

RECEIVED

SEP 12 2012

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 FANCELLI PANELING, INC.'S
OPPOSITION TO MOTION TO DISMISS CROSS-CLAIMS AND
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT
WITH POINTS & AUTHORITIES***

COMES NOW Defendant, FANCELLI PANELING, INC. ("Fancelli"), by and through its undersigned Counsel, to submit its *Opposition to Defendant, J.P. MOLYNEUX STUDIO, LTD.'S ("Molyneux") Motion to Dismiss the Cross-Claims* on the basis that it has alleged sufficient facts in support of its claim against Molyneux and hereby requests that this Honorable Court deny Molyneux's Motion.

I. FACTUAL BACKGROUND AND SUMMARY OF ALLEGATIONS

In 2005, Plaintiffs Jeffrey Epstein and L.S.J., LLC ("Plaintiffs") engaged the architectural and design services of Molyneux for certain structures that were to be constructed on Little St. James Island, U.S. Virgin Islands. As part of the design, Molyneux contracted with Fancelli to fabricate certain cabinetry that would be installed in a building known as the "Office Pavilion."

Plaintiffs originally brought this breach of contract and negligence claim against Fancelli based on allegations that Fancelli failed to provide a product based on what Plaintiffs had originally intended.

Fancelli's cross-claims for declaratory judgment and contribution/indemnity against Molyneux are based on factual allegations, which are incorporated by reference to its counterclaim against Plaintiffs. As stated in Fancelli's cross-claim, Fancelli was not a party to the discussions and agreements entered into between Plaintiffs and Molyneux pertaining to the specific design of the Office Pavilion. Fancelli's Answer with Counterclaim and Cross-Claims ("Fancelli's Answer") at ¶ 23. Instead, based on the agreement between Molyneux and Plaintiffs, Molyneux subsequently issued purchase orders to Fancelli for the fabrication of the cabinetry, which were purportedly based on what Molyneux and Plaintiffs had discussed with respect to design. ¶ 24. In accordance with the specifications outlined in the purchase orders, Fancelli performed the work for Molyneux. Subsequently Molyneux acknowledged its satisfaction of Fancelli's work, which establishes that Fancelli completed any and all of its obligations under the terms of the purchase order. ¶¶ 25-26; 31. The purchase order and Plaintiffs' written acceptance of Fancelli's work were accepted and acknowledged by Plaintiffs and Plaintiffs' acknowledgements were also attached as exhibits in further support of Fancelli's cross-claims. *See* Defendant's Exhibit 1 and 4 to Fancelli's Answer.

Most importantly, this Honorable Court has previously issued its Memorandum Opinion and Order carefully detailing and explaining the legal need for Molyneux's participation in this action.

Based on all of these factual allegations, Fancelli has sufficiently stated claims for declaratory judgment and indemnity against Molyneux.

II. LEGAL STANDARD

In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *See Jenkins v. McKeithen*, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969). The Court may dismiss a claim under Rule 12(b)(6) “only if the pleading does not plausibly suggest an entitlement to relief.” *Illaraza v. HOVENSA, LLC*, 2010 U.S. Dist. LEXIS 56212, at *4 (D.V.I. 2010)

Nevertheless, a Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a pleading. Fed. R. Civ. P. 12(b)(6). The starting point in analyzing a pleading is Rule 8(a), which requires that a pleading consist of “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). For a pleading to withstand a 12(b)(6) motion, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹ The pleading need merely provide “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Illaraza, supra*. The “plausibility” standard is not a ‘probability requirement.’ *Id.* By the same token, *Twombly* and its progeny do not require a plaintiff to plead in detail all of the facts upon which it bases its claim. The complaint need contain only “enough factual matters to suggest the required elements of the claim or to raise a reasonable expectation that discovery will reveal evidence of those elements.”²

¹ *Sprauve v. CBI Acquisitions, LLC*, 2010 U.S. Dist. LEXIS 92604, *10 (D.V.I. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

² *Island Green LLC v. Querrard*, 2010 U.S. Dist. LEXIS 32340 at 19-20 (D.V.I. 2010),

