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

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KIWI CONSTRUCTION, LLC, **Plaintiff,** **v.** **PAUL PONO, LANNY ROBERTS and BIG BEAR CONSTRUCTION, INC.,** **Defendants.**	)	**Case No. ST-2013-CV-0000011**
BIG BEAR CONSTRUCTION, INC., PAUL PONO and LANNY ROBERTS, **Plaintiffs,** **v.** **PHILIP HOLFORD and KIWI CONSTRUCTION, LLC,** **Defendants.**	)	**Case No. ST-2013-CV-0000670 (formally Case No. ST-2013-TOR-20)** **JURY TRIAL DEMAND**

MEMORANDUM OPINION

Before the Court is a Motion to Intervene By Third-Party Beneficiary Tom Secunda, By and Through Assignee Kiwi Construction, LLC and Brief in Support, which was filed on February 12, 2016. Defendants Paul Pono, Lanny Roberts, and Big Bear Construction LLC (herein collectively referred to as "Big Bear Construction") filed an Opposition on March 15, 2016. Kiwi Construction, claiming to be an assignee of Tom Secunda, seeks to have Secunda intervene in the above-captioned matter with case number ST-2013-CV-11 as a third-party beneficiary of the pertinent construction contract. The Court will deny the Motion because the assignment of Secunda's rights as a third-party beneficiary, if any, lacks valid consideration.

Overall, Big Bear Construction objects to the Motion for the following three reasons: 1) Secunda did not properly assign his rights as a third-party beneficiary to Kiwi Construction, 2) under the applicable procedural rules, Secunda should not be allowed to intervene as a right or with permission of the Court, and 3) Secunda's claims are untimely.

As a preliminary matter, the Court must determine if Kiwi Construction was properly assigned Secunda's rights as a third-party beneficiary because Kiwi Construction would have no standing to bring its Motion if it is not an assignee. Attached as Exhibit F to the Motion, Kiwi Construction provides a letter from Secunda assigning to Kiwi Construction his claims against

Big Bear Construction. The letter leaves blank the day it was signed but includes "January, 2015" as the execution date.

Big Bear Construction asserts the purported assignment was not properly executed because 1) the assigning instrument is not dated and was not executed in a manner dictated by several statutes cited by Big Bear Construction; 2) there is no consideration for the assignment; and 3) Secunda had no claims to assign because any claims were invalid under the statute of limitations.[1]

First, Big Bear Constructions' Opposition challenges the validity of the assignment depicted in the letter depicted in Exhibit F, arguing it was not executed and acknowledged in a manner accepted under the Virgin Islands Code. However, the statutory citations that Big Bear Construction provides pertain to assignments for the benefit of creditors[2] or conveyance of real property.[3] Therefore, Big Bear Construction does not provide any relevant authority that Secunda's assignment did not meet required any execution formalities. While the Court acknowledges that the letter is not completely dated, Big Bear Construction has offered no authority for the proposition that an assignment must include an execution date.

Big Bear Construction asserts that the assignment is invalid because there is no consideration for the assignment. The letter states the assignment is given in exchange for "Eighty Percent (80%) of any amounts recovered by Kiwi Against Big Bear and it principals Pono and Roberts after Kiwi's recovery of attorney's fees and expenses incurred in the pursuit of those claims against Big Bear, Pono and Roberts as the subcontractors responsible for the concrete construction on the Secunda Residence."

No statute or binding precedent addresses whether an assignment of rights or claims must be supported by an exchange for valid consideration. The Superior Court of the Virgin Islands, in an exercise of its concurrent authority with the Supreme Court of the Virgin Islands to shape Virgin Islands common law in the absence of local law to the contrary or binding precedent, must conduct a "*Banks* analysis" to determine the applicable common law.[4] A *Banks* analysis consists of balancing the following three non-dispositive factors: (1) whether any Virgin Islands courts previously have adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands.[5] Considering the lack of case law in the Virgin Islands regarding assignments not covered by the Virgin Islands Code, the Court narrows its focus to determining if a non-gratuitous[6] assignment must be supported by consideration.

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[1] Opp'n to the Motion to Intervene 3 n.6.
[2] *See* 5 V.I.C. §§ 1202, 1205.
[3] *See* 28 V.I.C. §§ 82, 90.
[4] *Virgin Islands v. Connor*, 2014 V.I. Supreme LEXIS 17 (V.I. Feb. 24, 2014) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011)).
[5] *Id.*
[6] The assignment of Secunda's rights to Kiwi Construction is not a gift because the letter depicts an exchange.

Considering the first factor, no local court has addressed this issue without reliance on the Restatement of Contracts.[7] The U.S. Court of Appeals for the Third Circuit requires consideration for an assignment to be valid.[8]

Second, the majority of other jurisdictions that have addressed this issue take the position that an exchange of valid or valuable consideration is necessary for a non-gratuitous assignment to be enforceable.[9] Courts in the majority of jurisdictions treat an assignment of claims as a contract

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[7] *See, e.g., RRCI Constructors, LLC v. Charlie's/Diamond Ready Mix, Inc.*, 51 V.I. 645, 654 (D.V.I. 2009) (citing Restatement (Second) of Contracts § 324 (1981) and 6 Am. Jur. 2d Assignments § 118).

