IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

GIL RON JEWELRY,

Plaintiff,

v.

DIAMOND WORLD and VALENZA JEWELERS,

Defendants.

CASE NO. ST-11-SM-380

INDIA GEMS,

Plaintiff,

v.

DIAMOND WORLD and AMALFI AND SALEM JUHDI,

Defendants.

CASE NO. ST-11-SM-381

MIGUEL LAUFER,

Plaintiff,

v.

VALENZA and DIAMOND WORLD,

Defendants.

CASE NO. ST-11-SM-385

A.G.M.,

Plaintiff,

v.

DIAMOND WORLD,

Defendant.

CASE NO. ST-11-SM-391

MEMORANDUM OPINION

Through a Memorandum Opinion and Order dated November 8, 2011, Magistrate Alan D. Smith dismissed these four small claims cases without prejudice, holding that Arthur Newman could not appear at trial as the personal representative of the Plaintiffs. These matters are now before this Court for review of that decision.

FACTS

Arthur Newman, who is not licensed to practice law in the Virgin Islands, filed each of these actions on behalf of the Plaintiffs. When the matters came on for trial on October 19, 2011, Newman attempted to appear on behalf of Plaintiffs to prosecute the cases as their personal representative. Magistrate Smith held that, as a natural person, Miguel Lauer was required to personally appear before the Court and prosecute the case. As to the other Plaintiffs, who Magistrate Smith indicated were artificial legal entities of unspecified form, Smith ruled that Newman did not qualify to appear as their personal representative on small claims because he was not an individual who had either the natural authority to bind the entity nor a regular and ongoing relationship to the entity.

STANDARD OF REVIEW

This Court has jurisdiction to review a judgment or order issued by a Magistrate in matters coming within the original jurisdiction of the Magistrate Division pursuant to 4 V.I.C. §123(a) (2008). Under Super. Ct. R 322.1, if appealed, a decision in a small claim action may be reviewed by a Superior Court judge. When reviewing appealable orders from the Magistrate's Division, this Court may overturn a Magistrate's findings of fact only if they were clearly erroneous, while the Magistrate's conclusions of law are afforded plenary review. Super. Ct. R. 322.3(b). Additionally, the Court must be "mindful that the goal of the [Magistrate] was 'to do substantial justice between the parties.'" *Cape Air Intl. V. Lindsey*, 53 V.I. 604, 612 (S. Ct. 2010) (quoting Super. Ct. R. 64).

ANALYSIS

Magistrate Smith reached his decision by balancing two public policies: the policy permitting public access to the Small Claims Division of the Superior Court in order to provide a simple and inexpensive means of collecting relatively modest debts, and the policy prohibiting the unauthorized practice of law. The Court finds his rationale and the balance he struck between these policies to be well reasoned and correct in so far as he held that Newman cannot appear as the personal representative of any of the parties.

Newman purports to derive his authority to represent the Plaintiffs from a four paragraph fill-in-the-blanks "Designation of Personal Representative" form he has his clients sign. By completing and executing the form, the client purports to designate Newman as the personal representative of the entity as that term is used in 4 V.I.C. § 112, which provides "Neither party may be represented by counsel and parties shall in all cases appear in person except for corporate parties, associations and partnerships which may appear by a personal representative." Essentially, Newman enters into a contract with the client, on a contingency fee basis, to perform legal services – to prepare and file pleadings and to represent the client before the Superior Court. Despite Newman's assertions to the contrary, it is hard to imagine a more evident example of the unauthorized practice of law. Moreover, Newman argues that he should be permitted to engage in this pretense because he confines it to appearing in cases in which licensed attorneys are specifically prohibited from doing so by statute. To approve such an artifice would not only undercut the safeguards ensured the public through the process of licensing attorneys, but also give Newman unfettered access to a group of cases prosecuted in a division of the Court where properly licensed, able practitioners cannot compete, without himself incurring the expense and necessity of obtaining admission to the bar or the responsibility of paying bar dues and licensing fees or engaging in continuing legal education licensed attorneys are require to maintain. The Court cannot condone such a contrivance.

That Newman inaccurately argues that local case law supports his contention underscores the wisdom of Magistrate Smith's ruling. The Memorandum Opinion rested in part on two cases: *Gore v. Tilden*, 50 V.I. 233 (S.Ct. 2008), and *Ryans* [sic] *Restaurant, Inc., v. Lewis*, 35 V.I. 187 (D.V.I. 1996). *Gore* held that an individual cannot appear through a surrogate for the trial of a small claim. In that matter Gore, a landlord who was unsuccessful in obtaining a continuance, attempted to have a rental agent, Bess, appear on his behalf to present evidence at trial. Relying on the clear language of 4 V.I.C. § 112(d), the Court ruled that Bess could not prosecute the case on behalf of Gore, an individual. That case obviously provides a firm foundation for Magistrate Smith's ruling that, as a natural person, Laufer must represent himself. What Newman overlooks, however, is that the case also supports Magistrate Smith's reasoning regarding the Plaintiffs who are entities, in that the *Gore* court prohibited the practice of appearing through a surrogate because the surrogate "had no personal knowledge of the debt at issue in Gore's complaint". *Gore, supra*, at 238.