III. FANCELLI HAS SUFFICIENTLY STATED A CLAIM FOR DECLARATORY JUDGMENT

A declaratory judgment is a statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. *Hill v. DeJongh*, 2012 V.I. LEXIS 11 (citing *Tip Top Constr. v. Dep't of Prop. & Procurement*, 41 V.I. 72, 78 (Terr. Ct. 1999)). Pursuant to 5 V.I.C. § 1261:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Furthermore, 5 V.I.C. § 1262 allows:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

“When deciding an action for declaratory judgment, a trial court must declare the parties’ respective rights and obligations.” *Hill v. DeJongh*, 2012 V.I. LEXIS 11 (citing *Williams v. Blyden*, 45 V.I. 90, 93 (Terr. Ct. 2002)).

The Court has determined that Plaintiffs are third-party beneficiaries to a woefully limited purchase order by and between Fancelli and Molyneux. Here, Fancelli seeks declaratory judgment that would establish its legal rights under the written contracts that are specifically identified in its cross-claims. Fancelli states that Molyneux issued purchase orders “for the

quoting Phillips v. County of Allegheny, 515 F.3d 224, 234 (3rd Cir. 2008) (Internal quotation marks omitted).

fabrication of work to the specifications as outlined therein.” Fancelli contends that the purchase order (which were attached as Defendant’s Exhibit 1) defined the “limited scope of work” as well as the materials that were to be used. Fancelli’s Answer at ¶ 24. Fancelli also contends that it performed all of its contractual obligations that were outlined in the purchase orders and that Molyneux specifically acknowledged that Fancelli had completed all of its obligations under the written contract. Fancelli’s Answer at ¶¶ 25-26, 31. In point of fact, Plaintiffs, through the specific agent they designated, also accepted Fancelli’s work, but for three exceedingly minor issues that were, themselves, corrected. Based on these factual allegations, Fancelli seeks declaratory judgment that: (1) Fancelli satisfied its written contractual obligations, if any, to Molyneux, terminating any claim of further benefit to Plaintiffs and Molyneux as a matter of law and fact; (2) Fancelli has been released by Defendant Molyneux and Plaintiffs a matter of law and fact; (3) Molyneux and Plaintiffs have accepted the work of Defendant without protest as a matter of law and fact; and (4) Fancelli is entitled to dismissal of this action upon release and/or accord and satisfaction and or the doctrine of “accounts stated” without protest. Fancelli’s Answer at ¶ 38.

The factual allegations in the cross-claim sufficiently establish a claim for declaratory judgment. The Court’s determination of Fancelli’s status under the written contract between Fancelli and Molyneux will establish whether or not Fancelli is liable to Plaintiffs. Fancelli submits that it performed all of its obligations under the contract, which was acknowledged by Molyneux and Plaintiffs. A party may seek declaratory judgment for purposes of determining its obligations under a written contract. See e.g. *Jacobs Constructors, Inc. v. NPS Energy Services, Inc.*, 264 F.3d 365, 375 (3d Cir. 2001) (granting summary judgment in declaratory

judgment action on issue of whether or not defendant fulfilled its obligation under the contract terms to name plaintiff as an additional insured); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999)(granting summary judgment on defendant's counterclaim seeking declaratory judgment that it was not liable under terms of written contract). Accordingly, Fancelli has sufficiently stated a claim for declaratory judgment in its cross-claim against Molyneux.

IV. FANCELLI HAS SUFFICIENTLY STATED A CLAIM FOR CONTRIBUTION AND INDEMNITY

The Virgin Islands Supreme Court has acknowledged and adopted the provisions of the Restatement (Third) of Torts: Apportionment of Liability, which represents the current majority rule, for the substantive requirements for common law contribution and indemnification. *Manbodh v. Hess Oil V. I. Corp.*, 47 V.I. 375, 395 (2006). Under Restatement (Third) of Torts § 22, a party is entitled to recover indemnity if: (1) the indemnitor has agreed by contract to indemnify the indemnitee, or (2) The indemnitee was not liable except vicariously for the tort of the indemnitor.

