

DIVISION OF ST. THOMAS AND ST. JOHN

Defendant.

)
) **CASE NO. ST-12-CV-34**

In an August 1, 2012, motion, Plaintiff George moved for leave to amend the Complaint. For the following reasons, Defendant's motion will be denied without prejudice to re-filing.

On January 24, 2012, Plaintiffs Velma and Kontie George filed a Complaint alleging that on November 5, 2011, Plaintiff Velma George was severely burned when a cup of hot tea spilled on her legs. Plaintiffs allege her injuries are the result of Defendant Wendy's failure to secure the hot tea properly with an appropriate "hot beverage" lid, and thereby seek special and compensatory damages.¹ In an August 1, 2012, motion, Plaintiff now seeks for leave to file an amended complaint.²

² Defendant filed an Opposition to Plaintiff's Motion for Leave to File an Amended Complaint on August 20, 2012. Plaintiff replied on August 22, 2012.

STANDARD

Once the twenty-one day statutory period for amendment has expired under Fed. R. Civ. P. 15(a)(1),³ a court “should freely give leave [to amend] when justice so requires.”⁴ “The decision whether to grant or deny [a motion to amend] rests within the court's discretion”⁵ and “should be denied only where there exists evidence of ‘undue delay, bad faith or dilatory motive on the part of the movant, ... undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment’”⁶ For a motion to amend to be denied solely on “substantial or undue” prejudice the non-movant must be “unfairly disadvantaged” by the proposed amendments.⁷

ANALYSIS

In this case, Defendant argues that Plaintiff's Motion for Leave to File an Amended Complaint would cause undue prejudice to Defendant because the proposed Amended Complaint goes well beyond the pleading requirements of Fed. R. Civ. P. 8(a) and includes photographs⁸ that are an “attempt to facilitate presentation of inflammatory

³ “(a) Amendments Before Trial. (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” FED. R. CIV. PRO. 15(a)(1).

⁴ FED. R. CIV. PRO. 15(a)(2).

⁵ *Foman v. Davis*, 371 U.S. 178, 182 (1962). See *Daniel v. Government of Virgin Islands*, Civ. No. 1992–070, 1994 WL 392236, at *4 (D.V.I. May 26, 1994); *Choate v. Skinner*, 19 V.I. 399 (Terr. Ct. 1983).

⁶ *Commissioner of Dept. of Planning and Natural Resources v. Century Alumina Co., LLLP*, Civ. No. 2005-062, 2009 WL 2241788, at *1 (D.V.I. July 23, 2009) (quoting *Foman*, 371 U.S. at 182).

⁷ *Cubica Group LLLP v. MAPFRE Puerto Rican American Ins. Co.*, 2012 WL 2398931, at *2 (D.V.I. June 26, 2012) (citing *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989)).

⁸ Defendant objects to photographs of the alleged injuries to Plaintiff Velma George's legs on page 4 and 5 of the proposed Amended Complaint; photos of the beverage cup and lid that caused Plaintiff injury on page 2 of the proposed Amended Complaint; and the “alternative” beverage lids which were not utilized by Defendant on page 2 and 3 of the proposed Amended Complaint. Plaintiff's Motion for Leave to File an Amended Complaint, Aug. 1, 2012.

evidence” under Fed. R. Evid. 403.⁹ Plaintiff argues that Defendant’s reliance on Fed. R. Civ. P. 8 and Fed. R. Evid. 403 is legally insufficient, and that Defendant’s only remedy would be to move for a Motion to Strike under Fed. R. Civ. P. 12(f). Each of these arguments will be addressed by the Court in turn.

I. Fed R. Civ. P. 8 Establishes Only Minimum Pleading Standards

Defendant’s argument that Plaintiff’s proposed Amended Complaint is improper simply because it goes beyond the pleading standards under Fed. R. Civ. P. 8 is flawed. Under Fed. R. Civ. P. 8(a)(2),¹⁰ a pleading must contain “a short plain statement of the claim showing that the pleader is entitled to relief.”¹¹ Fed. R. Civ. P. 8 and subsequent Supreme Court jurisprudence under *Bell Atlantic Corp. v. Twombly*¹² and *Ashcroft v. Iqbal*,¹³ merely elucidates the minimum standard for a pleading that states a claim for relief. Fed. R. Civ. P. 8 does not prescribe any limitations on pleadings which go beyond the minimum pleading standards. In fact, the Court strongly encourages counsel to submit straightforward pleadings that are “clear, poignant, and understandable.”¹⁴

⁹ Defendant’s Opposition to Motion for Leave to File Amended Complaint, August 20, 2012, at 2.

