

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ERIKA ANN OXLEY,

Plaintiff,

v.

SUGAR BAY CLUB & RESORT CORP,

Defendant.

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) **CIVIL NO. ST-18-CV-96**
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MEMORANDUM OPINION

Before the Court is Defendant's motion to dismiss for failure to state a claim of either negligence or premises liability as a theory of negligence. The motion includes as an alternative to dismissal a request to strike Count II, a claim for premises liability, from Plaintiff's two-count Complaint, as redundant of Count I, a claim for negligence. Because Plaintiff's claims for negligence and premises liability constitute duplicate claims under Virgin Islands law, rather than alternate forms of relief, the Court will strike Count II but permit Plaintiff to file an Amended Complaint to streamline the factual allegations of the counts under a single count or to distinguish the counts by arguing a theory of negligence different from ordinary negligence. Further, because Plaintiff has adequately pled a claim for negligence, the Court will deny the motion to dismiss.

FACTUAL & PROCEDURAL HISTORY

On July 20, 2017, Erika Ann Oxley visited the outdoor pool deck at Sugar Bay Club & Resort where a wild iguana approached and bit her, causing her to fall onto the concrete deck.¹ Oxley sustained injuries from the bite laceration and the impact of the fall.² On February 26,

¹ Complaint, ¶ 5, ¶¶ 9-11.

² Complaint, ¶¶ 13-17.

2018, Oxley filed a Complaint against Sugar Bay alleging claims of negligence and premises liability.³ Sugar Bay filed a motion to dismiss for failure to state a claim on April 3, 2018, in response to which Oxley filed an opposition on April 5, 2018.⁴

STANDARDS

I. V.I.R. CIV. P. 12(f)

Under V.I.R. CIV. P. 12(f), a court may, either on its own or on motion made by a party, strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. “Mere redundancy, immateriality, impertinence or scandalousness is not sufficient to justify striking an allegation[,]”⁵ and “[b]ecause of the drastic nature of the remedy ... motions to strike are usually viewed with disfavor and will generally be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.”⁶ “[P]rejudice exists when a contested claim or defense would confuse the issues or inject the possibility of unnecessarily extensive and burdensome discovery, improperly increase the time, expense, and complexity of the trial or otherwise unduly burden the moving party.”⁷

II. Motion to Dismiss for Failure to State a Claim

V.I.R. CIV. P. 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. In evaluating a motion to dismiss for failure to state a claim, the Court

³ Complaint, ¶¶ 18-30. In Plaintiff’s Opposition to Defendant’s Motion to Dismiss, Plaintiff withdraws Count III, a claim for negligent infliction of emotional distress, delineated in ¶¶ 31-35 of the Complaint. *See* Plaintiff’s Opposition to Defendant’s Motion to Dismiss, p. 3 (“Plaintiff will withdraw and dismiss Count III for Negligent Infliction of Emotion[al Distress]”).

⁴ On April 18, 2018, Defendant filed a Reply to Plaintiff’s Response to the Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim.

⁵ *Flanagan v. Wyndham Int’l. Inc.*, 2003 U.S. Dist. LEXIS 24211, at *4 (D.V.I. Apr. 21, 2003) (citation omitted).

⁶ *Benjamin v. Esso Standard Oil Co.*, 2009 U.S. Dist. LEXIS 48677, at *1-2 (D.V.I. June 4, 2009) (citations and internal quotations omitted).

⁷ *Merchs. Commercial Bank v. Tillet*, 55 V.I. 121, 124 (V.I. Super. Ct. 2011) (citations omitted).

does not address the merits of the claim but merely tests whether the claim has been adequately stated in the pleading.⁸

The Virgin Islands is a notice pleading jurisdiction, and V.I. R. Civ. P. 8(a)(2) requires a pleading to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁹ The Reporter’s Note to V.I. R. Civ. P. 8(a)(2) provides that, under the notice pleading approach, Virgin Islands courts decline “to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.”¹⁰ A complaint is sufficient “so long as it ‘adequately alleges facts that put an accused party on notice of claims brought against it.’”¹¹ Additionally, the Court must accept all well-pled factual allegations in the pleading as true and view them in the light most favorable to the pleader.¹²

ANALYSIS

I. Because Counts I and II of the Complaint are duplicate claims, resulting in confusion, the Court will grant Defendant’s request to strike Count II and permit Plaintiff to file an Amended Complaint.

