

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

ELLEN PETERSEN,

Plaintiff,

vs.

GOLDEN ORANGE CENTERS, INC.,

Defendant.

CASE NO. SX-08-CV-202

ACTION FOR DAMAGES

NOTICE OF ENTRY

OF

MEMORANDUM OPINION AND ORDER

TO: STX/STT JUDGES; MAGISTRATES, Esquire
STX/STT LAW CLERKS; LEE J. ROHN, ESQ. ; WILFREDO GEIGEL, ESQ., Esquire
TAMARA BERMUDEZ; IT; LAW LIBRARY; LOG LISTING, Esquire

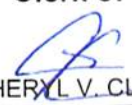
Please take notice that on SEPTEMBER 25,, 2014, a(n)

MEMORANDUM OPINION AND ORDER

dated SEPTEMBER 25, 2014 was entered by the Clerk in the above-entitled matter.

Dated: SEPTEMBER 25, 2014

ESTRELLA GEORGE
Clerk of the Court

By:  CHERYL V. CLARKE

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

ELLEN PETERSEN,	)	CASE NO. SX-08-CV-202
	)	
Plaintiff,	)	ACTION FOR DAMAGES
	)	
v.	)	
	)	
GOLDEN ORANGE CENTERS, INC.,	)	
	)	
Defendant.	)	

APPEARANCES:

LEE J. ROHN, ESQ.¹

Lee J. Rohn and Associates, LLC
Christiansted, St. Croix, VI
Attorney for Plaintiff

WILFREDO GEIGEL, ESQ.

Law Offices of Wilfredo A. Geigel
Christiansted, St. Croix, VI
Attorney for Defendant

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER comes before the Court on the Defendant's "Motion to Dismiss Under 5 VIC 31 (5)" filed on May 15, 2008. Defendant contends that Plaintiff's complaint is barred by the two-year statute of limitations for a negligence cause of action. Plaintiff filed a response on June 5, 2008, and Defendant filed a reply on June 27, 2008. For the reasons stated below, the Court will grant the motion to dismiss.

¹ On August 6, 2010, Attorney Lee Rohn filed a Motion to Withdraw as Co-Counsel requesting that the Law Offices of Rohn and Carpenter be relieved as counsel for Plaintiff Ellen Petersen. On November 18, 2013, the Court issued an Order granting Attorney Rohn's motion by requiring that the Law Offices of Rohn and Carpenter, LLC serve a copy of the Order on Plaintiff and provide proof of service to the Court within fifteen (15) days of the date of entry of the Order. To date, neither the Law Offices of Rohn & Carpenter nor Attorney Lee Rohn has filed proof that Plaintiff was served with a copy of the Order. Nonetheless, due to the fact that Defendant's motion to dismiss has been pending for more than six (6) years, the matter is fully briefed, and finding no prejudice to either party if the Court were to rule on the motion, the Court issues this Memorandum Opinion disposing of Defendant's Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 7, 2007, Plaintiff Ellen Petersen ("Petersen") filed a civil action in the District Court of the Virgin Islands against Golden Orange Centers, Inc. ("Golden") and Banco Popular de Puerto Rico ("Banco Popular") in a matter styled *Ellen Petersen v. Golden Orange Centers, Inc. and Banco Popular de Puerto Rico*, District Court Civil No. 1:07-cv-106. In that complaint, Petersen alleged that on September 8, 2005, she went to conduct banking business at Banco Popular and slipped on the curb located outside of the bank. Petersen further alleged that Golden, as the owner of the premises, and Banco Popular "were negligent in allowing the sidewalk to be painted in such a manner in which it was confusing to the eye" and thereby creating an unreasonable risk of injury to Petersen. On April 10, 2008, Petersen filed a motion requesting that the District Court voluntarily dismiss the complaint against Golden without prejudice. *See Petersen v. Golden*, District Court Case No. 1:07-cv-106 (Docket No. 13). The District Court granted Petersen's motion and dismissed Golden from the case on April 11, 2008. *See Id.* (Docket No. 14).

Petersen commenced the instant civil action in the Superior Court on April 16, 2008, asserting virtually identical factual allegations as alleged in the District Court case, with the exception that Petersen alleged that her injury occurred on September 5, 2005, as opposed to September 8, 2005, and the Superior Court complaint does not name Banco Popular as a defendant.

On May 8, 2008, Golden filed a motion requesting that the Court dismiss Petersen's complaint because it was filed beyond the applicable statute of limitations. Petersen opposes the motion.

