

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

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ALVIN BATTISTE and PATRICIA
BATTISTE, et al.,

Plaintiffs

vs.

CIVIL NO. 505/1980

CITABANK, N.A., IBG PROPERTIES,
INC., NBG PROPERTIES, INC., and
TRADEWINDS, INC.,

Defendants

DAVID E. MASS, ESQ.
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and

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(Co-Counsel for Plaintiffs
Battiste, et al.)

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NBG Properties, Inc., and Citibank, N.A.)

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(Counsel for Defendant Tradewinds, Inc.)

MEMORANDUM OPINION AND ORDER
(February 7, 1983)

FEUERZEIG, J.

In an enormous waste of resources of both the District Court and this court, several identical motions in two closely related cases have been before both courts. Now that the District Court

has issued its Memorandum Opinion and Order, ^{1/} this court will address the motions before it. All but one will be disposed of summarily.

Defendant Tradewinds, Inc. has moved to dismiss, pursuant to Rule 12(b)(6), Fed.R.Civ.P., all 27 counts of plaintiffs' complaint that relate to punitive damages. Tradewinds urges that plaintiffs' causes of action are based on contract and not tort and that punitive damages cannot be awarded. ^{2/} Tradewinds does admit, however, that plaintiffs' complaint does appear to allege fraud, but it claims those allegations are not stated with particularity, as required by Rule 9(b), Fed.R.Civ.P.

Paragraph 9 of plaintiffs' complaint states, "That the defects and deficiencies encountered in the homes purchased by the plaintiffs were all the result of negligence, carelessness, deceit, and fraud of the defendant. . ." It then specifies more than 35 defects found in the plaintiffs' homes. Moreover, paragraph 8 alleges the homes "were seriously lacking in the qualities which representatives of defendant in their sales representations and their warranties had led plaintiffs to believe would be delivered to them." Paragraph 12 further alleges that the "actions and breaches of each defendant were wilful and committed with

^{1/} Tradewinds, Inc. v. Citibank, N.A. et al., Civ. No. 80-7 (D.V.I., Jan. 11, 1983).

^{2/} See Restatement (Second) of Contracts §355 (1981), "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."

fraudulent intent . . ." Such averments surely constitute "a short and plain statement of the claim," sufficient to meet the standards of Rule 8(a). Fed.R.Civ.P. See Hirshhorn v. Mine Safety Appliances Co., 54 F.Supp. 588 (D.C. Pa. 1944) (Rule 9(b) held not to abrogate Rule 8(a) in fraud claims), and C. Wright and A. Miller, Federal Practice and Procedure, §1298 (1969). Punitive damages may be awarded for conduct that is outrageous, "because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts §908 (1979). Since the plaintiffs may establish that the defendant Tradewinds' conduct was fraudulent, and, thus, outrageous, the court will not dismiss the counts for punitive damages. ^{3/}

The remaining motions will be disposed of summarily, but not without comment. This court, as the District Court, also feels compelled to comment briefly and adopts the language of Judge Christian in Tradewinds v. Citibank, supra:

The number of lengthy*and in many instances almost purely specious motions, affidavits and discovery requests filed by counsel has, in the judgment of the Court, made a farce of the orderly pre-trial motion and discovery practice contemplated by the Federal Rules. It should be remembered that not every defect in an opponent's pleading provides a proper basis for attack by way of motion. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome..." Conley v. Gibson, 355 U.S. 41, 48 (1957). So also the longstanding custom in this jurisdiction of civility and accommodation among counsel is antithetical to the idea that motion practice and discovery are a syntactical jousting contest designed to trick an opponent into damning admissions or oversights.

^{3/} The stipulation and agreement to strike all claims for punitive damages that the plaintiffs had against Citibank, IBG Properties, and NBG Properties does not affect the plaintiffs' claims for punitive damages against Tradewinds.

