

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

JEFFREY EPSTEIN and L.S.J., LLC,)
)
 Plaintiffs,)
)
 -vs-)
)
 FANCELLI PANELING, INC.,)
)
 Defendant.)

CASE NO. ST-10-CV-443

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

2011 FEB 11 PM 5:01
SUPERIOR COURT
OF THE VIRGIN ISLANDS

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The motion to dismiss filed by Defendant Fancelli Paneling, Inc. ("Defendant") in the above-captioned action misstates New York law, improperly relies upon allegations not contained in Plaintiffs' first amended complaint ("FAC") and is unsupported by any affidavits or exhibits. For all of the reasons set forth below and accepting the factual allegations in the FAC as true, drawing all reasonable inferences from them and construing them in a light most favorable to the non-movant, Defendant's Motion to Dismiss the Complaint with Points and Authorities should be denied in its entirety. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. _____, 129 S. Ct. 1937 (2009), *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3rd Cir. 2009) (quoting *Iqbal*, 129 S.Ct. at 1949-50), *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir. 2010) and *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008).

I. PLAINTIFFS PROPERLY SERVED DEFENDANT WITH THE SUMMONS AND FIRST AMENDED COMPLAINT.

Defendant first seeks to avoid this Court's adjudication of Plaintiffs' claims by arguing that the FAC, which Defendant has obviously received, was not served properly. Defendant is mistaken. The FAC was properly served at the Defendant's correct business address on

Defendant's President in care of Christian Barthod, who has previously acted as the President's agent and liaison in connection with the very same dispute at issue in this case.

The Affidavit of Process Server¹ confirms, under oath, that Fancelli Paneling, Inc. was served with the summons and the FAC at its business address located at 24 East 64th Street, New York, NY 10021, in care of its president, Mr. Jean Pierre Fancelli, through Mr. Christian Barthod who verified to the process server that he worked at Fancelli Paneling, Inc. Defendant never argues that the summons and the FAC were served at an incorrect address, and in fact 24 East 64th Street, New York, NY 10021 is the same address on the business card that Mr. Christian Barthod supplied to the process server². It is also the same address Defendant has on file with the New York State Department of State. Pl. Ex. 4.

In support of its argument for insufficient service of process, Defendant asserts that the "...Summons and Complaint (sic) were delivered to Fancelli's office in New York on or about November 29, 2010 and left at that location with an unauthorized employee of Fancelli Paneling, Inc." However, Mr. Barthod did not refuse to accept the summons and the FAC. Nor did Mr. Barthod inform the process server that he was not authorized to accept the summons and the FAC.

Under Federal Rule of Civil Procedure 4(h), Plaintiff may properly effect service by serving an officer, manager, general agent or any other agent authorized by appointment or by law. Fed. R. Civ. P. 4(h)(1)(B). Federal Rule of Civil Procedure 4(e)(1)³ permits service of process on a corporation following the state law where service is made. Plaintiff served

¹ A true and correct copy of the Affidavit of Process Server, filed with the Court on January 20, 2011 is marked Plaintiffs' Exhibit 1, attached hereto and incorporated herein by this reference.

² A true and correct copy of the business card of Mr. Christian Barthod is marked Plaintiffs' Exhibit 2, attached hereto and incorporated herein by this reference.

³ Federal Rule of Civil Procedure 4(e)(1) is applicable to corporations via Rule 4(h)(1)(A).

Defendant in New York. New York permits service by delivery to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. NY CPLR §311(a)(1)⁴. Mr. Christian Barthod identified himself as a co-worker of the Defendant's President, Mr. Jean Pierre Fancelli. Pl. Ex 1. Moreover, in prior interactions between Plaintiffs and Defendant, it was confirmed that Mr. Barthod was an integral part of Defendant's business operations, and the specific contact for communications with Defendants' President relating to the matters alleged in the FAC. As documented by the attached email from Mr. Christian Barthod, for example, Mr. Barthod served as liaison to Defendant's President through whom legal communications relating to the matters alleged in the FAC were directed to Mr. Jean Pierre Fancelli.⁵ In addition, Defendant specifically informed Plaintiffs' counsel, Darren Indyke, that because of limitations with Mr. Fancelli's ability to communicate in English, Mr. Indyke should communicate with Mr. Fancelli through Mr. Barthod. Pl. Ex. 3 Thus, Mr. Barthod has been previously held out as a proper agent of the President of Defendant through whom all communications to Mr. Fancelli relating to the instant dispute with the Defendant were to be directed. As Mr. Fancelli's agent, Mr. Barthod was indeed a proper agent of Defendant on whom the summons and the FAC could properly be served.

Even if Mr. Barthod told the process server that Defendant had not authorized him to accept service and that Barthod was not authorized by law to accept service, which Mr. Barthod clearly did not do, this would not negate service. See *Shedlin v. State Tax Commission*, 62 A.D.2d 806, 808-809 (N.Y.A.D. 1978) (service on a secretary who protested that she could not

⁴ A true and correct copy of NY CPLR §311(a)(1) is marked Plaintiffs' Exhibit 10, attached hereto and incorporated herein by this reference.

⁵ A true and correct copy of the July 13, 2010 email from Christian Barthod of Fancelli Paneling to Darren Indyke, Plaintiffs' New York legal counsel, and the July 14, 2010 reply email from Darren Indyke to Mr. Fancelli are collectively marked Plaintiffs' Exhibit 3, attached hereto and incorporated herein by this reference.

accept service held valid where secretary forwarded documents to proper person.) In the case at hand, it is clear that Mr. Barthod forwarded the documents to the proper person because the Defendant has retained counsel in the U.S. Virgin Islands to defend this action.

Defendant has misstated New York law by asserting that because Defendant "is a New York corporation, it could have properly received service through its readily ascertainable registered agent..." This is simply untrue. As evidenced by the attached records from the web site of the New York Secretary of State, Defendant has provided no registered agent to accept service in New York.⁶ http://www.dos.state.ny.us/corps/bus_entity_search.html. Moreover, contrary to Defendant's assertion, under New York Business Corporation Law, the New York Secretary of State was not authorized to and did not accept service of the summons and the FAC because the New York Secretary of State may only accept service of process on behalf of a New York corporation for lawsuits commenced in New York State. Under the New York Business Corporation Law, only "process" may be served on the Secretary of State as agent.

See http://www.dos.state.ny.us/corps/faq_service_of_process.page.asp.⁷ NY BCL §102(a)(11)⁸ in turn, defines "process" as "judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation in any action or proceeding, civil or criminal, whether judicial, administrative, arbitrate or otherwise, *in this state or in the federal courts sitting in or for this state.*" NY Bus. Corp. § 102(a)(11) (emphasis added). The New York Secretary of State can only accept process, as defined above, for New York corporations or

⁶ A true and correct copy of the New York State Department of State entity information on Fancelli Paneling, Inc. is marked Plaintiffs' Exhibit 4, attached hereto and incorporated herein by this reference.

⁷ A true and correct copy of the New York Secretary of State's website on service of process is marked Plaintiffs' Exhibit 5, attached hereto and incorporated herein by this reference.

⁸ A true and correct copy of NY BCL §102(a)(11) is marked Plaintiffs' Exhibit 11, attached hereto and incorporated herein by this reference.

authorized foreign corporations. NY Bus. Corp. § 306(b)(1)⁹. As the instant lawsuit was commenced in the Virgin Islands, and not in New York, the New York Secretary of State cannot and did not accept service on behalf of Defendant.

Finally, the Defendant has actively avoided service of process, needlessly wasting time and money and now judicial resources, and should not be permitted to gain from doing so. On or about November 12, 2010, the undersigned counsel, pursuant to Section 4911 of Title 5 of the Virgin Islands Code, mailed the summons and a true and correct copy of the FAC to Mr. Jean Pierre Fancelli, Fancelli Paneling, Inc., 24 East 64th Street, New York, NY 10065. The envelope containing the summons and the FAC was returned by the U. S. Postal Service with the notation: "Addressee Not at this Location".¹⁰

Plaintiffs later received confirmation that they had mailed the summons and the FAC to the correct address, i.e. 24 East 64th Street, New York, NY 10065 because the Affidavit of Service dated January 3, 2011 affirms in the second paragraph that when Mr. Barthod was "...asked by the deponent whether said premises was the defendant's PLACE OF BUSINESS within the state and the reply was affirmative." Pl. Ex. 1.

Earlier, on August 5, 2010, another process server attempted service of the summons and the FAC at the same address, 24 East 64th Street, New York, NY, but "deponent was informed by an individual at that address, that they did not have the authority to accept service of legal documents. Deponent was told that the owner would not return until Monday the 9th of

⁹ A true and correct copy of NY Bus. Corp. § 306(b)(1) is marked Plaintiffs' Exhibit 12, attached hereto and incorporated herein by this reference.

¹⁰ A true and correct copy of the envelope which was returned is marked Plaintiffs' Exhibit 6, attached hereto and incorporated herein by this reference.

August.”¹¹ The same process server made a second attempt at 9:00 a.m. at 24 East 64th Street, New York, NY on August 10, 2010 and once again was “informed by an individual, that they did not have authority to accept service of legal documents.” Pl. Ex. 7. On August 10, 2010, a third and final attempt was attempted at the same address and once again the process server was told by an individual that they did not have authority to accept service of legal documents.” Pl. Ex. 7.

Significantly, Defendant admits that “service was subsequently attempted by first class mail to Fancelli’s New York address” which is consistent with the Plaintiffs’ Affidavit of Service in its third paragraph that “On 12/3/2010 Deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to defendant at defendant’s PLACE OF BUSINESS at 24 EAST 64TH STREET, NEW YORK, NY 10065 BY First Class Mail marked Personal and Confidential and deposited said wrapper (in a post office) official depository under exclusive care and custody of the United States Postal Service within the New York State.” Pl. Ex. 1. Defendant would only know that service of the summons and FAC “was subsequently attempted by first class mail to Fancelli’s New York address” if it had in fact received it by mail.¹²

Based upon the foregoing, service of the summons and the FAC was validly effected upon Defendant Fancelli Paneling, Inc. and Defendant’s motion to dismiss based upon ineffective service of process must be denied.

¹¹ The original August 19, 2010 Affidavit of Attempted Service is marked Plaintiffs’ Exhibit 7 attached thereto and incorporated herein by this reference.

¹² The Affidavit of Process server was filed with the Court on January 20, 2011 and Defendant mailed its Motion to Dismiss to Plaintiffs on January 13, 2011 so Defendant would not have learned of the mailing made in New York by any pleadings on file.

II. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANT FANCELLI PANELING, INC.

A. Legal Standard for Evaluating a Motion to Dismiss for Lack of Personal Jurisdiction.

While the plaintiff bears the burden of demonstrating facts that establish personal jurisdiction, once a jurisdictional defense has been raised, the plaintiff can then prove jurisdiction is proper by affidavits or other competent evidence. *Metcalf v. Renaissance Marine, Inc.*, 566 F.3d 324, 324, 330 (3d Cir. 2009) and *Bertrand v. Cordiner*, 2010 WL 2507305 (V.I. Super. 2010). In the absence of an evidentiary hearing, the plaintiff need only establish a *prima facie* case of personal jurisdiction. *Metcalf*, 566 F3d at 330.

