

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

BENJAMIN PRENTICE,

PLAINTIFF,

v.

**SUNNY ISLE DEVELOPERS, LLC; AND
METRO DOOR, INC.,**

DEFENDANTS.

SX-10-CV-122

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

SUNNY ISLE DEVELOPERS, LLC,

THIRD-PARTY PLAINTIFF,

v.

FOOT LOCKER RETAIL, INC.,

THIRD-PARTY DEFENDANT/COUNTERCLAIMANT.

FOOT LOCKER RETAIL, INC.,

FOURTH-PARTY PLAINTIFF,

v.

GLASS 2000, INC.; AND EDDIE'S GLASS, INC.,

FOURTH-PARTY DEFENDANTS.

MEMORANDUM OPINION

THIS MATTER came before the Court on Cross-Claim Defendant Metro Door, Inc. (hereinafter "Metro Door") and Third-Party Defendant/Counterclaimant/Fourth-Party Plaintiff Foot Locker Retail, Inc.'s (hereinafter "Foot Locker") motion to extend time to file an opposition

in response to Plaintiff Benjamin Prentice's (hereinafter "Plaintiff") motion to disqualify A. Jeffrey Weiss, Esq., filed on May 17, 2017. On May 23, 2017, Plaintiff filed an opposition.

BACKGROUND¹

In 2008, Plaintiff commenced a lawsuit against Sunny Isle Developers, LLC (hereinafter "Sunny Isle") for injury he sustained from an alleged incident that occurred while he was working at the Champs store located in Sunny Isle Shopping Center. Plaintiff subsequently filed a revised amended complaint and added Metro Door as a defendant. Thereafter, Sunny Isle cross-claimed against Metro Door and Sunny Isle filed a third-party complaint against Foot Locker. In response, Foot Locker counterclaimed against Sunny Isle. In June 2013, the Court dismissed all the counts Plaintiff alleged against Metro Door as time barred. Subsequently, Foot Locker filed a fourth-party complaint² against Metro Door, Glass 2000, Inc. (hereinafter "Glass 2000"), and Eddie's Glass, Inc. (hereinafter "Eddie's"). In response, Metro Door filed a motion to dismiss Foot Locker's fourth-party complaint. However, on April 20, 2015, Metro Door filed a notice of voluntary withdrawal of its motion to dismiss Foot Locker's fourth-party complaint. Then on May 6, 2015, Foot Locker filed a notice of voluntary withdrawal of claims made against Metro Door in its fourth-party complaint.

On May 8, 2015, Douglas Capdeville, Esq., counsel for Foot Locker, and A. Jeffrey Weiss, Esq. filed a stipulation for substitution of counsel whereby they stipulated and agreed that A. Jeffrey Weiss, Esq. of A. J. Weiss & Associates will substitute as counsel for Foot Locker

¹ This memorandum opinion recites the factual background only to the extent necessary to explain the present issues and the bases of the Court's decision.

² The fourth-party complaint and the motion for leave to file the fourth-party complaint was filed on February 18, 2015, and the Court granted Foot Locker's motion orally at the April 9, 2015 hearing. The ruling was reduced to writing in an order entered on September 16, 2015.

(hereinafter “Stipulation”). The Stipulation was silent with regards to the fact that A. Jeffrey Weiss, Esq. was already representing Metro Door in this matter.³ In an order entered on May 27, 2015, the Court granted the Stipulation and A. Jeffrey Weiss, Esq. became counsel of record for Foot Locker. On November 4, 2015, Foot Locker filed another fourth-party complaint whereby only Glass 2000 and Eddie’s were named as fourth-party defendants; Metro Door was no longer named as a fourth-party defendant in the amended fourth-party complaint.⁴

Subsequently, a plethora of documents were filed by the different parties involved in this matter. Most recently, on October 3, 2016, Sunny Isle,⁵ Metro Door,⁶ Foot Locker,⁷ Glass 2000,⁸ and Eddie’s Glass⁹ filed a joint motion for voluntary dismissal whereby they jointly moved the Court to voluntarily dismiss “all of the cross-claims, counterclaims, third-party claims, and fourth-party claims brought by or against them, without prejudice, as these parties have arrived at a partial settlement of all such cross-claims, counterclaims, third-party claims, and fourth-party claims” and that “[n]othing herein shall affect plaintiff’s direct claims against Defendant [Sunny Isle].”¹⁰ Plaintiff filed an opposition thereto. On March 30, 2017, Metro

³ On January 13, 2012, A. Jeffrey Weiss, Esq. of A. J. Weiss & Associates entered a notice of appearance for Metro Door.

⁴ The fourth-party complaint filed on November 4, 2015 is actually an amended fourth-party complaint and should have been captioned as such. To avoid confusion between the two “fourth-party complaint” filed on February 18, 2015 and on November 4, 2015, the Court will identify the latter one as the amended fourth-party complaint.

