

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

CAPRICE THOMAS and KAFELE THOMAS	)	
b/n/f CAPRICE THOMAS,	)	CASE NO.: ST-14-CV-312
	)	
Plaintiffs,	)	ACTION FOR DAMAGES
	)	
v.	)	JURY TRIAL DEMANDED
	)	
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
ANIJAH STEVENS, SHARON FRANCIS, and	)	
ERNEST STEVENS,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Government of the Virgin Islands' (the "Government") Motion to Dismiss, filed on August 12, 2014.¹ The Plaintiffs, Caprice Thomas individually, and behalf of her minor son, Kafele Thomas, ("Plaintiffs") filed an opposition to the Government's motion on August 28, 2014. That same day, Plaintiffs also filed a Motion to File Tort Claim out of Time. The Government did not file a response or reply to Plaintiffs' filings.

The Government moves this Court to dismiss Plaintiffs' action for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).² According to the Government, Plaintiffs failed to file a notice of intention to file a claim, or a tort claim against the Government of the Virgin Islands within the 90 day filing period established by the Virgin Islands Tort Claims Act ("VITCA"). The Government also moves this Court to dismiss the Plaintiffs' request for a jury trial in relation to any tort claims against the Government.

Plaintiffs concede that this Court does not have jurisdiction over Plaintiff Caprice Thomas' claim because she did not comply with VITCA's filing requirement. However, Plaintiffs argue that the Court has jurisdiction over Plaintiff Kafele Thomas' claim because he filed his tort claim with the Office of the Governor, and the Virgin Islands Office of the Attorney General within the two year statutory period that applies to claimants who are under a legal disability. Further, Plaintiffs concede that although they are not permitted to demand a jury trial in respect to their claim against the Government, they are entitled to a jury trial as to all other Defendants.

Having considered the premises of the pending motions, the Court finds that it does not have subject-matter jurisdiction over Plaintiff Caprice Thomas' claim because she did not comply with

¹ Plaintiffs are represented by George Marshall Miller, Esquire. Defendant Government of the Virgin Islands is represented by Aquanette Y. Chinnery, Assistant Attorney General. Defendants Sharon Francis and Ernest Stevens, individually and on behalf of Defendant Anijah Stevens, their minor child, are appearing *Pro Se*.

² The Federal Rules of Civil Procedure are applicable to this Court by virtue of Superior Court Rule 7.

VITCA's statute of limitations. However, the Court does have jurisdiction over Plaintiff Kafele Thomas' claim because, as a minor, he is permitted to file his tort claim after the 90 day filing period. Because he filed his claim against the Government prior to the expiration of the statutory two year period, his tort claim was timely filed, and Plaintiff's Motion to File Tort Claim out of Time will be denied as moot. Additionally, Plaintiff Kafele Thomas' tort claim against the Government will not be tried by jury, although Plaintiffs are entitled to a trial by jury for all other Defendants. Accordingly, for the reasons herein, the Government's Motion to Dismiss will be granted in part and denied in part.

FACTUAL AND PROCEDURAL HISTORY

On June 18, 2014, Plaintiffs, Caprice Thomas, individually, and on behalf of her minor son, Kafele Thomas ("Plaintiffs"), filed a Complaint against Defendants Government of the Virgin Islands (the "Government"), Anijah Stevens, a minor, and his parents Sharon Francis and Ernest Stevens. In their Complaint, Plaintiffs assert that on October 4, 2013, Defendant Anijah Stevens assaulted and battered Plaintiff Kafele Thomas at the Bertha C. Boschulte Middle School on St. Thomas, Virgin Islands. At the time of the incident, Anijah Stevens was 16-years-old, and Kafele Thomas was 13-years-old.

