

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

Cruzan Tires,

Plaintiff,

v.

Government of the Virgin Islands,

Defendant.

Case No. SX-18-CV-042

Action for Breach of Contract and
Collection of Debt

Appearances:

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For Plaintiff

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For Defendant

MEMORANDUM OPINION

MEADE, Judge

BEFORE THE COURT are the following motions: (1) “Motion Requesting Leave to Adopt by Reference Petition for a Preliminary Injunction or in the Alternative to File Amended Complaint”; (2) “Motion to Compel and to Show Cause”; (3) “Motion to Withdraw Motion to Compel and to Show Cause”; and (4) “Motion Requesting Government be Ordered Not Extend or Renew Contract While Action for Injunctive Relief Arising out Bid Contract Number IFB031DPPC17 (S) is Pending.” The motions were all filed by the Plaintiff, Cruzan Tires (hereinafter “Cruzan Tires” or “Plaintiff”). The Defendant, the Government of the Virgin Islands (hereinafter “the Government” or “Defendant”) has not responded.

For the reasons stated below, the Court will deny the first motion for failure to comply with the rules, but nonetheless deem the complaint amended based on “the evidence adduced at the trial.” V.I. R. Civ. P. 15-2. The Court cannot rule on the second motion because it was withdrawn by the third motion. *See Mitchell v. Gen. Eng’g Corp.*, 67 V.I. 271, 277 (Super. Ct. 2017) (“A motion which is withdrawn . . . is no longer pending.” (quotation marks and citation omitted)). And the Court cannot rule on third motion because is not a true motion. *Cf. Joseph v. Publ. Emples. Rels. Bd.*, 68 V.I. 425, 429 (Super. Ct. 2018) (“The filing of a motion presupposes that the court has authority to rule on the motion and can either grant or deny the relief sought.” (citations omitted)); *see Mitchell*, 67 V.I. at 277 (“To withdraw a motion, court approval generally is not required nor is consent of the other parties.” (collecting cases)). The fourth motion is basically a renewed motion for a preliminary injunction. Since judgment will issue separately in favor of Cruzan Tires granting permanent injunctive relief, the Court will deny the fourth motion as moot. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 98-99 (Super. Ct. 2014) (“A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion.” (citations omitted)). Granting *preliminary* injunctive relief at this juncture would be “without any practical significance.” *Id.* (quotation marks and citation omitted).

Background

By memorandum opinion dated February 26, 2018, and reported at 68 V.I. 241 (Super. Ct. 2018), the Court summarized the Plaintiff’s allegations, which are restated here solely as background:

Cruzan Tires, a retailer and supplier of tires and other auto parts, bid on and was awarded a contract to supply tires, tubes, and batteries to various departments of the Government of the Virgin Islands. The contract began on October 1, 2015 and initially ran through September 30, 2016, and was extended into the summer of 2017. Thereafter, the Government contracted with Cruzan Tires on a month-to-month basis until Hurricanes Irma and Maria impacted the Territory in September 2017. Raymond Sharmouj, owner of Cruzan Tires, periodically checked local newspapers (both in print and online) to stay up to date about the potential for a new bid. He never saw a notice, however. In November 2017, the Commissioner of the Department of Property and Procurement (hereinafter “Property & Procurement”) told him that there would be no bids this year due to the impacts of hurricanes Irma and Maria. But a month earlier, in October 2017, Property & Procurement had issued a bid. Cruzan Tires was not notified. On Friday, February 16, 2018 . . . Cruzan Tires . . . filed a complaint, verified by Sharmouj, against the Government . . . seeking, *inter alia*, judgment in the amount of \$44,790.66 for unpaid invoices. Cruzan Tires also filed an application for a temporary restraining order and a petition for injunctive relief the same day that it filed suit. . . . [O]n Thursday, February 22, 2018, the Clerk’s Office assigned the case at random to the undersigned judge. The next day, February 23, 2018, the Court denied the application for a temporary restraining order and scheduled a hearing for Friday, March 1, 2018.

