

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

JOY D. BENJAMIN, CAROL BENJAMIN, and LANDA BENJAMIN,	)	
	)	
	)	CASE NO. ST-11-CV-220
Plaintiffs,	)	
	)	
v.	)	ACTION FOR BREACH OF
	)	FIDUCIARY DUTY, REMOVAL
	)	AS TRUSTEE AND DAMAGES
JULIA BENJAMIN BENNERSON,	)	
	)	
Defendant.	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: February 13, 2012)

Before this Court is "Plaintiff's (sic) Motion to Dismiss Defendant's Counterclaim." Therein, Plaintiffs posit that Defendant fails to state a claim on all three counts alleged in her Counterclaim. For the reasons discussed below, the Court will dismiss Defendant's Counterclaim, but grant her leave to amend the pleading.

I. LEGAL ANALYSIS.

a. Timeliness of Plaintiffs' Motion to Dismiss and Appropriate Standard.

When addressing motions to dismiss counterclaims for failure to state a claim, trial courts apply the same standards used when such motions are directed at complaints.¹ Therefore, I first must confirm that Plaintiffs' Rule 12 motion² was timely filed before addressing the merits of its arguments.³ If a motion to dismiss is not filed before the movant submits a pleading and also

¹ *PPG Indus., Inc. v. Generon IGS, Inc.*, 760 F. Supp. 2d 520, 524 (W.D. Pa. 2011); *Hana Fin., Inc. v. Hana Bank*, 500 F. Supp. 2d 1228, 1232 (C.D. Cal. 2007).

² Plaintiffs' motion to dismiss was filed pursuant to FED. R. CIV. P. 12(b)(6). Because it does not conflict with any rule of this tribunal, the rule applies to this civil proceeding. SUPER. CT. R. 7.

³ *Martinez v. Columbian Emeralds, Inc.*, 51 V.I. 174, 189-191 (V.I. 2009).

within the 21-day time frame of Rule 12,⁴ the request is not properly before the Court.⁵ Generally, an improperly-filed motion to dismiss should not be entertained absent articulated circumstances which justify the Court's discretionary consideration of the request.⁶ In the present matter, Defendant filed her Counterclaim with her answer and affirmative defenses on June 3, 2011. Plaintiffs' present motion was filed and served on June 16, 2011, and Plaintiffs have not submitted any responsive pleading to the Counterclaim.⁷ Therefore, the motion was properly filed, and the Court will address the merits of the request.

Under the recently announced standards of the United States Supreme Court,⁸ a trial court must apply a three-part test when considering a motion to dismiss for failure to state a claim.⁹ The judge must: 1) take note of the legal elements of the asserted causes of action; 2) identify and disregard naked factual contentions and legal conclusions framed as allegations of fact; and 3) review the well-pleaded facts against the necessary legal elements to determine whether the claims are plausible.¹⁰ Plausibility is a "context-based" inquiry and driven by "judicial experience and common sense."¹¹ Applying the appropriate test to Defendant's three causes of action in her Counterclaim, the Court determines that none of asserted claims are plausible.

b. None of the Three Counts in Defendant's Counterclaim are Plausible.

In Count I of the Counterclaim, Defendant alleges a claim for breach of contract. The essential elements of such a claim are: 1) an agreement between the plaintiff and the defendant; 2) the agreement imposes duties on the parties; 3) the breach of a duty under the agreement by one of the parties; and 4) resultant damages.¹² Contrary to Plaintiffs argument, Defendant does assert the existence of an agreement between the parties. Specifically, Defendant avers "The Trustee and the plaintiffs agreed in July 2009 that Mr. Kean should reside in the house."¹³ Both sides agree that Defendant is the trustee of the trust which holds title to the real property at issue in this litigation.¹⁴ However, Ms. Bennerson does not provide any facts which identify the duties of the parties under the alleged agreement, or any breach thereof. Further, Defendant's allegation of damages in this count is a legal conclusion and must be disregarded by the Court.

⁴ FED. R. CIV. P. 12(a)(1)(B).

⁵ *Martinez v. Columbian Emeralds, Inc.*, 51 V.I. at 191.