In deciding a motion to dismiss for lack of jurisdiction, the court is required to accept the plaintiff's allegations as true. *Metcalf*, 566 F3d at 330.

At page 9 of its motion, Defendant incorrectly claims that "[c]ourts in this district have found that Due Process forbids the exercise personal jurisdiction even over defendants with more contact than Fancelli." This is simply a wrong statement of the law in this jurisdiction because the case upon which Defendant relies, *Metcalf vs. Renaissance Marine, Inc.*, Civ. No. 2007-131, 2008 WL 501172 at *6 (D.V.I. Feb, 15, 2008), as the applicable law in this jurisdiction was overruled by the Third Circuit Court Appeals in *Metcalf v. Renaissance Marine, Inc.*, 566 F.3d 324 (3d Cir. 2009) when it reversed and remanded with instructions because the District Court "reached its determination without applying the proper standard for evaluating a motion to dismiss for lack of personal jurisdiction." *Id.* at 330. On appeal, the Third Circuit in *Metcalf* found that the District Court had erroneously construed disputed facts against the plaintiffs and that the plaintiffs were entitled to have their allegations viewed as true and have disputed facts construed in their favor. *Id.* at 331 (citations omitted).

B. Defendant Fancelli Paneling, Inc.'s Connections with the Territory are Sufficient to Satisfy Both the Virgin Islands Long-Arm Statute and Constitutional Due Process.

The Virgin Islands Long Arm Statute which provides the basis for this Court to exercise jurisdiction over a non-resident defendant such as Defendant provides in relevant part:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's

- (1) transacting any business in this territory;
- (2) contracting to supply services or things in this territory

V.I. Code Ann. tit. 5, § 4903(a).

The Virgin Islands Long Arm Statute has been construed to authorize the exercise of jurisdiction to the fullest extent possible under the due process clause of the United States Constitution. *Godfrey v. International Moving Consultants, Inc.* 18 V.I. 60 (D.V.I. 1980), *Hendrickson v. Reg O Company*, 17 V.I. 457 (D.V.I. 1980).

Defendant Fancelli Paneling's connections with the United States Virgin Islands are sufficient to satisfy both the Virgin Islands long-arm statute and the Constitution's guarantee of due process. Contrary to Defendant's assertion that the FAC is "devoid of the particularized allegations" needed to establish contacts between the defendant and the forum state", Plaintiffs have specifically alleged in the FAC the following to show Defendant's contacts with the Territory:

That Plaintiffs learned of Fancelli after they engaged the architectural and design services of Juan Pablo Molyneux and J.P. Molyneux Studio, Ltd. ("Molyneux") to design a large-scale, multi-structure, multi-million dollar residential project to be constructed on Little St. James Island in St. Thomas, U. S. Virgin Islands. FAC at ¶4;

That as part of this project, Plaintiffs¹³ contracted with Molyneux for the architecture and design of the interior and exterior of a separate building on Little Saint James Island known as the Office Pavilion. FAC at ¶4;

That upon Molyneux's recommendation and at Molyneux's insistence, Plaintiffs agreed with Molyneux that Fancelli would be contracted to fabricate and install the Library Cabinetry comprising the interior of the Office Pavilion for the benefit of Plaintiffs. FAC at ¶6;

That when Defendant took the job, it knew that the Library Cabinetry was being built for installation on Little St. James Island off shore of St. Thomas and that the Library Cabinetry had to be shipped to St. Thomas and installed on Little Saint James Island. Pl. Ex. 3 to FAC;

That Defendant fabricated the Library Cabinetry in Europe and then shipped the disassembled pieces of the same in sealed crates to Little Saint James Island in or about May 2009. FAC at ¶8; and

That between May 2009 and March 2010, Fancelli installed the Library Cabinetry on Little St. James Island. FAC at ¶9.

In addition to the allegations of the FAC which must be accepted as true, Fancelli's multiple visits to Little Saint James Island and their duration are further confirmed by the attached affidavit of Gary Kerney¹⁴. Specifically, Fancelli workmen were on Little Saint James Island via St. Thomas on the following dates:

May 19, 2009 to June 12, 2009

January 19, 2010 to January 28, 2010

March 19, 2010 to March 22, 2010

¹³ The FAC uses the defined term Epstein to include both Jeffrey Epstein and L.S.J., LLC.

¹⁴ The original affidavit of Gary Kerney is attached hereto as Plaintiffs' Exhibit 8, attached hereto and incorporated herein by this reference.

Mr. Jean Pierre Fancelli, the president of Fancelli Paneling, Inc. was on St. Thomas and Little Saint James Island on January 27-28, 2010 and on March 21-22, 2010.

In its motion to dismiss Defendant disputes the dates of installation, but this and Defendant's other attempts to dispute the allegations of Plaintiffs' FAC must be construed in Plaintiffs' favor. *Metcalf*, 566 F.3d at 330 citing *O'Connor vs. Sandy Lane Hotel Co.*, 496 F.3d 312, 316 (3d Cir. 2007).

1. Defendant Fancelli Paneling, Inc. Transacted Business in the Territory.

This Court may exercise long arm jurisdiction over a non-resident defendant such as the Defendant which transacted business in the Territory. 5 V.I.C. § 4903(a)(1). Defendant clearly transacted business in the Virgin Islands when it shipped the Library Cabinetry to St. Thomas and commenced installing the Library Cabinetry on Plaintiff's property on Little Saint James Island, and then returned to the Territory on multiple occasions from May 2009 to March 2010 to resume the installation. FAC ¶9 and Pl. Ex. 8 Affidavit of Gary Kerney. 5 V.I.C. § 4903(a)(1). Defendant's conduct rose to the level of doing business and was more than a consequential act. *Bertrand v. Cordiner* at *17 citing *Manbodh*, 47 V.I. at 283 and *Hendrickson v. Reg O Co.*, 17 V.I. 457, 462 (D.V.I. 1980).

Even a single act amounting to "transaction of business" in the Territory may suffice as the basis for personal jurisdiction. *Bertrand v. Cordiner* at *16-17 citing *Metcalf v. Renaissance Marine, Inc.* 566 F.3d 324, 322 (3d Cir. 2009) (citations omitted). Defendant's multiple trips to the Virgin Islands satisfy the requirement of subsection (a)(1) of the Virgin Islands Long Arm Statute for "transacting any business" in the Territory.

2. Defendant Fancelli Paneling, Inc. Contracted to Supply Goods in the Territory.

This Court may also exercise long arm jurisdiction over a non-resident defendant such as the Defendant which contracts to supply goods and services into the Virgin Islands. 5 V.I.C. § 4903(a)(2). The FAC clearly alleges that Defendant knowingly contracted to supply Library Cabinetry to the Virgin Islands. FAC at ¶ 7 and Ex. 3 to FAC. Defendant did ship the Library Cabinetry to the Virgin Islands. FAC at ¶ 8. Defendant did commence services to install the Library Cabinetry on Little St. James, United States Virgin Islands. FAC at ¶ 9. On their first trip to the Territory, Defendant's workmen stayed for almost a month: from May 19, 2009 to June 12, 2009. Pl. Ex. 8.

By Defendant's own actions, this Court can find that Defendant contracted to supply a product, i.e. the Library Cabinetry, and services, i.e., installation of the Library Cabinetry, to the Territory. As pointed out by this Court in *Bertrand v Cardiner*, "all that is required to satisfy section 4903(a)(2) is that a 'contract be performed, at least in part, in the Virgin Islands and that the cause of action arise out of the contract.'" *Bertrand v. Cardiner* at *17. Thus, subsection (a)(2) provides an even stronger statutory basis for exercising long arm jurisdiction over the Defendant because the only requirement of subsection (a)(2) is that the contract be performed, at least in part in the Virgin Islands and that the cause of action arise out of the contract. See also *Metcalf* 566 at 332 and *Buccaneer Hotel Corp. v. Reliance Int'l Slaes Corp.*, 17 V.I. 249, 255 (D.V.I. 1981).

Moreover, as stated by the Third Circuit in *Metcalf*, "when a defendant is aware that the Virgin Islands is the ultimate destination of the goods it is supplying, the contract is said to be performed (at least in part) in the Virgin Islands." *Metcalf* at 332.

Plaintiffs have met their burden of showing that the actions of Defendant in undertaking

to construct the custom made Library Cabinetry, ship it to the Territory and install it in Plaintiffs' property of Little Saint James Island satisfies the requirement of subsection (a)(2) of "contracting to supply services or things in this territory[.]"

Each of subsections (a)(1) and (a)(2) provide a separate statutory basis for exercising long arm jurisdiction over the Defendant and Plaintiffs' allegations in the FAC satisfy the requirements of each of those subsections. Under the circumstances, there is no doubt that there is a sufficient statutory basis for the court to exercise long-arm jurisdiction over the Defendant in this case.

3. Defendant Fancelli Paneling, Inc. Has Certain Minimum Contacts with the Territory and the Exercise of Jurisdiction Over Defendant is Consistent with Due Process.

The allegations of Plaintiffs' FAC, together with the affidavits and exhibits attached hereto, also establish that the exercise of personal jurisdiction over Defendant satisfies constitutional due process.

The due process clause permits the exercise of in personam jurisdiction over a particular defendant if the defendant has such minimum contacts with the forum that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Godfrey*, 18 V.I. at 68-69 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

In evaluating whether the exercise of jurisdiction is fair and reasonable the courts exercise a balancing test looking at the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining relief at the particular forum and the relevant contacts the defendant has with the forum, measured against the burden of the defendant in defending in that forum. *Godfrey*, 18 V.I. at 68-69 and *World-Wide Volkswagen Corp. v Woodson*, 444 U.S. 286 292(1980).

In the case at hand, the Virgin Islands has a manifest interest in providing effective means of redress for its residents such as Plaintiffs, when the Library Cabinetry which was custom made for Plaintiffs to be used in the Virgin Islands is defective, unfinished and poorly constructed. Similarly in *Bertrand v. Cordiner*, this Court found such a manifest interest when Mystic Granite and Marble, Inc. ("Mystic"), a Florida company, knowingly sold marble that Mystic knew would be delivered to the Virgin Islands and otherwise purposefully directed its activity towards a consumer in the Virgin Islands. Accordingly, plaintiff had met her *prima facie* burden of producing evidence that the Court's exercise of personal jurisdiction over Mystic was consistent with the due process requirements. *Bertrand v. Cordiner* at *20. Similarly, in the instant case, Defendant accepted and began performing under its contract knowing that the Library Cabinetry was to be fabricated for shipping and installation in the Virgin Islands, and Plaintiffs' allegations to that effect in the FAC meet its *prima facie* burden of producing evidence to demonstrate that the Court's exercise of personal jurisdiction over Defendant is consistent with due process requirements.