¹⁰ Fed. R. Civ. P. 8(a)(2) governs this jurisdiction under Super. Ct. R. 7 which states that “[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court, and to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.” SUPER. CT. R. 7.

¹¹ FED. R. CIV. PRO. 8(a)(2).

¹² 550 U.S. 544 (2007).

¹³ 556 U.S. 663 (2009).

¹⁴ Plaintiff’s Reply to Defendant’s Opposition to Plaintiff’s Motion for Leave to File Amended Complaint, August 22, 2012, at 4.

II. A Motion to Strike Would be Premature

On the other hand, Plaintiff's argument that Defendant's only remedy here is under a motion to strike under Fed. R. 12(f) is also misplaced. In some limited circumstances, courts have granted motions to strike portions of a complaint under Fed. R. Evid. 408 because the threshold question of whether settlement discussions are clearly inadmissible at trial would govern the scope of discovery and the presentation of evidence.¹⁵ However, because a complaint is a series of allegations rather than evidence,¹⁶ courts more often find that a motion to strike is premature when it is in response to a motion for leave to amend a complaint where the Defendant argues solely on the limitations prescribed by the Federal Rules of Evidence.¹⁷

Further, in considering this Motion for Leave to File an Amended Complaint, the strict motion to strike standard is inapplicable to the facts of this case. A motion to strike's primary purpose is to completely prevent "redundant, immaterial, impertinent, or scandalous" material to be presented before the Court or jury that would be highly

¹⁵ *Ciolfi v. Iravani*, 625 F.Supp. 2d 276, 289-9 (E.D.Pa. 2009) (granting a motion to strike parts of a complaint which describe settlement negotiations for the purpose of proving defendant's liability in a wrongful initiation of civil proceedings and abuse of process suit).

¹⁶ *See Matos v. Nextran, Inc.*, 52 V.I. 676, 601-92 (D.V.I. 2009) (noting that mere allegations of "illegal conduct" is insufficient to prejudice the defendant, since this "illegal conduct" will have to be proven at trial).

¹⁷ *Triquint Semiconductor, Inc. v. Avago Tech. Limited*, 2010 WL 3034880, at *4 (D. Ariz, 2010) (noting that disputes over Fed. R. of Evid. 408 matters should be resolved as "evidentiary matters with motions *in limine* rather than prematurely in Rule 12(f) motions.") The only conceivable argument that a motion to strike would not be premature at this stage of the proceedings would be that Defendant's Motion to Amend would be futile as a matter of law. However, assuming *arguendo*, if the Court were to consider a *sua sponte* motion to strike for the purposes of this Motion to Amend, "[m]otions to strike are generally viewed with disfavor, and will usually be denied unless the allegations in the pleading have no possible relation to the controversy, and may cause prejudice to the parties." *Id.* at *3. The Court makes no determination whether or not these photographs would survive a motion to strike's strict standard.

prejudicial to the moving party.¹⁸ In this case, while the Defendant argues that the photographs are “inflammatory,” the Defendant does not argue that the content of the photographs is “redundant, immaterial, impertinent, or scandalous” such that the photographs would completely inadmissible before the Court at trial. Instead, the Defendant argues that the photographs inclusion in the Complaint at this early point in the proceedings would *procedurally* unduly prejudicial to the Defendant because it is an attempt to “lay the groundwork . . . to facilitate the presentation of inflammatory evidence,” while avoiding the procedural protections afforded Defendant at trial under Fed. R. Evid. 403.¹⁹ While the Court agrees that the proposed Amended Complaint is unduly prejudicial to the Defendant, it does so on slightly different grounds.

