IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

TOM PINCHBECK, Plaintiff, vs. **JEFFREY PROSSER, DAWN PROSSER, and INNOVATIVE COMMUNICATION COMPANY,** Defendants.	**CIVIL NO. 500/1999** **ACTION FOR DAMAGES, BREACH OF CONTRACT, AND WRONGFUL DISCHARGE** **JURY TRIAL DEMANDED** **NOT FOR PUBLICATION**

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CABRET, P.J.

MEMORANDUM OPINION
(September 12, 2000)

This matter is before the Court on several motions filed by the parties. Defendants Jeffrey Prosser and Dawn Prosser (collectively "Prossers") have each moved to dismiss the complaint against them and for Rule 11 sanctions against Plaintiff Tom Pinchbeck. Pinchbeck has moved to amend his complaint. For reasons which follow, the Court will deny the Prossers' Motions to Dismiss and for Sanctions and also deny Pinchbeck's Motion to Amend.

I. FACTS AND PROCEDURAL HISTORY

The complaint arose out of Pinchbeck's former employment as a chef in the Prossers' home. Pinchbeck alleges that prior to working in the Prossers' home, he operated a deli and catering business which catered meals for Defendant Innovative Communications Company ("ICC"). According to the Complaint, "in December 1998, Elaine Joseph of ICC contacted [Pinchbeck] to inquire if he would agree to be employed as a chef for the Prossers in their home."[1] Pinchbeck asserts that as part of the hiring process, Dawn Prosser interviewed him. Pinchbeck claims that after the interview, "Defendants represented to [him] if he would agree to become the [personal] chef for the Prossers that his employment would last at least one (1) year and hopefully longer."[2] Pinchbeck accepted the offer, was given the title "'Assistant Protocol Officer' for ICC,"[3] and assumed his duties as the Prossers' chef in January 1999. Pinchbeck claims that because these duties diverted his labor from his deli and catering business, he hired a substitute chef to fill the void.

In February, 1999, Pinchbeck became ill. He informed Defendants that he needed to go stateside for two weeks of treatment and arranged to have his substitute chef prepare meals for the Prossers during his absence. Pinchbeck claims that when he returned to St. Croix, Defendants told him they hired a temporary chef. Although the Defendants purportedly assured Pinchbeck he could return to work as soon as the temporary chef left, on July 2, 1999,

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[1] Complaint at paragraph 6.

[2] Complaint at paragraph 11.

[3] Id. at paragraph 13.

Defendants terminated Pinchbeck's employment. Pinchbeck alleges that after he protested his termination, Defendants retaliated by terminating his catering contract with ICC. Pinchbeck filed this action alleging causes of action for misrepresentation, breach of contract and common law wrongful discharge.[4]

II. DISCUSSION

A. The Prossers' Motions to Dismiss and for Sanctions

In separate motions, Jeffery and Dawn Prosser[5] each assert that the Complaint should be dismissed against them because it fails to state a claim upon which relief can be granted. Specifically, the Prossers argue that because Pinchbeck alleges that he was hired, employed, paid and terminated by the corporate defendant ICC, there is no basis in fact or law for naming them as defendants. The Prossers essentially advance this same argument in support of their Motions for Sanctions under Rule 11 of the Federal Rule of Civil Procedure. The Prossers contend that because Pinchbeck had no legitimate basis for naming them as defendants, he must have sued them for harassment purposes. Thus, in addition to asking the Court to dismiss the Complaint against them, the Prossers also ask the Court to sanction Pinchbeck for filing the claims.

Pinchbeck responds that he has properly alleged that the Prossers were his employers. Pinchbeck points to allegations that, notwithstanding his job title as "'Assistant Protocol Officer'

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[4] ICC filed a counterclaim against Pinchbeck which is not relevant to any of the pending motions.

[5] Dawn Prosser's Motion to Dismiss is erroneously titled a "Motion for Sanctions Pursuant to Rule 11, Fed. R. Civ. P."

for ICC"[6] and the fact that he was on ICC's payroll, he was interviewed for the position by Dawn Prosser and worked in the Prossers' home as their private chef.[7] Pinchbeck argues that when he served as the Prossers' chef, they were his immediate supervisors and employed him in their capacity as agents of ICC.

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal where a claimant has failed to state a claim upon which relief can be granted. A Court may not grant such relief, however, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims as pled which would entitle the plaintiff to relief." Manns v. Leather Shop, Inc., 36 V.I. 214, 216, 960 F. Supp. 925 (D.V.I. 1997). In reviewing the motion, the Court must assume that all factual allegations raised in the complaint are true, construe the allegations liberally in the plaintiff's favor, and give the plaintiff the benefit of all fair inferences which may be drawn from the allegations. *See* id. . "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id.. "Since a motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint, the court's inquiry is limited to the contents of the complaint." Id. at 216-17. Construing Pinchbeck's Complaint in this manner, the Court concludes that he has stated a claim

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[6] Id. at paragraph 13.