[8] *Am. Surety Co. v. Finletter*, 274 F. 152, 157 (3d Cir. 1921).

[9] *See Sapp v. Lifrand*, 36 P.2d 794, 796 (Ariz. 1934) ("We have examined the record carefully on this point, and are of the opinion that it appears the consideration of $10 recited in the assignment was merely a nominal one, and that there was no profit passed to the promisor and no loss or detriment to the promisee which will sustain the finding of the court that there was a valuable consideration for the assignment"); McLaughlin v. Nat'l Union Fire Ins. Co., 29 Cal. Rptr. 2d 559 (Cal. Ct. App. 1994); *In re Estate of Bucci*, 488 P.2d 216 (Co. Ct. App. 1971); *St. Search Partners, L.P. v. Ricon Int'l, L.L.C.*, 2006 Del. Super. LEXIS 200 (Del. Super. 2006) ("Alternately, if the Court were to accept A&R's claims that the assignment does not effectuate a division of the proceeds under the settlement agreement, the assignment would be unenforceable for lack of consideration. Every contract, to be enforceable, must contain good and valid consideration to the text of the note. Consideration generally consists of a benefit to a promisor, or detriment to a promise"); *Walton v. Horkan*, 38 S.E. 105, 106 (Ga. 1901) ("assignment by the defendant of the claim due to him, irrespectively of whether the assignment is equitable or legal, will take precedence of a subsequent writ of garnishment served upon the debtor at the suit of creditors of the assignor, provided the assignment was in good faith and for a valuable consideration. . ."); *Bank of Cave Spring v. Gold Kist, Inc.*, 327 S.E.2d 800, 802 (Ga. Ct. App. 1985) ("In equity the assignment of contingent interests, expectancies, and things not in esse, but resting in mere possibility, takes effect when the thing assigned comes into existence, provided that the assignment was fairly made, is supported by a sufficient consideration, and is not contrary to public policy"); *Holsinger, Theis & Co. v. Holsinger*, 69 N.E.2d 360, 366 (Ill. Ct. App. 1946) ("No particular form is necessary as to the validity of an assignment of a chose in action. Any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment of the fund. Any words are sufficient which show an intention of transferring the chose in action to the assignee for a valuable consideration"); *New Albany Nat'l Bank v. Brown*, 114 N.E. 486, 491 (Ind. 1916) ("It will be seen, therefore, that whether the bank procured the policy in 1893 or in 1902 as collateral, it was to secure an existing debt. As between Gebhart and the bank there can be no question but that a precedent debt would constitute a valuable consideration for the assignment of the policy"); *Dubowy v. Baier*, 856 F. Supp. 1491, 1499 (D. Kan. 1994) ("Because there was no consideration, the assignment must be considered as a gift. HN13 To establish a gift there must be an intention to make a gift; delivery by the donor to the donee; and an acceptance by the done"); *Scott v. First Nat'l Bank*, 168 A.2d 349, 351 (Md. Ct. App. 1961) ("An agreement to assign an expectancy is enforceable in equity and that the rule is supported by the great weight of authority where the agreement is fairly made upon adequate consideration and without oppression or unjust advantage being taken of the heir. A gratuitous assignment is unenforceable, because there is no contract to enforce"); *Johnson v. Wynn*, 196 N.W.2d 313, 315 (Mich. Ct. App. 1972) ("While lack of consideration is not ordinarily a defense to the validity of an assignment to the text of the note -- the transfer may be entirely donative and yet be valid"); *Will & Estate of Aikin v. Tillman*, 1998 Miss. App. LEXIS 910 (1998) ("The satisfaction that might arise by avoiding the depletion of a family member's estate by an outside party, coupled with the relief from the trouble of litigation, are valuable considerations that adequately supported these assignments"); *Sheeran v. Sitren*, 403 A.2d 53, 59 (N.J. Super. Ct. 1979) ("The assignment must also be based on valuable consideration"); *Ehlers v. Perry*, 494 N.W.2d 325, 332 (Neb. 1993) ("Unless a transfer by an assignment is a gift, an assignment is effective only when supported by valid consideration. . .. As in the ordinary case of a contract, an assignment, other than a gift, requires a benefit to the assignor or a detriment to the assignee"); *Taylor v. Smith*, 21 S.E. 202, 204 (N.C. 1895) ("a bona fide assignment of a contingent interest in land for a valuable consideration will be enforced as an equity"); *Johnson v. Schick*, 882 P.2d 1059, 1061 (Ok. 1994) ("the equitable assignment is enforceable if Schick received adequate or sufficient consideration. A valid consideration for a written contract is presumed by the law . . .. Generally, consideration exists as long as there is a benefit to the promisee or a detriment to the promisor") (citations omitted);

and, therefore, require valid or valuable consideration. Conversely, New York eliminated the consideration requirement for assignments.[10] Also, an Alabama court held that evidence of an instrument attempting to execute an assignment can itself satisfy the consideration requirement.[11]

This Court considers the position taken by the majority of other jurisdictions to be convincing and the soundest rule for the Virgin Islands. Requiring valid consideration allows the Court to effectively ascertain the benefit each party expects to receive from a non-gratuitous assignment. Several legal scholars discuss how an assignment of rights often is treated as a contract and, therefore, requires considerations to support mutual assent among parties.[12] Therefore, in accordance with the *Banks* analysis provided above, the Court holds that an assignment of rights or claims, unless transferred as a gift or other gratuitous manner, must be supported by valid consideration.