Approximately three months after the incident, on January 31, 2014, Plaintiff Kafele Thomas filed a Tort Claim against the Government of the Virgin Islands with the Office of the Governor, and the Virgin Islands Office of the Attorney General. Within his tort claim, Plaintiff Kafele Thomas listed the date and place where the claim arose, the nature of the claim, the damages suffered, and the total sum claimed against the Government. On August 12, 2014, the Government filed a Motion to Dismiss Plaintiffs' Complaint alleging that Plaintiffs failed to file their claim, or notice of intention to file a claim against the Government within the statutory 90 day filing period under the Virgin Islands Tort Claim Act ("VITCA"). On August 28, 2014, Plaintiffs filed a response to Defendant's Motion to Dismiss, and a Motion to File Tort Claim out of Time.

ANALYSIS

I. This Court does not have subject-matter jurisdiction over Plaintiff Caprice Thomas' tort claim against the Government of the Virgin Islands because she failed to comply with the 90 day statute of limitation set forth in the Virgin Islands Tort Claim Act.

The first issue is whether this Court has subject-matter jurisdiction over Plaintiff Caprice Thomas' claim so as to preclude dismissal of the action under Fed. R. Civ. P. 12(b)(1).³ Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may raise the lack of subject-matter jurisdiction as a defense to the court's ability to hear a particular case.⁴ When a defendant challenges a court's subject-matter

³ The Court notes that in addition to the Government's request for this Court to dismiss Plaintiffs' action for lack of subject-matter jurisdiction, the Government stated within its Memorandum in Support of Motion to Dismiss that "[t]hey also move the Court to dismiss on the grounds of failure to state a claim upon which relief may be granted." However, upon reviewing the Motion to Dismiss, and memorandum in support thereof, the Government did not provide any rule of law, or legal argument to support its request for the motion to be construed as a 12(b)(6) motion. Therefore, the Court will only address the Government's Motion to Dismiss based on the arguments that were raised pursuant to Fed. R. Civ. P. 12(b)(1).

⁴ See Fed. R. Civ. P. 12(b)(1).

jurisdiction, “the plaintiff must bear the burden of persuasion.”⁵ As the plaintiff presents evidence to meet this burden, “a court reviewing a 12(b)(1) motion does not presume the truthfulness of a plaintiff’s allegations.”⁶ “Instead, the court must evaluate the merits of the jurisdictional claim on its own,”⁷ and is “free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.”⁸

Here, upon weighing the evidence that has been presented by the parties, the Court finds that it does not have subject-matter jurisdiction over Plaintiff Caprice Thomas’ tort claim because she did not file a notice of intention, or claim prior to the expiration of the 90 day filing period. Pursuant to V.I. CODE ANN. tit. 33, § 3409(c), which is a part of VITCA,⁹ the Legislature of the Virgin Islands has provided that,—

a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the United States Virgin Islands while acting as such officer or employee, *shall be filed within ninety days after the accrual of such claim* unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.¹⁰

The Government argues that this Court lacks subject-matter jurisdiction because the Plaintiffs violated VITCA by failing to comply with the 90 day filing period.¹¹ Based on the Complaint, Defendant Anijah Stevens allegedly assaulted and battered Plaintiff Kafele Thomas on October 4, 2013. To comply with the 90 day rule, Plaintiffs must have filed their notice of intention to file a claim, or the actual tort claim on or before January 2, 2014. However, a review of the motion reveals that Plaintiff Caprice Thomas never file a notice of intention, or claim on her own behalf as a plaintiff in this matter. In fact, in response to the Government’s argument, Plaintiffs concede that this Court does not have jurisdiction over Plaintiff Caprice Thomas’ claim because of her failure to file the notice of intention to file.¹² Accordingly, this Court lacks subject-matter jurisdiction over Plaintiff Caprice Thomas’ tort claim against the Government of the Virgin Islands.

⁵ *Chavayez v. Buhler*, S. Ct. Civ. No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *45-47 (V.I. June 25, 2009) (unpublished) (citing *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (quoting *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991))).

⁶ *Id.* (citing *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)).

⁷ *Id.*

⁸ *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 189 (V.I. 2009) (citation omitted).

⁹ 33 V.I.C. §§ 3401-3417.

¹⁰ 33 V.I.C. § 3409(c) (emphasis added).

¹¹ (Pl.’s Resp. in Opp’n to Mot. to Dismiss, 2, Aug. 28, 2014).

