

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ELVIRIER MELCHIOR

Plaintiff)

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)

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vs

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UNIVERSITY OF THE VIRGIN
ISLANDS O/B/O REICHOLD
CENTER FOR THE ARTS

)

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)

Defendant

CASE NO. ST-15-CV-0000473

ACTION FOR: DAMAGES - CIVIL

**NOTICE OF ENTRY OF
MEMORANDUM OPINION &
ORDER**

TO: RYAN C. MEADE, ESQ.
RYAN W. GREENE, ESQ.
JUDGES, MAGISTRATES, LAW CLERKS, IT
ESTRELLA H. GEORGE, ACTING CLERK OF THE
COURT

Please take notice that on May 04, 2016 a(n) MEMORANDUM OPINION
& ORDER dated April 27, 2016 was entered by the Clerk in the above-entitled
matter.

Dated: May 04, 2016

Estrella H. George
Acting Clerk of the Court



CAMEIL A. CLARKE
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ELVIRIER MELCHIOR

Plaintiff,

vs.

**UNIVERSITY OF THE VIRGIN ISLANDS O/B/O
REICHHOLD CENTER FOR THE ARTS**

Defendant.

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) **CASE NO. ST-15-CV-473**
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MEMORANDUM OPINION

Pending before the Court is Defendant University of the Virgin Islands o/b/o Reichhold Center for the Arts' Motion to Dismiss Count I of Plaintiff's Complaint for Failure to State a Claim and Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss. Defendant's Motion to Dismiss will be granted in part as to Plaintiff's request for punitive damages but denied as moot with respect to Count I of the original Complaint for negligence. Additionally, the Court will deny Defendant's requests for attorney's fees and costs, but will grant Defendant's Motion for Extension of Time and extend the deadline for Defendant to answer, move, or otherwise plead in response to Plaintiff's First Amended Complaint.

FACTUAL & PROCEDURAL HISTORY

This matter arises out of a Complaint filed on September 16, 2015, by Plaintiff Elvirier Melchior against Defendant University of the Virgin Islands o/b/o Reichhold Center for the Arts ("Reichhold Center"), wherein Plaintiff seeks damages for injuries she sustained in an accident that occurred on February 7, 2015, while Plaintiff was traversing the Reichhold Center as an

invitee.¹ According to the Complaint, Plaintiff was walking toward her seat at the Reichhold Center when she tripped and fell on a set of stairs that were poorly lit and “lacked an appropriate railing,” causing her to sustain injuries, including an orbital fracture to her right eye.² Plaintiff alleges that at the time of her accident, “the stairs did not have proper lighting (if any), safety signs, warning signs or any other safety measures to enable pedestrians to safely traverse the area, and particularly to let pedestrians know that the stairs were there” and that “[j]ust after Plaintiff fell as she was in severe pain, bleeding and being attended to by her daughter and friends the Defendant’s security stated ‘I told them about putting lights up in this area in the parking lot!’”³ Further, the Complaint alleges that within weeks of Plaintiff’s accident, the Reichhold Center placed “a big spotlight shining to illuminate the subject area where” she fell.⁴ The original Complaint asserts two counts against Defendant Reichhold Center, Count I for negligence and Count II for premises liability, and requests “damages as they may appear” and “punitive damages if warranted by the facts.”⁵

By Order entered on October 19, 2015, the Court granted Defendant’s October 9, 2015, Emergency Motion for Extension of Time to Respond to Complaint and extended the deadline for Defendant to move, answer, or otherwise respond to the Complaint to October 28, 2015. In accordance with this Order, on October 28, 2015, Defendant filed a Motion to Dismiss Count I of Plaintiff’s Complaint for Failure to State a Claim, as well as a Motion for an Extension of Time to

¹ First Am. Compl. ¶¶ 4-5.

² First Am. Compl. ¶¶ 5-8, 10.

³ First Am. Compl. ¶ 7.

⁴ First Am. Compl. ¶¶ 9-10.

⁵ Compl. ¶¶ 14-28 & p. 5.

Answer Counts in Complaint not Subject to Motion to Dismiss. Plaintiff filed a timely Response to Defendant's Motion to Dismiss on December 8, 2015.⁶

On December 8, 2015, Plaintiff also filed a Motion for Leave to File First Amended Complaint, which the Court granted by Order entered on December 18, 2015, that instructed Plaintiff to serve Defendant with a copy of the First Amended Complaint and directed Defendant to respond to the amended Complaint within twenty days of service.⁷ However, on December 22, 2015, Defendant filed an objection in response to Plaintiff's Motion for Leave to File First Amended Complaint.⁸ Defendant also filed its timely Reply to Plaintiff's Response to Defendant's Motion to Dismiss on December 22, 2015.⁹

In accordance with the Court's Order granting her leave to amend, Plaintiff filed her First Amended Complaint on December 29, 2015.¹⁰ Plaintiff's First Amended Complaint removes the count for negligence in its entirety and asserts only one count against Defendant Reichhold Center for premises liability.¹¹ In addition, the First Amended Complaint revises Plaintiff's request for punitive damages by seeking punitive damages "if warranted by the facts adduced in discovery and at the time of the close of the evidence at trial."¹²

⁶ By Order entered on November 5, 2015, Plaintiff was directed to respond to Defendant's Motion to Dismiss and Motion for Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss by November 25, 2015, and Defendant directed to reply by December 7, 2015. However, on November 30, 2015, Plaintiff filed a Motion for Extension of Time to Respond to Defendant's Motion to Dismiss, which the Court granted by Order entered on December 3, 2015. By that Order, the deadline for Plaintiff to respond to Defendant's Motion to Dismiss was extended to December 8, 2015 and the deadline for Defendant to file its Reply was extended to December 22, 2015. *See* December 3, 2015, Order.

