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

NANCY ANDERSON,	)
	) CIVIL NO. ST-08-CV-545
Plaintiff,	)
vs.	) ACTION FOR PRELIMINARY
	) INJUNCTIVE RELIEF, BREACH OF
BASIL BRYAN,	) CONTRACT, DECLARATORY
	) RELIEF, NUISANCE AND DAMAGES
Defendant.	)
	) JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Dismiss Counts I and II of Plaintiff's Second Amended Complaint. Karin A. Bentz, Esq., of the Law Firm of Karin Bentz, represents Plaintiff Nancy Anderson. Joseph Arellano, Esq., of Arellano & Associates, represents Defendant Basil Bryan.

FACTS

The conflict between these parties began with a real estate transaction in 2002. That year, Bryan contracted with Anderson to sell her Parcel No. 17-5C ("Parcel"), Estate St. Peter, St. Thomas, U.S. Virgin Islands. After signing the contract, Bryan deeded the Parcel to Moonpath, LLC ("Moonpath"), a former plaintiff in this case, and a company of which Anderson was the principal. At the time of the transaction, Bryan also executed an express easement agreement with Moonpath. The easement agreement required Bryan to pave the easement within ninety (90) days of the agreement. In 2005, Moonpath transferred all of its interest in the subject property and the easement to Anderson. According to Anderson, Bryan never paved the easement.

On November 10, 2008, Moonpath sued Bryan for breach of contract, nuisance and injunctive relief. On July 23, 2009, the Court granted Moonpath's Motion to Amend Complaint to add Anderson as a plaintiff. The First Amended Complaint was deemed filed as of July 23, 2009. By Order entered on July 29, 2010, the Court granted Bryan's Motion to Dismiss Moonpath as a plaintiff because Moonpath lacked standing to assert a nuisance claim or a breach

of contract claim.[1] On August 12, 2010, Anderson filed a Second Amended Complaint, alleging on her own behalf claims of nuisance and breach of contract and requesting injunctive relief and damages. On September 22, 2010, Bryan filed a Motion to Dismiss Counts I and II of the Second Amended Complaint, arguing that the claims are time-barred. Anderson filed her Opposition on October 12, 2010, to which Bryan replied on November 3, 2010.

DISCUSSION

Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure[2] permits defendants to seek dismissal of claims when the complaints "fail[] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). As it considers such a motion, the Court will separate the factual allegations from the legal conclusions, and accept the factual allegations as true. *Ashcroft v. Iqbal*, -- U.S. --, 129 S.Ct. 1937, 1949 (2009); *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). It will construe the Complaint in the light most favorable to the Plaintiff. *Phillips*, 515 F.3d at 231. The Court will then determine whether, "under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Id.*

Rule 12(b)(6) motions test the sufficiency of the pleadings and are designed to "screen out cases" in which there is no remedy for the wrong alleged or no relief could possibly be granted. *Port Auth. of New York and New Jersey v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999). Motions to dismiss may allege that the complaint fails to state sufficient facts to establish plaintiff's entitlement to relief, or that the complaint states a legal theory that is not cognizable as a matter of law. In this case, Bryan contends that Moonpath states a legal theory that is not cognizable as a matter of law because it is barred by the statute of limitations.

I. BRYAN'S MOTION TO DISMISS IS TIMELY.

Before turning to the merits of Bryan's Motion to Dismiss, the Court must determine whether Bryan raised his limitations defense sufficiently early in this proceeding. Moonpath argues that because Bryan waited too long to raise the defense, he has waived it.

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[1] Because Moonpath transferred its interest in the easement, it could not move for injunctive relief or declaratory judgment to enforce the easement. In addition, the Court found that it could not allege a nuisance claim, since the cause of action would have accrued to Moonpath at the latest on the last day on which it maintained in interest in the easement, which was in 2005. Therefore, the nuisance claim was time-barred. In addition, the Court found that Moonpath could not allege a breach of contract against Bryan because the breach of contract accrued ninety days after the grant of easement, and that six years expired before Moonpath filed its Complaint. Therefore, the breach of contract claim was also time-barred. (Memo. Op. July 29, 2010.)