68 V.I. at 245 (quotation marks and citations omitted). The memorandum opinion explained the basis for the February 23, 2018 order, which had denied Cruzan Tires’ request for a temporary restraining order, but scheduled a preliminary injunction hearing, which had also been advanced and consolidated with the trial on the merits as per Virgin Islands Rule of Civil Procedure 65(a)(2).

The Government appeared on February 28, 2018 and on March 1, 2018, responded in opposition to the petition, construed as a motion for preliminary injunction. *See generally id.* at 248-54 (discussing the uncertainty whether the petition (a type of pleading insofar as it commences a civil proceeding) was intended to function as a motion since a complaint was also filed at the same time). In response to the February 26, 2018 Memorandum Opinion, Cruzan Tires filed its

motion for leave to incorporate the preliminary injunction petition by reference into the complaint or, in the alternative, for leave to file an amended complaint (hereinafter “motion to amend”). Cruzan Tires also filed a proposed amended complaint, but without delineating the changes from the original complaint. The Government did not respond to Cruzan Tires’ motion to amend and Cruzan Tires did not reply to the Government’s response in opposition to motion for the preliminary injunction.

Three witnesses testified at the March 1, 2018 trial: Raymond Sharmouj; Dynelle Williams, Deputy Commissioner of Property & Procurement; and Lloyd T. Bough, Jr., Commissioner of Property & Procurement (hereinafter “Commissioner Bough”). Five items were admitted into evidence: a December 4, 2017 letter Cruzan Tires wrote to Commissioner Bough; a December 6, 2017 letter Cruzan Tires (through counsel) wrote to Commissioner Bough; an August 4, 2017 Advertising Order issued by Property & Procurement; a December 22, 2017 letter Property & Procurement wrote to Cruzan Tires; and a January 1, 2018 supply contract between Property & Procurement (on behalf of the Government) and Echo Valley Imports, Inc. After hearing testimony and argument from the parties, the Court took the case under advisement.

Approximately a month later, Cruzan Tires filed a motion to compel. At trial, the Government, through counsel, had admitted that the Government was indebted to Cruzan Tires for the unpaid invoices and that “a check . . . was being processed to Cruzan Tires.” (Pl.’s Mot. To Compel & to Show Cause 1, filed Apr. 5, 2018.) However, when no check was forthcoming, Cruzan Tires asked that the Government be ordered show cause why it should not be compelled to comply with the in-court

representations that the Assistant Attorney General (“AAG”) had made on behalf of the Government. The Government did not file a response to Cruzan Tires’ April 5, 2018 motion. However, six days later, Cruzan Tires withdrew its April 5, 2018 motion because “payment from Defendant has been issued.” (Pl.’s Mot. [sic] to Withdraw Mot. to Compel and to Show Cause 1, filed Apr. 11, 2018.) But then on June 20, 2018, Cruzan Tires filed a notice to advise the Court that “the Defendant has failed to comply with the full payment outstanding to the Plaintiff.” (Pl.’s Notice to Ct. 1, filed June 20, 2018.) And on July 18, 2018, Cruzan Tires filed another motion, asking that the Court prohibit the Government “from carrying out any further business with either Echo Valley or HH Tires and Battery pursuant to” “Bid Number 1FB031DPPC17 (S).” (Pl’s Mot. Req. Gov’t be Ordered Not to Extend or Renew Contract While Action for Inj. Relief Arising Out of Bid Contract Number IFB031DPPC17 (S) is Pending 1, filed July 18, 2018 (hereinafter “Renewed Mot.”).) The Government did not file a response.

Discussion

Motion to Amend

“A party may amend its pleading once as a matter of course within” “21 days after serving it.” V.I. R. Civ. P. 15(a)(1)(A). “In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave.” V.I. R. Civ. P. 15(a)(2). And “[t]he court should freely give leave when justice so requires.” *Id.* But it is not only the parties who can amend pleadings. Courts too can “amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial.” V.I. R. Civ. P. 15-2.

