

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

SHIRLEY PACQUETTE,	)	
Plaintiff,	)	CASE NO. ST-08-CV-538
	)	
vs.	)	
	)	
EUSTACE GRANT, JR.,	)	
Defendant.	)	
_____	)	
	)	
EUSTACE GRANT, JR.,	)	
Third Party Plaintiff	)	
	)	
vs.	)	
	)	
JOANNE DICKENSON, VIRGIN ISLANDS	)	
CARNIVAL COMMITTEE, AND	)	
INTERNATIONAL RENTAL AND LEASING	)	
D/B/A BUDGET RENT-A-CAR	)	
	)	
Third Party Defendants.	)	
_____	)	

MEMORANDUM OPINION

Pending before the Court are Plaintiff's July 25, 2012, Motion for Award of Costs and September 12, 2012, Motion to Deem Conceded Plaintiff's Motion for Award of Costs. For the following reasons, both motions will be denied.

FACTUAL AND PROCEDURAL HISTORY

On November 6, 2008, Plaintiff filed a Complaint alleging that Defendant Grant negligently ran his vehicle over Plaintiff's foot causing her injuries during the St. Thomas Carnival celebration on April 26, 2008. The parties engaged in a lengthy mediation process which initially did not result in an agreement, but the parties notified the Court on

July 6, 2012, that Plaintiff had accepted an offer of judgment in the amount of Eight thousand dollars (\$8,000) made by Defendant International Leasing on June 20, 2012. The only remaining matters before the Court are Plaintiff's Motion for Award of Costs and Motion to Deem Conceded Plaintiff's Motion for Award of Costs.¹

STANDARD

Under Fed. R. Civ. P. 68(a), made applicable to the Virgin Islands under Super. Ct. R. 7,² a defendant may offer "to allow judgment of specified terms, with the costs then accrued."³ The offer "necessarily includes costs and attorney's fees either explicitly or implicitly."⁴ But, if the plaintiff accepts a Rule 68 offer that is not explicit regarding what amount of the offer covers the statutory allowance of attorney's fees and costs,⁵ the defendant may be subject to additional liability and "those [reasonable] costs must be determined by the court."⁶

Under 5 V.I.C. § 541(a), a prevailing party may recover costs which include

- (1) Fees of officers, witnesses, and jurors;
- (2) Necessary expenses of taking depositions which were reasonably necessary in the action;
- (3) Expenses of publication of the summons or notices, and the postage when they are served by mail;
- (4) Compensation of a master as provided in Rule 53 of the Federal Rules of Civil Procedure; [and]

¹ Defendant Grant responded to Plaintiff's Motion for Award of Costs on August 1, 2012, and subsequently responded to Plaintiff's Motion to Deem Conceded Plaintiff's Motion for Award of Costs on September 18, 2012.

² The Federal Rules of Civil Procedure apply to matters before this Court whenever they are not inconsistent with the Superior Court Rules. SUPER. CT. R. 7.

³ FED. R. CIV. P. 68(a).

⁴ *Lima v. Newark Police Dept.*, 658 F.3d 324, 330 (3d Cir. 2011)(*applying Marek v. Chesny*, 473 U.S. 1 (1985)).

⁵ *Marek*, 473 U.S. at 6 ("It is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowed for costs, or for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.")

⁶ *Lima*, 658 F.3d at 330 ("Extrinsic evidence of the parties' subjective intent is not admissible to determine whether a Rule 68 offer of judgment includes costs."); *See also McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561 (6th Cir. 2004); *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553-4 (8th Cir. 2001)(construing any ambiguity against the offeror).

(5) Necessary expense of copying any public record, book, or document used as evidence on the trial . . .⁷

A prevailing party may not recover attorney's fees in a personal injury suit unless the complaint or defense was frivolous.⁸

Nevertheless, Rule 68 offers are also governed by the laws of contract, which, in the absence of local law to the contrary, is guided by the common law principles of the Restatement (Second) of Contracts in this jurisdiction.⁹ Under RESTATEMENT (SECOND) OF CONTRACTS §281, where a "creditor who indorses and cashes a check sent by the debtor and marked 'payment in full,'" the creditor has created an accord.¹⁰

An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.¹¹

Absent evidence that the accord was "unfair, unconscionable, or void for lack of consideration," or that the creditor was not aware of the "payment in full" notation, the new accord extinguishes any duties the debtor had under the prior contract.¹²

ANALYSIS

Plaintiff's September 12, 2012, Motion to Deem Conceded Plaintiff's Motion for Award of Costs is without merit because Defendant responded to Plaintiff's Motion for Award of Costs within the requisite 14-day statutory period. As a result, Plaintiff's Motion to Deem Conceded Plaintiff's Motion for Award of Costs will be denied, and the Court will address the merits of Plaintiff's Motion for Award of Costs.

