

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

JACQUELINE L. CHARLES,

Plaintiff,

v.

ARCOS DORADOS USVI, INC.,
d/b/a MCDONALD'S RESTAURANT,

Defendant.

SX-13-CV-336

ACTION FOR BREACH OF
WARRANTY AND DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant's Motion for Summary Judgment (Motion), filed March 7, 2016; Plaintiff's Response Brief in Opposition thereto (Response), filed April 11, 2016; Defendant's Supplemental Brief Re: McDonald's Motion for Summary Judgment (Defendant's Sup.), filed May 5, 2016; Plaintiff's Supplemental Brief (Plaintiff's Sup.), filed May 24, 2016; Plaintiff's Motion to Strike Defendant's Exhibits G and H, filed April 11, 2016; and Defendant's Opposition thereto, filed May 5, 2016.¹

Background

On October 9, 2013, Plaintiff filed her Complaint alleging that "on or about February 16, 2013 McDonald's Restaurant sold and delivered to Charles a fish filet sandwich for her consumption." Complaint, at ¶ 6. Plaintiff further alleges that, "in reliance on the representations and warranty of McDonald's Restaurant" that the sandwich was "good, wholesome, and fit for consumption," Plaintiff consumed the sandwich, "and as a proximate result thereof, became severely ill and incapacitated." *Id.* at ¶¶ 8-9. Plaintiff describes that she "was poisoned, became seriously ill, and suffered great pain and distress, *to wit*: itching and bumps about her body, and

¹ At the August 9, 2016 hearing on the Motion for Summary Judgment, neither Plaintiff nor Defendant presented evidence. Rather, each party summarized its argument, and both parties generally elected to rest on their briefs.

swelling and blisters around the mouth and lips.” *Id.* at ¶ 12. Lastly Plaintiff asserts that, “as a direct result of such illness, Charles has expended funds for medical care, medicines, care, and treatment; and was rendered unable to work.” *Id.* at ¶ 13.

By its allegations, Plaintiff’s Complaint purports to present a claim for breach of the implied warranty of fitness for particular purpose under 11A V.I.C. § 2-315. Complaint at 2. However, the comments to § 2-315 clarify that “a ‘particular purpose’ differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business.” 11A V.I.C. § 2-315 cmt. 2. Clearly, Plaintiff does not contend that her purchase of the fish sandwich for the purpose of consumption was in any way peculiar to the nature of her business or life affairs, or constituted anything other than a purchase of a good for its ordinary purpose. Thus, the Court construes Plaintiff’s claim as one for breach of the implied warranty of merchantability pursuant to 11A V.I.C. § 2-314.

Additionally, in both Plaintiff’s Response and Plaintiff’s Supplemental Brief, Plaintiff presents a second theory of her case not set forth in her Complaint, based upon strict product liability as expressed in the Restatement (Second) of Torts. Response at 2.² However, claims may not be raised for the first time at the summary judgment stage of litigation, but must rather be contained in the complaint. *See Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 699 (V.I. 2011) (collecting cases). A motion for summary judgment or a response thereto may not be used as a means of circumventing the proper procedure for amending a complaint pursuant to Superior Court Rule 8. *See Harvey v. Christopher*, 2011 V.I. Supreme LEXIS 18, at *22 (V.I. 2011) (holding that

² Both Plaintiff and Defendant in their supplemental briefs assert that Virgin Islands courts have universally accepted and applied the doctrine of strict products liability as set forth in § 402A of the Restatement (Second) of Torts. However, the Supreme Court in *Banks v. Int’l Rental & Leasing Corp.*, in the context of a case concerning the strict liability of a lessor of a defective product, explicitly determined that §§ 1 and 20 of the Restatement (Third) of Torts: Products liability “represents the sounder rule.” 55 V.I. 967, 985 n.10 (V.I. 2011). However, as applicable to the facts presented in this case, the outcome is the same under either version of the Restatement.

amendment under Superior Court Rule 8 is not as of right, but is instead “vested in the sound discretion of the Superior Court”). Therefore, Plaintiff’s claim that Defendant is strictly liable for Plaintiff’s injuries pursuant to the doctrine of strict product liability, as expressed in either the Restatement (Second) of Torts or the Restatement (Third) of Torts: Products Liability, is not properly before the Court.³

Discussion

A moving party will prevail on a motion for summary judgment if the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008), citing Fed. R. Civ. P. 56(e), as applicable per Super. Ct. R. 7. The Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Id.*; see also *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citations and quotations omitted). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 391-92 (V.I. 2014). In analyzing the evidence, the Court must consider the pleadings and full factual record, drawing all justifiable inferences in favor of the nonmoving party, to determine whether the movant has met its burden of showing that there is no unresolved genuine issue of material fact. *Williams*, 50 V.I. at 194-95, and cases cited.