⁷ *See* December 18, 2015, Order.

⁸ Def.'s Response to Pl.'s Mot. for Leave to File First Am. Compl., p. 3.

⁹ *See* December 3, 2015, Order.

¹⁰ *See* December 18, 2015, Order.

¹¹ First Am. Compl. ¶¶ 14-22.

¹² First Am. Compl., p. 4.

STANDARD

A. MOTION TO DISMISS.

Under Fed. R. Civ. P. 12(b)(6), a defendant may test the sufficiency of the pleadings against preliminary defenses by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."¹³ The pleading requirements of Fed. R. Civ. P. 8¹⁴ "require a complaint to set forth a plausible claim for relief, thus allowing courts to dismiss, under Rule 12(b)(6), complaints that fail to meet that standard."¹⁵ According to the three-pronged analysis employed by the Supreme Court of the Virgin Islands in reviewing motions to dismiss filed pursuant to FED. R. Civ. P. 12(b)(6):

First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.¹⁶

The Virgin Islands Supreme Court has further instructed that "[t]he plausibility determination is a 'context-based' determination which should be guided by the court's 'judicial experience and

¹³ FED. R. CIV. P. 12(b)(6). FED. R. CIV. P. 12(b)(6) is applicable to the practice and procedure in the Superior Court through Super. Ct. R. 7.

¹⁴ See *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649 (V.I. 2011) ("While Superior Court Rule 22 provides that '[a] civil action is commenced by filing a complaint with the court,' no Superior Court rule establishes any standards with respect to the contents of a complaint. Accordingly, Federal Rule of Civil Procedure 8(a)(2) is applicable to civil actions in the Superior Court through Superior Court Rule 7").

¹⁵ *Joseph*, 54 V.I. at 649 (citing *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 499 (V.I. 2008)) (other citations omitted); See also *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (U.S. 2009) ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (U.S. 2007)).

¹⁶ *Joseph*, 54 V.I. at 649-650 (internal quotation marks omitted) (citations omitted).

common sense.”¹⁷ “Plausibility requires that the plaintiff allege facts that are more than simply ‘consistent with a defendant’s liability’ and must permit the court to infer more than the mere possibility of misconduct.”¹⁸

“A motion to dismiss a complaint should be denied if the factual allegations are ‘enough to raise a right to relief above the speculative level’”¹⁹ and “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”²⁰ Only after satisfying this multi-step analysis can a party survive a motion to dismiss under Rule 12(b)(6).

B. MOTION FOR ENLARGEMENT OF TIME.

“When an act is required or allowed to be done at or within a specified time,” Super. Ct. R. 10(a) provides “[t]he court for cause shown may at any time in its discretion . . . [w]ith or without notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order of the court.”²¹

ANALYSIS

A. MOTION TO DISMISS AS TO COUNT I OF THE ORIGINAL COMPLAINT FOR NEGLIGENCE.

In its Motion to Dismiss, Defendant argues Count I of the original Complaint must be dismissed for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) because Count I asserts negligence under a theory of *respondeat superior*, but the Complaint fails to allege sufficient facts to plausibly suggest that Plaintiff is entitled to relief under that theory of negligence.²² Specifically, Defendant argues Plaintiff fails to “name any particular

¹⁷ *Id.* at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950)).

¹⁸ *Id.* (citing *Fowler*, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949)).

¹⁹ *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 54 (V.I. Super. Ct. 2013) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008)); *See also Twombly*, 127 S. Ct. at 1965 & n.3.

²⁰ *Twombly*, 127 S. Ct. at 1964.

²¹ SUPER. CT. R. 10(a)(1).

²² Def.’s Mot. to Dismiss, pp. 3-4.

individual tortfeasor (*i.e.*, agent, employee, or officer) as a co-defendant in this case, or even identify one in the body of her pleading, nor does she identify any specific negligent act or omission.”²³ Defendant also argues Count I for negligence must be stricken under Fed. R. Civ. P. 12(f) as redundant or, alternatively, dismissed under Fed. R. Civ. P. 12(b)(6) because the allegations underlying Count I for negligence are virtually identical to those underlying Count II for premises liability.²⁴ On the other hand, Plaintiff argues that, rather than dismiss the claim for negligence, the Court should grant her leave to amend the Complaint because the proposed First Amended Complaint removes Count I for negligence in its entirety, thus rendering Defendant’s Motion to Dismiss moot.²⁵ In its Reply, Defendant argues its Motion to Dismiss is not moot because Plaintiff should be denied leave to amend her Complaint since the circumstances indicate that she is in bad faith by seeking to amend the Complaint for an improper purpose, namely, to avoid Defendant’s Motion to Dismiss.²⁶

A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion.²⁷ “In other words, when the court’s decision on a pending motion will be ‘hypothetical or academic’ or without any ‘practical significance,’²⁸ then the motion is moot.”²⁹ “In that instance, the motion should be dismissed or denied as moot because a decision will have no practical impact in the case however the court decides the motion.”³⁰

²³ Def.’s Mot. to Dismiss, p. 3.