It is well known to all the members of the bar that this Court operates under a stringent mandate to minimize the congestion of its criminal and civil case calendar. As such, we can only take a dim view of the practice of servicing interminable filings solely for the purpose of delay, obstruction, or harrassment. The above-captioned action was commenced three years ago this month. ^{4/} At this late date, counsel for all parties surely owe a responsibility to their clients, if not to the Court, to resolve minor differences over discovery and filing deadlines through stipulation rather than through time consuming (and costly) motions. See Memorandum to Members of the Virgin Islands Bar, D.V.I., July 15, 1981. Counsel are hereby put on notice that the court is prepared to impose appropriate sanctions whenever a filing is submitted merely as a dilatory tactic.

*Judge Aldisert has recently noted that "advocacy is measured by effectiveness, not loquaciousness." "The Appellate Bar: Professional Competence and Professional Responsibility," Capital University Law Review, 445, 458 (1982). Indeed loquacity is the very reason a legal memorandum may fail to persuade a court inasmuch as meritorious arguments are readily lost among groundless arguments.

ORDER

The court having reviewed the motions and supporting memoranda before it, it is

ORDERED that the motion of defendant Tradewinds, Inc. to strike all punitive damage counts against it from plaintiffs' complaint is denied, and it is further

ORDERED that the motion of Citibank, N.A. to join James J. Urban, Lois Urban, Ken Kolasa, and Lynn Kolasa, four former directors of Tradewinds, who now are serving as liquidating trustees of that corporation, is granted in accordance with Tradewinds, Inc. v. Citibank, N.A., No. 80-7 (D.V.I. Memorandum and Order, January 11, 1983), and it is further

^{4/} The Territorial Court action was filed May 29, 1980, just short of three years.

ORDERED that the motion of Tradewinds to dismiss the complaint of 14 plaintiffs for failure to comply with this court's order of May 24, 1982 is denied on the grounds that all plaintiffs, although in a very tardy fashion, now have complied with that order, and it is further

ORDERED that the motion of defendants Citibank, N.A., et al. to compel answers to a combined set of interrogatories and production of documents is denied as moot, and it is further

ORDERED that the renewed motion of Citibank, et al. to compel complete and non-evasive responses to questions 21(a)-(c), 25(a), 33, 39, 50A (Second), 97(a)-(h), and 98 (a) and (b) in its first set of interrogatories and request for production of documents is granted because the information sought is relevant to the subject matter of the pending action and Tradewinds has raised no claim of privilege with respect to the information sought. Tradewinds shall supply the information sought within fifteen days of this order. The motion is denied as to questions 31 and 40, and it is further

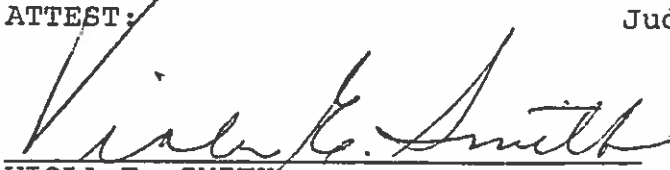
ORDERED that the motion of Citibank to compel answers to its second set of interrogatories and request for the production is denied. The second set of interrogatories and request for the production of documents are xeroxed copies bearing a joint caption: the caption of this case and of the Tradewinds v. Citibank, District Court case. The court can think of no reason why the exact same set of interrogatories needs to be filed and answered

in both cases. Whatever need Citibank may have for answers to interrogatories, this need will be more than adequately served by one set of answers, which have been ordered to be answered by the District Court, and which certainly will be available to Tradewinds and Citibank in preparing for as well as for the trial of this case, and it is further

ORDERED that the motion of Citibank to permit the filing with this court of photocopied discovery requests is denied for the reasons stated in connection with Citibank's motion to compel answers to its second set of interrogatories, and it is further

ORDERED that the motion of Tradewinds to strike interrogatories addressed to the four newly joined liquidating trustees of Tradewinds is denied because the basis of the motion--that the trustees were not parties to whom interrogatories could be sent--is no longer applicable, and the interrogatories shall be deemed served on the non-joined parties as of the date of they are served with the defendants' crossclaim that names them as parties, and they shall have 45 days from service to answer the interrogatories.

ATTEST:


VIOLA E. SMITH
Administrator/Clerk of the Court


HENRY L. FEUERZEIG
Judge of the Territorial Court