

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

DEBRA CHRISTOPHER,

Plaintiff,

v.

GOV. JUAN F. LUIS HOSPITAL & MEDICAL
CENTER, VIRGIN ISLANDS HOSPITAL AND
HEALTH FACILITIES CORPORATION,
GOVERNMENT OF THE VIRGIN ISLANDS,
JANE & JOHN DOES, NURSES & STAFF OF
THE GOV. JUAN F. LUIS HOSPITAL &
MEDICAL CENTER, DR. ARAKERE B.
PRASAD, M.D., and PRIMARY CARE, PLLC,

Defendants.

CASE NO. SX-16-CV-97

ACTION FOR DAMAGES:
MEDICAL MALPRACTICE

JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Primary Care, PLLC (Primary Care)'s Motion Requesting Dismissal ("Motion"), filed April 1, 2016; Plaintiff's Opposition to Defendant Primary Care PLLC's Motion to Dismiss ("Opposition"), filed May 5, 2016; Defendant's Reply thereto, filed May 18, 2016; and Plaintiff's Motion to File Response Out of Time, filed May 5, 2016. Because the only excuse or justification Plaintiff offers for her failure to timely file her Opposition is counsel's hectic schedule, Plaintiff's Motion to File Response Out of Time will be denied. Nonetheless, because the relevant provisions of the Virgin Islands Code establish that Defendant Primary Care is a "health care provider" within the meaning of the Virgin Islands Medical Malpractice Act (MMA), Primary Care's Motion will be denied.

Also before the Court is Gov. Juan F. Luis Hospital and Medical Center's, Virgin Islands Hospital and Health Facilities Corporation's, and Government of the Virgin Islands' (collectively "Government Defendants") Motion to Dismiss for Lack of Jurisdiction and Memorandum in Support (Memo), filed April 18, 2016;¹ and Plaintiff's Opposition thereto, filed May 3, 2016. Because the Court finds that Plaintiff has responded adequately to Defendants'

¹ Defendants' Motion was originally filed on April 6, 2016 under an incorrect case number. Therefore the Court deems the Motion filed as of April 18, 2016, the date on which Defendants filed a corrected copy of the Motion.

Motion by providing uncontroverted proof of compliance with the jurisdictional pre-filing requirements under both the Virgin Islands Tort Claims Act (VITCA) and the MMA, the Motion will be denied.

Plaintiff's Motion to File Response Out of Time

Superior Court Rule 10(a)(2) provides that "The court for cause shown may at any time in its discretion... (2) On motion, permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect." Thus, because the specified time period for Plaintiff to file her Opposition has expired, the Court will only exercise its discretion to extend the deadline upon finding that Plaintiff's failure to timely file her Opposition was the result of excusable neglect.

The Supreme Court of the Virgin Islands has established that in this jurisdiction "excusable neglect" is essentially synonymous with "good cause."

The determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances... including... the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether or not it was within the reasonable control of the movant, and whether the movant acted in good faith.

Fuller v. Browne, 59 V.I. 948, 955 (V.I. 2013) (citation and internal quotations omitted).

The general preference "is to decide cases on their merits" and accordingly, "any doubts should be resolved in favor this preference." *Id.*² However, trial courts have significant discretion in ruling on motions to extend deadlines pursuant to the language of Rule 10. *See* Super. Ct. R. 10(a)(2).

Evaluating the factors articulated in *Fuller*, the Court finds that Plaintiff's proffer is insufficient to permit a finding that her failure to file her Opposition by the April 21, 2016 deadline was the result of excusable neglect.³ Plaintiff's attempt to demonstrate that her failure

² *Fuller* addressed a matter arising "under Super. Ct. R. 322.5(b)(2) which authorizes the Appellate Division to 'consider a motion to set aside a dismissal order and to reopen the matter that is dismissed... upon a showing of good cause or excusable neglect.'" However, the definition of "excusable neglect" outlined therein is equally applicable to the present Rule 10(a)(2) analysis.