²⁴ Def.’s Mot. to Dismiss, pp. 7-8.

²⁵ Pl.’s Response to Defendant’s Mot. to Dismiss, pp. 1, 3.

²⁶ Def.’s Reply to Pl.’s Response to Defendant’s Mot. to Dismiss, p. 3; Def.’s Response to Pl.’s Mot. for Leave to File First Am. Compl., p. 3.

²⁷ *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, *11 (V.I. Super. Ct. 2014) (citations omitted).

²⁸ *Id.* at *12 (citing BLACK’S LAW DICTIONARY 1099 (9th ed. 2009)).

²⁹ *Id.* (citations omitted).

³⁰ *Id.* at *13.

After Defendant filed its Motion to Dismiss, the Court granted Plaintiff leave to amend the Complaint³¹ and on December 29, 2015, Plaintiff filed the First Amended Complaint, which completely removed Count I of the original Complaint for negligence. “Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading.”³² At the time Defendant filed its objection to Plaintiff’s Motion for Leave to Amend the Complaint,³³ the Court had already granted Plaintiff leave to amend³⁴ and Defendant has not contested the Court’s Order granting Plaintiff leave to file an amended Complaint.

Moreover, “[i]t is axiomatic that, as a matter of law, trial judges have the inherent power ‘to control the disposition of the causes on [the court’s] docket with economy of time and effort for itself, for counsel, and for litigants’ . . . [and therefore,] legally, the Superior Court c[an] consider motions in whichever order it cho[oses],” including ruling on Plaintiff’s Motion for Leave to Amend the Complaint before considering Defendant’s Motion to Dismiss.³⁵ Consequently, because the original Complaint no longer has legal effect in the proceedings and the First Amended Complaint removed Count I for negligence, Defendant’s Motion to Dismiss is now moot with respect to Count I of the original Complaint.

B. MOTION TO DISMISS AS TO PLAINTIFF’S REQUEST FOR PUNITIVE DAMAGES.

Defendant also seeks dismissal of Plaintiff’s request for punitive damages on the grounds that the Complaint, even as amended, fails to “allege facts demonstrating that . . . [D]efendant

³¹ See December 18, 2015, Order.

³² 6 Wright, Miller, Kane, *FEDERAL PRACTICE AND PROCEDURE* § 1476, 636-638 (2010).

³³ See Def.’s December 22, 2015, Response to Pl.’s Mot. for Leave to File First Am. Compl.

³⁴ See December 18, 2015, Order.

³⁵ *Pedro v. Ranger American of the Virgin Islands, Inc.*, 2015 V.I. Supreme LEXIS 19, *23-27 (V.I. 2015) (Gomez, J., dissenting in part) (citing *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005)).

acted with reckless indifference to the rights of others, if not with a downright evil motive.”³⁶ In response, Plaintiff again argues that Defendant’s Motion to Dismiss is moot because the First Amended Complaint clarifies that Plaintiff requests punitive damages “if warranted by the facts adduced in discovery and at the time of the close of the evidence at trial.”³⁷

“A plaintiff seeking punitive damages must demonstrate ‘conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.’”³⁸ This Court has consistently held that “entitlement to punitive damages requires something more than knowledge of, and failure to act on, possibility or probability of injury on the part of the defendant.”³⁹ “The primary purpose behind punitive damages, compared to nominal or compensatory damages, is to punish the tortfeasor for ‘outrageous conduct’ and to further deter him and others like him from similar conduct in the future.”⁴⁰ “[P]unitive damages are not a stand-alone claim⁴¹ . . . Rather, like any other type of damages — whether nominal, compensatory, liquidated, or exemplary — punitive damages are just one element of a cause of action.”⁴²

³⁶ Def.’s Mot. to Dismiss, pp. 8-9; Def.’s Reply to Pl.’s Response to Def.’s Mot. to Dismiss, pp. 3-4.

³⁷ First Am. Compl. ¶¶ 14-28.

³⁸ *Adams v. North West Co., Inc.*, 2015 V.I. LEXIS 123, *14 (V.I. Super. Ct. Oct. 6, 2015) (citing *Marian v. Fraser*, 2014 V.I. LEXIS 19, *9 n.22 (V.I. Super. Ct. Mar. 17, 2014) (adopting *Banks* analysis conducted in *Segura v. Meyer*, ST-13-CV-565, mem. op., n. 24 (V.I. Super. Ct., Feb. 21, 2014) with respect to punitive damages) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2)).

