

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

RESQWEST-AXIOM
SERVICES,LTD

Plaintiff)

)

)

)

vs

)

CRUZ BAY WATERSPORTS,INC.
CRUZ BAY WATERSPORTS
CO,INC.

)

)

)

Defendant

CASE NO. ST-16-CV-0000384

ACTION FOR: BREACH OF
CONTRACT - CIVIL

**NOTICE OF ENTRY OF
MEMORANDUM OPINION &
ORDER**

TO: MARJORIE WHALEN, ESQ.
RAVINDER S, NAGI, ESQ.
JUDGES, MAGISTRATES, LAW CLERKS, IT
ESTRELLA H. GEORGE, ACTING CLERK OF THE
COURT

Please take notice that on December 05, 2016 a(n) MEMORANDUM
OPINION & ORDER dated November 30, 2016 was entered by the Clerk in the
above-entitled matter.

Dated: December 05, 2016

Estrella H. George
Acting Clerk of the Court

CAMEIL A. CLARKE
COURT CLERK II

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

RESQWEST-AXIOM SERVICES, LTD.,

Plaintiff,

v.

**CRUZ BAY WATERSPORTS, INC.,
CRUZ BAY WATERSPORTS CO., INC.,
CBWS-M&C, INC., ISLAND TIME
WATERSPORTS, INC. d/b/a CRUZ BAY
WATERSPORTS and CHRIS BATCHELOR,**

Defendants.

CASE NO. ST-16-CV-384

MEMORANDUM OPINION

Pending before the Court is Defendant Chris Batchelor's August 11, 2016, Motion to Dismiss,¹ and Defendant Island Time Watersports, Inc., d/b/a Cruz Bay Watersports' August 11, 2016, Motion to Dismiss.² For the following reasons, Defendants' Motions to Dismiss will granted.

FACTUAL AND PROCEDURAL HISTORY

On October 5, 2013, Plaintiff entered into a contract with Defendant Island Times Watersports, Inc., d/b/a Cruz Bay Watersports to provide customer reservation software and associated support services.³ Plaintiff is a Bermuda company doing business in the Virgin Islands with a principle place of business in Bermuda. Defendant Island Times is a U.S. Virgin Islands corporation doing business in the U.S. Virgin Islands. The agreement was signed by Defendant

¹ Plaintiff responded on August 25, 2016, and Defendant replied on September 12, 2016.

² Plaintiff responded on August 25, 2016, and Defendant replied on September 12, 2016.

³ Pl.'s June 30, 2016, Compl. ¶ 9.

Batchelor in his capacity as an officer, the Vice President and Secretary, of Island Time Watersports. On February 12, 2016, Plaintiff notified Defendants that they were in breach of their agreement based on a failure to pay monthly invoices and a failure to inform Plaintiff of their desire to terminate their use of Plaintiff's services or allow Plaintiff to provide an upgrade.⁴ On June 30, 2016, Plaintiff filed a Complaint alleging breach of contract and claiming damages of \$12, 124.50.

STANDARD

A motion asserting a defense under Fed. R. Civ. P. 12(b) must be raised by the party before filing a responsive pleading.⁵ Under Fed. R. Civ. P. 12(b)(6), a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."⁶ "In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider 'the allegations contained in the complaint, exhibits attached thereto, and matters of public record.'"⁷ The Court may also consider "items of unquestioned authenticity that are referred to in the challenged pleading and are integral to the pleader's claim for relief."⁸

Generally, when considering such a motion, the Court must first identify the elements of a claim and identify the items the Plaintiff must sufficiently plead.⁹ The Supreme Court of the

⁴ Pl.'s June 30, 2016, Compl. ¶¶ 12-16.

⁵ FED. R. CIV. P. 12(b); see *Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015) ("[T]he Court relies on the principles espoused in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and construes pleading requirements under Rules 8(a) and 12(b)(6) of the Federal Rules Civil Procedure. Federal Rules 8 and 12 are made applicable to the Superior Court by Superior Court Rule 7....").

⁶ FED. R. CIV. P. 12(b)(6); *Id.*

⁷ *Lockhart v. Treasure Bay V.I. Corp.*, 2015 V.I. LEXIS 101, *5 (V.I. Super. Ct. 2015) (citing *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 190 n.3 (3d Cir. 1999)); *E.g. First Bank of Puerto Rico v. Prosser*, 2015 V.I. LEXIS 72, *5 (V.I. Super. Ct., June 22, 2015) (citations omitted); *Nicholas v. Damian-Rojas*, 2015 V.I. LEXIS 11, *2-4 (V.I. Super. Ct. 2015); *Manbodh v. Hess Oil V. I. Corp.* (In re Kelvin Manbodh Asbestos Litigation Series), 47 V.I. 375, 381-384 (V.I. Super. Ct. 2006) (citations omitted); *Sprauve v. W. Indian Co.*, 799 F.3d 226, 232 (3d Cir. V.I. 2015).