¹² (Pl.’s Resp. in Opp’n to Mot. to Dismiss, 2, Aug. 28, 2014).

II. This Court does have subject-matter jurisdiction over Plaintiff Kafele Thomas' tort claim because, as a minor, he is permitted to file a tort claim against the Government of the Virgin Islands at any time prior to the expiration of the two year filing period that applies to claimants under a legal disability.

Upon determining whether this Court has subject-matter jurisdiction over Plaintiff Kafele Thomas' tort claim, this Court must consider the fact that Plaintiff Kafele Thomas is a minor claimant. Under VITCA, a claimant who is a minor is given greater leeway in respect to procedural requirements. Specifically, in pertinent part, 33 V.I.C. § 3409(c) provides that,—

[a] claimant who fails to file a claim or notice of intention, as provided in the foregoing subsections, within the time limited therein for filing the notice of intention, may, nevertheless, in the discretion of the court, be permitted to file such claim at any time within two years after the accrual thereof, or in the case of a claim for wrongful death within two years after the decedent's death. The application for such permission shall be made upon motion based upon affidavits showing a reasonable excuse for the failure to file the notice of intention and that the Virgin Islands or its appropriate department or agency had (sic), prior to the expiration of the time limited for the filing of the notice of intention, actual knowledge of the facts constituting the claim. The claim proposed to be filed, containing all of the information set forth in section 3410 of this title, shall accompany such application. No such application shall be granted if the court shall find that the Government of the United States Virgin Islands has been substantially prejudiced by the failure of the claimant to file such notice of intention within the time limited therefor. *But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed.*¹³

Here, the Government argues that this Court lacks subject-matter jurisdiction over Plaintiff Kafele Thomas' tort claim because Plaintiff Kafele Thomas failed to file his tort claim within the 90 day filing period. Plaintiff Kafele Thomas filed his tort claim with the Office of the Governor, and the Office of the Attorney General on January 31, 2014. This was 29 days after the expiration of the 90 day filing period, which expired on January 2, 2014. As a result of the delayed filing, the Government argues that it has not waived its sovereign immunity as provided under 33 V.I.C. § 3408(a).¹⁴ In relevant part, section 3408(a) provides that the Government's waiver of immunity only applies to a case if the claimant complies with the provisions of the chapter regulating claims against

¹³ 33 V.I.C. § 3409(c) (emphasis added).

¹⁴ 33 V.I.C. § 3408(a) reads—

[s]ubject to the provisions of section 3416 of this chapter, the Government of the United States Virgin Islands hereby waives its immunity from liability and action and hereby assumes liability with respect to injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government of the United States Virgin Islands while acting within the scope of his office or employment, under circumstances where the Government of the United States Virgin Islands, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The Government consents to have the liability determined in accordance with the same rule of law as applied to actions in the courts of the Virgin Islands against individuals or corporations; Provided, That the claimant complies with the provisions of this chapter.

the Government of the Virgin Islands.¹⁵ In other words, “the Government's liability [] is specifically conditioned on a claimant's compliance with the provisions of the Tort Claims Act, 33 V.I.C. § 3401 *et seq.* As such, noncompliance with the Act can nullify the Government's waiver of immunity and consent to be sued, and thus, deprive the Court of subject-matter jurisdiction over a claim.”¹⁶

In response to the Government's position, Plaintiffs raise two points of opposition. First, Plaintiffs argue that this Court has the discretion to permit a claimant to file a claim after the expiration of the 90 day filing period.¹⁷ In accord with this position, Plaintiff Kafele Thomas filed a Motion to File Tort Claim out of Time on August 28, 2014, and “move[d] this Honorable Court to grant him leave *nunc pro tunc* to file his Tort Claim Against the Government of the Virgin Islands” out of time.¹⁸

