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

* * * * *

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

DEFENDANT'S REPLY TO OPPOSITION TO MOTION TO DISMISS THE COMPLAINT WITH POINTS AND AUTHORITIES

COMES NOW Defendant, **FANCELLI PANELING, INC.** ("Fancelli"), by and through its undersigned counsel, to provide its ***Reply*** to Plaintiffs' ***Opposition to Motion to Dismiss the First Amended Complaint*** filed herein, pursuant to ***Super. Ct. Rules 7, 27, 128, Fed. R. Civ. P. 4, 12(b), 19, , 48 U.S.C. §1561*** and the Constitutional considerations embodied therein.

In support of its ***Reply***, Defendant states the following facts and circumstances:

DEFENDANT HAS CONTINUING CHALLENGES TO THE JURISDICTIONAL DEFICIENCIES ON THE FACE OF THE FIRST AMENDED COMPLAINT

Defendant moves to dismiss, *inter alia*, pursuant to ***Fed. R. Civ. P. 12(b)(1) & (2)***. It is respectfully submitted that it is Plaintiffs' obligation to state in the body of their ***(First Amended) Complaint*** the statutory basis they choose to designate for jurisdiction in all respects. Pursuant to ***Fed. R. Civ. P. 8(a)(1)*, a pleading that states a claim for relief must contain:**

> **(1) A short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support. (Emphasis added).**

Although Defendant may be able to cull some theory adverse to its interests from juxtaposing selected allegations of fact from portions of Plaintiffs' pleading, the ***First Amended Complaint*** does not provide any reference to the statutory underpinnings for the subject matter jurisdiction of the Superior Court, ***4 V.I.C.§ 76***, nor should it be Defendant's responsibility to select Plaintiffs' best weapon in this regard for any response. Subject matter jurisdiction was not affirmatively plead in the ***First Amended Complaint***. It is unequivocally Plaintiffs' responsibility to state the statutory basis for this Court's subject matter jurisdiction and Defendant can admit, or deny the specifics of same thereafter. Defendant chose to move to dismiss for, *inter alia*, that reason.

Although Defendant may also be able to cull some theory adverse to its interests from juxtaposing selected allegations of fact from portions of Plaintiffs' pleading, the ***First Amended Complaint*** does not provide any reference to the statutory underpinnings for this Honorable Court's jurisdiction over this non-resident Defendant and it cannot be as designated for residents

of the Virgin Islands with an enduring relationship. See 5 ***V.I.C. § 4902***. Plaintiffs readily admit the fact that Defendant is not subject to this Court's jurisdiction as a residence within, or by having an enduring relationship with the U.S. Virgin Islands. ***First Amended Complaint, ¶ 3, p. 1.*** Nor should it be Defendant's responsibility to select Plaintiffs' best weapon in this regard for any response. It is unequivocally Plaintiffs' responsibility to state the statutory basis for this Court's jurisdiction over this non-resident Defendant and Defendant can thereafter admit, or deny the specifics of same. Personal jurisdiction alleged through some subsection of the long-arm statute, ***5 V.I.C. § 4903***, over this non-resident Defendant was not affirmatively plead in the ***First Amended Complaint***-it is argued in opposition to the ***Motion to Dismiss***, but it was never plead. Defendant similarly chose to move to dismiss for, *inter alia*, that reason.

Should the Court find jurisdiction in these respects and, given the two forums available through the Superior Court, Defendant would otherwise admit, with a full reservation of rights, that jurisdiction as to venue in St. Thomas & St. John would be preferred over venue in St. Croix.

I. THE SUMMONS AND FIRST AMENDED COMPLAINT WERE NOT PROPERLY SERVED UPON FANCELLI PANELING, INC.

Defendant moves to dismiss Plaintiffs' First Amended Complaint pursuant to ***Fed. R. Civ. P. 12(b)(4)***, insufficient process, and Plaintiffs' ***Opposition*** claims to satisfy that contention.

Plaintiffs' argument and annexed affidavits from process servers, however, are self-

defeating and instead serve to show that Fancelli Paneling, Inc., acknowledged by Plaintiffs to be a New York corporation, FAC, para. was not properly served under New York law. Clearly, Plaintiff has confused the sections of New York law setting forth the requirements for service upon a corporation and service upon an individual.

According to the affidavit of attempted service submitted by Plaintiffs,their process server attempted service upon Defendant at its offices, 24 East 64th Street, New York, New York on August 5 and August 10, 2010, but the process server was told by "an individual" that "they did not have authority to accept service of legal documents." The process server left each time without leaving any documents.

According to the affidavit of service submitted by Plaintiff's counsel, Plaintiff's process server then purported to serve Defendant at its offices, 24 East 64th Street, New York, NY on November 29, 2010, by "delivering a true copy of [the Summons and First Amended Complaint] on Christian Barthod, **CO-WORKER a person of suitable age and discretion**." (emphasis supplied). FAC, Exhibit 1.

