

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JENSEN KEN ALEXANDER,

Appellant/Plaintiff,

v.

JULIUS C. WILSON, BASIL RICHARDS, and

SHAWN MORRIS,

Appellees/Defendants.

) **S. Ct. Civ. No. 2019-0008**

) Re: Super. Ct. RV. No. 04/2018 (STX)

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On Appeal from the Superior Court of the Virgin Islands

Division of St. Croix

Superior Court Judge: Hon. Douglas A. Brady

Considered: July 14, 2020

Filed: August 17, 2020

Cite as: 2020 VI 13

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and
 IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

Jensen Alexander

Big Stone Gap, VA

Pro se,

Aysha R. Gregory, Esq.

Assistant Attorney General

St. Thomas, U.S.V.I.

Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Jensen Ken Alexander appeals from a January 10, 2019 order of the Appellate Division of the Superior Court, which affirmed a February 16, 2018 judgment of the Magistrate Division that dismissed his complaint pleading a civil rights cause of action under 42 U.S.C. § 1983 for failure

to comply with certain notice and timing requirements of the Virgin Islands Tort Claims Act (“VITCA”). For the reasons that follow, we reverse the January 10, 2019 order of the Appellate Division, vacate the February 16, 2018 judgment of the Magistrate Division, and direct that the Superior Court reinstate Alexander’s complaint in the Civil Division.

I. BACKGROUND

¶ 2 On July 6, 2017, Alexander filed a *pro se* complaint in the Superior Court under 42 U.S.C. § 1983 against Julius C. Wilson, the former director of the Virgin Islands Bureau of Corrections; Basil Richards, the former warden of the Golden Grove Adult Correctional Facility (hereafter “Golden Grove”); and Shawn Morris, the Chief of Security at Golden Grove.¹ The complaint alleged that when Alexander was transferred from Golden Grove to Wallens Ridge State Prison (hereafter “Wallens Ridge”) in Virginia on April 12, 2013, the defendants did not transfer his personal belongings with him, but instead threw them away. In his complaint, Alexander estimated the value of the lost property as \$6,275, and sought monetary damages in the amount of at least \$5,000 to \$7,000.

¶ 3 The Clerk of the Superior Court construed Alexander’s complaint as a small claims action, and assigned it to a magistrate judge. See 4 V.I.C. § 123(a)(4) (providing that a magistrate judge may hear “small claims cases”). The case was set for a hearing on February 13, 2018. The defendants did not file an answer,² but on the day of the hearing appeared through counsel, who

¹ State and territorial courts have concurrent jurisdiction with the federal courts to entertain cases alleging violation of federal rights under § 1983. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 506-07 (1982).

² See V.I. SM. CL. R. 2(e) (“It shall not be necessary for any party in the Small Claims Division to file an answer, plea, or other defense in writing, except in cases where the defendant asserts a counterclaim, right of set-off, or recoupment, in which circumstances the court may require a written response to the complaint or another pleading.”).

filed a “Motion to Continue.” In addition to requesting a postponement of the February 13, 2018 hearing, the motion noted “that this claim may be subject to dismissal for lack of jurisdiction because [Alexander] is serving a life sentence for murder and may not have the capacity to file a civil action.”

¶ 4 Although counsel appeared on behalf of the defendants, and neither Alexander nor the defendants appeared at the February 13, 2018 hearing, the magistrate judge denied the motion to continue and instead issued a February 16, 2018 judgment dismissing the complaint.³ The magistrate judge construed the complaint as alleging that Morris violated Alexander’s due process rights by failing to preserve his personal property, and that Wilson and Richards were responsible for ensuring that their subordinates did not violate the due process rights of inmates. The magistrate judge determined that Alexander had the capacity to sue notwithstanding his life imprisonment. However, the magistrate judge, acting *sua sponte*, dismissed Alexander’s complaint for failure to state a claim for purportedly failing to comply with VITCA.

