

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

**RUSSELL (RUSS) J. HART, SR.
d/b/a HART'S CONSULTING CO.,**

Plaintiff,

v.

**OSBERT POTTER in his capacity as
Commissioner of Insurance,**

Defendant.

Case No. ST-18-CV-220

**ACTION FOR
DECLARATORY
JUDGMENT**

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (filed at 5:10pm on April 24, 2018) (the "Motion for TRO").¹

Plaintiff Russell (Russ) J. Hart, Sr. d/b/a Hart's Consulting Co. ("Hart") sought a temporary restraining order enjoining and restraining Defendant Osbert Potter in his capacity as Commissioner of Insurance (the "Commissioner") from taking any action that serves to revoke Hart's business license. Hart also moved for a stay of enforcement of the Commissioner's Order dated April 11, 2018 (the "Order"). In an Order issued April 25, 2018, this Court denied the Motion for Temporary Restraining Order and scheduled a hearing on the Motion For Preliminary Injunction.² That

¹ Contemporaneously with the Motion for TRO, Plaintiff filed a Motion to Stay. A hearing is scheduled for May 8, 2018 to address that Motion.

² The Court also scheduled a Status Conference for May 4, 2018, but the parties agreed to change the Status Conference to May 2, 2018. At the Status Conference the Court determined this matter is a Writ of Review or appeal of an administrative decision, and therefore Plaintiff is not entitled to a hearing on a preliminary injunction. Indeed, his motion for temporary restraining order was likely not eligible for consideration. However, since the Court had

Order did not elucidate the reasons the Motion For Temporary Restraining Order was denied. This Memorandum Opinion Order provides the basis for the denial of the motion for temporary restraining order.

BACKGROUND

Plaintiff Russell J. Hart describes himself as an off-island public insurance adjuster. In November 2017, Hart arrived in the U.S. Virgin Islands and applied for a non-resident public adjuster's license in order to represent consumers in the Territory with respect to their insurance claims related to Hurricanes Irma and Maria. Hart was issued such a license by the Division of Banking, Insurance and Financial Regulation (the "Division") on December 8, 2017. In early February 2018, the Division learned that Hart had previously held a non-resident public adjuster's license in the Territory, a fact which he did not disclose on his November 2017 application. Upon investigation, the Division discovered that Hart's previously-issued license had been revoked by an order dated March 4, 1996 (the "1996 Order"), information Hart had also failed to disclose on his November 2017 application. In addition, the Division learned that Hart had begun writing letters to insurance companies on behalf of consumers in the Territory in November 2017, thereby providing services as a public adjuster prior to the issuance of his license to do so. As

a result of this information, on February 16, 2018, the Commissioner issued an order revoking Hart's December 2017 license. On March 1, 2018, the Commissioner issued an order granting a stay of the February Order pending a hearing on the matter and on March 5, 2018, the Commissioner held said hearing (the "Hearing").

At the Hearing, Hart claimed that his failure to disclose the fact that he had previously held a Virgin Islands license was the result of a mistake in reading the application form. Further, Hart asserted that he was not required to report that the previous license had been revoked because a subsequent order had been issued following a hearing, rescinding the revocation. Finally, Hart stated that he had been told by a member of the Division's staff that he could begin providing services as a public adjuster while the issuance of his license was pending, but he did not provide the name of the staff member who allegedly gave him this information. At the conclusion of the Hearing, the Commissioner took the matter under advisement and gave Hart fifteen (15) days in which to provide a copy of the order rescinding the revocation of his previous license. In a letter dated April 6, 2018, Hart stated that he accepted the fact that he had "commenced adjusting services in the Virgin Islands prior to the issuance of a license from the Division" but asked that his actions be viewed in light of the circumstances at the time, claiming that homeowners had been desperate and the situation "chaotic." Mot. for TRO Ex. E ¶ 20. Hart further stated that he was unable to locate the order rescinding revocation of his 1996 license. As a result, the Commissioner ordered Hart to immediately surrender his 2017 Virgin

Islands public adjuster's license and cease and desist from providing public adjusting services in the Territory. This directive was contained in an April 11, 2018 Order. Hart appeals that Order in the instant case.