Implied contractual indemnity may arise when one party incurs a liability the other party should discharge by virtue of the nature of the relationship between the two parties. *Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346, 350 (2d Cir. 1986). The nature of the relationship between the parties gives rise to the right of implied indemnity. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956), superseded by statute as stated in *Ducrepont v. Baton Rouge Marine Enters., Inc.*, 666 F. Supp. 882 (1987); See also *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513,

946 P.2d 760 (1997) (a claim for implied contractual indemnity arises when one party incurs a liability the other party should rightfully discharge). Implied indemnity obligations will be enforced when the obligation is a necessary element in the parties' relationship or where fairness "demands that the burden of paying for the loss be shifted to the party whose fault or responsibility is qualitatively different from the other parties." *Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 218 (3d Cir. 2003)(citing *Velsicol Chem Corp. v. Rowe*, 543 S.W. 2d 337, 339 (Tenn. 1976)).

Here, Fancelli entered into a contract with Molyneux for the fabrication of cabinetry that was designed by Molyneux, based on its discussions with Plaintiffs. Molyneux issued its purchase order to Fancelli, based on Molyneux's specifications. Fancelli subsequently constructed the cabinetry in accordance with the purchase order, which was accepted by Molyneux. As a matter of law, Fancelli contends that Molyneux's specific written acknowledgement served as a complete release of all of Fancelli's obligations under the contract and thereby any that Plaintiffs could have raised. Based on the specific relationship between Fancelli and Molyneux, and the specific transactions between these two parties that are described in the cross-claim, Fancelli has sufficiently stated a claim for indemnity against Molyneux.

V. FANCELLI HAS STATED A CLAIM FOR CONTRIBUTION

A party is entitled to contribution "when two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other." *Restatement (3d) Tort § 23*. Fancelli acknowledges that contribution and indemnity are mutually exclusive remedies. However, a party "may seek both indemnity and contribution as

alternative theories of recovery. *Id. at cmt. d.* Here, to the extent that Fancelli may be found liable for the purported condition of Plaintiffs' cabinetry, Fancelli is entitled to seek contribution from Molyneux on the basis that Molyneux approved the work before it was shipped to Plaintiffs. Fancelli's Answer at ¶¶ 25-26. It is in the interest of judicial economy, especially in considering the myriad discovery issues presented in the absence of Molyneux as a party, to conclude all issues between all parties in this action.

VI. FANCELLI OPPOSES MOLYNEUX'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Molyneux was added as a Nominal Defendant in Plaintiffs' Second Amended Complaint in compliance with the Court's order finding that Molyneux was a necessary party. Second Amended Complaint ¶ 4. For reasons that were fully explored above, Fancelli submits that Molyneux's Motion to Deny the Second Amended Complaint should be denied. Molyneux is a crucial party to this matter and Fancelli will be prejudiced if Molyneux is dismissed from this action.

Alternatively, the Second Amended Complaint should be dismissed as against both Defendants Fancelli and Molyneux, but not as to either of them.

VII. CONCLUSION

Based on the foregoing, and taking the factual statements of Fancelli's Cross-Claim as true and in a light most favorable to Fancelli, it is clear that Fancelli has pleaded sufficient facts that raise a right to relief above the speculative level for each count of the Cross-Claim. As such, the Court should deny Molyneux's Motion to Dismiss the Cross-Claims in its entirety. In addition, Fancelli respectfully submits that Molyneux's Motion to Dismiss the Second Amended

Complaint should be denied in its entirety based on this Court's finding, as well as Fancelli's contentions that Molyneux is a necessary party to this litigation.

Dated this 10th day of September, 2012.

Respectfully submitted,



Treston E. Moore, Esquire
V.I. Bar No. 10
[REDACTED] Esquire
V.I. Bar No. 1157
MOORE DODSON & RUSSELL, P.C.
Attorneys for Defendant
5035 Norre Gade, P.O. Box 310
St. Thomas, VI 00804-0310
PHONE: (340) 777-5490
FAX: (340) 777-5498
EMAIL: tresmoore@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2012, 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 and A. Jeffrey Weiss, Esq., 6934 Vessup Lane, St. Thomas, VI 00802.

