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

FIRSTBANK OF PUERTO RICO, Plaintiff, v. DAWN E. PROSSER, JEFFREY J. PROSSER, ARTISAN DESIGN GROUP, LLC, ARTISAN STONE AND WOODWORDS, LLC, ROITER MECHANICAL SERVICES, JERRY MANN d/b/a MANN INTERPRISES, CHARLIE'S STONE CONSULTING, LLC, AND ADDISON CONSTRUCTION AND MAINTENANCE, INC., Defendants.	SX-09-CV-520 ACTION FOR DEBT AND FORECLOSURE OF MORTGAGE
JEFFREY J. PROSSER, Counterclaimant, v. FIRSTBANK OF PUERTO RICO, Counterclaim Defendant.	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff/Counterclaim Defendant FirstBank of Puerto Rico's ("FirstBank") Motion to Dismiss Counterclaim filed by Jeffrey J. Prosser ("Motion") and the accompanying Memorandum in support thereof ("Memorandum"), filed April 27, 2010; Defendant/Counterclaim Plaintiff Jeffrey J. Prosser's ("Mr. Prosser") Opposition thereto ("Opposition"), filed June 14, 2010; and FirstBank's Reply ("Reply"), filed July 7, 2010. In his Opposition, in the event that the Court finds his pleading inadequate, Mr. Prosser seeks leave to amend his Counterclaim. For the reasons that follow, FirstBank's Motion will be denied without prejudice, and leave will be granted to Mr. Prosser amend his Counterclaim.

BACKGROUND

FirstBank's Complaint, filed November 5, 2009, alleges that on or about September 16, 2005, Dawn Prosser and Jeffrey Prosser (collectively "the Prossers") executed and delivered to FirstBank a promissory note ("Note") by which they promised to pay the principal sum of $1,500,000, plus interest at 5.75% per annum, in monthly installments commencing November 1, 2005.[1] Complaint, ¶ 11. FirstBank further alleges that as security for the Note, on September 16, 2005, the Prossers executed and delivered a mortgage ("Mortgage") on several Properties in favor of FirstBank.[2] *Id.* at ¶ 12. FirstBank alleges that the Prossers are in default under the terms of the Note and Mortgage and have failed to cure the default. *Id.* at ¶¶ 13, 15.

Jeffrey Prosser filed his Counterclaim against FirstBank on March 26, 2010, alleging breach of contract; negligence; recklessness or gross negligence; and intentional infliction of emotional distress. Counterclaim, at ¶¶ 21–36. Mr. Prosser also seeks punitive damages. *Id.* at ¶ 37. Mr. Prosser's claims are based upon allegations that FirstBank breached its contractual duty of confidentiality and good faith during bankruptcy proceedings and negotiations, specifically, concerning information regarding the Prossers' mortgage account with FirstBank. *Id.* at ¶¶ 16, 18, 20, 22. FirstBank seeks dismissal of Mr. Prosser's claims, arguing that this Court lacks subject matter jurisdiction, and in the alternative, that Mr. Prosser's Counterclaim fails to state a claim upon which relief may be granted for breach of contract, intentional infliction of emotional distress, and punitive damages. Memorandum, at 8–17.

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[1] FirstBank included in the action Defendants Artisan Design Group, LLC, Roiter Mechanical Services, Jerry Mann d/b/a Jerry Mann Interprises, Charlie's Stone Consulting, LLC, Artisian Stone & Woodworks, LLC, and Addison Construction and Maintenance, Inc., all of whom claim liens against the subject Properties. Complaint, at ¶¶ 4–10.

[2] The subject properties are listed in the Complaint as: Remainder Plot No. 4; Plot No. 4-A and Plot No. 10-AA, all of Estate Anna's Hope (Shoys), East End Quarter "A," St. Croix, U.S. Virgin Islands ("Properties"). Complaint, at ¶3.