In the case of *Godfrey v International Moving Consultants, Inc.*, 18 V.I. 60, the plaintiffs' employer, the U. S. Department of Health, Education and Welfare Center for Disease Control, on behalf of its employee Dr. Harry Godfrey, contracted with defendant Ocean-Air (a Pennsylvania company with a principal place of business in Burgettstown, Pennsylvania) to move plaintiffs' household goods from St. Thomas to Abidjan, Ivory Coast as Dr. Godfrey was being transferred there for a new assignment. Ocean Air in turn contracted with Caribbean Forwarders of St. Thomas for pick up of the goods in St. Thomas and initial shipment to the goods to New York where trans-shipment to Africa was to be arranged by Ocean-Air. Ocean Air also contracted with Major Van Lines to receive the container of plaintiffs' goods at its warehouse in New Jersey,

upon arrival of the goods in New York and keep same in storage while they awaited further shipment to Africa.

Unfortunately, after the goods were delivered to Major Van Lines' depot, the warehouse and all of its contents, including plaintiffs' goods were destroyed by fire. The plaintiffs then filed suit against Ocean-Air in the District Court of the Virgin Islands for damages sustained as a result of the loss of their goods. After finding that Ocean-Air's activities within the Virgin Islands constituted transacting business within the Territory and contracting to supply services or things in this Territory within the meaning of subsections (a)(1) and (a)(2), the court, applied the balancing test to the facts of the case, and found that Virgin Islands had manifest interest in providing effective means of redress for its residents when their personal goods are lost, damaged or destroyed during the course of transport.

Just as in the *Godfrey* case, the interest of the Plaintiffs in bringing the suit in St. Thomas, United States Virgin Islands is clear. Plaintiff Jeffrey Epstein is a resident of the Virgin Islands.¹⁵ His company L.S.J., LLC owns real estate in the St. Thomas and St. John District which both Plaintiffs sought to improve with the construction of the Office Pavilion and installation of the Library Cabinetry. Defendant shipped the Library Cabinetry to St. Thomas and installed the Library Cabinetry on Little St. James Island. However, Defendant's installation of the Library Cabinetry in the United States Virgin Islands was incomplete and improper and the Library Cabinetry as installed is in defective condition. Under the circumstances, the Virgin Islands has a manifest interest in providing effective means of redress for its residents with respect to the defective and improperly and incompletely installed Library Cabinetry.

The Defendant knew in advance that it was fabricating Library Cabinetry bound for the

¹⁵ Defendants claim that Jeffrey Epstein is a resident of several other jurisdictions but the allegations of Plaintiffs' FAC must be accepted as true and any disputes resolved in favor of Plaintiffs.

Virgin Islands as evidenced by the purchase order. Ex. 3 to FAC. Then Defendant's workers travelled to the St. Thomas and St. John District multiple times to assemble and install the Library Cabinetry. Pl. Ex. 8. The Defendant took action purposefully directed to the forum state. Metcalfe at 334. Exercising jurisdiction over a company over these circumstances "does not offend "traditional notice of fair play and substantial justice." *Id.* at *20 citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1965).

Plaintiffs have met their prima facie burden of producing evidence that the Court's exercise of personal jurisdiction satisfies both the long arm statute and due process. Accordingly, Defendant's motion to dismiss for lack of personal jurisdiction should be dismissed.

III. PLAINTIFFS' FIRST AMENDED COMPLAINT SUFFICIENTLY ESTABLISHES A CAUSE OF ACTION FOR BREACH OF A THIRD PARTY BENEFICIARY CONTRACT AND NEGLIGENCE ON THE PART OF DEFENDANT.

1. The First Amended Complaint Provides the Specifics of this Court's Jurisdiction Over the Defendant in All Respects.

With respect to Defendant's motion to dismiss for failure to state a claim, the Court must accept the factual allegations in the FAC as true and construe the FAC in the light most favorable to the Plaintiffs. *Bertrand v. Cordiner Enterprises* at * 5.

Defendant makes unsupported general claims that the FAC fails to allege that this court has subject matter jurisdiction or personal jurisdiction over Defendant and that venue is improper. This Court has jurisdiction over this matter under section 76(a) of title 4 of the Virgin Islands Code. And although that section of the Code was not specifically alleged in the FAC, everything else needed to establish this Court's subject matter and personal jurisdiction is contained in the FAC.

Although Plaintiffs' FAC clearly pleads facts sufficient to show that this Court has subject matter jurisdiction and personal jurisdiction, Defendant's motion to dismiss does not clearly specify on which basis this Court lacks subject matter jurisdiction. A lack of subject matter jurisdiction falls under Federal Rule of Civil Procedure 12(b)(1). In section IV. C. of its Motion to Dismiss, Defendant suggests that the motion to dismiss for lack of jurisdiction is based on Plaintiffs alleged failure to state a claim for which relief may be granted, which falls under Federal Rule of Civil Procedure 12(b)(6).

A motion to dismiss under 12(b)(1) must be denied if the allegations in the complaint are sufficient for the court to infer the basis of jurisdiction, even if the complaint fails to state the statutory basis of jurisdiction. See *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620, (6th Cir. 2010). Plaintiffs' FAC clearly alleges the facts necessary for this Court to infer that it has jurisdiction under section 76(a) of title 4 of the Virgin Islands Code. Claims for breach of contract and negligence are both civil actions which are subject to the original jurisdiction of this Court under section 76(a). *Smith v. Benjamin*, Civ. No. 846/1988, 1994 WL 567721, at *4 (Terr. V.I. Sep 27, 1994).

To prove breach of contract under Virgin Islands law, the plaintiff must allege an (1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages. *Id.* Plaintiffs' FAC alleged that Plaintiffs were the third party beneficiaries of the agreement between Defendant Fancelli Paneling, Inc. and Molyneux. FAC at ¶¶7 & 12. The FAC alleged that the agreement between Molyneux and Defendant required Defendant to fabricate and install cabinets for Plaintiffs. FAC at ¶7. Plaintiffs attached the Molyneux and Fancelli agreement to the FAC. FAC at ¶3. The FAC alleged that Defendant failed to meet its duty under the agreement. FAC ¶¶13 & 15. The FAC alleges damages in increased expenses to correct the

defects. FAC ¶ 16. Plaintiffs sufficiently pled detailed allegations of the elements of a Breach of Contract claim to survive Defendant's motion to dismiss under Rule 12(b)(6).

In addition, the attached Affidavit of Juan Pablo Molyneux confirms that "It was the clear understanding and agreement of Studio and Fancelli when they contracted that all of their contracts with respect to the Library Cabinetry were for the benefit of Epstein and LSJ and that the Library Cabinetry was to be installed and used in an office/library structure located in the tropical Caribbean locale of the United States Virgin Islands."¹⁶ ¶6. The Affidavit further confirms the allegations of breach made in the FAC, stating that "Fancelli has failed to fully complete the proper installation, staining and finishing of the Library Cabinetry on Little Saint James Island in accordance with the requirements of the contracts between Studio and Fancelli, and, as installed, the Library Cabinetry is incomplete and defective in numerous respects . . ." ¶8

Plaintiffs have also sufficiently pled all of the elements to prove negligence under Virgin Islands law, i.e., (1) a duty; (2) a breach of that duty; (3) causation; and (4) damages. *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F.Supp.2d 545, 571 (D.V.I. 2004). Here, Plaintiffs alleged that Defendant owed them a duty of care and a duty to perform the professional services contracted for in a reasonable, competent, diligent, careful and good workman-like manner. FAC ¶ 18. The FAC also alleges that Defendant breached its duty by virtue of the specific acts and omissions alleged in the FAC in that it failed to exercise requisite care, skill, knowledge and judgment. FAC ¶ 19. The FAC further alleged that the breach caused Plaintiffs damages for their loss of the benefit of their bargain or their expectation interest and increased expenses. FAC ¶ 20. Plaintiffs sufficiently pled detailed allegations of the elements of a negligence claim

¹⁶ A true and correct copy of the Affidavit of Juan Pablo Molyneux is marked Plaintiffs' Exhibit 12, attached hereto and incorporated herein by this reference. The original affidavit will be filed with the Court as soon as it is received by undersigned counsel for Plaintiffs.

to survive Defendant's motion to dismiss under Rule 12(b)(6).

Defendant's motion to dismiss for failure to state a claim must be denied in light of the very specific allegations of Plaintiffs FAC and the exhibits attached thereto.

2. Plaintiffs Have Filed Their Lawsuit in the Proper Venue: The St. Thomas and St. John Division of the Superior Court.

Defendant also suggests that this case be dismissed because the venue is improper. "To survive a motion to dismiss for improper venue, the plaintiff must only make a prima facie showing of venue." *Rothstein v. Harstad*, Civ. No. 2:10-01421, 2010 WL 3259789, *2 (D.N.J. Aug 17, 2010). In the Virgin Islands "[a]ll civil actions shall be initiated in the judicial division where the defendant resides or where the cause of action arose or where the defendant may be served with process." 5 V.I.C. § 78(a). "[W]here the defendant deliberately has engaged in significant activities within a State, or has created continuing obligations between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Urgent v. Technical Assistance Bureau, Inc.*, 255 F.Supp.2d 532, 536 – 37 (D.V.I. 2003) (quoting *Burger King Corp.*, 471 U.S. at 475 – 476, 105 S.Ct. 2174 (1985) (citations and quotations omitted)). As explained above, long arm jurisdiction applies because the cause of action arose on Little St. James where the Defendant failed to honor its contractual obligation and where Defendant's negligence caused Plaintiffs damages in excess of \$780,000. Defendant contracted to supply Library Cabinetry to be shipped to and installed in the St. Thomas and St. John Division and the cause of action arose in this Division. The Library Cabinetry was installed incompletely, improperly and in defective condition in Little St. James Island located in the St. Thomas and St. John Division. Venue is not proper anywhere else.

3. Plaintiffs' Status as Third Party Beneficiaries of the Fancelli and Molyneux Contract is an Exception to the Privity of Contract Requirement.

Without legal support and in reliance on facts not alleged in Plaintiffs' FAC, Defendant argues that it had no privity of contract with Plaintiffs. Defendant bases the lack of privity on the rejection of Plaintiffs' status as third party beneficiaries. "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." *KMART Corp. v. Balfour Beatty, Inc.*, 994 F.Supp. 634, 636 (D.V.I. 1998) (quoting *Restatement (Second) of Contracts* § 304). A third party beneficiary is an exception to the privity of contract requirement for standing to sue for breach of contract. *Shay v. Aldrich*, 790 N.W.2d 629, 640 n. 48 (Mich. 2010); *Peter Kiewit Sons', Inc. v. ATSER, LP*, 684 F.Supp.2d 1126, 1137 (D. Neb. 2010); *Matos v. Nextran, Inc.*, Civil No. 2008-65, 2009 WL 2477516, *3 (D.V.I. Aug 10, 2009).

As alleged in the FAC, Plaintiffs entered into a contract with Molyneux for the design of an Office Pavilion that included fabrication and installation of the Library Cabinetry. Molyneux entered into an agreement with Defendant for the Library Cabinetry. Molyneux's agreement with Defendant helped Molyneux fulfill the agreement between Molyneux and Plaintiffs for the Library Cabinetry on Little St. James Island. The FAC properly alleges that Plaintiffs were the third party beneficiaries of the agreement between Molyneux and Defendant. Moreover, as confirmed in paragraphs 6 and 12 of the attached Affidavit of Juan Pablo Molyneux, Plaintiffs were in fact the clear and intended beneficiaries of the agreement between Molyneux and Defendant.

