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

RAYMOND FINN, as the personal Representative of the survivors of SAVANNAH FINN, Deceased, Plaintiff, **-vs-** **PETER ADAMS AND ADAMS RIB, LLC,** Defendants.	**CASE NO. ST-16-CV-752** **ACTION FOR WRONGFUL DEATH AND SURVIVAL DAMAGES** **JURY TRIAL DEMANDED**

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff's Motion to File a Third Amended Complaint, which was filed on March 16, 2018. Defendants Peter Adams and Adams Rib, LLC (ARLLC), filed an opposition, and Plaintiff Raymond Finn filed a reply. Being fully briefed, the Court will grant the motion.

I. BACKGROUND

Plaintiff Raymond Finn, as the personal representative of the survivors of his daughter Savannah Finn, filed a Verified Complaint on December 20, 2016, pursuant to V.I. Code Ann. tit. 5, §§ 76 and 77. Since filing the original complaint, Finn has subsequently amended the complaint twice and now seeks to amend the complaint a third time to add a new count, as well as a few technical edits:

> Count III – Piercing the LLC Veil
>
> 38. All preceding allegations are incorporated herein by reference.
>
> 39. While Peter Adams used his personal funds to help purchase the property and thereafter used his own personal funds to help maintain it, he tried to shield his own liability for his acts by having the property placed in the name of ARLLC, with him being the sole member.
>
> 40. However, Peter Adams was one of the alter egos of Adams Rib, LLC, as it had no independent existence apart from him and his wife, as it was simply a facade used to buy property for their own personal vacation home.
>
> 41. In fact, ARLLC was dominated and controlled by Peter Adams, along with his wife, who operated ARLLC for his own personal benefit to build a vacation home.

42. In this regard, Peter Adams disregarded the separate LLC existence of ARLLC by using his own funds to pay all corporate obligations (like taxes, fees and insurance) and fund all development activities at the site between 2004 and 2018, without ARLLC ever opening its own bank account.

43. Indeed Peter Adams, in conjunction with his wife, totally ignored all LLC formalities as required by the LLC's operating agreement, as he took whatever action he wanted without:

> a) Having ARLLC taking any action to have annual meetings, as required to be done every January 31st by ARLLC's Operating Agreement, which it never held once;
>
> b) Having ARLLC hold any special meetings to consider any decisions made by him regarding the Property, which were never held once;
>
> c) Making decisions regarding the Property without obtaining the Special Consent required by ARLLC's Operating Agreement, as no such Consents were ever issued;
>
> d) Failing to make sure ARLLC had adequate capital to operate, as it never had any capital, leaving it grossly undercapitalized;
>
> e) Failing to maintain a complete and accurate set of books and records, as required by ARLLC's Operating Agreement;
>
> f) Failing to make sure ARLLC had financial reports, as required by ARLLC's Operating Agreement to be done at least annually, as it never had any;
>
> g) Failing to hire employees and personnel needed to do the business of ARLLC.
>
> h) Failing to ever open a bank account for ARLLC.

44. In this regard, the sole purpose of ARLLC was to own Peterborg Point for the benefit of Peter Adams (and his wife), as it has not generated any income or profits since its existence, despite its stated intent in its operating agreement to develop commercial and residential real estate throughout the world.

45. Indeed, after securing plans that would have secured the Property, Peter Adams was a direct participant in the decision not to proceed with those plans without any regard as to what would have been best for ARLLC.

46. Moreover, even though ARLLC is faced with potential exposure to certain liability claims, he (along with his wife) decided to give the Property away, rendering ARLLC without any assets to pay its lawful debts, as it was grossly

undercapitalized, as he (along with his wife) decided it was best for their own personal interests to do so.

