SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ORLANDO REMAK,	)
	)
Plaintiff,	)
	)
vs.	) **CASE NO. ST-15-CV-662**
	)
VIRGIN ISLANDS WATER AND POWER AUTHORITY a/k/a WAPA and GREGORY RHYMER,	)
	)
Defendants.	)

MEMORANDUM OPINION

Pending before the Court is Plaintiff Orlando Remak's motion to amend the November 16, 2016, Opinion to allow for interlocutory appeal. For the following reasons, Remak's motion will be granted.

FACTUAL AND PROCEDURAL HISTORY

On November 16, 2016, the Court issued an Opinion dismissing Plaintiff's Complaint against the Virgin Islands Water and Power Authority ("WAPA"), including a claim for breach of the implied covenant of good faith and fair dealing. This Court held that Plaintiff had failed to allege facts that WAPA made false representations that Plaintiff relied on to his detriment.[1]

[1] The Court dismissed the claims against WAPA based on the heightened pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Subsequently, on March 31, 2017, the Supreme Court of the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure, which "supersede all previous civil procedure rules applicable to the Superior Court." *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, *11 (VI. July 14, 2017). The Virgin Islands Rules of Civil Procedure "govern ... proceedings in any action pending on the effective date of the rules or amendments, unless ... the Supreme Court ... specifies otherwise by order ... or ... the Superior Court makes an express finding that applying them in a particular previously pending action would be infeasible or work an injustice." V.I. R. Civ. P 1(c)(2). Virgin Islands Rule of Civil Procedure 8 "expressly states that the Virgin Islands 'is a notice pleading jurisdiction,' V.I. R. Civ. P. 8(a), and the Reporter's Note eliminates any doubt that this

Plaintiff filed his motion to amend that Opinion and Order on January 11, 2017, to permit him to file an immediate appeal of the dismissal of his claim for breach of the implied covenant of good faith and fair dealing.

STANDARD

4 V.I.C. § 33 (c) provides that "[w]henever the Superior Court judge, in making a civil action or order not otherwise appealable under this section, is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order."

ANALYSIS

In *Chapman v. Cornwall*, the Supreme Court of the Virgin Islands stated that the "duty of good faith limits the parties' ability to act unreasonably in contravention of the other party's reasonable expectations. A successful claim … requires proof of acts amounting to fraud or deceit on the part of the employer."[2] Subsequently, in *Stapleton v. WenVI, Inc.*, the District Court of the Virgin Islands dismissed a claim for breach of the covenant of good faith and fair dealing because the pleadings were "bereft of any allegations of detrimental reliance."[3] And, in *Edwards v.*

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language is calculated to 'apply[ ] an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.'" *Mills-Williams*, *12-14. Consequently, the "adoption of Rule 8 of the Virgin Islands Rules of Civil Procedure supersedes … prior precedents which imposed the *Twombly* plausibility standard." *Id.*, at *12. Regardless, the Court entered its dismissal of Plaintiff's claims against WAPA "when the old pleading rules were still in effect." *Id.* Under similar circumstances, the Supreme Court determined that it must "apply the procedural rules as they existed at the time the matter was pending in the Superior Court." *Id.*, at *14. As a result, this Court will not reconsider its dismissal of the claims against WAPA based on the newly adopted Virgin Islands Rules of Civil Procedure.

[2] *Chapman v. Cornwall*, 58 V.I. 431, 441-442, 2013 V.I. Supreme LEXIS 20, *17, 2013 WL 2145092 (VI. May 15, 2013).

[3] *Stapleton v. WenVI, Inc.*, 2014 U.S. Dist. LEXIS 103626, *13, 2014 WL 3765855 (D.V.I. July 30, 2014). See also *Baumann v. V.I. Water & Power Auth.*, 2014 U.S. Dist. LEXIS 127952, *4-5, 2014 WL 4496639 (D.V.I. Sept. 12, 2014) ("Plaintiff must … show he detrimentally relied on the fraudulent, deceitful, or misrepresentative act(s) he alleges

Marriott Hotel Mgmt. Co. (VI.), Inc.,[4] the Superior Court found that Plaintiff's claim for breach of the covenant of good faith and fair dealing was deficient because he "fail[ed] to establish how he was intentionally misled by the Defendant."[5]

Based on *Chapman* and other Virgin Islands authority, this Court dismissed Plaintiff's claim against WAPA for breach of the implied covenant of good faith and fair dealing, noting that Plaintiff had failed to allege facts that WAPA made false representations that Plaintiff relied on to his detriment.

