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

* * * * *

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| JEFFREY EPSTEIN, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | NO. ST-10-CV-443 |
| FANCELLI PANELING, INC., | ) | |
| Defendant. | ) | (CARROLL, J.) |

***OPPOSITION TO MOTION TO RECONSIDER WITH POINTS AND AUTHORITIES***

**COMES NOW** Defendant, by and through its undersigned Counsel, to state its ***Opposition*** to ***Plaintiffs' Motion for Reconsideration***, pursuant to ***Fed. R. Civ. P. 1, 12 & 19, Sup. Ct. Rule 7, the Fifth and 14th Amendment (due process), The Revised Organic Act of 1954*** and the Constitutional considerations embodied therein.

In support of its ***Opposition***, Defendant states the following:

## I. THE MEMORANDUM OPINION AND ORDER DATED MAY 16, 2011

By *Memorandum Opinion* dated May 16, 2011, the Court held that:

> Plaintiffs must join Molyneux as a necessary party. The Court will deny the Motion to Dismiss, but will direct Plaintiffs to join the necessary party (p.1).

In the Factual and Procedural Background section of the *Memorandum Opinion*, the Court noted that in 2005 Epstein contracted with non-parties – "J.P. Molyneux Studio, Ltd., and Juan Pablo Molyneux (collectively, "Molyneux")" – to design a residential project on Little St. James."

In Discussion, the Court cited to ***FRCP, Rule 19(a)(1)(A)*** and ***(B)*** and held, as follows:

> Without Molyneux Studio in the case, the Court would be hard-pressed to accord complete relief among Plaintiffs and Fancelli… Without Molyneux in the case, it will be difficult for the trier of fact to resolve the evidentiary issues that will arise. Furthermore, the Court lacks jurisdiction to compel the production of documents or depositions outside the Territory…making it more difficult to obtain necessary discovery from Molyneux were it not a party to the action. In addition, courts interpreting contracts generally require that all parties to the contract join the action [citations omitted] (p.8-9),

and concluded that:

> …[t]he Court sees no reason to make an exception in this case. Therefore, the Court…will require Plaintiff's to serve and join Molyneux in this matter (Id.).

## PRELIMINARY STATEMENT

The Court's ***Order*** recognized the *sine qua non* of ***Rule 19***:

Rule 19(a) PERSONS REQUIRED TO BE JOINED IF FEASIBLE

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties . . .

Because this state court action is not predicated upon federal diversity jurisdiction, ***28 U.S.C. § 1331***, this Court will not lose subject-matter jurisdiction by requiring the joinder of Mr. Juan Pablo Molyneux and Molyneux Studio, Ltd. Plaintiffs concede that the individual and the entity are subject to service of process. After a review of the matter posed by the existing parties on ***Defendant's Motion to Dismiss*** prior to the issuance of its ***Order***, the Court concluded that it could not afford complete relief to the existing parties in the absence of Molyneux.

First, ***FRCP, Rule 19(a)(1)*** mandates joinder of a non-party if: [A] "...in that person's absence, the court cannot accord complete relief among the existing parties (emphasis added)." The federal courts give the ***Rules*** "their plain meaning . . . and generally with them as with statutes, when (the court finds) the terms . . . unambiguous, judicial inquiry is complete." ***Pavelic LeFlore v. Marvel Entertainment, 493 U.S. 120, 123 (1989)***.

In ordering joinder, this Court has acknowledged that in Molyneux's absence such "complete relief" cannot be accorded the Plaintiffs and Fancelli. In seeking reconsideration, Plaintiffs, not only continue to misstate ***Rule 19(a)(1)***, erroneously holding that "[i]f this Court can grant Plaintiffs complete relief without Molyneux, then Molyneux is not a necessary party" (see Plaintiffs' ***Memorandum***, pp.7,12 and ***Opposition***, p.21), but also merely repeat the same arguments advanced in opposition to that branch of the ***Motion to Dismiss*** for failure to join Molyneux as a necessary party, which the Court previously considered and rejected. In short, not one case cited by Plaintiffs in support of reconsideration alters the grounds asserted in opposition

to the ***Motion to Dismiss*** or supports granting the ***Motion to Reconsider*** or amending the ***Order*** as requested by Plaintiffs.