[2] The Federal Rules of Civil Procedure are applicable to matters before the Superior Court whenever they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

Although in this jurisdiction defendants need not plead the statute of limitations as an affirmative defense in their answer, and may raise it in a Rule 12(b)(6) motion to dismiss, nonetheless, the defense should be raised "as early as possible." *Robinson v. Johnson*, 313 F.3d 128, 135-36 (3d Cir. 2002) (citing *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987)). A failure to raise the defense in a pleading "'can be harmless.'" *Robinson*, 313 F.3d at 136 (quoting *Venters v. City of Delphi*, 123 F.3d 956, 968 (7th Cir. 1997)). However, depending upon the circumstances, a defendant might deprive the plaintiff "of fair notice and a reasonable opportunity to respond . . . [for example,] by not raising [the defense] until 'the parties had largely completed an exhausted discovery process, and the scheduled trial date was only a month away.'" *Id.*

In this case, Anderson first asserted her nuisance and breach of contract claims in the First Amended Complaint, which was deemed filed as of July 23, 2009.[3] In response to that Complaint, Bryan filed an Answer on August 12, 2009. His Answer did not raise the statute of limitations defense. On September 10, 2009, Bryan filed a Motion to Dismiss Moonpath, and raised the defense in his November 3, 2009 Reply to Moonpath's Opposition. On August 12, 2010, Anderson filed her Second Amended Complaint, again asserting claims of nuisance and breach of contract. Bryan filed his Motion to Dismiss on September 22, 2010, asserting that the claims are barred by the statute of limitations.

The "earliest possible opportunity" for Bryan to raise his statute of limitations defense was in his Answer to Anderson's Complaint, or August 12, 2009. He did not raise it until November 3, 2009. The Court must determine whether, despite this delay, Anderson had fair notice and a reasonable opportunity to respond. *Venters*, 123 F.3d at 968.

The delay in raising the statute of limitations defense amounted to a little less than three months. While the length of this delay is far from insignificant, it is not so great as to have deprived Anderson of reasonable notice or an opportunity to respond. Unlike in *Venters*, at the time the defense was raised in this case, discovery had not yet been completed. In fact, the Court had not yet issued a scheduling order. Furthermore, Anderson has had notice and a reasonable opportunity to respond in the year since Bryan first raised the defense. In fact, Anderson has asserted in her Opposition to the Motion to Dismiss a number of arguments relating to the defense. Therefore, the Court finds that the statute of limitations defense was raised in a sufficiently timely manner and was not waived.

Having determined that Bryan brought the Rule 12(b)(6) Motion in a timely fashion, the Court will now discuss whether or not the claims in Counts I and II of the Second Amended Complaint should be dismissed.

[3] The Court granted Moonpath's Motion to Amend Complaint by Order entered on July 23, 2009, which ordered that the First Amended Complaint would be deemed filed as of that date.

II. WHETHER ANDERSON'S NUISANCE CLAIM IS TIMELY.

Anderson asserts in her Second Amended Complaint a claim for nuisance based on Bryan's failure to pave the easement. She states that she has suffered a "loss of use and enjoyment," that the failure to pave the easement "threatens the health and welfare" of Anderson and her guests by making it difficult to traverse the easement, and that Anderson is unable to arrange for home delivery of certain items. (Pl.'s Second Am. Compl. ¶¶ 41, 43, 44.) Bryan argues that Anderson's claim for nuisance is barred by the statute of limitations. Anderson contends that the doctrine of continuing torts operates to toll the claim's accrual.

Nuisance claims in the Virgin Islands must be brought within two years of the date the cause of action accrued. V.I. CODE ANN. tit. 5, § 31(5)(A) (1997); *see also Bluebeard's Castle, Inc. v. Hodge*, D.C. Civ. App. No. 2002-154, 2009 WL 891896 (D.V.I. App. Div. 2009) (applying a two-year statute of limitations to a nuisance claim). The first date on which Anderson suffered from the nuisance alleged in her Complaint was the day on which Moonpath transferred its interest in the property and easement to her, which occurred sometime in 2005. Anderson does not state in her Complaint or in any attached exhibits the date on which the transfer occurred. Assuming, to Anderson's benefit, that the transfer occurred on the last possible date in 2005—December 31, 2005—she first suffered from the nuisance on that date. Consequently, her nuisance claim would be barred after December 31, 2007. 5. V.I.C. § 31(5)(A). Her nuisance claim was not asserted until she filed her First Amended Complaint on July 23, 2009. Therefore, it would appear to be untimely. Anderson argues, however, that the continuing torts doctrine operates to toll the date of the claim's accrual.