II. LEGAL STANDARD

Before addressing the merits of Golden's dismissal motion, the Court must first determine the legal standard that will govern this issue. In lieu of filing an Answer, Golden filed a pre-answer motion to dismiss contending that Petersen's complaint was filed beyond the applicable statute of limitations. The defense of a statute of limitations is an affirmative defense that is ordinarily asserted in an answer. *See* Fed. R. Civ. P. 8(c)(1). However, "[i]f the allegations, taken as true, show that relief is barred by the applicable statute of limitations, a complaint is subject to dismissal for failure to state a claim" under Federal Rules of Civil Procedure 12(b)(6). *Simms v. Freeman*, 428 F.App'x 119, 120 (3d Cir. 2011) (citing *Jones v. Bock*, 549 U.S. 199, 215 (2007)).

Under Rule 12(b)(6), the Court "must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120 (3d Cir. 2012) (internal citations omitted). In order to defeat a Rule 12(b)(6) motion, Petersen's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although the Court is required to accept as true all factual allegations, "unsupported conclusions and unwarranted inferences" are not entitled to the presumption of truthfulness. *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997). In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider "the allegations contained in the complaint, exhibits attached thereto, and matters of public record." *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 190 n.3 (3d Cir. 1999).

III. DISCUSSION

Golden asserts that Petersen's negligence claim is barred by the two-year statute of limitations under 5 V.I.C. § 31(5)(A) which provides that a claim for negligence must be commenced within two years after the cause of action accrued. *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 128 (V.I. 2009) ("The statute of limitations claim for negligence in the Virgin Islands is two years . . .") (overruled in part on other grounds by *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 564 (V.I. 2012)). "[A] claim accrues as soon as the potential plaintiff either is aware, or should be aware after a sufficient degree of diligence, of the existence and source of an actual injury." *Podobnik v. United States Postal Serv.*, 409 F.3d 584, 590 (3d Cir. 2005) (emphasis omitted). In her complaint, Petersen alleges that she was injured on September 5, 2005, as a result of Golden's negligence in maintaining the sidewalk. Thus, on September 5, 2005, Petersen was aware that she was injured and the cause of her injuries. However, Petersen did not file her complaint in the Superior Court until April 16, 2008, more than two after her cause of action accrued. Thus, Petersen's claim is time-barred under 5 V.I.C. § 31(5)(A).

In response to Golden's claim that her action is time-barred, Petersen asserts, in a cursory fashion, that "[Golden] ignored the fact that this action was originally timely filed and that the new complaint is simply a re-filing of the original claims brought in District Court." See Pl.'s Resp. to Def.'s Mot. to Dismiss at 2. To the extent Petersen's assertion can be construed as an argument that the statute of limitations should be tolled under the doctrine of equitable tolling, the Court finds that argument unpersuasive.

In *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200 (3d Cir. 2002), the Third Circuit Court of Appeals held that the statute of limitations for a second action may be equitably tolled by the filing of a first action dismissed for lack of personal jurisdiction if: (1) the first action gave defendant timely notice of plaintiff's claim; (2) the lapse of time between the first and second actions will not prejudice the defendant; and (3) the plaintiffs acted reasonable and in good faith in prosecuting the first action, and exercised diligence in filing the second action. *Id.* at 217-18. Although the Third Circuit in *Insteel* applied the equitable tolling doctrine when the first case was dismissed for lack of personal jurisdiction, the Supreme Court of the Virgin Islands has extended the *Insteel* test to situations when the complaint in the first action "is dismissed for any reason not related to the merits." *Jensen v. V.I. Water & Power Auth.*, 52 V.I. 435, 443 n.9 (V.I. 2009) ("Although the original complaint in *Island Insteel Systems* had been dismissed for lack of personal jurisdiction, the same equitable tolling rule applies when a complaint is dismissed for any reason not related to the merits.").² Nonetheless, courts have cautioned that "[t]he doctrine of

² In its reply brief, Golden argues that "filing a suit after [the] previous one has been dismissed voluntarily does not toll the statute." Def.'s Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss at 3. In *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68 (3d Cir. 1983), the Third Circuit stated that "[i]t is a well-recognized principle that a statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice. As regards the statutes of limitations, the original complaint is treated as if it never existed." *Id.* at 77. The Third Circuit's application of the equitable tolling doctrine to cases that were re-filed after the first case was dismissed without prejudice is directly at odds with the Virgin Islands Supreme Court's decision in *Jensen*. Undoubtedly, the Virgin Islands Supreme Court is "the highest court of the Virgin Islands" being the "supreme judicial power of the Territory." 4 V.I.C. § 21. This apparent irreconcilable conflict would ordinarily pose a quandary for the Superior Court because the Third Circuit retains certiorari jurisdiction over the Virgin Islands Supreme Court for all cases commenced in the Superior Court prior to December 28, 2012. See *United Indus., Serv., Transp., Profl and Gov't Workers of North America Seafarers Int'l Union v. Gov't of the Virgin Islands*, --- F.3d ---, 2014 WL 4179481, at *10-14 (3d Cir. Aug. 25, 2014). Thus, according to the Third Circuit's opinion in *United*, the *Cardio-Medical* rule would apply to cases commenced in the Superior Court prior to December 28, 2012, and the *Jensen* rule would apply to cases commenced after December 28, 2012. However, the Third Circuit has also opined that "[u]pon its establishment, the Virgin Islands Supreme Court became the final authority on local law" subject to review for manifest error and "that the Virgin Islands Supreme Court may reject our local decisions that predate its establishment." *Defoe v. Philip*, 702 F.3d 735, 742-46 (3d Cir.