⁵ Sunny Isle is a defendant, a cross-claim plaintiff, a counterclaim defendant and a third-party plaintiff in this matter.

⁶ Metro Door was dismissed as a defendant, but remains as a cross-claim defendant in this matter. It is interesting to note that parties, including Metro Door itself, appeared to have forgotten that Foot Locker had voluntarily withdrew its claims against Metro Door in its fourth-party lawsuit and that Metro Door was not named as a fourth-party defendant in Foot Locker’s amended fourth-party complaint.

⁷ Foot Locker is a third-party defendant, a counterclaim plaintiff, and a fourth-party plaintiff in this matter.

⁸ Glass 2000 is a fourth-party defendant in this matter.

⁹ Eddie’s Glass is a fourth-party defendant in this matter.

¹⁰ A copy of stipulation of dismissal without prejudice, signed by Sunny Isle, Metro Door, Foot Locker, Glass 2000, and Eddie’s was attached to their joint motion. A. Jeffrey Weiss, Esq. signed the stipulation of dismissal as counsel for Metro Door and as counsel for Foot Locker.

Door and Foot Locker filed a renewed motion for voluntary dismissal. Plaintiff filed an opposition and Metro Doors and Foot Locker filed a reply thereafter.

On May 2, 2017, Plaintiff filed a motion to disqualify A. Jeffrey Weiss, Esq. On May 11, 2017, parties appeared before the Court for a status conference. Plaintiff, Foot Locker, and Metro Door were given the opportunity to address the issues raised in Plaintiff's motion to disqualify A. Jeffrey Weiss, Esq. Foot Locker and Metro Door advised the Court that an opposition will be filed in response thereto. On May 17, 2017, Foot Locker and Metro Door filed this instant motion to extend time to file an opposition in response to Plaintiff's motion to disqualify A. Jeffrey Weiss, Esq.

STANDARD OF REVIEW

Under Virgin Islands Rule of Civil Procedure 6-1, "[u]nless otherwise ordered by the court, a party shall file a response within 14 days after service upon the party of any motion — except a motion filed pursuant to Rule 12 or Rule 56." V.I. R. CIV. P. 6-1(f). Under Virgin Islands Rule of Civil Procedure 6, "[w]hen the period is stated in days or a longer unit of time is '14 days or less, do not count intermediate Saturdays, Sundays, and legal holidays.'" V.I. R. CIV. P. 6(a)(1). Under Virgin Islands Superior Court Rule 10, "[w]hen an act is required or allowed to be done at or within a specified time—[t]he court for cause shown may at any time in its discretion: (1) With or without notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order of the court; (2) On motion, permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect." Super. Ct. R. 10(a). Similarly, Virgin Islands Rule of Civil Procedure 6 provides that "[w]hen an act is required or allowed to be done by or within a specified period, the court may upon a showing of good cause or excusable neglect,

extend the date for doing that act.” V.I. R. CIV. P. 6(b). Virgin Islands Rule of Civil Procedure 6 further provides that “[t]he court may consider whether the request to extend time is made before or after the required date; the reason for the movant’s delay; whether the reason for delay was within the reasonable control of the movant; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party’s failure to meet the originally prescribed deadline.” *Id.* Moreover, under Virgin Islands Rule of Civil Procedure 6-2, “[a]ll motions seeking an extension of time under Rule 6(b) shall include the following: (a) A statement that the moving party has conferred with opposing parties and there is agreement or objection to the motion or that despite diligent effort, the moving party cannot ascertain opposing counsel’s position; and (b) A representation reporting the number of motions for extension of time that have been filed in the pending action by the movant with respect to the same prescribed time period.” V.I. R. CIV. P. 6-2.

DISCUSSION

In Foot Locker and Metro Door’s motion to extend time, they requested for an additional fourteen days to respond to Plaintiff’s motion to disqualify A. Jeffrey Weiss, Esq. because they are “waiting for affidavits...which are necessary to refute the allegations raised by [P]laintiff and to establish that there is no basis for the motion for disqualification.” (Motion, p. 1)

Furthermore, Foot Locker and Metro Door submitted that there is “good cause for extension of time sought,” that “there will be no prejudice to [P]laintiff if the short extension of time requested is...granted,” that “the extension of time requested will not adversely impact on or cause undue judicial delay,” that “movants have acted in good faith in seeking this extension,” and that “interests of justice weigh heavily in favor of granting the extension.” (*Id.*, at p. 3-4)

In his opposition, Plaintiff argued that Foot Locker and Metro Door's motion to extend time should be denied because A. Jeffrey Weiss, Esq. "is automatically disqualified regardless as to whether any party brought this matter to the attention of the court." (Opp., p. 2) Plaintiff pointed out that the "[t]imeliness of [his] Motion to Disqualify is not an issue where there is an actual conflict in the representation provided by counsel because he simply cannot represent both a plaintiff and a defendant in the same matter." (Id.) Thus, Plaintiff requested the Court to deny Foot Locker and Metro Door's motion to extend time.