⁶ *Id.* at n. 11 and n. 12.

⁷ The Court notes that Defendant has not responded to Plaintiffs' motion to dismiss. Notwithstanding Defendant's failure, however, the Court must still determine whether Plaintiffs are entitled to the substantive relief they seek. *See, Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168 (3d Cir. 1990) (noting that movant is not entitled to summary judgment merely because the motion is unopposed).

⁸ *See, Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁹ *Joseph v. Bureau of Corrs.*, 54 V.I. 644, 649 (V.I. 2011).

¹⁰ *Id.* at 649-650 (citing *Santiago v. Warminster Tp.*, 629 F.3d 121, 130-132 (3d Cir. 2010)). *See also, Brady v. Cintron*, S.Ct. Civ. No. 2010-0014, 2011 WL 4543906 * 8-9 (V.I. Sept. 27, 2011) (citing *Joseph v. Bureau of Corrs.*).

¹¹ *Joseph v. Bureau of Corrs.*, 54 V.I. at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)).

¹² *See, George v. V.I. Lottery Comm'n*, 54 V.I. 533, 539 (V.I. 2010) (citations omitted). *See also, Danielson v. Innovative Commc'ns Corp.*, 49 V.I. 1071, 1082 (D.V.I. 2008) (citations omitted).

¹³ Counterclaim at ¶ 45.

¹⁴ Complaint at ¶ 8. Counterclaim at ¶¶ 3 and 13.

Because Defendant fails to provide any well-pleaded facts on three of the four elements required to sustain a breach of contract cause of action, Count I is not plausible and will be dismissed.

Count II of Ms. Bennerson's Counterclaim is titled "FRAUD." To state a claim for fraud in the Virgin Islands, Plaintiff must allege facts which demonstrate "(1) misrepresentation of fact, opinion, intention or law; (2) knowledge by the maker of the misrepresentation that it was false; (3) ignorance of the falsity by the person to whom it was made; (4) an intention that the representations should be acted upon; and (5) detrimental and justifiable reliance."¹⁵ In addition, claims for fraud or intentional misrepresentation must be pleaded with particularity.¹⁶ The pleader must set forth the date, time, and place of the alleged fraud or misrepresentation.¹⁷

Defendant alleges that: a) Plaintiffs made false and misleading statements of material facts; b) they omitted material facts; c) they knew, or should have known, about the falsity or omission of material facts; d) the false and misleading statements, or omissions, of the material facts were made, or not made, with knowledge that she would act on them; e) she did rely on the statements and omissions; and f) she suffered damages as a consequence of Plaintiffs' alleged actions.¹⁸ However, all of the asserted factual allegations are simply legal conclusions disguised as averments of fact, and the Court must discount such statements. Ms. Bennerson does not state what the material facts are, what misrepresentations or omissions were made with respect to the material facts, or by whom, or when or where the misrepresentations or omissions were made. She also fails to plead any facts demonstrating how she was damaged by Plaintiffs' alleged activities. Consequently, Defendant's Counterclaim for fraud and misrepresentation is neither plausible under Rule 8, nor particularly pleaded under Rule 9(b). Therefore, Count II will be dismissed.

In Count III, Defendant seeks damages for "DESTRUCTION OF PROPERTY." Therein she states that Plaintiffs damaged and/or willfully damaged the house, and failed to take care of the property. However, she does not say under what legal theory of liability she is proceeding, or how Plaintiffs allegedly damaged the house. Not only are her allegations improperly-pleaded legal conclusions, but she places the Court and Plaintiffs in the untenable position of having to guess at what claim is being asserted.¹⁹ The Court will not hazard a guess at what is being charged, or force Plaintiffs to defend against such an uncertain accusation.²⁰ Plainly, the allegations of Count III do not meet the notice pleading standard of Rule 8, and it shall be dismissed.²¹

¹⁵ *Fitz v. Islands Mech. Contractor, Inc.*, 53 V.I. 806, 826 (D.V.I. 2010) (citations omitted).

