

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IRVIN POWELL,)	
)	
Plaintiff,)	CIVIL CASE NO. SX-10-CV-081
)	
vs.)	ACTION FOR DAMAGES
)	
FAM PROTECTIVE SERVICES, INC.,)	
)	2019 VI Super 37
Defendant.)	

**MEMORANDUM OPINION and ORDER GRANTING MOTION TO PERMIT
INTERLOCUTORY APPEAL**

¶1 Before the Court is the Parties' March 5, 2019 Joint Motion to Amend Order to Provide for Interlocutory Appeal, filed pursuant to 4 V.I.C. § 33(c) and V.I. R. App. P. 6(a).¹ By Defendant's Objection to Joint Motion to Amend Order to Provide for Interlocutory Appeal, filed March 6, 2019, Defendant stated that it does not oppose the interlocutory appeal.² The Joint Motion arises from the Court's denial of Plaintiff's Motion to Reconsider Grant of Defendant's Motion to Amend, filed October 31, 2018, which was denied from the bench at the February 28, 2019 Final Pretrial Conference, and memorialized by Order entered March 1, 2019. Because the Court is of the opinion that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of litigation, the Parties' Joint Motion will be granted.

BACKGROUND

¶2 Plaintiff's Complaint was filed by Plaintiff's former counsel on March 22, 2010 alleging, among other things, that "[t]he conduct of Defendant constitutes a violation of 24 V.I.C. § 76, the Virgin Islands Wrongful Discharge Statute [WDA]." Complaint ¶ 12. Defendant's Notice of

¹ The Joint Motion was signed and filed by Plaintiff's counsel alone, stating that Defendant's counsel "at the status conference held February 28, 2019, verbally stated that it joins Plaintiff's motion seeking certification for interlocutory appeal." Joint Motion, n.1.

² Defendant's Objection states that "Counsel never received or reviewed the 'Joint Motion' to Amend Order to Provide for Interlocutory Appeal before it was filed with the Court." Nevertheless, "Defendant has no objection to an Amended Order for Interlocutory Appeal because it may materially advance the ultimate termination of expensive litigation which Defendant cannot afford." Defendant's Objection, at 1 (emphasis in original).

Appearance and its initial Answer were filed October 4, 2010.³ By its Answer, Defendant responded to the allegation that its conduct violated the WDA, as follows: “Denied.” Answer, ¶ 12. Defendant also included 16 Affirmative Defenses, including: “¶ 13. Plaintiff has committed fraud against Defendant and is therefore not entitled to judgment against Defendant. ¶ 14. Plaintiff was continually absent from his employment with Defendant.”

¶3 Defendant’s First Amended Answer, the permitted filing of which provides the basis for the requested interlocutory appeal, supplements the Affirmative Defenses set out in the original Answer, reciting virtually verbatim eight of the nine substantive grounds for permissible termination of an employee under the WDA, among the 21 Affirmative Defenses listed.

¶4 By Scheduling Order entered April 29, 2011, all fact discovery was to be concluded by August 31, 2011. The date for the completion of fact discovery was extended to November 30, 2011 by Scheduling Order entered (after the fact) on February 16, 2012. Despite stipulations of the Parties to further extend discovery completion dates by filings of April 23, 2012 and May 31, 2012, submitted proposed orders were not entered.

¶5 By filings of January 9, 2012 and February 9, 2012, respectively, Defendant provided responses to Plaintiff’s First Set of Interrogatories and to Plaintiff’s Request for Production of Documents. Defendant’s Voluntary Disclosures, pursuant to Rule 26(a), were filed February 9, 2012. By filings of July 6, 2012 and July 11, 2012, Defendant noted supplementation of its responses to Plaintiff’s First Set of Interrogatories and to Plaintiff’s Request for Production of Documents. On January 29, 2018 and again on February 15, 2018, Defendant filed its Supplemental Responses to Plaintiff’s Request for Production of Documents.⁴

³ For reasons unclear from the record, Plaintiff’s Motion for Entry of Default was granted by Order of the Clerk entered October 27, 2010. Thereafter, Defendant refiled its Answer on November 3, 2010 and again on January 20, 2011. Defendant’s Motion to Set Aside Entry of Default was granted by Order entered April 29, 2011.

