

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

DECEMBER
MAR 14 2011
COURT

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

***DEFENDANT'S AMENDED REPLY TO OPPOSITION TO MOTION TO DISMISS
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*)

**DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
*Epstein, et al. v. Fancelli Paneling, Inc.***

Page 2

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 pled 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 reasonably believes that any action in contract is for the courts of New York, but that both contract and negligence counts have been barred as noted herein. Defendant chose to move to dismiss for, *inter alia*, those reasons.

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 personal 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 resident

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 3

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 the Court's personal 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 Defendant was not affirmatively pled in the *First Amended Complaint*-it is argued in opposition to the *Motion to Dismiss*, but it was never pled. 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.

The Court is required to satisfy itself that it has jurisdiction over this action in all respects at this threshold juncture. A judgment from a court lacking jurisdiction is void. *Burnham v. Superior Ct. of California*, 495 U.S. 604, 608 (1990). For an Order to bind a party, the issuing Court must have jurisdiction over that individual. *McComb v. Wambaugh*, 934 F.2d 474, 482 (3d Cir. 1991). Should the Court feel secure with its jurisdiction, it must further determine whether Defendant has properly received the process required to bind it to this litigation.

**DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
*Epstein, et al. v. Fancelli Paneling, Inc.***

Page 4

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

Defendant maintains that the required notice it received of the pendency of this action was contrary to procedures required by law. Defendant moves to dismiss Plaintiffs' *First Amended Complaint* pursuant to *Fed. R. Civ. P. 12(b)(4)*, insufficient process, and Plaintiffs' *Opposition* purports to satisfy that contention. The summons and process shall be served in the same manner as required to be served by *Fed. R. Civ. P. 4*. See *Super. Ct. R. 7 & 27*.

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, ¶ 3**, 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

**DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
*Epstein, et al. v. Fancelli Paneling, Inc.***

Page 5

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."

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 6

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 an employee and is 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 further asserted that jurisdiction here would be 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).

Plaintiffs correctly state that this Court was initially obliged to accept Plaintiffs' assertion of facts as true when a motion to dismiss is originally made, but a court is not precluded from

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 7

revisiting the issue if it appears that the facts alleged to support jurisdiction are in dispute.

Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330-31 (3d Cir. 2009).¹ Under the old standards of pleading in federal courts, the rules were lax. "Unless is it impossible to read the complaint with a straight face or the contention was recently and authoritatively rejected, there is federal jurisdiction even if the claim must fail on the merits." *Kasper v. Board*, 814 F.2d 332, 338 (7th Cir. 1987). If the threshold requirements for stating a claim have been tightened under *Twombly* and *Iqbal*, can those for alleging jurisdiction be far behind?

But 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).

Plaintiffs' burden of proof is by a preponderance of the evidence. *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).

¹ Counsel appreciates Plaintiffs' correction to the full citation for this case. In her dissenting opinion concluding that the District Court was correct in its conclusion that the District Court lack personal jurisdiction, however, Judge Stapleton may have shown prescience to the evolving "*Twombly/Iqbal*" line of cases requiring rules of pleading removing legal conclusions and requiring the remaining factual allegations to "plausibly suggest" them. If Plaintiffs suggest a realistic basis for believing that personal jurisdiction exists, they should be allowed to pursue discovery before having to prove it. *Id.*, at 340-41.

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*; it was not pled. Nevertheless, this statute is invoked and aggressively utilized by Plaintiffs in opposing Defendant's *Motion to Dismiss* on point, to the extent that 5 *V.I.C. § 4903(a)(1) & (2)* now provide Plaintiffs' reasons for personal jurisdiction. Plaintiffs support those recent statutory 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 as jurisdictional contacts for the purposes of resolving disputes. *Fed. R. Evid. 407-408.*

Because case law concludes the *V.I. Long-Arm Statute* to be coextensive with the parameters of the Due Process Clause, *Urgent v. Tech. Assistance Bureau, Inc., 255 F.Supp. 2d 532, 535-36 D.V.I. 2003*), its constitutionality as applied in this instance becomes the ultimate question. Defendant maintains that these limited 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 (co)stitutional due process requirements serve to shield persons from the judgment of a forum with which they have established no substantial ties or relationship."