³ Local Rule Civil Procedure 56.1 applies as a rule of last resort, pursuant to Superior Court Rule 7, establishing that "any party adverse to a motion [for summary judgment] may file a response... within twenty (20) days of the filing of the motion."

was the result of excusable neglect is summarized in Plaintiff's Motion to File Response Out of Time as follows:

At the time Counsel received [this motion], he was preparing for an upcoming criminal trial... which began April 11, 2016 and concluded April 18, 2016. Counsel also attended a Calendar Call and an Arraignment Hearing at the District Court on April 15, 2016. Upon the conclusion of the criminal trial, Counsel was also working on responding to two (2) Motions for Summary Judgment that was due on April 29, 2016 and May 13, 2016, respectively.

Motion to File Response Out of Time, at 1-2.

In general, conflicting or hectic schedules do not constitute sufficiently good cause to justify or excuse a failure to comply with deadlines established by rules of the Superior Court. *See Hills v. Whitecap Investment Corp.*, 2016 V.I. LEXIS 11, at *6 (V.I. Super. Ct. 2016); *Kan. Packing Co. v. Lavilla*, 39 V.I. 76 (V.I. Super. Ct. 1998) (citations omitted). But even assuming *arguendo* that there might conceivably be some set of circumstances concerning the hectic and conflicting schedule of Plaintiff's counsel that might explain Plaintiff's failure to timely respond to Primary Care's Motion Requesting Dismissal, these underlying scheduling difficulties are irrelevant with respect to Plaintiff's failure to move for an extension of time prior to expiration of the deadline. As to this second and more significant failure, Plaintiff's Motion is silent.

Even if Plaintiff's counsel's inability to timely draft and file her Opposition was outside of her control—in that Plaintiff's exceedingly busy schedule made timely drafting and filing a practical impossibility—her failure to timely file her Motion to File Response Out of Time was not. Plaintiff has offered no justification or excuse for her failure to file her Motion prior to the expiration of the deadline to respond. Therefore, the Court cannot find that this failure was the result of excusable neglect, and under Rule 10(a)(2), the Court will not exercise its discretion to extend the deadline for the filing of Plaintiff's Opposition. Accordingly, Plaintiff's Motion to File Response Out of Time will be denied.

The Court notes that while the length of the delay in Plaintiff's filing was brief—only fourteen days—and unlikely to significantly prejudice Defendants or negatively impact judicial proceedings, equity is unoffended by the denial of Plaintiff's Motion as, even without

considering Plaintiff's Opposition, the Court nonetheless denies Primary Care PLLC's Motion Requesting Dismissal on the basis of controlling provisions of the Virgin Islands Code which the briefs of both parties fail to address.

Primary Care PLLC's Motion Requesting Dismissal

In its Motion, Defendant Primary Care argues that Plaintiff's Verified Complaint should be dismissed as to Primary Care because "the present action is one under 27 V.I.C. § 166 *et seq.* for medical malpractice," but Primary Care is not a "health care provider" within the meaning of the statute. Motion Requesting Dismissal, at 1. Because it "is merely an administrative corporation to run an office, provide accounting services and hire clerks and personnel to assist in the running of an office," Primary Care argues that it is not a "health care provider" and therefore that it cannot be sued under the MMA.⁴ Reply to Plaintiff's Opposition, at 1.

Section 166 of Title 27 Virgin Islands Code defines "health care provider" as "a person, corporation, facility or institution who must be licensed by this territory to provide health care or professional medical services including a medical, osteopathic, chiropractic or naturopathic physician, hospital, dentist, registered or licensed practical nurse to include the Advanced Practice Registered Nurse, optometrist, podiatrist, physical therapist, psychologist, paramedical personnel, emergency medical technician, pharmacist and laboratory technician." 27 V.I.C. § 166(c). Thus, it is clear from the statute that Defendant Primary Care will qualify as a "health care provider" if it is a corporation that *must be licensed to provide health care or professional medical services*.

⁴ As an initial matter, Defendants appear to argue their Motion under the assumption that if Primary Care does not qualify as a "health care provider" within the meaning of the MMA, it cannot be sued for negligence in connection with the practice of medicine. This assumption finds no support in Virgin Islands law. The MMA establishes procedures to insulate "health care providers"—as defined therein—from frivolous lawsuits such as requiring submission of all proposed complaints to a review board of medical experts before they may be filed with the Court. Defendants have presented no argument or authority, and the Court finds no indication in the language of the statute itself to support the proposition that the MMA in any way abrogates the right of individuals to pursue common law negligence claims against individuals or organizations purporting to engage in a health care related business who may not qualify as "health care providers" within the meaning of the statute. Thus, even assuming *arguendo* that Primary Care does not qualify as a "health care provider," this fact alone does not necessitate dismissal of Plaintiff's action.