Plaintiff, in its argument, goes to great lengths to convince this Court that Christian Barthod "acted as the President's agent and liaison." This is irrelevant to the issue of proper service on a corporation under New York law. Plaintiff itself states that it purported to serve defendant under NY law, CPLR 311(a)(1). That statute is quite clear:

> "Personal service upon a corporation . . . 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 any other agent

authorized by appointment or by law to receive service N.Y. CPLR §311(a)(1). Def. Exhibit A.

There is no allegation whatsoever that Christian Barthod is an "officer, director, managing or general agent, or cashier or assistant cashier," or that he was authorized by appointment or law to receive service. There is only a sworn statement by Plaintiff's first process server that he was told that the person he tried to serve was not authorized to accept service.

According to Plaintiff's own process server, he served a "co-worker" of Defendant's President. In addition, that "co-worker" had already informed the earlier process server that stated he was not authorized to accept service. The business card procured by the process server discloses no title for Mr. Barthod, which further supports the affidavit describing Mr. Barthod as a "co-worker." The description Plaintiff's counsel sets forth for Mr. Barthod purports to qualify him as a person of suitable age and discretion."

Plaintiff, however, has confused the New York statute setting forth the requirements for service upon individual and service upon a corporation. N.Y. CPLR § 308.2 permits personal service upon a "natural person…by delivering the summons within the state to a person of suitable age and discretion at the actual place of business…and… by mailing the summons by first class mail to the person to be served at his or her actual place of business…."

The affidavit of service of Plaintiff's process server states that he delivered a copy of the Summons and First Amended complaint to "Christian Barthod, co-worker, a person of suitable age and discretion." Although Defendant does not concede the truth of the statements of the

process server, even assuming their truth, service was patently insufficient under New York law.

As noted in the Affidavit of Mr. Christian Barthod, Def. Exhibit B, he is solely an employee and not otherwise authorized to accept service on behalf of Defendant corporation.

II. THIS COURT DOES NOT HAVE PROPER JURISDICTION OVER DEFENDANT

Defendant moves to dismiss pursuant to ***Fed. R. Civ. P. 12(b)(2)***, lack of personal jurisdiction over it. In its ***Motion to Dismiss***, Defendant asserted its insufficient contacts with the Virgin Islands for Plaintiffs to invoke this Court's long-arm jurisdiction over this New York corporation, but also in a manner inconsistent with the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States of America through ***48 U.S.C. §1561*** (the *Revised Organic Act of 1954*, as amended).

When a defendant raises the defense of lack of personal jurisdiction, "the burden falls upon the plaintiff to come forward with sufficient facts to establish that jurisdiction is proper." ***Mellon Bank (East) PSFS, Nar. Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992)***; ***Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142 n. 1 (3d Cir. 1992)***. "The resolution of a motion to dismiss for lack of personal jurisdiction is dependent on factual issues outside the pleadings. The plaintiff, as the party asserting personal jurisdiction, has the burden of establishing it." ***Evans v. General Gases of V.I., Inc., 1998 WL 912544 *1, *2 (Terr. Ct. V.I. Nov. 30, 1998)***.

A. LONG-ARM JURISDICTION

It must be conceded at the outset that Plaintiffs' failed to reference the V.I. long-arm

statute within its ***First Amended Complaint***. Nevertheless, this statute is lustily utilized in opposing Defendant's ***Motion to Dismiss*** on point, to the extend that ***5 V.I.C. § 4903(a)(1) & (2)*** are now Plaintiffs' exclusive reasons for personal jurisdiction. Plaintiffs now support those recent contentions on the following fact pattern:

> Two New York companies contract in New York for the fabrication of cabinetry in Europe that will be shipped to St. Thomas (by a third party) and installed (by another third party) in a residence to be constructed on Little St. James Island.
>
> Defendant comes to Little St. James to see the cabinetry during installation and returns after disputes arise for purposes of settlement.

Defendant respectfully submits that it would be unseemly to consider trips into this jurisdiction for the purposes of resolving disputes. ***Fed. R. Evid. 407-408***. But it is also beyond muster that these activities fail due process protections as well.

B. DUE PROCESS

If the Court finds satisfaction under the long-arm statute, it must then collapse the question into a single inquiry: does jurisdiction violate the due process clause of the (Organic Act/Constitution)? "The (c)onstitutional due process requirements serve to shield persons from the judgment of a forum with which they have established no substantial ties or relationship." ***Mottley v. Maxim Crane Works Holding, Inc., 2008 WL 5158090 *1, *2 (D.V.I. Dec. 9, 2008)(citing Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001)***. Accordingly, the exercise of personal jurisdiction depends on the relationship between the defendant, the forum, and the litigation. Id.

