

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

MAURA HERMAN,

PLAINTIFF,

v.

**VIRGIN ISLANDS HOSPITAL AND HEALTH
FACILITIES CORPORATION, D/B/A
GOVERNOR JUAN F. LUIS HOSPITAL AND
MEDICAL CENTER;
WALTER J. PEDERSEN, M.D.;
MOSES DEGRAFT-JOHNSON, M.D.;
JOHN DOES AND JAN DOES,**

DEFENDANTS.

SX-12-CV-471

CITE AS: 2019 VI SUPER U 53

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOT FOR PUBLICATION

Appearances:

K. Glenda Cameron, Esq.
Law Offices of K. G. Cameron, P.C.
St. Croix, VI
For Plaintiff

Johanna Harrington, Esq.
Virgin Islands Department of Justice
Office of the Attorney General
St. Thomas, VI
For Defendants

WILLOCKS, Administrative Judge

MEMORANDUM OPINION and ORDER

¶1 **THIS MATTER** is before the Court on the Motion to Dismiss (hereinafter “Motion”) of Defendant Virgin Islands Government Hospitals and Health Facilities Corporation, St. Croix District Governing Board of the Governor Juan F. Luis Hospital and Medical Center (hereinafter

“VIFHC”), filed April 22, 2013. The Plaintiff’s Opposition was filed on May 22, 2013, and the Reply followed on May 31, 2013. The Motion requests dismissal of the Complaint pursuant to Virgin Islands Rules of Civil Procedure Rules 12(b)(5), 4(j)(2), and 4(m)¹, as well as Superior Court Rule 7.²

BACKGROUND

¶2 This matter stems from an allegation of medical malpractice related to a knee injury “on or about April 1, 2011.”³ The treatment of the knee took place at the Governor Juan F. Luis Hospital (hereinafter “JFL”) on St. Croix, “an instrumentality of the Government of the Virgin Islands” operated by VHHFC.⁴

¶3 VHHFC states that the “Plaintiff failed to deliver process to VHHFC as prescribed by Rule 4(j)(2)⁵ after commencement of the lawsuit. Plaintiff further failed to deliver process to VHHFC within 120 days after commencement of the lawsuit (November 16, 2012).”⁶ This is the

¹ The Federal Rules of Civil Procedure are no longer operative in the Superior Court because the Supreme Court of the Virgin Islands has adopted the Virgin Islands Rules of Civil Procedure in March 2017. However, the federal rules cited by VHHFC are substantially similar to the territorial rules. Though procedural rules generally should not be retroactively applied to pending motions, the Virgin Islands Rules of Civil Procedure indicate that they are applicable to “proceedings in any action pending on the effective date of the rules...” with few exceptions including “an express finding that applying them in a particular previously-pending action would be infeasible or work an injustice.” V.I.R. Civ. P. 1-1(c)(2)(B). In this case, it is appropriate to apply the Virgin Islands Rules of Civil Procedure since the rules are so similar to the Federal Rules of Civil Procedure that it would not be an injustice to either party to apply the territorial rules.

² Previously, Superior Court Rule 7 allowed the application of the Federal Rules of Civil Procedure to proceedings in the Superior Court. With the adoption of the Virgin Islands Rules of Civil Procedure, it is no longer necessary to apply the rules in that way. VIFHC also requested dismissal pursuant to Rule 12.1 of the Local Rules of Civil Procedure of the District Court of the Virgin Islands, but the application of this rule is redundant in light of the procedural rules.

³³ Mem. to Mot. 4.

⁴ *Id.*

⁵ Rule 4(j)(2) of the Federal Rules of Civil Procedure indicates that a state or local government must be served by delivering the summons and complaint to its chief executive officer or in a manner defined by local law. Fed. R. Civ. P. 4(j)(2). The territorial rule for service upon the Government of the Virgin Islands or its public corporations is 4(i)(2) which, in addition to serving the chief executive officer of the corporation, requires service be made upon the Government and specifically named officers or employees of the corporation. V.I.R. Civ. P. 4(i)(2).