Second, ***Plaintiff's Motion for Reconsideration***, alleging "manifest injustice" in reliance upon a "confidential settlement agreement" with Molyneux that is not before the Court, other than in self-serving, selective part, is patently frivolous. Effectively, Plaintiffs would have the Court find that some secret agreement supersedes or overrules ***FRCP Rule 19(a)(1)*** and warrants reconsideration of the Court's *Memorandum Opinion*. What is clear from the limited disclosure of the "Confidential Agreement" is that Juan Pablo Molyneux is unquestionably a necessary party who must be joined in the action and the Confidential Agreement must be produced in its entirety. Specifically, the Confidential Agreement: (i) is between Plaintiffs and "Juan Pablo Molyneux and J.P. Molyneux Studio, Ltd., (Molyneux)" (Francois Affidavit, ¶3); (ii) arises out of the same transaction or series of transactions as the captioned action, including Molyneux's Purchase Order with Defendant, as to which the Court has found Plaintiffs to be third party beneficiaries, and as to which Molyneux and Epstein each issued work approvals/accords and satisfactions (annexed hereto as **Exhibit "A"** and **"B,"** respectively); and (iii) is dated December 30, 2010, a scant two days after the sworn *Affidavit of Juan Pablo Molyneux* was submitted in opposition to ***Defendant's Motion to Dismiss***, which directly and materially contradicts Molyneux's June 11, 2010 ***First Amended Complaint*** in the action formerly pending in the District Court of the Virgin Islands, bearing the Case No. 3:10-cv-00034, captioned

*J.P.Molyneux Studio, Ltd. and Juan Pablo Molyneux against Jeffrey Epstein and L.S.J., LLC. (the "Molyneux Action")*, in which Molyneux alleges: [1].

> [s]ubsequent to the execution of the Design Services Agreement, Plaintiffs, with the assistance of an internationally-known woodworking craftsman [Fancelli Paneling, Inc.], undertook to and did perform the Exhibit B Services, thereby satisfying their obligations pursuant to the Design Services Agreement (Molyneux Action, ***First Amended Complaint***, ¶14)
>
> On March 22, 2010...Plaintiffs and their representatives...undertook to complete, and did complete, the Punch List items falling under the Design Services Agreement (Molyneux Action, ***First Amended Complaint***, ¶17)
>
> On March 25, 2010 Defendants' agent signed off on all items enumerated on the Punch List by signing it and noting that all the woodwork on the list was done with the exception of three minor items, none of which were specified in Exhibit B to the Design Services Agreement (Molyneux Action, ***First Amended Complaint***, ¶15) (***First Amended Complaint***, the Settlement Agreement, the Design Services Agreement with annexed Exhibits A & B, annexed hereto as **Exhibit "C"**).

Nor will it escape the Court that the Confidential Agreement supersedes the prior Settlement Agreement that is the subject of the Molyneux Action, by relieving Molyneux of $1,200,000 of potential liability to Plaintiffs and an additional $250,000 of liability under the Design Services Agreement.

Further, the Court recognized problems with the evidentiary distinctions between those limited through Molyneux as a witness and those available through Molyneux as a party. With joinder, those already parties would have the benefit of the Molyneux parties' self-executing

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[1] On motion (for judgment on the pleadings), the court may take judicial notice of matters of public record. ***United States v. Woods, 925 F.2d 1580, 1582 (7th Cir. 1991). Fed. R.***

discovery, responses to admissions, interrogatories, experts, more extensive time for depositions and active participation throughout this litigation. In short, the "manifest injustice" that would result would follow from granting reconsideration and amending the ***Order*** as Plaintiffs request based on a ruse -- the secret agreement -- to obstruct the Court's power to compel document production from, physical inspection of the Premises with, and depositions of Mr. Molyneux and Molyneux Studio's witnesses and employees, including ***Rule 30(b)(6)*** witnesses, as well as their appearance to testify at trial. Manifest injustice would follow, not only from Plaintiffs' successful obstruction of Defendant's right to dispositively cross-examine Mr. Molyneux as a party, especially given Mr. Molyneux's contradictory sworn testimony based on the timing of Plaintiffs' Confidential Agreement with Molyneux, but also from Plaintiffs' suggestion that, as third party beneficiary of the Purchase Order, they stand in place of Molyneux to preclude Court-ordered joinder of Molyneux as a "necessary party," again to shield Mr. Molyneux from cross examination and preclude a decision on the merits.

Third, under ***FRCP, Rule 19(a)(1)***, having found "Molyneux" to be a "necessary party," most respectfully, ***Defendant's Motion to Dismiss*** should have been granted, subject to Plaintiffs joining Molyneux as a necessary party by a fixed date, rather than denied, but with an order directing Molyneux to be joined as a necessary party. Respectfully, if the Court grants reconsideration, we urge the Court to adhere to its finding Molyneux a necessary party, but in so finding, granting ***Defendant's Motion to Dismiss*** subject to timely joinder. Plaintiffs' attempt to deflect the Court's finding Molyneux a necessary party, suggesting that Defendant implead

Molyneux pursuant to ***FRCP, Rule 14***, is misplaced as Defendant presently seeks neither contribution, nor indemnification from Molyneux.