⁴ In its March 19, 2018 Opposition to Plaintiff’s March 9, 2018 Motion to Prohibit Introduction of Certain Documents at Trial, Defendant states that the same documents had previously been submitted to Plaintiff’s former counsel “almost six (6) years ago on May 31, 2012, July 5, 2012 and at Defendant’s 30(b)(6) deposition on July 6, 2012. Out [of] an abundance of caution, Defendant resubmitted the Supplemental Responses in February 2018, since Ms. Rohn was not representing Plaintiff in 2012.” Opposition to Plaintiff’s Motion to Prohibit Introduction of Certain Documents at Trial, at 1.

¶6 The Rule 30(b)(6) deposition of Defendant was rescheduled for July 6, 2012 by Second Amended Notice, filed June 25, 2012, requiring the person designated to testify on Defendant's behalf to be knowledgeable with regard to a litany of facts, information and documentation described over five pages in 31 numbered paragraphs relative to the allegations of Plaintiff's Complaint, including "All facts to support the Defendant's denial of any of Plaintiff's allegations in his Complaint." Second Amended Notice of 30(b)(6) Deposition of Defendant FAM Protective Services, Inc. ¶ 25.

¶7 The Court's file reflects no activity of any type by either Party from July 2012 preceding reassignment of the matter to the undersigned by Notice entered April 19, 2014. Status Conference scheduled by Order entered September 18, 2014 was continued to January 15, 2015 by Order entered November 17, 2014. Neither counsel for Plaintiff nor counsel for Defendant appeared at the January 15, 2015 Status Conference. Following March 26, 2015 Status Conference, pursuant to the Parties' Stipulation, Scheduling Order was entered April 21, 2015 requiring the completion of all factual discovery by August 30, 2015. The date for the completion of factual discovery was extended to February 15, 2016, pursuant to agreement of the Parties, by Scheduling Order entered October 1, 2015.

¶8 By Order entered October 27, 2015, Defendant's counsel was granted leave to withdraw, conditioned upon his filing proof of service on Defendant and new counsel for Defendant noting an appearance within 30 days. To date, counsel for Defendant has filed no proof of service of the Order granting counsel's withdrawal and no other counsel has appeared on behalf of Defendant. As such, Jeffrey B.C. Moorhead, Esq. remains counsel for Defendant.

¶9 By Order entered November 22, 2016, all discovery was to be completed within 45 days. The case was thereafter referred to mediation which failed to resolve the dispute and, following the passing of Hurricanes Irma and Maria, trial was rescheduled for April 16, 2018. Subsequently, on Defendant's motions, the trial date was continued initially to August 20, 2018, then to November 12, 2018, and finally to March 18, 2019. That trial date will be continued without new date pending the Supreme Court's resolution of the interlocutory appeal permitted by this Order.

¶10 In anticipation of the April 2018 trial date, the Parties were required to complete and file their proposed Rule 16.1 Final Pretrial Order. For reasons of timing and the inability of counsel to cooperate sufficiently to file jointly, Defendant filed its Defendant's Portion of Joint Final Pretrial Order on March 21, 2018. Therein, Defendant stated: "Defendant will amend his Answer/Affirmative Defenses. A copy of the First Amended Answer is attached...."⁵ No motion to amend its pleading accompanied Defendant's filing, and Plaintiff offered no objection. Defendant filed its Motion to File First Amended Answer on October 22, 2018, the day prior to the scheduled Final Pretrial Conference. At that conference, over Plaintiff's oral objection, the Court granted Defendant's motion to amend, continued the trial date and permitted the supplemental depositions of two of Defendant's fact witnesses: its principal and a co-employee of Plaintiff. Plaintiff's Motion to Reconsider Grant of Defendant's Motion to Amend was filed October 31, 2018, the denial of which gives rise to the Joint Motion seeking interlocutory appeal.