¹⁶ *Ringo v. Southland Gaming of U.S. Virgin Islands, Inc.*, No. ST-10-CV-116, 2010 WL 7746074 * 3-4 (V.I. Super. Ct. Sept. 22, 2010) (citing FED. R. CIV. P. 9(b)).

¹⁷ *Id.*

¹⁸ Counterclaim at ¶¶ 56-66.

¹⁹ *See, Clement v. Pub. Serv. Elec. and Gas Co.*, 122 F. Supp. 2d 551, 552 (D.N.J. 2000) ("An attorney practicing before a...court should not plead a cause of action in a manner which requires a judge to guess as to [its nature]...").

²⁰ *Id.* ("The concept of 'notice pleading' embodied in the Federal Rules of Civil Procedure is not a license to mystify.").

²¹ *See, Oliva v. Town of Greece*, No. 11-CV-06189, 2012 WL 253423 * 3 (W.D.N.Y. Jan. 26, 2012) ("The Court is left to guess, as the Defendants have, what cause of action underlies the instant access to the courts claim.

c. Defendant will Receive an Opportunity to Amend her Counterclaim.

While the Court will grant Plaintiffs' motion and dismiss all three counts of Defendant's Counterclaim, it is appropriate to grant Defendant leave to amend her pleading. Under the precedent of the United States Court of Appeals for the Third Circuit, "...if a complaint is subject to a Rule 12(b)(6) dismissal, a district court **must** permit a curative amendment unless such an amendment would be inequitable or futile. Moreover, we have instructed that a district court **must** provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend."²² The Virgin Islands Supreme Court has held that Third Circuit "...precedent that was extant when [the Court] became operational continues unless and until [the Court] address[es] the issues discussed there."²³

While *Phillips v. Cnty. of Allegheny* was issued after the Supreme Court commenced operations, and notwithstanding Defendant's failure to oppose Plaintiffs' motion or request leave to amend her pleading, the undersigned elects to follow this precedent. The opinion is an expression of a federal appellate court on an important policy consideration under a federal rule, and the Virgin Islands are within the Third Circuit.²⁴ In the Virgin Islands, by and large, the Federal Rules of Civil Procedure govern civil practice in both the federal and territorial courts. Disparate application of these rules by the two court systems would likely lead to unnecessary and undesirable forum shopping in a party's hopes of achieving some tactical advantage. The Court believes and holds that consistency in the application of Rule 12 is beneficial to administration of justice, and provides stability to legal practitioners, their clients, and *pro se* parties appearing in the courts of this Territory. Thus, the Court will follow the lead of the Third Circuit.

II. CONCLUSION.

Based on the foregoing discussion, Plaintiffs' motion to dismiss will be granted and all three counts of the Counterclaim dismissed. However, the Court will grant Ms. Bennerson a window of opportunity to file and serve an amended counterclaim to cure the deficiencies of the

The complaint, therefore, does not satisfy the notice pleading standard which requires that the plaintiff give the defendant fair notice of the nature of her claim.")

²² *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008) (citation omitted) (Emphasis added).

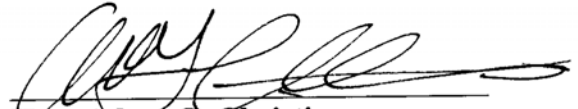
²³ *In re People*, 51 V.I. 374, 389 n. 9 (V.I. 2009) (citation omitted).

²⁴ *See, Schnabel v. Tyler*, 646 A.2d 152, 158-159 (Conn. 1994) ("...in applying federal law in those instances where the United States Supreme Court has not spoken, we generally give special consideration to decisions of the Second Circuit Court of Appeals."); *Whipps Land & Cattle Co., Inc. v. Level 3 Commc'ns, LLC*, 658 N.W.2d 258, 267 (Neb. 2003) ("On matters of federal law, the decisions of federal courts are highly persuasive, particularly where federal legislative history and the interpretation of federal statutes are at issue.").

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present pleading. The Court also will direct that the parties submit a proposed discovery and scheduling order for consideration. An appropriate order will be issued contemporaneously with this opinion.

Dated: February 13, 2012


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Donna D. Donovan
Acting Court Clerk Supervisor 2/13/12