DISCUSSION

I. Subject Matter Jurisdiction

FirstBank maintains that Mr. Prosser's Counterclaim must be dismissed because this Court lacks subject matter jurisdiction over the claims, as they "could have a possible effect on the estate being administered in bankruptcy." Reply, at 5. Citing 28 U.S.C. § 1334(a), FirstBank argues that the District Court of the Virgin Islands has exclusive jurisdiction of all Virgin Islands bankruptcy cases, as well as all civil proceedings that "could conceivably have any effect on the estate being administered in bankruptcy." Memorandum, at 8–7 (quoting *Sudanto, Inc., v. Richardson*, 1999 U.S. Dist. LEXIS 2910 at *6 (D.V.I. 1999)). FirstBank then concludes that "there is no question that this Court's adjudication of Mr. Prosser's claims could have, at a minimum, a possible effect on the estate being administered in bankruptcy." *Id.* at 9.

However, FirstBank offers nothing more than this conclusory statement, and fails to state how the claims asserted by Mr. Prosser could have any bearing upon the estate being administered in bankruptcy, or how any judgment obtained could have any effect on the arrangement, standing, or priorities of the estate's creditors. *See Torkelsen v. Maggio (In re Guild & Gallery Plus),* 72 F.3d 1171, 1180-82 (3d Cir. 1996). FirstBank argues that "the 'Statement of Facts' in Mr. Prosser's counterclaim is nothing more than a recitation of the history of Prosser bankruptcy and FirstBank's conduct during the course of those proceedings" (Memorandum, at 9).

Yet, the Counterclaim alleges entitlement to relief relative to FirstBank's "discussions with regard to proposed foreclosure proceedings" (Counterclaim, at ¶14) and "disclosure of any information regarding their mortgage account" (*Id.* at ¶16). Mr. Prosser alleges that Plaintiff "breached its contractual duty of good faith" (*Id.* at ¶20) and its "contractual duty of confidentiality" (*Id.* at ¶22), presumably relating to the Note and Mortgage "contracts" between the parties. The Order Granting Relief from Stay, entered by the Bankruptcy Court on October 7, 2009 (Motion, Exhibit K), specifically permits Plaintiff to pursue this action against the Properties by virtue of the Note and Mortgage. Since the Counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" (Fed. R. Civ. P. 13(a)(1)(A), applicable per Super. Ct. R. 7), the Order Granting Relief would appear to be sufficiently broad to allow Mr. Prosser's compulsory Counterclaim.

"[T]he mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate" does not grant the bankruptcy court exclusive jurisdiction. *See Torkelsen*, 72 F.3d at 1181. Therefore, FirstBank's argument that this Court lacks subject matter jurisdiction over Mr. Prosser's Counterclaim fails, and the Court now addresses whether Mr. Prosser's Counterclaim should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

II. 12(b)(6) Legal Standard

FirstBank seeks dismissal of Mr. Prosser's Counterclaim under Fed. R. Civ. P. 12(b)(6), applicable to this Court pursuant to Superior Court Rule 7.[3] Under the Rule 12(b)(6) standard, the federal Supreme Court has established a heightened pleading standard for all civil complaints:

[3] FirstBank attached several exhibits to its Motion. If a court only considers "'allegations contained in the complaint, exhibits attached to the complaint and matters of public record,' the standard of review applicable to a motion to dismiss is required." *Sprauve v. CBI Acquisitions, LLC*, Civ. No. 09–165, 2010 WL 3463308, at *4 (D.V.I. 2010). (citing *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (3d Cir.1998)). However, when the court considers matters outside the pleading and public record, "the court must decide the motion as one for summary judgment in accord with Rule 56 and the required notice to the parties under Rule 12(d)." *Id.* (citing *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir.1992)). Because this Court will decide FirstBank's Motion based only on matters within the four corners of the Counterclaim and matters of public record, the motion to dismiss standard is appropriate.

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (internal quotation marks omitted).

The Supreme Court of the Virgin Islands has articulated a three-prong analysis in reviewing motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6):

> 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 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 factual 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. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

Joseph v. Bureau of Corrections, 54 V.I. 645, 649–650 (V.I. 2011) (internal quotations and citations omitted).