³ Restatement (Second) of Torts §402A states that “one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for *physical harm thereby caused to the ultimate user or consumer, or to his property*, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.” Similarly, Restatement (Third) of Torts: Products Liability §1 states that “one engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property *caused by the defect*.” Even if the Court were to consider Plaintiff’s strict products liability claim, under either version of the standard it would not survive summary judgment as Plaintiff has not provided sufficient evidence from which a reasonable juror could infer that the use of Defendant’s arguably defective product proximately caused Plaintiff’s injuries. Thus, for the same reasons more fully discussed below in the context of Plaintiff’s implied warranty claim, Plaintiff’s strict product liability claim would also fail as a matter of law.

“[T]o survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.” *Id.* at 195 (quotation omitted). The nonmoving party then has the burden to “set out specific facts showing a genuine issue for trial.” *Id.* (citation omitted). The Court may not weigh the evidence or determine the credibility of witnesses. *Id.* at 194-95. Instead, the Court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Id.*; see also *Perez*, 59 V.I. at 527. As to materiality, “only those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Williams*, 50 V.I. at 195 (citations omitted). A movant must meet his burden of demonstrating the absence of genuine material factual issues and his entitlement to judgment as a matter of law. *Seales v. Devine*, 2008 V.I. Supreme LEXIS 23, *4 (V.I. 2008) (unpublished).

In order to recover on a claim for breach of the implied warranty of merchantability, a Plaintiff must demonstrate that: 1) an implied warranty of merchantability existed, 2) the warranty was broken by the seller, 3) the breach of the warranty proximately caused, 4) the loss sustained. 11A V.I.C. § 2-314 cmt. 13.⁴ For the reasons discussed below, even assuming that Plaintiff has

⁴ Although the official comments to 11A V.I.C. § 2-314 establish that proving some breach—some wrongdoing on the part of the defendant—is an essential element of a claim for breach of the warranty of merchantability, and state that “evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken,” some courts have analyzed these claims under a strict liability framework. See, e.g., *Bronson v. Club Comanche, Inc.*, 6 V.I. 683 (D.V.I. 1968) (“implied warranty imposes a strict liability upon seller making him liable to his customers even though in the exercise of all possible care in the purchase and preparation of food he could not discover its unwholesome nature”); see also *Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3d Cir. 1983) (concluding that a jury’s finding that the defendant was not liable under section 402A of the Restatement (Second) of Torts governing strict products liability but was liable for breach of the implied warranty of merchantability was “irreconcilably inconsistent,” and should be set aside). Here, the Court need not decide whether a claim for breach of the implied warranty of merchantability requires a demonstration that Defendant breached some standard of care, as in either case, Plaintiff must show that her use of the Defendant’s allegedly defective product proximately caused her injury and, on this record, Plaintiff has failed to produce sufficient evidence from which a reasonable trier of fact could infer that it is more likely than not that Defendant’s product caused Plaintiff’s injuries.

made a sufficient showing to survive summary judgment as to the first, second, and fourth elements of her claim, summary judgment must be granted. Drawing all reasonable inferences in favor of Plaintiff, based upon the undisputed, material facts in the summary judgment record, Plaintiff has failed to demonstrate that her consumption of the fish sandwich proximately caused her injuries. Therefore, Defendant is entitled to judgment as a matter of law.

The undisputed, material facts relevant to Plaintiff's ability to demonstrate proximate cause in this case are stated simply as follows: 1) Defendant sold and delivered to Plaintiff a fish filet sandwich (Charles Dep. 20:23-25); 2) Plaintiff consumed approximately half of the sandwich (Charles Dep. 21:16-17); 3) upon consumption, Plaintiff noted that the sandwich did not taste good (Charles Dep. 21:4-5); 4) soon after eating the sandwich, Plaintiff developed itching, swelling, and blisters in her mouth, followed by itching about her whole body including itching in her vaginal area (Charles Dep. 21-23); 5) Plaintiff's daughter, who also consumed a fish filet sandwich at the same time as Plaintiff either did not notice anything unusual about the taste of the sandwich (Brown Dep. 17:10-19) or perhaps said it tasted good (Charles Dep. 21:6-7), but complained subsequently that she suffered from diarrhea (Brown Dep. 18:2-25).

Critically, Plaintiff attempts to demonstrate proximate cause based primarily upon the temporal proximity between Plaintiff's ingestion of the sandwich and the onset of Plaintiff's illness. However, close examination of the record reveals that Plaintiff has offered little evidence to support this strained inference of causation; and she has offered no evidence from which a reasonable juror could rule out plausible alternative explanations and infer that Plaintiff's consumption of the fish sandwich was not merely a *possible*, but rather the *probable* cause of Plaintiff's injuries. While Plaintiff's daughter also became ill after eating her sandwich, she did

not notice anything unusual about the taste of the sandwich and experienced entirely different symptoms.

