

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

PETER THEODULE,

PLAINTIFF,

v.

**ASSOCIATION OF ST. C CONDOMINIUM
OWNERS AND THOMAS WHITE,**

DEFENDANTS.

SX-14-CV-078

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiff Peter Theodule's (hereinafter "Plaintiff") motion to amend complaint, filed on July 6, 2016 (hereinafter "Motion to Amend"). Thereafter, Defendant Association of St. C Condominium Owners (hereinafter "Association") and Defendant Thomas White (hereinafter "White," together with Defendant Association, "Defendants") filed an opposition and Plaintiff filed a reply.

BACKGROUND¹

On March 20, 2014, Plaintiff filed a complaint against Defendant Association and Defendant White in connection with Plaintiff's employment with them. Although Plaintiff did plead any causes of action by name in his complaint, it appears that Plaintiff alleged a wrongful discharge claim and a defamation claim. On June 6, 2016, Defendant Association and Defendant White each filed a motion for judgment on the pleadings. On July 6, 2016, Plaintiff filed this instant Motion to Amend.

STANDARD OF REVIEW

Superior Court Rule 8 governs amendments to pleadings in the Superior Court. *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, 275 (V.I. 2012). "[W]hile the Superior Court may allow a party to

¹ This memorandum opinion recites the factual background only to the extent necessary to explain the present issues and the bases of the Court's decision.

‘amend any ... pleading for any omission or defect therein’ ... such amendments are not as of right, but are vested in the sound discretion of the Superior Court.” *Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 534 (V.I. 2012) (quoting *Harvey v. Christopher*, 55 V.I. 565, 577-78 (V.I. 2011) (quoting SUPER. CT. R. 8)); see also *Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 699 n.4 (V.I. Sept. 2, 2011) (“[A]ny motion to amend filed on remand would not be granted as of right, but would be instead vested in the sound discretion of the trial court and its decision would be subject only to a review for an abuse of that discretion.”). In *Anthony*, the Supreme Court of the Virgin Islands (hereinafter “Supreme Court”) cautioned that while “the grant or denial of an opportunity to amend is within the discretion of the [trial court],” the “outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion” 56 V.I. at 535 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). The Supreme Court noted “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” as reasons to deny a motion to amend. *Anthony*, 56 V.I. 535; see also, *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511, 522-23 (V.I. 2015) (Gomez, dissenting in part).

DISCUSSION

In his Motion to Amend, Plaintiff indicated that, “pursuant to Superior Court Rule 8 and Federal Rule of Civil Procedure 15[,] moves this Court for leave to amend his Complaint to address all issues raised by Defendants in the pending Motion to Dismiss.” (Motion, p. 1) Plaintiff noted that if the Court grants his Motion to Amend, then Defendants’ motions to dismiss would be rendered moot. (Id.)

The Court must note at the outset that Plaintiff's Motion to Amend is deficient and therefore, not properly before the Court.² However, in the interest of efficiency, rather than denying Plaintiff's Motion to Amend and having Plaintiff re-file, the Court will go ahead and address the propriety of Plaintiff's Motion to Amend.

A. Whether Plaintiff's Motion to Amend was Unduly Delayed, Filed in Bad Faith and/or with Dilatory Motive

"The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become 'undue,' placing an unwarranted burden on the court." *Pedro*, 63 V.I. at 523 (Gomez, dissenting in part) (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). Here, Plaintiff filed his complaint on March 20, 2014. Given that

² Here, aside from simply indicating that he filed his Motion to Amend pursuant to Superior Court Rule 8 and Federal Rule of Civil Procedure 15, Plaintiff failed to make any legal arguments or cite to other relevant legal authorities to support his assertion that the Court should grant him leave to amend his complaint. In other words, Plaintiff failed to provide any explanations as to the propriety of his request for leave to amend his complaint, such as why the circumstances do not constitute undue delay, bad faith or dilatory motive on his part, why Defendants will not be prejudiced by the allowance of the amendment, and why the amendment is not futile.