47. As such, Peter Adams is the alter ego of ARLLC, so that they should be treated as one entity, with that Peter Adams being liable for ARLLC's own negligence since he exercised sufficient control over ARLLC negligent acts and omissions.[1]

II. STANDARD

Pursuant to Virgin Islands Rule of Civil Procedure 15(a)(2), "[t]he court should freely give leave [to amend a pleading] when justice so requires." A motion to amend may be denied for "reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment."[2] The decision to grant a motion to amend is within a trial court's discretion.[3]

III. DISCUSSION

A. Undue delay, bad faith or dilatory motive.

Finn argues that this motion to amend was not the result of undue delay or bad faith, as "[t]he information needed to request this amendment was finally obtained in th[e] deposition of [Peter Adams]," which suffered from a series of postponements and eventually took place on March 12, 2018.[4] After the deposition, Finn ordered an expedited transcript, which he received on March 14, 2018, and then filed his motion to amend on March 15, 2018.[5] Neither Adams nor ARLLC contest this point.

When considering whether undue delay is present, it is important to recognize that "delay alone is an insufficient ground to deny leave to amend."[6] However, "at some point, the delay will become 'undue,' placing an unwarranted burden on the court[.]"[7] Indeed, "delay that is 'undue' – a delay that is protracted and unjustified – can [also] place a burden on the . . . counterparty, or can indicate a lack of diligence sufficient to justify a discretionary denial of leave."[8]

---

[1] Pl.'s Mot. to File a Third Amended Compl. Ex. 3.
[2] *Merchs. Commercial Bank v. Oceanside Vill., Inc.*, 64 V.I. 3, 11 (V.I. Super. Ct. 2015) (quoting *Mountaintop Ltd. P'ship v. Columbian Emeralds Int'l, Inc.*, 43 V.I. 193, 204 (V.I. Super. Ct. 2001)).
[3] *Gerald v. R.J. Reynolds Tobacco Co.*, 2016 V.I. LEXIS 53 (V.I. Super. Ct. Apr. 25, 2016) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).
[4] Pl.'s Mot. to File a Third Amended Compl. 2.
[5] Pl.'s Mot. to File a Third Amended Compl. 3.
[6] *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001).
[7] *Hartzog v. United Corporation*, 2011 WL 13136520, at *2 (V.I. Super. Ct. Sept. 7, 2011).
[8] *Mullin v. Balicki*, 875 F.3d 140, 151 (3d Cir. 2017).

Once he deposed Adams, Finn promptly ordered a transcript of the deposition and filed a motion to amend. Adams and ARLLC fail to point out any indication that bad faith was present or that this motion resulted from undue delay, and the Court finds no reason to conclude otherwise.

B. Futility.

The main point of contention around Finn's proposed Third Amended Complaint is the addition of Count III. This count seeks to pierce the corporate veil of ARLLC. Finn argues that Count III would survive a motion to dismiss under Rule 12(b)(6) given the less stringent notice pleading standard of Rule 8(a).[9] Adams and ARLLC conversely argue that Finn's new count is facially insufficient because it fails to allege any fraud or injustice, an essential element of piercing the veil, regarding the use of ARLLC to hold the property in question.[10] Further, Adams and ARLLC summarily argue that Finn's factual assertions in the proposed Third Amended Complaint are mere legal conclusions and do not satisfy any of the factors necessary to justify piercing the veil.[11]

"Futility refers to the complaint, even after amendment, failing to state a claim upon which relief could be granted."[12] In other words, would the new amendment survive a motion to dismiss under Rule 12(b)(6) of the Virgin Islands Rules of Civil Procedure? To survive a 12(b)(6) motion, a plaintiff must merely provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[13] Since Virgin Islands Rule 8(a)(2) explicitly states that the Virgin Islands is a notice pleading jurisdiction, a plaintiff needs only to provide a basic legal and factual basis for her claim so as to put a defendant on fair notice of the claims brought against him.[14]

1. Standard for piercing the corporate veil.

Piercing the corporate veil is an "equitable remedy whereby a court disregards the existence of the corporation to make the corporation's individual principals and their personal assets liable for the debts of the corporation."[15] The Superior Court in *Donastorg v. Daily News Publishing Co., Inc.*,[16] upon conducting the analysis required by *Banks v. International Rental & Leasing Corporation*,[17] found that piercing the corporate veil is appropriate "only in those circumstances where the shareholder has exercised such domination and control over the corporation that the corporation has become an alter ego of the shareholder, and where the shareholder has utilized the corporate form to perpetuate the fraud or injustice at issue in the litigation."[18] To determine