4. Defendant Fancelli Paneling Owed a Duty to Plaintiffs As the Intended Third Party Beneficiaries.

Without reference to any legal authority, Defendant claims that it did not owe a duty to

Plaintiffs. However, the duty owed by Defendant to Molyneux under the Molyneux Fancelli Agreement transferred to Plaintiffs, as the intended third party beneficiaries (discussed above) of that agreement. *In re Kaplan*, 143 F.3d 807, 813 (3d Cir. 1998) (citing *Restatement (Second) of Contracts* § 305 comment a (noting that a promisee may recover damages that flow from a promisor's failure to perform to the intended beneficiary); *17A Am. Jur.2d Contracts* § 436 (recognizing that a promisor owes overlapping duties to a promisee and a third party beneficiary)). In other words, Defendant owed Plaintiffs a duty via the Molyneux Fancelli agreement.

5. Defendant's Claim that Plaintiffs Accepted the Library Cabinetry and Released Defendant is Unsupported and Relies Upon Allegations Beyond the Scope of Plaintiffs' FAC.

While the Court has the discretion to consider matters outside of the pleadings in ruling on a Rule 12(b)(6) motion to dismiss, it cannot rely upon allegations unsupported by affidavit or other reliable documentary evidence. Accordingly, Defendant's unsupported claim that Plaintiffs accepted Defendant's work and released Defendant is without basis in law or fact, is contrary to the allegations contained in the FAC, and should not be considered as any basis to grant Defendant's motion to dismiss.

IV. PLAINTIFFS HAVE NOT FAILED TO JOIN AN INDISPENSIBLE PARTY

As another and further grounds for dismissal, Defendant claims that Molyneux is an indispensable party because Defendant has no privity of contract with Plaintiffs. Under Fed. R. Civ. P. 19(b), a party cannot be "indispensible" unless it is first found to be "necessary" under Rule 19(a). *Williams v. Mackay*, D.C. Civ. App Nos. 2002/0152 & 2002/0154, 2011 WL 98401 (D.V.I. 2011) citing *Alpa S.A. Agroindustrial Alemano v. ACLI International, Inc.*, 573 F. Supp.

1070, 1078 (S.D.N.Y. 1983). The existence of the contract between Molyneux and Defendant where Plaintiffs are the clear and intended third-party beneficiaries renders Defendant's argument thin and hollow because third-party beneficiaries such as the Plaintiffs need not be in privity to sue for breach of contract. See Molyneux Affidavit Pl. Ex. 13.

If this Court can grant Plaintiffs complete relief without Molyneux, then Molyneux is not a necessary party. See *Byas v. Legislature of Virgin Islands*, Civil No. 2006-238, 2008 WL 5422852, *5 (D.V.I. Dec 17, 2008). Defendant claims, without legal support, that under Virgin Islands law, a judgment rendered without Molyneux's participation would not be adequate because Defendant cannot properly be obligated to refund contractual damages to Plaintiffs. Defendant fails to explain why it could not be obligated to refund the contractual damages. Third-party beneficiaries can recover the intended benefit from any party that promised to confer the benefit. *Wilhide v. Keystone Ins. Co.*, 195 F.Supp. 659, 661 – 62 (D.C.Pa. 1961). Plaintiffs' FAC properly alleges that Plaintiffs were the third-party beneficiaries of the agreement between Molyneux and Defendant and, as such, were entitled to recover the intended benefits promised by Defendant under that contract. Defendant has provided nothing that undermines the Plaintiffs' allegations.

Additionally, in a third-party beneficiary contract action, the party that contracted on behalf of the third-party beneficiary is not a necessary party. *Miller v. Augusta Mut. Ins. Co.*, 157 Fed.Appx. 632, 637 – 638 (4th Cir. 2005). Here, the complaint is limited to the Library Cabinetry – work solely performed by Defendant. Even if Molyneux has information or materials that Defendant desires for its defense, that alone provides no justification to deem Molyneux a necessary party, as Defendant can always subpoena Molyneux to provide the information Defendant desires. See *Greenwich Life Settlements, Inc. v. ViaSource Funding*

Group, LLC, --- F.Supp.2d ----, No. 08 Civ. 3062(PKL), 2010 WL 3895481, at *9 (S.D.N.Y. Oct 4, 2010).

Defendant fails to provide any legal or factual basis as to why Molyneux is a necessary party. Defendant's concern that whatever judgment Plaintiffs may obtain might not enforceable against Molyneux is a decision for Plaintiffs to make, not Defendant. Plaintiffs' ability or inability to recover damages from Defendant has no bearing.

In support of its argument that Plaintiffs have failed to join an indispensable party, Defendant relies upon *Feriozzi Co., Inc. vs. Ashworks, Inc.* 130 Fed. Appx 535, 538 (3d Cir 2005) which was not selected for publication in the Federal Reporter and is factually distinguishable from the instant case, in that it involved collection on a promissory note and does not support Defendant's claim that Molyneux is an indispensable party.

Defendant has failed to prove that Plaintiffs are required to join Molyneux as a party as required by Fed. R. Civ. P. 19(a). Defendant has not demonstrated that Molyneux has an interest in the Library Cabinetry that Fancelli fabricated. Defendant has not demonstrated how, if at all, the absence of Molyneux as a party (rather than as a witness) may impair or impede Defendant's ability to protect its interest. Moreover, Defendant is free to file a third party complaint against Molyneux if it so chooses. However, Plaintiffs' FAC has established that Plaintiffs seek damages from Defendant and Defendant alone arising from Defendant's breach of a third-party beneficiary contract for Plaintiffs' benefit.

V. THE U.S. VIRGIN ISLANDS ARE THE CORRECT FORUM FOR PLAINTIFFS' CAUSES OF ACTION AGAINST DEFENDANT.

Ignoring the facts that: Plaintiff Jeffrey Epstein is a resident of the United States Virgin Islands with his home on Little Saint James Island; L.S.J., LLC, which is solely owned by a United States Virgin Islands resident and maintains its principal address in the United States Virgin Islands, is the owner of Little St. James Island; the ultimate destination and current location of the Library Cabinetry fabricated by Defendant was Little Saint James Island in the United States Virgin Islands; Defendant somehow argues that the Virgin Islands is an inconvenient forum and then fails to meet its burden of showing that New York is a convenient forum and appropriate forum..

All of the relevant public interest, including the interest in the Virgin Islands over this action and the private interests dictate that this action be heard in the Virgin Islands. The Plaintiff Jeffrey Epstein is a resident of the Virgin Islands. The Plaintiff L.S.J., LLC is wholly owned by a Virgins Island resident (i.e., Mr. Epstein), maintains its principal address in the Virgin Islands and owns the property on which the Library Cabinetry has been installed (albeit incompletely, improperly and in defect condition) and is currently located. Any witnesses not residing in the Virgin Islands can be deposed telephonically or where they are located. Any documentary evidence not located in the Virgin Islands can be assembled and transferred electronically with relative ease. Direct physical evidence of the current condition and state of completion of the Library Cabinetry, which is a primary issue in this case, can only be found on Little St. James Island located in the Virgin Islands

Plaintiffs have filed suit where the Plaintiff Jeffrey Epstein resides and where the Plaintiff L.S.J., LLC maintains its principal address and owns real estate where the Library Cabinetry is

installed. Plaintiffs' forum choice is their home forum. Defendant has not met its heavy burden in opposing Plaintiffs' chosen forum. *Sinochem Intern. Malaysia Intern. Shipping*, 549 U.S. 421 at 430 (2007). Defendant's *forum non conveniens* argument is based upon the false premise that Plaintiffs are residents of the State of New York when the FAC specifically alleges that Plaintiff Jeffrey Epstein is a resident of the Virgin Islands and that L.S.J., LLC maintains its principal address and owns real estate located in the Virgin Islands. ("A defendant seeking dismissal on *forum non conveniens* grounds must show that the balance of the public and private factors 'tips decidedly in favor of trial in the foreign forum.'") (quoting *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991)).

It may be true that when the plaintiff's choice of forum is not its home forum, "the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" *Id.* (quoting *Piper Aircraft Co.*, 454 U.S., at 255-56). *HCB, LLC v. Oversee.net*, Civil No. 2007-29, 2009 WL 2996578, at *4 - *5 (D.V.I. Sep 16, 2009). That does not apply in the instant case where, based on the allegations in the FAC, the Virgin Islands is clearly the home forum of the Plaintiffs. Under the circumstances, Defendant has a heavy burden to meet to show that New York would enhance the convenience of the parties. *Id.* at *8. Defendant has not even begun to meet that heavy burden.

1. New York is Not the Appropriate Forum for this Action.

Defendant fails to offer any reason why New York is an adequate alternative forum. The suggestion that New York is available as an alternative does not mean that it is an adequate forum. Defendant offers no reason why this Court should override Plaintiffs' deference to Virgin Islands. Defendant and even Molyneux are both amenable to this Court's long arm jurisdiction. The shoddy and defective Library Cabinetry is located in the Virgin Islands.

Plaintiff Jeffrey Epstein is a resident of the Virgin Islands and his wholly owned company, Plaintiff L.S.J., LLC maintains its principal address in the Virgin Islands. Accordingly, the Virgin Islands is the appropriate forum.

2. The Balance of Private Interest Factors Does Not Favor Litigation in New York

Defendant suggests that the cost and burden of localizing subpoenas and demanding production of documents on persons in New York is a reason for this Court to dismiss this case in favor of filing in New York. By its own admission, Defendant accepts that it can subpoena persons in New York. If this Court denies Defendant's motion, Defendant will still have access to its alleged relevant discovery located in New York. Moreover, Defendant names only one non-party potential witness who may have documents to support its defenses as a basis to dismiss the entire action in favor of New York. Defendant fails to cite to any case where dismissal under *forum non conveniens* was granted due to the expenses related to a single witness. A single witness in an alternative forum is not a basis to dismiss a case under *forum non conveniens*. *In re Seatrain Lines, Inc.*, 32 B.R. 669, 671 (Bkrcty.N.Y. 1983). Additionally, "the location of documents, records and photographs has become a less significant factor in forum non conveniens analysis in the modern age of email, internet, telefax, copying machines and world-wide delivery services, since they can now be easily copied and sent." *Vivas v. Boeing Co.*, 911 N.E.2d 1057, 1070 (Ill.App. 2009). Defendant's argument that potential witness Molyneux and its documents are located in New York is unavailing as a *forum non conveniens* grounds.