⁸ *Manbodh*, 47 V.I. at 382 (citations omitted).

⁹ *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 458 (V.I. 2013).

Virgin Islands has explained that “a claim requires a complaint with enough factual matter (taken as true) to suggest the required element.”¹⁰ Thereafter, the Court can liberally construe the pleadings to the extent permitted by the pleading requirements of Fed. R. Civ. P. 8¹¹ and “accept as true all well-pleaded allegations in the complaint” in favor of the plaintiff.¹² While “the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation.”¹³

The Virgin Islands Supreme Court has further instructed that “[t]he plausibility determination is a ‘context-based’ determination which should be guided by the court’s ‘judicial experience and common sense.’”¹⁴ “Plausibility requires that the plaintiff allege facts that are more than simply ‘consistent with a defendant’s liability’ and must permit the court to infer more than the mere possibility of misconduct.”¹⁵ Only after satisfying this multi-step analysis can a party survive a motion to dismiss.

Additionally, a motion to dismiss based on a forum selection clause can be treated as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), or as a motion to dismiss for improper venue according to Rule 12(b)(3).¹⁶ While the Supreme Court of the Virgin

¹⁰ *Brady v. Cintron*, 55 V.I. 802, 822-23 (V.I. 2011); *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 494 (V.I. 2008) (citations and internal quotations omitted).

¹¹ *Iqbal*, 556 U.S. at 678 (“the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

¹² *Joseph v. Bureau of Corrs.*, 54 V.I. 644, 649-50 (V.I. 2011) (internal quotations and citations omitted); see also *Gov’t Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff’d sub nom* (“[I]n considering a motion to dismiss under Rule 12(b) (6), the Court must accept as true the well-pleaded allegations in the complaint [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . .”) (internal citations omitted).

¹³ *Webster v. CBI Acquisitions, LLC*, 2012 V.I. LEXIS 9, *2 (V.I. Super. Ct., Mar. 5, 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

¹⁴ *Joseph*, 54 V.I. at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)) (quoting *Iqbal*, 129 S. Ct. at 1950).

¹⁵ *Id.* (citing *Fowler*, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949).

¹⁶ *Neon Constr. Enters., Inc. v. Int’l Bonding & Constr. Servs., Inc.*, 2012 V.I. LEXIS 34, *4 (V.I. Super. Ct., July 25, 2012) (citing *Salovaara v. Jackson Nat’l Life Ins. Co.*, 246 F.3d 289, 298 n. 6 (3d Cir. 2001)).

Islands has cautioned against this tribunal's wholesale incorporation of the Federal Rules of Civil Procedure, since both the Supreme Court and the Superior Court have consistently applied the standards and judicial precedent established under Rule 12(b)(6), the Superior Court can rely on federal case law interpreting motions to dismiss. Accordingly,

forum selection clauses will be applied unless (1) the clause is a result of fraud or overreaching, (2) some strong Virgin Islands public policy would be violated if the clause is enforced, or (3) the opponent to the enforcement of such a clause would be forced to litigate in a jurisdiction that would be so seriously inconvenient to the opponent that it would be unreasonable.¹⁷

ANALYSIS

I. Defendant Island Time Watersports, Inc., d/b/a Cruz Bay Watersports' Motion to Dismiss

Island Time asserts the Complaint must be dismissed because Plaintiff has failed to present a claim upon which relief can be granted since the forum selection clause limits any dispute for breach of contract. According to Section 12.3, Governing Law of Plaintiff's Software and Service Contract:

This Agreement shall be governed by the laws of Bermuda, and without reference to its conflict of laws as though entered into between Bermuda residents and to be performed entirely within Bermuda, and both Customer and resQwest consent to jurisdiction and venue being Bermuda.¹⁸

¹⁷ *Citibank, N.A. v. Chammah*, 44 V.I. 85, 92 (Terr. Ct. 2001) (citing *Gen. Eng'g Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 358 (3d Cir. 1986)); see also *Neon Constr. Enters., Inc.*, 2012 V.I. LEXIS 34, *4 ("a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or overreaching; (2) that enforcement would violate strong public policy of the forum; or (3) that enforcement would in the particular circumstances of the case result in jurisdiction so seriously inconvenient as to be unreasonable." (citing *Moneygram Payment Sys., Inc. v. Consorcio Oriental, S.A.*, 65 F. App'x 844, 846 (3d Cir. 2003) (quoting *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.* 709 F.2d 190, 202 (3d Cir. 1983))).