ANALYSIS

A. Standard for Temporary Restraining Orders.

The Court has the authority to issue a temporary restraining order upon motion, pursuant to Virgin Islands Rule of Civil Procedure 65(b). A temporary restraining order is a stop-gap procedural device to preserve the status quo until a preliminary or permanent injunction can be considered. *Appleyard v. Juan F. Luis Hosp. & Med. Ctr.*, 2014 V.I. LEXIS 56, *3 (V.I. Super. Ct. July 28, 2014). Such relief is considered “an ‘extraordinary and drastic remedy’ . . . never awarded as of right and may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Yusuf v. Hamed*, 59 V.I. 841, 847, 2013 V.I. Supreme LEXIS 67 (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90, (2008); *Appleyard v. Governor Juan F. Luis Hospital & Medical Center*, 61 V.I. 578, 584, 2014 V.I. Supreme LEXIS 61. The grant or denial of a request for a temporary restraining order is within a trial court's discretion. *Pate v. Gov't of the V.I.*, 2014 V.I. LEXIS 112, *1. “The factors to be considered when evaluating a temporary restraining order request are the same factors courts consider when evaluating whether to issue a preliminary injunction”. *Canegata v. Schoenbaum*, 64 V.I. 252, 259 n.20 (V.I. Super. Ct. May 27, 2016). The

Court considers the following, referred to as the *Petrus* factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the requested relief; (3) whether granting injunctive relief will result in even greater harm to the nonmoving party; and (4) whether granting the injunctive relief will be in the public interest. *Pate*, 2014 V.I. LEXIS 112, at *7; *Canegata*, 64 V.I. at 259 (citing *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554, 2012 V.I. Supreme LEXIS 34).

B. Hart Has Not Demonstrated a Reasonable Probability of Success on the Merits.

Hart claims that he is likely to succeed on the merits of his case because the Commissioner improperly treated the 1996 order as a final order.

Hart cites 22 V.I.C. §§790 and 791 in his assertion that there was no final order revoking his 1996 license.³ §790(b), as it existed in 1996, states that “[t]he Commissioner may suspend, revoke, or refuse to renew any such license by order given to the licensee not less than fifteen days prior to the effective date thereof, subject to the right of the licensee to have a hearing” Per §791, also as it existed in 1996, “[e]very order suspending any such license shall specify the period during which suspension will be effective, and which period shall in no event exceed twelve months.” Hart claims that he petitioned for and received a hearing before the then

³ The Court notes that the sections of the Code Hart references have since been amended and are now incorporated in chapter 31 as 22 V.I.C. §776 (a), (b) and (i). 2016 V.I. ALS 7964.

Commissioner of Insurance in 1996 and that said hearing resulted in an order rescinding the revocation of his license, but Hart did not produce that alleged order. Instead, Hart asserts that because the 1996 Order does not specify the duration of the suspension, as required by §791, it cannot qualify as a “final order” for the revocation of Hart’s license. Mot. for TRO. This is problematic for two reasons. First, §791 does not apply in this instance. §791 applies to “[e]very order *suspending* any such license” (Emphasis added.) Hart’s previous license was revoked, not suspended. A suspension is defined as “[t]he temporary deprivation of a person’s powers or privileges,” Black’s Law Dictionary 1584 (9th ed. 2009), whereas a revocation is “[a]n annulment, cancellation, or reversal.” *Id.* at 1435. There is no need to define a period of time during which a revocation will be effective, as a revocation is essentially permanent (unless the Commissioner decides to modify the order). The duration of a suspension, however, must be specified. Later amendments to 22 V.I.C. chapter 31 support this analysis. §776(i) was added in February 2017 and replaces §790(b).⁴ The new statute reads, “[e]very order suspending a license must specify the period during which suspension will be effective, and the period may not exceed 12 months. For purposes of this section, the 12-months period applies only to suspension.” §777, also added in February 2017, expands upon the difference between a suspension and a revocation. §777(a) reads in relevant part,

Upon written application of a person who was refused a license or whose license was not renewed or was revoked, or surrendered for cause under

⁴ See n.3.

section 776, the Commissioner shall hold a hearing to determine whether the administrative action imposing the refusal, nonrenewal, revocation, or other administrative action should be modified . . .

§777(e), however, makes clear that “[f]or the purpose of this section, administrative action *does not include suspension that cannot exceed 12 months.*” (Emphasis added.) Taken together, §§776(i) and 777(e) imply that the amendments to chapter 31 were intended to clarify the difference between a temporary suspension “that cannot exceed 12 months” and other instances wherein a person might lose or be denied an adjustor’s license. Read in this light, §791 was intended to apply only to suspension orders, not revocation orders. As a result, the law did not require that the 1996 Order include a specific time period in order to be considered “final.”

The second problem with Hart’s argument is the law did not (and does not) require that a second orders after a revocation. Neither §790 nor §791 makes any mention of a requirement for a second, “final” order to be issued, even if a hearing is not held. As no additional Order has been produced, the 1996 Order is the final order of record in that matter. Hart has not supplied the Court with any authority for his proposition that the Commissioner has the burden to produce the second order that Hart believes exists, but which Hart has not produced. Therefore, Hart has not demonstrated a reasonable probability of success on the merits.