³⁹ *Id.* at *16-17 (citing *Bertrand v. Cordiner Enters.*, 2013 V.I. LEXIS 67, *28 (V.I. Super. Ct. Nov. 15, 2013) (declining to award punitive damages on the basis that the defendant did not act with sufficient outrageousness to merit punitive damages when defendant negligently designed a piece of equipment, knowing that the equipment would likely injure the user); *Powell v. Chi-Co’s Distrib.*, 2014 V.I. LEXIS 21, *9-10 (V.I. Super. Ct. Apr. 3, 2014) (declining to award punitive damages when plaintiff pled only that defendant maintained a staircase in a “dangerous” condition); *Johnson v. Marriott Hotel Mgmt. Co. V.I.*, 2013 V.I. LEXIS 46, *5-6 (V.I. Super. Ct. June 17, 2013) (refusing plaintiff punitive damages when her allegation that defendant failed to maintain a rug in a safe condition did not establish the requisite “evil motive” or “reckless indifference to the rights of others”)).

⁴⁰ *Id.* at *14-15 (citing *Powell*, 2014 V.I. LEXIS 21, at *6 (other citations omitted)).

⁴¹ *Der Weer*, 2014 V.I. LEXIS 109, at *21 (citing *Anthony v. FirstBank V.I.*, 58 V.I. 224, 227 n.4 (V.I. 2012)) (other citations omitted).

⁴² *Id.* at *22 (citations omitted).

Defendant does not contest the sufficiency of Plaintiff's premises liability claim, the only count asserted in Plaintiff's First Amended Complaint. Because "[a] request for punitive damages is not an independent cause of action"⁴³ . . . but is a claim incidental to another cause of action,"⁴⁴ Plaintiff's request for punitive damages is incidental to her claim of premises liability. In considering the sufficiency of Plaintiff's request for punitive damages by assuming the veracity of the factual allegations asserted in the Complaint and drawing all factual inferences in favor of Plaintiff, it appears Plaintiff bases her request for punitive damages on the following factual allegations asserted in the First Amended Complaint: "Just after Plaintiff fell as she was in severe pain, bleeding and being attended to by her daughter and friends the Defendant's security stated 'I told them about putting lights up in this area in the parking lot!'"⁴⁵ and that by "March 4, 2015[,] the subject premises had a big spotlight shining to illuminate the subject area where . . . Plaintiff had fallen on February 7th."⁴⁶

The facts alleged in this case are similar to those at issue in *Powell v. Chi-Co's Distributing, Inc.*,⁴⁷ where this Court found that the factual allegations that the plaintiff "tripped over the edging . . . of the stairs and fell" were insufficient to state a plausible entitlement to punitive damages.⁴⁸ In *Powell*, the Court reasoned that the plaintiff "appear[ed] to suggest that the condition of the stairs was 'dangerous' because Defendants failed to ensure that the stairs were evenly spaced and failed to provide safety rails and lighting, but, without more, these allegations do not rise to the level of

⁴³ *Adams*, 2015 V.I. LEXIS 123, at *16 (citing *Molloy v. Independence Blue Cross*, 56 V.I. 155, 176 n.5 (V.I. 2012)).

⁴⁴ *Id.* (citing *Anthony*, 58 V.I. at 227 n.4) (other citations omitted); *See Marian*, 2014 V.I. LEXIS 19, at *9 (V.I. Super. Ct. Mar. 17, 2014) ("However, punitive damages in themselves are not a cause of action, but are only a remedy incidental to another cause of action").

⁴⁵ First Am. Compl. ¶ 7.

⁴⁶ First Am. Compl. ¶ 9.

⁴⁷ *Powell, supra*, 2014 V.I. LEXIS 21, at *6-10.

⁴⁸ *Id.* (internal quotation marks omitted).

reckless conduct because these alleged ‘failures to act’ do not demonstrate conduct showing Defendant had a conscious indifference to the safety of individuals walking on the stairs.”⁴⁹

Here, while the factual allegations contained in both the original and amended Complaints, when accepted as true, indicate that Defendants knew the stairs were poorly lit and the potential for causing injury, that is not enough to establish entitlement to punitive damages.⁵⁰ As the Court found in *Powell*, facts such as these, without more, are insufficient to demonstrate a reckless indifference to the rights of others or evil motive by Defendant. Consequently, the Complaint, even as amended, does not plead facts sufficient to state a plausible entitlement to punitive damages.⁵¹

Plaintiff urges the Court to follow Third Circuit precedent and allow Plaintiff “to amend any allegation in the Complaint that this Court finds deficient in any way.”⁵² In contrast, Defendant argues “there is not an unqualified right to amend a deficient complaint.”⁵³ On several occasions, this Court has applied Third Circuit precedent, which mandates that “if a complaint is subject to a Rule 12(b)(6) dismissal a ... court must permit a curative amendment unless such an amendment would be inequitable or futile . . . [and] must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend.”⁵⁴

However, Third Circuit precedent is not binding on this Court, and, Plaintiff already took advantage of the opportunity to amend her Complaint to attempt to cure the deficiencies raised in Defendant’s Motion to Dismiss. Indeed, after the Motion to Dismiss was filed, Plaintiff sought

⁴⁹ *Id.*

⁵⁰ *See supra* n. 39.

