

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

\*\*\*\*\*

|                                          |   |                               |
|------------------------------------------|---|-------------------------------|
| <b>ARIEL BRATHWAITE,</b>                 | ) | <b>CASE NO.: ST-16-CV-764</b> |
|                                          | ) |                               |
| <b>Plaintiff,</b>                        | ) | <b>ACTION FOR NEGLIGENCE</b>  |
|                                          | ) | <b>AND DAMAGES</b>            |
| <b>-vs-</b>                              | ) |                               |
|                                          | ) | <b>JURY TRIAL DEMANDED</b>    |
| <b>H.D.V.I. HOLDING CO., INC., d/b/a</b> | ) |                               |
| <b>THE HOME DEPOT,</b>                   | ) |                               |
|                                          | ) |                               |
| <b>Defendant.</b>                        | ) |                               |

---

**MEMORANDUM OPINION AND ORDER**

Pending before the Court are the following: (1) Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim, filed on February 21, 2017; (2) Plaintiff's] Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted, filed on March 17, 2017; and (3) Defendant's Reply in Support of Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim, filed on April 21, 2017.<sup>1</sup> Having considered the premises, the Court will deny in part Defendant's Motion to Dismiss with respect to negligence (Count I) and will grant in part the Motion to Dismiss with respect to gross negligence (Count II). In addition, the Court will stay the dismissal of Count II for twenty-one (21) days to allow Plaintiff to file a First Amended Complaint if he so chooses.

**BRIEF BACKGROUND**

On or about November 19, 2015, Plaintiff Ariel Brathwaite ("Brathwaite") was shopping at Defendant H.D.V.I. Holding Co., Inc., d/b/a The Home Depot's ("Home Depot") store on St. Thomas, United States Virgin Islands.<sup>2</sup> Brathwaite went to the flooring aisle of the store and began sorting through a box of ceramic tiles.<sup>3</sup> Unbeknownst to Brathwaite, there were a few broken tiles at the bottom of the box. While sorting, Brathwaite cut the palm of his right hand and suffered injuries as a result.<sup>4</sup>

**MOTION TO DISMISS STANDARD**

To determine if a claim will survive a motion to dismiss, the V.I. Supreme Court instructs that:

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

---

<sup>1</sup> Plaintiff is represented by Attorney Clive Rivers. Defendant is represented by Attorney Kyle R. Waldner.

<sup>2</sup> Compl. ¶ 4.

<sup>3</sup> Compl. ¶¶ 5-6.

<sup>4</sup> Compl. ¶ 6.

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 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.<sup>5</sup>

Pursuant to the now-repealed Superior Court Rule 7, Virgin Islands courts have applied Federal Rule of Civil Procedure 8(a) when considering if a party adequately pleaded a claim.<sup>6</sup> Under Fed. R. Civ. P. 8(a), a complaint needs only present a short, plain statement of the causes of action and the basis for the claims for relief.<sup>7</sup> A complaint does not have to plead specific items of proof in its allegations, but must aver more than labels and conclusions.<sup>8</sup>

On April 3, 2017, the V.I. Supreme Court adopted the Virgin Islands Rules of Civil Procedure. Fed. R. Civ. P. 8(a)(2) and V.I. R. Civ. P. 8(a)(2) both provide that “a pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” However, V.I. R. Civ. P. 8(a)(2) specifies the Virgin Islands “is a notice pleading jurisdiction.” This language is included “to note that practice in the Virgin Islands continues to adhere to the traditional ‘notice’ pleading ethos . . . applying 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.”<sup>9</sup> Therefore, the Court determines it should take an even more liberal approach than that prescribed by Virgin Islands precedent applying Fed. R. Civ. P. 8(a)(2) when considering if a complaint adequately alleges facts that put an accused party on notice of claims brought against it.

## ANALYSIS

Home Depot argues that Brathwaite’s Complaint fails to state a claim for both negligence and gross negligence.

### **I. Brathwaite’s Complaint sufficiently pleads a claim for negligence.**

Home Depot argues that Brathwaite does not plausibly allege that Home Depot had actual or constructive knowledge of an allegedly dangerous condition and therefore fails to state a claim for negligence.<sup>10</sup>

In 2014, the Supreme Court of the Virgin Islands decided *Machado*, which set forth two important points. First, the Supreme Court chose to depart from the trichotomy of dividing entrants into invitees, licensees, and trespassers for the purposes of defining a land possessor’s duty of care

---

<sup>5</sup> *Brady v. Cintron*, 55 V.I. 802, 822-23 (V.I. 2011) (citing *Joseph v. Bureau of Corrections*, 54 V.I. at 649-50).