B. Hart Has Not Demonstrated that He May Suffer Irreparable Harm without a Temporary Restraining Order.

The Supreme Court of the Virgin Islands has implied that a party's ability to show irreparable harm is the most significant factor for the Superior Court to consider when deciding whether to issue a temporary restraining order. See *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 554, 2015 V.I. Supreme LEXIS 22. ("This is why 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 - in other words, harm without an adequate legal remedy"). "The most compelling reason in favor of entering an injunction is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Pate*, 2014 V.I. LEXIS 112, at *10 (quoting 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*, § 2947) (punctuation deleted).

Here, Hart states that he is required to report a license revocation and/or any negative action to the appropriate authorities in all jurisdictions where he is licensed and that revocation of his Virgin Islands license would result in revocation of his licenses in those jurisdictions, as well. Further, Hart points out that his work is adjusting insurance claims in the aftermath of hurricanes and thus the timing of this revocation is important. Hart asserts that he could potentially suffer irreparable harm from losing his licenses (and thus his ability to earn a living in this field), as well as losing post-Irma and Maria clients in the Virgin Islands.

However, “[i]rreparable harm is certain and imminent harm for which a monetary award does not adequately compensate.” *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2018 V.I. Supreme LEXIS 4, *19 (quoting *Yusuf v. Hamed*, 59 V.I. 841, 854, 2013 V.I. Supreme LEXIS 67 (citations and internal quotation marks omitted)). While it is true that Hart may suffer harm should he lose his licenses and post-Irma and Maria customers, the possible harm would be purely financial and a monetary award for any lost income would compensate Hart. Therefore, the harm is not irreparable. This factor weighs in favor of the Commissioner.

C. Entering the Temporary Restraining Order Would Not Cause the Commissioner or the Division to Suffer Greater Harm than Hart.

Hart suggests that little or no harm will come to the Commissioner or the Division should his request for injunctive relief be granted, whereas he himself will suffer irreparable harm, as described above. The Court concurs that it is unlikely that the Commissioner or Division would suffer harm from the issuance of a temporary restraining order. This factor weighs in favor of Hart. But it is the only factor that weighs in his favor.

E. Public Interest Weighs in Defendant’s Favor.

Hart claims that the public interest factor weighs in his favor because “the public interest is always furthered when the right thing is done” and the public would

benefit from knowing that Government entities will not “arbitrarily take licenses without due process of law.” Mot. for TRO.⁵ In fact, the public interest is best served when service providers are properly regulated and licensed. This is particularly true in challenging times, such as those following a disaster, when untrained or otherwise unfit individuals may attempt to provide services to those in need.⁶ The public should be able to have confidence that a licensed public adjuster has been properly vetted and is qualified to perform those services. Moreover, 22 V.I.C. §776(b) explicitly provides for the due process Hart claims he did not receive. In the event that a license is revoked, “[t]he applicant or licensee may make written demand upon the Commissioner not later than 15 days after the notice for a hearing before the Commissioner to determine the reasonableness of the Commissioner’s action.” Nothing herein suggests Hart did not receive due process as he had a hearing in April 2018.

Finally, Hart has not shown that the people of the Virgin Islands will be harmed, should his license be revoked. There is no reason to believe that there is a shortage of insurance adjusters in the Territory at this time or that the general public will be injured, should Hart be removed from that pool of workers while this matter is pending. This factor weighs in favor of the Commissioner.

⁵ As the Mot. for TRO was not paginated, it is impossible to provide a pin citation.

⁶ This Court makes no findings as to Hart; it has no opinion on whether he is untrained or otherwise unfit to serve as a public adjuster. The Court simply recognizes that the Commissioner of Insurance is charged with regulating and licensing public adjusters.

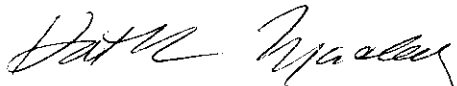
CONCLUSION

After weighing the *Petrus* factors, the Court was not persuaded that it should grant the Motion for TRO. Hart is unlikely to prevail on the merits, he has not demonstrated the potential for irreparable harm, and he has not shown any public interest rationale for injunctive relief. Therefore, the Court denied Plaintiff's Motion for Temporary Restraining Order by the Order issued April 25, 2018.

This Opinion is issued to support that April 25, 2018 Order that denied the Motion For Temporary Restraining Order. Therefore, no order will accompany this opinion.

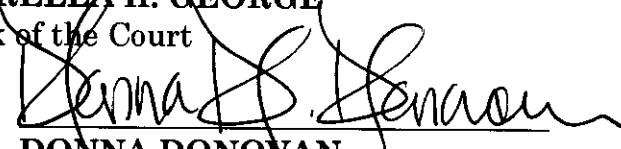
ORDERED that a copy of this Order be served upon Defendant and copies directed to Clive Rivers, Esq., Dolace McLean, Esq., and Ariel Smith, Esq.

DATED: May 7, 2018



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: 
DONNA DONOVAN
Court Clerk Supervisor 5/7/2018