⁵¹ *Accord Adams*, 2015 V.I. LEXIS 123, at *16.

⁵² Pl.’s Response to Def.’s Mot. to Dismiss, p. 2.

⁵³ Def.’s Reply to Pl.’s Response to Def.’s Mot. to Dismiss, pp. 2-3.

⁵⁴ *Adams*, 2015 V.I. LEXIS 123, at *18 (citing *Benjamin v. Bennerson*, 2012 V.I. LEXIS 7, *7 (V.I. Super. Ct. Feb. 13, 2012) (quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008)); *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *12-13 (V.I. Super. Ct. June 25, 2015) (“[D]espite these deficiencies in the complaint, the Court must grant [plaintiff] an opportunity to amend her complaint unless amendment would be futile”) (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)).

leave to amend her Complaint on the grounds that the proposed First Amended Complaint “clarifies the Plaintiff’s allegations and renders the Defendant’s Motion to Dismiss the original Complaint moot.”⁵⁵ And, upon being granted leave,⁵⁶ Plaintiff filed the First Amended Complaint on December 29, 2015. Because Plaintiff already had the opportunity to attempt to cure the deficiencies raised in Defendant’s Motion to Dismiss, the Court will not allow Plaintiff leave to amend the Complaint to cure the aforementioned defects a second time. Further, this ruling does not preclude Plaintiff from having her case decided at a trial on the merits, as Defendant has not challenged her premises liability claim, which remains pending before the Court. Rather, this decision merely precludes Plaintiff from recovering an award of punitive damages at trial, which in any event “should only be granted in exceptional circumstances,”⁵⁷ and therefore does not deviate from “the preference of [the Superior] Court, in accordance with precedent from the Supreme Court of the Virgin Islands, that cases be resolved on their merits.”⁵⁸ Accordingly, Plaintiff’s prayer for punitive damages will be stricken from the First Amended Complaint.

C. DEFENDANT’S REQUESTS FOR ATTORNEY’S FEES AND COSTS.

Defendant requests an award of attorney’s fees and costs incurred by Defendant in having to file and brief its Motion to Dismiss⁵⁹ and address Plaintiff’s “frivolous motion to amend.”⁶⁰ However, Defendant cites no authority to support its request and “[t]he Supreme Court of the Virgin Islands has established that in order for a motion to be properly before the court, parties

⁵⁵ Pl.’s December 8, 2015, Mot. for Leave to File First. Am. Compl., p. 1.

⁵⁶ See December 18, 2015, Order.

⁵⁷ *Adams*, 2015 V.I. LEXIS 123, at *15 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)).

⁵⁸ *Id.* at *18-19 (citing *Joseph*, 54 V.I. at 650) (“Both this Court and the United States Supreme Court have recognized that there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules”).

⁵⁹ Def.’s Reply to Pl.’s Response to Def.’s Mot. to Dismiss, p. 4.

⁶⁰ Def.’s Response to Pl.’s Mot. for Leave to File First Am. Compl., p. 5.

must support their arguments by citing the proper legal authority, statute or rule.”⁶¹ Because Defendant fails to support its argument, the Court finds Defendant’s requests for attorney’s fees and costs are deficient. Notwithstanding, even assuming, *arguendo*, Defendant had properly supported its requests, the Court would decline to award Defendant attorney’s fees and costs.

Because this is a personal injury case, Defendant is prohibited from collecting attorney’s fees as a prevailing party under 5 V.I.C. § 541(b) unless the Court finds that the complaint or defense filed is “frivolous,” which is defined by statute as “without legal or factual merit; or ... for the purpose of causing unnecessary delay; or ... for the purpose of harassing an opposing party.”⁶² Further, the Supreme Court of the Virgin Islands has instructed that the Superior Court must refrain from adjudicating a motion for attorney’s fees and costs under 5 V.I.C. § 541 that is not ripe because “the Superior Court has no way to determine which party is the ‘prevailing party’ [entitled to an award of attorney’s fees and costs under 5 V.I.C. § 541] while the litigation is ongoing.”⁶³

Here, the Court found merit in Plaintiff’s mootness argument with respect to Defendant’s Motion to Dismiss as to Count I of the original Complaint and granted Plaintiff leave to file her First Amended Complaint. Defendant has not challenged the only remaining count in the First Amended Complaint for premises liability. At this early stage of the proceedings, the Court does not find that Plaintiff’s Complaint is “frivolous”⁶⁴ and, even if it did, the on-going nature of this

⁶¹ See *In re Catalyst Litig.*, 2015 V.I. LEXIS 145, *3-6 n. 12 (V.I. Super. Ct. 2015) (citing *Bernhardt v. Bernhardt*, 51 V.I. 341, 345-346 (V.I. 2009); *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 238-239 (V.I. 2013)).