⁶ Mem. to Mot. at 2.

basis for the argument that the Complaint should be dismissed under Rule 4(m).⁷ According to VIHHC, the Complaint was filed on November 16, 2012, but VIHHC was not served “within 120 days after commencement or at anytime.”⁸

¶4

“The record indicates an initial Summons was issued to ‘Roberto Centeno c/o Virgin Islands Hospital & Health Facilities Corp. d/b/a Juan F. Luis Hospital’ on November 19, 2012, but was not served. As second Summons was issued to VIHHC on March 18, 2013, after the expiration of the 120-day period. Plaintiff’s belated attempt on March 18, 2013, to serve Royette Russel, Esquire, legal counsel to Governor Juan F. Luis Hospital & Medical Center...with a copy of the Summons and Complaint, who is not an authorized agent by appointment or by law to accept service on behalf of VIHHC, is defective service.”⁹

VIHHC therefore asserts that “service of process was insufficient because it was simply not made and delivery was not accomplished within 120 days after commencement, and then made upon an improper person outside the 120-day period.”¹⁰

¶5 The Plaintiff counters that the Summons was served on March 18, 2013 due to an error calculating the time to serve.¹¹ However, the Plaintiff also asserts that the final day for service, March 16, 2013, was a Saturday and that Rule 6 extends time periods that fall on weekends to the next day that is not a weekend or legal holiday.¹²

¶6 Further, the Plaintiff alleges that service upon Attorney Russell was proper because it gave JFL and VIHHC notice of the Complaint’s existence.¹³ JFL, “is a corporation that may sue and be sued in its own right,” and for this reason service was effective when accepted by Attorney

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ *Opp’n* 2.

¹² *Id.* at 2-3. V.I.R. Civ. P. 6(a).

¹³ *Id.* at 3.

Russell, JFL's legal counsel, who did not inform the process server that she was not authorized to accept service.¹⁴

¶7 The Plaintiff also alleges that VIHHC had sufficient notice of the Complaint because it was given to Attorney Russel in correspondence used in an attempt to settle this matter.¹⁵ "In addition, [VIHHC] has been on notice of Plaintiff's claim by way of the... Notice of Intent to File a Claim that was served on the Medical Malpractice Action Review Committee, the Honorable John P. De Jongh, Governor of the Virgin Islands, and the Honorable Vincent F. Frazer, Attorney General of the Virgin Islands."¹⁶ The Plaintiff argues that this notice is good cause to extend the time limit for service and that, under Rule 4(m), such extension is mandatory.¹⁷ Moreover, "[e]ven in the absence of good cause, the court has discretion to extend the service period... [and] has the power to extend an expired deadline on the grounds of excusable neglect."¹⁸

¶8 The Plaintiff also states that VIHHC will not be prejudiced by an extension of the deadline because VIHHC's counsel, Attorney Hymes, has already filed an Answer on behalf of Defendant Pederson, and a motion to serve Defendant DeGraft-Johnson is pending before the Court.¹⁹

DISCUSSION

¶9 According to the Virgin Islands Rules of Civil Procedure, "if a defendant is not served within 120 days after the complaint is filed, the court... must dismiss the action without prejudice against that defendant or order that service be made within a specified time."²⁰ When a prescribed

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ V.I.R. Civ. P. 4(m).

time period ends on a weekend or legal holiday, “the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.”²¹

¶10 Should a party fail to take proper action within a specified time period, “the court must extend the time for service” upon a showing of good cause,²² and upon a showing of excusable neglect has the discretion to extend the time period.²³ “‘Excusable neglect’ and ‘good cause’ are essentially synonyms, and ‘the determination of excusable neglect “is at bottom an equitable one....”’²⁴ In the case of excusable neglect,

[t]he court may consider whether the request to extend time is made before or after the required date; the reason for the [party’s] delay; whether the reason for delay was within the reasonable control of the [party]; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party’s failure to meet the originally prescribed deadline.²⁵

¶11 Service upon a public corporation, such as VIHHC,²⁶ necessarily includes service upon the Government of the Virgin Islands as well as upon the chief executive officer of the corporation.²⁷ An exception to this rule is that “a proper summons and complaint which have reached the person to whom they are directed within the time prescribed by law, if any, shall be sufficient although not served or accepted.”²⁸ However, if service is ultimately insufficient, a case must be dismissed.²⁹

²¹ V.I.R. Civ. P. 6(a)(1)(C)

²² V.I.R. Civ. P. 4(m).