In *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, n. 13 (V.I. 2016), the Supreme Court clearly stated that "Members of the Virgin Islands Bar... must be cognizant of their responsibility to serve as advocates for their clients, which includes making all necessary legal arguments..." Moreover, albeit it is in the context of an appeal, the Supreme Court has long established that in order for a motion to be properly before the court, parties must support their arguments by citing the proper legal authority, statute or rule. See *Bernhardt v. Bernhardt*, 51 V.I. 341, 345-46 (V.I. 2009); see also, *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 238-239 (V.I. 2013) (The rules of the Supreme Court require an appellant's brief to "contain the contentions of the appellant with respect to each of the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.") (emphasis in original); *Yusuf v. Hamed*, 59 V.I. 841, 851 n. 5 (V.I. 2013) ("To preserve an objection on appeal, a party must object on the specific grounds raised on appeal, and a general objection or an objection on other grounds will not suffice.") (internal citations and quotation marks omitted).

Although Plaintiff subsequently argued in his reply brief that there is no undue delay, bad faith, and dilatory motive on his part, that Defendants will not be prejudiced if Plaintiff was granted leave to amend his complaint, and that the amendment is not futile, this deprived Defendants the opportunity to respond. When an argument is raised for the first time in a reply brief, that argument is deemed waived because the opposing party will not receive a chance to respond. *Christopher v. People*, 57 V.I. 500, 513 n.7 (V.I. 2012) ("Any argument that is raised for the first time in a reply brief is considered waived, because the [opposing party] will not have a chance to respond."); see also *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 567-68 (V.I. 2012). Defendants should not be ambushed by unbriefed, unargued and unsupported claims without the opportunity to respond. Plaintiff, by making his arguments only in the reply brief, deprived Defendants the opportunity to counter Plaintiff's arguments, to distinguish and refute the cases cited by Plaintiff, and to cite opposing cases. If Plaintiff wished to argue the propriety of his request for leave to amend his complaint, Plaintiff should have presented his arguments in his motion instead of in his reply brief. Permitting Plaintiff to belatedly brief the arguments he failed to even mention in his motion would promote gamesmanship in motion practice where the moving party could simply make conclusory statements without any support in its motion or not make any arguments at all and wait for the reply brief to cite to legal authority and develop its analysis. Thus, the Court finds Plaintiff's Motion to Amend to be deficient and therefore, not properly before the Court.

discovery has only recently closed in in this matter,³ the Court does not find Plaintiff's Motion to Amend to be unduly delayed, filed in bad faith and/or with dilatory motive. Moreover, shortly before Plaintiff filed this instant Motion to Amend, Defendant Association and Defendant White each filed a motion to amend its/his answer. It is unfair for Defendants to argue that Plaintiff's Motion to Amend is untimely because Plaintiff filed it over two years after he filed the original complaint when Defendants themselves filed their motion to amend their answers over two years after they filed their answers.

B. Whether Defendants will be Unduly Prejudiced by the Allowance of the Amendment

"The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become... 'prejudicial,' placing an unfair burden on the opposing party." *Pedro*, 63 V.I. at 523 (Gomez, dissenting in part) (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). Here, Plaintiff's proposed amendment did not include any new causes of action. Rather, Plaintiff's proposed amendment clarified his original causes of action against Defendants by pleading them by name—to wit, violation of Virgin Islands Wrongful Discharge Act and Defamation, and added more factual allegations. The Court finds that the initial complaint gave Defendants sufficient notice of Plaintiff's claims against them,⁴ and thus, the Court does not find the prejudice suffered by Defendants, if any, warrants the denial of Plaintiff's Motion to Amend. Furthermore, in their opposition, Defendants never argued that they will be unduly prejudiced by the allowance of the amendment.⁵

³ According to the scheduling order entered on August 10, 2015, the parties were ordered to complete all factual discovery, including written discovery and fact witness depositions by February 8, 2016 and to complete all expert depositions by August 5, 2016.

⁴ The U.S. Virgin Islands is a "notice pleading" jurisdiction. See *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011).

⁵ In their opposition, Defendants focused their argument mainly on the futility of the amendment proposed by Plaintiff.