¶ 5 On March 5, 2018, Alexander filed a notice of appeal with this Court, which shortly thereafter dismissed it for lack of jurisdiction on March 22, 2018, because appeals from the Magistrate Division must first be appealed to a Superior Court judge. Alexander then filed an appeal with the Appellate Division of the Superior Court, which accepted it as timely in light of the earlier erroneous filing with this Court. The clerk issued a briefing schedule, and while Alexander timely filed a brief, the defendants did not participate in the proceeding.

¶ 6 The Appellate Division, in a January 10, 2019 order, affirmed the February 16, 2018

³ It is not clear from the record what arrangements—if any—had been made by the Virgin Islands Bureau of Corrections or the Wallens Ridge State Prison to ensure that Alexander could appear at the February 13, 2018 hearing.

judgment of the Magistrate Division. In its affirmance order, the Appellate Division determined that Alexander’s complaint was properly dismissed under VITCA, but *sua sponte* found, as an alternate ground for affirmance, that Alexander’s claim was subject to a two-year statute of limitations and time-barred pursuant to 5 V.I.C. § 31(5)(a). Alexander timely filed a notice of appeal with this Court on February 6, 2019. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 7 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over “all appeals from the decisions of the courts of the Virgin Islands established by local law[.]” 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over “all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court.” Because the Superior Court’s January 10, 2019 order resolved all of the claims between the parties, it is a final judgment within the meaning of section 32(a), thereby conferring jurisdiction on this Court. *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 8 This Court exercises plenary review of the Superior Court’s application of law. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)).

B. Automatic Transfer to the Civil Division

¶ 9 “The small claims division of the Superior Court has jurisdiction of all civil actions, concurrently with the civil division of the said court, wherein the amount in controversy does not exceed the sum or value of \$10,000, exclusive of interest and costs.” 4 V.I.C. § 112(a). Pursuant to statute, “[n]either party may be represented by counsel.” 4 V.I.C. § 112(d). However, because the Due Process Clause of the Fourteenth Amendment of the United States Constitution safeguards

the right to appear through retained counsel in a judicial proceeding, it has long been the practice in the courts of the Virgin Islands to provide for a transfer to the Civil Division as of right whenever a defendant desires to be represented by counsel. *See Carr v. Pena*, 432 F.Supp. 828 (D.V.I. 1977); *see also* V.I. SM. CL. R. 2 Reporter’s Note (collecting cases). The Virgin Islands Small Claims Rules, which went into effect on December 1, 2017, codify this long-standing practice by providing that

An action filed in the Small Claims Division shall be automatically transferred to the Civil Division if:

. . . .

(2) an attorney enters an appearance on behalf of the defendant, or the defendant requests to be represented by an attorney, prior to any party or witness being sworn to give evidence at the Small Claims trial[.]

V.I. SM. CL. R. 2(d)(2).

¶ 10 Here, the record reflects that counsel filed a “Motion to Continue” on behalf of the defendants on February 13, 2018, which both requested a postponement of the hearing date and made the substantive legal argument that Alexander lacked the capacity to sue. Consequently, because the document had been filed before any party or witness had been sworn to give evidence, pursuant to the plain language of Small Claims Rule 2(d)(2) the matter should have been automatically transferred to the Civil Division at that point. Nevertheless, the magistrate judge proceeded to adjudge the matter and issue the February 16, 2018 judgment. Because the filing of the “Motion to Continue” by the defendants’ counsel divested the magistrate judge of authority to adjudicate the small claims matter, we vacate the February 16, 2018 judgment and direct that Alexander’s complaint be reinstated in the Civil Division.

C. Applicability of the VITCA to Alexander’s Claims

¶ 11 Because the Small Claims Division lacked authority to issue the February 16, 2018

judgment, it would ordinarily not be necessary to consider any of the other issues raised as part of this appeal. However, it is highly likely that the issue of whether the VITCA precludes Alexander’s complaint will recur on remand. Therefore, in the interests of judicial economy, we proceed to consider that issue on the merits. *Malloy v. Reyes*, 61 V.I. 153, 181 (V.I. 2014).