Like the agent in *Gore*, Newman lacks personal knowledge of the debts his clients seek to collect through the small claims process. Newman's argument reveals the true nature of his relationship with his clients. Newman asserts he "will only testify s to his own personal knowledge, otherwise he still call the appropriate person to testify – but the court must allow the agent to appear and <u>question the witness</u>." (emphasis added) Thus, Newman implicitly admits that he provides his clients with legal representation, by offering evidence through questioning of witnesses with personal knowledge of underlying facts. Moreover, in the absence of an ongoing relationship with his clients akin to that of a principal of an entity, he can learn of the facts underlying the debts only through speaking with others who have personal knowledge of the debts or by reading written account data prepared by someone else. He cannot personally present admissible testimony as evidence of the debts his clients seek to collect; he can only pass on hearsay.

In *Ryans,* the Appellate Division of the District Court held that the trial court should have considered the defendant's motion to set aside a default judgment supported by an affidavit from its personal representative indicating he did not appear for trial because of the illness of his child. Without explaining the basis for his contention, Newman merely states that "the Ryan case is distinguishable". He fails to observe, however, that the personal representative, Alexander Treml, was a principal in the defendant entities and, thus, lawfully appeared on their behalf. Newman lacks any such connection with any of the entities for whom he seeks to prosecute these collections.

In arguing that his "Designation of Personal Representative" form authorizes his appearance, Newman relies on *Martin v. Sealey*, 21 V.I. 252 (T.Ct. 1985) and *Callwood v. Virgin Islands National Bank, et al.*, 221 F.2d 770, 3 V.I. 540 (3rd Cir. 1955). Neither of those cases involved appearances before the Small Claims Division. *Martin* held that, while a power of attorney may be effective to authorize an attorney in fact to convey title to real property, it does not permit the attorney in fact to make gifts of the principal's property through a deed of gift to herself in the absence of express authority. While Newman's Designation form is certainly akin to a power of attorney, Magistrate Smith did not hold that all powers of attorney are ineffective. He held only that such a document does not authorize the agent of a party to appear in a small claim in the absence of an ongoing relationship with the principal. As indicated previously, despite the "Designation", Newman still lacks the personal knowledge necessary for him to present admissible evidence.

Callwood held that the attempted assignment of a bank account to an attorney in fact was void under Article V of Law No. 53 of the Military Government Law in Germany, a decision not the least applicable to the question here presented. Newman does not possess an assignment of the underlying debts, nor, despite his assertion to the contrary, is he attempting to collect a debt in which he has a personal financial interest. Newman is attempting to appear, for a fee, as the representative of the principal, to collect a debt that is not owed to Newman. The extent of Newman's "financial interest" is merely the payment of his contingency fee upon performance of legal services for the client.

Finally, Newman claims that *Thomas v. St. Croix Marine*, 41 V.I. 3 (T.Ct. 1995), supports his position. In *Thomas*, the court ruled that corporations may not be represented by counsel in Small Claims Division but may be represented there only by a "non lawyer personal representative" [sic]. Newman asserts that the court's description of the statute as being "unambiguous" essentially means that any non-lawyer can appear as a personal representative in a small claim. The fallacy of this reasoning has already been demonstrated and was ably dispelled by the Magistrate.

While the Court agrees with that portion of the Magistrate's decision that prohibits Newman from serving as a personal representative in these cases, it disagrees, however, with the portion of the decision dismissing these cases without prejudice. In this Court's opinion, the dismissal did not afford the Plaintiff's substantial justice, as it was premature.

None of the Plaintiffs have demonstrated an intentional failure to appear to prosecute their cases. In fact, the evidence suggests that they thought they were effectively doing so by engaging Mr. Newman to appear for them. Moreover, it appears that Mr. Newman's practice of appearing in small claims through the use of the Designation of Personal Representative form had been going on for a substantial period of time. Now that Plaintiffs understand that Newman may not represent them in the Small Claims Division, Plaintiffs ought to have the opportunity to appear personally, in the case of Mr. Laufer, or, in the cases of the other Plaintiffs, through an appropriate representative with either the natural authority to bind the entity or a regular and ongoing relationship to the entity. A *sua sponte* continuance of the cases, to permit Plaintiffs to properly appear, would have afforded Plaintiffs substantial justice while imposing minimal, if any, prejudice on the Defendants. Therefore, I remand these cases to the Magistrate with instructions to vacate the dismissals and reset the cases for trial after giving appropriate notice to the parties that they may appear either personally or through a proper personal representative, as the case may be. If Plaintiffs still fail to prosecute their cases following notice of the trial and of the Court's ruling, dismissal again may be entered if otherwise appropriate.

An Order consistent with this Memorandum Opinion, which shall serve as the mandate of this Court, will issue.

Dated: February 27, 2012.

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

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

by: Paula Clayton
for Donna D. Donovan
Court Clerk Supervisor 2/28/2012