

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

DIAMOND M. CARTER,

Plaintiff,

vs.

UNIVERSITY OF THE VIRGIN ISLANDS;

Defendant.

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) **CIVIL NO. ST-16-CV-217**
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MEMORANDUM OPINION

Pending before the Court is Defendant's Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim. For the following reasons, Defendant's Motion to Dismiss will be denied.

FACTUAL & PROCEDURAL HISTORY

This matter arises out of a Verified Complaint Diamond Carter originally filed April 21, 2016, and amended on March 2, 2017,¹ alleging that the University of the Virgin Islands is liable for negligence. According to the Amended Complaint, Carter was volunteering at the UVI gymnasium on December 4, 2015,² when Carter fell off a platform that was elevated approximately one foot above the gym floor, sustaining a fractured ankle, among other injuries.³ Carter argues that UVI breached its duty of care by failing to provide adequate safety measures to protect Carter from the foreseeable risk of falling from the platform onto the gym floor.⁴ On March 22, 2017, UVI filed a Motion to Dismiss Plaintiff's First Amended Complaint for Failure

¹ The First Amended Complaint is not verified.

² First Amended Complaint, ¶ 4 and ¶ 10.

³ *Id.*, ¶ 5, ¶ 7, ¶¶ 10-12, and ¶¶ 16-17.

⁴ *Id.*, ¶ 15, ¶ 19, and ¶ 21.

to State a Claim, arguing that Carter's Amended Complaint fails to adequately plead a claim for negligence.⁵

STANDARD

The Superior Court has jurisdiction over civil actions under 4 V.I.C. §76(a).⁶ Under V.I. R. CIV. P. 12(b)(6), a party may test the sufficiency of the pleadings against preliminary defenses by seeking dismissal for an opposing party's "failure to state a claim upon which relief can be granted." In ruling on a motion to dismiss for failure to state a claim, the issue is not whether a party will ultimately prevail but whether the party is entitled to offer evidence to support the claim.⁷ A motion to dismiss for failure to state a claim does not address the merits of the claim but merely tests whether the claim has been adequately stated in the pleading.⁸ In considering whether a pleading should be dismissed for failure to state a claim, a court must accept all well-pled allegations in the pleading as true and view them in the light most favorable to the pleader.⁹ "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'"¹⁰ and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."¹¹ According to the analysis employed by the Supreme Court of the Virgin Islands in reviewing motions to dismiss based on Rule 12(b)(6):

⁵ Defendants' Motion to Dismiss, pgs. 1-2. Carter filed a Response to Defendants' Motion to Dismiss on June 2, 2017, and UVI filed a Reply to the Response to Defendant's Motion to Dismiss on June 19, 2017.

⁶ 4 V.I.C. § 76(a) provides, in pertinent part: "Subject to the original jurisdiction conferred on the District Court by section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy."

⁷ *Espinosa v. Government of the Virgin Islands*, 20 V.I. 78, 83 V.I. LEXIS 38 (1983) (citation omitted).

⁸ *Hans Lollik Corp. v. Gov't of the V.I.*, 1981 V.I. LEXIS 79, 24 (V.I. Terr. Ct. Mar. 6, 1981).

⁹ *In re Tutu Water Wells Contamination Litig.*, 40 V.I. 279, 287-288 (D.V.I. Dec. 15, 1998) (citation omitted).

¹⁰ *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)).

¹¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (U.S. May 21, 2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (U.S. Nov. 18, 1957)).

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.¹²

Importantly, the Virgin Islands Rules of Civil Procedure became effective on March 31, 2017,¹³ emphasizing the designation of the Virgin Islands as “a notice pleading jurisdiction[.]”¹⁴ indicating “an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.”¹⁵ Accordingly, the plausibility standard has been abolished for proceedings in any action commenced after March 31, 2017,¹⁶ and for proceedings in any actions that were pending on March 31, 2017, unless the

¹² *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-650 (VI. Mar. 7, 2011) (internal quotation marks omitted) (citations omitted).

¹³ *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS 22, 1-2 (VI. Apr. 3, 2017).

¹⁴ *Id.* at 49 (V.I. R. CIV. P. 8(a)(2)).

¹⁵ *Id.* at 52 (V.I. R. CIV. P. 8 Reporter's Note). *See also Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, 12 (VI. July 14, 2017) (citing *Brathwaite v. H.D.V.I. Holding Co.*, Super. Ct. Civ. No. 764/2016 (STT), ___ V.I. ___, ___, 2017 V.I. LEXIS 76, *3, [WL], at *2 (V.I. Super. Ct. May 24, 2017) (acknowledging that Virgin Islands Civil Procedure Rule 8(a)(2) eliminates the plausibility standard and instead will permit a complaint so long as it “adequately alleges facts that put an accused party on notice of claims brought against it”).

¹⁶ *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS 22, 3-4. (Rule 1-1 and its accompanying Reporter's Note provide:

“(a) Title and Citation. These rules shall be known as the Virgin Islands Rules of Civil Procedure and may be cited in short-form as V.I. R. CIV. P.

(b) Effective Date. These rules shall take effect as provided in a promulgation order by the Supreme Court of the Virgin Islands.

(c) Application to Pending Proceedings. These rules, and subsequent amendments, govern:

(1) proceedings [*4] in any action commenced after their effective date; and

(2) proceedings in any action pending on the effective date of the rules or amendments, unless:

(A) the Supreme Court of the Virgin Islands specifies otherwise by order; or

Supreme Court of the Virgin Islands specifies otherwise by order or the Superior Court makes an express finding that an injustice or infeasibility would result from the application of the Virgin Islands Rules of Civil Procedure.¹⁷

ANALYSIS

UVI argues that Carter fails to adequately plead that UVI owed a duty of care to Carter, and that, even if UVI owed a duty of care to Carter, UVI breached that duty.¹⁸ In order to establish a claim of negligence in the Virgin Islands, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff and that the defendant breached that duty, constituting the factual and legal cause of the plaintiff's injury.¹⁹ In *Machado v. Yacht Haven U.S.V.I., LLC*, the Supreme Court of the Virgin Islands pronounced that “the foreseeability of harm ‘is the touchstone of the existence of [a land possessor's] duty of reasonable or ordinary care’”²⁰ and abandoned the traditional approach to premises liability in which a landowner's duty to individuals injured on its property was determined by the individual's classification as either an invitee, licensee, or trespasser.²¹ The *Machado* Court explained that, in the context of premises liability, foreseeability means that “if a possessor could anticipate that the conditions on

(B) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.

NOTE

Under this Rule the V.I. R. Civ. P. will take effect as provided in a Promulgation Order by the Supreme Court, and will apply to all actions commenced after their effective date. Importantly, under subpart (c) of this Rule they will apply to all actions that are pending on the date the Rules become effective unless a Superior Court judge makes a specific finding that applying them in a particular previously-pending litigation would be “infeasible” or would “work an injustice.” It is anticipated that having an express ruling that prior rules or practices will be applicable will provide clear guidance to counsel and parties in such previously pending cases. If no ruling is made, under this Rule 1-1 the Rules of Civil Procedure will apply to actions filed before adoption of the Rules.”).

¹⁷ *Id.*

¹⁸ Defendants' Motion to Dismiss, pgs. 4-5.

¹⁹ See *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (finding the foundational elements of negligence to be unquestionably the soundest rule for the Virgin Islands).

²⁰ *Id.* at 386 (citing *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (VI. Aug. 14, 2013)).

²¹ *Id.* at 386.

its property would result in injury to those foreseeably using the property, the possessor can be held liable for those injuries.”²²

UVI argues that “Carter fails to allege that UVI owed her a duty because she fails to plausibly allege that the injury was foreseeable.”²³ Notwithstanding that the plausibility standard is nonextant, in establishing a negligence claim, “[p]laintiffs plead duty in terms of foreseeability by alleging that [d]efendants knew or should have known that their actions would cause harm to the [p]laintiffs.”²⁴ In the Amended Complaint, Carter asserts that UVI, as the possessor of the premises “had a duty to maintain the premises in a condition free from foreseeable risks of harm,”²⁵ contending that it was a “foreseeable [consequence] that people working on the platform for hours at a time exiting the platform would not timely see or expect that there was a significant approximately one foot drop-off that was not level with the gym floor below.”²⁶ Carter further pleads that:

- “the raised platform . . . was made of wood of a similar color of the gym floor, such that a volunteer such as the Plaintiff . . . was not able to see where the edge of the platform ended, and the gym floor below began”²⁷;
- the platform that was “virtually indistinguishable from the gym floor, did not have markings on its edges, a rope line barrier with stanchions, or any other similar

²² *Id.* at 394.

²³ Defendant’s Motion to Dismiss, page 4.

²⁴ *Alleyne v. Diageo USVI, Inc.*, 2015 V.I. LEXIS 110, 24 (V.I. Super. Ct. 2015).

²⁵ First Amended Complaint, ¶ 19.

²⁶ *Id.*, ¶ 15.

²⁷ *Id.*, ¶ 7.

measures . . . to mark where the edge of the platform ended, and the gym floor below it began”²⁸;

- “there was no brightly colored tape or paint on the edge of the raised platform so as to notify or to warn the Plaintiff of a [drop] off from it, down to the gym floor below”²⁹; and
- “the platform also did not have handrails, clearly marked points for ingress and egress, a ramp, or any other device to assist individuals from exiting from the raised platform back on to the University’s gymnasium floor.”³⁰

Because the foregoing factual allegations suggest that UVI knew or should have known that the platform could cause injury to those crossing the platform, the Court finds that Carter adequately pleads that her injury was foreseeable to UVI, and thus, that UVI owed her a legal duty of care.

Further, UVI argues that Carter “fails to allege specific facts that UVI had actual or constructive knowledge of the alleged uneven floor or that the uneven floor constituted a dangerous condition.”³¹ With respect to whether a defendant breached its duty to take reasonable steps to protect a plaintiff against foreseeable harm, a plaintiff must plead facts adequate to indicate that the defendant had actual or constructive notice of a condition and that the defendant should have realized this condition involved an unreasonable risk of harm.³² Recognizing that “it is a well-settled principle of tort law that when a defendant itself

²⁸ *Id.*, ¶ 21.

²⁹ *Id.*, ¶ 8.

³⁰ *Id.*, ¶ 9.

³¹ Reply to Plaintiff’s Response to Defendant’s Motion to Dismiss the First Amended Complaint, page 5.

³² *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 529-530 (VI. Aug. 14, 2013) (“To establish that Appellees breached their duty to protect Ms. Perez [*530] against a dangerous condition, the Perezes had to show that Appellees had actual or constructive notice of the condition, and that they should have realized this condition involved an unreasonable risk of harm.”).

has created the potential hazard, it has actual notice of the foreseeable dangers associated with it,”³³ Carter’s allegation that UVI erected the “unmarked[,]” “un-barricaded[,]” platform, similar in appearance to the gym floor one foot below it,³⁴ is sufficient to indicate that UVI had actual notice of the foreseeable dangers associated with the platform, and thus, should have realized the platform posed an unreasonable risk of harm to those crossing it and taken reasonable steps to prevent such harm.³⁵ Accordingly, Carter sufficiently pleads that UVI breached its duty of care.

Finally, because Carter alleges that her injuries were a direct and proximate result of UVI’s breach of its duty of care,³⁶ Carter sufficiently pleads both factual and legal causation. And, since Carter alleges that she suffered a fracture to her ankle, among other injuries,³⁷ Carter adequately pleads damages.³⁸

³³ *Hairston v. Long Island R.R.*, 2003 U.S. Dist. LEXIS 9015, 16 (S.D.N.Y. May 30, 2003) (citing *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 702, 709 (8th Cir. 1996) (“a possessor will be deemed to have had actual notice if it is affirmatively shown that an agent or employee of the possessor created the dangerous condition”) and *Pianforini v. Kelties Bum Steer*, 685 N.Y.S.2d 804, 805 (N.Y. App. Div. 2d Dep’t Feb. 22, 1999) (citation omitted) (“Actual notice may be found where the defendant created the condition, or was in fact aware of its existence prior to the accident.”)) (other citations omitted).

³⁴ First Amended Complaint, ¶ 5 (“Plaintiff was preparing to exit the subject premises when she fell off of a raised platform that was erected by UVI to cover the gymnasium floor”). See also *Id.* at ¶ 12.

³⁵ The *Machado* Court found that Machado met her burden at summary judgment with regard to Yacht Haven’s duty of care because “[t]he undisputed testimony indicated that countless people — including customers and employees of tenants at the Yacht Haven Grande complex, and Yacht Haven’s own employees — regularly walked across the median [**29] to reach the far side of the parking lot” and because “it was undisputed that Yacht Haven had no posted signs or official policy warning patrons against walking across the narrow median to cross the parking lot. . . . [V]iewing [**392] the evidence in the light most favorable to Machado, a reasonable jury could conclude that Yacht Haven should have foreseen that the median would be used in such a manner and that it should have taken reasonable steps to prevent its patrons from being injured in doing so.” *Machado*, 61 V.I. at 391-392.

³⁶ First Amended Complaint, ¶ 16.

³⁷ *Id.*, ¶¶ 16-17.

³⁸ Additionally, Carter stipulates that her request for punitive damages should be stricken from the Amended Complaint. See Plaintiff’s Response to Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint, pgs. 2-3.

CONCLUSION

For the foregoing reasons, the Court will deny Defendant's Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim. An Order consistent with this Memorandum shall follow.

Dated: July 31, 2017

ATTEST: Estrella George
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: 7-31-17
ESTRELLA H. GEORGE
Clerk of the Court
By: 
Camell A. Clarke
Court Clerk II