⁶² 5 V.I.C. § 541(c).

⁶³ *Hodge v. Bluebeard's Castle, Inc.*, 2015 V.I. Supreme LEXIS 15, *45 (V.I. 2015) (citations omitted) (in finding the Superior Court cannot adjudicate a motion for attorney’s fees that is not ripe, “[t]he reason for this rule is obvious: the Superior Court has no way to determine which party is the ‘prevailing party’ while the litigation is ongoing”); *V.I. Gov’t Hosps. & Health Facilities Corp. v. Gov’t of the V.I.*, 50 V.I. 276, 280 (V.I. 2008) (“A ruling on a motion for attorney’s fees must be vacated on ripeness grounds “when the presence of ongoing litigation precludes an informed determination of whether the moving party is in fact entitled to attorney’s fees under the relevant law”) (citations omitted).

⁶⁴ *Accord Adams*, 2015 V.I. LEXIS 123, at *17-18.

litigation precludes the Court from determining whether Defendant is the prevailing party so as to entitle Defendant to an award of attorney's fees and costs under 5 V.I.C. § 541. Consequently, the only avenue through which Defendant could be awarded attorney's fees and costs at this early stage would be through the imposition of sanctions against Plaintiff, but Defendant's requests are also procedurally deficient in this regard.

Considering the arguments submitted by both parties, Defendant's requests for attorney's fees and costs could be construed as a prayer for sanctions against Plaintiff for her alleged violations of Fed. R. Civ. P. 11(b),⁶⁵ the procedural rule governing a party's representations to the Court.⁶⁶ According to "[t]he Third Circuit . . . sanctions [under Fed. R. Civ. P. 11] should only be imposed 'in the exceptional circumstances where a claim or motion is patently unmeritorious or frivolous.'"⁶⁷ Further, to pursue such sanctions, Fed. R. Civ. P. 11(c)(2) clearly requires the request be brought in "[a] motion for sanctions" that is made "separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)."⁶⁸

Because Defendant only requested attorney's fees and costs in its Motion to Dismiss and Response to Plaintiff's Motion for Leave to File First Amended Complaint, rather than in a

⁶⁵ See SUPER. CT. R. 29 ("Rules 10 and 11 of the Federal Rules of Civil Procedure as to form, signing and verification of pleadings and other papers shall apply to the [S]uperior [C]ourt"); SUPER. CT. R. 7 ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, . . . the Federal Rules of Civil Procedure").

⁶⁶ FED. R. CIV. P. 11(b) provides, in pertinent part, that:

By presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [that] (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; [and] (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument.

⁶⁷ *Hilmon Co. v. Hyatt Int'l, S.A.*, 138 F.R.D. 66, 69 (D.V.I. 1991) (citing *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988)).

⁶⁸ FED. R. CIV. P. 11(c)(1)-(2) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation . . . [T]he motion or sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)").

separate motion for sanctions, Defendant has failed to meet the procedural requirements of Fed. R. Civ. P. 11. That the Court may impose sanctions through its inherent power⁶⁹ does not defeat the requirements of Rule 11 in this case because the Court may “fill in the gaps of sanctions law with [its] own inherent power[] where there is a finding of bad faith . . . and where ‘neither the statutes nor the rules are up to task.’”⁷⁰ An invocation of the Court’s inherent power to impose sanctions is not necessary here, where Fed. R. Civ. P. 11 provides an adequate means for imposing sanctions for the conduct alleged by Defendant.

Nevertheless, even assuming, *arguendo*, that Defendant had properly moved for sanctions against Plaintiff, the Court would deny Defendant’s requests for attorney’s fees and costs at this time because, as discussed above, nothing in the record indicates that Plaintiff’s original Complaint or First Amended Complaint were patently unmeritorious or frivolous so as to warrant Rule 11 sanctions.⁷¹ Accordingly, Defendant’s requests for attorney’s fees and costs must be denied.

D. DEFENDANT’S MOTION FOR AN EXTENSION OF TIME TO ANSWER COUNTS IN COMPLAINT NOT SUBJECT TO MOTION TO DISMISS.

With its Motion to Dismiss, Defendant simultaneously filed a Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss on October 28, 2015. In its motion for extension of time, Defendant requests an enlargement of time to submit an answer

⁶⁹ See *Remy v. Ford Motor Co.*, 48 V.I. 141, 150 (V.I. 2006) (“In its discretion, the court may impose a wide range of sanctions . . . depending upon the severity of the circumstances,” limited by the Supreme Court’s exclusive jurisdiction to disbar an attorney under 4 V.I.C. 32(e)) (citing *Bowman v. American Med. Sys., Inc.*, 1998 U.S. Dist. LEXIS 16082, [WL], at *5 (E.D.Pa. Oct. 9, 1998); *Santiago v. People of the Virgin Islands*, 51 V.I. 283, at n. 5 (V.I. 2009) (“The . . . most common use of the [Court’s] inherent powers encompasses those powers necessary . . . to adjudicate cases in an orderly and efficacious manner”) (quoting *United States v. Dunegan*, 251 F.3d 477, 478 (3d Cir. 2001)); *V.I. Taxi Ass’n v. V.I. Port Auth.*, 2015 V.I. LEXIS 67, *6 (V.I. Super. Ct. June 15, 2015) (“The Court may also sanction pursuant to its incidental powers as codified in 4 V.I.C. § 243”).