Defendant's attempt to characterize Primary Care as a purely "administrative corporation" is belied by the very name of the business itself: Primary Care, *PLLC*. In the Virgin Islands, as in other jurisdictions, "PLLC" is a designation signifying a particular corporate structure—the professional limited liability corporation—which must, by operation of law, appear at the end of the official name of any registered business seeking to obtain the legal benefits associated with this particular form of incorporation. *See* 13 V.I.C. § 713(b) ("Such corporate name shall end with the words 'Professional Corporation or Professional Limited Liability Corporation' or the abbreviation 'P.C., PC, P.L.L.C., or PLLC'"). The Professional Service Corporations Act (PSCA), codified at Title 13, Chapter 10 Virgin Islands Code, unequivocally establishes that "[n]o professional service corporation shall engage in any business other than the rendering of the professional services for which it was incorporated..." 13 V.I.C. § 707. Thus, as a professional limited liability corporation owned and operated by health care professionals, Primary Care, PLLC, by definition, may only engage in the business of providing health care.

Additionally, while no provision of the PSCA explicitly requires that professional service corporations shall be licensed as such, the Act does establish that:

A professional service corporation... shall be under the supervision of the appropriate licensing authority as set forth in Title 27 and be subject to disciplinary proceedings and penalties, and its certificate of incorporation shall be subject to suspension, revocation of annulment for cause, in the same manner and to the same extent as is provided with respect to individuals and their licenses, certificates, and registrations in Title 27 relating to the applicable profession.

13 V.I.C. § 704(d).

Thus, it is clear from language of the Act itself that the certificate of incorporation of a professional service corporation providing medical care operates as the functional equivalent of a license to provide professional medical services as it is subject to the supervisory and disciplinary procedures of the regulatory board *in the same manner and to the same extent as is provided with respect to individuals and their licenses*.⁵

⁵ This interpretation is consistent with the language of the MMA itself, expressly including corporations in the list of entities potentially qualifying as "health care providers" within the meaning of the statute. *See* 27 V.I.C. § 166.

Therefore, consistent with the plain meaning of the language used in both the MMA and the PSCA, the Court finds that Defendant Primary Care, as a professional limited liability corporation, constitutes a corporation which “must be licensed by this territory to provide health care or professional medical services,” thereby qualifying as a “health care provider” within the meaning of the MMA, and accordingly, Defendant Primary Care’s Motion Requesting Dismissal will be denied.

Government Defendants’ Motion to Dismiss

Government Defendants move for dismissal pursuant to Fed. R. Civ. P. 12(b)(1), applicable through Super. Ct. R. 7, for lack of subject matter jurisdiction.⁶ Although the Supreme Court of the Virgin Islands has repeatedly declined to decide that the pre-filing requirements of the VITCA are jurisdictional, the Court recently noted in *Fleming v. Cruz* that it “has never endorsed this legal principle,” and that “[m]oreover, persuasive precedent exists which counsels otherwise.” 62 V.I. 702, 718 (V.I. 2015) (internal citations omitted). However, in *Richardson v. Knud Hansen Mem’l Hosp.*, the Third Circuit—sitting in its capacity as *de facto* court of last resort in the Virgin Islands⁷—held that the terms under which the Government of the Virgin Islands consented to waive its immunity from tort liability, as embodied in the VITCA, are jurisdictional in nature and not subject to waiver. 744 F.2d 1007, 1009-10 (3d Cir. 1984).

Additionally, the Third Circuit found that, as compliance with the VITCA’s pre-filing requirements are necessary to establish subject matter jurisdiction, a challenge to such compliance by a Rule 12(b)(1) motion may be presented at any stage of the proceedings. *Id.* Therefore, despite any contrary intimations from the Supreme Court, this Court is bound by the

⁶ Although Defendants’ Motion specifically challenged subject matter jurisdiction only on the basis of an alleged failure to comply with the pre-filing requirements of the MMA, Plaintiff’s Opposition responds to Defendants’ Motion as if it had also included a challenge based upon failure to comply with the VITCA. In the interest of judicial economy, and in order to preempt any future facial or factual challenge to subject matter jurisdiction based upon an alleged failure to comply with the pre-filing requirements of the VITCA, the Court addresses both potential bases for Defendants’ challenge to subject matter jurisdiction.

⁷ For a detailed description of the procedural background of *Richardson*, see *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, at *16 (V.I. Super. Ct. 2015).

Third Circuit's precedent in *Richardson*,⁸ and must consider challenges to the VITCA's pre-filing requirements as challenges to subject matter jurisdiction unless and until the Supreme Court of the Virgin Islands conclusively determines otherwise. *Accord, James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74 (V.I. Super. Ct. 2015).

In *Martinez v. Colombian Emeralds, Inc.*, the Supreme Court of the Virgin Islands implicitly endorsed the Third Circuit's framework for evaluating challenges to subject matter jurisdiction under Rule 12(b)(1). 51 V.I. 174, 188 (V.I. 2009) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891-92 (3d Cir. 1977)). Under this framework, a court must first determine whether the 12(b)(1) challenge is facial or factual in nature; that is to say whether the motion to dismiss is based purely upon the sufficiency of the allegations in the complaint or also upon additional facts and evidence.⁹ *Mortensen*, 549 F.2d at 891-92.

Where, as here, a Rule 12(b)(1) motion challenges subject matter jurisdiction based upon facts, or the lack thereof, as developed in the record, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Additionally, "no presumptive truthfulness attaches to [the] plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* Lastly it is the plaintiff who bears the burden of proving that jurisdiction does in fact exist. *Id.*

In this case, Defendants have effectively presented a factual challenge to subject matter jurisdiction, alleging that Plaintiff has, in fact, failed to satisfy the statutory pre-filing requirements for bringing a tort claim against the Government of the Virgin Islands under the

⁸ See *Najawicz v. People of the V.I.*, 58 V.I. 315, 327-28 (V.I. 2013) (explaining that Third Circuit decisions in which that court was sitting as the "*de facto* court of last resort in the Virgin Islands" are binding upon the Superior Court even though they would only represent persuasive authority if the Supreme Court of the Virgin Islands were to consider the issue).

⁹ This distinction is critical. While facial challenges to subject matter jurisdiction under Rule 12(b)(1) are subject to essentially the same standard of review as Rule 12(b)(6) motions and require the Court to accept all well pleaded allegations as true, factual challenges leave the Court free to evaluate any and all evidence available. See *Martinez*, 51 V.I. at 188 (citing *Mortensen*, 549 F.2d at 891-92).

VITCA. Memo, at 1.¹⁰ Specifically, the VITCA requires that a party seeking to bring a tort claim against the Government must either file his claim in court or file a written notice of intent to file such a claim within ninety (90) days of accrual. 33 V.I.C. § 3409, *et seq.* If proper written notice is filed with both the Governor's Office and the Attorney General, the claimant is then allowed two years from the date of accrual to file his claim in court. *Id.* If a claimant fails to file written notice, the Superior Court may still permit the claim to proceed if it is "filed within two years after the accrual of the cause of action, if reasonable excuse for late filing is shown, if the late filing does not cause substantial prejudice to the Government, and if the late filing contains the information required by 33 V.I.C. § 3410." *Fleming v. Cruz*, 62 V.I. at 719.

On the other hand, the Supreme Court of the Virgin Islands has definitively established that the pre-filing requirement of the MMA, as embodied in 27 V.I.C. § 166i, is a jurisdictional prerequisite to bringing a medical malpractice action in the Superior Court. *Brady v. Cintron*, 55 V.I. 802, 815 (V.I. 2011). Under 27 V.I.C. § 166i, before filing a medical malpractice claim in court, a prospective plaintiff must first file a copy of his or her proposed complaint with the Medical Malpractice Action Review Committee ("Committee") by either delivering or mailing it to the Virgin Islands Commissioner of Health. 27 V.I.C. § 166i(b)-(c). At that point the prospective plaintiff must wait for the Committee to review the claim and for a reviewing expert to issue an opinion before filing the claim in court. *Id.* at § 166i(d). However, "if [the] opinion is not received by the Committee within ninety days from the date the complaint was filed with the Committee, the claimant may commence his action against the health care provider in court." *Id.* at § 166i(b).

