relief. Nevertheless, Appellees impugn the sufficiency of Appellant's recitation of damages, on the ground that it is too vague, relying upon *Sanchez-Mariani v. Ellingwood*, 691 F.2d 592, 596 (1st Cir. 1982) (Appellee's Br. 6.), an inapt case.

Ellingwood is inapt because Sanchez-Mariani, the plaintiff therein, presented no basis in her complaint for damages to be awarded by a court.[20] On the other hand, Appellant presents a straightforward complaint, alleging breach of warranties contained in both the parties' contract of sale and the warranty deed for which she seeks damages. Additionally, Appellant's complaint seeks damages to be proven at trial. The complaint simultaneously seeks cost and attorney's fees. (Compl. 2-3.) Because of Appellees' conduct, a notice of lis pendens was allowed to languish upon the title of Appellant's property. It was not until after Appellant initiated a lawsuit that the lis pendens was removed from the title to her property. Accordingly, Appellant incurred

[20] Sanchez-Mariani sought "such damages as may be just and proper under the circumstances of this case." 691 F.2d 596. However, she brought the action against the defendants in their official capacities, sought "[i]njunctive and [d]eclaratory [r]elief[,]" and made no mention of "damages for a . . . tort . . . or particular damages flowing from the alleged violation." *Id*. Furthermore, the *Ellingwood* court found that because damages are available only when an official is sued in the official's personal capacity, an award of damages was improper. *Id.*

damages and costs of this lawsuit, because the notice of lis pendens was recorded against her property.

A court may dismiss an action for lack of jurisdiction at any time pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). *See Kulick v. Pocono Downs Racing Ass'n, Inc*., 816 F.2d 895, 898 (3d Cir. 1987). "Trial judges enjoy substantial procedural flexibility in handling Rule 12(b)(1) motions." *Berardi v. Swanson Mem'l Lodge No. 48 of the Fraternal Order of Police*, 920 F.2d 198, 200 (3d Cir. 1990) (citing *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947)). However, "the record must clearly establish that after jurisdiction was challenged[,] the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention." *Id*. (*quoting Local 336, Am. Fed'n of Musicians, AFL-CIO v. Bonatz,* 475 F.2d 433, 437 (3d Cir. 1973)). Appellant was not afforded such an opportunity by the trial court. She had absolutely no opportunity to respond to Appellees' "Motion to Set Aside Entry of Default," which the trial court characterized as a "Motion to Set Aside Default and Dismiss the Complaint pursuant to Rule 12(b)(6)."

Importantly, Appellant asserts that Appellees' Motion to Set Aside the Default Entry and to dismiss the case was never served on her, and as a result the time period for her to respond to the Motion never commenced. Appellant's counsel avers that Appellant was not aware of Appellees' Motion to Set Aside Entry of Default prior to her receipt of the trial court's March 26, 2007 Order, which dismissed the case and Appellant's claims against Appellees. The trial court never addressed Appellant's contention that she was not served with the Motion to Set Aside Entry of Default.

Under the then existing rule, Rule 7.1 of the Local Rules of Civil Procedure, a response to a Rule 12(b)(1) motion, as it is dispositive, was due twenty days after service of the

dispositive motion. LRCi 7.1(f); LRCi 56.1 (adopted July 20, 1992, effective July 21, 1992; amended August 2, 2007, effective Oct. 15, 2007).[21] Because Appellant was never served with Appellee's Motion to Set Aside the Entry of Default, she was unable to respond to the Motion. Consequently, the dismissal of the complaint on the ground asserted by the trial court, the complaint's mootness, cannot be sustained. *Cf. Berardi*, 920 F.2d at 200.

Interestingly, Appellees unreservedly admitted in their brief and at oral argument that they did not seek dismissal of the case on grounds of mootness and that they did not file a memorandum of law supporting a dismissal of Appellant's complaint. (Appellee's Br. 9.) However, Appellee's Motion to Set Aside Entry of Default did seek the relief of dismissal of Appellant's complaint. Moreover, Appellees provided the proposed order that the trial court adopted and signed as its June 17, 2002 Order, characterized as "Order Setting Aside Default and Dismissing Complaint." Also, on appeal, Appellees argue that dismissal was proper.

"When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (quoting *Kehr Packages, Inc.*, 926 F.2d at 1409). Therefore, Appellant must be afforded the opportunity to discharge this burden. Additionally, a court reviewing a 12(b)(1) motion does not presume the truthfulness of a plaintiff's allegations. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Instead, the court must evaluate the merits of the jurisdictional claim on

[21] The Local Rules of Civil Procedure of the District Court of the Virgin Islands of the United States, LRCi, were amended and renumbered effective October 15, 2007. *See* LRCi 1.2. Rule 7.1(f) of the Local Rules of Civil Procedure, which was in effect at the time of the trial court's March 26, 2007 Order, provided that the "time period for any response and reply to a dispositive motion filed under Civil Rule 12(b) and (c) shall be as provided in LRCi 56.1." Rule 56.1 of the Local Rules of Civil Procedure provided that "[a]n original and two copies of all opposition papers shall be served on the moving party within twenty (20) days after being served with the notice and motion." (Parenthetical material omitted). However, the 2007 amendments maintained this twenty-day rule but provided for this limitation within Rule 12.1 of the Local Rules of Civil Procedure. In the 2007 amendments, under LR Ci 7.0.1(d)(4), "[t]he time period for any response and reply to a motion filed under Civil Rule 12 shall be as provided in LRCi 12.1." Rule 12.1(b) of the Local Rules of Civil Procedure provides that "[a]ny party adverse to a motion submitted under this Rule may respond by filing an opposition brief within twenty (20) days of the filing of the motion."

its own. *Id.* Appellant's due process rights are implicated by the manner in which the case is disposed by the trial court. *Cf. Roman v. Jeffes*, 904 F.2d 192, 196 (3d Cir. 1990) ("[t]hese methods of disposing of the case provide due process protections (i.e., notice and an opportunity to respond) . . . .").