And “[i]f a party is surprised as a result of such amendment, the court shall adjourn the hearing to some future day, upon such terms as it shall think proper.” *Id.*

To secure leave to amend a pleading, a party must file a motion and “attach a complete—and properly signed—copy of the proposed amended pleading to the motion papers.” V.I. R. Civ. P. 15-1(a). And, unless the court orders differently, every “amendment to a pleading . . . must reproduce the entire pleading as amended specifically delineating the changes or additions and may not incorporate any prior pleading by reference.” *Id.*

Here, Cruzan Tires seeks leave either to incorporate the petition by reference into the complaint or to file an amended complaint. (See Pl’s Motion to Amend at 1 (“Accordingly having pled for adoption of the Preliminary Injunction relief by incorporating it by reference at paragraph ten (10) of the complaint, it is respectfully requested that the Court allow the adoption of the Petition for Preliminary Injunction and [sic] as allowed under VIRCiv. P. 10 (c).”); *see also id.* at 2 (“Plaintiff herein alternatively seeks leave from the Court to amend the Complaint pursuant to Virgin Islands Rule of Civil Procedure 15.”).) In this instance, the Court cannot grant either request.

First, Cruzan Tires misreads the rules. What Cruzan Tires is seeking, essentially, is to have the complaint and the petition deemed to be the same pleading. Cruzan Tires argues that the complaint, in paragraph ten, references the petition. Therefore, since the two documents were “presented together,” (Pl.’s Mot. to Amend 1), the Court should view the petition in the same manner as “‘a written instrument that is an exhibit to a pleading is [deemed] part of the pleading for all

purposes.” *Id.* (quoting V.I. R. Civ. P. 10(c)) (emphasis omitted). But Cruzan Tires misunderstands how incorporation by reference functions.

As this Court previously explained, “Rule 10 is a one-way street. A later pleading or a motion can adopt statements from ***an earlier*** pleading. Hence, an answer can adopt a statement from the complaint. But a complaint cannot adopt statements from a motion, even if the motion were filed simultaneously with the complaint.” 68 V.I. at 253 (emphasis added). The reason why is because the complaint is always the first document in a case. The second pleading in a case, typically the answer, can adopt statements from the first pleading, typically the complaint. Likewise, a third-party complaint can incorporate statements from an answer or the complaint. And if the court had ordered a reply to an answer, *cf.* V.I. R. Civ. P. 7(a)8), the reply could also incorporate statements from both the complaint and the answer. Later pleadings can build on earlier pleadings. But the first pleading in a case cannot adopt statements from “any other pleading or motion,” V.I. R. Civ. P. 10(c), because there are no other pleadings yet. The filing of a complaint commences a civil action. *See* V.I. R. Civ. P. 3 (“A civil action is commenced by filing a complaint with the clerk of court.”). And the pleadings—in this instance Cruzan Tires’ complaint and the Government’s answer—control the case. The Court cannot deem the petition merged with the complaint.

As an alternative, Cruzan Tires requests leave to file an amended complaint. That request must also be denied, even though leave to amend, generally, should be freely granted when justice requires. Granting leave to amend in this instance would further obfuscate, not crystalize, the issues. First, both the complaint and the proposed amended complaint fail to designate each of Cruzan Tires’ claims

separately. See V.I. R. Civ. P. 8(a)(2) (“[T]he pleading shall be set forth in separate numbered paragraphs as provided in Rule 10(b), with separate designation of counts and defenses for each claim identified in the pleading.”); see also V.I. R. Civ. P. 10(b) (“[E]ach claim founded on a separate transaction or occurrence . . . must be stated in a separate count.”). Second, the proposed amended complaint fails to “delineat[e] the changes or additions” between it and the initial complaint. V.I. R. Civ. P. 15-1(a). Third, assuming the petition was intended or referenced by the initial complaint, the amended complaint maintains this prior incorporation, which is not permitted. See *id.* (“Except as otherwise ordered by the court, any amendment to a pleading . . . may not incorporate any prior pleading by reference.”). Fourth, the proposed amended complaint references as exhibits various contracts, purchase orders, and outstanding invoices, but failed to include the documents. Documents can be attached to pleadings and incorporated by reference. See V.I. R. Civ. P. 10(c). But the documents were inadvertently omitted in this instance. In sum, the Court finds that justice would not be served by accepting the proposed amended complaint.