equitable tolling . . . should be applied ‘sparingly’”. *Podobnik*, 409 F.3d at 591 (citation omitted). The application of this doctrine is “generally committed to the discretion of the trial court.” *Insteel*, 296 F.3d at 218.

Petersen fails to satisfy the first element under the *Insteel* test because the first action filed in the District Court was not timely. As mentioned above, Petersen’s complaint in this matter alleges that her injury occurred on September 5, 2005. Compl. ¶ 5. However, Petersen did not file her initial action in the District Court until September 7, 2007, more than two years after her cause of action accrued.³ Thus, the first action did not give Golden timely notice of Petersen’s claim and the Court, therefore, will decline to apply the doctrine of equitable tolling in this matter.

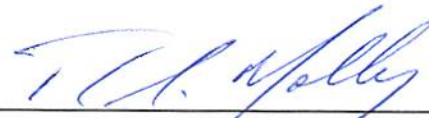
IV. CONCLUSION

For the reasons stated above, the Court concludes that Petersen’s claim is time-barred under the two-year statute of limitations for negligence. The Court also concludes that the doctrine of equitable tolling does not apply to Petersen’s claim. Accordingly, the Court will grant Golden’s motion to dismiss. An appropriate Order follows.

2012); see also *United States v. Fontaine*, 697 F.3d 221, 227 n.12 (3d Cir. 2012) (“Because [defendant’s] appeal requires us to interpret a territorial law, it is our role to predict how the Supreme Court of the Virgin Islands would resolve this interpretive issue.”); *Pichardo v. V.I. Comm’r of Labor*, 613 F.3d 87, 95 (3d Cir. 2010) (opining “that the Virgin Islands Supreme Court, once it was established by the Virgin Islands Legislature, would possess an authoritative voice on matters of Virgin Islands law”); In light of the Virgin Islands Supreme Court’s authority as the highest court in the Virgin Islands and the final arbiter on matters of local law, the Court will apply the rule espoused in *Jensen* to determine whether the common law doctrine of equitable tolling applies to Petersen’s claim notwithstanding that the first case filed in District Court was dismissed without prejudice.

³ The Court recognizes that the complaint filed in the District Court alleges that Petersen slipped on the curb and suffered injuries on September 8, 2005, and that the complaint filed in this Court alleges that Petersen suffered her injuries on September 5, 2005. Neither party addresses this three-day discrepancy in their briefs. Nonetheless, for purposes of a motion to dismiss filed pursuant to Rule 12(b)(6), the Court must accept the factual allegations in the complaint filed in this court as true to determine whether Petersen states a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (“only a complaint that states a plausible claim for relief survives a motion to dismiss.”). Thus, the Court considers the date of September 5, 2005, as the date of injury.

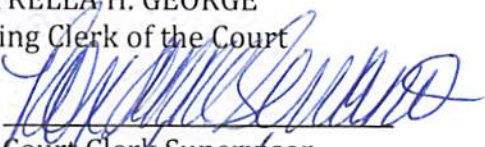
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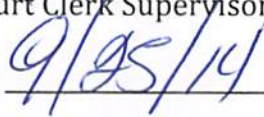
ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA H. GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 

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ELLEN PETERSEN,

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v.

GOLDEN ORANGE CENTERS, INC.,

Defendant.

CASE NO. SX-08-CV-202

ACTION FOR DAMAGES

ORDER

THIS MATTER comes before the Court on the Defendant Golden Orange Centers, Inc.'s "Motion to Dismiss Under 5 VIC 31 (5)" filed on May 15, 2008. For the reasons stated in the accompanying Memorandum Opinion dated September 25, 2014, it is hereby

ORDERED that Defendant's Motion to Dismiss is **GRANTED**; it is further

ORDERED that this matter is **DISMISSED**; it is further

ORDERED that copies of this Order shall be provided to Ellen Petersen, Lee J. Rohn, Esq., and Wilfredo Geigel, Esq.

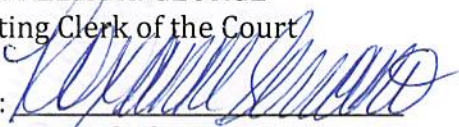
DATED: September 25, 2014



ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA H. GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 9/25/14