

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

HOLLAND CONSTRUCTION, INC.,)
)
 Plaintiff,)
)
 v.) Civil No. 2007-127
)
FREDERICK KOPKO, JR., and)
MARY ELIZABETH KOPKO,)
)
 Defendants.)
_____)

ATTORNEYS:

James M. Derr, Esq.
St. Thomas, U.S.V.I.
For the plaintiff.

Alan D. Smith, Esq.
St. Thomas, U.S.V.I.
For the defendants.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court is the motion for reconsideration of the defendants, Frederick Kopko, Jr. and Mary Elizabeth Kopko (the "Kopkos").

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff in this matter, Holland Construction, Inc. ("Holland"), is a corporation organized under the laws of the U.S. Virgin Islands and with its principal place of business on St. Thomas, U.S. Virgin Islands. According to the Complaint, the Kopkos are citizens of the State of Illinois. Holland alleges

that it contracted with the Kopkos to complete a partially-constructed house on certain real property the Kopkos own on St. Thomas. Holland further alleges that it substantially completed the house, and that the Kopkos thereafter unilaterally terminated the contract. Consequently, Holland initiated this two-count action for (1) amounts due under the contract and (2) foreclosure of a construction lien. Holland alleges that this Court has jurisdiction pursuant to 28 U.S.C. § 1332.¹

The Kopkos moved to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.² That motion was denied.³ The Kopkos now seek reconsideration of the Court's Order denying their motion to dismiss.

II. ANALYSIS

Motions for reconsideration are governed by Local Rule of Civil Procedure 7.4, which provides:

A party may file a motion asking a judge or magistrate judge to reconsider an order or decision made by that judge or magistrate judge. Such motion shall be filed within ten (10) days after the entry of

¹ 28 U.S.C. § 1332 provides, in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between--
(1) Citizens of different States.

² (See Defs.' Mot. to Dismiss, Nov. 13, 2007.)

³ (See Order, Nov. 20, 2007.)

the order or decision unless the time is extended by the court. . . . A motion to reconsider shall be based on: (1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice.

LRCi 7.4 (2000). The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Such motions are not substitutes for appeals, and are not to be used as "a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not." *Bostic v. AT&T of the V.I.*, 312 F. Supp. 2d 731, 733 (D.V.I. 2004). As the *Bostic* court noted, ". . . Local Rule 7.4 affirms the common understanding that reconsideration is an 'extraordinary' remedy not to be sought reflexively or used as a substitute for appeal." *Id.*

The Kopkos do not explicitly assert an intervening change in controlling law. To the extent the Kopkos' arguments could be construed as an attempt to assert the availability of new evidence or the need to correct clear error or prevent manifest injustice, the Court finds those arguments unavailing.

The thrust of the Kopkos argument is that Holland, in response to the Kopkos' motion to dismiss, filed with the Court "bogus invoices that on their face are fictitious and false."

(Defs.' Mem. in Supp. of Mot. for Recons. 1.) Specifically, the Kopkos maintain that Holland has done no work on the Kopkos' property since June, 2007. The Kopkos further contend that those invoices "reflect[] an additional 10% mark up for overhead on invoices previously issued and paid. The newly created charges are not even time and material charges" (*Id.* at 2.) The Kopkos further assert that the charges in the invoices "were only added after the motion to dismiss, obviously done by [Holland] and his counsel only to mislead this Court as to the amount in controversy."⁴ (*Id.*) Because the invoices are fraudulent, argue

⁴ The Kopkos also argue that they "were not allowed an opportunity to reply" to Holland's response to the Kopkos' motion to dismiss. (Defs.' Mem. in Supp. of Mot. for Recons. 3.) In support of that argument, the Kopkos invoke Local Rule of Civil Procedure 7.1(g), which provides:

Only a motion, a response in opposition, and a reply may be served on counsel and filed with the court; further response or reply may be made only by leave of court obtained before filing (counsel will be sanctioned for violation of this limitation).