Sugar Bay asks the Court to strike Count I, a claim for negligence, as redundant of Count II, a premises liability claim.¹³ Virgin Islands law does not recognize a claim for negligence as separate from one for premises liability as a theory of negligence,¹⁴ applying the foreseeability of

⁸ *Hans Lollik Corp. v. Gov’t of the V.I.*, 1981 V.I. LEXIS 79, at *24 (V.I. Terr. Ct. Mar. 6, 1981).

⁹ *In re Adoption of the V.I. Rules of Civil Procedure*, No. 2017-001, 2017 V.I. Supreme LEXIS 22, at *49 (Apr. 3, 2017).

¹⁰ *Id.* at *51-52.

¹¹ *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017) (quoting *Brathwaite v. H.D.V.I. Holding Co.*, 2017 V.I. LEXIS 76, at *3 (V.I. Super. Ct. May 24, 2017)).

¹² *In re Tutu Water Wells Contamination Litig.*, 40 V.I. 279, 287-288 (D.V.I. Dec. 15, 1998) (citations omitted).

¹³ Motion to Dismiss, pp. 6-7.

¹⁴ *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 413 (V.I. 2016) (“We agree that Lembach’s causes of action for negligence and premises liability were duplicative. As Antilles School correctly noted in its objection, ‘[p]remises liability is a theory of negligence, where the basis of the duty of care is the possession or control of the premises where [an] injury occurred,’ for ‘[t]he elements are the same — a plaintiff must prove: (1) duty, (2) breach, (3) causation, and (4) damages.’ (J.A. 277-78.) This Court reached this same conclusion in *Machado*, in which it analyzed a premises liability claim through the lens of the four elements of negligence. 61 V.I. at 380-81.

harm test to both claims.¹⁵ In addition, the “negligence” and “premises liability” labels, as well as the factual allegations underlying Oxley’s claims¹⁶ suggest duplicative claims, rather than alternate forms of relief.¹⁷ Thus, the Court will grant Sugar Bay’s request to strike Count II as redundant of Count I but permit Oxley to file an Amended Complaint to streamline the counts as one or to distinguish the counts by arguing a theory of negligence different from ordinary negligence or premises liability as a theory of negligence.

II. Because Plaintiff has adequately pled her claim under V.I. R. Civ. P. 8(a)(2), the Court will deny Defendant’s motion to dismiss for failure to state a claim.

Prior to the adoption of the Virgin Islands Rules of Civil Procedure, the Virgin Islands was deemed a notice pleading jurisdiction¹⁸ but applied the Federal Rules of Civil Procedure through former Superior Court Rule 7.¹⁹ As articulated in *Joseph v. Bureau of Corrections*, 54 V.I. 644 (V.I. 2011), the previous pleading regime was characterized as a three prong analysis requiring the (1) pleading of facts in support of each element of a claim, (2) a requirement that those facts not be legal conclusions couched as factual allegations, and (3) a requirement that those facts plausibly give rise to an entitlement to relief—specifically that a plaintiff allege facts

Consequently, even though Lembach asserted two separate causes of action in his complaint, the Superior Court should have instructed the jury on only a single cause of action: negligence under a premises-liability theory”).

¹⁵ See *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 394 (V.I. 2014) (explaining that in the context of premises liability, foreseeability means that “if a possessor could anticipate that the conditions on its property would result in injury to those foreseeably using the property, the possessor can be held liable for those injuries”).