Ordinarily, the Court could reject just the proposed amendment, but still grant the motion to amend. Cf. *Peng v. Williams*, 67 V.I. 482, 486 (Super. Ct. 2017) (granting leave to amend but striking proposed amended complaint). But in this instance, granting leave to amend will result in further delay since this case already proceeded to trial. While the pleadings control the case, setting the parameters for discovery, the pleadings can also be amended based on what the parties expressly agreed to, e.g., *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 474 (2007) (“Claims, issues, defenses, or theories of damages not included in the pretrial order

are waived even if they appeared in the complaint and, conversely, the inclusion of a claim in the pretrial order is deemed to amend any previous pleadings which did not include that claim.” (brackets, quotation marks, and citation omitted)); *see also Deakyne v. Comm’rs of Lewes*, 416 F.2d 290, 295 n.7 (3d Cir. 1969) (“[A] pretrial order supplements the pleadings and controls the course of the trial.” (quotation mark and citations omitted)), or what they impliedly agreed to. See V.I. R. Civ. P. 15(b)(2) (“When an issue *not raised by the pleadings* is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpled issue. But failure to amend does not affect the result of the trial of that issue.”). Here, two issues were tried by the parties: a debt claim and a bid protest claim. Therefore, since “[p]leadings must be construed so as to do justice,” V.I. R. Civ. P. 8(e), and “[t]he court may amend any . . . pleading . . . for any variance between the complaint and the evidence adduced at the trial,” V.I. R. Civ. P. 15-2, the Court will deem the Complaint amended based on “the parties’ . . . implied consent.” V.I. R. Civ. P. 15(b)(2).¹

¹ How “the court may amend any pleading or process,” V.I. R. Civ. P. 15-2, has not been addressed by courts in the Virgin Islands. Virgin Islands Rule of Civil Procedure 15-2 derives from Superior Court Rule 8, which was first promulgated (as Municipal Court Rule 8) in 1956 as part of the Rules of Practice and Procedure governing the Municipal Court of the Virgin Islands. The Virgin Islands rule, which has not been amended since 1956, is remarkably similar to a New Jersey municipal court rule promulgated in 1948. *Compare* Terr. Ct. R. 8 (“The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If a party is surprised as a result of such amendment, the court shall adjourn the hearing to some future day, upon such terms as it shall think proper.”), *reprinted in* V.I. Code Ann., Tit. 5, App’x, Part IV, p. 270 (1982 ed.), *with* N.J. Mun. Ct. R. 8:12-3 (“The magistrate may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If the defendant is surprised as a result of such amendment, the magistrate shall adjourn the hearing to some future day, upon such terms as he shall think proper.”), *reprinted in* Rules Governing the Courts of the State of New Jersey 84 (1948 ed.). Given the similarity between the two rules, it is likely that the District Court of the Virgin Islands borrowed Municipal Court Rule 8 from New Jersey pursuant to the authority the District Court had at that time to promulgate rules for the Municipal Court of the Virgin Islands. Further support for

Accordingly, Cruzan Tires stated a debt claim and a bid protest claim against the Government.

Renewed Motion for Preliminary Injunction

In its July 18, 2018 motion, Cruzan Tires claims that the Government may seek to extend or renew the contracts that were issued under the bid, which Cruzan Tires is protesting in this action, but then turn around and argue that “returning to the status quo . . . would be far too onerous in view of the renewed contract[s].” (Pl’s Renewed Mot. 2.) Accordingly, Cruzan Tires asks that the Government be prohibited from extending or continuing with “the contract[s] issued pursuant to IFP031DPPC17 (S) with either Echo Valley or HH Tires and Batter. This would include any type of extension or renewal . . . while this matter is pending.” *Id.*

this conclusion can be found by examining other rules adjacent to Rule 8, namely former Territorial Court Rule 9 and Rule 10, which mirror New Jersey Municipal Court Rule 8:12-4(a) and Rule 8:12-4(b) respectively. *Compare* Terr. Ct. R. 9 and Terr. Ct. R. 10, *reprinted in* 5 V.I.C. § App’x, part IV at 270, *with* N.J. R. 8:12-4(a)-(b), *reprinted in* Rules Governing the Courts of the State of New Jersey at 84.