This three-prong analysis is applied below to Mr. Prosser's claims of breach of contract, intentional infliction of emotional distress, and his request for punitive damages.[4]

[4] FirstBank's Memorandum makes no argument that Count Two (Negligence) or Court Three (Recklessness/Gross Negligence) should be dismissed. Mr. Prosser's Counterclaim alleges "Intentional Infliction of Emotional Distress" twice, both listed as "Count Four." Counterclaim, at 4–5. This may be why FirstBank's Memorandum argues for dismissal of Mr. Prosser's negligent infliction of emotional distress claim, even though Mr. Prosser's Counterclaim makes no such claim. Memorandum, at 13–15.

III. ANALYSIS

A. Breach of Contract

Count one of Mr. Prosser's Counterclaim alleges that FirstBank "breached its contracts with Counter Claimant in that [FirstBank] has violated its contractual duty of confidentiality." Counterclaim, at ¶ 22. "To state a claim for a breach of contract under Virgin Islands law, a plaintiff must allege: (1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages." *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 473 (V.I. 2013) (internal quotation omitted). FirstBank argues that Mr. Prosser failed to plead "as to the particular contract at issue and/or any corresponding clause(s) that might impose a contractual duty of confidentiality. As such, it is impossible to determine what contract was allegedly breached." Memorandum, at 10.

FirstBank is correct that Mr. Prosser's allegations of breach of contract in his Counterclaim are merely conclusory. He fails to allege the contractual agreement(s) to which his claims refer (although reference to the Note and Mortgage is inferred), and fails to allege what duty was created by such agreement(s), and when and how that duty was breached. *Id.* As such, the Counterclaim fails to state a plausible claim that FirstBank is liable for breach of contract. However, the Court will grant Mr. Prosser time to amend his Counterclaim to provide further support to his allegations of breach of contract.[5]

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[5] Superior Court Rule 8 governs amendments to complaints in the Superior Court of the Virgin Islands. *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, 275 (V.I. 2012). Super. Ct. R. 8 states:

> The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If a party is surprised as a result of such amendment, the court shall adjourn the hearing to some future day, upon such terms as it shall think proper.

Mr. Prosser's Opposition requested, should the Court find his pleadings inadequate "time to amend the counter complaint." Opposition, at 10. Neither FirstBank's Memorandum nor Reply argues against granting Mr. Prosser leave to amend the Counterclaim, nor does FirstBank allege that it would be prejudiced if leave to amend were granted. The Court will exercise its discretion and grant Mr. Prosser leave to amend his Counterclaim.

B. Intentional Infliction of Emotional Distress

The Supreme Court of the Virgin Islands has not yet adopted an elemental test that a claimant must satisfy to successfully plead a claim for intentional infliction of emotional distress. In the absence of binding precedent, the Superior Court must conduct a "*Banks* analysis" by determining: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands. *Matthew v. Herman*, 56 V.I. 674, 680–81 (V.I. 2012).

The Court finds that RESTATEMENT (SECOND) OF TORTS § 46 best reflects the common law of this jurisdiction. This section has been previously adopted by the courts of the Virgin Islands to address intentional infliction of emotional distress.[6] Further, a majority of jurisdictions have adopted section 46, or a very similar rule.[7] Also, considering the previous application of this rule for intentional infliction of emotional distress claims in Virgin Islands, the Court finds that the RESTATEMENT (SECOND) OF TORTS § 46 represents the soundest rule for the Virgin Islands.

Under section 46, the tort of intentional infliction of emotional distress is committed when "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. . . ." RESTATEMENT (SECOND) OF TORTS, § 46; *see also Moolenaar v. Atlas*

[6] *See Joseph v. Sugar Bay Club & Resort*, 2014 V.I. LEXIS 14, *7–9, 2014 WL 1133416 (V.I. Super. Ct. Mar. 17, 2014) (*reversed on other grounds in Joseph v. Sugar Bay Club & Resort, Corp.*, 2015 V.I. Supreme LEXIS 4 (V.I. 2015)); *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, *23 (V.I. Super. Ct. Jan. 29, 2015).