The continuing torts doctrine stands for the proposition that, "when a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases." *Barnes v. American Tobacco Co.*, 161 F.3d 127, 154 (3d Cir. 1998). In such a case, the "cumulative effect of the conduct," rather than a single incident, is actionable. *Id.* "Moreover, since one should not be allowed to acquire a right to continue the tortious conduct, it follows logically that statutes of limitations should not run prior to its cessation." *Id.*

The continuing torts doctrine applies only to continuing, and not permanent, nuisances. A continuing nuisance is one that "may be discontinued at any time." 58 AM. JUR. 2D *Nuisances* § 26 (Updated July 2010). It "involves continuing or repeated conduct." *Bluebeard's Castle, Inc.*, 2009 WL 891895, at *5. It is the continuing conduct, and not continuing harm, which is relevant for the determination of whether the doctrine applies. *Id.* (quoting *Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982)); *see also Cannon v. United States*, 338 F.2d 1183, 1193 (10th Cir. 2003) ("To determine whether a trespass is permanent or continuous, . . . courts 'look solely

to the act constituting the trespass [or nuisance], and not to the harm resulting from the act.'"). When the doctrine applies, it operates to toll the accrual date of the claim "until the date of the last injury or when the tortious conduct ceased." *Bluebeard's Castle, Inc.*, 2009 WL 891896, at *5.

Applying these principles to this matter, the Court finds that Anderson's nuisance claims are not time-barred. Anderson alleges that Bryan's wrongful and harmful conduct—his failure to pave the easement—continued from the date on which Anderson received the property from Moonpath through the date of the Complaint. In fact, she alleges that he continues to refuse to pave the easement. Assuming that Anderson's factual allegations are true, Bryan's omissions have continued for a number of years, and may be discontinued at any time. 58 AM. JUR. 2D *Nuisances* § 26 (Updated July 2010). Consequently, the nuisance claim is a "continuous tort," which did not accrue before Anderson filed her Complaint, and Count II is not time-barred. Therefore, Bryan's Motion to Dismiss will be denied as to Count II.

III. ANDERSON'S BREACH OF CONTRACT CLAIM IS UNTIMELY.

Anderson also asserts a breach of contract claim for which she seeks both an injunction and money damages. She states in Count I of her Second Amended Complaint that she has an express easement and that Bryan violated that easement agreement by failing to pave the easement.

At the time he sold the subject property to Moonpath, Bryan also signed a grant of an easement, which was attached as an exhibit to the Second Amended Complaint. The grant includes within it certain covenants, including a covenant to pave the easement within "ninety (90) days of the effective date of [the easement agreement]." (Pl.'s Second Am. Compl. Ex. A.) The agreement was executed on May 9, 2002. Therefore, assuming Anderson's factual allegations are true, Bryan contracted to pave the easement on or before August 7, 2002. *Iqbal*, 129 S.Ct. at 1949 (directing courts to separate factual allegations from legal conclusions in a complaint, and assume as true all factual allegations for the purposes of a Rule 12(b)(6) motion). According to Anderson, Bryan did not pave the easement by that date and, in fact, has failed to date to pave it.

The breach of contract claim accrued on August 7, 2002. Actions for breaches of contract must be brought within six years of the claim's accrual. 5 V.I.C. § 31(3)(A). Therefore,

Anderson's claim for breach of contract, which was filed on July 23, 2009, was untimely.[4]

Anderson argues that Bryan made a number of promises to her or her attorney over the years which, she argues, constitute separate enforceable promises, the violation of which she can now sue for. The Second Amended Complaint alleges that in some of Anderson's "multiple telephone conversations with Bryan," Bryan "promised" to pave the easement. (Second Am. Compl. ¶ 20.) She also states that she relied on those promises and "held off filing a lawsuit" as a result. (Second Am. Complaint ¶ 21.)

In her Opposition to Bryan's Motion to Dismiss, Anderson argues that Bryan breached these promises, and that these promises "constituted a new agreement regarding the date that the easement would be paved, and had the effect of tolling the statute of limitations." (Pl.'s Opp'n to Def.'s Mot. to Dismiss 4.) She cites Section 82 of the Restatement, which states:

> (1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.
>
> (2) The following facts operate as such a promise unless other facts indicate a different intention:
>
> (a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or
>
> (b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or
>
> (c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.