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 9

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.**

"There are two types of jurisdiction that can be exercised over an out-of-state defendant--specific and general. When the defendant's activities in the state with respect to the transaction underlying the litigation serve as the basis for jurisdiction, the assertion of jurisdiction is said to be "specific." (citations omitted). By contrast, when the defendant's overall activity in the state, not simply its actions with respect to the underlying transaction, are the basis, the jurisdiction is said to be "general." (Citing *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 n.8, n.9 (1984))."

It appears conceded that Plaintiffs herein are not alleging general jurisdiction. 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 Defendant 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 basic source for his protection under that New York contract would have come from a New York court. It would be unlikely that contract action could be resolved by this Court.

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

**DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
*Epstein, et al. v. Fancelli Paneling, Inc.***

Page 11

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 upon consideration of fair play and substantial justice. 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, ¶¶ 4 & 7. The theory advanced by Plaintiffs’ is that Defendant was somehow contractually obligated to provide more than his obligation to Molyneux, even though Molyneux and Plaintiffs’ agent were

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.
Page 12

fully satisfied and accepted the work contracted to Defendant. The Plaintiffs, however, attempt to bridge the chasm between these distinct sets of terms services and obligations with a very interest Affidavit from Mr. Molyneux.

His Affidavit, authored in New York, signed on December 28, 2010, and the original delivered after the *Opposition* herein had been filed,² contains several statements so inconsistent with the facts as to be charitably regarded as prevarications. The Molyneux contract with Defendant stated a very limited scope of work that should not be expanded by a court beyond its own boundaries.

Plaintiffs' causes of action allege a breach of contract and negligence by Defendant. The allegations, however, are totally unsupported by proffered facts: Plaintiffs elect not to file sworn affidavits in support of their causes of action or in *Opposition to Defendant's Motion to Dismiss*; Plaintiffs' counsel's factual allegations must be ignored as she has no personal knowledge of the facts; and each and every allegation in the sole supporting affidavit of Juan Pablo Molyneux ("Molyneux"), on which Plaintiffs rely in asserting incomplete and defective fabrication, installation, staining and finishing of the Library Cabinetry is directly and irrefutably contradicted by court documents, contemporaneous e-mail transmissions, purchase orders, other correspondence between and among Molyneux, and the parties hereto and correspondence between Molyneux's New York counsel and plaintiffs' New York counsel.

2

The *Stipulation for Dismissal* in *Molyneux v. Epstein* was filed with our District Court a few days after the *Molyneux Affidavit* for this case was signed.

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 13

By *First Amended Complaint* in the action captioned, *J.P. Molyneux, Ltd. and Juan Pablo Molyneux v. Jeffery Epstein and L.S.J., LLC*, dated June 11, 2010, as was pending in the District Court bearing a Case No. 3:10-cv-00034, Plaintiffs, by counsel, allege:

14. ...Plaintiffs, with the assistance of an internationally-known woodworking craftsman, undertook to and did perform the Exhibit B Services (Fancelli installation, restaining and refinishing of Library), thereby satisfying their obligations pursuant to the Design Services Agreement. (First Amended Complaint with annexed Exhibit A (Fancelli Purchase Order #7106, dated October 14, 2008, marked "REPLACES PO#2680") and Exhibit B. **Def. Exhibit 11.**

Moyneux's directly contradictory allegations cannot both be truthful.

Molyneux's Little St. James Punch List Report March 22, 2010, confirms that the punch list status was either "complete," "acceptable" or outside the Molyneux Purchase Order with Fancelli.

Def. Exhibit 7.

Through the Work Approval dated March 23, 2010, in regard to P.O. 2680 (and complement PO 8321), signed by Plaintiffs' designated agent, Gary Kerney, Plaintiffs approve the fabrication, installation and finishing of the Library Cabinetry, as follows:

The work executed by Fancelli Paneling following the project designed by Molyneux Studio, and corrections executed March 19-23 are approved and accepted by the client representative and by Molyneux Studio. Balance on completed work is now due (annexed hereto as Exhibit 6 and 6A, together with plaintiff e-mail dated March 17, 2010, directing that communication regarding the Library Cabinetry is to be with Gary Kearney, himself or his counsel. **Def. Exhibit 5.**

The satisfactions directly and irrefutably contradict both the Complaint herein and Molyneux's sworn Affidavit.