¹⁶ See Complaint, ¶¶ 18-30 (alleging in both counts that Sugar Bay owed a duty to Oxley as possessor of the premises to keep the premises free of dangerous conditions and breached that duty as a result of failing to keep the premises free of or to warn Oxley of the dangerous condition of the wild iguanas, which led to Oxley’s injury).

¹⁷ See V.I. R. Civ. P. 8(a)(3) and V.I. R. Civ. P. 12(f).

¹⁸ See *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, n.10 (V.I. 2015) (“the Virgin Islands is a ‘notice pleading’ jurisdiction”) (citing *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011)).

¹⁹ *Mills-Williams*, 67 V.I. at 585.

that are more than simply “consistent with a defendant's liability” and which permit the court to infer more than the mere possibility of misconduct.²⁰

The Virgin Islands Rules of Civil Procedure that went into effect on March 31, 2017, superseded all previous civil procedure rules applied in the Superior Court.²¹ The Reporter's Note to V.I. R. Civ. P. 8(a)(2) signaled a departure from the plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007),²² providing in pertinent part: “[T]he Virgin Islands continues to adhere to the traditional ‘notice’ pleading ethos as many states and territories have chosen to do, 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.”²³ Notably, in *Mills-Williams v. Mapp*, 67 V.I. 574 (V.I. 2017), the Virgin Islands Supreme Court regarded the Reporter's Note to V.I. R. Civ. P. 8(a)(2) as binding, explaining that the Court

was certainly aware of its prior precedents applying the plausibility standard, yet nevertheless chose to adopt a rule of civil procedure that expressly and unambiguously eliminated the plausibility standard, any precedents of this Court construing the former rule must prospectively yield to the plain language of the new rule to the extent the new rule differs from the old rule.²⁴

²⁰ See *Joseph v. Bureau of Corr.*, 54 V.I. 644, 649-650 (V.I. 2011) (this three prong analysis was based upon *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491 (V.I. 2008), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *Santiago v. Warminster Tp.*, 629 F.3d 121 (3d Cir. 2010), and *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009)).

²¹ See *Mills-Williams*, 67 V.I. at 585.

²² *Id.* at 585-586.

²³ V.I. R. Civ. P. 8(a) Reporter's Note. Because V.I. R. Civ. P. 8(a)(2) merely iterates that the Virgin Islands remains a notice pleading jurisdiction (“this is a notice pleading jurisdiction”), the Reporter's Note to V.I. R. Civ. P. 8(a)(2) is the only place in the Virgin Islands Rules of Civil Procedure that suggests that the plausibility standard is no longer the law in the Virgin Islands.

²⁴ *Mills-Williams*, 67 V.I. at n.6; see also *Augustin v. Hess Oil V.I. Corp.*, 67 V.I. 488, 518-519 (V.I. Super. Ct. 2017) (noting that in *Mills-Williams*, the Virgin Islands Supreme Court indicates that the Reporter's Note to V.I. R. Civ. P. 8(a) has the status of law).

Further, the Court in *Mills-Williams* described the current pleading regime as “permit[ting] a complaint so long as it ‘adequately alleges facts that put an accused party on notice of claims brought against it.’”²⁵ Accordingly, under the pleading regime established by the Virgin Islands Rules of Civil Procedure, a complaint must adequately allege facts that put a party on notice of the claims brought against it but need not contain facts that, if proven, would plausibly entitle the pleader to relief.

Here, Sugar Bay moves to dismiss the Complaint, arguing that Oxley fails to allege facts in support of each element of the negligence claim²⁶ and to plead a plausible claim in accordance with the pleading standard set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).²⁷ Because Oxley filed this action on February 26, 2018, the pleading standard articulated in V.I. R. Civ. P. 8(a)(2), rather than the previous pleading regime incorporating the *Twombly* plausibility standard, governs her Complaint. That Sugar Bay’s motion argues for dismissal based in part upon a failure to allege facts in support of each element of her claim raises the question of whether the pleading standard of V.I. R. Civ. P. 8(a)(2) requires a complaint to allege facts to support each element of a claim, even if those facts need not plausibly entitle the pleader to relief, and if it does not, to what extent a complaint must allege facts to put an accused party on notice of a claim.