C. Whether the Proposed Amendment was Futile

In order to determine whether Plaintiff's Motion to Amend should be dismissed as futile, the Court examines whether the proposed first amended complaint pleads facts sufficient to state a plausible claim for relief for violation of the Virgin Islands Wrongful Discharge Act and defamation. *See e.g., Adams v. North West Co., Inc.*, SX-14-CV-235, 2015 V.I. LEXIS 123 (Super. Ct. Oct. 16, 2015) ("In determining whether an amendment would be futile, the court considers whether it would survive a motion to dismiss.") (citing *Jones v. L.S. Holdings, Inc.*, ST-06-CV-145, 2010 V.I. LEXIS 10, *3 (Super. Ct. Feb. 25, 2010)).

1. Violation of the Virgin Islands Wrongful Discharge Act

To state a claim under Virgin Islands Wrongful Discharge Act, the plaintiff only needs to plead that the defendant was his/her employer and that the defendant wrongfully discharged him/her. *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 544 (V.I. 2015). The burden then shifts to the employer to plead any of the applicable grounds for discharge set forth in Title 24 V.I.C. § 76. *Id.*; *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511 (V.I. 2015). The plaintiff "was not required to anticipate in [his/her] complaint any affirmative defenses [the defendant] might raise in its answer..." *Rennie*, 62 V.I. at 544. Here, Plaintiff's proposed first amended complaint met these pleading requirements by alleging that Defendant Association and Defendant White were his employers and that they wrongfully discharged Plaintiff. As noted in *Rennie*, Plaintiff was not required to anticipate any affirmative defenses that Defendants may raise in their answers. *See Id.* Moreover, in *Rennie*, the Supreme Court rejected the notion that numerosity must be affirmatively pled in a plaintiff's complaint under the Virgin Islands Wrongful Discharge Act. *Id.*, n. 10. By pleading that he was discharged in violation of the Virgin Islands Wrongful Discharge, Plaintiff gave Defendant sufficient notice of the claim he was bringing.⁶ *See Id.* As such, the Court finds

⁶ *Bureau of Corr.*, *supra*, note 4.

Plaintiff's proposed first amended complaint sufficiently stated a cause of action under the Virgin Islands Wrongful Discharge Act. Accordingly, Plaintiff's proposed amendment was not futile.

2. Defamation (as to Defendant White only)

"To succeed on a defamation claim under Virgin Islands law, a party must show: a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher; and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Simpson v. Anderw L. Capdeville, P.C.*, 64 V.I. 477, 485 (V.I. 2016) (internal quotation marks omitted) (citing to *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 585-87 (V.I. 2012)). The Supreme Court noted in *Simpson* that, "because the First Amendment to the United States Constitution protects the freedom of expression in the Virgin Islands, a party cannot succeed on a defamation claim if doing so would infringe on this fundamental right."⁷ 64 V.I. at 485. Under both the First Amendment and Virgin Islands law, "only statements that are provable as false are actionable." *Simpson*, 64 V.I. at 487 (quoting *Kendall v. Daily News Publ. Co.*, 55 V.I. 781 (V.I. 2011)). Thus, "[h]yperbole and expression of opinion not provable as false fail to meet this actionability element of a defamation claim, and are also constitutionally protected." *Simpson*, 64 V.I. at 487 (internal citation and quotation marks omitted).

In this instance, Plaintiff alleged in his proposed first amended complaint that "Defendant White, on November 7 or 8, 2013, falsely told [Defendant Association's] Board of Directors that Plaintiff was lazy, did not know what he was doing and did not properly perform his work." Plaintiff further alleged that "Defendant Thomas knew that his statements to the Board of Directors was false

⁷ Pursuant to the Revised Organic Act of 1954, the First Amendment extends to the Virgin Islands and has the same force and effect here as in the United States or in any State of the United States. 48 U.S.C. § 1561.

and that there was no reasonable basis for making such statements” and “[a]s a result, the Plaintiff has suffered damages as alleged herein.”

The Court finds the alleged statements Plaintiff “was lazy” and Plaintiff “did not know what he was doing” do not support a defamation action. To recover under defamation, Plaintiff is required to show that the statement is provable as false in order to constitute defamation under Virgin Islands law and to survive First Amendment scrutiny. *Simpson*, 64 V.I. at 487. Here, the Court concludes that these statements are opinions representing subjective viewpoints that cannot be proved as false. Instead, they represent Defendant White’s personal opinions and beliefs. At most, the statement that Plaintiff “did not know what he was doing” is nothing more than a hyperbole, i.e., an “[e]xaggeration, esp. to an excessive degree; specif., a manner of speaking that depicts something as being much bigger, smaller, worse, etc. than it really is.” Black’s Law Dictionary (10th ed. 2014).