¶ 12 The Revised Organic Act of 1954, which serves as the *de facto* constitution for the Virgin Islands, provides that “no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature.” 48 U.S.C. § 1541. The Legislature later waived this grant of immunity for tort claims by enacting the VITCA, 33 V.I.C. §§ 3401 through 3417, which conditions this waiver on first satisfying certain notice, filing, and service requirements. To comply with the VITCA with respect to “a claim to recover damages for injuries to property . . . caused by the tort of an officer or employee of the Government of the United States Virgin Islands while acting as such officer or employee,” the claimant must file the claim “within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.” 33 V.I.C. § 3409(c). “The claim or notice of intention shall be filed in the Office of the Governor and a copy shall be served upon the Attorney General,” and “shall state the time when and the place where such claim arose, the nature of same, and items of damage or injuries claimed to have been sustained and the total sum claimed,” except that a notice of intention need not state the items of damage or injuries or the sum claimed.” 33 V.I.C. § 3410. Moreover, both “[t]he claim and notice of intention to file a claim shall be verified.” *Id.*

¶ 13 It remains an issue of first impression in the Virgin Islands whether the pertinent provisions of the VITCA are jurisdictional, or claims-processing rules which may be waived. *See Bonelli v.*

Gov't of the V.I., 67 V.I. 714, 723-24 (V.I. 2017); *Brunn v. Dowdye*, 59 V.I. 899, 904-05 (V.I. 2013). Here, it is unclear whether the magistrate judge considered the relevant VITCA provisions to be jurisdictional requirements or non-jurisdictional claims-processing rules. Although the magistrate judge invoked the VITCA *sua sponte*—an action typically only done with jurisdictional requirements—the February 16, 2018 judgment states that it is dismissing Alexander’s complaint for failure to state a claim, and not for lack of subject-matter jurisdiction. See *Brady v. Cintron*, 55 V.I. 802, 817 n.15 (V.I. 2011) (noting the distinction between a dismissal pursuant to Civil Rule 12(b)(1) and one under Civil Rule 12(b)(6)).

¶ 14 Nevertheless, we need not decide as part of this appeal whether the VITCA requirements are jurisdictional or non-jurisdictional because the magistrate judge erred in questioning *sua sponte* whether Alexander complied with the VITCA, without providing him with an opportunity to respond to that concern. See *Brunn*, 59 V.I. at 904-05 (citing *Mendez v. Gov’t of the V.I.*, 56 V.I. 194, 205 (V.I. 2012)). Although there is nothing in Alexander’s *pro se* complaint that indicates that he complied with the notice, filing, and service requirements of the VITCA, there is also nothing in his complaint that demonstrates that he did not comply with them. To the extent the VITCA codifies a non-jurisdictional claims-processing rule that is subject to waiver, Alexander was not required to preemptively plead in his initial complaint any facts in anticipation of the defendants asserting non-compliance with the VITCA. See *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, n.5 (V.I. 2015) (“[P]laintiffs need not anticipate the statute of limitations or other affirmative defenses when they draft their complaints. . . .”). And even if the VITCA requirements are jurisdictional, it is well-established that a court of general jurisdiction is presumed to possess subject-matter jurisdiction, and a plaintiff therefore need not plead jurisdictional facts until jurisdiction is properly drawn into question. See, e.g., *Troupis v. Summer*, 218 P.3d 1138, 1141