Fourth, by ***Order*** of May 16, 2011, based as it is on the reasons stated in the *Memorandum Opinion* of the same date, the Court may have inadvertently made a scrivener's error in restricting "necessary party" status to "Molyneux Sudio," rather than to "Molyneux," which is the collective term defined by Plaintiffs (***First Amended Complaint***, ¶4, p.2; ***Opposition to Motion to Dismiss***, p.8, and ***Affidavit in support of Motion to Reconsider***, p.2), ***Defendant's Motion to Dismiss***, p.2, and the Court by *Memorandum Opinion* (p. 2), to refer to Juan Pablo Molyneux, individually, and Molyneux Studio, Ltd. Based on the facts at bar, Juan Pablo Molyneux is unquestionably a necessary party who, respectfully, must be joined in the action for the reasons identified in the Court's *Memorandum Opinion.*

Ordinarily, the Court's determination on point should conclude the Court's inquiry, especially on a ***Motion to Reconsider*** the same or similar allegations that were before the Court initially. Plaintiffs first assert that <u>they can get all the relief they want</u> with the existing parties (see, ***Memorandum***, p. 7, 14). Perhaps, but that myopic view is not what the ***Rule*** mandates, since Defendant must be afforded complete relief as well. Equally myopic is Plaintiffs' conclusion that they " .. . to not anticipate Molyneux's absence to substantially increase the difficulty of litigation," (Memorandum, p. 15). Defendant vigorously disagrees

Finally, given a fair reading of what follows and upon information and belief, it appears that Molyneux is still obliged to continue to complete the disputed woodwork and installation under the terms and conditions of its new Settlement Agreement by and between Plaintiffs and

Molyneux. See *Francois Affidavit*, p. 2, ¶ 5 ("Anything to the contrary in this Section 3(a) notwithstanding, nothing herein shall release the Molyneux Releasees from any of their respective joint or several obligations under the Agreement or the Office Design Agreement . . ."). Apparently, Plaintiffs continue to receive the services from Molyneux that will impact their causes of action and alleged damages from Defendant.

The court, in its exercise of judicial discretion, has determined its comfort level on the issue of complete relief and requires the inclusion of Molyneux

## III. RELEVANT FACTS AND PROCEDURAL STATUS

### A. Relevant Facts

In 2005, Plaintiff Epstein engaged Juan Pablo Molyneux and [redacted] Molyneux Studio, Ltd. ("Molyneux") to design a large-scale, multi-structure, multi-million dollar residential project to be constructed on Little St. James Island. On May 19, 2006, [redacted] Molyneux Studio, Ltd. presented a proposal to Epstein for the fabrication and installation of cabinetry in the OFFICE and SITTING AREA of the project. On information and belief, the first written Design Services Agreement among Juan Pablo Molyneux, J. P. Molyneux Studio, Ltd. and Jeffrey Epstein for the project is dated May 15, 2009. Defendant is not a party to a 2005 Agreement or the May 15, 2009 Agreement.

By Purchase Order #2680 dated June 15, 2006, Defendant was retained by "MOLYNEUX" to fabricate and install cabinetry for the OFFICE & SITTING AREA of this project. Purchase Order #2680 was replaced by Purchase Order #7106 dated October 14, 2008,

which is annexed as Exhibit A to Molyneux's Design Services Agreement with Epstien which, in turn, is annexed to the June 11, 2010 ***First Amended Complaint*** in the action formerly pending in the District Court of the Virgin Islands, bearing the Case No. 3:10-cv-00034, captioned *J.P.Molyneux Studio, Ltd. and Juan Pablo Molyneux against Jeffrey Epstein and L.S.J., LLC* ***(Exhibit C** hereto).* The Purchase Order, Revised, is the sole "contract" between Molyneux and Defendant, consisting of 41 words with reference to "JPM design," which was based on Escorial in Spain. That plan was rejected by Plaintiffs and substituted for an "Exotic" design, as to which no JPM design was produced or submitted to Defendant.

**B. Procedural Status**

1. Counsel for the parties herein have regularly consulted on the applicable procedural rules since shortly after the inception of this action and through the regular exchange of professional courtesies.

2. Plaintiffs' Counsel first documented some procedural concerns regarding due dates pertaining to ***Fed. R. Civ. P. 6*** in ***Plaintiffs' Motion for Enlargement of Time Within Which to File Opposition to Defendant's Motion to Dismiss, ¶¶ 1-5*** (filed 2/11/11-received 2/15/11, service by mail).

