

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

DAVID AUBAIN,	)	CASE NO. ST-12-CV-461
	)	
Plaintiff,	)	
	)	ACTION FOR DAMAGES
vs.	)	
	)	<u>JURY TRIAL DEMANDED</u>
KAZI FOOD OF THE V.I., INC. D/B/A	)	
PIZZA HUT ST. THOMAS,	)	
	)	
Defendant.	)	
	)	

ORDER

THIS MATTER is before the Court on 1) Plaintiff's Motion for Sanctions for Failure to Attend and Timely Complete Mediation, and 2) Defendant's Motion to Compel Plaintiff to Attend Independent Medical Examination ("IME") in St. Croix. In accordance with the Memorandum Opinion entered on this date, it is hereby

ORDERED that Plaintiff's Motion for Sanctions is **GRANTED in part and DENIED in part**; and it is further

ORDERED that the Court will not impose sanctions for failing to timely mediate; and it is further

ORDERED that the court hereby imposes sanctions upon Defendant in the sum of Two Thousand Six Hundred Sixty and 00/100 Dollars (\$2,660.00); and it is

ORDERED that Defendant shall pay said sum to Plaintiff within thirty (30) days of the date of this Order; and it is further

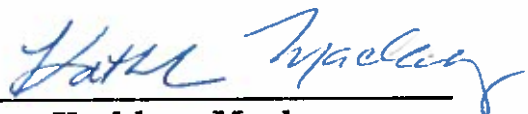
ORDERED that Defendant's Motion to Compel Plaintiff to Attend Independent Medical Examination ("IME") in St. Croix is **DENIED**; and it is further

ORDERED that should Defendant still wish to conduct an IME it shall advance to Plaintiff reasonable travel expenses necessary to permit him to travel to St. Croix for an IME; and it is further

ORDERED that Plaintiff shall, at the conclusion of the matter, reimburse Defendant for the travel sums advanced by Defendant; and it is further

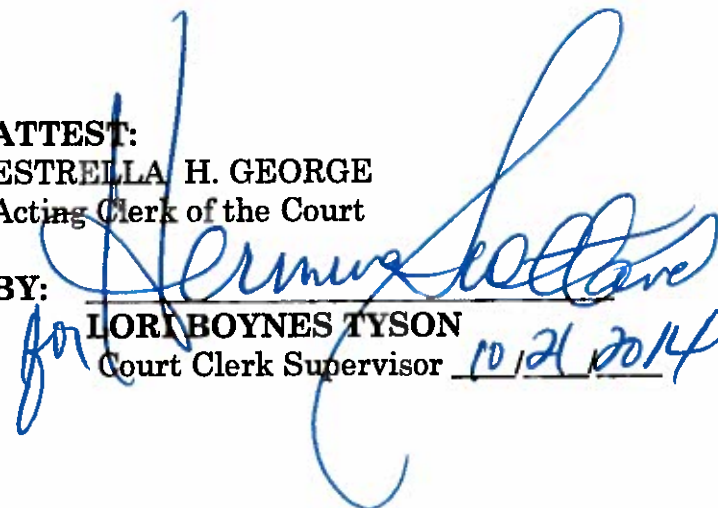
ORDERED that copies of the Memorandum Opinion and this Order shall be directed to Lee Rohn, Esq., Trudy Fenster, Esq., Ravinder Nagi, Esq. and Lisa Komives, Esq.

DATED: October 21, 2014



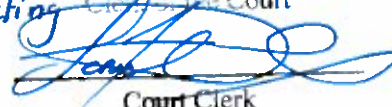
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
LORI BOYNES TYSON
Court Clerk Supervisor 10/21/2014

CERTIFIED A TRUE COPY

Date: 10/21/2014
Estrella H. George
Acting Clerk of the Court

By: 
Court Clerk

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	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on two motions. Plaintiff David Aubain filed Motion for Sanctions for Failure to Attend and Timely Complete Mediation,¹ through his counsel, Lee J. Rohn, Esq. (Lee J. Rohn and Associates, LLC). Defendant Kazi Foods of the V.I., Inc. d/b/a Pizza Hut St. Thomas ("Pizza Hut") filed Defendant's Motion to Compel Plaintiff to Attend Independent Medical Examination ("IME") in St. Croix, USVI, at His Own Expense² through its counsel Ravinder S. Nagi (BoltNagi, P.C.). Each party responded to the other's motion.

I. Plaintiff's Motion for Sanctions

The parties scheduled mediation for January 13, 2014 at defense counsel's offices. The mediation report dated January 13, 2014 provides that the matter was

¹ Filed on January 30, 2014.

² Filed on April 22, 2014.

recessed for further mediation. The mediator's handwritten note at the end of the report states:

Defendant's local representative appeared with Defendant's counsel, but a representative of the [Defendant's] insurance carrier was not present. The mediation was immediately recessed to be rescheduled with all necessary parties present.

Aubain moves the Court to sanction Pizza Hut for its failure to attend mediation in good faith in violation of Rule 40(e)(2) of the Superior Court Rules.

Rule 40(e)(2) requires the Court to impose sanctions, including mediator and attorneys' fees along with costs, against a party who, "without good cause, fails to appear at a duly noticed mediation conference or fails to participate in the mediation in good faith." A party "appears" at a mediation only when certain persons are physically present. Those persons are "the party or its representative having full authority to settle without further consultation" *and* "a representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation." Super. Ct. R. 40(e)(2)(A) and (B).

