

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

Randolph Turnbull and Alix Bourdeau, Derivatively,
on Behalf of Nominal Defendant
V.I. TAXI ASSOCIATION, INC.,

Plaintiffs,

vs.

WINSTON PARKER, President, GEORGE SEBASTIAN,
Vice President, George Richardson, Treasurer,
LEONARD FABIEN, in his capacity as a board member,
HENRY ASHTIAN, in his capacity as a board member,
PETER JULION, in his capacity as a board member,
ALPHONSE FAHIE, in his capacity as a board member,
EUSTACE GRANT, in his capacity as a board member,
OCINTO DURANT, in his capacity as a board member,

Defendants,

and V.I. TAXI ASSOCIATION, INC., a Virgin Islands
Corporation, Nominal Defendant,

Defendant.

CASE NO. ST-11-CV-429

ACTION FOR TEMPORARY
AND PERMANENT
INJUNCTION, AND
DECLARATORY JUDGMENT

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: July 20, 2011)

Before the Court is Plaintiffs' "Application for Temporary Restraining Order and Preliminary Injunction," which was filed on July 18, 2011. For the reasons set forth below, the Court will deny the motion for a temporary restraining order and set a hearing on the request for a preliminary injunction. The Court will also direct Plaintiffs to serve the nominal defendant.

I. Relevant factual and procedural background.

In support of their motion, Plaintiffs rely upon the contents of and attachments to a Verified Complaint and a Memorandum of Law. In these documents, Plaintiffs aver that they are shareholders of the V.I. Taxi Association, Inc. ("VITA"), a Virgin Islands corporation. They bring this action derivatively¹ on behalf of VITA against several Individual Defendants who are, or were, directors and officers of VITA. In accordance with applicable law, VITA is named as a nominal defendant.²

Plaintiffs allege that they and other shareholders have had serious concerns about the management and financial condition of VITA since the Individual Defendants were elected during an annual meeting in 2010. Plaintiffs further allege that they followed the procedures for the president to call a special meeting to discuss these concerns, but were rebuffed by the Individual Defendants. Finally, VITA's next regular annual meeting occurred on June 30, 2011. At the commencement of the meeting Defendant Winston Parker told the shareholders, apparently without explanation, that previously circulated proxies for the meeting were invalid. He then summarily terminated the annual meeting, unplugged the PA system, and left with several of the other Individual Defendants. Nevertheless, the shareholders remaining at the June 30, 2011 meeting voted to remove the Individual Defendants as the officers and directors of VITA. Additionally, these same shareholders remained at the annual meeting and, after voting to remove the Individual Defendants, elected an interim committee to operate VITA for a period of ninety (90) days.

However, the Individual Defendants have refused to be removed and continue to hold themselves out as the directors and officers of VITA. Plaintiffs allege that they and other shareholders continue to worry about the financial condition and management of VITA. But the Individual Defendants continue to prohibit the other shareholders from accessing the pertinent information of their own corporation. By their motion, Plaintiffs request that this Court issue a temporary restraining order which will prohibit: 1) the Individual Defendants from holding themselves out as the officers and directors of VITA; and 2) the Individual Defendants from hindering the interim committee from operating VITA. Plaintiffs also request a preliminary injunction to the same effect.

II. Legal discussion.

Plaintiffs invoke the provisions of Rule 65 of the Federal Rules of Civil Procedure.³ When considering a motion for a temporary restraining order, the Court essentially applies the same test it would utilize if it were considering a request for a preliminary injunction.⁴ When determining whether to issue a preliminary injunction, the trial court considers: 1) the threat of

¹ FED. R. CIV. P. 23.1, which governs derivative actions by corporate shareholders, is applicable to this Court pursuant to SUPER. CT. R. 7, as it does not conflict with any Superior Court Rule.

² E.g., 18B AM. JUR. 2D *Corporations* § 1159 (Database Update May 2011) (citing to New York law); V.I. CODE ANN. tit. 1, § 4.

³ Rule 65 applies to civil proceedings in this Court pursuant to SUPER. CT. R. 7.

⁴ See, 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2951 (2nd ed. 1995).

irreparable harm if the injunction is denied, 2) whether the proponent has a reasonable probability success on the merits, 3) the balance of the relative benefits or harms which may inure to or befall the parties if an injunction is, or is not, issued; and 4) the public interest.⁵ In addition, a temporary restraining order may be issued *ex parte* only if the movants' attorney certifies in writing the efforts taken to give notice to the defendants of this action and application for emergency relief, and such relief without notice is warranted.⁶

Addressing the notice issue first, it is settled that temporary restraining orders, which may issue without advance notice to the opposing party, are to be entered only under the most compelling of circumstances.⁷ Therefore, "an *ex parte* TRO may be appropriate 'where notice to the adverse party is impossible either because the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing.'"⁸ This is certainly not the case in this matter. All parties are shareholders of VITA and, based on the allegations of the pleading, familiar with each other. The Court concludes that Plaintiffs have the ability to locate the Individual Defendants in this matter.