<sup>6</sup> See, e.g., *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 500 (V.I. 2008); *Brady*, 55 V.I. at 822.

<sup>7</sup> *Robles v. HOVENSA, L.L.C.*, 49 V.I. at 500; *Brady*, 55 V.I. at 822 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). The Court recognizes these memorandum opinions cite to Federal Rule of Civil Procedure 8 by operation of the now-repealed Superior Court Rule 7. However, the Court finds the rationale behind the V.I. Supreme Court’s interpretation of Fed. R. Civ. P. 8 persuasive and applicable to V.I. R. Civ. P. 8.

<sup>8</sup> *Gov’t Emps. Ret. Sys. v. Gov’t of the V.I. Office of the Attorney Gen.*, 64 V.I. 205, 215 (V.I. Super. Ct. 2016).

<sup>9</sup> V.I. R. Civ. P. 8 note to April 3, 2017 adopted rule.

<sup>10</sup> Def. Mot. to Dismiss Pl. Compl. for Failure to State a Claim, 3, Feb. 21, 2017.

in premises liability actions.<sup>11</sup> Second, the Court opined that the elements of negligence are (1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff.<sup>12</sup>

With respect to a legal duty of care to Brathwaite, in *Machado*, the Supreme Court of the Virgin Islands held that in all premises liability actions “the foreseeability of harm is the touchstone of the existence of a land possessor’s duty of reasonable or ordinary care.”<sup>13</sup> A plaintiff must plead that a defendant had either actual notice or constructive notice, wherein a dangerous condition can be imputed to a land possessor through evidence that the condition persisted over a long enough period of time such that the owner should have become aware of it through the exercise of reasonable care.<sup>14</sup>

The Complaint states that Home Depot owed Brathwaite a duty of care while he was a business invitee and guest upon the premises.<sup>15</sup> While the Complaint erroneously relies on Brathwaite’s status as a “business invitee,” Brathwaite’s Complaint also states that Home Depot had a duty to warn of open and obvious dangers upon its premises, which were known to Home Depot, or that in the exercise of reasonable caution should have been known.<sup>16</sup> Such language speaks to the foreseeability of harm, which is essential for pleading a duty of care. Therefore, the Court finds that Brathwaite sufficiently pleads a legal duty of care.

With respect to a breach of a duty of care, the Complaint states that Home Depot, acting through its authorized agents and employees, was guilty of acts of negligence, which include but are not limited to: allowing the premises to have a dangerous condition in its store items, failure to properly warn Brathwaite and other guests and invitees of the dangerous condition, and failure to properly maintain the box of ceramic tiles that were offered for sale in a safe condition.<sup>17</sup> As such, the Court finds that Brathwaite’s Complaint sufficiently pleads a breach of a duty of care.

With respect to factual and legal cause, the Complaint states that Home Depot’s acts of negligence, *e.g.* failing to properly warn Brathwaite and other guests and invitees of the dangerous condition, were a proximate cause of Brathwaite’s injuries.<sup>18</sup> Such language in the Complaint sufficiently pleads both factual and legal cause.

With respect to damages, the Complaint states that as a consequence of the broken ceramic tiles in the box, Brathwaite suffered injuries and pain including past and future pain, disability, and past and future medical costs.<sup>19</sup> Such language identifies the form of damages allegedly incurred by Brathwaite; therefore, the Court finds that Brathwaite’s Complaint sufficiently pleads damages.

Accordingly, the Court finds that Brathwaite’s Complaint states a claim for negligence.

---

<sup>11</sup> *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 385 (V.I. 2014).

<sup>12</sup> *Id.*

<sup>13</sup> *Machado*, 61 V.I. at 380.

<sup>14</sup> *Id.* at 393 (citing *Williams v. United Corp.*, 50 V.I. 191, 195-96 (V.I. 2008)).

<sup>15</sup> Compl. ¶ 9.

<sup>16</sup> Compl. ¶ 10.

<sup>17</sup> Compl. ¶ 12.

<sup>18</sup> Compl. ¶ 13.

<sup>19</sup> Compl. ¶ 15.