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 14

By correspondence from Jay Goldberg, Esq., Molyneux's New York counsel, dated May 10, 2010, addressed to Darren Indyke, plaintiff's New York counsel, Mr. Goldberg addresses the punch lists, as follows:

As the record will show, two punch lists were given to Mr. Molyneux and Mr. Fancelli. Both were satisfied by checkmarks and a signature of a person with authority to bind Mr. Epstein. If there are additional items which your client believed warranted Mr. Fancelli's attention, your client should have been on the island and not "laid back in the grass", claiming there are new problems which were overlooked when your client's personnel prepared the punch list.

Mr. Fancelli traveled from Italy and had one of his craftsmen (sic) journeyed from Moscow, but still your client did not appear.... Mr. Molyneux has said that despite the fact that the Design Services Agreement gives him the authority to judge whether the color of the paneling is consistent with the overall ambiance of the library, he is willing...to have Mr. Fancelli return to the island to finish the cabinetry as you wish....But the responsibility must be your client's to arrange for Mr. Fancelli and his craftsmen to appear, pre-pay their expenses and that of Mr. Molyneux... and to pay for the expense of refinishing the cabinetry with the color your client finds desirable. **Def. Exhibit 10.**

Thus, even Molyneux's counsel contradicts his client's sworn affidavit.

The specific *First Amended Complaint* allegations are contradicted by contemporaneous correspondence and documents, as follows:

A. Library Cabinetry was fabricated in oak instead of walnut. See, Molyneux PP 7106, replacing PO 2689, dated October 14, 2008, as annexed to Molyneux Complaint in the related action, providing "FABRICATION & INSTALLATION of light oak with waxed finish cabinetry of JPM design." Also, note that Molyneux's sworn Affidavit omits such allegation.

B,C,D. Cabinetry is “discolored”, sloppy and uneven and antique and distressed wax finish is “inconsistent with warping and cracking not previously recorded. The discoloration and inconsistent finish is attributed to plaintiffs’ negligence in ignoring defendant’s instructions, acknowledged by Molyneux, that the reinstalled Library Cabinetry must be in an air conditioned environment with a de-humidification system. See: correspondence between Fancelli and Molyneux dated May 17, 2009, March 25, 2010, July 12, 2010 (the last with annexed Exhibit A, an e-mail from defendant to Molyneux dated February 3, 2009 and Molyneux e-mail to plaintiff dated March 30, 2010) (annexed as **Def. Exhibits 8, 8A, and 8B**), concurring that the “discoloration” and “inconsistent antique and distressed finish” is attributed to plaintiffs’ failure to install the de-humidification system until February, 2010, eight (8) months after re-installation. See also, **Def. Exhibits 11, 6 and 7**, identified above.

The claim that plaintiff did not approve the simulated distressed finish is irrelevant as to Defendant as there was neither a contract, nor, at Molyneux’s instructions, communication between them. See also: Molyneux e-mail to plaintiff dated May 1, 2009, describing the colour as “fabulous” and the stain he selected as “perfect” (annexed as **Def. Exhibit “9”**) and Molyneux e-mail to Defendant noting that Plaintiff is interested in modifying the finish of the entire cabinetry, although approved by plaintiff’s agent, Gary Kearney, and requesting “an estimate by Fancelli of refinishing the entire Office/Library...[with] an estimate for travel, accommodations and expenses” (annexed as **Def. Exhibit 9A**).

E. Different types of wood and lack of uniform color and finish. Noticeably, unsupported by Molyneux Affidavit and, therefore, a totally unsupported allegation. This item was also omitted from

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.

Page 16

plaintiff's punch lists. See, **Def. Exhibits 6, 7, 9, and 11**, identified above.

F,Q. Rough, jagged edges. See, Molyneux Punch List dated March 22, 2010, specifically Items 4 and 6 thereof (**Def. Exhibit "7"**), the status of which is marked "completed" and Item 19, the status of which is marked, "Not in Agreement."

G,H. Finish not properly sealed and proportions inconsistent with El Escorial. Unsupported by Molyneux Affidavit and, therefore, totally unsupported allegation.

Also omitted from Plaintiff's punch lists. See, **Def. Exhibits 6, 7, 9, and 11**, identified above.