¶11 Although not cited as authority, Defendant's Motion to Amend was filed pursuant to V.I. R. Civ. P. 15(a)(2), by which "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." The Court considered and granted Defendant's Motion at the conference, conducted the day following its filing, over Plaintiff's oral objection. Despite Plaintiff's protests, the Court found no prejudice to Plaintiff in permitting the amendment which had been presented to Plaintiff and filed with the Court, although without accompanying motion, seven months earlier. Extensive discovery had been conducted by the Parties over the eight years the case was pending, including discovery specifically requiring Defendant to provide the factual basis for its denial of Plaintiff's WDA claim. The Court also permitted Plaintiff to conduct limited additional discovery following the filing of the First Amended Answer if deemed necessary.

¶12 In his Motion to Reconsider, Plaintiff reiterated his claims of prejudice which the Court found unpersuasive. In light of the opportunity of the Parties to engage in full discovery over the course of the litigation; the lack of new issues presented by the amendment; and the opportunity

⁵ Defendant's Portion of Joint Final Pretrial Order ¶ 5.

to engage in further limited discovery prior to trial, leave to amend was deemed proper in the interests of justice.

¶13 It is the other primary allegation within Plaintiff's Motion to Reconsider that is deemed to be a controlling question of law in this litigation concerning which there is a substantial ground for difference of opinion, the resolution of which may materially advance the ultimate termination of this case. Plaintiff cites Supreme Court jurisprudence for the proposition that Defendant's failure to specifically list as affirmative defenses in its initial Answer the specifically enumerated grounds upon which an employer may dismiss an employee, set out in 24 V.I.C. § 76(a)-(c), constitutes a waiver as to those statutory defenses.

¶14 "[I]n order to state a cause of action under the VIWDA, a plaintiff need only allege that an employer discharged him. It then becomes the employer's burden to plead any of the applicable grounds for a valid discharge set forth in 24 V.I.C. § 76(a)-(c) as affirmative defenses." *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511, 520 (V.I. 2015), citing *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 544 (V.I. 2015). In this case, Plaintiff's Complaint alleged a violation of the WDA, an allegation Defendant specifically denied in its initial Answer.⁶ In denying Plaintiff's Motion for Reconsideration, the Court determined that Defendant's general denial to the allegation of a violation of the WDA put in play all of the statutorily acceptable grounds for termination, consistent with Virgin Islands "notice pleading" standards. *See* V.I. R. Civ. P. 8(a).

¶15 The Supreme Court has determined that the language of Rule 8(a) "is calculated to apply an approach that *declines* to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief." *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017) (quoting Advisory Committee Reporter's Note) (emphasis in original). Hence, a plaintiff's complaint is sufficient "so long as it adequately alleges facts that put an accused party on notice of claims brought against it." *Id.* (citation omitted). It would be incongruous to hold an

⁶ In addition to its general denial, Defendant's initial Affirmative Defenses alleged Plaintiff's fraud against Defendant and chronic absenteeism, language that may be deemed sufficient to set forth grounds for permissible termination under 24 V.I.C. § 76(a)(8) and (6) respectively.

answering defendant to a higher pleading standard than the notice pleading required in a plaintiff's complaint.