In *Mercer*,¹⁹ the Territorial Court of the Virgin Islands provided that under VITCA, a claimant must satisfy several conditions before a court may exercise its discretion to permit the claimant to file a tort claim against the Government after the 90 day filing period. These conditions include the following: 1) a reasonable excuse for failure to timely file claim or notice of intention; 2) actual and timely knowledge by government of facts constituting a claim; 3) no substantial prejudice to the government; and 4) the filing of the motion, affidavit, or proposed claim.²⁰ In order for the Court to grant such a request, each condition must be met.²¹ But here, despite whether these conditions are met, the arguments raised in Plaintiff's Motion to File Tort Claim out of Time are moot because Plaintiff Kafele Thomas' tort claim was not untimely filed under VITCA.²²

As Plaintiffs argue in the alternative, and this Court agrees, Plaintiff Kafele Thomas is a minor claimant who has a statutory right under VITCA to file a tort claim against the Government within the two year filing period that governs claimants under a legal disability. In *In re Consol. Bus Cases*,²³ the District Court of the Virgin Islands analyzed “whether a person under [a] legal disability is excused from the requirement of the Tort Claims Act that a claim or notice of intention to file a claim be filed within ninety days after the accrual of the claim.”²⁴ Upon holding that 33 V.I.C. § 3409(c) only requires a claimant who is under a legal disability to present a tort claim against the Government within two years after the disability is removed,²⁵ the court explained that—

[s]urely, it cannot be that the Legislature intended that an incompetent or an infant, who has two years after the removal of his disability within which to present a claim, must nevertheless file a notice of intention within 90 days after the accident and within

¹⁵ 33 V.I.C. § 3408(a).

¹⁶ *Walters v. Gov't of the V.I.*, 30 V.I. 36, 39 (V.I. Super. Ct. 1994) (citing *Mercer v. Gov't of the V.I.*, 18 V.I. 171 (V.I. Super. Ct. 1982)).

¹⁷ See 33 V.I.C. § 3409(c).

¹⁸ (Pl.'s Mot. to File Tort Claim out of Time, 1, Aug. 28, 2014).

¹⁹ 18 V.I. at 180.

²⁰ *Id.*

²¹ *Delgado v. Gov't of the V.I.*, 137 F. Supp. 2d 611, 614 (D.V.I. App. Div. 2001).

²² (See Pl.'s Resp. in Opp'n to Mot. to Dismiss, 4, Aug. 28, 2014).

²³ 21 V.I. 96 (D.V.I. 1984).

²⁴ *Id.* at 98.

²⁵ *Id.* at 102.

a period during which such legal disability exists. That would be wholly unreasonable.²⁶

Although decisions from the District Court of the Virgin Islands are merely persuasive authority in this Court,²⁷ the rationale set forth in *In re Consol. Bus Cases* presents sound reasoning that this Court adopts in analyzing the present issue. As the last sentence of 33 V.I.C. § 3409(c) provides, claimants with legal disabilities have up to two years *after* their disability has been removed to file their tort claim against the Government. A legal disability includes conditions such as “[i]nfancy, [] incompetency, habitual drunkenness, and the like.”²⁸ Accordingly, it follows that although Plaintiff Kafele Thomas filed his tort claim prior to reaching the age of majority—which would have removed his legal disability—the 90 day filing period is still inapplicable to his tort claim while he is under the legal disability. The language of § 3409(c) provides claimants, such as Plaintiff Kafele Thomas, with a statutory right to file a claim against the Government up to two years after reaching the age of majority. Plaintiff Kafele Thomas’ decision to file his tort claim against the Government prior to that time does not deprive him of the greater leeway that is afforded to claimants in his position. Therefore, because he filed his tort claim prior to the expiration of the two year period, this Court has jurisdiction over his claim against the Government of the Virgin Islands.

III. Plaintiff Kafele Thomas is entitled to a jury trial in this matter against all named Defendants, with the exception of the Government of the Virgin Islands.

The final issue is whether Plaintiffs are entitled to a jury trial in a matter that involves a tort claim against both the Government of the Virgin Islands and codefendants. The Government argues that under VITCA, a jury trial cannot be held in an action against the Government of the Virgin Islands.²⁹ The Plaintiffs do not dispute this assertion. In 33 V.I.C. § 3413, the Legislature of the Virgin Islands expressly provides that, “[t]he trials of actions instituted in accordance with the provisions of section 3408³⁰ shall be by the Court sitting without a jury.” Thus, it is clear from the statute that Plaintiff Kafele Thomas is not entitled to a jury trial in relation to his tort claim against the Government.