3. One of the procedural controversies pertains to electronic filing and simultaneous service, newly added to the District Court of the Virgin Islands as a requirement for all cases filed in that forum. Under such circumstances, response times logically run from filing, as stated by rules newly amended to account for the fact of electronic filing and service, so

that responses there no longer account in timing from the fact of service, it is simultaneous with electronic filing.

4. The practices and procedures in the Superior Court shall be governed by the rules of that court and to the extent not inconsistent therewith, by the rules of the District Court, etc. ***Super. Ct. R. 7; Investigations Unlimited v. All Ameican Holding Corp., 16 V.I. 524, 525 Terr. Ct. St. T. & St. J. 1979***) (Terr. Ct. must conform to the Federal Rules of Civil Procedure where there is no local rule to the contrary).

5. For our limited purposes to point, the only Superior Court Rule arguably contrary to ***Fed. R. Civ. P. 1-19*** and ***LRCi 1-12.1***, is ***Super. Ct. R. 9***, excluding intervening weekends and holidays from the calculations for periods of eleven (11) days or less.[2]

6. The Court's ***Memorandum Opinion and Order*** denying/granting in part relief sought in ***Defendant's Motion to Dismiss First Amended Complaint*** issued May 16th , but was not served on Defendant until the afternoon of May 27th (by facsimile transmission); original service was received through Counsel's box on the day after the Memorial Day holiday, May 31st.

7. The parties timely filed (pursuant to ***Super. Ct. R. 9) Motions to Extend Time in Which to File Motions to Reconsider***, Plaintiff filed, then withdrew ***Plaintiffs' Motion to Reconsider on the Ground of Manifest Injustice*** and the Court granted and extended the time in which Plaintiffs could file their ***Motion to Reconsider*** through to June 21, 2011.

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[2] A series of filings issued from Defendant's Counsel March 10-14, 2011, of a procedural nature may be addressed in Defendant's ***Motion for Reconsideration***.

8. Plaintiffs' ***Motion to Reconsider*** was filed and "served by mail" on June 21st. Defendant's Counsel requested a copy by email on that date, but did not receive a response from Plaintiffs' Counsel. The Court is asked to judicially notice that St. Thomas mail, even if directed to St. Thomas residents, goes through Puerto Rico. Defendant received its service copy by mail on June 27th. Without clarity on which rules are applicable to this situation, Defendant is currently unsure when its response to ***Plaintiff's Motion for Reconsideration*** is due. By operation of ***Fed. R. Civ. P. 6(d)***, ***LRCi 7.1(e)(1)*** and ***Super. Ct. Rule 7***, however, it would appear that Defendant should be afforded the additional 3 days due service by mail on June 21st, directing a response time on, or before July 8th, or by July 11th upon the date of service with a literal application of ***LRCi 7.1(e)(1)***.

9. ***Defendant's Motion to Extend Time in Which to File Motion to Reconsider*** was granted by ***Order*** dated June 22nd, entered on June 24th, received by Defendant's Counsel on June 27th and, by terms of the ***Order***, Defendant has 14 days from its entry in which to file its ***Motion to Reconsider***, on or before July 8th. ***Fed. R. Civ. P. 6(a)(1)(A) & (C)***.

10. Plaintiffs take issue with those portions of the Court's May 16th ***Order*** requiring Plaintiffs to file and serve ***Plaintiffs' Second Amended Complaint*** within 14 days of the ***Order*** adding Molyneux Studios in the caption and asserting such claims as it may choose in the body of the pleading. Defendant agrees with that portion of the Court's ruling, but requested the addition of Mr. Molyneux as well, while objecting to the remainder of the Court's several ***Orders*** on the merits.

11. Defendant maintains that the Court Granted, in part, its ***Motion to Dismiss***, pursuant to ***Fed. R. Civ. P. 12(b)(7)***, with dismissal of the existing ***First Amended Complaint*** as the appropriate remedy for the relief requested.

12. Defendant acknowledges, however, that the Court may exercise its discretion to join parties independently, pursuant to ***Fed. R. Civ. P. 19(a)(2)***.