If the District Court of the Virgin Islands did borrow Municipal Court Rule 8 from New Jersey Municipal Court Rule 8:12-3, case law construing the New Jersey rule would be instructive, *cf. Ventura v. People*, 64 V.I. 589 (2016). In this instance, however, New Jersey case law is not particularly helpful because New Jersey’s rule only applied to criminal cases, a point that was made clear by later amendments to the rule. *See* Rules Governing the Courts of the State of New Jersey 480 (1969 ed.) (amending and re-designating N.J. Mun. Ct. R. 8:12-3 as 7:10-2); *see also* N.J. Mun. Ct. R. 7:14-2 (2014 ed.) (present designation of the rule); *cf. State v. Bernstein*, 118 A.2d 437 (N.J. Essex County Ct. 1955) (applying Rule 8:12-3); *State v. Latorre*, 549 A.2d 971 (N.J. Super. Ct. App. Div. 1988) (applying Rule 7:10-2); *State v. Quality Mgmt. Assocs. of N.J., Inc.*, No. A-6286-08T4, 2011 WL 9827, *9 (N.J. Super. Ct. App. Div. July 14, 2010) (applying Rule 7:14-2). The Court notes this likely history of Superior Court Rule 8 (now Virgin Islands Rule of Civil Procedure 15-2) because of the lack of case law on the topic and the uncertainty here, whether a court can amend the complaint in a *civil* action. Certainly, courts can deem pleadings amended based on minor discrepancies. *Cf.* 51 N.J. Prac., Mun. Ct. Prac. § 5:57 (3d ed. 2006) (discussing N.J. Mun. Ct. R. 7:14-2) (“Sometimes, evidence will be produced in the course of a trial which will call for an amendment of some technical aspects of the complaint. For example, if the defendant’s name is misstated in the complaint Other technical information which may come during the course of the trial, such as the defendant’s address, social security number or other pedigree information, is frequently made the subject of amendment under this Rule.”) (footnotes omitted). But whether courts can amend pleadings to state the claims the plaintiff pleaded in its complaint based on the evidence adduced at trial – that is not apparent from the text of the rule or from its history.

Since the relief Cruzan Tires seeks is injunctive relief—a prohibition on any extensions or renewals of the contracts issued to Echo Valley or HH Tires and Battery—the motion is either a renewed motion for a preliminary injunction or a motion for reconsideration. Under either standard, however, the motion must be denied.² Three reasons support this conclusion.

First, Cruzan Tires failed to cite any authority (statute, rule, or precedent) in its motion. That alone warrants denying the motion. *See* V.I. R. Civ. P. 11(b)(5) (“By presenting to the court a . . . written motion . . . an attorney . . . certifies . . . that the applicable Virgin Islands law has been cited, including authority for and against the positions being advocated by the party.”); *accord* *People v. Hatcher*, 68 V.I. 362, 368 (Super. Ct. 2018). Second, if viewed as a motion for reconsideration, the motion is untimely since the Court denied Cruzan Tires’ *ex parte* application for a temporary restraining order on February 23, 2018, *see* 68 V.I. at 258, and more than fourteen days have passed between then and July 18, 2018, the date when Cruzan Tires filed this motion. *See* V.I. R. Civ. P. 6-4(a) (reconsideration motion must be filed within fourteen days from date of decision unless leave of court is obtained first). Third, Cruzan Tires failed to identify a change in the law, clear error, new evidence, or an