But given that Plaintiffs have also raised claims against several other Defendants to whom they are entitled to a trial by jury, the Court will not deprive Plaintiffs of their right. Pursuant to Fed. R. Civ. P. 38(a),³¹ “[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.” Here, Plaintiffs demanded a jury trial in respect to the three non-government Defendants named in this matter.³² As Plaintiffs note while citing to *Simon v. Lovgren*,³³ courts have allowed matters against the government

²⁶ *Id.*

²⁷ *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755 (V.I. 2014) (citing *Parrot v. Gov't of the V.I.*, 230 F.3d 615, 621 (3d Cir. 2000) (“[D]ecisions of the District Court sitting in its capacity as a local trial court are not binding on the Superior Court”).

²⁸ *Id.*

²⁹ (Mem. of Law in Supp. of Mot. to Dismiss, 10, Aug.12, 2014).

³⁰ 33 V.I.C. § 3408 addresses the Government of the Virgin Islands’ waiver of immunity for tort claims.

³¹ See Super. Ct. R. 7.

³² (Compl., June 18, 2014); (Pl.’s Resp. in Opp’n to Mot. to Dismiss, 1, Aug. 28, 2014).

³³ 10 V.I. 302, 311-12 (D.V.I. 1973).

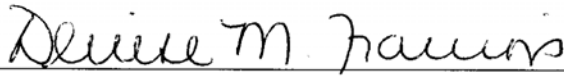
and non-government defendants to proceed as a single trial before a jury, although the Court solely decides the outcome of the issues pertaining to the government.³⁴ Similar to *Simon*, because this Court does not foresee any “special circumstances” that would warrant separate trials, any difficulties that may arise because of a dual adjudication are not insurmountable, and can be “handled in a manner comparable to that used when issues of law are tried to a jury and issues of an equitable nature in the same case are tried by the court alone.”³⁵ Therefore, although Plaintiffs’ demand for a jury trial does not apply to Plaintiff Kafele Thomas’ tort claim against the Government of the Virgin Islands, this Court will not violate Plaintiffs’ right to demand a jury trial as it relates to all other Defendants.

CONCLUSION

Because Plaintiff Caprice Thomas failed to comply with VITCA’s 90 day filing deadline, this Court does not have subject-matter jurisdiction over her tort claim against the Government of the Virgin Islands. However, this Court does have subject-matter jurisdiction over Plaintiff Kafele Thomas’ claim against the Government because he properly filed his tort claim prior to the expiration of the two year filing period that applies to claimants operating under a legal disability. Because Plaintiff’s Kafele Thomas’ tort claim was timely filed, Plaintiff’s Motion to File Tort Claim out of Time will be denied as moot. Additionally, Plaintiffs are entitled to a jury trial against all other Defendants named in this action although such right does not apply to any tort claim against the Government of the Virgin Islands. For the reasons herein, the Government’s Motion to Dismiss will be granted in part and denied in part.

An Order consistent with this Memorandum Opinion will follow.

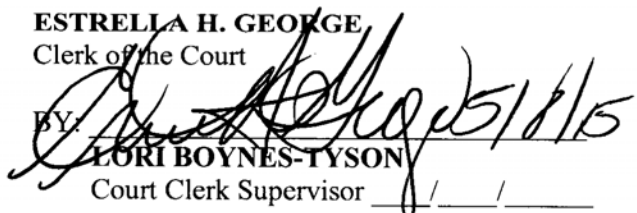
Dated: May 8, 2015


DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

BY:


LORI BOYNES-TYSON

Court Clerk Supervisor 5/8/15 / /

³⁴ *Id.* (citing *United States v. Yellow Cab Co.*, 340 U.S. 543, 553-57 (1951)).

³⁵ *Id.* at 311; *Yellow Cab Co.*, 340 U.S. at 556.

Defendants.)

JURY TRIAL DEMANDED

Court Clerk Supervisor / /