III. Plaintiff’s Proposed Amended Complaint Would Cause Undue Prejudice to Defendant

Under Fed. R. Civ. P 8(e), the Court must construe pleadings “as to do justice.”²⁰ The primary purpose behind the pleading requirements of Fed. R. Civ. P. 8 is “to give reasonable notice [to the adverse party] of the allegations in the complaint sought to be placed in issue.”²¹ “If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e)

¹⁸ See *Hobson v. Govt. of the Virgin Islands*, 20 V.I. 413, 418 (Terr.V.I. 1984) (stating that parts of a complaint that are redundant or irrelevant should not be stricken where the defendant simply states the pleading is “scandalous” or “irrelevant” without more)

¹⁹ Defendant’s Opposition to Motion for Leave to File Amended Complaint, August 20, 2012, at 2.

²⁰ FED. R. CIV. PRO. 8(e).

²¹ *U.S. v. 1866.75 Board Feet, 11 Doors and Casings, more or Less of Dipteryx Panamensis Imported from Nicaragua*, 2008 WL 839792, at *3 (E.D. VA 2008) (citing 5 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1261 (3d ed.2004)).

before responding.”²² While Defendant did not raise such an objection, the Court may consider it *sua sponte* in its sound discretion, particularly in a unique situation as is the case here.²³

One primary purpose a motion for a more definite statement is to compel a plaintiff to remedy a pleading that is “so vague or ambiguous” so that the defendant may be able to prepare a reasonable response under the requirements of Fed. R. Civ. P. 8(b).²⁴ Under Fed. R. Civ. P. 8(b) a defendant is required to:

- (A) state in short and plain terms its defenses each claim asserted against it; and
- (B) admit or deny the allegations asserted against it by an opposing party.²⁵

While the defendant can generally deny all the allegations or claim it “lacks the knowledge or information sufficient to form a belief about the truth of the allegation,” it must do so in good faith.²⁶ A defendant’s failure to follow these pleading requirements

²² *Swierkiewicz*, 534 U.S. at 514. *See Callender v. Nichtern*, 1995 WL 409028, at *3 (Tenn. V.I. 1995) (noting that while a complaint lacked specificity by simply attaching a news article which, among other things, included alleged derogatory statements made by defendant, the appropriate remedy for defendant was to move under a Fed. R. Civ. P. 12(e) motion). Fed. R. Civ. P. 12(e) motions are most often granted in the case of “shotgun complaints” or where the complaint only contains “bare bones allegations.” While here the proposed Amended Complaint clearly does not rise to the level of a “bare bones allegation,” the Court is concerned with the level of *specificity* of the facts alleged in the amended complaint. *See generally Matos*, 52 V.I. at 682-3.

²³ *See Fikes v. City of Daphne*, 79 F.3d 1079, 1083, Footnote 6 (11th Cir. 1996) (“The district court had the inherent authority to require the appellant to file a more definite statement. Such authority, if not inherent in Rule 12(e), is surely within the district court’s authority to narrow the issues in the case in order to speed its orderly, efficient, and economic disposition. In this case, the district court would have acted well within its discretion if, acting *sua sponte*, it had returned the complaint to appellant’s attorney”); *see also Doe v. Borough of Morrisville*, 130 F.R.D. 612 (E.D.Pa. 1990) (ordering that, while considering the greater latitude afforded a *pro se* plaintiff, plaintiff file a more definite complaint because his complaint did not provide defendants with proper notice).

²⁴ FED. R. CIV. PRO. 8(e) (“A party may move for a more definite statement of pleading to which a responsive pleading is allowed by which is so vague or ambiguous that the party cannot reasonably prepare a response.”)

²⁵ FED. R. CIV. PRO. 8(b)(1).