¹⁸ Def. Island Time's Aug. 11, 2016, Mot. to Dismiss, Ex. A, Software & Service Contract, p. 5, § 12.3. The Court recognizes that although the contract was not attached to the Complaint, the Court is still able to rely on the Contract without converting the motion to one for summary judgment, because both parties have referred to the contract in their pleadings and it is an integral part of the claim for relief.

In the Complaint, Plaintiff claims this Court has jurisdiction over the breach of contract action under 4 V.I.C. § 76¹⁹, and that venue is proper under 4 V.I.C. § 78²⁰, since this is the judicial division where Defendants operate their businesses and where the action arose.²¹ Additionally, Plaintiff asserts the forum selection clause is merely permissive rather than mandatory, indicating that the parties consent to jurisdiction and venue in Bermuda, but nothing in the clause indicates that jurisdiction and venue shall be exclusive to Bermuda.

Island Time maintains that the forum selection clause is clear and should apply since the burden is on Plaintiff to demonstrate that it is unenforceable. Island Time believes there is no reasonable argument that would support any claim by Plaintiff that the clause is a result of fraud or would in any way violate Virgin Islands public policy if enforced. Further, Plaintiff cannot claim Bermuda to be an inconvenient venue, because Plaintiff's principal place of business is located there, rather than in the Virgin Islands.

Based on federal case law interpreting Rule 12(b)(6) motions, when parties provide a choice of law provision in the contract, the provision controls unless one of the three elements for unreasonableness is satisfied.²² Here, the agreement clearly states a choice of law by using the terms, "[t]his agreement shall be governed by the laws of Bermuda, and without reference to its conflict of laws as though entered into between Bermuda residents and to be performed entirely within Bermuda." It seems that both parties agree that the word "shall" in this portion of the

¹⁹ "[T]he Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy...." 4 V.I.C. § 76.

²⁰ "All civil actions shall be initiated in the judicial division where the defendant resides or where the cause of action arose or where the defendant may be served with process." 4 V.I.C. § 78.

²¹ Pl.'s June 30, 2016, Compl. ¶¶ 7-8.

²² See *Dysart v. Dysart*, 2002 V.I. LEXIS 33, *12-13 (V.I. Terr. Ct. 2002) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1)).

agreement mandates the application of the laws of Bermuda. What remains in dispute is the second portion of the clause, “both Customer and resQwest consent to jurisdiction and venue being Bermuda.” While the Agreement must be governed by the laws of Bermuda, the Court agrees with Plaintiff that the language merely permits jurisdiction in Bermuda, rather than requires it.

Nevertheless the Court is unable to find that Plaintiff has sufficiently met its burden to show why the forum selection clause is unreasonable and unenforceable. Taking the allegations of the Complaint as true, Plaintiff is the drafter of the clause, Plaintiff has not alleged fraud, Plaintiff has failed to point to any public policy that would be violated if the clause is enforced, and Plaintiff is unable to claim that Bermuda would be an inconvenient jurisdiction because Bermuda is Plaintiff’s principal place of business. Moreover, the Complaint asserts that the breach occurred in February, 2016, so it does not appear that any claims would be time barred in Bermuda. Furthermore, unlike insurance contracts in the Virgin Islands, for which the Virgin Islands Code prevents the enforcement of forum selection clauses and choice-of-law clauses, here the subject matter of the contract and the enforcement of the forum selection clause are not restricted by Virgin Islands law.²³ Although it is indisputable that this Court may assert jurisdiction over the parties, given the forum selection clause and Island Time’s desire to enforce it, the Court will decline to exercise jurisdiction and will dismiss this portion of the suit without prejudice.