⁷⁰ See *Withey v. Bermudez*, 2014 V.I. LEXIS 108, *9-10 (V.I. Super. Ct. Dec. 16, 2014) (citing *United States v. Hudson & Goodwin*, 11 U.S. 32, 33 (U.S. 1812); *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, (U.S. 1991)).

⁷¹ See *Hilmon*, 138 F.R.D. at 69 (citing *Doering*, 857 F.2d at 194).

to the Complaint in order to promote judicial economy and efficacy and diminish any risk of confusion “over the proper scope of discovery during the [M]otion[] [to Dismiss]’ pendency.”⁷² Plaintiff failed to submit a response to Defendant’s motion for extension of time in accordance with the directives of the Court.⁷³

At the outset, the Court notes that Defendant was directed to respond to Plaintiff’s First Amended Complaint within twenty days of service.⁷⁴ This Court has explained that:

Superior Court Rule 27(a) requires that service of all process “shall be made in any part of the territory by the marshal of the court and such other persons authorized by law to serve such process. . . .” Although the “summons and process shall be served in the same manner as required to be served by [Federal] Rule 4,”⁷⁵ the Rules of the Superior Court are silent as to how parties must serve any other pleadings and papers. Consequently, service of any motion and any pleading other than the original complaint is governed by Federal Rule of Civil Procedure 5.”⁷⁶

Under Fed. R. Civ. P. 5, when a party is represented by counsel, service must be made on the party’s attorney and service may be made by “mailing it to the person’s last known address- in which event service is complete upon mailing.”⁷⁷

It is uncontested that Defendant Reichhold Center was served with a copy of Plaintiff’s original Complaint on September 18, 2015,⁷⁸ in accordance with Super. Ct. R. 27 and Fed. R. Civ.

⁷² Def.’s Mot. for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss, p. 3.

⁷³ See November 5, 2015, Order (directing Plaintiff to respond to Defendant’s Motion to Dismiss Count I of Plaintiff’s Complaint . . . as well as [Defendant’s] Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss by November 25, 2015). While the Court granted Plaintiff’s Motion for Extension of Time to respond to Defendant’s Motion to Dismiss by Order entered on December 3, 2015, Plaintiff did not request an extension of time to respond to Defendant’s Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss and an extension with regard to that motion was not given. Pl.’s November 20, 2015, Mot. for Extension of Time; December 3, 2015, Order.

⁷⁴ See December 18, 2015, Order.

⁷⁵ SUPER. CT. R. 27(b).

⁷⁶ *Donastorg v. Willis*, 2015 V.I. LEXIS 10, *1-3 (V.I. Super. Ct. Jan. 27, 2015). FED. R. CIV. P. 5 applies to this proceeding through the operation of SUPER. CT. R. 7.

⁷⁷ FED. R. CIV. P. 5(b)(2)(C).

⁷⁸ See Def.’s October 9, 2015, Emergency Mot. for Extension of Time to Respond to Complaint, p. 1 (“Upon information and belief, UVI was served with a copy of the Complaint in this matter on September 18, 2015); Pl.’s September 25, 2015, Notice of Proof of Service of Summons (attaching Return of Service and Affidavit of Service as

P. 4, and that counsel for Defendant entered an appearance on behalf of Defendant on October 9, 2015, by filing an Emergency Motion for Extension of Time to Respond to Complaint.

With respect to Plaintiff's First Amended Complaint, the certificates of service attached with Plaintiff's Motion for Leave to File First Amended Complaint and First Amended Complaint indicate Plaintiff's counsel e-mailed and mailed defense counsel copies of the pleadings on December 8, 2015, and December 29, 2015, respectively.⁷⁹ In so doing, Plaintiff complied with Fed. R. Civ. P. 5(b)(2)(C), which permitted her to serve these pleadings by mail to defense counsel's law firm, the address for which was provided on Defendant's pleadings.

Additionally, the Notice of Entry of Order dated December 18, 2015, also indicates that the Court's Order granting Plaintiff leave to file her First Amended Complaint and directing Defendant to respond thereto within twenty days of service was distributed to counsel for all parties on December 18, 2015. Accordingly, service of Plaintiff's First Amended Complaint by mailing was proper, and Defendant was obligated to respond to the First Amended Complaint within twenty days of service, *e.g.* twenty days from the date Plaintiff's counsel mailed defense counsel a copy of the First Amended Complaint on December 29, 2015.⁸⁰ However, to date, it does not appear that Defendant has filed a response to Plaintiff's First Amended Complaint.

Nevertheless, the record also reveals that the Court has not yet ruled on Defendant's Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss. Although Defendant filed its motion for extension of time when the original Complaint still had legal effect and the Court has since directed Defendant to respond to the First Amended Complaint

Exhibit 1, which indicate Una Dyer, Director of Presidential Operations of Defendant, was personally served by hand by Michael A. Richardson, a duly appointed Process Server for the Superior Court, on September 18, 2015).