(Idaho 2009); *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007) (citing *Turner v. Bank of N. America*, 4 U.S. 8, 11 (1799)); *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004); *Mart v. Hess*, 703 N.E.2d 190, 192 (Ind. Ct. App. 1998). Thus, rather than essentially assuming that Alexander did not comply with the VITCA requirements because his complaint did not plead his compliance, the magistrate judge should have provided him with an opportunity to amend his complaint to plead those facts, to demonstrate with cognizable proofs that the required forms of claim and notice were provided, or to argue why the VITCA requirements were not applicable to his case. *Brunn*, 59 V.I. at 904-05

¶ 15 In any case, it is clear from the face of Alexander’s complaint that he was not required to comply with the VITCA requirements as a prerequisite to maintaining his action. The magistrate judge correctly construed Alexander’s complaint as asserting claims against Wilson, Richards, and Morris for violating his due process rights by failing to preserve his personal property when transferring him from Golden Grove to Wallens Ridge. It is well-established that a complaint that alleges that government officials violated one’s due process rights raises a claim under 42 U.S.C. § 1983, which “creates a federal cause of action for anyone deprived of a right or privilege under the Constitution or laws of the United States” which may be prosecuted in either federal or state court. *Fleming v. Cruz*, 62 V.I. 702, 712 (V.I. 2015). Significantly, the Supreme Court of the United States has held that all state laws which impose notice, service, or filing requirements as a prerequisite to suing a government official for a constitutional violation under section 1983 are preempted, since such requirements burden the federal right created by that statute. *Felder v. Casey*, 487 U.S. 131, 152 (1988). In fact, this Court has already recognized the limited preemption of the VITCA due to the *Felder* decision, and has therefore applied the VITCA requirements only to tort claims arising under local law, and not to a claim brought under section 1983. *Fleming*, 62

V.I. at 717. To be sure, here, the form complaint that Alexander used to initiate the litigation in this case states at the outset that it is “For use by inmates in filing a complaint under [the] C[ivil] R[ights] A[ct], 42 USC § 1983,” and as completed by Alexander, it pleads a Due Process claim under the Fourteenth Amendment. Consequently, the magistrate judge also erred in requiring Alexander to prove his compliance with the notice, service, and filing requirements of the VITCA as a prerequisite to maintaining his action against Wilson, Richards, and Morris.

¶ 16 Finally, we note that in its January 10, 2019 order, the Appellate Division of the Superior Court, as an alternate ground for affirmance, held that Alexander’s action was filed outside of the Virgin Islands’ two-year statute of limitations for tort claims. But even assuming, without deciding, that the action is subject to a two-year statute of limitations, the defendants never asserted a statute of limitations defense at any stage of the proceedings, and Alexander was consequently not required to anticipate a potential statute of limitations defense in either his complaint or his appellate brief. Importantly, even if the statute of limitations has expired, Alexander could potentially plead sufficient facts to establish an entitlement to equitable tolling of the limitations period. *See Jensen v. Virgin Islands Water & Power Auth.*, 52 V.I. 435, 442-43 (V.I. 2009). Because the statute of limitations is an affirmative defense subject to waiver if not timely asserted, the Superior Court committed error in invoking that defense *sua sponte* for the first time on appeal. *Rennie*, 62 V.I. at 538.

III. CONCLUSION

¶ 17 Because the defendants appeared through counsel on February 13, 2018, before any witness or party was sworn to give evidence in the small claims trial, on that date the case was automatically transferred from the Small Claims Division to the Civil Division by virtue of Virgin Islands Small Claims Rule 2(d)(2). Thus, the magistrate judge lacked the authority to issue the

February 16, 2018 judgment dismissing Alexander's complaint for failure to comply with the VITCA. Moreover, since Alexander's cause of action against the defendants arose under 42 U.S.C. § 1983, the magistrate judge also erred in determining that Alexander was required to comply with the notice, filing, and service requirements of the VITCA to maintain his action. Accordingly, we reverse the January 10, 2019 order of the Appellate Division, vacate the February 16, 2018 judgment of the Magistrate Division, and direct that Alexander's complaint be reinstated in the Civil Division.

Dated this 17th day of August, 2020.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court