Plaintiff, relying on *Merchants Commercial Bank v. Oceanside Village, Inc.*,[6] calls into question the authority of *Chapman* because the Supreme Court did not "endeavor[] to set forth the soundest rule for the Virgin Islands as it pertains to alleged breaches of the implied covenant of good faith and fair dealing under the *Banks*[7] framework." Because *Chapman* lacked a *Banks* analysis, the *Merchants Commercial Bank* court performed one and held that "a party breaches the implied covenant of good faith and fair dealing by taking actions that deprive another party of the benefits for which it had bargained."[8]

Merchants Commercial Bank stands on uncertain ground because the Supreme Court has not definitely stated that, after *Banks*, the Supreme Court must to perform a *Banks* analysis in order to establish binding precedent. Instead, the Supreme Court has merely stated that it "has adopted

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Defendant committed"); *Mendez v. Puerto Rican Int'l Cos., Inc.*, 2013 U.S. Dist. LEXIS 147648, *52, 2013 WL 5587253 (D.V.I. Oct. 8, 2013) ("Plaintiffs have failed to provide evidence that they detrimentally relied upon PPSI's and PIC's purportedly fraudulent reasoning for their termination, and thus, cannot support a claim for breach of the implied covenant of good faith and fair dealing").

[4] 2015 V.I. LEXIS 13, *11-12 (V.I. Super. Ct. 2015).

[5] *Id.*

[6] 2015 V.I. LEXIS 146, *40-42, 64 V.I. 3, 34-36 (V.I. Super. Ct. Dec. 18, 2015).

[7] *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 2011 V.I. Supreme LEXIS 46, 2011 WL 6299025 (VI. Dec. 15, 2011).

[8] *Id.*

the practice of not blindly following its pre-*Banks* decisions which were predicated solely on 1 V.I.C. § 4, but instead determining whether the three *Banks* factors justify continued reliance on the Restatement."[9] After *Banks*, the Supreme Court has relied on the Restatement without performing a *Banks* analysis on occasion.[10] [11]

Plaintiff also cites *Hiss v. Commercial Security, LLC, Inc.*,[12] wherein the Superior Court determined that the plaintiff "pled sufficient facts to permit a plausible inference of fraud or deceit by Defendant: that is, of 'an intention to deceive' or of 'intentionally giving a false impression' regarding the Plaintiff's continued employment."[13] The *Hiss* court relied on the following allegations to reach its conclusion:

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[9] *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 605, 2014 V.I. Supreme LEXIS 17, *12-15, 2014 WL 702639 (VI. Feb. 24, 2014).

[10] See, e.g., *Pollara v. Chateau St. Croix*, LLC, 58 V.I. 455, 471, 2013 V.I. Supreme LEXIS 22, *28, 2013 WL 2948081 (VI. June 14, 2013) (quoting Restatement (Second) Contracts § 162). See also *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, *15 (V.I. 2017) (citing *Pollara*, supra).