## IV. LOCAL RULE 7.3 / MOTION FOR RECONSIDERATION

Plaintiffs seek reconsideration under one of only three purposes authorized under ***LRCi 7.3***, an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. The Third Circuit favors two purposes for reconsideration, " . to correct manifest errors of law or fact or to present newly discovered evidence. ***Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)***

Here, Plaintiffs specify the ground of "manifest injustice," without providing the standard for comparison against the law and facts previously stated in this case. Plaintiffs make the allegation of manifest injustice, but fail to provide its legal standard. Manifest injustice , in the context of a motion to reconsider, it "generally means the that the court overlooked some dispositive factual or legal matter that was presented to it. ***In Re Rose, U.S. Dist. LEXIS 64622, at *3 (D.N.J. Aug. 30, 2007)***. "Most cases . . . use the term "manifest injustice' to describe the result of a plain error." ***Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1425 (5th Cir. 1996)***. When Plaintiffs fail to point to any error and set forth the facts that would support the inference of manifest injustice, reconsideration should be denied. ***McCauley v. University of the***

***Virgin Islands, et al., 2009 U.S. Dist. LEXIS 37285***. Mere disagreement with the court's conclusions is not a valid basis for reconsideration. Id.

If Plaintiff raises matters which have already been considered and decided by the Court, the motion for reconsideration will be denied. ***Hamilton v. Dowson Holding Company, Inc., et al., 51 V.I. 855, 859-60 (D.V.I. 2009)***. Plaintiffs initial ***Opposition*** raised both its third-party beneficiary standing and its need for only one joint tortfeasor. The Court determined in its discretion a need for the actual contracting parties, in order to afford complete relief to those already parties. It is well-established that a party to a contract (here a series of contracts) which is the subject of litigation is considered a necessary party. ***CP Solutions PTE, Ltd. v. General Electric Co., et al., 470 F. Supp 2d 151, 157 (D.C. Conn. 2007)***; ***Caribbean Telecommunications Limited v. Guyana Telephone & Telegraph Company, Ltd., 594 F. Supp. 2d 522 (D.C. N.J. 2009)***. On the underlying facts and circumstances in this action, Molyneux is so inextricably intertwined, by his several contracts, often incorporating one, or more of the others, his acts and facts, as to require his full participation as a party to fully sort out the just relief for all existing parties.

A motion for reconsideration is not for raising matters that could have been raised before, but were not. ***Bostic v. AT&T of the Virgin Islands, 45 V.I. 553, 312 F. Supp. 2d 731, 733 (D.V.I. 2004)***.

## V. CONCLUSION

Manifest injustice will result if both Molyneux and Molyneux Design are not joined as parties. Plaintiffs contend that, as a result of a Confidential Settlement Agreement created, in part, in aid of Plaintiffs in the instant litigation, during the pendency of this litigation, it would be unseemly to require Plaintiffs to join their settling party, even in response to a Court Order. In that portion of the "Confidential Agreement" Plaintiffs' elect to disclose on point, they highlight their agreement not to sue the Molyneux Releasees. *Francois Affidavit*, p. 2, ¶ 6.

The ***Federal Rules*** are open and notorious. The possibility of joinder in either action had to be contemplated between Molyneux's filing of the federal action against Epstein April 10, 2010 and Epstein filing the instant action against Fancelli July 30, 2010. Fancelli's reaction and rights would have been part of each side's due diligence during their settlement negotiations. The resulting machinations of private interests could not contractually circumvent the rules, nor take precedence over the Court's vision of justice.

To alleviate Plaintiffs' concerns, the ***Rules*** permit Plaintiffs to join Molyneux as a party-plaintiff, obviating any need for them to sue those settling parties and the Court's joinder order did not require Plaintiffs to assert any claims against the Molyneux parties. The Court can look beyond the pleadings in arranging joined parties according to their sides in a dispute. ***Fed. R. Civ. P. 19(a)(2) & 20(a)(1)(B) & (a)(3)***. ***Hansen v. United States, 42 V.I. 456, 191 F.R.D. 492, 2000 U.S. Dist. LEXIS 2388 (2000)***. Joinder is required in the interest of justice.

**WHEREFORE, Defendant respectfully requests:**

A. **That this Honorable Court DENY Plaintiffs' *Motion to Reconsider*** its requirement that Plaintiffs' join Molyneux Design;

B. **That the Court further require the additional joinder of Molyneux as well; and**

C. **For such other and further relief as the Court deems just and proper.**

Dated this 5th day of July, 2011.

Respectfully submitted,

Treston E. Moore, Esquire
V.I. Bar No. 10
MOORE DODSON & RUSSELL, [redacted].
Attorneys for Defendant
[redacted]
PHONE:
FAX:
EMAIL:

***CERTIFICATE OF SERVICE***

I hereby certify that on this 5th day of July, 2011, a copy of the foregoing was served by first class mail, postage prepaid, upon Denise Francois, Esquire, Hodge & Francois, #1340 Taarneberg, St. Thomas, V.I. 00802.