¶16 Here, Defendant's general denial of Plaintiff's allegations of a violation of the WDA was followed by Plaintiff's substantial discovery of Defendant over several years, including an examination as to all facts that support Defendant's denial of wrongful discharge and its allegation that Plaintiff's termination was lawful. This is not a case where Defendant has been "permitted to lie behind a log and ambush a plaintiff with an unexpected defense." *Coastal Air Transport v. Royer*, 64 V.I. 645, 657 (V.I. 2016) (citations omitted). Rather, the Court determined that all defenses under the WDA were preserved by Defendant's initial Answer, fully subject to discovery, permitting the case to be determined by the finder of fact on the merits. Otherwise, as Plaintiff forthrightly argues, he would be entitled to verdict directing judgment in his favor following his trial presentation of evidence that he was employed by Defendant and that his employment was terminated. That evidence establishing a presumption of wrongful discharge, could not be challenged if Defendant is deemed to have waived the right to rebut such evidence by its failure to specifically affirmatively plead such defenses, rather than generally denying Plaintiff's allegations. If such were the law of the Virgin Islands, every complaint filed alleging violation of the WDA would be met in each case by a defendant employer's answer including a boilerplate rendition of permissible reasons for termination under 24 V.I.C. § 76(a)-(c).

LEGAL STANDARD

¶17 "Whenever the Superior Court judge, in making a civil action or order not otherwise appealable under this section, is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order." 4 V.I.C § 33 (c).

¶18 Pursuant to V.I. R. App. P. 6(a): "An appeal from an order in a civil action, under 4 V.I.C. § 33(c), containing this statement by a Superior Court judge that such order involves a controlling question of law about which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation, may be sought by filing a petition for permission to appeal with the Clerk of the Supreme Court within 10 days after the entry of such order in the Superior Court with proof of service on all other parties to the action in the lower court. And order as defined in this paragraph may be amended at any time to include the prescribed statement, and permission to appeal may be sought within 14 days after entry of the order as amended.”

¶19 In determining whether an order involves a controlling question of law courts have considered whether the subject matter is “serious to the conduct of the litigation, either practically or legally.” *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.), cert. denied, 419 U.S. 885 (1974). “A question of law is deemed to be ‘controlling’ if reversal of the order would terminate, the action or a determination of the issue on appeal would materially affect the outcome of the litigation.” *Charleswell v. Chase Manhattan Bank, NA.*, 277 F.R.D. 277, 284 (D.V.I. 2011) (citing *In re Enron Corp.*, No. M-47, 2007 WL 120458, at *2 (S.D.N.Y. 2007)).

DISCUSSION

¶20 The question whether Defendant was required to specifically plead as an Affirmative Defense in its initial Answer each applicable permissible ground for discharge under 24 V.I.C. §76(a)-(c) or be deemed to have waived such defense is without controlling precedent. Rule 8(a) and case law make clear that the Virgin Islands is a notice pleading jurisdiction with regard to plaintiffs’ complaints. Case law further clearly establishes that affirmative defenses are waived if not set out in a defendant’s initial pleading. The answer to the question whether each permissible ground for termination under the WDA must be specifically pled in the initial responsive pleading, or be deemed waived, will materially affect the outcome of this litigation. As such, the Court’s Order denying Plaintiff’s Motion to Reconsider involves a controlling question of law concerning which there is substantial ground for difference of opinion. An immediate appeal of this issue may materially advance the ultimate termination of this litigation. Accordingly, the Joint Motion will be granted, and Plaintiff may petition the Clerk of the Supreme Court for permission to appeal the Order denying Plaintiff’s Motion to Reconsider Grant of Defendant’s Motion to Amend.

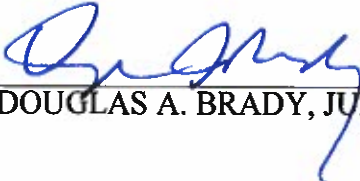
In light of the foregoing, it is hereby

ORDERED that the Parties' Joint Motion to Amend Order to Provide for Interlocutory Appeal is GRANTED. It is further

ORDERED that the Order entered March 1, 2019 denying Plaintiff's Motion to Reconsider Grant of Defendant's Motion to Amend is amended by the inclusion of the following statement: "This Order involves a controlling question of law about which there is substantial ground for difference of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation." It is further

ORDERED that the jury selection and trial of this matter, scheduled for March 18, 2019, are continued without new date pending the conclusion of the permitted appeal.

DATED: March 13, 2019.


DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

By:


Court Clerk Supervisor 3/13/19

DISTRIBUTION LIST:

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