3. The Public Interest Lies with the Virgin Islands.

Public interest lies with the Virgin Islands. Defendant's attempt to reclassify the allegations in the Amended Complaint as being New York centric fails because the applied

reasoning stretches the bounds of rational logic. See also *Godfrey vs. International Moving Consultants, Inc.* 18 V.I. 60, 74 (D.V.I.) (the Court found the Plaintiffs were Virgin Islands residents and it was therefore important for their cause to be determined in the Virgin Islands).

a. **The Locus of Controversy is the Virgin Islands.** The locus of the controversy is in the Virgin Islands. Public interest favors the forum where the locus of the injury occurred. See *Esheva v. Siberia Airlines*, 499 F.Supp.2d 493, 489 (S.D.N.Y. 2007). The dispute is not over a purchase order. The dispute is over Library Cabinetry that is located on Little St. James Island in the Judicial District of St. Thomas and St. John. Defendant delivered a product to the Virgin Islands that it incompletely and improperly installed in defective condition in the Virgin Islands. The Virgin Islands was the intended contractual destination and installation site for the product at the time the contract was made. See attached affidavit of Juan Pablo Molyneux. The locus of the injury was undoubtedly in the Virgin Islands.

b. **Virgin Islands Has Local Interest in the Controversy.** Jeffery Epstein is a resident of the United States Virgin Islands. His wholly owned company, L.S.J., LLC, maintains its principal address in the Virgin Islands and owns the real estate which, as stated above, is the locus of the controversy in this case. Defendant's improper and unsupported allegation that Mr. Epstein owns real estate in other jurisdictions is completely irrelevant and does not somehow invalidate his Virgin Islands residency or L.S.J., LLC's local ties. Plaintiffs' FAC, the factual allegations of which must be accepted as true and construed in the light most favorable to the Plaintiffs, clearly establishes the Virgin Islands' overwhelming local interest in this controversy.

The controversy is of local interest in the Virgin Islands and localized interest rests with the Virgin Islands. See *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 (3d Cir. 2010); *Rogers v. Petroleo Brasileiro, S.A.*, --- F.Supp.2d ----, Nos. 09 Civ. 08227

(PGG), 09 Civ. 08228 (PGG), 2010 WL 3768158, at *11 (S.D.N.Y. Sep 27, 2010). This action belongs in the Virgin Islands because a resident of the Virgin Islands spent hundreds of thousands of dollars on Library Cabinetry, which was to be delivered and installed in the Virgin Islands on property owned by one of the Plaintiffs. Defendant victimized a resident of the Virgin Islands and a Virgin Islands property owner in the Virgin Islands when Defendant breached the Molyneux-Fancelli agreement and was negligent in its treatment of Plaintiffs. Defendant cannot avail itself of business opportunities in the Virgin Islands and then dictate where he should be sued.

c. **Virgin Islands Law Applies.** Virgin Islands law applies to this dispute. The Molyneux and Fancelli agreement does not have a choice of forum clause. This Court should apply local law because the location of the inferior Library Cabinetry is in the Virgin Islands, the breach of contract occurred in the Virgin Islands and the negligence occurred in the Virgin Islands. See *Long-Middendorf Corp. v. Dietrich Industries*, 968 F.2d 1218 (Table), at *2 (7th Cir. 1992). New York law does not govern to the instant controversy because the injury occurred outside New York. Defendant offers no legal argument why Virgin Islands law does not apply.

VI THERE IS NO BASIS IN LAW OR FACT TO SUPPORT DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT ON THE BASIS OF A NON-EXISTENT RELEASE OF DEFENDANT OR RES JUDICATA

Defendant claims that this case is barred under *res judicata* and an earlier suit between Plaintiffs and Molyneux. Defendant fails to offer any support for its theory that *res judicata* applies to this lawsuit. In fact, the attached affidavit of Jean Pablo Molyneux establishes that Plaintiffs clearly have cause of action against Defendant for failure to correct the multitude of

defects in and to properly and fully complete the fabrication, installation, staining and finishing of the Library Cabinetry as contracted. See Affidavit of Jean Pablo Molyneux at ¶8 and 11. The doctrine of *res judicata* prevents re-litigation where there is a valid and final judgment and the claim extinguished includes all rights of the “plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” *Restatement (Second) of Judgments § 24(1)*). Defendant cannot point to a prior lawsuit between Plaintiffs and Defendant because this lawsuit is the first suit between Plaintiffs and Defendant; naturally, it is also the first suit between Plaintiffs and Defendant arising out of the Library Cabinetry. There is no prior lawsuit between Plaintiffs and Defendant dealing with the Library Cabinetry. The doctrine of *res judicata* does not apply to this case.

Defendant also claims that Plaintiffs and Molyneux entered into a settlement agreement and that Defendant may be a beneficiary of said settlement agreement. No settlement between Molyneux and Plaintiffs is alleged in the FAC. And Defendant has provided no evidence (because there is none) that it is a beneficiary of any settlement between Molyneux and Plaintiffs. Plaintiffs have not released Defendant for its breach of contract and negligence in connection with the Library Cabinetry. Defendant has the burden of proof that any releases between Plaintiffs and Molyneux also released Defendant and has failed to provide any proof in that regard. See *Piche v. Stockdale Holdings, LLC*, Civil No. 2006-79, 2009 WL 799659, at *8 (D.V.I. Mar 24, 2009). Defendant’s speculation that releases between Plaintiffs and Molyneux may also release Defendant is improper, and without merit and provides no basis to support its motion to dismiss.

VI. BOTH PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.

Defendant suggests that this Court dismiss this case for lack of standing. As proof to support dismissal, Defendant states, “[f]urther discovery could result in the determination that one, or the other is not proper Plaintiff for one count or the other in this action.” Defendant offers no legal authority to support the notion that future discovery might prove its theory to warrant immediate dismissal. As stated above and as confirmed by the attached affidavit of Juan Pablo Molyneux at ¶¶ 6 and 12, Plaintiffs are the third party beneficiaries of the agreement between Defendant and Molyneux for the construction and installation of the Library Cabinetry on Little St. James Island. Accordingly, the Plaintiffs are the proper parties to bring this action.

VII. DEFENDANT RAISES AFFIRMATIVE DEFENSES WHICH ARE NOT A BASIS FOR A MOTION TO DISMISS

In the final section of Defendant’s motion there is a section entitled “Reservation of Affirmative Defenses and Evidentiary Exclusions” which do not constitute grounds for dismissal and belong in an answer to a complaint.

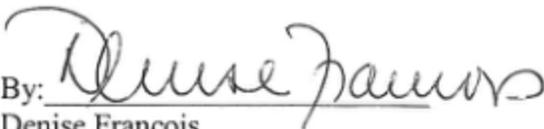
VIII. CONCLUSION

Based upon the foregoing reasons, the affidavits and exhibits attached hereto and the pleadings and other exhibits on file, the Defendant's Motion to Dismiss the Complaint with Points and Authorities should be denied in its entirety.

Respectfully submitted,

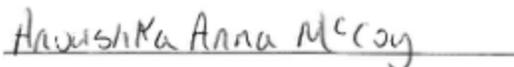
HODGE AND FRANCOIS

Dated: 2/11/2011

By: 
Denise Francois
V.I. Bar Association #285
1340 Taarneberg
St. Thomas, VI 00802
Tel. (340) 774-6845
Fax. (340) 776-7720
Email: denise@hodgefrancois.com
*Attorneys for Jeffrey Epstein and
L.S.J., LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT that I caused a true and correct copy of the foregoing **Plaintiff's Opposition to Defendant's Motion to Dismiss** to be served upon Treston E. Moore, Esquire, MOORE DODSON & RUSSELL, P. O. Box 310, St. Thomas, VI 00804 by first class U. S. Mail, postage prepaid on this 11th day of February, 2011.



Superior Court of the Virgin Islands - Division of St. Thomas - St. John

JEFFREY EPSTEIN AND L.S.J., LLC

Plaintiff

v.

FANCELLI PANELING, INC.

Defendant

) Index No.: ST-10-CIV-443
) Filing Date: 08-03-2010
) Court Date: at

) AFFIDAVIT OF SERVICE

ST-10-CIV-443
08-03-2010

STATE OF New York. COUNTY OF Nassau ss:

I, CHARLES GUERRIERO, being duly sworn deposes and says deponent is not a party to this action and is over the age of eighteen years and resides in the state of New York. That on NOVEMBER 29, 2010 at 5:10 PM at 24 EAST 64TH STREET, NEW YORK, NY 10065, deponent served the within SUMMONS & FIRST AMENDED COMPLAINT bearing Index # ST-10-CIV-443 on FANCELLI PANELING, INC -C/O-PRESIDENT- JEAN PIERRE FANCELLI defendant therein named (the intended recipient)

SUITABLE AGE PERSON By delivering a true copy of each to CHRISTIAN BARTHOD, CO-WORKER a person of suitable age and discretion. That person was also asked by deponent whether said premises was the defendant's PLACE OF BUSINESS within the state and the reply was affirmative.

On 12/3/2010 Deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to defendant at defendant's PLACE OF BUSINESS at 24 EAST 64TH STREET, NEW YORK, NY 10065 by First Class Mail marked Personal & Confidential and deposited said wrapper in (a post office) official depository under exclusive care and custody of the United States Postal Service within New York State.

DESCRIPTION Deponent describes the individual served to the best of deponent's ability at the time and circumstances of service as follows:

Gender: Male Race/Skin: White Hair: Long-Grey Glasses: No Age: 53 Height: 6'2 Weight: 170lbs
Distinguishing Features: French Accent-Hair Parted in Middle

Description of Door: Off White Interior Door

COMMENTS: When I Spoke with Christian Barthod I verified that Jean Pierre Fancelli does work there and the reply was affirmative.

MILITARY SERVICE I Asked the Person Spoken to whether defendant was in active military service of the United States or of the State of New York in any capacity whatever, and received a negative reply The source of my information and the grounds of my belief are the conversations and observations above narrated Upon information and belief I aver that the defendant is not in the military service of New York State or of the United States as that term is defined in either the State or Federal statutes

I declare under penalties of perjury that the information contained herein is correct to the best of my knowledge

James E. Schults
Notary Public
State of New York
My Commission Expires 12/31/12

Charles Guerriero

Charles Guerriero, Lic. #1280305
TMS Services Inc.
600 Old Country Road, Suite 300
Garden City, New York 11530
(516) 280-2501

1/3/11
Executed on

Subscribed and sworn to before me, a notary public, on this 3rd day of January, 2011.

ID 10-005187

Client Reference: Troutman 1of1

TMS Services Inc. • 600 Old Country Road, Suite 300, Garden City, New York 11530 • (516) 280-2501

PLAINTIFFS' EXHIBIT 1

Fancelli
PANELING



24 EAST 64TH STREET
NEW YORK, NY 10021
212 935 6537 fax 212 935 6538

1 IMPASSE DE LA GENDARMERIE
ST. OVEN 93400 FRANCE
01 40 10 08 15 fax 01 40 10 15 30

CHRISTIAN BARTHOD
cbarthod@fancelli-paneling.com

PLAINTIFFS' EXHIBIT 2

EFTA00309212



July 13th 2010

Mr. Darren K. Indyke
VIA EMAIL (dkiesq@aol.com)

Subject: Little Saint James Office Woodwork – Color staining modification.

Dear Mr. Indyke

In answer to your email Monday, July 12, 2010, we confirm that during our last on site intervention of March 2010 we executed all the expected work listed on the punch list provided by Molyneux Studio, Mr. Epstein's Designer. Since we haven't been informed of any additional work, therefore we cannot give you any confirmation of a "2 days 2 persons" for additional work that has not been defined.

All work executed for this project was done in accordance to the Work Orders we received from Mr. Epstein's designer, Molyneux Studio, who has been Fancelli Paneling's direct and exclusive client and contact for the project. We would need the consent of our client, Molyneux Studio, to be able to deal directly with Mr. Molyneux' client, Mr. Epstein.