² The standard for renewing a motion appears to be similar to the standard for a motion for reconsideration. *Compare* *People v. Armstrong*, 64 V.I. 528, 535-36 (2016) (“[T]he availability of new evidence’ or ‘the need to correct a clear error or prevent manifest injustice’ warrants” considering a renewed motion (quoting *Island Tile & Marble v. Bertrand*, 57 V.I. 596, 616 (2012)), *with* V.I. R. Civ. P. 6-4(b) (“A motion to reconsider must be based on: (1) intervening change in controlling law; (2) availability of new evidence; (3) the need to correct clear error of law; or (4) failure of the court to address an issue specifically raised prior to the court’s ruling.”). But the concern in *Armstrong* (and in *Island Tile & Marble, LLC* which *Armstrong* relied on) was the mechanistic reliance by the bench and bar on procedural rules promulgated by other jurisdictions. *See* *Armstrong*, 64 V.I. at 534 n.3. And both cases were decided before the Virgin Islands Rules of Civil and Criminal Procedure were promulgated.

issue that it raised prior to filing its July 18, 2018 motion, which the Court failed to address.

Instead, what Cruzan Tires has expressed is its concern about the approaching “anniversary or deadline,” (Pl.’s Renewed Mot. 1), of the bid which is the subject of this lawsuit (and which it claims it was wrongfully excluded from). Although there may be times when renewing or making a subsequent motion for the same relief is justified,³ this is not one of those times. The Court acknowledges Cruzan Tires’ concern. But it is a hypothetical concern, not an imminent harm. *Cf. id.* 1-2 (“This Party is concerned by the fact that as we are approaching the anniversary or deadline for contract Bid Number IF031DPPC17 (S) that the Government *may take* the action of extending said contract month to month or for another year while this matter is still pending.” (emphasis added)). And “a party seeking injunctive relief must demonstrate that the injunction is necessary to avoid ‘certain and imminent harm for which a monetary award does not adequately compensate.’” *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 554 (2015) (quoting *Yusef v. Hamed*, 59 V.I. 841, 854 (2013)). Cruzan Tires has not carried this burden.

Finally, the Court also acknowledges that preliminary injunctive relief is unnecessary because the Court, by separate order of even date, will issue its judgment on the merits, permanently enjoining the Government from extending, renewing, or continuing with bid number IFP031DPPC17 (s). Consequently, Cruzan

³ *Cf. Mozes v. Daru*, 49 P.2d 957, 961 (Ariz. Ct. App. 1966) (“While extreme care should be used in the granting of a motion for summary judgment, no purpose would be served by forcing a case to trial once it clearly appears that there is no genuine issue of fact between the parties notwithstanding a previous motion for summary judgment has been made and denied. Hence, there is no ironclad rule that a denial of such a motion is res judicata and absolutely precludes renewal or the making of a subsequent motion for the same relief.” (paragraph break omitted)).

Tires' July 18, 2018 motion for injunctive relief "while the [matter] is pending before the Court" (Pl's Renewed Mot. 2), must be denied.

Conclusion

For the reasons stated above, the Court will deny Cruzan Tires' renewed motion and its motion to amend. Granting preliminary injunctive relief is unnecessary at this time. Further, the complaint and the petition (which was really a motion) cannot be deemed merged into the same pleading and the proposed amended complaint Cruzan Tires submitted does not clarify the claims Cruzan Tires pleaded. Nevertheless, because this matter proceeded to trial, and because the evidence adduced at trial supported a debt claim and a bid protest claim, the Court will deem the complaint amended to state both claims. Lastly, the Court need not rule on the motion for sanctions since it was withdrawn or the motion to withdraw because it is not a true motion. A separate order follows.

Dated this 5 day of September, 2018.



JOMO MEADE

Judge of the Superior Court

ATTEST:

Estrella H. George
Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 9/6/18

CERTIFIED TO BE A TRUE COPY
This 6 day of SEP 2018

ESTRELLA H. GEORGE

CLERK OF THE COURT

By: 

Court Clerk 