

FOR PUBLICATION

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

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|-------------------------------|---|--------------------|
| RICHARD J. CORNELL, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil No. 2006-100 |
| |) | |
| THE PIRATES' PENSION BOARD OF |) | |
| DIRECTORS; EQUIVEST ST. |) | |
| THOMAS, INC.; FAIRFIELD |) | |
| RESORTS, INC.; and ZIMMERMAN, |) | |
| ZIEGLER & CHAMBERLAIN, |) | |
| |) | |
| Defendants. |) | |
| |) | |

ATTORNEYS:

Pamela L. Colon, Esq.
St. Thomas, U.S.V.I.
For the plaintiff.

Chad C. Messier, Esq.
St. Thomas, U.S.V.I.
*For defendant Equivest St. Thomas, Inc. and Fairfield
Resorts, Inc.*

Richard H. Dollison, Esq.
St. Thomas, U.S.V.I.
For defendant The Pirates' Pension Board of Directors.

Douglas L. Capdeville, Esq.
St. Thomas, U.S.V.I.
For defendant Zimmerman, Ziegler & Chamberlain.

ORDER

GOMEZ, C.J.

The plaintiff, Richard J. Cornell ("Cornell"), commenced this matter in the Superior Court of the Virgin Islands in June, 2006. Defendant Equivest St. Thomas, Inc. ("Equivest")

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thereafter removed this matter to this Court. Equivest subsequently filed an answer, a cross-claim against defendant Pirates' Pension Board of Directors (the "Board"), and a counterclaim against Cornell. The Board filed an answer but no counterclaim. Defendant Zimmerman, Ziegler & Chamberlain ("Zimmerman") did not file an answer or a counterclaim.

At some point during the pendency of this matter, Equivest filed a Chapter 11 bankruptcy petition.¹ In March, 2008, Equivest filed a motion to refer this matter to the bankruptcy court. The Court ordered the parties to brief whether the Bankruptcy Code's automatic stay provision applied to Equivest. Equivest and Zimmerman filed briefs. The Court thereafter stayed this matter with respect to Equivest. The remaining parties were to proceed to trial on November 30, 2009.

Cornell has since filed a motion for voluntary dismissal of this matter with prejudice, with all parties to bear their own attorneys' fees and costs, as to all defendants pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. That rule provides, in pertinent part, that

an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the

¹ Equivest did not file a notice of bankruptcy with the Court after filing its bankruptcy petition.

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defendant's objection only if the counterclaim can remain pending for independent adjudication.

Fed. R. Civ. P. 41(a)(2). It is within the Court's discretion whether to grant a Rule 41(a)(2) motion. See *Ferguson v. Eakle*, 492 F.2d 26, 28 (3d Cir. 1974). In ruling on such a motion, the Court must "decide the presence or extent of any prejudice to the defendant by the draconian measure of dismissing plaintiff's complaint." *Id.* at 29.

After Cornell filed its motion for voluntary dismissal, Cornell and Zimmerman jointly filed a signed stipulation of dismissal with prejudice. By Order of August 11, 2008, the Court approved that stipulation and dismissed Cornell's claims against Zimmerman with prejudice. Thus, only Equivest and the Board remain as defendants in this matter.

The Board has not filed an objection or any other pleading in response to Cornell's motion for voluntary dismissal. Because the Board has not filed a counterclaim, the Court perceives no prejudice to the Board if Cornell's motion is granted. The Court will therefore dismiss Cornell's claims against the Board.

Equivest has filed a response to Cornell's motion. In its response, Equivest states that it does not oppose Cornell's motion. However, Equivest requests that the dismissal of this matter be conditioned on Cornell's reimbursement to Equivest of attorneys' fees and costs Equivest asserts it incurred in

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preparing a motion Equivest filed in the bankruptcy court.² Equivest states that Cornell filed his motion to dismiss in this Court in reaction to Equivest's motion in the bankruptcy court. Equivest points to Rule 41(a)(2)'s provision that a voluntary dismissal may be granted "on terms that the court considers proper." See Fed. R. Civ. P. 41(a)(2).

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides for the recovery of attorneys' fees and costs "to the prevailing party." See Fed. R. Civ. P. 54(d)(1). As a general rule, "a defendant may not recover fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances." See *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997). The rationale for this rule is that "when a plaintiff dismisses an action with prejudice, attorneys' fees are usually not a proper condition of dismissal because the defendant cannot be made to defend again." *Id.* (citing *Cauley v. Wilson*, 754 F.2d 769, 771-72 (7th Cir. 1985)).

In this matter, the Court fails to see any exceptional circumstances raised by Equivest's motion before the bankruptcy division. The Court, in its discretion, therefore declines Equivest's request for attorneys' fees and costs. Furthermore, because Equivest does not oppose Cornell's motion, the Court

² That motion, which Equivest has attached to its response, is entitled, "Debtor's Motion to Enforce Plan Provisions."

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likewise sees no prejudice to Equivest if this matter is dismissed with prejudice.

The premises considered, it is hereby
ORDERED that the motion for voluntary dismissal is **GRANTED**;
it is further

ORDERED that this matter is **DISMISSED** with prejudice, with all parties to bear their own attorneys' fees and costs; and it is further

ORDERED that the Clerk of Court shall **CLOSE** this matter.³

S_____
CURTIS V. GÓMEZ
Chief Judge

³ While Equivest is in bankruptcy, "the automatic stay does not divest all other courts of jurisdiction to hear every claim that is in any way related to the bankruptcy proceeding. *Arnold v. Garlock Inc.*, 288 F.3d 234, 236 (5th Cir. 2002). "Further, th[e] district courts retain jurisdiction to determine the applicability of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay." *Id.* (citations omitted); see also *Dennis v. A.H. Robins Co., Inc.*, 860 F.2d 871, 872 (8th Cir. 1988) (reasoning that a district court, despite a stay, may dismiss a case for failure to comply with court rules to decongest its docket, among other things).

The Court may therefore dismiss Equivest pursuant to Rule 41(a)(2) despite the automatic stay. See, e.g., *Villarreal v. City of Laredo*, Civ. No. 03-11, 2007 U.S. Dist. LEXIS 73584, at *16-17 (S.D. Tex. Sept. 28, 2007) (considering a Rule 41(a)(2) motion notwithstanding an automatic stay).