²⁶ FED. R. CIV. PRO. 8(b)(2)-(5). *See U.S. v. 1866.75 Board Feet*, 2008 WL 839792, at *3 (“Resort to this form of allegation [that the party lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegation] should not be capricious. A denial of knowledge or information requires that

can have serious consequences because any failure to respond to or deny an allegation in the complaint, the Court considers the allegation admitted by the defendant.²⁷ In other words, a complaint has to be written in such a way that the defendant (1) has notice of all the allegations against them and (2) has a meaningful opportunity to reply so that they “fairly respond to the substance of the allegation[s],” thereby also subsequently placing the plaintiff on notice of the defendant’s defenses, admissions, and denials.²⁸

In this case, the photographs of Plaintiff’s alleged injuries included in the proposed Amended Complaint are so vague and ambiguous that they do not provide the Defendant with a meaningful opportunity to reply, causing undue prejudice to the Defendant. While the Court by no means implies that all photographs are barred from inclusion in a complaint,²⁹ an adverse party’s ability to specifically admit or deny the substance of the “allegations” inferred by a photograph can be extremely limited depending on what the image of the photograph contains and the photograph’s context within the complaint.³⁰ As Plaintiff acknowledges, “a picture [can] be worth a hundred

the party not only lack first-hand knowledge of the necessary facts involved but also that the pleader lack information upon which she reasonably could form a personal belief concerning the truth of the adversary’s allegations”).

²⁷ FED. R. CIV. PRO. 8(b)(6).

²⁸ FED. R. CIV. PRO. 8(b)(2)-(5); *See Zokari v. Gates* 561 F.3d 1076 (10th Cir., 2009)(finding the court would “not do justice” if a *pro se* complaint was interpreted so broadly that it would not give the defendant reasonable notice of the claims against them); *see also Francisco v. Verizon South, Inc.*, 2010 WL 2990159. At *6 (E.D.Va 2010)(discussing the split of authority of applying *Twombly-Iqbal* pleading standards to affirmative defenses).

²⁹ However, the Court does not encourage the inclusion of pictures rather than a “short and plain statement of the claim.” If anything, pictures should be included for a specific purpose to supplement the “short and plain statement” such that it would both meet the minimum requirements under Fed. R. Civ. P. 8, as well as not rise to the level of being unduly prejudicial to the Defendant. Photographs alone do not meet the “particularity” pleading requirements under the Federal Rules.

³⁰ *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (“[A pleading] statement [under Fed. R. Civ. P 8(a)] must simply ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”) (*citing Conley v. Gibson*, 355 U.S. 41 (1957))

words.” Thus, if Plaintiff chooses to go so far beyond the minimum pleading standards of Fed. R. Civ. P. 8 by including photographs, the photographs must be accompanied by specific written statements which describe in detail exactly the allegations Plaintiff is asserting by the photographs, thereby providing the adverse party with notice and a reasonable opportunity to respond.

Here, the purpose of including many of the photographs in the Complaint is unclear and would not provide Defendant with a reasonable opportunity to respond under Fed. R. Civ. P. 8. First, while the image of the beverage cup and lid on page 2 of the proposed Amended Complaint *infers* that this lid and cup were the specific drinking instruments which “expand[ed] and warp[ed]” when hot tea was inside it, it is unclear from the written portion of the Complaint whether or not the Plaintiff is attempting to make such a specific allegation. Second, the photographs on page 4 of the proposed Amended Complaint seem to illustrate the “large bubbling blistering, burn damage to [Plaintiff’s] . . . skin” described in paragraph 18; and the photos on page 5 seem to illustrate the “severe injury” which “continues to [cause her] . . . pain and scarring,” referred to in paragraph 20. However, it is unclear from the context of the complaint what exactly these pictures are attempting to allege. For instance, no date or time is provided indicating when the pictures were taken, and therefore it is unclear if the pictures are of the burn damage that Plaintiff continues to suffer from, or if it is the burn damage right after the occurrence of the alleged incident. Finally, while the photographs of “proper lids for . . . hot beverage[s]” on pages 2 and 3 are unnecessarily duplicative of the information contained in paragraph 10 of the proposed Amended Complaint, the

Court does not find the inclusion of these photographs as unduly prejudicial to the Defendant.³¹

Moreover, the Court reiterates that the Complaint is not the proper forum in which to attempt to introduce evidence.³² While the Court encourages well-pleaded complaints, the purpose of the complaint is not to prove the case, but simply to state a clear, plausible claim for relief which places the adverse party and the Court on reasonable notice. Here, Plaintiff is blatantly attempting to include evidence in the Complaint while avoiding the Federal Rules of Evidence, at substantial risk of undue prejudice to the Defendant. Plaintiff will not be prejudiced by the exclusion of the photographs in any future proposed amended complaint because Plaintiff can simply provide a detailed written description of Plaintiff's injuries. Plaintiff may also move to admit the photographs into evidence during trial. In fact, by including such photographs in the proposed Amended Complaint, the Plaintiff himself increased his burden to a standard higher than necessary in traditional pleading practice under the Federal Rules.

