

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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TNS DIAMONDS, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-2388
	:	
UNITED STATES POSTAL SERVICE,	:	
DAVID B. VINCENT and ROBERT	:	
APLIN,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.**

**MARCH 3, 2005**

Presently before this Court is Defendant's, United States Postal Service ("USPS"), Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) or for Summary Judgment. For the following reasons, USPS's Motion to Dismiss will be granted and the claims against USPS will be dismissed without prejudice for failure to exhaust administrative remedies. Additionally, as this Court lacks subject matter jurisdiction over the claims against the remaining Defendants, David B. Vincent ("Vincent") and Robert Aplin ("Aplin"), the claims against them will be dismissed without prejudice.

**I. BACKGROUND**

Plaintiff, TNS Diamonds, Inc. ("TNS") is a retail jeweler. TNS conducts some of its business through telephone orders. The facts of this case arise from two telephone orders. In 2003, two separate telephone orders were placed by individuals identifying themselves as Aplin and Vincent. The person identifying himself as Aplin ordered jewelry totaling \$1,975. This

person provided a shipping address of 12472 Lake Under Hill Road, Suite 266, Orlando, Florida, 32828. This address turned out to be a Mailboxes, Etc. facility. The person identifying himself as Vincent ordered jewelry totaling \$2,960. This person provided an address of 402 Morse Avenue, 1<sup>st</sup> floor, Ridgefield, New Jersey 07657. Both items were paid by credit card, and TNS mailed both packages through the USPS, by registered mail, restricted delivery with postal insurance. Ultimately, TNS received a charge-back from the credit card companies used for the purchases which reversed the charges for both packages. This charge back was because both Aplin and Vincent claimed that they each did not authorize the purchase from TNS and that their credit card had been stolen. TNS has neither received the returned merchandise or the money for the jewelry it mailed.

TNS has brought forth its claims against the USPS asserting that the USPS erred in delivering the two purchases because neither Aplin or Vincent signed for the packages upon delivery.<sup>1</sup> In November, 2003, TNS submitted a claim to the USPS to recover on its insurance on the Aplin package. The USPS denied the claim on February 6, 2004. Subsequently, TNS filed an appeal of that denial to the Claims Appeals in Saint Louis, Missouri on February 19, 2004 and again on March 25, 2004. As of yet, the Claims Appeals has yet to issue a decision on this appeal. Regarding the Vincent package, TNS attempted to submit a claim to recover on its

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<sup>1</sup> The Complaint contains four state law claims. Counts I and II are being brought against the USPS and Vincent. Count I is for breach of contract against the USPS and Vincent whereas Count II is for unjust enrichment against the USPS and Vincent. Count III is for breach of contract against the USPS and Aplin and Count IV is for unjust enrichment against the USPS and Aplin.

insurance of this package on December 12, 2003, but apparently was refused by the USPS.<sup>2</sup> Subsequently, TNS appealed this denial to the Claims Appeals in Saint Louis, Missouri on February 20, 2004 and again on March 25, 2004. As of yet, it appears that there has been no decision from the Claims Appeals on this appeal as well. Having not heard from the Claims Appeals, TNS filed the instant Complaint in this Court on June 1, 2004.

USPS has moved to dismiss TNS's claims against it under Federal Rule of Civil Procedure 12(b)(1) arguing that TNS has failed to exhaust its administrative remedies. In the alternative, USPS argues that TNS's claims against it fail on the merits. For the following reasons, because I find that TNS has failed to exhaust its administrative remedies, I need not reach the merits of TNS's claims.

## **II. DISCUSSION**

At the outset, it is important to state the rationale for this Court's jurisdiction. According to the Complaint, "[j]urisdiction in this court is appropriate pursuant to 28 U.S.C. Section 1339 because the USPS is a defendant."<sup>3</sup> (Compl. ¶ 5). I agree that Section 1339 gives this Court proper subject matter jurisdiction over the Complaint as the USPS is listed as a Defendant.

### **A. CLAIMS AGAINST USPS**

USPS argues that TNS's decision to file the instant Complaint before the Claims Appeals could issue a decision and before TNS filed a final appeal to the Consumer Advocate

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<sup>2</sup> According to TNS, it was advised by a USPS branch employee that it would not process the Vincent claim.

<sup>3</sup> 28 U.S.C. § 1339 states "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service."

constitutes a failure to exhaust the administrative remedies. No party disputes that the Claims Appeals has yet to issue a decision on TNS's appeals or that TNS has failed to file an appeal to the Consumer Advocate. However, TNS argues that the Claims Appeals failure to make a final disposition of the claim within six months after the Aplin and Vincent claims were filed constitutes a final denial of the claim. Additionally, TNS argues that the instant Motion marks the first time USPS has asserted such a defense and thus this Court should not allow USPS to assert such a defense after each party has "spent a significant amount of time on discovery in a case with an amount in controversy of less than \$5,000.00." (Pl.'s Mem. Law Opp'n Def.'s Mot. Dismiss Compl. or Summ. J. and Pl.'s Cross Mot. Summ. J., at 9). I will consider these arguments in turn.