Pizza Hut counters that two attorneys and a corporate representative with full settlement authority attended the mediation. To explain the absence of an insurance representative, Pizza Hut explains that its insurer elected not to be involved in the case until the One Hundred Thousand Dollar (\$100,000) deductible is exhausted. Pizza Hut adds that it was only willing to offer a nominal "nuisance value" settlement amount to Plaintiff at mediation because it believes the incident underlying

Plaintiff's complaint – the collapse of a bench in Defendant's St. Croix restaurant when Aubain was sitting on it – never occurred.

The express language of Rule 40(e)(2) requires that a party or its representative attend, along with an insurance representative for any insured party. Pizza Hut did not comply with that provision, nor did it offer any "good cause" for its failure to do so. The credibility of Plaintiff's allegations and the value Pizza Hut has assigned to this case are irrelevant to its duty to observe the Superior Court's Rules. Accordingly, the Court will impose sanctions against Pizza Hut for its failure to appear at mediation.

Finally, Pizza Hut argues that the requested sanctions are excessive. Aubain asserts that Pizza Hut should pay for his counsel's flight from St. Croix to St. Thomas, four hours of attorneys' fees spent preparing for and traveling to mediation, and Plaintiff's airfare and lodging fees. Aubain's counsel's expenses and Aubain's expenses are supported by affidavits and are reasonable. There is one exception, however: Aubain's counsel attests that she paid Six Hundred Ten Dollars (\$610) for her flight from St. Croix to St. Thomas. Because commercial flights are available for approximately Two Hundred Dollars (\$200), Pizza Hut is responsible for only that amount of counsel's flight. The Court will impose sanction to reimburse Plaintiff and counsel as follows: attorneys' fees in the sum of \$1,500.00, airfare for counsel in the amount of \$200.00, and David Aubain's travel expenses in the sum of \$960.00.

The Court will not impose any sanctions for failing to timely mediate.

II. Defendant's Motion to Compel Plaintiff to Attend Independent Medical Examination in St. Croix

The parties agree that Pizza Hut may require Aubain to submit to an Independent Medical Examination ("IME"), but disagree over who should bear the cost Aubain will incur in traveling for the examination. Pizza Hut asks the Court to compel Aubain to attend an IME in St. Croix, Virgin Islands. Because Aubain sued in the Virgin Islands, Pizza Hut asserts, it can require Aubain to travel there for an IME at his own expense.

"Generally, a plaintiff is required to pay his own travel expenses to an examination in the forum state." *Page v. Hertz Corp.*, No. 09-5098, 2011 WL 5553489, at *6 (D.S.D. Nov. 15, 2011) (citing *McClosky v. United Parcel Serv. Gen. Serv. Co.*, 171 F.R.D. 268, 270 (D. Ore. 1997)). This is because the plaintiff is usually being examined in the forum he chose to sue in, and the plaintiff is expected to pay the costs of litigation in his chosen forum. *McClosky*, 171 F.R.D. at 270. An exception to that rule is when the plaintiff will suffer undue financial hardship in traveling for the IME. *Id.* This exception applies here.

Aubain alleges that he moved from St. Croix to Maryland to live with his sister when he became unable to work due to his injuries. He also submitted an affidavit to the Court providing that he is currently living on Social Security Disability benefits in the amount of \$1,200 per month. Traveling from Maryland to St. Croix will require

airfare plus lodging and local transportation expenses. Aubain has demonstrated that such a trip would cause undue financial hardship.

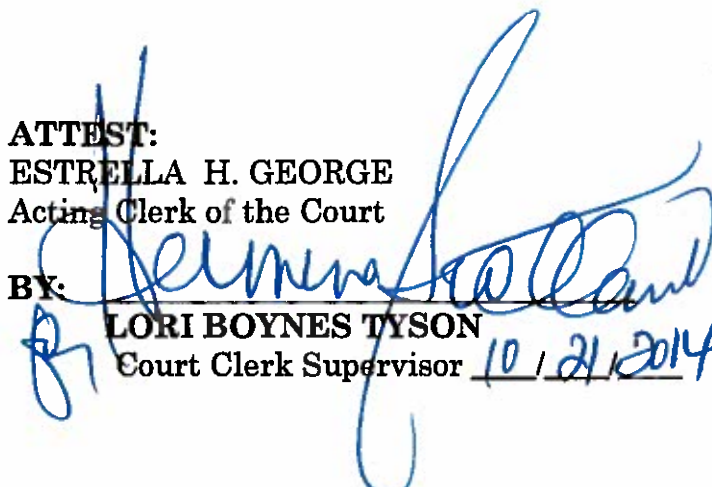
Aubain suggests that Pizza Hut advance the expenses of attending the IME in St. Croix, and those expenses will be deducted from any award he recovers. *See Drake v. J.B. Hunt Trans., Inc.*, No. 97-5641, 1999 WL 83935, at *1 (E.D. Pa. Feb. 18, 1999); *Eckmyre v. Lambert*, No. 87-2222-O, 1988 WL 573858, at *2 (D. Kan. Sept. 6, 1988); *Warren v. Weber & Heidenthaler, Inc.*, 134 F. Supp. 524, 525 (D. Mass. 1955). The Court will accept Aubain's suggestion as it provides an equitable solution and will permit this case to move forward. Therefore, Aubain is required to submit to an IME in St. Croix on the condition that Pizza Hut advances reasonable related travel expenses.

The Court will enter an Order consistent with this Opinion.

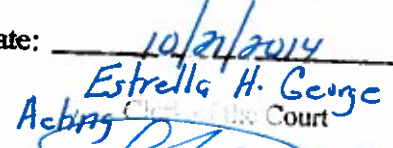
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