The analysis of whether the exercise of personal jurisdiction is permitted by the due

process clause depends upon whether the court seeks to exercise general or specific jurisdiction. Id. General jurisdiction occurs when a non-resident defendant's contacts with the forum state are "continuous and substantial." Id. It appears conceded that Plaintiffs herein are not making that allegation. If the Court had general jurisdiction over a defendant, then the defendant may be called into court on any type of action regardless of whether the action arises from the Defendant's contacts with the forum state. Conversely, specific jurisdiction exists when the cause of action "arises from or related to conduct purposely directed at the forum state. Id.

Defendant maintains that this Court lacks specific jurisdiction over it as well, because Fancelli does not have sufficient minimum contacts with the Virgin Islands to support the exercise of jurisdiction consistent with due process. See ***Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)***. Absent general jurisdiction, the due process clause permits jurisdiction over a non-resident defendant only where that defendant has sufficient "minimum contacts" with the forum state. ***Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)***. These contacts must be of the nature such that the individual non-resident defendant "should reasonably anticipate being haled into court there." Id. (Emphasis added). It is respectfully submitted that shipping its work to the Virgin Islands through third parties, for installation by third parties, coming to see the work being installed and returning to resolve disputes is an insufficient process to reasonably anticipate being haled into a Virgin Islands court.

1. Plaintiffs Have Not Established Defendant's Minimum Contacts

A finding of sufficient minimum contacts requires that "there be some act or acts by virtue of which defendant has purposefully availed himself of the benefits and protections of the

laws of the forum state." ***Burger King Corp., 471 U.S. at 474-476***. The purposeful availment requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." **Id. at 475**. Defendant's payment for services rendered under its agreement with Molyneux, from Molyneux was the only "benefit" it sought and expected from it. The only source for his protection under that New York contract would have come from a New York court.

2. Fair Play and Substantial Justice Require This Court To Decline of Jurisdiction

Even if this Court were to conclude that Defendant had sufficient minimum contacts, it should decline to exercise personal jurisdiction, because the assertion of jurisdiction would not comport with fair play and substantial justice. ***Urgent v. Technical Assistance Bureau, Inc., 255 F. Supp. 2d 532, 537 (D.V.I. 2003)***("It is not enough that TAB has minimum contacts with the Virgin Islands; the exercise of personal jurisdiction must not offend traditional notions of fair play and substantial justice.").

The factors that the Court should consider in evaluating whether the assertion of jurisdiction comports with fair play and substantial justice "include: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Id. (quoting ***Pennzoil Products Co. v. Coletti & Assoc., Inc., 149 F.3d 197, 205-06(3d Cir. 1998)***. Defendant submits that its activities in the

dispute as outlined by either party herein counsel a ruling for Defendant. The only factor favoring Plaintiffs is one of "convenient" relief.

III. THE FIRST AMENDED COMPLAINT DOES NOT SUFFICIENTLY ESTABLISH A CAUSE OF ACTION FOR BREACH OF A THIRD PARTY BENEFICIARY CONTRACT AND THE NEGLIGENCE ON THE PART OF DEFENDANT IN THIS COURT.

In Plaintiffs' ***First Amended Complaint***, they allege the separate contracts between Plaintiff Epstein and Molyneux, then between Molyneux and Defendant Fancelli. FAC, para. 4 & 7. The Plaintiffs, however, attempt to bridge the chasm with a very interest Affidavit from Mr. Molyneux.

His Affidavit, authored in New York, signed on December 28, 2010, but the original was not delivered until after the Opposition herein had been filed, contains several statements so inconsistent with the facts as to be charitably regarded as prevarications by Defendant. The Molyneux contract with Defendant stated a very limited scope of work that should not be expanded by a court beyond its own boundaries. The Court is also asked to judicially notice his First Amended Complaint in ***Molyneux v. Epstein, Dist. Ct. No. 10-cv-34***, in which he readily conceded that he and Defendant, an-internationally known woodworking craftsman, satisfied their obligations to Plaintiffs, a fact further acknowledged by Plaintiffs when their agent signed off on the punch list, noting that all of the woodwork on the list was done (paragraphs 14, 18). Def. Exhibit C. That agent signed off on an impressive listing of punch list items, some of which go beyond Defendant's scope of work. Def. Exhibit D. An Exhibit to that Complaint further

noted that Oak was the wood to be used by Defendant in fabricating the cabinets.

Defendant maintains that any duty owed to Plaintiffs did not exceed that owed to Molyneux. Molyneux agreed that it had been satisfied and, with the three minor punch items referenced therein, so did Plaintiffs.

IV. PLAINTIFFS FAILED TO JOIN AN INDISPENSIBLE PARTY

The Affidavit of Molyneux similarly shows how integral he is to all aspects of this dispute; he is the pivot, the fulcrum and the glaring inconsistency to the polarized parties.