[11] *Merchants Commercial Bank* is also distinguishable because the facts of that case involve a commercial context, whereas the facts in this case concern an employment context. In other jurisdictions, courts treat the two contexts differently and narrowly construe a claim for breach of the implied covenant of good faith and fair dealing in the employment context. See, e.g., *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 244 F. Supp. 2d 1250, 1270, 2003 U.S. Dist. LEXIS 2124, *47-48 (D. Kan. Feb. 11, 2003) ("In the limited and unique context of employment-at-will, requiring an employee to prove that his or her employer's conduct amounted to fraud in order to show a breach of the duty of good faith and fair dealing is entirely consistent with the notion of an at-will employment relationship"). See also *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99, 1992 Del. LEXIS 157, *7, 7 I.E.R. Cas. (BNA) 781, 121 Lab. Cas. (CCH) P56,900 (Del. Apr. 21, 1992); *Rumis v. Brady Worldwide, Inc.*, 2007 U.S. Dist. LEXIS 37190, *14-16 (S.D. Cal. May 21, 2007). The reason for the disparate treatment is that, "in the absence of a showing of fraud, the covenant of good faith and fair dealing could not operate in the employment-at-will context without wholly defeating the benefit for which the parties bargained-the employer's ability to discharge the employee and the employee's ability to quit his or her employment for good reason, bad reason or no reason at all. *Horizon Holdings, L.L.C.*., 244 F. Supp. 2d at 1270. Granted, in the Virgin Islands, a private employer can only discharge an at-will employee for the stated reasons in the Wrongful Discharge Act. See 24 V.I.C. § 76.

[12] 2016 V.I. LEXIS 59, *8-10 (V.I. Super. Ct. Apr. 8, 2016).

[13] *Id.* (citations omitted). The standard for fraud and deceit as stated in *Hiss* does not take into consideration the precedent in *Pollara v. Chateau St. Croix*, LLC, 58 V.I. 455, 471, 2013 V.I. Supreme LEXIS 22, *28, 2013 WL 2948081 (VI. June 14, 2013), wherein the Supreme Court held that: "to succeed on a claim of fraudulent misrepresentation one must prove that the maker of the contract intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion." While *Pollara* does not use the words "detrimental reliance," the quoted language indicates that the defendant must "induce" the claimant's assent by misrepresenting facts. As a result, a

> the parties entered into a verbal contract for employment (¶ 5); that Defendant's representative "told Plaintiff not to return to work until he cleared the issue that Plaintiff was being accused of (¶ 7); that "Plaintiff never got questioned, investigated, written up, or received any further information regarding any internal investigation" (¶ 8); that "Plaintiff was never advised of when to return to work" (¶ 9); that Plaintiff attempted to find out when he could return to work, but "was only told that he needed to wait to hear from Commercial Security's owners about the next step" (¶ 10); that Plaintiff has never "been told the reason for his termination" (¶ 12); and that Defendant did not "afford Plaintiff an opportunity to be heard on the issues regarding his termination" (¶ 13).

While the *Hiss* Court did not specifically state the words "detrimental reliance" in its opinion, the pled allegations suggest that the plaintiff left his employment at the direction of his employer and relied to his detriment on his employer to inform him when to return to work or notify him concerning the internal investigation to afford him an opportunity to be heard on the allegations against him.

Still, *Hiss* expresses an alternative interpretation of *Chapman*, and suggests to this Court that the "requires proof of acts amounting to fraud or deceit on the part of the employer" language in *Chapman* is ambiguous.

As a consequence, Plaintiff has demonstrated there is a ground for difference of opinion on the elements necessary to establish a claim for breach of the covenant of good faith and fair dealing, and his motion to amend the November 16, 2016, order for certification will be granted.

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claim for misrepresentation against a contracting party requires more than proof of an intention to deceive or give a false impression as stated in *Hiss*. The claimant must detrimentally rely on the misrepresentation as well. See also *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, *15 (V.I. 2017) (to state a claim for fraudulent misrepresentation, a plaintiff must "allege that a fact was misrepresented, and that the plaintiff relied on that misrepresentation to her detriment." (citing *Pollara*, 58 V.I. at 471)). Arguably, though, *Pollara* is distinguishable from *Hiss*, because *Pollara* involves misrepresentations that induced contract formation, while *Hiss* involves misrepresentations during the course of an employment relationship. As a result, it is not clear whether the Supreme Court would apply the standard set forth in *Pollara* to the facts in *Hiss*.

An Order consistent with this Opinion shall follow.

Dated: July 21, 2017

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

ATTEST: Estrella H. George
Clerk of Court ____/____/____

by: __________________
Lori Boynes-Tyson
Court Clerk Supervisor 7/21/2017