1. Whether Automatic Disqualification is Warranted Under These Circumstances

In essence, the basis of Plaintiff's argument to deny Foot Locker and Metro Door's motion to extend time is that a concurrent conflict of interest exists due to the fact that A. Jeffrey Weiss, Esq.'s representation of Foot Locker is directly adverse to Metro Door, in violation of Virgin Islands Rules of Professional Conduct 211.1.7. V.I.S.Ct.R. 211.1.7(a)(1) ("A concurrent conflict of interest exists if: the representation of one client will be directly adverse to another client."). In this instance, there is no direct adversity between Foot Locker and Metro Door. Here, Foot Locker initially filed a fourth-party lawsuit and named, *inter alia*, Metro Door as a fourth-party defendant and Metro Door filed a motion to dismiss in response. However, prior to the substitution of A. Jeffrey Weiss, Esq. as counsel of record for Foot Locker, Foot Locker filed a notice of voluntary withdrawal on May 6, 2015, and voluntarily withdrew its claims against Metro Door in its fourth-party complaint. Since Foot Locker filed its notice before the opposing party—Metro Door—filed an answer or a motion for summary judgment in the fourth-party lawsuit, Foot Locker was permitted to dismiss its claims against Metro Door without a court

order. *See* FED. R. CIV. P. 41.¹¹ Although an amended fourth-party complaint was not filed promptly, by the time the Court granted the Stipulation and A. Jeffrey Weiss, Esq. became counsel of record for Foot Locker on May 27, 2015, Metro Door was no longer named as a fourth-party defendant in Foot Locker's fourth-party lawsuit. As such, A. Jeffrey Weiss, Esq.'s representation of Foot Locker is not directly adverse to Metro Door. Parties' mistaken belief, including Metro Door itself, that Metro Door remains as a fourth-party defendant in Foot Locker's fourth-party lawsuit is inconsequential.

However, even where there is no direct adverseness between the affected clients, a concurrent conflict of interest may still exist if there is a significant risk of material limitation on A. Jeffrey Weiss, Esq.'s advocacy due to his relationship with Foot Locker and Metro Door. V.I.S.Ct.R. 211.1.7(a)(2) ("A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."). Nevertheless, given that this issue—whether a concurrent conflict of interest exists due to a significant risk of material limitation on A. Jeffrey Weiss, Esq.'s advocacy due to his relationship with Foot Locker and Metro Door—is the heart of Plaintiff's motion to disqualify A. Jeffrey Weiss, Esq. currently pending before the Court, the Court will not make a determination

¹¹ Federal Rule of Civil Procedure 41, which was in effect at the time, provides:

Rule 41. Dismissal of Actions.

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

at this juncture but save the discussion for the memorandum opinion addressing Plaintiff's motion to disqualify.

2. Whether Foot Locker and Metro Door's Motion to Extend Time Complied with the Applicable Rules

Here, according to the certificate of service attached to Plaintiff's motion to disqualify A. Jeffrey Weiss, Esq., a copy of said motion was served upon Foot Locker and Metro Door on May 1, 2017. As such, the deadline for Foot Locker and Metro Door to file a response did not expire until May 19, 2017. See V.I. R. CIV. P. 6-1(f); V.I. R. CIV. P. 6(a)(1). Thus, Foot Locker and Metro Door's motion to extend time was timely filed prior to the expiration of the period prescribed for them to file a response. The Court finds that there is good cause for Foot Locker and Metro Door to request the extension—namely, they are waiting for affidavits to refute the allegations raised by Plaintiff in his motion to disqualify A. Jeffrey Weiss, Esq. However, Foot Locker and Metro Door failed to comply with the requirements under Virgin Islands Rule of Civil Procedure 6-2. Nevertheless, in the interest of justice, the Court will grant Foot Locker and Metro Door's motion to extend time. However, parties are advised to comply with the requirements of all applicable rules for future motions. Furthermore, although it is the preference of this Court to allow both sides to put forth their argument prior to ruling on a motion, parties are cautioned to not make it a habit of moving this Court for extensions of deadlines.

CONCLUSION

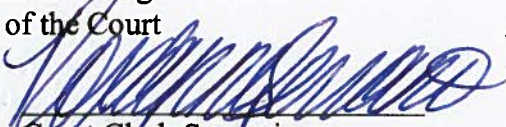
Based on the foregoing, the Court will grant Foot Locker and Metro Door's motion to extend time. An Order consistent with this Memorandum Opinion shall follow.

DONE and so ORDERED this 24 **day of May, 2017.**

ATTEST:

Estrella H. George
Clerk of the Court

By:


Court Clerk Supervisor

Dated:

5/24/17



HAROLD W.L. WILLOCKS

Administrative Judge of the Superior Court