V. THIS TERRITORY IS AN INCORRECT FORUM FOR THIS ACTION

It cannot be gainsaid that the whole of this dispute blossoms from an agreement made in New York between Plaintiff Epstein (wherever he was residing in 2005) and Molyneux (New York), then an agreement between Molyneux and Fancelli (New York). It is respectfully submitted that the law of the State of New York will be operative throughout this litigation on matters sounding in contract and, to a lessor extent, derivative matters of negligence as well. Although this Honorable Court has mechanisms for the application of foreign law, ***5 V.I.C. 4926-28***, we are not stepped in its subtle applications to commercial transactions such as these. It is respectfully **submitted** that this action should be dismissed or stayed for this reason as well, with leave to the litigants to file with the appropriate New York court.

Defendant submits that the individuals and documents evolving from this genesis are similarly in and immediately around New York and the contracting parties' offices in Europe.

> **When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just. 5 V.I.C. 4905.**

VI. DEFENDANT MAY CLAIM BENEFIT OF RELEASE AT THIS JUNCTURE

In addition to dismissal based upon a plaintiff's failure to plead sufficient facts to "plausibly suggest" some cognizable cause of action, dismissal also is appropriate under ***Rule 12(b)(6)*** if there is a dispositive legal issue,[1] or if (either) plaintiff lacks statutory standing to bring suit.[2]

VII. THE STANDING OF EACH DEFENDANT IS SUBJECT TO INQUIRY

In their ***First Amended Complaint***, it is alleged "[i]n 2005, Epstein 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. As part of this project, Epstein 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,, para. 4, p. 2. They also state that Plaintiff L.S.J., LLC, is the owner of Little St. James Island.

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1 *See* ***Neitzke v. Williams, 490 U.S. 319, 326-27 (1989)***

2 *See* ***Leuthner v. Blue Cross & Blue Shield of Northeastern Pa., 454 F.3d 120 (3d Cir. 2006)***(affirming dismissal under ***Rule 12(b)(6)*** for lack of statutory standing).

FAC, para. 2, but it does not say when this Plaintiff came into existence in Delaware to own this residence "to be constructed."

Given the foregoing and for purposes of *Count I-Breach of Contract*, Defendant would ordinarily focus on Plaintiff Epstein. Perhaps and for purposes of *Count II-Negligence* within the two count ***First Amended Complaint***, Defendant would ordinarily focus on Plaintiff LSJ. Defendant does not acquiesce to Plaintiffs contentions that both are beneficiaries of Epstein's agreement with Molyneux and submits that it is sufficiently unclear from the face of Plaintiffs' pleading to call it to the attention of the Court.

VIII. AFFIRMATIVE DEFENSES ARE PROPER CONSIDERATION FOR DISMISSAL

Defendant reiterates the matter referenced in VI, above, but otherwise acknowledges its intention to raise additional affirmative defenses in any ***Answer*** it may be required to file and as may be developed through discovery. The reservation of rights was just that.

V. CONCLUSION

Plaintiffs ***Amended Complaint*** against Defendant Fancelli must be dismissed, with prejudice, for all, or any of the foregoing reasons.

WHEREFORE, Defendant respectfully requests this Honorable Court to grant the following relief:

A. To dismiss the Complaint and each Count within it, with prejudice;

B. To award Defendant its costs, including attorney's fees, incurred in the defense of this action; and

C. To award such other and further relief as the Court deems just and proper.

Dated this 10th day of March, 2011.

Respectfully submitted,

Treston E. Moore, Esquire
V.I. Bar No. 10
MOORE DODSON & RUSSELL, P.C.
Attorneys for Defendant
5035 Norre Gade, P.O. Box 310
St. Thomas, VI 00804-0310
PHONE: [redacted]
FAX:
EMAIL:

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2011, a copy of the foregoing was served by first class mail, postage prepaid, upon Denise Francois, Esquire, Hodge & Francois, #1340 Taarneberg, St. Thomas, V.I. 00802.

effective unless the front of the envelope bears the legend "URGENT LEGAL MAIL" in capital letters. The chief executive officer of every such agency shall designate at least one person, in addition to himself or herself, to accept personal service on behalf of the agency. For purposes of this subdivision the term state agency shall be deemed to refer to any agency, board, bureau, commission, division, tribunal or other entity which constitutes the state for purposes of service under subdivision one of this section.

1993 AMENDMENTS

L. 1993, ch. 420, eff. Oct. 19, 1993, amended subdivision (2) by replacing the clause that began "In the event any provision of law . . ." with the clause "Personal service on a state officer sued solely in an official capacity or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency."

1992 AMENDMENTS

L. 1992, ch. 44, eff. Jan. 1, 1993, amended subdivision (2) to add a provision authorizing personal service upon specified state agency officers by certified mail, return receipt requested, in an envelope bearing the legend "URGENT LEGAL MAIL."

1985 AMENDMENTS

L. 1985, ch. 290, eff. Nov. 1, 1985, added subdivision (2).

§ 308. Personal service upon a natural person.

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed

with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation

or advertisement, has held out as its place of business.

CROSS REFERENCES

[redacted]. § 232, referred to in subds. (2), (3) and (4), *above*, appears in Appendix, *below*.