II. Defendant Batchelor’s Motion to Dismiss

Batchelor contends that Plaintiff has failed to state a claim for breach of contract upon which relief can be granted because, even though Batchelor signed the contract in his capacity as an officer of Island Time Watersports, the Complaint fails to allege any facts from the agreement

²³ See 22 V.I.C. § 820(a); *Neon Constr. Enters., Inc.*, 2012 V.I. LEXIS 34, *6-7.

which would make him personally liable. Instead, Batchelor argues he is a non-party to the agreement since the agreement was executed between ResQwest and Island Time Watersports.²⁴ In the Virgin Islands, “to establish a claim for breach of contract, a party must plead that a contract existed, that there was a duty created by the contract, that such duty was breached, and that the party suffered damages as a result of the breach.”²⁵ Here, the Court agrees that Plaintiff has failed to sufficiently plead a claim for breach of contract as to Batchelor, as there is no contract between Batchelor and ResQwest. Additionally, since Plaintiff has consented to dismissal of the claims without prejudice against Batchelor and the remaining named defendants²⁶, and since Island Time Watersports has appeared in the action, the Court finds additional analysis to be unnecessary regarding leave to amend and finds it appropriate to dismiss the Complaint against Batchelor.²⁷

In Batchelor’s reply, he seeks the reasonable costs and fees as a prevailing party according to 5 V.I.C. § 541. Batchelor asserts Plaintiff’s claim against him was frivolous and that Plaintiff has failed to provide a reasonable explanation for the Complaint against him in his personal capacity. Plaintiff claims that, when initially contacted to determine the resident agent for Cruz Bay Watersports, the Lieutenant Governor’s Office informed Plaintiff’s counsel there were numerous entities associated with Cruz Bay Watersports and it was unclear which entity, if any, remained in existence.²⁸ Defendant Batchelor maintains that, since Plaintiff is a sophisticated

²⁴ Def. Batchelor’s Aug. 11, 2016, Mot. to Dismiss, Ex. A, Software & Service Contract.

²⁵ *Fenster v. Dechabert*, 2016 V.I. LEXIS 90, *14 (V.I. Super. Ct., July 13, 2016) (quoting *Merchants Commercial Bank v. Oceanside Village, Inc.*, 64 V.I. 3, 14 (V.I. Super. Ct. 2015) (“Given that a plaintiff in the Virgin Islands has had to prove the same elements for a breach-of-contract claim that it would have to prove in any other jurisdiction in the United States, the soundest rule for the Virgin Islands is to perpetuate the rule stated by the Supreme Court of the Virgin Islands in *Chapman v. Cornwall*, having now subjected same to a Banks analysis.”)).

²⁶ Defendant Island Time alleged that Plaintiff inappropriately brought a breach of contract action against all of the named corporate entities and Chris Batchelor for an agreement entered into between Island Times and Plaintiff for use of software and services.

²⁷ Pl.’s August 25, 2016, Resp. to Def. Batchelor’s Mot. to Dismiss, at 1.

²⁸ *Id.* at 1.

business entity, the claim that Plaintiff was unsure which company with whom Plaintiff had entered into a contract is inexcusable as a basis for suing a corporate officer.

The Court has discretion to award costs in a civil action to the prevailing party from a finite list provided in 5 V.I.C. § 541(a), including attorney's fees.²⁹ Although Batchelor alleges the Complaint filed against him was frivolous, the Court need not determine if the Complaint is frivolous because 5 V.I.C. § 541(b) only requires this finding for awards of costs in personal injury actions. In order to qualifying as a prevailing party, the claims between the parties must be fully resolved so that the prevailing party is generally "considered to be the one in whose favor a decision or verdict is rendered and a judgment is entered, [but] the term may be construed more broadly."³⁰ Accordingly, since the Court agrees with Batchelor that, even without the concession of Plaintiff, the Complaint fails to state a claim upon which relief can be granted, the Court finds Batchelor to be a prevailing party within the meaning of 5 V.I.C. § 541 and that, upon proper application, the Court will consider an award of attorney's fees and costs.

²⁹ 5 V.I.C. § 541. *See Christopher v. V.I. Taxi Ass'n*, 2009 V.I. LEXIS 24 (V.I. Super. Ct., Dec. 1, 2009) (Plaintiffs were granted dismissal without an award to defendants of fees and costs under 5 V.I.C. § 541 as the case was in an early stage and defendants had generated the bulk of the fees and costs in a very short time through their aggressive defense; plaintiffs had promptly requested dismissal when defendants submitted their pleadings.); *see also Bell v. Radcliffe*, — V.I. —, 2014 V.I. LEXIS 119 (V.I. Super. Ct., Apr. 30, 2014) (Defendants were not entitled to attorney's fees since none of the defendants were prevailing parties because the matter was still pending and the parties had yet to even exchange any discovery).

³⁰ *Melendez v. Rivera*, 24 V.I. 63, 1988 V.I. LEXIS 35 (V.I. Terr. Ct. 1988).