[7] *See* RESTATEMENT (SECOND) OF TORTS § 46, Reporters Notes (collecting cases); *see also Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994); *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278–79 (Fla. 1985); *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev. 2000); *McGanty v. Staudenraus*, 901 P.2d 841, 849 (Or. 1995); *Miller v. Willbanks*, 8 S.W.3d 607, 612 (Tenn. 1999); *Retherford v. AT&T Communications*, 844 P.2d 949, 967 (Utah 1992); *Farnum v. Brattleboro Retreat*, 671 A.2d 1249, 1256 (Vt. 1995); *Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003).

Motor Inns, Inc., 616 F.2d 87 (3d Cir. 1980). The actor's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." RESTATEMENT (SECOND) OF TORTS, § 46, comment d.

By his Counterclaim, Mr. Prosser has failed to allege any facts that tend to show intent to cause emotional distress or, alternatively, reckless behavior.[8] The Counterclaim recites conclusory statements, not factual allegations, to allege that FirstBank's conduct was outrageous, and fails to offer any factual allegations of behavior that could reasonably be found "utterly intolerable in a civilized society." The Court will grant Mr. Prosser time to amend his Counterclaim to provide support to his allegations of intentional infliction of emotional distress.

C. Punitive Damages

Lastly, FirstBank argues that Mr. Prosser has not alleged conduct on the part of FirstBank that could warrant the imposition of punitive damages.[9] Memorandum, at 15. FirstBank correctly notes that even if Mr. Prosser's factual allegations in his Counterclaim are assumed true, "FirstBank's alleged conduct would not constitute evil motive, reckless indifference, violence, or

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[8] The extent of Mr. Prosser's factual allegations appears to be that (1) "[o]n August 19, 2008 [FirstBank] admitted to the Bankruptcy Court that without consent or consultation with Counter Claimant or Co-defendant, Dawn E. Prosser [FirstBank] had been engaged in discussions with regard to proposed foreclosure proceedings against the Shoy Property as well as with regard to disposition and contemplated distribution of proceeds from said proposed foreclosure proceedings to creditors of Counter Claimant's estate" (Counterclaim, at ¶14); and (2) "[o]n August 19, 2008, plaintiff [FirstBank] further acknowledged that then pending hearings before the Bankruptcy Court should be delayed to allow discussions with 'others' who may 'have a dog in this fight' as they would have to be '...negotiated with...'" (Counterclaim, at ¶15).

[9] Although it is not a separate claim, "a claim for punitive damages may be the target of a motion to dismiss." *Acosta v. Hovensa, LLC*, 53 V.I. 762, 780 (2010).

wanton or wicked conduct" as is traditionally required to merit punitive damages.[10] *Id.* at 16. The Court will grant Mr. Prosser time to amend his Counterclaim to provide support for his request for punitive damages.

In light of the foregoing, it is hereby

ORDERED that Plaintiff/Counterclaim Defendant FirstBank Puerto Rico's Motion to Dismiss is DENIED without prejudice. It is further

ORDERED that Defendant/Counterclaim Plaintiff Jeffrey J. Prosser is granted 21 days from the date of entry of this Order within which to amend his Counterclaim.

Dated: June 22, 2015.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: ______________________
Court Clerk Supervisor 6/22/15

CERTIFIED A TRUE COPY
DATE: June 24, 2015
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: ______________________
COURT CLERK

[10] Because Mr. Prosser will be granted leave to amend the Counterclaim, and because his current allegations clearly fall short of any standard necessary to reach the level necessary to warrant punitive damages, a *Banks* analysis will not be conducted at this time.

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:	)	
	)	**MISC NO. DAB 012/2018**
ORDER DESIGNATING CERTAIN	)	
OPINIONS FOR PUBLICATION.	)	

TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw

ORDER

THE PREMISES considered, it is hereby

ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyoute v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned maters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By:
Court Clerk Supervisor 10/1/18