Additionally, neither Plaintiff nor her daughter sought medical attention upon developing symptoms, although Plaintiff did visit her doctor three days later on February 19, 2013. (Charles Dep. 32:8-14). Medical records of that visit make no mention of food poisoning or foodborne illness, and offer no diagnosis or explanation of the cause of Plaintiff's symptoms, noting only that Plaintiff complained of "itching and swelling after eating a fish sandwich." *See* Motion, Exhibit D. Medical records also indicate that Plaintiff has known allergies to Tylenol and Codeine. *Id.* Thus, while Plaintiff presents enough information from which a reasonable person could infer that the fish sandwich was a *possible* cause of Plaintiff's symptoms, she fails to provide sufficient support for an inference that the sandwich was the *probable* cause of Plaintiff's symptoms. Therefore, Plaintiff cannot, as a matter of law, prove by a preponderance of the evidence that her consumption of the sandwich was the proximate cause of her injuries and Defendant is entitled to summary judgment.⁵

As to Plaintiff's Motion to Strike, Plaintiff states in conclusory terms that Defendant's Exhibits G and H to Defendant's Motion "are not in admissible form." Motion to Strike, at 1. In support, Plaintiff argues only that the documents "contain (unrelated) personal and confidential communication information which was shared by Plaintiff with her gynecologist in 2008 and 2012

⁵ The rule that a plaintiff cannot, as a matter of law, sufficiently prove proximate cause merely by showing that he or she became sick subsequent to consuming food finds support in case law from courts both in the Virgin Islands and in other jurisdictions that have considered the issue. *See, e.g., Etienne v. United Corporation*, 44 V.I. 113, 2001 V.I. LEXIS 36, *8 (V.I. Super. 2001) ("just because [plaintiff] ate souse purchased from [defendant], and subsequent to that time she contracted Salmonella, it does not necessarily follow that the souse was the most probable source of the Salmonella"); *Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1196 (2008) (proof must go further than "mere after-the-restaurant-meal illness") (collecting cases); *Meyer v. Super Disc. Mkts.*, 231 Ga. App. 763, 765 (1998) ("Illness alone cannot establish proximate cause; a mere showing that a person became sick subsequent to eating food is insufficient").

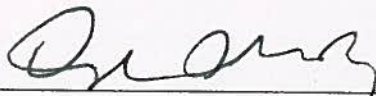
and are irrelevant to the treatment for itching, blistering, and skin irritation due to the consumption of contaminated foods.” *Id.* This argument is unpersuasive. Plaintiff’s gynecological health and medical history are relevant insofar as they suggest a potential alternative explanation for at least some of the symptoms Plaintiff experienced following her consumption of the fish sandwich. Thus, because the Court finds that Plaintiff’s medical records presented in Exhibits G and H to Defendant’s Motion are relevant to the issue of proximate cause, and because Plaintiff has presented no other legal basis for exclusion, Plaintiff’s Motion to Strike will be denied.

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Plaintiff’s Motion to Strike Defendant’s Exhibits G and H is DENIED. It is further

ORDERED that Defendant’s Motion for Summary Judgment is GRANTED, and this action is DISMISSED with prejudice.

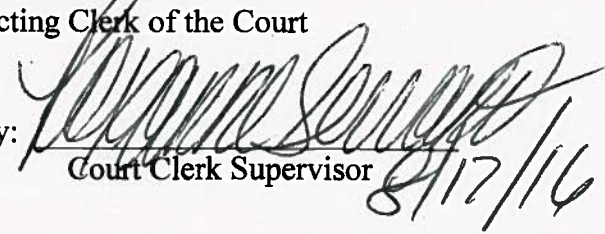
Dated: August 18, 2016.


DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By:


Court Clerk Supervisor 8/17/16

CERTIFIED A TRUE COPY

DATE:

Aug 19, 2016
ESTRELLA H. GEORGE

ACTING CLERK OF THE COURT

BY:


COURT CLERK

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:)
) MISC NO. DAB 011/2018
ORDER DESIGNATING CERTAIN)
OPINIONS FOR PUBLICATION.)

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

ORDER

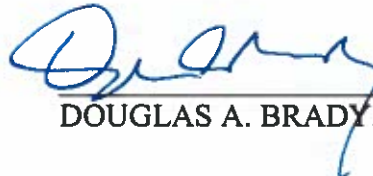
THE PREMISES considered, it is hereby

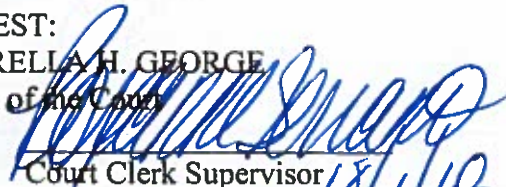
ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

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 matters, 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