[9] Pl.'s Mot. to File a Third Amended Compl. 4-5.
[10] Opp'n to Pl.'s Third Mot. to Amend 3-4.
[11] Opp'n to Pl.'s Third Mot. to Amend 4-6.
[12] *Hartzog*, 2011 WL 13136520, at *3 (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)).
[13] V.I.R. Civ. P. 8(a)(2).
[14] *See Bank of Nova Scotia v. Flavius*, 2018 WL 745958, at *6 (V.I. Super. Ct. Feb. 2, 2018).
[15] *Trustees of Nat. Elevator Industry Pension, Health Benefit and Educational Funds v. Lutyk*, 332 F.3d 188, 192 (3d Cir. 2003); *see also Pearson v. Component Technology Corp.*, 247 F.3d 471, 484-85 (3d Cir. 2001).
[16] 63 V.I. 196 (Super. Ct. 2015).
[17] 55 V.I. 967 (V.I. 2011).
[18] *Donastorg*, 63 V.I. at 333.

whether sufficient domination and control exist to justify treating the shareholder and corporation as one entity, the Court weighs the eight factors articulated in *Matheson v. Virgin Islands Community Bank, Corporation*:[19]

> (1) whether the corporation suffers from gross undercapitalization;
>
> (2) a failure to observe corporate formalities;
>
> (3) the non-payment of dividends;
>
> (4) the insolvency of the debtor corporation;
>
> (5) the siphoning of funds from the debtor corporation from the dominant stockholder;
>
> (6) the presence of nonfunctioning officers;
>
> (7) the absence of corporate records; and
>
> (8) whether the corporation is merely a facade for the operation of the dominant stockholder.[20]

None of these factors are dispositive, nor is the Court limited to these factors in its analysis.[21] Though this standard grants flexibility when considering the facts of each case, piercing the veil is permitted only in the narrowest of circumstances, e.g., in instances of perpetuated fraud, where necessary to effectuate justice or fairness, or if equity requires it.[22]

2. Count III in the Third Amended Complaint would survive a 12(b)(6) motion to dismiss.

The Virgin Islands follows a notice pleading standard without reference to the *Twombley* plausibility standard, and this standard only requires that a pleader put a defendant on fair notice of the claims being brought against her. As such, the standard is not a difficult one, and for good reason: the Supreme Court of the Virgin Islands has clearly expressed the "strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules."[23]

---

[19] 297 F. Supp. 2d 819 (D.V.I. 2003).
[20] *Donastorg*, 63 V.I. at 331-32.
[21] *Id.* at 333
[22] *See Wachovia Securities, LLC v. Banco Panamericano, Inc.*, 674 F.3d 743, 751-52 (7th Cir. 2012) ("[C]ourts may pierce a corporation's veil . . . if the corporate form is used as a cloak or cover for fraud or illegality, to work an injustice, to defend crime, or to defeat an overriding public policy, or where necessary to achieve equity.") (citing 18 AM. JUR. 2D *Corporations* § 57) (internal quotation marks omitted); *Pearson*, 247 F.3d at 484 (stating same); *Aries Ventures Ltd. v. Axa Finance S.A.*, 729 F. Supp. 289, 296 (S.D.N.Y. 1990) (finding that piercing corporate veil applied only if doing so would "accomplish justice or equity.") (quoting *Brunswick Corp. v. Waxman*, 599 F.2d 34, 36 (2d Cir. 1979)).
[23] *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011).

Here, if the alleged facts in the proposed third count are taken as true, then the Court finds no reason why that count would fail under a Rule 12(b)(6) motion to dismiss. In Count III, Finn asserts several specific allegations in support of piercing the veil: Adams incorporated ARLLC for to purchase the property in question for a vacation home for him and his wife, and to shield himself from any personal liability related to the property; Adams used his own personal funds to purchase the property initially and to fund all corporate obligations thereafter; Adams and his wife ignored all of the LLC formalities, i.e., failed to hold annual meetings pursuant to the Operating Agreement, failed to hold any special meetings, failed to maintain a complete and accurate set of books and records, etc.; ARLLC was grossly undercapitalized due to its only asset being the property in question and Adams subsequently transferring that property, leaving ARLLC with no bank account, no income, and no form of capital.[24] Simply based on the allegations, taken at face value, the Court concludes that Finn adequately placed Adams and ARLLC on reasonable notice of his cause of action for piercing the corporate veil.