On the other hand, the alleged statement Plaintiff “did not properly perform his work” can be proved as false. Furthermore, this alleged statement could be construed as defamatory because “it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *See Joseph*, 57 V.I. at 586. The Court finds that this statement, read in conjunction with Plaintiff’s allegations that the statement was published to the board of directors of Defendant Association, that Defendant Thomas knew his statement was false and that there was no reasonable basis for making such statement, and that Plaintiff suffered damages as a result, sufficiently stated a cause of action for defamation. Accordingly, Plaintiff’s proposed amendment was not futile.

In addition to Defendants’ contention that the alleged statements of Defendant White were all statements of opinion, Defendants also argued in their opposition that the proposed amendment was futile because said statements were privileged and Plaintiff never explained how he obtained this new information. (Opp., p. 4-5) Defendants appeared to neglect the fact that the motion before the

Court is Plaintiff's Motion to Amend. In considering a motion to amend, the Court is to determine whether there is any reason to deny the motion, such as futility of amendment. In considering whether the proposed amendment is futile, the Court examines whether the proposed first amended complaint pleads facts sufficient to state a plausible claim for relief on its face. *See e.g., Adams*, 2015 V.I. LEXIS 123; *Jones*, 2010 V.I. LEXIS 10 at *3. As noted above, the Court finds Plaintiff's proposed first amended complaint sufficiently stated a cause of action for defamation. At this juncture, the Court is merely determining the sufficiency of the proposed first amended complaint. It would be improper for the Court to go ahead and decide the case on the merits. *See, Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 472 (V.I. 2013) ("as the Supreme Court of the United States has observed, "[a] well-pleaded Complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely") (internal quotation marks omitted). If Defendants wish to argue that the alleged statements of Defendant White were privileged, they may file the appropriate motion and raise it therein. Furthermore, unlike what Defendants implied in their opposition, the complaint is not the proper forum for Plaintiff to attempt to introduce evidence. "The purpose of the complaint is not to prove the case, but simply to state a clear, plausible claim for relief which places the adverse party and the Court on reasonable notice." *George v. Wenhaven, Inc.*, 2012 V.I. LEXIS 66, *15 (Super. Ct. Sep. 28, 2012). Thus, it is not necessary for Plaintiff to explain how he came about the information in his proposed first amended complaint.

CONCLUSION

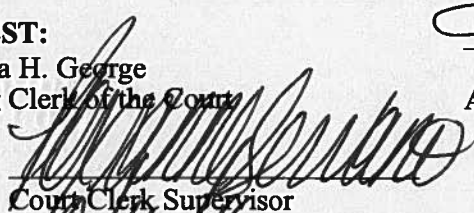
Based on the foregoing, the Court will grant Plaintiff's Motion to Amend. Plaintiff's first amended complaint will be deemed filed but, for the reasons stated above, the following language will be stricken from Paragraph 30 of the first amended complaint: "was lazy, did not know what he was doing and" pursuant to Superior Court Rule 8. *See Brooks v. Gov't of the Virgin Islands*, 58 V.I.

417, n. 11 (V.I. 2013) ("Superior Court Rule 8...states the general rule that a court can correct errors or defects in pleadings."). An order consistent with this memorandum opinion will follow.

DONE and so ORDERED this 16 day of December, 2016.

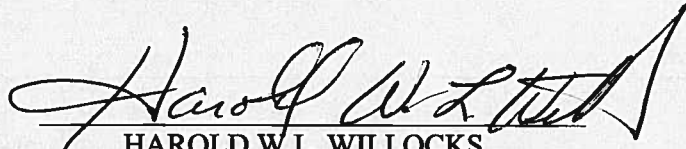
ATTEST:

Estrella H. George
Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 12/16/16



HAROLD W.L. WILLOCKS

Administrative Judge of the Superior Court