IV. Providing a Red-Lined Copy of Proposed Amended Complaint Under Loc. R. Civ. P 15.1

Finally, Defendant also argues that Plaintiff's Motion to Amend should be denied because it fails to comply with the technical requirements under Loc. R. Civ. P. 15.1. Loc. R. Civ. P. 15.1 requires a party to provide a "red-lined" copy of the complaint by "reproduc[ing] the entire pleading as amended specifically delineating the changes or

³¹ See *Hobson*, 20 V.I. 413 at 418.

³² STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, *FEDERAL CIVIL RULES HANDBOOK*, at 361 (2012) ("Parties should set forth the averments in general terms and should omit evidential material.")

additions and may not incorporate any prior pleading by reference.”³³ However, both the Federal Rules and the Local Rules reject the approach that pleading as a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”³⁴ Here, Plaintiff requests that the Court waive the “red-line” requirement because (1) counsel does not have access to an electronic version of prior counsel’s Complaint or Microsoft Word, and (2) the whole Amended Complaint “would just be one red strike through.”³⁵ While the Court decides this motion on other grounds, the Court finds the fact that counsel does not have access to Microsoft Word or prior counsel’s Complaint is not a sufficient excuse not to follow Loc. R. Civ. P. 15.1, and recommends that counsel takes note of the local rules if Plaintiff intends to file another motion for leave to amend the complaint.

³³ LOC. R. CIV. P. 15.1

³⁴ *Foman v. Davis*, 371 U.S. at 181-2; *but see, e.g., In re Tutu Water Wells Contamination Litigation v. Texaco Inc.*, 1995 WL 841939, at *1 (D.V.I, Nov. 22, 1995) (denying motion to amend where the motion merely summarizes the changes to the original complaint in a “cursory manner” and “radically departs” from the legal basis of the original complaint); *Davis v. Ragster*, 2008 WL 961194, at *1 (D.V.I. Apr. 4, 2008) (noting that litigants are required to know and follow the Local Rules of Civil Procedure because they are critical to the integrity of the judicial proceedings); *Lawance v. Morris*, 2012 WL 3553090, at *2 (D.V.I., Aug. 2, 2012)(dismissing a *pro se* litigant’s appeal, even when liberally construing the litigants brief, because the litigant arguments were so vague and they failed to comply with the technical rules by providing a detailed appendix).

³⁵ Plaintiff’s Motion for Leave to File an Amended Complaint, at 2, Aug. 1, 2012.

CONCLUSION

For the foregoing reasons, the Court will deny Plaintiff's Motion for Leave to File an Amended Complaint without prejudice to re-filing within 14 days. An Order consistent with this Opinion shall follow.

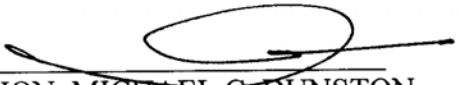
Dated: September 29, 2012

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:

Lori Tyson

Court Clerk Supervisor 10/5/12


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

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VELMA GEORGE and KONTIE GEORGE,

Plaintiffs,

vs.

WENHAVEN, INC., d/b/a WENDY'S,

Defendant.

)
) **CASE NO. ST-12-CV-34**
)
)
)
)
)
)
)
)
)

ORDER

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

ORDERED that Plaintiff's Motion for Leave to File an Amended Complaint is
DENIED without prejudice to re-filing within Fourteen (14) days of this Order;

ORDERED that a copy of this Order and the accompanying Memorandum
Opinion shall be directed to counsel of record.

Dated: September 27, 2012

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:

Lori B. Tyson

Court Clerk Supervisor

[Signature]
10/5/12

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