

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

SLIM and MARILYN FRANCIS

Plaintiffs

vs.

PUEBLO INTERNATIONAL, INC.

Defendant

CIVIL NO. 536/82

ACTION FOR DAMAGES

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FINCH, Judge

MEMORANDUM OPINION

March 9 , 1983

I. INTRODUCTION

Plaintiffs, Slim and Marilyn Francis, have filed a Motion for Trial by Jury pursuant to Fed. R. Civ. P. 39(b) and a Motion for Continuance. Defendant, Pueblo International, Inc. has filed an opposition to the motions. For the reasons set

forth below the Motion for Trial by Jury and the Motion for a Continuance will be granted.

On June 28, 1982, plaintiffs filed a complaint in which they alledged that the defendant negligently maintained its business premises and as a result they were injured. On August 2, 1982, the defendant filed its answer, which was the last pleading concerning the issues in the complaint. It was not until January 7, 1983 that a demand for jury trial was made.

The Federal Rules of Civil Procedure, made applicable to this Court pursuant to 5 V.I.C. App. IV, Rule 7, preserves the right of trial by jury. Fed. R. Civ. P. 38(b) states in pertinent part:

Any party may demand a trial by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue (emphasis added).

Fed. R. Civ. R. P. 38(d) provides in pertinent part:

The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury.¹

^{1/} Fed. R. Civ. P. 5(d) states that all papers which are required to be served upon a party after the complaint is filed shall be filed with the court either before service or within a reasonable time thereafter.

In applying the above rules, plaintiff, by delaying five months before making their jury demand have waived their right to a jury trial. However, pursuant to Fed. R. Civ. P. 39(b) the Court has in its discretion the power to ~~relax~~ the time requirements of Rule 38(b) upon a motion by a party who has waived his right by failing to make a timely demand.^{2/} Fed. R. Civ. P. 39(b).

In exercising its discretion on a Rule 39(b) motion, the courts have adopted two well-defined but divergent approaches. Some courts have adopted a view that "the court should grant a jury trial in the absence of strong and compelling reasons to the contrary". Cox v. C. H. Masland & Sons, 607 8.2d 138 (5th Cir. 1979); Swofford v. B & W., Inc., 336 F. 2d 406, 409 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965). As stated in 9 C. Wright & A. Miller, Federal Practice and Procedure §2334, at 116 (1971):

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 denied.

^{2/} This rule provides that, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Concomitantly, other courts have strictly interpreted Rule 39(b) to mean that the court has no discretion to grant a jury trial when a party has not made a timely demand and, absent any special circumstances, a court should not excuse a party for his non-compliance with the procedural requirements of Rule 38(b). Lynch v. Consolidated Rail Corp., 76 F.R.D. 147 (2nd Cir. 1977); Biesen Kamp v. Atlantic Richfield Co., 21 F.R. Serv. 2d 801 (E.D. Pa. 1976); Canuso v. Dennis J. Sweeney & Co., Inc., 16 F.R. Serv. 2d 1056 (E.D. Pa. 1972); Godfrey v. Pabst Brewing Co., 15 F.R. Serv. 2d 1309 (E.D. Pa. 1972).

Plaintiffs have asserted five reasons in support of their motion. Firstly, they contend that failure to have demanded a jury trial within the time allowed by law was due solely to a clerical error and the failure of counsel to spot the omission for a jury demand in the final draft of the complaint. Secondly, plaintiffs argue that the case is only in the preliminary stages of discovery. Thirdly, that the issues in the case are "readily susceptible" to determination by a jury. Fourthly, plaintiffs contend that their counsel did not become aware of the fact that the demand for trial by jury was not on the face of the complaint until counsel's return to St. Croix after the Christmas holidays. Finally, plaintiffs assert that defendant would incur no prejudice at this time if the Court granted its Motion for Trial by Jury and a continuance.

Although this Court advocates a strict interpretation of Fed. R. Civ. P. 39(b), it is, however, cognizant of Judge Christian's position in Samuel v. Soto and TMX, V.I., Inc., Civil No. 42/1978, D.V.I. (September 19, 1978). In that case, Judge Christian adapted the liberal approach in interpreting Fed. R.Civ. P. 39(b). He took the position that mere untimeliness was not a "compelling reason to deny an out-of-time motion for a jury trial."

In the case at bar, the Court is likewise presented with an "out-of-time" motion for a jury trial. Here the plaintiffs have delayed five months before making their demand for a trial by jury. Plaintiffs' reasons in support of their Motion for Trial by Jury do not impress the Court in the least. However, in light of Judge Christian's ruling in Samuel, where he adopted the view that mere untimeliness is not a compelling reason to deny a motion for trial by jury, the Court will grant plaintiffs' motion.

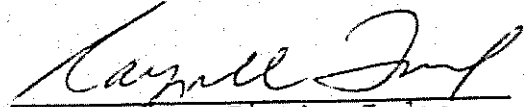
The Court, in rendering a ruling on the instant motion, feels compelled to enunciate its views concerning the compliance with the applicable Rules of the Territorial Court and the Federal Rules of Civil Procedure.

As indicated earlier in this opinion, the Court is a strong advocate of the compliance with procedural rules of the Court. In the instant case, counsel for plaintiffs have

requested that this Court grant its Motion for Trial by Jury and a Continuance, both of which were filed a mere three weeks before the case was set for trial by the court. The only real excuse for counsel's failure to make a proper demand for a jury trial was mere oversight. The Court believes that compliance with the procedural rules of the Court is the predicate indispensable to the preservation of certain fundamental rights such as the right to a jury trial. The time requirements of Fed. R. Civ. P. 38(b) were intended to provide for procedural standardization and the orderly administration of caseloads. In view of this, this Court in the future, notwithstanding Judge Christian's ruling in Samuel, will strictly scrutinize all motions for trial by jury which are not in compliance with the time limitations of Fed. R. Civ. P. 38(b) for a showing of special circumstances. In the exercise of its discretion to order a jury trial under Rule 39(b), 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).

For the foregoing reasons, plaintiffs' Motion for Trial by Jury and Motion for Continuance are granted.

DATED: *March 9, 1983*


Raymond L. Finch, Judge