"The USPS is liable only to the extent that it agrees to be liable." Gelbfish v. United States Postal Service, 51 F. Supp. 2d 252, 254 (E.D.N.Y. 1999)(citing Frank Mastoloni & Sons, Inc. v. United States Postal Service, 546 F. Supp. 415, 419 (S.D.N.Y. 1982)). "The extent to which the USPS agrees to be liable is identified in the postal laws and regulations." Id. The Domestic Mail Manual ("DMM") is the relevant postal regulation since it regulates registered mail. See id.

In Gelbfish, the court dismissed a complaint against the USPS for plaintiff's failure to exhaust administrative remedies. Id. at 254. In that case, the court dismissed the complaint because the plaintiff failed to appeal the USPS decision at any time. Id. As in Gelbfish, I find that the relevant sections of the DMM are DMM § S010.4.2 and DMM § S010.4.3. Section S010.4.2 states that a customer may appeal a claim decision by filing a written appeal to the manager of the Claims Appeals in Saint Louis, Missouri. Section S010.4.3 is

entitled “Final USPS Decision” and states that if the manager of the Claims Appeals sustains the denial of a claim, a customer may submit an additional appeal for final review to the Consumer Advocate at the USPS Headquarters. In this case, while TNS filed appeals with the Claims Appeals, there has been no decision on these appeals from the Claims Appeals. Additionally, TNS has not filed any type of appeal to the Consumer Advocate. Thus, there has been no final USPS decision on TNS’s claims and TNS has failed to exhaust its administrative remedies. See Gelbfish, 51 F. Supp. 2d at 255 (dismissing complaint for failure to exhaust administrative remedies because plaintiff failed to appeal the USPS decision to the Claims Appeal or the Consumer Advocate).

TNS offers two arguments in response to its failure to exhaust its administrative remedies. First, TNS argues that the Claims Appeals failure to make a final disposition within six months of the appeal constituted a final denial of the claim pursuant to 28 U.S.C. § 2675(a). Section 2675(a) falls under the Federal Tort Claims Act (“FTCA”) and states that “[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.” 28 U.S.C. § 2675(a). However, I find that TNS’ reliance on Section 2675(a) is inapplicable in this case. Specifically, 28 U.S.C. § 2680(b) under the FTCA bars “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.” Id.; see Hudak v. United States Postal Service, No. 94-0007, 1994 WL 45134, at \*1 (E.D. Pa. Feb. 15, 1994)(stating that Section 2680(b) states that the postal service is immune from any claim arising out of a loss, miscarriage, or negligent transmission of postal matter). As I previously noted, the USPS is only liable to the extent in which it agrees to be liable as identified in the postal laws

and regulations, in this case the DMM.<sup>4</sup> See Gelbfish, 51 F. Supp. 2d at 254. Thus, TNS's reliance on Section 2675(a) is unpersuasive to overcome its failure to exhaust the administrative remedies set forth in the DMM.

The second argument TNS asserts is that the instant Motion marks the first time the USPS has sought to dismiss the Complaint for TNS's failure to exhaust administrative remedies. The implication is that the USPS waived this defense. However, I find this argument unmoving for two reasons. First, in its Answer, the USPS stated that this Court lacked subject matter jurisdiction because TNS failed to comply with the provisions of the DMM. (See Ans. Second Affirmative Defense). Thus, it is clear the USPS never waived this defense. Second, and perhaps more importantly, as the United States Court of Appeals for the Third Circuit has stated "subject matter jurisdiction can never be waived." Duvall v. Elwood, 336 F.3d 228, 230 n.3 (3d Cir. 2003)(citing Okereke v. United States, 307 F.3d 117, 120 n.1 (3d Cir. 2002)). Thus, I find TNS's second argument unmoving.

I find that TNS has failed to exhaust its administrative remedies. As such, this Court lacks jurisdiction as it relates to the claims against USPS. Therefore, I will grant USPS's Motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

## **B. CLAIMS AGAINST APLIN AND VINCENT**

As previously stated, the sole basis for subject matter jurisdiction in the Complaint is under 28 U.S.C. § 1339 because the USPS is a Defendant. However, I have already concluded that the claims against the USPS must be dismissed for failure to exhaust

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<sup>4</sup> No party has come forward with any provision in the DMM similar to the six-month provision found in Section 2675(a) of the FTCA. Additionally, as previously noted, TNS has never appealed to the Consumer Advocate.

administrative remedies. As previously mentioned, all of the claims set forth in the Complaint against Aplin and Vincent are being brought pursuant to state law. See supra note 1. TNS readily admits that the amount in controversy amounts to less than \$5,000.00. Thus, TNS cannot satisfy the amount in controversy requirement necessary to establish diversity jurisdiction. See 28 U.S.C. § 1332(a)(stating that amount in controversy requirement in diversity cases is over \$75,000). Therefore, I will dismiss the claims against Aplin and Vincent without prejudice due to this Court's lack of subject matter jurisdiction over claims against them.

An appropriate Order follows.