In an effort to comply with the attempt-to-notify requirement, Plaintiffs' attorney inserted a "Certification of Counsel re Notice" at the end of the Application. Therein, it is asserted that the verified complaint, motion, memorandum of law, and proposed order was mailed to all defendants at VITA's mailing address. However, nowhere is it demonstrated that any of the individual defendants receive their personal mail at that address. Moreover, although Plaintiffs have obtained summonses for the Individual Defendants, it is not clear whether only the complaint is being served with the summons, or if the motion and memorandum for emergency relief are being served contemporaneously. Because Plaintiffs have not scrupulously complied with Rule 65(b) or demonstrated that there is such an emergency that notice should be disregarded, their motion for a temporary restraining order will be denied.⁹

Nevertheless, the Court will set this matter for a hearing on the request for preliminary injunction. This Court has statutory authority to enjoin corporate directors and officers from abusing their trust.¹⁰ The allegations of the Verified Complaint demonstrate that there may be misconduct within VITA, and a hearing is needed to determine whether this is an appropriate circumstance for preliminary injunctive relief and, if so, the form of such relief.¹¹

However, at this point Plaintiffs have not taken the steps necessary for the Court to exercise personal jurisdiction over the nominal defendant VITA. In accordance with the rules of the Court,¹² Plaintiffs obtained summonses to be personally served on each of the Individual

⁵ E.g., *Dennie v. Abramson Enterprises, Inc.*, 124 F. Supp. 2d 928, 930 (D.V.I. App. Div. 2000).

⁶ FED. R. CIV. P. 65(b)

⁷ E.g., *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130-1131 (9th Cir. 2006) (quoting *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974)).

⁸ *Id.* (quoting *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir.1984)).

⁹ See, *Velasquez v. Ortiz*, No. 06-cv-01986-REB-MEH, 2006 WL 3847991 (D. Colo. Jan. 3, 2006).

¹⁰ 13 V.I.C. § 341.

¹¹ See, *Lichtenberg v. Besicorp Group, Inc.*, 43 F. Supp. 2d 476 (S.D.N.Y. 1999) (preliminary injunction proper where breaches of fiduciary duties caused harm to shareholders).

¹² SUPER. CT. R. 22.

Defendants with a copy of the complaint.¹³ The proper service of process is necessary for this Court to issue any binding order or judgment on all defendants.¹⁴ However, Plaintiffs did not obtain a separate summons for VITA, and this oversight must be corrected. In a derivative action, the corporation is a necessary party and, though named as a nominal defendant, is the real party in interest to whose benefit any relief granted by the trial court flows.¹⁵ Therefore, in a derivative action, the corporation must not only be named as a party, but also must be served as any other party before the action can proceed.¹⁶ In view of the foregoing, Plaintiff will be required to immediately obtain a summons for VITA and serve process on that entity in accordance with Virgin Islands law.¹⁷

On a final note, in their motion Plaintiffs ask that this Court waive the requirement that they post a bond as a condition of a preliminary injunction, if one is issued. The Court points out to Plaintiffs that the bond requirement is practically mandatory, and may be waived only under very narrow circumstances.¹⁸ The proffered reason for waiving the bond, that all of the parties to this case are members of VITA, does not appear on its face to meet the narrow exception to the bond requirement described in *Zambelli Fireworks*. Therefore, all parties must be prepared to address the bond requirements at the hearing on the preliminary injunction.

III. Conclusion.

Because Plaintiffs have not demonstrated that they have attempted to provide notice to the Individual Defendants in a manner calculated to succeed, or that the circumstances are so extreme that a temporary restraining order should issue without the requisite notice, the motion for such emergency relief will be denied. Further, the Plaintiffs must properly serve the nominal defendant V.I. Taxi Association, Inc. before this matter can proceed. Finally, the Court will set

¹³ SUPER. CT. R. 27(b) (incorporating FED. R. CIV. P. 4).

¹⁴ E.g., *Lampe v. Xouth, Inc.*, 952 F.2d 697, 700-701 (3rd Cir. 1992); *Citimortgage, Inc. v. Paniagua-Latimer*, 756 F. Supp. 2d 211, 214 (D.P.R. 2010).

¹⁵ *Ross v. Bernhard*, 396 U.S. 531, 538-539 (1970).

¹⁶ *Morgan v. Robertson*, 609 S.W.2d 662, 664 (Ark. Ct. App. 1980); *White v. Ross*, 716 So.2d 293, 294 (Fla. Dist. Ct. App. 1998).

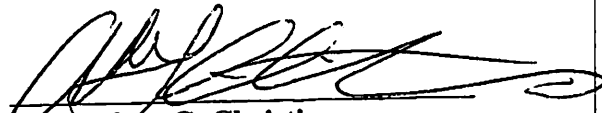
¹⁷ 13 V.I.C. § 51; FED. R. CIV. P. 4(h).

¹⁸ *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412, 425-426 (3rd Cir. 2010).

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Memorandum Opinion

this matter for a hearing on Plaintiffs' request for preliminary injunctive relief. An appropriate order will be issued contemporaneously with this memorandum opinion.

Dated: July 20, 2011


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: Paula Clayton
for Donna Donovan
Acting Court Clerk Supervisor 7/20/2011