Adams and ARLLC argue that several of the allegations within the Third Amended Complaint are factually incorrect and attach corroborating exhibits evincing such.[25] Further, and more specifically, they argue that Finn's assertions in paragraphs 39-41, which discuss ARLLC being a single-purpose entity with a single asset and member, do not support piercing the veil, that paragraph 42 does not allege anything improper, that the assertions in paragraph 43 are factually contradicted by the exhibits attached in their opposition, and that the assertions in paragraphs 44-45 do not fall within any of the *Donastorg* factors nor support his alter ego theory.[26] Consequently, they argue that the proposed count, in its entirety, does not offer enough factual support to withstand a motion to dismiss.

The Court appreciates Adams and ARLLC's arguments but believes that they are misplaced in this particular instance. Several of their arguments, including some referenced in the preceding paragraph, appear to challenge Finn's ability to win on the merits of his newest count, i.e., that the purported facts do not support piercing the corporate veil, as opposed to whether his count was properly pleaded in accordance with Rule 8(a), i.e., whether the factual recitations within the new count, if taken as facially true, put the opposing party on reasonable notice of the cause of action. While the Court recognizes that Adams and ARLLC might have evidence that refutes certain factual statements within the proposed Count III, the standard governing futility requires that the Court determine whether the amended complaint would survive a motion to dismiss. When analyzing a motion to dismiss under Rule 12(b)(6), the Court does not consider matters outside of the pleadings themselves. Therefore, if the proposed additions to the complaint are taken as true and all inferences are drawn in favor of Finn, the Court concludes that the Third Amended Complaint would survive a motion to dismiss under Rule 12(b)(6) because Adams and ARLLC would be put on reasonable notice of the newest claim brought against them.

---

[24] Pl.'s Mot. to File a Third Amended Compl. 5-8.
[25] Opp'n to Pl.'s Third Mot. to Amend 6-7.
[26] Opp'n to Pl.'s Third Mot. to Amend 4-6.

C. Prejudice.

Finn argues that neither Adams nor ARLLC would be prejudiced from amending the complaint because the alleged facts have been known to them since the start of the litigation, fact discovery is still open, which gives the parties ample time to prepare a defense, and the statute of limitations has yet to expire on the issue.[27] Adams and ARLLC do not raise the issue of prejudice in their opposition.

The U.S. Court of Appeals for the Third Circuit has stated that "prejudice to the non-moving party has long been the 'touchstone' for the denial of leave to amend."[28] A court may find prejudice exists where "the proposed amendment causes surprise, results in additional discovery, or adds costs to the litigation in defending against the new facts or theories alleged."[29]

Nothing in the facts before the Court support a finding of prejudice here that would warrant a denial of the motion to amend. Neither Adams nor ARLCC complain of any prejudice in their opposition. Therefore, the Court determines that filing a Third Amended Complaint would not prejudice the defendants here.

IV. CONCLUSION

Based on the arguments presented, the Court concludes that Finn's motion to amend should be granted under Rule 15(a)(2) of the Virgin Islands Rules of Civil Procedure. Accordingly, it is hereby

ORDERED that Plaintiff's Motion to File a Third Amended Complaint is **GRANTED;** and it is further

ORDERED that, **on or before August 17, 2018**, Plaintiff Raymond Finn **SHALL** file a Third Amended Complaint and serve the same upon counsel of record for Defendants Peter Adams and Adams Rib, LLC; and it is further

ORDERED that, **on or before August 31, 2018**, Defendants Peter Adams and Adams Rib, LLC, **SHALL** respond upon receiving service of the Third Amended Complaint; and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to counsel of record.

Date: August 6, 2018

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

ATTEST:
Estrella H. George
Clerk of the Court
By: Lorna Stoddard
for **Lori Boynes-Tyson**
Chief Deputy Clerk 8/6/2018

[27] Pl.'s Mot. to File a Third Amended Compl. 3-4.
[28] *Mullin*, 875 F.3d at 155.
[29] *TL of Florida, Inc. v. Terex Corporation*, 54 F. Supp. 3d 320, 325-26 (D. Del. 2014).