

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT CHRISTIANSTED

GEORGE JnLOUIS and LEAH JnLOUIS,)

Plaintiffs,)

v.)

PUEBLO INTERNATIONAL, INC.,
d/b/a SUPERFOODS SUPERMARKET,)

Defendant.)

CIVIL NO. 1642/1981

ACTION FOR DAMAGES

ALBERT A. SHEEN, ESQUIRE
46-47 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-3115
(Attorney for Plaintiff)

DOUGLAS A. BRADY, ESQUIRE
#6 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-2156
(Attorney for Defendant)

PETERSEN, Judge

MEMORANDUM OPINION

June 7, 1983

At issue here are the guidelines to be followed when this Court is asked to exercise its discretion, pursuant to Rule 39(b), Fed. R. Civ. Pro., and grant a jury trial to a party who has waived it by failing to comply with Rule 38, Fed. R. Civ. Pro.

Rule 38(b), Fed. R. Civ. Pro., allows a party to demand a jury trial at any time up until ten (10) days after

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service of the last pleading (usually the answer) directed at the issue for which a jury trial is sought. Rule 38(d) provides that the right to a trial by jury is deemed waived if a party fails to comply with Rule 38(b). Rule 39(b) permits the court, in its discretion, to order a jury trial upon motion of the party that has failed to comply with Rule 38(b). The courts are hardly in agreement as to how this discretion should be exercised. See Cox v. C.H. Masland & Sons, 607 F.2d 138 (5th Cir. 1979); AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965) (should grant jury trial in absence of strong and compelling reasons to the contrary). Cf. General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.), cert. denied 377 U.S. 952 (1964); Add-A-Bin Co. v. H.S.D. Hot Mix Surge & Storage Equip. Corp., 54 F.R.D. 1 (S.D.N.Y. 1971) (no discretion to grant jury trial without special circumstances). It has been stated that those courts which have taken the restrictive view when interpreting the discretion granted by Rule 39(b) are, in effect, penalizing a party for its technical shortcomings by denying a jury trial, which flies in the face of the spirit of the rules. Pawlak v. Metropolitan Life Ins. Co., 37 F.R.D. 717 (D. Mass. 1980); Comment, 47 Iowa L. Rev. 759 (1962). On the other hand, freely granting Rule 39(b) motions effectively abolishes the ten-day limitations period of Rule 38(b). Mark v. Francis, 17

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V.I. 278 (Terr. Ct., St. T. & J., 1981). With such antithetical viewpoints, "A median, but liberal standard seems fairest." Mark v. Francis, supra, at 280.

The court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied.

9 C. Wright & A. Miller, Federal Practice and Procedure: Civil, Section 2334 at 115 (1971). Furthermore, the following statement should be kept in mind: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Collins v. Government of the Virgin Islands, 5 V.I. 622, 632, 366 F.2d 279, 284 (3d Cir. 1966) (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959)).

In Samuel v. Soto and TMX, V.I., Inc., Civil No. 42/1978 (D.V.I. Sept. 19, 1978), the District Court of the Virgin Islands adopted the liberal approach to the exercise of discretion under Rule 39(b). In that case the Court held that

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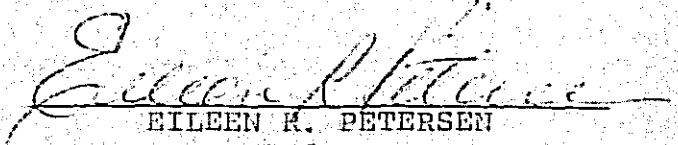
untimeliness was not reason enough to disallow a jury trial by denying a Rule 39(b) motion. But in Francis v. Pueblo International, Inc., Civil No. 536/1982 (Terr. Ct., Div. St. C., March 9, 1983), the Court, although it granted the plaintiff's Rule 39(b) motion relying on the District Court's opinion in Samuel, supra, stated that, despite the ruling in Samuel, it was adopting the restrictive approach to the exercise of discretion under Rule 39(b) and that, in the future, "the Court will not consider mere inadvertence, lack of diligence or bare oversight by counsel as constituting the type of special circumstances that would warrant a suspension of the requirements of Fed. R. Civ. P. 38(b)." Francis, supra, at 6.

Applying the foregoing to the factual situation at bench, it is this Court's determination that no furtherance of the letter or the spirit of the law will be effected by denying the Rule 39(b) Motion for a jury trial. This Court cannot, in fairness to the Plaintiff, completely ignore the circumstances prior to and after the filing of the complaint which was lacking a jury trial demand. The Plaintiff initially sued a party which it reasonably thought was the owner of the supermarket involved in this action. This initial complaint included a demand for a jury trial. After being notified that the subject supermarket had been sold to

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Pueblo International, Inc., the Defendant herein Plaintiff dismissed the initial complaint and filed a new complaint against the proper owner. However, this new pleading did not contain a jury trial. As a result of some further confusion, the Plaintiff served upon Defendant Pueblo another complaint which was exactly the same as the first, except it demanded a jury trial. This latter pleading, however, was never filed with the Court.

In light of this factual background, it is this Court's conclusion that the Plaintiff has complied with the spirit, if not the letter, of the Rules and that it is not an abuse of discretion to direct a trial by jury. See 9 F. Poore & E. Kosher, Cyclopedia of Federal Procedure, Section 31.23 (3d ed. 1967). Plaintiffs' motion will be granted.


EILEEN R. PETERSEN
Judge