Consequently, Kiwi Construction was required to provide Secunda valid consideration in order to receive his rights as a third-party beneficiary under the construction contract. The Virgin Islands Supreme Court has defined consideration as a "bargained-for legal benefit and/or detriment . . .."[13] The letter states the assignment is given in exchange for "Eighty Percent (80%) of any amounts recovered by Kiwi Against Big Bear and it principals Pono and Roberts. .. ." The Court finds Kiwi Construction has not provided Secunda with valid consideration for assignment of his claims against Big Bear Construction. The dispute between Kiwi Construction and Big Bear Construction was adjudicated by an arbitrator.[14] The arbitrator decided that Kiwi Construction has no claim for damages against Big Bear Construction because Secunda incurred all the damages resulting from an alleged contract violation.[15] Only Secunda has a potentially valid claim to

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Estate of Dutton, 37 A. 582, 582 (Pa. 1897) ("An heir or expectant devisee or legatee may in the lifetime of the testate or intestate, sell or assign his expectant or contingent interest, and if the contract be on a valuable consideration, equity will enforce it"); *Westbury v. Simmons*, 35 S.E. 764, 764 (S.C. 1900) ("Thee policy of insurance taken out in the name of such stranger, or transferred to such stranger, without some specific valuable consideration, would be void in law, as the same would be a mere wager policy"); *Indep. E. Torpedo Co. v. Herrington*, 95 S.W.2d 377, 381 (Tex. 1936) ("Under well known principles of contract law the assignment relied upon by Herrington was void if without valid consideration"); *Belknap v. Nw. Mut. Life Ins. Co.*, 188 A. 897, 899 (Vt. 1936) ("We hold, therefore, without hesitation, that this assignment is supported by a sufficient and valuable consideration"); *Estate of Katze-Miller v. Int'l Equity Research*, 463 N.W.2d 853, 860 (Wis. 1990) (Enforcement of an assignment is controlled by equitable principles including fair and adequate consideration).

[10] N.Y. GEN. OBLIG. LAW § 5-1107 ("An assignment shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or by his agent").

[11] *In re Edwards*, 2016 Bankr. LEXIS 2500 (Bankr. N.D. Ala. 2016) (the recitals of the assignment constitute prima facie evidence of sufficient consideration).

[12] *See, e.g.,* RICHARD A. LORD, WILLISTON ON CONTRACTS § 74:3 (4th ed. 2003).

[13] *Peppertree Terrace v. Williams*, 52 V.I. 225, 241 (V.I. 2009) (citing *Navair, Inc. v. IFR Americas, Inc.*, 519 F.3d 1131, 1137-39 (10th Cir. 2008)).

[14] Notice of Filing of Award by the Arbitrator, Case No. ST-11-CV-13 (filed Nov. 16, 2015).

[15] Award by the Arbitrator, attached as Exhibit 1 to Notice of Filing of Award by the Arbitrator, p. 10 ¶ 33 (Sept. 24, 2015) ("Although Kiwi alleged that he was responsible for the payment of the 'Actual Costs; incurred on the job, the funds used to pay those costs belong to The Owner, so in effect Kiwi did not incur in any costs") .

recover damages against Big Bear Construction. As such, the assignment does not provide Secunda with any benefit he did not have, or require Kiwi Construction to suffer a detriment it did not have to endure before executing the assignment. Therefore, the Court finds that the assignment of Secunda's claims as a third-party beneficiary of the construction contract Construction was invalid due to lack of valid consideration.

The Court has determined that Kiwi Construction is not a valid assignee of Secunda and, therefore, Kiwi Construction lacks standing to bring a claim to recover damages he may be owed as third-party beneficiary. Since there is no valid motion to intervene before it, the Court does not consider addressing whether Secunda should be allowed to intervene necessary. Consequently, the Court will deny the Motion. Accordingly, it is hereby

ORDERED that Kiwi Construction, LLC's Motion to Intervene by Third-Party Beneficiary Tom Secunda, By and Through His Assignee Kiwi Construction, LLC and Brief in Support is **DENIED**; and it is further

ORDERED that a copy of this Order shall be directed to Attorney Charlotte K. Perrell of Dudley, Topper and Feuerzeig, LLP and to Attorney Anna H. Paiewonsky of the Paiewonsky Law Firm, PLLC.

Dated: August 30, 2016

DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST: Estrella H. George
Acting Clerk of the Court

By:

Lori Boynes-Tyson
Acting Chief Deputy Clerk 8/31/16