CONCLUSION

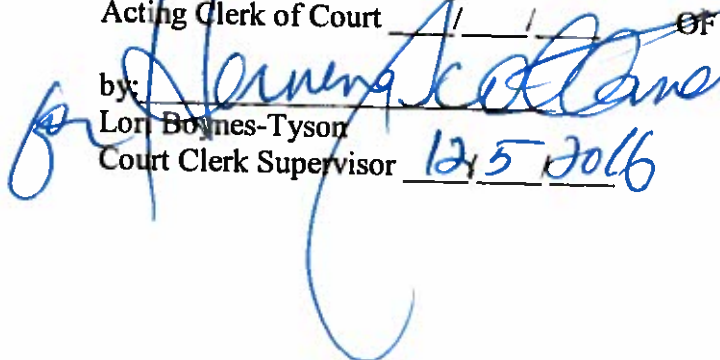
For the foregoing reasons, Defendant Chris Batchelor's August 11, 2016, Motion to Dismiss is granted, and Defendant Island Time Watersports, Inc., d/b/a Cruz Bay Watersports' August 11, 2016, Motion to Dismiss is granted. An Order consistent with this Memorandum Opinion shall follow.

Dated: November 30, 2016

ATTEST: Estrella H. George
Acting Clerk of Court


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

by:


Lori Boynes-Tyson
Court Clerk Supervisor

12-5-2016

CERTIFIED A TRUE COPY

DATE:

12-5-16

ESTRELLA H. GEORGE
Acting Clerk of the Court

By:


Camell A. Clarke
Court Clerk II

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

RESQWEST-AXIOM SERVICES, LTD.,

Plaintiff,

v.

**CRUZ BAY WATERSPORTS, INC.,
CRUZ BAY WATERSPORTS CO., INC.,
CBWS-M&C, INC., ISLAND TIME
WATERSPORTS, INC. d/b/a CRUZ BAY
WATERSPORTS and CHRIS BATCHELOR,**

Defendants.

CASE NO. ST-16-CV-384

ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Defendant Island Time Watersports, Inc. d/b/a Cruz Bay Watersports' August 11, 2016, Motion to Dismiss is **GRANTED**, and this case is **DISMISSED WITHOUT PREJUDICE** as to Defendant Island Time; and it is

ORDERED that Defendant Batchelor's August 11, 2016, Motion to Dismiss is **GRANTED**, and this case is **DISMISSED WITHOUT PREJUDICE** as to Defendant Batchelor; and it is **ORDERED** that the Complaint is **DISMISSED WITHOUT PREJUDICE** as to Defendants Cruz Bay Watersports, Inc., Cruz Bay Watersports Co., Inc., and CBWS-M&C, Inc., on the agreement of the parties; and it is

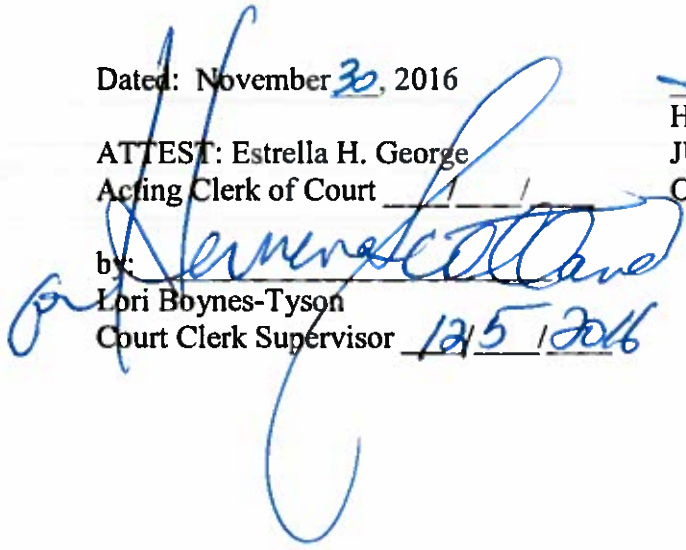
ORDERED that Defendant Batchelor may file an itemized and fully supported motion seeking attorney's fees and costs by December 9, 2016, and Plaintiff may respond by December 19, 2016;

ORDERED that copies of this Order and Memorandum Opinion shall be directed to
counsel of record.

Dated: November 30, 2016

ATTEST: Estrella H. George
Acting Clerk of Court

by:


Lori Boynes-Tyson
Court Clerk Supervisor 12/5/2016


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY
DATE: 12-5-16
ESTRELLA H. GEORGE
Acting Clerk of the Court
By: 
Cameil A. Clarke
Court Clerk II