As part of our usual work ethic, we renew our commitment to "do whatever is reasonable and appropriate to satisfactorily resolve the situation." Nevertheless, at this point, you should not assume that Fancelli should nor will bear the cost for a project modification; our initial order has been approved by our direct customer. Further as expressed earlier, before committing to any new work, we renew our imperative requirement for a clear and detailed definition of modifications to be executed. Prior to any Fancelli Paneling work commitment we need to be in possession of reasonable and appropriate knowledge of the situation and conditions.

As you directly experienced, my English competency is limited, therefore I would very much appreciate to limit our exchanges to written contacts, as to prevent any misunderstanding between us.

Best regards,

Jean Pierre Fancelli
JPF/cb

24 EAST 64TH STREET
NEW YORK, NY 10021
212 935 6537 fax 212 935 6538
info@fancelli-paneling.com
WWW.FANCELLI-PANELING.COM

PLAINTIFFS' EXHIBIT 3

EFTA00309213

NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through February 8, 2011.

Selected Entity Name: FANCELLI PANELING INC.

Selected Entity Status Information

Current Entity Name: FANCELLI PANELING INC.

Initial DOS Filing Date: APRIL 05, 2002

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC BUSINESS CORPORATION

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

FANCELLI PANELING INC.
24 EAST 64TH STREET
NEW YORK, NEW YORK, 10021

Registered Agent

NONE

This office does not record information regarding the names and addresses of officers, shareholders or directors of nonprofessional corporations except

PLAINTIFFS' EXHIBIT 4

http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTIT... 2/9/2011

the chief executive officer, if provided, which would be listed above.

Professional corporations must include the name(s) and address(es) of the initial officers, directors, and shareholders in the initial certificate of incorporation, however this information is not recorded and only available by viewing the certificate.

***Stock Information**

# of Shares	Type of Stock	\$ Value per Share
200	No Par Value	

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
APR 05, 2002	Actual	FANCELLI PANELING INC.

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTIT... 2/9/2011



Division of Corporations, State Records and Uniform Commercial Code • New York State Department of State

How do I serve process on the Secretary of State?

A. Service of process on the Secretary of State as agent of a corporation or other business entity may be accomplished by serving an authorized person at the Department of State's office at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. Process should be brought to the Customer Service Counter located on the 6th Floor.

In addition to the other methods prescribed by law, the Secretary of State acts as the statutory agent for service of process for domestic and foreign business corporations; not-for-profit corporations that have been formed or amended their Certificate of Incorporation after September 14, 1981; limited liability companies; limited partnerships; and limited liability partnerships.

Only "process" may be served on the Secretary of State as agent. "Process" is defined as judicial process and all orders, demands, notices, or other papers required or permitted to be personally served on a domestic or foreign entity, for the purpose of acquiring jurisdiction of such entity in any action or proceeding, civil or criminal, whether judicial, administrative, arbitative, or otherwise, in this state or in the federal courts sitting in, or for, this state. (See §102(a)(11) of the Business Corporation Law, §102(a)(12) of the Not-for-Profit Corporation Law, §102(x) of the Limited Liability Company Law, §121-101(o) of the Partnership Law.)

Service of process is accepted pursuant to Sections 306, 306-A, and 307 of the Business Corporation Law; Sections 306 and 307 of the Not-for-Profit Corporation Law; Sections 301-A, 303, and 304 of the Limited Liability Company Law; Sections 121-104-A, 121-109, 121-1505, and 121-1506 of the Partnership Law. Please note that nothing in these sections of law affects the right to serve process in any other manner permitted by law.

Service of process upon a domestic or authorized foreign corporation, limited liability company, limited partnership, or limited liability partnership requires that two copies of the process be personally served on the Secretary of State or any person authorized by him at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. Service by mail is not permitted. The statutory fee for serving process is \$40.

Service of process upon an unauthorized foreign or suspended corporation, limited liability company, limited partnership, or limited liability partnership requires that one copy of the process be personally served on the Secretary of State or any person authorized by him at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. Service by mail is not permitted. The statutory fee for serving process is \$40. Please refer to the appropriate section of law for additional mailing/service requirements.

The Department of State has prepared "[Instructions for Service of Process on the Secretary of State as Agent for Domestic or Authorized Foreign Entities](#)." The instructions are intended to provide guidance to Process Servers who wish to serve process on the Secretary of State. Please note that the Department of State cannot provide legal advice. Process Servers are encouraged to consult with their own attorneys for advice on any matter discussed in these instructions or regarding any other aspect of service of process.

To serve process on the Secretary of State as statutory agent of any person, corporation or other business entity, the Process Server will be required to:

1. determine the identity of the entity intended to be served;
2. obtain the "DOS Search Page(s)" for the entity the Process Server intends to serve;
3. complete a "[Service of Process Cover Sheet](#);"

PLAINTIFFS' EXHIBIT 5

4. hand-deliver the process being served (with the Service of Process Cover Sheet and DOS Search Page(s) stapled thereto), and the applicable fee, to an authorized person at the Department of State's office at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. Process, should be brought to the Customer Service Counter located on the 6th Floor.

B. Service of process on the Secretary of State in any action or proceeding in which the Secretary of State is a party to such action may be accomplished by serving a deputy secretary of state authorized to accept service. All such process may be served at the Department of State's office at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. Process should be brought to the Customer Service Counter located on the 6th Floor.

Download "[Service of Process Cover Sheet](#)" (pdf file) >>

Read "[Instructions for Service of Process on the Secretary of State as Agent for Domestic or Authorized Foreign Entities](#)" >>



7007 2680 0001 2594 4735

* ADDRESSSEE
NOT AT THIS
LOCATION

- VACANT
- NO SUCH #
- TEMPORARILY AWAY
- NO MAIL RECEIPTS
- REFUSED
- ATTEMPTED NOT IN
- OTHER



- VACANT
- NO SUCH #
- TEMPORARILY AWAY
- NO MAIL RECEIPTS
- REFUSED
- ATTEMPTED NOT IN
- OTHER

HODGE & FRANCOIS
1340 Taarneberg
St. Thomas, VI 00802

RETURNED TO SENDER
Mr. Jean Pierre Fancelli
FANCELLI PANELING, INC.
24 East 64th Street
New York, NY 10065

RETURNED TO SENDER
Mr. Jean Pierre Fancelli
FANCELLI PANELING, INC.
24 East 64th Street
New York, NY 10065

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

~~Mr. Jean Pierre Fancelli
FANCELLI PANELING, INC.
24 East 64th Street
New York, NY 10065~~

ANK

COMPLETE THIS SECTION ON DELIVERY

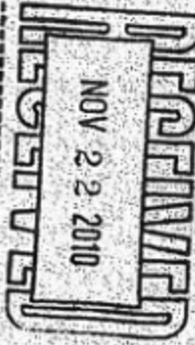
- A. Signature Agent Addressee
- B. Received by (Printed Name) Date of Delivery
- D. Is delivery address different from item 1? Yes No

3. Service Type

- Certified Mail
- Registered
- Insured Mail
- Express Mail
- Return Receipt for Merchandise
- C.O.D.
- Restricted Delivery? (extra fee) Yes

2. Article Number (Transfer from service label) 2594-4735

PS Form 3811, February 2004



PLAINTIFFS' EXHIBIT 6



Demovsky Lawyer Service

Premier Nationwide Document Retrieval
and Process Service Company

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

-----X
JEFFREY EPSTEIN and L.S.J., LLC

Plaintiff,

CASE NO. ST-10-CIV-443

vs.

AFFIDAVIT OF
ATTEMPTED SERVICE

FANCELLI PANELING, INC.,

Defendant.

-----X
STATE OF NEW YORK)

S.S.

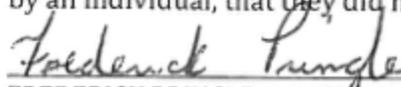
COUNTY OF NEW YORK)

FREDERICK PRINGLE, being duly sworn, deposes and says that he is over the age of eighteen years, is employed by the attorney service, [REDACTED], Inc., and is not a party to this action.

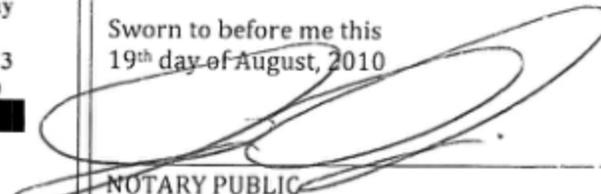
That on the 5th day of August, 2010, at approximately 3:00 pm, deponent attempted to serve a true copy of the **SUMMONS Action For Damages AND FIRST AMENDED COMPLAINT** upon **FANCELLI PANELING, INC.** at 24 East 64th Street, New York, NY, but deponent was informed, by an individual, that they did not have the authority to accept service of legal documents. Deponent was told that the owner would not return until Monday the 9th of August.

That on the 10th day of August, 2010, at approximately 9:00 am, deponent attempted to serve a true copy of the **SUMMONS Action For Damages AND FIRST AMENDED COMPLAINT** upon **FANCELLI PANELING, INC.** at 24 East 64th Street, New York, NY, but deponent was informed, by an individual, that they did not have the authority to accept service of legal documents.

That on the 10th day of August, 2010, at approximately 12:00 pm, deponent attempted to serve a true copy of the **SUMMONS Action For Damages AND FIRST AMENDED COMPLAINT** upon **FANCELLI PANELING, INC.** at 24 East 64th Street, New York, NY, but deponent was informed, by an individual, that they did not have the authority to accept service of legal documents.


FREDERICK PRINGLE, # 1350201

Sworn to before me this
19th day of August, 2010


NOTARY PUBLIC

PLAINTIFF'S EXHIBIT 7

JONATHAN T. RIPPES
NOTARY PUBLIC - STATE OF NEW YORK
NO. 01R16109718
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MAY 17, 2012

[REDACTED], Inc.
401 Broadway
Ste 510
NY, NY 10013
212-925-1220

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

JEFFREY EPSTEIN and L.S.J., LLC,)	
)	
Plaintiffs,)	CASE NO. ST-10-CV-443
)	
-vs-)	ACTION FOR DAMAGES
)	
FANCELLI PANELING, INC.,)	JURY TRIAL DEMANDED
)	
<u>Defendant.</u>)	

AFFIDAVIT OF GARY KERNEY

I, GARY KERNEY, after being duly sworn, depose and say:

1. That I am an independent contractor hired to manage construction on Little St. James Island.
2. In my capacity as a construction manager I have routine access to and have personally reviewed the log books kept in the regular course of business of Little Saint James Island's construction company which records the trips made by contractors, subcontractors, suppliers, etc., such as Fancelli Paneling, Inc., to the island.
3. Based upon my review of the records, and my work on the island since September, 2009, and my personal knowledge, Fancelli Paneling's workmen were on Little Saint James Island on the following dates:
 - (a) May 19, 2009 to June 12, 2009;
 - (b) January 19, 2010 to January 28, 2010; and
 - (c) March 19, 2010 to March 22, 2010.
4. Mr. Jean Pierre Fancelli of Fancelli Paneling, Inc. was on St. Thomas and Little Saint James Island on January 27-28, 2010 and on March 21-22, 2010.