The trial court did not adhere to Rule 12(b)(1)'s standards. The following is the rationale underlying the trial court's dismissal, as enumerated in its March 26, 2007 Order:

> On May 29 2002, the Court Clerk entered Default against Defendants. Subsequently, Defendants filed a Motion to Set Aside Default and Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules. A Certificate of Service accompanied the Motion stating it was mailed First Class postage prepaid to Plaintiff's attorney. On June 17, 2002, Plaintiff had yet to respond, and, therefore, the Court issued an Order granting the Motion.

(Order of the Super. Ct., March 26, 2007.)

The trial court's rationale reflects that in its June 17, 2002 Order, the trial court "[o]rdered that the complaint be dismissed as moot . . . ." (Order Setting Aside Default & Dismissing Compl.). However, in its March 26, 2007 Order denying Appellant's Motion for Relief from Judgment (Order of the Super. Ct., March 26, 2007), the trial court believed that it dismissed Appellant's complaint pursuant to a Rule 12(b)(6) motion filed by Appellees. Thus, the trial court's Orders are confounding.

The trial court granted Appellees' Motion by default, relying on its assumption that "[o]n June 17, 2002, Plaintiff had yet to respond."[22] The trial court's rational that Appellant should have responded by June 17, 2002, only five days after Appellees' dispositive motion, or a motion the trial court regarded as dispositive for mootness, is not appropriately within Rule 12(b)(1)'s standards applicable to the Superior Court, which rules allow twenty (20) days for a party's

[22] The adverb "yet" and the preposition "to" are "often used to imply the negative of a following infinitive" for example, "have *yet* to win a game." Merriam-Webster's Online Dictionary, 2008, *available at* http: / / www.merriam-webster.com/dictionary/yet. The trial court's "had yet to respond" language indicates its erroneous belief that Appellant's response was due or overdue.

response to a dispositive motion. Super. Ct. R. 7 and LRci 12.1(b). Accordingly, I conclude that the trial court erred in dismissing the case and in not reconsidering its decision. Next, I will discuss whether the trial court's decision was not harmless.

D. The Trial Court's Errors were not Harmless

Whether viewed for mootness or for a failure to state a claim upon which the court may grant relief, the trial court committed error by dismissing Appellant's complaint and all its causes of action before expiration of the time afforded her to respond to Appellees' Motion. Similarly, error occurred when the trial court failed to contemplate Rule 59 in considering Appellant's Motion for Relief from Judgment, particularly after the trial court correctly determined that Rule 60(b) was inapplicable. Pursuant to Rule 61, we may disturb a trial court's decision only if its errors are "not harmless." A harmless error is one that does not substantially undermine the integrity of the ultimate result. Fed. R. Civ. P. 61. A court reviews "harmlessness" on a case-by-case basis and considers the record as a whole. *See Sims v. Great American Life Ins. Co.*, 469 F.3d 870, 886 (10th Cir. 2006); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st. Cir. 1997). Every reasonable possibility of prejudice need not be disproved. *Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 329 (3d Cir. 2001).

Generally, technical errors are considered harmless, because they do not adversely affect any party's substantive interest. *See* Rule Fed. R. Civ. P. 61; *Toth v. Corning Glass Works*, 411 F.2d 912, 914 (6th Cir. 1969) ("Whatever error was committed by [the trial court] . . . did not affect the substantial rights of the parties and was harmless.") (citing *id*.). Appellant's error of seeking relief pursuant to Rule 60(b) rather than 59(e) is more a technical than substantive error. The movant has the burden to establish that the trial court's error was not harmless. *See* Rule 61; *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *SR. Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr.*

Props., LLC, 467 F.3d 107, 119 (2d Cir. 2006). Appellant discharged this burden by timely filing a Motion for Relief from Judgment specifying the trial court's legal errors. The only question is whether pursuant to Rule 61 of the Federal Rules of Civil Procedure, the trial court's decisions were not harmless.

The trial court's error in not evaluating Appellant's Motion pursuant to Rule 59, as Rule 50 of the trial court's rules instructs, essentially deprived Appellant of a hearing before the court. Furthermore, the trial court's legal error in dismissing Appellant's claims, which precluded a hearing on her damages and attorney's fees claims, was obviously prejudicial to Appellant. It is more probable than not that the trial court's errors affected the nature of the judgment it entered. Furthermore, I opine that it is highly probable that the errors adversely affected Appellant's substantial rights. Therefore, I am compelled to reverse the trial court. *See generally McQueeney*, 779 F.2d at 928; *Hill*, 435 F.3d at 411.

Accordingly, I would reverse and remand this case to the trial court and instruct that trial court to reinstate this case on the court's calendar. Upon reinstatement, the trial court shall conduct an evidentiary hearing on Appellees' June 12, 2002 Motion to Set Aside Entry of Default, after Appellant has been afforded an opportunity to respond to Appellees' Motion.

IV. CONCLUSION

The Order of the Superior Court should be **VACATED**, and the case **REMANDED** for further proceedings consistent with this opinion.