⁷⁹ See Pl.'s Mot. for Leave to File First. Am. Compl.; Pl.'s First Am. Compl., p. 4.

⁸⁰ See FED. R. CIV. P. 5(b)(2)(C).

within twenty days of service,⁸¹ this technically did not resolve Defendant's Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss because, "[i]n general, every motion filed remains pending until 'ruled upon, dismissed, or withdrawn.'"⁸² Because Defendant's motion has not been ruled upon, dismissed, or withdrawn, the Court finds it remains pending and may function to enlarge the period of time within which Defendant may respond to the First Amended Complaint.

Plaintiff, having failed to submit any response to Defendant's motion for extension of time, and Defendant, having shown good cause warranting an enlargement of time within which to file an Answer to the Complaint, the Court finds that Defendant should be granted an extension of time to answer, move, or otherwise plead in response to Plaintiff's First Amended Complaint under Super. Ct. R. 10(a). Consequently, the Court will grant Defendant's Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss and direct Defendant to answer, move, or otherwise plead in response to Plaintiff's First Amended Complaint by May 13, 2016.

CONCLUSION

Defendant's Motion to Dismiss will be granted in part. Plaintiff's request for punitive damages will be stricken from the First Amended Complaint, but Defendant's Motion to Dismiss with respect to Count I of the original Complaint for negligence will be denied as moot. The Court will also deny Defendant's requests for attorney's fees and costs. Defendant's Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss will be

⁸¹ See December 18, 2015, Order.

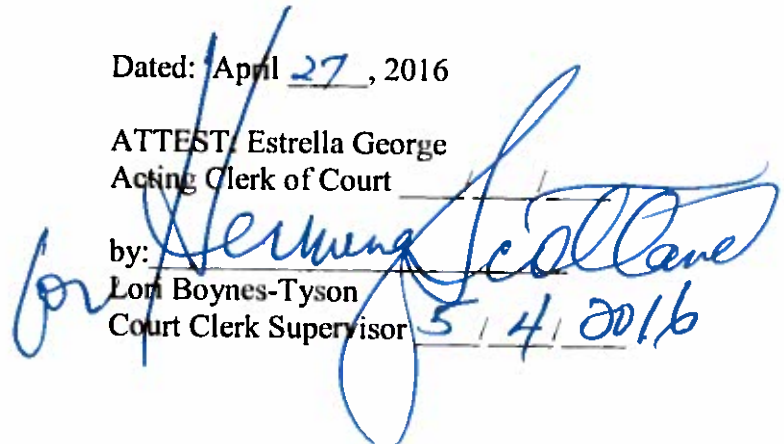
⁸² See *Der Weer*, 2014 V.I. LEXIS 22, at *18 (citing 56 AM. JUR. 2D *Motions, Rules, and Orders* § 31 (2010)).

granted, and Defendant will be directed to answer, move, or otherwise plead in response to Plaintiff's First Amended Complaint by May 13, 2016.

An Order consistent with this Memorandum Opinion shall follow.

Dated: April 27, 2016

ATTEST: Estrella George
Acting Clerk of Court

by: 
Loni Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY

DATE: 5-4-16
ESTRELLA H. GEORGE
Acting Clerk of the Court

By: 
Cameil A. Clarke
Court Clerk II

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ELVIRIER MELCHIOR

Plaintiff,

vs.

**UNIVERSITY OF THE VIRGIN ISLANDS O/B/O
REICHHOLD CENTER FOR THE ARTS**

Defendant.

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) **CASE NO. ST-15-CV-473**
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ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Defendant's Motion to Dismiss Count I of Plaintiff's Complaint for Failure to State a Claim is **GRANTED IN PART**, and Plaintiff's request for punitive damages shall be **STRICKEN** from the Complaint, as amended; and it is

ORDERED that the remainder of Defendant's Motion to Dismiss Count I of Plaintiff's Complaint for Failure to State a Claim is **DENIED AS MOOT**; and it is

ORDERED that Defendant's requests for attorney's fees and costs, made in Defendant's Motion to Dismiss Count I of Plaintiff's Complaint for Failure to State a Claim and Response to Plaintiff's Motion for Leave to File First Amended Complaint, are **DENIED**; and it is

ORDERED that Defendant's Motion for an Extension of Time to Answer Counts in Complaint not Subject to Motion to Dismiss is **GRANTED**, and Defendant shall answer, move, or otherwise plead in response to Plaintiff's First Amended Complaint by May 13, 2016; and it is

ORDERED that copies of this Order and accompanying Memorandum Opinion shall be directed to all counsel of record and to the IT Division of the Superior Court of the Virgin Islands.

Dated: April 27, 2016

ATTEST: Estrella George
Acting Clerk of Court

by:

Lori Boynes-Tyson

Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY

DATE:

5-4-16

ESTRELLA H. GEORGE
Acting Clerk of the Court

By:


Camell A. Clarke
Court Clerk II