1994 AMENDMENTS

L. 1994, ch. 131, eff. Jan. 1, 1995, added CPLR 308(6) pertaining to "actual place of business."

1988 AMENDMENTS

L. 1988, ch. 125, eff. Jan. 1, 1989, amended subdivision 2 to require delivery and mailing to be accomplished within 20 days of each other, and subdivision 4 to require affixing and mailing to be accomplished within 20 days of each other; to require proof of service—under both subdivisions—to be filed within 20 days of whichever service is accomplished later; to make statute gender neutral.

1987 AMENDMENTS

L. 1987, ch. 115, eff. July 15, 1987, amended paragraphs two and four by providing alternative means of satisfying mailing requirement of substituted service and "nailing and mailing" procedures.

1986 AMENDMENTS

L. 1986, ch. 77, eff. Jan. 1, 1987, repealed the undesignated paragraph following paragraph (5) of CPLR 308 relating to the additional notice required to take a default judgment in an action against a natural person based upon nonpayment of a contractual obligation. New paragraph (3) of CPLR 3215(f) now governs.

1977 AMENDMENTS

L. 1977, ch. 344, eff. Jan. 1, 1978, amended CPLR 308 by adding a new undesignated paragraph which provides that in an action against a natural person for nonpayment of a contractual obligation additional notice must be given at least 20 days prior to the entry of a default judgment and which describes the procedures for service of such notice.

1974 AMENDMENTS

L. 1974, ch. 765, eff. July 7, 1974, amended paragraphs two, three and four of CPLR 308 by deleting the words "except in matrimonial actions" at the beginning of each paragraph and by adding the clause "except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law."

1971 AMENDMENTS

L. 1971, ch. 176, eff. Sept. 1, 1971, amended CPLR 308.

This amendment was recommended by the Judicial Conference February 1, 1971 Report to the Legislature, wherein it was stated:

"Paragraph 4 would be amended to provide that in order to avail himself of substituted service by 'nailing and mailing,' a party must make diligent attempts at prior service under paragraphs 1 *and* 2, rather than under paragraphs 1, 2 *or* 3, as at present . . .

"In addition, minor verbal improvements would be made in paragraph 4 . . .

"A similar change is proposed in paragraph 5, to allow the use of a special mode of service according to court order where diligent attempts have failed under paragraphs 1, 2 *and* 4, rather than under paragraphs 1, 2, 3 *or* 4, as at present.

"Paragraphs 1 and 2 would be amended to add the disjunctive word 'or' at the end of each, to clarify that paragraphs 1, 2 or 3 offer alternatives for effecting service and that each of the specified modes can be used as a first preference.

"Paragraph 2 would also be made stylistically consistent with paragraph 4 by changing the word 'address' therein to 'residence.' "

1970 AMENDMENTS

L. 1970, ch. 852, eff. Sept. 1, 1970, repealed former CPLR 308 and inserted a new section 308.

1968 AMENDMENTS

L. 1968, ch. 276, eff. Sept. 1, 1968, amended Subd. (3) [now (4)] to require that proof of substituted service be filed within twenty days after such service.

§ 309. Personal service upon an infant, incompetent or conservatee.

(a) Upon an infant. Personal service upon an infant shall be made by personally serving the summons within the state upon a parent or any guardian or any person having legal custody or, if the infant is married, upon an adult spouse with whom the infant resides, or, if none are within the state, upon any other person with whom he resides, or by whom he is employed. If the infant is of the age of fourteen years or over, the summons shall also be personally served upon him within the state.

(b) Upon a person judicially declared to be incompetent. Personal service upon a person judicially declared to be incompetent to manage his affairs and for whom a committee has been appointed shall be made by personally serving the summons within the state upon the committee and upon the incompetent, but the court may dispense with service

1999 AMENDMENTS

L. 1999, ch. 341, eff. July 27, 1999, added section to provide for personal service upon a limited partnership.

§ 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 authotized 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.

CROSS REFERENCES

See B.C.L. §§ 304, 306 and 307, in Appendix, *below*, as to service upon secretary of state or other designated agent of corporation.

1999 AMENDMENTS

L. 1999, ch. 341, eff. July 27, 1999, amended by adding the last two sentences providing that a business corporation may also be served pursuant to B.C.L. § 306 or 307 and a not-for-profit corporation may also be served pursuant to the Not-for-Profit Corporation Law § 306 or 307.

1998 AMENDMENTS

L. 1998, ch. 202, eff. July 7, 1998, amended subdivision (b) by replacing "in time to secure and file the proof of service called for by subdivision (a) of" with "within the one hundred twenty days allowed by." In effect, this provides that an application may be made if service cannot be effected within the 120 days allowed by CPLR 306-b.

1996 AMENDMENTS

L. 1996, ch. 337, eff. Jan. 1, 1997, amended the section by numbering the opening paragraph as subdivision (a); adding new subdivision (b) governing situations where service under subdivision (a) is impracticable; and making the section gender neutral.