Restatement (Second) of Contracts § 82 (1981).

The Restatement provides the rules of decision for Virgin Islands courts, but only in the absence of local laws to the contrary. V.I. CODE ANN. tit. 1, § 4 (1995). With respect to the

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[4] Even if it was timely asserted, it is questionable whether Anderson could assert the breach of contract claim. A covenant may run with the land, but that does not necessarily mean that the breach of a covenant is actionable by a party to whom the contract rights are transferred if the breach occurred *before* the transfer. *See, e.g.*, *Iowa Loan & Trust Co. v. Fullen*, 93 S.W. 58, 59-60 (Mo. App. 1905) ("It is true that . . . where there is such a covenant as will run with the land and there is a breach of such covenant, it becomes a chose [sic] in action in the hands of the person owning the premises at the time of the breach, and does not further run with the land as a covenant."); *see also Reid-Strutt, Inc. v. Wagner*, 671 P.2d 724, 726 (Or. App. 1983) ("A covenant running with the land ceases to run as soon as it has been breached."); WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS, § 1287 Effect of Breach of Covenant Running with the Land (Vol. 4, 1920).

question of whether subsequent promises to pay toll the statute of limitations, there *is* a local law to the contrary. Section 39 of Title 5 states in relevant part as follows:

> No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of [the statute of limitations], unless the same is contained in some writing, signed by the party to be charged thereby.

5 V.I.C. § 39. Because Section 39 of Title 5 conflicts with Section 82 of the Restatement, the local statute controls. 1 V.I.C. § 4.

Anderson's Second Amended Complaint does not allege that Bryan signed any writing incorporating a promise to pay. In fact, it specifically states that he made these promises orally. (Pl.'s Second Am. Compl. ¶ 20.) Therefore, Anderson does not allege sufficient facts to plausibly suggest that she has a breach of contract claim against Bryan which is not time-barred. *Iqbal*, 129 S.Ct. at 1949 (requiring plaintiffs to plead their claims with sufficient facts to make them plausible). The Court will grant Bryan's Motion to Dismiss as to Count I.

CONCLUSION

Bryan timely raised a statute of limitations defense. However, his Motion to Dismiss must fail as to Count II of Anderson's First Amended Complaint, because the continuing torts doctrine operates to toll the accrual date for Anderson's nuisance claim. However, his Motion to Dismiss must succeed as to Count I of the First Amended Complaint because Anderson never alleged that Bryan made a subsequent promise to pave in writing, which is required if a plaintiff is to succeed on a claim that the limitations period should be tolled. Therefore, by separate Order of even date, the Court will grant Bryan's Motion to Dismiss as to Count I, but deny the Motion to Dismiss as to Count II.

DATED: December 6, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 12/13/10
Court Clerk Supervisor

CERTIFIED A TRUE COPY
Date: 12/16/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: Court Clerk

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ORDER

AND NOW, pursuant to the Memorandum Opinion issued on today's date, it is hereby

ORDERED that Defendant Basil Bryan's September 22, 2010 Motion to Dismiss is **GRANTED as to Count I** and **DENIED as to Count II**; and it is further

ORDERED that **Count I** of Plaintiff Nancy Anderson's Second Amended Complaint is **DISMISSED**; and it is further

ORDERED that copies of this Order shall be directed to counsel of record.

DATED: December 6, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:

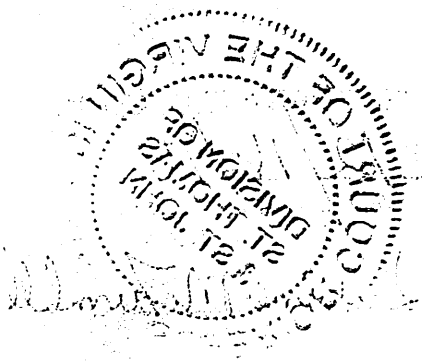
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:
ROSALIE GRIFFITH
Court Clerk Supervisor 12/13/10

CERTIFIED A TRUE COPY

Date: 12/16/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By: Diane M. Turnbull
Court Clerk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