I,J,K,L. Decorative Hardware defects. The 17th century-styled hardware was designed by Molyneux and fabricated by COUDERT Paris, a fabricator selected by Molyneux who oversaw its fabrication.

M,N,O. Woodfiller pieces, gapping, light shines through. See Molyneux Punch List (**Def. Exhibit "7"**) and plaintiff Work Order (**Def. Exhibit "6" and "6A"**). No mention of these items. See also, Goldberg Letter to Indyke (**Exhibit "10"**).

P,Q,R,S. Cabinet doors not square; perforated panels unfinished; exterior sliding panels unfinished, sliding panels improperly constructed. See Molyneux Punch List (**Def. Exhibit "7"**): Cabinet Doors, Item 8, status: "complete"; unfinished perforated panels, Items 4 and 6, status: "complete"; unfinished exterior of panels, Item 19, status: "Not in Agreement"; improperly constructed sliding panels, Items 2, status: as designed, "gap must remain."

T. Overall workmanship inadequate. See Molyneux Complaint in related action, **Def. Exhibit "11,"** ¶14; and sign-offs by Molyneux Punch List (**Def. Exhibit "7"**); and Epstein Work Approval (**Def. Exhibits 6 and 6A**).

Molyneux's concluding paragraphs 9, 10 and 11 are self-serving as he has a financial interest in deflecting liability from himself to Defendant Fancelli. However, his new "partnership" with Plaintiffs, alleging defects in Fancelli's fabrication, installation, staining and finishing are directly and irrebutably contradicted by contemporaneous documents, to wit: Molyneux Punch List (**Exhibit "7"**), Molyneux's Complaint in the related action against Epstein (**Exhibit "11" ¶14**), Molyneux's e-mails regarding the staining and finishing (**Exhibits "9" and "9A"**), Molyneux's New York counsel's letter confirming the finishes were approved and any modification would be at Plaintiff's expense (**Exhibit "10"**); and climate related issues of discoloration, uneven distressed and antiqued finish, and cracking resulted from plaintiff's failure to provide de-humidification (**Exhibits "8," "8A," "8B"**) and they did not exist at the time of installation (see **Exhibit "7"**). Based on the foregoing, we leave it to this Honorable Court on the issue of how to deal with Molyneux's questionable testimony, but we request that his Affidavit be ignored and absent which, the action should be dismissed with prejudice for failing to plead and prove causes of action for breach of contract or negligence.

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

IV. PLAINTIFFS FAILED TO JOIN AN INDISPENSIBLE PARTY

In addressing the Affidavit of Molyneux, the Court can see how integral he is to all aspects

of this dispute; he is the pivot, the fulcrum and the glaring inconsistency to the respective positions of 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 lesser 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,³ or if (either) plaintiff lacks statutory standing to bring suit.⁴ A court can grant a motion to dismiss for lack of subject matter jurisdiction when the claim is legally insufficient. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408 (3d Cir. 1991).

VII. THE STANDING OF EACH DEFENDANT IS SUBJECT TO INQUIRY

Plaintiffs' standing is a jurisdictional issue for the Court's consideration. *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534 (3d Cir. 1994). In their *First Amended Complaint*, it is alleged "[i]n 2005, Epstein engaged the architectural and design services of Juan Pablo Molyneux and [REDACTED] Molyneux Studio, Ltd. ("Molyneux") to design a large-scale, multi-structure, multi-million dollar residential project to be constructed on Little St. James Island 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., ¶ 4, p. 2.⁵ They also state that Plaintiff L.S.J., LLC, is the owner of Little St. James Island. FAC, ¶ 2, but it does not say when this Plaintiff came into existence in Delaware to own this

³
See *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)

⁴
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).

⁵
At that time, Plaintiff Epstein was residing on East 71st Street, New York, New York, 10022.

residence "to be constructed."

Given the foregoing and for purposes of *Count I-Breach of Contract*, Defendant would ordinarily defend against only Plaintiff Epstein. Perhaps and for purposes of *Count II-Negligence* within the two count *First Amended Complaint*, Defendant would ordinarily focus only upon 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**

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Epstein, et al. v. Fancelli Paneling, Inc.
Page 21

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

Dated this 11 th 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: [REDACTED]
EMAIL: [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on this 11 th 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.