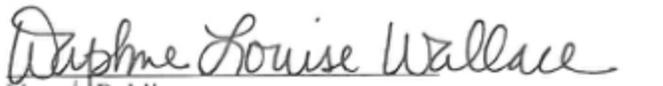
PLAINTIFFS' EXHIBIT 8

5. Attached hereto are true and correct copies of the following documents:
- A. Lafayette Contractors, LLC Superintendent's Daily Project Log documenting the arrival of Fancelli workers on May 19, 2009. (attached hereto as Exhibit 8-A)
 - B. An email sent to me on January 18, 2010 advising that the Fancelli workers would arrive on St. Thomas on January 18, 2010 and then begin work on Little Saint James Island on Tuesday, January 19, 2010. (attached hereto as Exhibit 8-B)
 - C. An email dated March 17, 2010 that I received containing the schedules of the Fancelli crew and Mr. Jean Pierre Fancelli for March 18, 2010 to March 22, 2010. (attached hereto as Exhibit 8-D).

FURTHER AFFIANT SAYETH NOT.


GARY KERNEY

Acknowledged before me this 11TH day of February, 2011.


Notary Public
My Commission Expires: JANUARY 6, 2014



PLAINTIFFS' EXHIBIT 8

Gary Kerney

From: Brice Gordon [bgordon@nysgmail.com] **Sent:** Mon 1/18/2010 2:56 AM
To: Arran maguiness; Gary Kerney; Daphne Wallace
Cc:
Subject: FW: Fancelli Crew - Arrival Delayed
Attachments:

FYI

From: Fancelli Email [mailto:info@fancelli-paneling.com]
Sent: Sunday, January 17, 2010 10:00 PM
To: Brice Gordon; Laurin Goff; FPNY Fancelli FPNY
Subject: Fancelli Crew - Arrival Delayed

Dear Brice:

I just got word that our installation crew has been delayed in Miami [their flight arrived late from Italy and they missed their connecting flight to St Thomas.

The earliest flight available to St Thomas is tomorrow Monday arriving at 4:30 PM

JAN 18

Therefore they will be only able to start working Tuesday.

You probably are not directly involved with the boat transportation to and from St. James, but you are the only direct contact I have on the island – if this not too much of an imposition could you please kindly forward the information to the relevant party –

Studio Molyneux has been informed but I am not sure that they can forward this information on a Sunday evening in time for the Monday AM boat – I just want the people who are expecting our crew not to be wondering of their where about.

Thank you

Christian

Gary Kerney

From: Kristen Goff [Kristen@molynieuxstudio.com] **Sent:** Wed 3/17/2010 6:03 PM
To: Arran McGinnis; Gary Kerney
Cc:
Subject: 01901 - LSJ - Travel Arrangements for Fancelli
Attachments:

Hello Arran and Gary,

To confirm the schedules of the Fancelli crew arriving on St. Thomas to do work on Little St. James, please see below:

Carpenters

2 people

Arriving in St Thomas March 18th

Start working March 19th

Finishers

2 people

Arriving in St Thomas March 20th

Start working March 21st

Fancelli

Jean Pierre Fancelli

Arriving in St Thomas March 21st

Will be on site March 22nd for meeting

Again, the crew will need access to Little St. James on the weekend. Please let me know if you have any questions or concerns.

<https://secure.landmarklandco.com/exchange/GKerney/Inbox/01901%20-%20%20...> 2/4/2011

EXHIBIT 8-D

Gary Kerney

From: Brice Gordon [bgordon@nysgmail.com] **Sent:** Mon 1/18/2010 2:56 AM
To: Arran maguiness; Gary Kerney; Daphne Wallace
Cc:
Subject: FW: Fancelli Crew - Arrival Delayed
Attachments:

FYI

From: Fancelli Email [mailto:info@fancelli-paneling.com]
Sent: Sunday, January 17, 2010 10:00 PM
To: Brice Gordon; Laurin Goff; FPNY Fancelli FPNY
Subject: Fancelli Crew - Arrival Delayed

Dear Brice:

I just got word that our installation crew has been delayed in Miami [their flight arrived late from Italy and they missed their connecting flight to St Thomas.

The earliest flight available to St Thomas is tomorrow Monday arriving at 4:30 PM

JAN 18

Therefore they will be only able to start working Tuesday.

You probably are not directly involved with the boat transportation to and from St. James, but you are the only direct contact I have on the island – if this not too much of an imposition could you please kindly forward the information to the relevant party –

Studio Molyneux has been informed but I am not sure that they can forward this information on a Sunday evening in time for the Monday AM boat – I just want the people who are expecting our crew not to be wondering of their where about.

Thank you

Christian

Gary Kerney

From: Kristen Goff [Kristen@molyneuxstudio.com] **Sent:** Wed 3/17/2010 6:03 PM
To: Arran McGinnis; Gary Kerney
Cc:
Subject: 01901 - LSJ - Travel Arrangements for Fancelli
Attachments:

Hello Arran and Gary,

To confirm the schedules of the Fancelli crew arriving on St. Thomas to do work on Little St. James, please see below:

Carpenters

2 people

Arriving in St Thomas March 18th

Start working March 19th

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Arriving in St Thomas March 20th

Start working March 21st

Fancelli

Jean Pierre Fancelli

Arriving in St Thomas March 21st

Will be on site March 22nd for meeting

Again, the crew will need access to Little St. James on the weekend. Please let me know if you have any questions or concerns.

McKinney's CPLR § 311

McKinney's Consolidated Laws of New York Annotated Currentness
Civil Practice Law and Rules (Refs & Annos)

▣ Chapter Eight. Of the Consolidated Laws

▣ Article 3. Jurisdiction and Service, Appearance and Choice of Court (Refs & Annos)

⇒§ 311. Personal service upon a corporation or governmental subdivision

(a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law;
2. upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county;
3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;
4. upon a county, to the chair or clerk of the board of supervisors, clerk, attorney or treasurer;
5. upon a town, to the supervisor or the clerk;
6. upon a village, to the mayor, clerk, or any trustee;
7. upon a school district, to a school officer, as defined in the education law; and
8. upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

(b) If service upon a domestic or foreign corporation within the one hundred twenty days allowed by section three hundred six-b of this article is impracticable under paragraph one of subdivision (a) of this section or any other law, service upon the corporation may be made in such manner, and proof of service may take such form, as the court, upon motion without notice, directs.

CREDIT(S)

(L.1962, c. 308. Amended L.1976, c. 745, § 1; L.1977, c. 17, § 1; L.1996, c. 337, § 1; L.1998, c. 202, § 1, eff. July 7, 1998; L.1999, c. 341, § 2, eff. July 27, 1999.)

C

Effective:[See Text Amendments]

McKinney's Consolidated Laws of New York Annotated Currentness
 Business Corporation Law (Refs & Annos)

↳ Chapter 4. Of the Consolidated Laws (Refs & Annos)

↳ Article 1. Short Title; Definitions; Application; Certificates, Miscellaneous (Refs & Annos)

→ § 102. Definitions

(a) As used in this chapter, unless the context otherwise requires, the term:

(1) "Authorized person" means a person, whether or not a shareholder, officer or director, who is authorized to act on behalf of a corporation or foreign corporation.

(2) "Bonds" includes secured and unsecured bonds, debentures, and notes.

(3) "Certificate of incorporation" includes (A) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or (B) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

(4) "Corporation" or "domestic corporation" means a corporation for profit formed under this chapter, or existing on its effective date [FN1] and theretofore formed under any other general statute or by any special act of this state for a purpose or purposes for which a corporation may be formed under this chapter, other than a corporation which may be formed under the cooperative corporations law.

(5) "Director" means any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term "board" means "board of directors".

(6) *Repealed. L.1997, c. 449, § 1, eff. Feb. 22, 1998.*

(7) "Foreign corporation" means a corporation for profit formed under laws other than the statutes of this state, which has as its purpose or among its purposes a purpose for which a corporation may be formed under this chapter, other than a corporation which, if it were to be formed currently under the laws of this state, could not be formed under this chapter. "Authorized", when used with respect to a foreign corporation, means having authority under article 13 (Foreign corporations) to do business in this state.

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PLAINTIFFS' EXHIBIT 10

<http://web2.westlaw.com/print/printstream.aspx?sv=Split&prft=...> 2/11/2011

EFTA00309229

(7-a) "Infant" means a person who has not attained the age of eighteen years.

(8) "Insolvent" means being unable to pay debts as they become due in the usual course of the debtor's business.

(9) "Net assets" means the amount by which the total assets exceed the total liabilities. Stated capital and surplus are not liabilities.

(10) "Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where business activities are conducted by such corporation.

(11) "Process" means judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation in any action or proceeding, civil or criminal, whether judicial, administrative, arbitrativ or otherwise, in this state or in the federal courts sitting in or for this state.

(12) "Stated capital" means the sum of (A) the par value of all shares with par value that have been issued, (B) the amount of the consideration received for all shares without par value that have been issued, except such part of the consideration therefor as may have been allocated to surplus in a manner permitted by law, and (C) such amounts not included in clauses (A) and (B) as have been transferred to stated capital, whether upon the distribution of shares or otherwise, minus all reductions from such sums as have been effected in a manner permitted by law.

(13) "Surplus" means the excess of net assets over stated capital.

(14) "Treasury shares" means shares which have been issued, have been subsequently acquired, and are retained uncanceled by the corporation. Treasury shares are issued shares, but not outstanding shares, and are not assets.

CREDIT(S)

(L.1961, c. 855. Amended L.1962, c. 834, § 1; L.1964, c. 725, § 1; L.1966, c. 664, § 14; L.1974, c. 899, § 1; L.1997, c. 449, § 1, eff. Feb. 22, 1998; L.1998, c. 375, § 1, eff. Aug. 13, 1998.)

[FN1] September 1, 1963.

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

L.1998, c. 375 legislation

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PLAINTIFFS' EXHIBIT 10

<http://web2.westlaw.com/print/printstream.aspx?sv=Split&prft=...> 2/11/2011

McKinney's Business Corporation Law § 306

McKinney's Consolidated Laws of New York Annotated Currentness
Business Corporation Law (Refs & Annos)

Chapter 4. Of the Consolidated Laws (Refs & Annos)

Article 3. Corporate Name and Service of Process (Refs & Annos)

→§ 306. Service of process

(a) Service of process on a registered agent may be made in the manner provided by law for the service of a summons, as if the registered agent was a defendant.

(b)(1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose. If a domestic or authorized foreign corporation has no such address on file in the department of state, the secretary of state shall so mail such copy, in the case of a domestic corporation, in care of any director named in its certificate of incorporation at the director's address stated therein or, in the case of an authorized foreign corporation, to such corporation at the address of its office within this state on file in the department.

(2) An additional service of the summons may be made pursuant to paragraph four of subdivision (f) of section thirty-two hundred fifteen of the civil practice law and rules.

(c) If an action or special proceeding is instituted in a court of limited jurisdiction, service of process may be made in the manner provided in this section if the office of the domestic or foreign corporation is within the territorial jurisdiction of the court.

(d) Nothing in this section shall affect the right to serve process in any other manner permitted by law.