Dissenting in *Twombly*, Justices Stevens and Ginsburg distinguished the plausibility standard from the notice pleading standard as follows:

The majority is correct to say that what the Federal Rules require is a “showing” of entitlement to relief. *Ante*, at 555, n 3, 167 L. Ed.

²⁵ *Mills-Williams*, 67 V.I. at 585 (quoting *Brathwaite v. H.D.V.I. Holding Co.*, 2017 V.I. LEXIS 76, at *3 (V.I. Super. Ct. May 24, 2017)).

²⁶ Defendant’s Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim, p. 4.

²⁷ *Id.* at 2-4.

2d, at 940. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." See *supra*, at 570-571, 167 L. Ed. 2d, at 949. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.²⁸

Thus, under notice pleading, a "showing" of entitlement to relief must provide sufficient notice so that a defendant may answer intelligently, and whether and to what extent a "showing" of entitlement to relief requires allegations of fact depends on the 'particulars of the claim.' Additionally in their dissent, Justices Stevens and Ginsburg cited Wright & Miller on the meaning of 'notice' with respect to the 'simplified notice pleading standard,' providing that a pleading "simply may be a general summary of the party's position that is sufficient to advise another party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury."²⁹ The majority in *Twombly* described the plausibility standard as not requiring a "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."³⁰ The Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) expounded the *Twombly* plausibility standard as "not akin to a

²⁸ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (Stevens, J. and Ginsburg, J. dissenting).

²⁹ *Id.* at 585; see also *id.* at n.7 (quoting 5 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1202, pp. 89-90 (3d ed. 2004)).

³⁰ *Id.* at 570.

‘probability requirement,’ but asking “for more than a sheer possibility that a defendant has acted unlawfully[.]” enabling a court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.”³¹ The *Iqbal* Court explained that “where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”³²

Looking outside of *Twombly* and *Iqbal*, this Court finds distinctions between ‘notice pleading’ and ‘fact pleading’ instructive. Fact pleading has been described by courts as requiring a plaintiff “to set out the ultimate facts which support his or her cause of action and legal conclusions unsupported by allegations of specific facts are insufficient.”³³ Black’s Law Dictionary defines ‘ultimate fact’ as “[a] fact essential to the claim or the defense,” synonymous with an elemental fact.³⁴ By contrast, notice pleading has been explained as “merely require[ing] that the plaintiff give notice to the defendant of the theory behind claims alleged and the basic facts supporting those allegations”³⁵ or that a plaintiff “concisely set forth only those operative facts sufficient to give ‘fair notice of the nature of the action.’”³⁶ Black’s Law Dictionary defines ‘operative fact’ as “[a] fact that constitutes the transaction or event on which a claim or defense is based.”³⁷

Based upon the differences among notice pleading, fact pleading, and the plausibility standard, this Court determines that a complaint need not plead facts to support each element of a claim in order to adequately allege facts that put an accused party on notice or to “show[] the

³¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (interpreting *Twombly* at 556-557).

³² *Id.* (quoting *Twombly* at 557) (some internal quotations omitted).

³³ See, e.g., *La Salle Nat’l Tr., N.A. v. Vill. of Mettawa*, 249 Ill. App. 3d 550, 557 (2d Dist. 1993).

³⁴ BLACK’S LAW DICTIONARY 671 (9th ed. 2009).

³⁵ *Great S. Co. v. Allard (In re Allard)*, 198 B.R. 715, 718 (Bankr. N.D. Ill. 1996) (citation omitted).

³⁶ *Columbia Gas v. Robinson*, 81 Ohio Misc. 2d 15, 16-17, 673 N.E.2d 701, 702 (M. C. 1996) (citation omitted).

