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

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MARIO M. BONANNO, Plaintiff vs. KENNETH G. KLEIN, Defendant	CIVIL NO. 419/1985

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MEMORANDUM OPINION AND ORDER
(March 13, 1986)

FEUERZEIG, J.

Defendant Kenneth G. Klein has moved to dismiss plaintiff's complaint, alleging that the two-count complaint is barred by the statute of limitations. The court agrees that plaintiff's complaint is time barred and the defendant's motion to dismiss will be granted.

Defendant's motion was filed on September 18, 1985, and to date no opposition has been filed nor has there been any elaboration of the plaintiff's complaint. On this basis alone, the court may treat the motion as being conceded and grant it. 5 V.I.C. App. V R. 6, 5 V.I.C. App. IV R.7 (1982).

In considering a motion to dismiss under Rule 12(b)(6), F.R.Civ.P., the court must assume that the well-pleaded facts in the complaint are true. Based on Count I, the defendant on March 29, 1976, executed a promissory note to the plaintiff for $10,000, which note was payable on demand. Count II alleges fraud and deceit and that the defendant on May 28, 1976, uttered a check for partial payment of the loan, knowing that there were insufficient funds to cover the check.

Defendant's motion to dismiss is founded upon 5 V.I.C. 31(3)(A)(1967), which provides that if an "action is upon a contract or liability, express or implied," it must be commenced within six years of its accrual. Initially, therefore, the court must decide whether an action on a promisssory note or a check is contractual in nature, and, if so, when the statute of limitations has run on such causes of action.

It has been held in this jurisdiction that a default on a promissory note constitutes a breach of contract and, therefore, is subject to the six-year statute of limitations of 5 V.I.C. 31(3)(A). <u>Bank of Nova Scotia v. St. Croix Drive-In Theatre, Inc.</u>, 19 V.I. 319, 330-31 (D.V.I. 1982). The Uniform Commercial Code provides that "a cause of action against a maker . . . accrues . . . in the case of a demand instrument upon its date, or, if no date is stated, on the date of issue." 11A V.I.C. 3-122(1)(b)(1965). <u>See also</u> J. White and R. Summers, <u>Uniform Commercial Code</u>, 13-7 (1980). It also has been held in the Virgin Islands that the applicable statute of limitations for a demand note commences on the date of issuance. <u>Bank of Nova Scotia</u>, <u>supra</u>, n. 2, at 331. Based upon plaintiff's allegations in Count I that defendant's note was executed on March 29, 1976, the six-year statute of limitations established by 5 V.I.C. 31(3)(A) expired in 1982, more than two years before plaintiff's complaint was filed.

With respect to Count II and plaintiff's suit on a check for which there were insufficient funds, a draft drawn on bank in the form of a check and payable upon demand is a negotiable instrument. 11A V.I.C. §3-104(2)(b)(1965). A cause of action against the drawer of a draft accrues upon notice of dishonor. 11A V.I.C. §3-122(3). Moreover, checks generally are viewed as written contracts for the payment of money and, consequently, are subject to the statute of limitations applicable to contracts in general. See, e.g., Williams v. Lowe, 62 Ind. App. 357, 113 N.E. 471 (1916); First Nat. Bank v. Price, 187 Okla. 380, 103 P.2d 103 (1940), and Scott v. State, 33 So.2d 390 (Ala. Ct. App. 1918). Plaintiff's cause of action on the alleged worthless check thus arose upon notice of insufficient funds in defendant's acccount and also is governed by the six-year limitation prescribed by 5 V.I.C. §31(3)(A).

Although the complaint does not indicate when the plaintiff discovered that the defendant's check could not be honored because of insufficient funds, a check is deemed to be "stale" when it is more than six months old. 11A V.I.C. §4-404. As plaintiff has not contended that the check was not paid because it was "stale," the court presumes that the defendant received notice of dishonor within six months after defendant uttered the check. Consequently, if defendant uttered the check on May 28, 1976, as alleged, the defendant received notice of dishonor no later than early December of 1976. Thus, giving plaintiff the benefit of six months from the date of utterance, his complaint still was filed outside the six-year statute of limitations, which again had run in 1982.

CONCLUSION

It appears, therefore, that plaintiff's cause of action on Count I arose on March 29, 1976, at the time of the promise to pay on demand, and on Count II, sometime in mid-to-late 1976. Both counts are founded on a contract and are governed by the six-year statute of limitations prescribed by 5 V.I.C. §31(3)(A). The complaint not having been filed until March 19, 1985, defendant's motion to dismiss must be granted. Accordingly, it is

ORDERED that defendant's motion to dismiss be and the same hereby is granted, and this action is dismissed with prejudice.

HENRY L. FEUERZEIG
Judge of the Territorial Court

ATTEST:

VIOLA E. SMITH
Administrator/Clerk of the Court