PLAINTIFFS' EXHIBIT 11

CREDIT(S)

(L.1961, c. 855. Amended L.1962, c. 834, § 7; L.1967, c. 17, § 1; L.1984, c. 93, § 1; L.1990, c. 419, § 1.)

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

L.1990, c. 419 legislation

Par. (b), subpars. (1), (2). L.1990, c. 419, § 1, eff. Jan. 1, 1991, designated existing text as subpar. (1), and as so redesignated, made provisions gender neutral, and added subpar. (2).

Derivation

Gen.Corp.Law of 1929, § 217. Formerly § 16-f, added L.1927, c. 425, § 1; renumbered § 217, L.1929, c. 650; amended L.1941, c. 538, § 2; L.1949, c. 292, § 3; L.1955, c. 230, § 3; L.1956, c. 144, § 3; L.1960, c. 131, § 3; and repealed by L.1973, c. 451, § 2.

Stock Corp.Law of 1923, § 25, added L.1934, c. 908, § 2; amended L.1937, c. 167; L.1941, c. 538, § 1; L.1946, c. 598, § 3; L.1949, c. 292, § 1; L.1955, c. 230, § 1; L.1960, c. 131, § 1; and repealed by L.1966, c. 664, § 16.

LEGISLATIVE STUDIES AND REPORTS

2003 Main Volume

1. Source: McKinney Stock Corporation Law § 25 and McKinney General Corporation Law § 217.

2. Changes: Reworded; new provisions.

Comment: The procedure for serving process on the registered agent and the secretary of state is set forth in this section. Service on the registered agent is similar to service on any defendant. The procedure for serving the secretary of state is similar to that set forth in Stock Corporation Law § 25 and General Corporation Law § 217.

PLAINTIFFS' EXHIBIT 11

<http://web2.westlaw.com/result/documenttext.aspx?ss=CNT&mt...> 2/11/2011

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

AFFIDAVIT OF JUAN PABLO MOLYNEUX

JUAN PABLO MOLYNEUX, after being duly sworn, deposes and says:

1. I reside in the State of New York, and I have personal knowledge of the matters set forth herein.
2. I am the owner and president of J.P. Molyneux Studio, Ltd., which is incorporated and maintains its principal place of business in the State of New York ("Studio").
3. In 2005, Jeffrey Epstein ("Epstein") and I, together with our respective companies, L.S.J., LLC ("LSJ") and Studio, entered into an agreement whereby, among other things, Studio would design the interior and exterior, and provide, through third party vendors and contractors, certain furnishings, furniture, fixtures and millwork for, a high-end office/library structure to be located on Little Saint James Island known as the Office Pavilion.
4. In consultation with Mr. Epstein, I created the conceptual design, including cabinetry, entry doors, bookcases, bookshelves, columns, cornices, wood paneling and sliding window shutters, for the library in the Office Pavilion (the "Library Cabinetry"). My design concept for the library of the Office Pavilion, as agreed to by Mr. Epstein, was inspired by the library at El Escorial in Spain. I also provided to Mr. Epstein my own drawing of the proposed Library Cabinetry. On the basis of the concept of the library at El Escorial, and my drawings, Mr. Epstein approved the general design, color and finish of the proposed Library Cabinetry. Mr. Epstein and I later agreed to certain modifications to that design which required that the columns and cornices included in the general design be intricately carved

PLAINTIFFS' EXHIBIT 12

EFTA00309233

with representations of marine flora and fauna consistent with a tropical locale. Additional intricate wood carvings of the same tropical theme were to be applied at various places on the Library Cabinetry as well.

5. In connection with the performance of our agreement relating to the Office Pavilion, Epstein and I agreed that Studio would contract with Fancelli Paneling, Inc., a New York corporation ("Fancelli"), to fabricate, finish, deliver and install the Library Cabinetry for the benefit of Epstein and LSJ. Fancelli holds itself out as skilled in intricate wood sculpting and specializing in the reproduction of fine antique cabinetry and woodwork. Fancelli's website advertises that Fancelli's "[t]eam of artisans, sculptors and cabinet makers uphold the tradition and carry on the sophisticated art of fine wood paneling that graces the walls of some of the world's most beautiful interiors." Fancelli's website also advertises that its craftsmen are able to "carve intricate motifs as well as restore and replicate any antique design."

6. Beginning in or about 2006, Studio discussed and eventually contracted with Fancelli to fabricate and finish the Library Cabinetry, and to deliver it to, and properly install it on, Little Saint James Island in the United States Virgin Islands. It was the clear understanding and agreement of Studio and Fancelli when they contracted that all of their contracts with respect to the Library Cabinetry were for the benefit of Epstein and LSJ and that the Library Cabinetry was to be installed and used in an office/library structure located in the tropical Caribbean locale of the United States Virgin Islands.

7. Fancelli fabricated and began the process of finishing the Library Cabinetry in Italy, and in or about February or March 2009 shipped the disassembled pieces of the same in sealed air-controlled crates to the United States Virgin Islands, where it was to be properly installed on Little Saint James Island, and the finishing was to be completed.

8. Between May 2009 and March 2010, Fancelli proceeded to install the Library Cabinetry on Little St. James Island. As of the date of this Affidavit, however, Fancelli has failed to fully complete the proper installation, staining and finishing of the Library Cabinetry on Little Saint James Island in accordance with the requirements of the contracts between Studio and Fancelli, and, as installed, the Library Cabinetry is incomplete and defective in numerous respects, including, but not limited to, the following:

- A. The Library Cabinetry is discolored, its finish is incomplete, sloppy, unevenly and poorly applied, and the color and/or finish is completely absent in various places;
- B. Under Fancelli's contract with Studio, the Library Cabinetry was to have an antiqued and distressed "wax finish." However, the finish is inconsistent throughout;
- C. The method used to simulate the antiqued and distressed finish was the responsibility of Fancelli;
- D. As installed by Fancelli, the surfaces and edges of all of the woodwork throughout library, including, but not limited to, the areas around all of the windows, the door panels, the cabinets and the floor pieces of the Library Cabinetry, have a distressed finish that is inconsistent. Several cracks and seams are evident in the columns of the Library Cabinetry but were not recorded at the time they were installed. Such work is not consistent with the high standards required of Fancelli under its agreement with Studio, which Fancelli held itself out as being able to provide;

- E. Contrary to Fancelli's agreement with Studio, the fabrication and installation of the sliding panels at the windows of the library are incomplete in that the exterior sides (i.e., the sides facing out and viewable from the exterior when looking into the windows of the Office Pavilion) of the sliding panels are completely unfinished, leaving exposed plywood and hardware that can be clearly seen from the exterior of the Office Pavilion; Fancelli is required to complete such work once the finish to be applied to the shutter material on the interior is selected by Epstein;
- F. As installed by Fancelli, the connecting hardware at the sliding panels at the picture window of the library was loose or broken, and the sliding window shutters on all windows are misaligned and rattle;
- G. Fancelli was required to install wood filler pieces behind the carved filigree frames around the sliding panels at the windows so daylight does not shine through. Fancelli's installation of the wood filler pieces is incomplete in that daylight continues to shine through in certain areas;
- H. There are open joints in the woodwork throughout the Library Cabinetry, including, without limitation in several areas at the decorative cornices of the Library Cabinetry. These open joints were not recorded when the Library Cabinetry was installed and reflect a substandard level of workmanship inconsistent with high standards required of Fancelli under its agreement with Studio, which Fancelli held itself out as being able to provide;
- I. The decorative brass handles on the hardware holding the upper bookcases of the Library Cabinetry closed are poorly installed and are systematically coming off.

The small screw pins holding the handles to the rods are not only backing out, but also shearing or breaking off. Under its contract with Studio, Fancelli is responsible for the provision, proper installation and proper functioning of all such hardware;

- J. The concealed hardware inside the swinging bookcases at the entry doors was improperly installed and is falling off. The keys that operate the locks on those doors are breaking and the keyhole escutcheons that Fancelli was required to provide are missing. Under its contract with Studio, Fancelli is responsible for the provision, proper installation and proper functioning of all of this hardware;
- K. As installed by Fancelli, the swinging bookcase doors at the entries to the library are misaligned;
- L. As installed by Fancelli, several cabinet doors throughout the library do not fit evenly and square within their frames;
- M. The overall workmanship and finish of the Library Cabinetry reflects a substandard level of workmanship inconsistent with the high standards required of Fancelli under its agreement with Studio, which Fancelli held itself out as being able to provide, and is wholly inconsistent with the quality of woodwork priced at \$780,000.

9. I am advised that Fancelli has claimed that it fabricated, installed, stained and finished the Library Cabinetry strictly in accordance with all of the designs and specifications provided to it by Studio and that Studio has fully approved the fabrication, installation, staining and finishing of the Library Cabinetry in its present condition on Little Saint James Island. I understand that Fancelli has also claimed, among other things, that certain of the

items identified in paragraph 8 of this Affidavit are not the fault of Fancelli, but instead a result of either (a) improper specifications and designs provided by Studio and myself or (b) the high temperature levels inherent in Little Saint James' tropical climate, on the one hand, and efforts to maintain cooler air temperatures in the interior space at the Office Pavilion where the Library Cabinetry was installed, on the other hand. These claims are entirely without merit.

10. As stated in paragraph 8, the items identified therein are contrary to Studio's and my designs and specifications. Moreover, the items identified in paragraph 8 of this Affidavit existed at the time of installation and were not the result of any environmental conditions. In addition, it was clearly understood and intended by Studio and Fancelli when they contracted that the Library Cabinetry was to be installed and used in an office/library structure located in the United States Virgin Islands and would be therefore subject to temperature and humidity levels inherent in a Caribbean climate, as well as within an office structure in which air conditioning would be present. The Library Cabinetry should have been fabricated for such intended use, and Fancelli cannot now escape its obligations by blaming environmental conditions. Consequently, Fancelli continues to be obligated to properly and fully complete the fabrication, installation, staining and finishing of the Library Cabinetry, including, without limitation, by properly and fully correcting all of the items identified in paragraph 8 of this Affidavit.

11. Despite repeated demands from Studio and me, as well as Epstein and LSJ, for Fancelli to correct the multitude of defects in, and to properly and fully complete, the fabrication, installation, staining and finishing of the Library Cabinetry as contracted, Fancelli refuses to do so without first being paid additional sums for such work. However, Fancelli

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has been paid all moneys to which it is entitled under its contracts with Studio and is not entitled to any additional sums to correct and properly and fully complete the Library Cabinetry in accordance with its contracts with Studio, including, without limitation, by properly and fully correcting all of the items identified in paragraph 8 of this Affidavit. Moreover, it is standard practice in Fancelli's industry that items of the type identified in paragraph 8 of this Affidavit are customarily corrected by the contractor at no additional charge.

12. Epstein and LSJ were the clear and intended beneficiaries of the contracts between Studio and Fancelli relating to the Library Cabinetry.

FURTHER AFFIANT SAYETH NOT.



JUAN PABLO MOLYNEUX

SUBSCRIBED AND SWORN TO
before me this 28th day of December, 2010.



Notary Public
My Commission Expires:

Michael G. Berger
Notary Public, State of New York
No. 02BE4642978
Qualified in New York County
Commission Expires October 15, 2013