²³ V.I.R. Civ. P. 6(b)(1).

²⁴ *Fuller v. Browne*, 59 V.I. 948, 954 (S. Ct. 2013) (citing *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 713 (S. Ct. 2010) and *Brown v. People*, 49 V.I. 378, 383 (S. Ct. 2008)).

²⁵ *Id.*

²⁶ 19 V.I.C. § 243(a) (stating that VIHHC “is a body corporate and politic constituting a public benefit corporation of the Government of the Virgin Islands”).

²⁷ V.I.R. Civ. P. 4(i)(2).

²⁸ V.I.R. Civ. P. 4(n).

²⁹ *See* V.I.R. Civ. P. 12(b)(5).

¶12 In this case, the record demonstrates that the Complaint was filed on November 16, 2012. The 120-day time period was therefore set to expire on Saturday, March 16, 2013. Since the expiration of the period fell on a weekend, the time period was automatically extended to Monday, March 18, 2013, the date that the Plaintiff attempted service upon Attorney Russell. However, because service was not made on VIHFC's chief executive officer, it is facially defective. Nevertheless, the Court finds excusable neglect because the Summons and Complaint were served in the original period to do so, but inadvertently addressed to the wrong individual. The Court is satisfied that the mistake was made in good faith.

¶13 At the time the Motion was filed in 2013, this case was still in its most nascent stage and, as the Plaintiff pointed out, VIHFC's counsel has already made an appearance in this matter on behalf of another defendant. These circumstances suggest that VIHFC will not have difficulty obtaining counsel who can become familiar with the matter and will not be prejudiced by an extension of the time to serve. Moreover, that VIHFC appeared in this action at all is indicative to the Court that it likely received the Summons and Complaint even if service was not properly made.

CONCLUSION

¶14 In sum, the Plaintiff did not correctly serve VIHFC when it made service upon Attorney Russel, but the failure to do so is not fatal to this action. VIHFC has been put on notice of the case against it and is not prejudiced by the Plaintiff's inadvertence. For good cause shown, the Court will extend the deadline to serve VIHFC. Under these circumstances, VIHFC may not be dismissed for insufficient service. Accordingly, it is hereby:

ORDERED that VIHHC's Motion to Dismiss is **DENIED**; and it is further

ORDERED that the Plaintiff make proper service upon VIHHC, in accordance with Rule 4(i)(2) of the Virgin Islands Rules of Civil Procedure, within **FOURTEEN (14) DAYS** and submit proof of service to the Court. Failure to do so may result in the dismissal of VIHHC as a defendant.

DONE and so ORDERED this 10th day of April, 2019.

ATTEST:

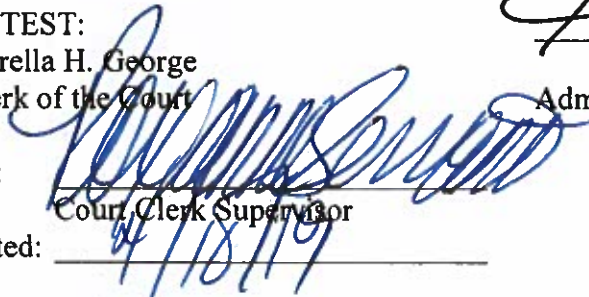
Estrella H. George
Clerk of the Court



HAROLD W.L. WILLOCKS

Administrative Judge of the Superior Court

By:



Court Clerk Supervisor

Dated:

4/18/19