1977 AMENDMENTS

L. 1977, ch. 17, eff. March 22, 1977, amended paragraph 8 by striking the reference to a "school" district. A 1976 amendment enacted paragraph 7 to govern service upon a school district.

1976 AMENDMENTS

L. 1976, ch. 745, eff. Sept. 1, 1976, added paragraph (7) to CPLR 311 and renumbered accordingly.

Amendment recommended by the Judicial Conference in its Report to the 1976 Legislature, in which it stated:

"The purpose of the proposed amendment is to broaden the category of persons designated by law as persons to whom a summons, and thus a notice of claim, in a Supreme Court action against a school district may be delivered to include those identified in section 2 of the Education Law. By so doing, notice to school officers to whom parents are most likely to give notice will constitute effective notice, thereby avoiding results like that Mr. Justice Bernard S. Meyer felt compelled to reach in *Bayer v. Board of Education*, 58 Misc. 2d 259 (Sup. Ct. Nassau Co. 1968). In that case a letter stating a claim was timely served upon the superintendent of schools but the action was dismissed because the superintendent was not one of those

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FANCELLI PANELING, INC.,	)	
Defendant.	)	**(CARROLL, J.)**

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

CHRISTIAN BARTHOD, having been sworn, deposes and says as follows:

1. I am an employee of Fancelli Paneling, Inc., and I submit this affidavit in order to apprise the Court of the facts of the purported service of process on the defendant herein.

2. First, I can say without doubt that I am the person described in the affidavit of attempted service submitted by "Frederick Pringle." Mr. Pringle states that he attempted to serve a copy of the Summons and First Amended Complaint at the offices of Fancelli Paneling, Inc., 24 East 64th Street, New York, NY on August 5 and August 10, 2010, and each time, he was informed by "an individual" that they did not have the authority to accept service of legal documents. I am that individual.

3. On November 26, 2010, we received a voicemail at the office of Fancelli Paneling, Inc., from a name sounding to me like "Charles Gregario," stating that he was a potential client interested in paneling for a library. I spoke with Mr. "Gregario" later that day. He told me he

had seen the Fancelli Paneling website and had a potential project - a library - in mind. He seemed vague as to details, so I asked him to send plans. He said he did not have any, but wanted to visit the Fancelli showroom. I set an appointment with him for November 29, 2010 at 5:30 [redacted]

4. On November 29, 2010, Charles Gregario called again to make sure that I would be in at 5:30. He appeared at the showroom around that time, and appeared nervous to me. He made some comments as to how nice the office was and requested my business card. When I went to get it, he took his bag from the chair and placed it on the work table. I handed him my card and he confirmed that I am Christian Barthod.

5. I requested his card, but instead he pulled out a large yellow envelope. He said, "I hope you are not going to be mad, but I have to do this, I am sorry." He handed me the envelope and quickly closed his bag and prepared to leave. I said, " I had the feeling it was something like that. You know I cannot accept that envelope. I am not an officer. I am not a part of the corporation."

6. He answered, " It does not matter. You are an employee?" I responded that I was. He said, " That is the same thing." I asked, again, for his business card. He told me "It does not matter who I am. [redacted] glad you are not furious." I responded "You just do what you have to do." He left.

CHRISTIAN BARTHOD

Sworn to before me this 10th day of March, 2011.

PETER F. EDELMAN
Notary Public, State of New York
No. 31-4913649
Qualified in New York County
Commission Expires Jan. 4, 1990
2014

Jay Fred

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

[redacted]. Molyneux Studio, Ltd. and
Juan Pablo Molyneux

FIRST AMENDED COMPLAINT

-against-

Case No. 3:10-cv-00034

Jeffrey Epstein and
L.S.J., LLC.

PLAINTIFFS, by and through the undersigned counsel, for their First Amended Complaint allege as follows:

JURISDICTION AND AMOUNT IN CONTROVERSY

1. Plaintiff Juan Pablo Molyneux is a citizen of the State of New York.

2. [redacted]. Molyneux Studio, Ltd. is incorporated in the State of New York and maintains its principal place of business in the State of New York.

3. Defendant Jeffrey Epstein is a citizen of the Territory of the U.S. Virgin Islands.

4. Upon information and belief, the remaining Defendant, L.S.J., LLC, is organized in the State of Delaware and maintains its principal place of business within the U.S. Virgin Islands.

5. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) because the amount in controversy exceeds $75,000, exclusive of costs, interest and disbursements and the Plaintiffs and Defendants are citizens of different states.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a), (c).

EXHIBIT C

FACTS COMMON TO ALL COUNTS

7. Juan-Pablo Molyneux is a world-renowned interior designer.

8. Jeffrey Epstein, via his company L.S.J., LLC, is the owner of Little Saint James, a 70-acre island within the U.S. Virgin Islands.

9. In 2005, the parties entered into an agreement whereby the Plaintiffs would provide design services for the residential compound Epstein was constructing on Little Saint James.