LRCi 7.1(g). The Kopkos state that the Court ruled on their motion to dismiss before ten days had elapsed after Holland filed his response. Thus, assert the Kopkos, given an opportunity to file a reply, "this Court would have been apprised of the fraudulent documents." (Defs.' Mem. in Supp. of Mot. for Recons. 4.) To the extent the Kopkos argue that they "had no opportunity" to address Holland's response, the Kopkos ignore Local Rule of Civil Procedure 7.1(f), which provides, in pertinent part:

Nothing herein shall prohibit a district judge or magistrate judge from ruling without a response or reply when deemed appropriate.

the Kopkos, Holland has not met his burden of proving by a preponderance of the evidence that this Court has jurisdiction in this matter.⁵ That argument finds little support.

The Third Circuit Court of Appeals has differentiated between 12(b)(1) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject-matter jurisdiction in fact, apart from the pleadings. See *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977). The second type of 12(b)(1) motion, the factual attack, may occur only after the allegations of the complaint have been controverted. *Id.* at 892 n.17 ("A factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted."). Since no answer has been filed in this matter, the Court may consider the Kopkos' 12(b)(1) motion only as a facial attack. For purposes of the motion, the

LRCi 7.1(f).

⁵ Attached to the Kopkos' motion for reconsideration are two affidavits. The first affidavit is signed by defendant Frederick Kopko, Jr. That affidavit states that the Kopkos last received an invoice from Holland in February, 2007. The affidavit further states that the contract between the Kopkos and Holland was for time and materials only. The second affidavit attached to the Kopkos' motion is signed by the Kopkos' architect. That affidavit states that the last invoice for work on the Kopkos' property was received in February, 2007. The affidavit further states that on November 16, 2007, Holland told the architect by telephone of new charges, and faxed an invoice with those new charges on November 21, 2007 (the "November Invoice").

Court thus takes all allegations of the Complaint as true. See *id.* at 891.

Here, the Complaint alleges that the amount in controversy exceeds the statutory minimum. Moreover, attached to Holland's Opposition to Motion to Dismiss are two invoices. Those invoices enumerate services Holland claims to have provided to the Kopkos. Each service is accompanied by a numerical charge. Together, those charges amount to \$83,075.74. That amount exceeds the amount-in-controversy threshold. Finally, Holland has filed a signed declaration stating that the charges in the invoices reflect commissions that he charged for work actually performed as part of his agreement with the Kopkos.⁶

Subject-matter jurisdiction is thus present on the face of the Complaint and supported by competent and preponderate evidence. See, e.g., *Megan v. Goldman*, Civ. No. 98-1825, 1998 U.S. Dist. LEXIS 8798, at *3-4 (E.D. Pa. June 5, 1998) (finding that "[a]t this stage of the proceedings, it is not clear to a legal certainty that plaintiff's claim is for less than \$75,000" where the plaintiff provided an invoice showing that the

⁶ Holland specifically states that the November Invoice reflects "unbilled commissions" that Holland had intended to waive if Kopko timely paid his final bill. (Holland Decl. ¶ 4, Dec. 4, 2007.) Holland further states that "[w]hen [the Kopkos] refused to pay that bill I had the [November Invoice] prepared reflecting commissions for services and work actually performed for the Kopkos." (*Id.*)

defendants owed the plaintiff in excess of \$162,818). The Kopkos' argument is tantamount to a factual attack on subject-matter jurisdiction in its motion, brief and accompanying affidavits. As noted above, such a motion is premature before the filing of an answer.⁷ See, e.g., *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.*, 110 F.R.D. 446, 447 (W.D Pa. 1986).

The Kopkos have failed to meet their burden for reconsideration because the arguments they now raise fail to identify any intervening change in the law, new evidence, or clear error. See, e.g., *Devcon Int'l Corp. v. Reliance Ins. Co.*, Civ. No. 2001-201, 2007 U.S. Dist. LEXIS 84283, at *9-10 (D.V.I. Nov. 9, 2007).

For the reasons stated above, it is hereby

ORDERED that the motion is **DENIED**.

Dated: December 7, 2007

S\ _____
CURTIS V. GÓMEZ
Chief Judge

copy: Hon. Geoffrey W. Barnard
James M. Derr, Esq.

⁷ While the Kopkos could file another 12(b)(1) motion after serving an answer, the Court believes that the issue may be more appropriate for summary judgment.

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