In their Motion, Defendants argue that "Plaintiff's Complaint should be dismissed because the Plaintiff has failed to first submit her claim to the Medical Malpractice Action Review Committee... which is a prerequisite to commencing a medical malpractice action..." Memo, at 1. In her Opposition, however, Plaintiff contends that she did, in fact, comply with the

¹⁰ Defendants do not specify whether their Motion constitutes a facial or factual challenge to subject matter jurisdiction. Because Plaintiff has attached evidentiary exhibits to her Opposition demonstrating her compliance with both the VITCA and the MMA, the Court evaluates Defendants' 12(b)(1) Motion as a factual challenge. The better practice would have Plaintiff's Verified Complaint affirmatively allege facts demonstrating her compliance with both the VITCA and the MMA, rendering moot any potential facial challenge. At least one judge of the Superior Court has held that such pleading itself is a jurisdictional prerequisite. See *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *11.

pre-filing requirements of both the VITCA and the MMA. The Opposition states that Plaintiff's counsel "submitted a Notice of Claim on behalf of the Plaintiff dated June 30, 2014, to the Honorable Gov. John deJongh and Hon. Vincent Frazer, Attorney General of the Virgin Islands via certified mail/return receipt requested." Additionally, Plaintiff states that "on October 10, 2014, [she] submitted a Proposed Complaint to the Hon. Darice Plaskett, Commissioner of Health via hand delivery."

As Plaintiff has submitted, by way of exhibits to her Opposition, copies of all aforementioned notices along with signed and dated receipts of delivery, she has established both that she provided notice to the Governor and Attorney General within ninety days of the accrual of her claim on or about April 4, 2014 as required by the VITCA; and that she waited to file her Verified Complaint in this Court until March 4, 2016 more than ninety days after filing her proposed complaint with the Committee as required by the MMA. *See* Opposition, Exhibits 1-8; 33 V.I.C. § 3409, *et seq.*; 27 V.I.C. § 166i.

Accordingly, the Court finds that Plaintiff has sufficiently demonstrated her compliance with the pre-filing requirements of both the VITCA and the MMA and that, therefore, the Court properly has subject matter jurisdiction over this action. Thus, Defendants' Motion to Dismiss for Lack of Jurisdiction will be denied.

Conclusion

Because Plaintiff has not demonstrated that her failure to timely file her Opposition to Primary Care, PLLC's Motion Requesting Dismissal, or to at least move for extension of the deadline prior to its expiration was the result of excusable neglect, Plaintiff's Motion to File Response Out of Time will be denied. Additionally, because the Court concludes that Defendant Primary Care, PLLC, as a professional limited liability corporation under Title 13, Chapter 10 Virgin Islands Code, does, by definition, qualify as a "health care provider" within the meaning of the 27 V.I.C. § 166, Defendant Primary Care, PLLC's Motion Requesting Dismissal will be

denied. Finally, because Plaintiff has submitted uncontroverted evidence demonstrating her compliance with the jurisdictional pre-filing requirements of both the VITCA and the MMA, Government Defendants' Motion to Dismiss for Lack of Jurisdiction will be also be denied.

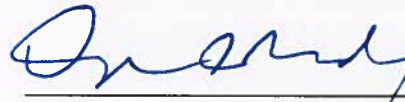
Therefore, on the basis of the foregoing, it is hereby

ORDERED that Plaintiff's Motion to File Response Out of Time is DENIED. It is further

ORDERED that Defendant Primary Care, PLLC's Motion Requesting Dismissal is DENIED. It is further

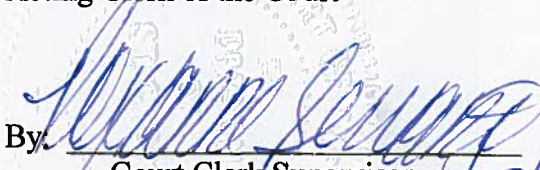
ORDERED that Government Defendants' Motion to Dismiss for Lack of Jurisdiction is DENIED.

DATED: October 12, 2016.



DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By  _____

Court Clerk Supervisor 10/13/16