[7] Although Pinchbeck elaborated on his duties in an affidavit attached to his response to the Prossers' motions and relies on other evidence outside the pleadings, inasmuch as the matter is before the Court on Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b) (6), the Court will disregard anything other than the allegations of the complaint in considering the motion.

for which relief may be granted and that the Prossers are therefore neither entitled to dismissal nor the imposition of sanctions.

The crux of the Prossers' argument in favor of dismissal is that Pinchbeck has failed to "show that this Defendant meets the common law definition of 'employer.'"[8] Pinchbeck, who undoubtedly has asserted common law and not statutory claims for relief, has inexplicably failed to cite authority addressing common law definitions of "employer." Instead, he responds to the Prossers' argument with citations to statutory definitions of "employer" and cases applying statutory definitions. Those statutory definitions, found in title 24 of the Virgin Islands Code, are inapplicable. Specifically, title 24, section 2 broadly defines "employer" as any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee." V.I. Code Ann. tit. 24, §2 (1997). While this definition is at first blush applicable, Pinchbeck ignores the section 2 definition of "employee" which clearly exempts the instant employment relationship from its coverage: "'employee' includes any individual employed by an employer but does not include-- (1) an individual employed in domestic service in a private home[.]" Id. Inasmuch as Pinchbeck alleged that he was employed as a chef in the Prossers' home, section 2 can provide no support for his claims. Similarly, title 24, section 62, which contains a comparably broad definition of "employer," is inapplicable. Like section 2, section 62 expressly excludes from its definition of "employee" any person employed "in the domestic service of any family or person at his home."

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[8] Jeffery Prosser's Reply Memorandum in Support of Motion to Dismiss at 6; Dawn Prosser's Reply Memorandum in Support of Motion to Dismiss at 5.

Title 24, §62. For the same reason, Plaintiff's citation to cases relying on these definitions is of no value.[9] *See* Freeman v. United Dominion Constructors, Inc., Civ. No. 1993/215 (D.V.I. November 11, 1994); Smith v. Thompson, Civ. No 635/1990 (Terr. Ct. April 12, 1991).

More appropriately, the Court will look to the common law rules defining an employment relationship to establish whether Pinchbeck's Complaint adequately alleges that the Prossers were his employers. To determine whether an employment relationship exists under the common law, the Court must generally consider whether the purported employer has the

> 'right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the [purported employer] has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the [purported employer] whether the [purported employer] is in business; the provision of employee benefits; and the tax treatment of the hired party.'

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-34, 112 S.Ct.1344, 1348, 117 L.Ed.2d 581 (1992). What makes this case unique is that, as argued by the Prossers, Pinchbeck alleges that he was hired and paid by ICC, but also employed by the Prossers.

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[9] The Prossers also argue that section 62 is inapplicable because the Virgin Islands Wrongful Discharge Act was ruled unconstitutional in Bell v. Chase Manhattan Bank, 40 F.Supp.2d 307, (D.V.I. 1999). The District Court's decision in Bell, however, was overruled by the Third Circuit's decision in St. Thomas-St. John Hotel & Tourism Assn. Inc. v. Government of the Virgin Islands, Nos 99-3513, 99-3563 (3d Cir. June 30, 2000).

The common law recognizes such a joint employer relationship.

> A dual employment relationship may exist if more than one individual or company has the right to control or direct an employee in the performance of the work. . . . While dual employment does not necessarily exist whenever two entities affect the actions of a single employee, it may exist if two employers exercise substantial control over the employee by participating in the selection, hiring, and paying of the employee, by having the power to discharge the employee, and by controlling the employee in the performance of his or her duties.

27 Am. Jur. 2d Employment Relationship § 6 (1996). *See also* Graves v. Lowery, 117 F.3d 723, 727-28 (3d Cir. 1997) (finding that complaint adequately alleged defendants were joint employers of plaintiffs); 30 C.J.S. Employer-Employee § 10(a) (1992) (stating that "[t]he test for determining whether dual employment exists is whether there is evidence to support an inference that more than one individual or company controls or directs a person in the performance of a given function.").

Under these tests, Pinchbeck has alleged that the Prossers and ICC were his joint employers. Pinchbeck claims that before he was offered the position, Dawn Prosser interviewed him. It is therefore reasonable to infer that the Prossers played a role in hiring Pinchbeck. Furthermore, considering that Pinchbeck allegedly served as the Prossers' "personal chef,"[10] it is reasonable to infer that they controlled what meals he prepared and when he prepared the meals. In addition, considering that Pinchbeck allegedly served as a chef in the Prossers' home, one could infer that he used their equipment to prepare the meals. It is certainly reasonable to infer that a personal chef would not bring his own refrigerator and oven to work with him. Finally, if

[10] Complaint at paragraph 9.

the Prossers were unsatisfied with Pinchbeck's performance, it would be reasonable to infer that they could have him terminated from the position. The Court will not speculate whether Pinchbeck will ultimately succeed on his claims against the Prossers. The Court merely concludes that, in light of the above discussion, Pinchbeck's Complaint alleges that the Prossers were a joint employer. *See* Graves, 117 F.3d 723, 729. For this reason, the Court will deny the Prossers' Motions to Dismiss and their Motions for Sanctions grounded on the same arguments.