³⁷ BLACK’S LAW DICTIONARY 670 (9th ed. 2009).

pleader is entitled to relief” under V.I. R. CIV. P. 8(a)(2). But, a complaint should provide factual allegations sufficient to advise the responding party of the transaction or occurrence on which the claim is based and identify the claim, reciting its elements, so as to enable the defendant to respond intelligently and to enable the Court to determine on a motion to dismiss under V.I. R. CIV. P. 12(b)(6) whether the claim is adequately pled. Additionally, considering the policy of the Supreme Court of the Virgin Islands requiring the Superior Court to conduct a *Banks* analysis to determine the applicable common law when confronted with an issue of common law that has not yet been adopted by the Supreme Court of the Virgin Islands,³⁸ in order to enable the Superior Court to recognize a potential *Banks* issue and order the parties to brief it, this Court underscores that a complaint should recite the elements of a common law claim so as to make clear the legal theory presented, given that elements among common law claims of the same name may vary.³⁹

Here, Sugar Bay contends that Oxley’s Complaint fails to allege facts to support each element of a negligence claim, and thus, must be dismissed. Oxley has identified her claim as negligence, recounting the four elements (duty, breach, causation, and damages) and providing factual allegations describing the occurrence in which the iguana caused injury to her on Sugar Bay’s premises, precipitated by Sugar Bay’s tolerance of and feeding of iguanas on the premises and failure to warn or take reasonable steps to protect Oxley against any harm posed by the iguanas.⁴⁰ Thus, Oxley’s claim is adequately pled, and the motion must be denied.

³⁸ See *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011).

³⁹ See, e.g., *Simon v. Joseph*, 59 V.I. 611, 625 (V.I. 2013) (contrasting the elements of the majority and minority approach (“Ohio approach”) to the common law claim for legal malpractice).

⁴⁰ Complaint, ¶¶ 18-30.

To the extent a defendant needs more information to defend against a claim, the defendant may file a motion for a more definite statement under V.I. R. CIV. P. 12(e).⁴¹

CONCLUSION

For the foregoing reasons, the Court will grant Defendant's request to strike as redundant Count II of the Complaint and permit Plaintiff to file an Amended Complaint. Further, the Court will deny Defendant's motion to dismiss without prejudice. An Order consistent with this Memorandum Opinion shall follow.

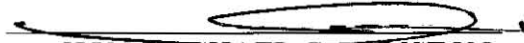
Dated: May 14, 2018

ATTEST: Estrella George
Clerk of Court

by:

Lori Boyner-Tyson

Court Clerk/Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

⁴¹ See generally, 5 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1203, p. 99 (3d ed. 2004) ("[I]t should be noted that even though a statement of a claim sufficiently shows that the pleader may be entitled to relief and thus satisfies the test of Rule 8(a), the district judge still may order it revised pursuant to a motion for a more definite statement or a motion to strike."). The Court determines that V.I. R. CIV. P. 12(e), being identical to FED. R. CIV. P. 12(e), is analogous. See V.I. R. CIV. P. 12(e) ("**Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order").

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ERIKA ANN OXLEY,

Plaintiff,

v.

SUGAR BAY CLUB & RESORT CORP,

Defendant.

CIVIL NO. ST-18-CV-96

ORDER

The Court having issued a Memorandum Opinion on this date, consistent therewith it is
ORDERED that Defendant Sugar Bay's Motion to Dismiss for Failure to State a Claim is
DENIED WITHOUT PREJUDICE; and it is

ORDERED that Defendant Sugar Bay's request to strike as redundant Count II of the
Complaint is GRANTED and Plaintiff Erika Ann Oxley may file an AMENDED COMPLAINT
by June 8, 2018, to cure the defects in the Complaint; and it is

ORDERED that copies of this Order and the accompanying Memorandum Opinion shall
be directed to counsel of record.

Dated: May 14, 2018

ATTEST: Estrella George
Clerk of Court

by:

Lori Boynes-Tyson

Court Clerk Supervisor

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS