

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

RAYMOND A. MOORHEAD,	)	
	)	
Plaintiff,	)	CIVIL NO. 564/1994
	)	
vs.	)	
	)	ACTION FOR DAMAGES,
V.I. GROUND HANDLERS, INC.,	)	ACTION FOR BREACH OF
	)	CONTRACT
Defendant.	)	
	)	<u>NOT FOR PUBLICATION</u>

APPEARANCES

Jeffrey B.C. Moorhead, Esq.
1132 King Street
Christiansted, St. Croix
U.S. Virgin Islands 00820-4943
For Plaintiff Raymond A. Moorhead

H.A. Curt Otto, P.C.
2118 (53A) Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820-4945
For Defendant V.I. Ground Handlers, Inc.

MEMORANDUM OPINION
(Filed: October 18, 1996)

Cabret, Judge

This Matter is before the Court on Defendant's Motion to Dismiss and Plaintiff's Opposition thereto. The Defendant claims that the Plaintiff's Complaint should be dismissed for failure to state a claim for relief pursuant to Fed. R. Civ. P. 12(b)(6). In addition, Defendant also claims that Plaintiff has failed to prosecute his case and that therefore it should be dismissed pursuant to Fed. R. Civ. P. 41(b).

STATEMENT OF FACTS

On March 18, 1994, the Washington Hospital Center contacted Plaintiff to advise him that a kidney had been located for him and that emergency arrangements were being made for a kidney transplant in Washington D.C. within a few short hours. On that same day, Defendant American Aerovac, Inc. ("AA") telephoned Plaintiff advising him that time was of the essence. AA immediately assembled a medical team and flew an air ambulance to St. Croix, Virgin Islands. Plaintiff was scheduled to leave St. Croix at approximately 2:00 a.m. on March 19, 1994 for Washington D.C.

Defendant AA allegedly had arranged for Defendant, V.I. Ground Handlers ("VIGH") to fuel and service AA Flight N50DT at 2:00 a.m. at the Alexander Hamilton Airport on March 19, 1994. VIGH was not present at the Alexander Hamilton Airport at said time on March 19, 1994.¹ Therefore, VIGH did not fuel or service AA Flight N50DT for Plaintiff. Eventually, Plaintiff personally arranged to obtain alternative fuel and service from a third party in the middle of the night.

Plaintiff claims that Defendant VIGH breached its contract with Defendant AA Flight N50DT at the Alexander Hamilton Airport.

¹ Plaintiff, in his amended complaint, alleges that VIGH was waiting at the St. Thomas airport.

As a result, Plaintiff alleges that he suffered emotional and physical pain and suffering and arrived at Washington Hospital Center several hours late which caused complications with his kidney transplant and recovery.

DISCUSSION

I. 12(b)(6) Motion to Dismiss for Failure to State a Claim for Relief

A. 12(b)(6) Standard

Defendant VIGH first alleges in its motion to dismiss that Plaintiff has failed to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). Specifically, Defendant alleges that Plaintiff has failed to allege his status as a third party beneficiary to the contract.

In considering a motion to dismiss based on failure to state a claim upon which relief can be granted, the court must view all factual allegations in the complaint as true and construe it liberally as well as in a light most favorable to the plaintiff. See Callender v. Nichtern, 32 V.I. 99 (Terr.Ct. 1995); Francis v. Graham Miller (Caribbean)Ltd, 26 V.I. 184 (Terr.Ct. 1991). The court's inquiry is limited to the contents of the complaint, and the motion to dismiss must be considered in conjunction with Rule 8(a) which sets forth the requirements for pleading a claim.

Callender, 32 V.I. at 99.

The issue with respect to a 12(b)(6) motion is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim. Espinosa v. Government of the Virgin Islands, 20 V.I. 78 (Terr.Ct. 1983). A 12(b)(6) motion does not address the merits of the claim, but merely tests whether the claim has been adequately stated in the complaint. Hans Lolik Corporation v. Government of the Virgin Islands, 17 V.I. 220 (Terr.Ct. 1981). Thus, before a court can grant a 12(b)(6) motion, it must appear to a certainty that the petitioner would be entitled to no relief under any set of facts which could be proved in support of its claim; in essence, there must be no circumstances under which the petitioner is entitled to any relief. Department of Housing and Community Renewal v. United Industrial Service, 23 V.I. 333 (Terr.Ct. 1988).

B. *Plaintiff's claim for relief*

The substance of Plaintiff's claim is that as an intended beneficiary of the agreement made between VIGH and AA, VIGH owed a duty to Plaintiff to perform on the agreement. By failing to appear, fuel and service AA Flight N50DT at the Alexander Hamilton Airport on St. Croix on March 19, 1994 at 2:00 a.m., VIGH breached

said duty to Plaintiff.²

Before an analysis of the Restatement law on third party beneficiaries, the Court first notes that the Federal Rules of Civil Procedure do not require plaintiff to specifically allege in his complaint that he is an intended, as opposed to incidental, third party beneficiary of an agreement. Francis v. Graham Miller (Caribbean) Ltd., 26 V.I. 184, 186 (Terr.Ct. 1991). However, before a party can be considered an intended beneficiary, the agreement generally must clearly express an intent to benefit third parties. Virgin Islands Corporation v. Merwin Lighterage Co., 4 V.I. 80, 177 F.Supp. 810 (D.C.V.I. 1959).

Section 302 of the Restatement (Second) of Contracts states

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and
 - (b) circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS §302 (1981). The contract need not provide that performance is to be rendered directly to the

² See Plaintiff's Amended Complaint, page 4.

beneficiary. RESTATEMENT (SECOND) OF CONTRACTS §302 cmt.c. Neither is any contact or communication with the beneficiary essential. Id. Comment d of section 302(1) further states

A gift promise {as defined in §302(1)(b)} involves a manifestation of intention by the promisee and promisor sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable... If the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.

Plaintiff, in support of his argument that VIGH had a duty to perform the services under the agreement made with AA, alleges that AA neither makes regularly scheduled flights to the Virgin Islands, nor does VIGH regularly service private jets in the middle of the night on short notice when the airport is officially closed.³ Thus, Plaintiff claims that the agreement made between the defendants was intended for Plaintiff's sole benefit. Defendant VIGH, on the other hand, alleges that in the event it entered into an agreement with AA, it owes Plaintiff no duty since Plaintiff was not a party to the contract and that at the most, Plaintiff can only be considered an incidental beneficiary pursuant to the Restatement. According to the Restatement, "performance of a contract will often benefit a third person. But unless the third

³ See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, page 1.

person is an intended beneficiary as here defined, no duty to him is created." RESTATEMENT (SECOND) OF CONTRACTS §302 comment e; See Francis, 26 V.I. at 186. At present, the Plaintiff has stated a sufficient claim for relief. Although Plaintiff never specifically states in his complaint that he was an intended beneficiary to the agreement between the defendants, the Plaintiff did not have to do so. See Francis, 26 V.I. at 186. In addition, Plaintiff's factual assertions concerning the nature of the parties and the circumstances surrounding the flight to Washington D.C. are sufficient to qualify him as an intended beneficiary under §302(1)(b) of the Restatement. Specifically, the allegations that AA does not make regularly scheduled flights to the Virgin Islands and that VIGH does not regularly service planes when the airport is closed are enough to indicate that the promisee (AA) intended to give the beneficiary (Plaintiff) the benefit of the promised performance by VIGH. Therefore, Plaintiff must be given the opportunity to bring forth evidence that shows that the Defendants entered into an agreement for the sole benefit of Plaintiff and that VIGH owed Plaintiff a duty to perform on the contract. Accordingly, VIGH's motion to dismiss for failure to state a claim for relief is denied.

II. Rule 41 Dismissal

Defendant VIGH states a second reason in support of its motion to dismiss. It claims that Plaintiff has failed to prosecute this case since Plaintiff has done nothing to move this action forward for more than a year.

Federal Rule Civil Procedure 41(b) states

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed.R. Civ. P. 41(b) (1996).

Dismissal of a complaint with prejudice as a sanction for dilatory conduct is a drastic measure reserved for comparable cases. Andrews v. Government of the Virgin Islands, 25 V.I. 284 (D.C.V.I. 1990), affirmed 935 F.2d 1280 (3d Cir. 1991). Such dismissal is discretionary and may be invoked not only as a sanction against those whose conduct may be deemed to warrant such a sanction but also to deter those who might be tempted to such conduct in the absence of such a deterrent. Id.

In determining whether a party's dilatory conduct warrants the sanction of dismissal with prejudice, the Court must consider

- (1) the extent of the party's personal responsibility,
- (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery,
- (3) a history of dilatoriness,
- (4) whether the conduct of the party or the attorney was willful or a bad faith,
- (5) the effectiveness of sanctions other than dismissal, and
- (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 867-868 (3d Cir. 1984). Some but not all, of the factors must weigh against the opposing party to warrant dismissal. Id.

Defendant VIGH contends that since the filing of the Complaint on or about July 1, 1994, Plaintiff has done nothing in over a year to proceed or move the action forward. Specifically, VIGH points to the fact that Plaintiff has propounded no discovery requests, filed no motions, nor called for any depositions. Accordingly, dismissal of Plaintiff's action is warranted under Fed. R. Civ. P. 41(b).

Plaintiff responds by claiming that neither the Federal Rules nor the Territorial Court Rules require that discovery be conducted within a certain time frame. In addition, Plaintiff states that due to past experience, "he estimated that this matter would hopefully go to trial sometime in 1996 or early 1997 and that therefore there was no need to file unnecessary motions and waste

valuable time resources."⁴

When balancing the factors set forth in Poulis, the Court cannot find that Plaintiff's actions warrant a dismissal of this case. Specifically, there is no evidence

(1) of prejudice to the defendant in this matter since Plaintiff responded to the Court's sole order in this matter;

(2) of a history of dilatoriness on the part of Plaintiff,

(3) of willful or bad faith conduct on the part of Plaintiff's counsel;

(4) that sanctions would be ineffective as an alternative to dismissal; and

(5) that the Plaintiff has failed to make a meritorious claim. In addition, Defendant's use of the case Andrews v. Government in support of his argument is misplaced since, as Plaintiff points out, the court in Andrews dismissed the case not only because the plaintiff had failed to take any further action with respect to the matter but also that the plaintiff violated numerous court orders and discovery deadlines. There is no such comparable conduct present in this case. Accordingly, dismissal of this action is not warranted pursuant to FRCP 41(b).

⁴ See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Page 3

CONCLUSION

Defendant VIGH has failed to prove that a 12(b)(6) motion to dismiss is warranted against the plaintiff. In light of the alleged factual circumstances surrounding American Aerovac Flight N50DT, the Plaintiff can present a set of facts that shows that he was an intentional beneficiary of an agreement entered into by the defendants and that therefore VIGH owed Plaintiff a duty to perform on the contract. In addition, Defendant VIGH has failed to prove that a Rule 41(b) dismissal of plaintiff's case is warranted. Specifically, there is no evidence of the factors enunciated by the Third Circuit in the Poulis case. Accordingly, defendant VIGH's motion to dismiss must be DENIED.

ENTER:



MARIA M. CABRET
Territorial Court Judge