B. Pinchbeck's Motion to Amend

As stated above, the Court must also determine whether to permit Pinchbeck to amend his complaint. Pinchbeck seeks to add claims for tortious interference with contract and tortious interference with prospective contractual relations. Specifically, Pinchbeck's proposed amended complaint alleges that "subsequent to filing of the lawsuit, Defendants have tortiously interfered with prospective contracts of Plaintiff. Since the filing of this lawsuit, Defendants have encouraged persons whom they do business with or have business or charitable relations with not to do business with Plaintiff. . . . As a result of Defendants['] actions, Plaintiff has not been awarded contracts and has lost contracts resulting in loss of income, mental anguish, pain and suffering, and loss of enjoyment of life."[11] Defendants oppose the amendments on the ground that they would be subject to dismissal for failure to state a claim upon which relief can be granted and therefore futile. Specifically, Defendants argue that because Pinchbeck fails to identify any specific contractual or prospective contractual relationships with which they

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[11] Proposed First Amended Complaint at paragraphs 33, 34 and 47 (paragraph indentions omitted).

allegedly interfered, he would not be entitled to relief under the proposed amendments.

The Court's authority to permit amendments is governed by Rule 15 of the Federal Rules of Civil Procedure. Rule 15 requires that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In this case, Pinchbeck's proposed claims for interference of contractual and prospective contractual relations are based on sections 766 and 766B of the Restatement (Second) of Torts. To prevail on his proposed claims under these sections, Pinchbeck would be required not only to identify actual and prospective relationships, but also produce evidence that Defendants' intentionally and improperly interfered with those relationships. *See* Restatement (Second) of Torts §§ 766, 766B (1979).

It is clear that Pinchbeck's proposed amendments do not allege such specifics. He argues, however, that the sufficiency of the proposed amendments is to be governed by the same standard as that governing a filed pleading. That standard requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a). Under Rule 8, however, "a complaint must provide a defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.' Williams v. New Castle County, 970 F.2d 1260, 1265-66 (3d Cir. 1992) (quoting Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))." Krouse v. American Sterilizer Co., 126 F.3d 494, 499 n.1 (3d Cir. 1997).

In a case similar to the one at bar, the District Court of the Virgin Islands dismissed a vaguely pled claim for interference with prospective contractual relations. *See* Gov't Guar. Fund of Finland v. Hyatt Corp., 955 F.Supp. 441, 456 (D.V.I. 1997). There, the court reasoned that "[t]he existence of 'a sufficiently concrete prospective contractual relation' is an essential element" and nowhere in the pleadings did the claimant allege any such "concrete or even vaguely specific future contracts" which were interfered with by the purported tortfeasors. Id.

Similarly, in Advanced Power Sys., Inc. v. Hi-Tech Sys. Inc., 801 F.Supp. 1450, 1458-59 (E.D.Pa. 1992), the court ruled that "[a] mere allegation of lost business does not suffice [in stating a cause of action]." Id. at 1459. The court, applying the law of Pennsylvania, which like the Virgin Islands follows §766B of the Restatement in defining the cause of action for tortious interference, reasoned

> Even at the pleading stage, a plaintiff may not rest a claim for tortious interference with prospective contractual relations on a mere hope that additional contracts or customers would have been forthcoming but for the defendant's interference. The complaint must allege facts that, if true, would give rise to a reasonable probability that particular anticipated contracts would have been entered into.

Id. (Emphasis added).

In this case, the Court can discern no reason to depart from these pleading requirements. Only by requiring Pinchbeck to identify particular contracts or anticipated contracts, can the Court ensure that Defendants' will be provided fair notice of the grounds for the claims. *See* Krouse, 126 F.3d at 499 n.1 (stating that under Rule 8 "a complaint must provide a defendant with 'fair notice of what the plaintiff 's claim is and the grounds upon which it rests.'"). Furthermore, without such notice, the Court cannot establish whether Pinchbeck is basing his allegations on "mere hope that additional contracts or customers would be forthcoming," Advanced Power Sys., 801 F.Supp. at 1459, or on actual relationships with current and prospective customers. Accordingly, although the Court will allow Pinchbeck to amend his complaint if he can identify particular contracts or anticipated contracts, it will deny his instant Motion to Amend. *Accord* Brumer v. HCA Health Serv. of Fla., Inc., 662 So.2d 1385, 1386 (Fla.App. 1995) (court held that where complaint was dismissed for failure to allege interference with specific relationship, trial court should have granted leave to amend). Inasmuch as Pinchbeck's proposed claims, as alleged, would be subject to dismissal for failure to state a claim, allowing the amendments would be futile.

III. CONCLUSION

For the reasons stated above, the Court concludes that the Prossers' Motions to Dismiss and for Sanctions must be denied. Pinchbeck's Complaint sufficiently alleges that the Prossers and ICC were his common law dual employers. The Court also concludes that Pinchbeck's Motion to Amend his Complaint must be denied. The proposed amendments fail to sufficiently allege causes of action for interference with contractual and prospective contractual relationships. The amended claims would thus be subject to dismissal and therefore futile.

MARIA M. CABRET
Territorial Court Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court
By:__________________
Deputy Clerk
Dated:________________