⁷ 5 V.I.C. §541(a). *See Ryan v. Ryan*, 53 V.I. 140 (V.I. 2010) (noting that mediation fees are not among the costs listed in 5 V.I.C. §541(a)).

⁸ 5 V.I.C. §541(b).

⁹ In the absence of local law, as is the case here, 1 V.I.C. §4 directs that the "common law, as expressed in the restatements of the law approved by the American Law Institute, [are] . . . the rules of decision in the courts of the Virgin Islands in cases to which they apply." 1 V.I.C. §4.

¹⁰ RESTATEMENT (SECOND) OF CONTRACTS §281 cmt. d; *see Spell v. A&J Power Systems*, 42 V.I. 200 (D.V.I. 2000).

¹¹ RESTATEMENT (SECOND) OF CONTRACTS §281.

¹² *Spell*, 42 V.I. at 201-2; *see* RESTATEMENT (SECOND) OF CONTRACTS §281 cmt. d.

When Plaintiff accepted Defendant's June 20, 2012, offer of judgment, which simply stated that, "Defendant, Eustace Grant, through counsel, and pursuant to Fed. R. Civ. P. 68 makes an offer of judgment to Plaintiff in the amount of eight thousand dollars (\$8,000.00)", a contract was formed between the parties. To discharge his duties under the contract, the Defendant sent Plaintiff a check in the amount of Eight-thousand dollars (\$8,000) which bore the notation "final settlement" on its face.¹³ Further, the check was accompanied by a letter that stated the check was for "full payment of the Offer of Judgment."¹⁴ The check cleared on July 23, 2012.¹⁵ Nonetheless, Plaintiff then filed the Motion for Award of Costs on August 1, 2012.

Because the offer was silent on the amount of the statutory allowance of attorney's fees and costs the offer covers, the Defendant found himself in what the court in *Lima v. Newark Police Department* called the "trap for the unwary."¹⁶ This Rule 68 "trap" occurs "when a defendant erroneously believes that an accepted Rule 68 offer of judgment finally resolves a civil action, only" to be possibly subject to additional statutory costs assessed by the court.¹⁷ However, the moment Plaintiff deposited Defendant's settlement check representing "full payment," Plaintiff manifested his assent and created an accord, discharging Defendant from any other prior duties under the original agreement. Further, there is no evidence, nor does Plaintiff contend, that the accord was "unfair, unconscionable, or void for lack of consideration," or that the Plaintiff was not aware of the "payment in full" notation.

¹³ Opposition to Plaintiff's Motion to Deem Conceded Plaintiff's Motion for Costs, Exhibits E & F, Sept. 18, 2012.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 658 F.3d at 328.

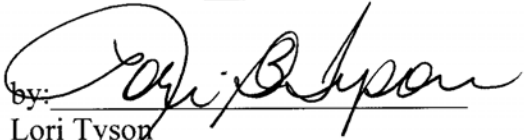
¹⁷ *Id.*

This result is clearly in accordance with the objective of Fed. R. Civ. P. Rule 68, “which is to encourage settlements.”¹⁸ Further, it limits the duration of a defendant’s uncertainty when found in a Rule 68 trap, and thereby promotes the swift conclusion of litigation in the interest of judicial efficacy.

Accordingly, Plaintiff’s Motion for Award of Costs will be denied. An Order consistent with this Opinion shall follow.

Dated: October 29, 2012

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ____/____/____

by: 
Lori Tyson
Court Clerk Supervisor 10/29/12



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
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¹⁸ *Marek*, 473 U.S. at 6.

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D/B/A BUDGET RENT-A-CAR	)	
	)	
Third Party Defendants.	)	

ORDER

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

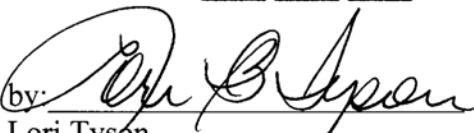
ORDERED that Plaintiff's Motion for Award of Costs is DENIED; and it is

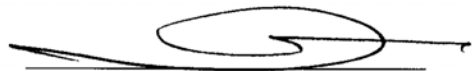
ORDERED that Plaintiff's Motion to Deem Conceded Plaintiff's Motion for
Costs is DENIED; and it is

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

Dated: October 29, 2012

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ____/____/____

by: 
Lori Tyson
Court Clerk Supervisor 10/29/12


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
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