10. Subsequently, disputes arose between the parties with respect to the design services to be provided by Plaintiffs.

11. On May 15, 2009, the parties entered into a Settlement Agreement, annexed hereto, whereby the Defendants released all claims they might have had against the Plaintiffs in exchange for $1.2 million.

12. Following the Settlement Agreement, the parties entered into a written contract on May 15, 2009, entitled Agreement for Design Services ("Design Services Agreement"), annexed hereto, wherein the parties agreed that the Plaintiffs would perform certain design services related to the office pavilion being constructed by Defendants on Little Saint James, for which Plaintiffs would credit Defendants' account with Plaintiffs in the amount of $250,000 to be applied toward such services. The specific services to be provided were itemized on Exhibit B to the Design Services Agreement (the "Exhibit B Services").

13. The Settlement Agreement specifically provides that the Design Services Agreement "shall not be treated as an inducement to the execution of the Settlement Agreement." Settlement Agreement at ¶ 2.

14. Subsequent to the execution of the Design Services Agreement, Plaintiffs, with the assistance of an internationally-known woodworking craftsman, undertook to and did perform the Exhibit B Services, thereby satisfying their obligations pursuant to the Design Services Agreement.

15. On January 26 and 27, 2010, Plaintiffs travelled to Little Saint James to supervise the final stages of the work pursuant to the Design Services Agreement. It was agreed that Epstein would be present in order to give his approval of the work. Epstein, however, failed to attend this agreed meeting.

16. On March 10, 2010, Defendants' agent created a Punch List cataloguing certain tasks remaining to be completed pursuant to the Design Services Agreement.

17. On March 22, 2010, Plaintiffs again travelled to Little Saint James to meet with Epstein in an effort to finalize the work performed by Plaintiffs pursuant to the Design Services Agreement. Epstein again failed to attend the agreed meeting. In an effort to perform their obligations under the Design Services Agreement, Plaintiffs and their representatives, nevertheless, undertook to complete, and did complete, the Punch List items falling under the Design Services Agreement.

18. On March 25, 2010, Defendants' agent signed off on all items enumerated on the Punch List by signing it and noting that all the woodwork on the list was done with the exception of three minor items, none of which was specified in Exhibit B to the Design Services Agreement.

19. Although their agent had signed off on the Punch List, Defendants' counsel sent a letter to Plaintiffs on April 15, 2010, claiming that Plaintiffs had failed to perform their obligations pursuant to the Design Services Agreement.

20. In the letter, Defendants' counsel also claimed that the Plaintiffs fraudulently induced Defendants to enter both the Settlement Agreement and the Design Services Agreement.

21. In an effort to resolve the dispute, Plaintiffs' representatives once again traveled to Little Saint James on April 29, 2010 to meet with Defendants' representatives. The meeting was unproductive and Defendants' counsel continued wrongfully to insist that Plaintiffs had not satisfied their obligations with respect to the Design Services Agreement.

FIRST CLAIM
DECLARATORY JUDGMENT

22. Plaintiffs repeat and reallege the allegations contained in paragraphs one through 21 above.

23. There are justiciable controversies with respect to the following issues:

a. Whether the Plaintiffs substantially performed their duties as required by the Design Services Agreement; ✓

b. Whether Defendants violated their duty of good faith and fair dealing under the Design Services Agreement by engaging in conduct that was inconsistent with the terms and purpose of that agreement and the reasonable expectations of the parties by, among other things: (a) wrongfully rejecting the Plaintiffs' work with respect to the Exhibit B Services; and, (b) absenting themselves from the meetings between the parties which were held to resolve their differences, thereby interfering with and failing to cooperate with Plaintiffs in the performance of their obligations; and

c. Whether, as alleged in Defendants' April 15, 2010 letter, ✓ not an exhibit Plaintiffs fraudulently induced Defendants to enter the Settlement Agreement and the Design Services Agreement.

24. A declaration of the rights among the parties is warranted pursuant to 28 U.S.C. § 2201.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

a. Adjudging and declaring that Plaintiffs substantially performed their duties as required by the Design Services Agreement;

b. Adjudging and declaring that the Defendants violated their duty of good faith and fair dealing under the Design Services Agreement; and

c. Adjudging and declaring that Plaintiffs did not fraudulently induce Defendants to enter the Settlement Agreement or the Design Services Agreement, and that the Settlement Agreement and Design Services Agreement are valid and enforceable; and

d. Awarding such other and further relief as the Court deems equitable and just.