## **II. Brathwaite's Complaint fails to sufficiently plead a claim for gross negligence.**

Home Depot argues that Brathwaite's Complaint is devoid of facts plausibly suggesting that Home Depot's actions or inactions were done with reckless or wanton disregard to Brathwaite's rights.<sup>20</sup>

In order to state a claim for gross negligence, a plaintiff must plead wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property.<sup>21</sup>

Brathwaite's Complaint states that Home Depot's "negligence was gross," but does not provide any more detail.<sup>22</sup> In his Opposition, Brathwaite "concedes that he failed to specifically allege the elements for gross negligence."<sup>23</sup> Accordingly, the Court finds that Brathwaite fails to state a claim for gross negligence.

## **III. The Court will grant Brathwaite leave to amend and cure deficiencies in the Complaint.**

Precedent from the Supreme Court of the Virgin Islands demonstrates a strong preference for resolving cases based on their merits rather than upon procedural or formal deficiencies.<sup>24</sup>

The Superior Court of the Virgin Islands, in particular, has granted leave to amend a complaint to cure deficiencies by relying on authority from the Court of Appeals for the Third Circuit which has held "if a complaint is subject to a Rule 12(b)(6) dismissal a . . . court must permit a curative amendment unless such an amendment would be inequitable or futile. Moreover . . . [a] court must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend."<sup>25</sup> An amendment would be futile if the complaint, as amended, would fail to state a claim upon which relief could be granted.<sup>26</sup>

The Court will grant Home Depot's request to dismiss Brathwaite's claim for gross negligence (Count II). However, having conducted a futility analysis, the Court will grant Brathwaite leave to amend the Complaint to cure the aforementioned deficiencies.

---

<sup>20</sup> Def. Mot. to Dismiss Pl. Compl. for Failure to State a Claim, 8, Feb. 21, 2017.

<sup>21</sup> *Yusuf v. Ocean Props.*, \_\_ V.I. \_\_, Super Ct. Civ. No. SX-15-CV-008, 2016 V.I. LEXIS 19, at \*11 (V.I. Super. Ct. Mar. 7, 2016).

<sup>22</sup> Compl. ¶ 20.

<sup>23</sup> Pl. Opp. to Def. Mot. to Dismiss Compl., 5, March 17, 2017.

<sup>24</sup> See *Fuller v. Browne*, 59 V.I. 948, 955 (V.I. 2013); see also *Henry v. Hovenssa, LLC, et al.* 2016 V.I. LEXIS 55 (V.I. Super. Ct. May 19, 2016).

<sup>25</sup> *Benjamin v. Bennerson*, 2012 V.I. LEXIS 7, at \*7 (V.I. Super. Ct. Feb. 13, 2012), quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008); see also *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004); *Shane v. Fauver*, 213 F.3d 113, 117 (3d Cir. 2000).

<sup>26</sup> *James-St. Jules*, 2015 V.I. LEXIS 74, at \*13 (citing *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010)).

### CONCLUSION

Having considered the premises, the Court will deny Home Depot's Motion to Dismiss with respect to Brathwaite's claim for negligence (Count I). However, the Court will grant Home Depot's Motion to Dismiss with respect to Brathwaite's claim for gross negligence (Count II). The Court will, however, stay the dismissal of Count II for twenty-one (21) days to allow Plaintiff to file a First Amended Complaint if he so chooses.

Accordingly, it is hereby

**ORDERED** that Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim is **DENIED with respect to negligence (Count I)**; and it is further

**ORDERED** that Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim is **GRANTED with respect to gross negligence (Count II)**; and it is further

**ORDERED** that dismissal of Count II with respect to gross negligence is **STAYED** for twenty-one (21) days from the date of entry of this Order; and it is further

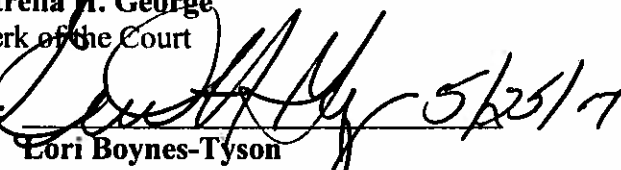
**ORDERED** that a copy of this Memorandum Opinion and Order shall be directed to Attorney Kyle Waldner and Attorney Clive Rivers.

DATED: 5/24/2017

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

ATTEST:

Estrella H. George  
Clerk of the Court

By:  5/25/17  
Lori Boynes-Tyson  
Chief Deputy Clerk