Respectfully Submitted,
Rosh D. Alger Esquire, LLC
Attorneys for Plaintiffs

DATED: June 11, 2010
St. Thomas, U.S. Virgin Islands

By: s/ Rosh D. Alger
Rosh D. Alger, Esq.
VI Bar No. 932
PMB 10 Royal Dane Mall #12
St. Thomas, VI 00802
Tel. (340) 626-0787
Fax (866) 211-2646

Exhibit A

MOLYNEUX

29 EAST 69TH STREET
NEW YORK, NEW YORK 10021
TEL (212) 628 0097
FAX (212) 737 6126
EMAIL jpm@molyneuxstudio.com

ARCHITECTURAL INTERIORS & DECORATION

4 RUE CHAPON
75003 PARIS, FRANCE
TEL (33) 01 40 96 63 01
FAX (33) 01 42 59 99 44
EMAIL paris@molyneuxstudio.fr

VENDOR: FANCELLI PANELING
24 EAST 64TH STREET
NEW YORK, NY 10021

212-935-6537
212-935-6538 Fax

ORDER NUMBER 7106

DATE 10/14/2008

SALESPERSON

QUANTITY	DESCRIPTION	UNIT COST	EXTENDED COST
1	Woodworking FABRICATION & INSTALLATION of light oak with waxed finish cabinetry per JPM design. Will include survey, shop drawings, moldings of base, lower cabintery with doors and upper bookshelves 3 hidden cabinet doors and interior window shutter columns with bases and crown. Will include packing insurance and waterproof container to St. thomas and crew travel. Cost will not include 2 globes, flat base (stone) transportation of goods to St. James, scaffolding, local taxes, customes or workman's accomodations NOTE: THIS PO REPLACES PO#2680	780,000.00	780,000.00

Deposit Required: $ 0.00
Payments: $ 780,000.00
Total: $ 780,000.00

CK# _____
Account #:
Terms: 100% Deposit

DO NOT PROCESS THIS ORDER UNLESS SPECIFICATIONS AND PRICES ARE CORRECT

SIDEMARK: JPM / LSJ-OFFICE / OFFICE /

CLIENT: LSJ-OFFICE

AREA: OFFICE

PROPOSAL #: 29764

ITEM #:

ORDERED BY:

SHIP TO:
ATELIER FANCELLI
63 RUE ALBERT
DAHLENNE

DATE PROMISED

AUTHORIZED SIGNATURE

DO NOT FAIL TO SHIP OUR ORDER NUMBER AND CUSTOMER NO INVOICE WILL BE PAID WITHOUT P.O. OR ORDER NUMBER
ATTENTION CONTRACTORS: SIXTEEN PERCENT OF YOUR TOTAL SUBCONTRACT WILL BE WITHHELD IF YOU FAIL TO SUPPLY US WITH PROPER WORKMEN'S COMPENSATION INSURANCE DOCUMENTATION

N.Y. RESALE # 13-310-2323

Document #013

Meeting August 20th 2010

Sent from my BlackBerry wireless device

From: Doug Schoettle <daschoettle@yahoo.com>
Date: Wed, 10 Mar 2010 09:58:56 -0800 (PST)
To: <[redacted]>
Cc: <[redacted]>; <[redacted]>; <[redacted]>; William Rowles<[redacted]>
Subject: Fancelli Punch List

FANCELLI PUNCH LIST
Wood Paneling at LSJ Office

1. Complete the installation of the toe molding at the baseboard. Material on site.
NO 2. Install closure trim piece of oak belowthe picture window sill to fill gap approx. 3 cm high, the length of the window.
3. Finish rough, unfinished end condition at the sliding panels at the picture window.
4. Drill, file and sand perforations at tilt down desk panels to remove rough and ragged edges.
5. Glue and clamp open joints in paneling through out the room.
6. Generally sand rough finishes and raised grain at paneling through out the room.
7. Replace tortise shell inlay where it is pieced or flaking and delaminating.
8. Repair cabinet door hardware so that the screw does not loosen when the handle is rotated to operate door and so the hardware does not rattle.
9. Supply and install two turtle pulls at tilt down desk panels.
OK 10. Replace bamboo mesh at all cabinet doors with metal mesh in a dark color that will not rust.
11. Replace the non functioning blackboards with slate that will take chalk. The existing surface has been wiped clean with water and dried. The surface does not take chalk satisfactorly.
12. Provide additional light bulbs for the shelf lights inside the cabinets and provide the specification.
13. Confirm the size of the carpet and provide under padding.
PAINT 14. The staining of the cornice should be like the Escorial Library with light and dark.
PAINT 15.The staining of the columns should highlight the carvings with light and dark.
PAINT 16.All wood surfaces in the room are to be finished, currently the undersides of the desk tops are unfinished.
PAINT 17.Interiors of the cabinets are to be stained darker so as not to appear orange when the shelf lights are on.
PAINT 18. All wood surfaces are to be varnished.
19. The sliding panels are unfinished plywood, how are they to be finished?
20.

ALL WOOD WORK IS DONE ON THE LIST OTHER THAN
OPEN ISSUES:
PIC'S
1. SEND US LITE BULBS
2. SEND US BAMBOO GRILL 4 BIG 4 SMALL
3. BLACKBOARD.

3/25/2010 Gary Kenney

EXHIBIT D