

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

ALAN RACZ,	)	
	)	CASE NO.: ST-17-CV-461
Plaintiff,	)	
	)	COMPLAINT FOR DAMAGES
v.	)	
	)	
DR. BRIAN CHEETHAM,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	

Cite as: 2019 VI Super 158U

MEMORANDUM OPINION

¶1 Before the Court is Defendant Dr. Brian Cheetham's Supplemental Memorandum in Support of Defendant Dr. Brian Cheetham's Motion to Dismiss, which was filed on October 11, 2019. Plaintiff Alan Racz filed his Supplemental Brief in Support of Opposition to Motion [sic] Dismiss Plaintiff's Verified Complaint on October 21, 2019. The converted motion for summary judgment will be granted because: (1) Cheetham's motion was supported by portions of the record demonstrating that the absence of a genuine issue of material fact that his treatment dates of Racz occurred more than two (2) years before the Verified Complaint was filed and (2) once the burden shifted to Racz, he failed to present affirmative evidence from which a jury might reasonably return a verdict in his favor.¹

I. BACKGROUND

¶2 On November 14, 2017, Racz filed a Verified Complaint against Cheetham asserting claims of negligence and medical malpractice. On May 24, 2018, Cheetham filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief may be granted. By Memorandum Opinion and Order dated September 27, 2019, this Court denied Cheetham's motion to dismiss to the extent it asserted lack of subject-matter jurisdiction, finding subject-matter jurisdiction under V.I. CODE ANN. tit. 27, § 166i(b). Further, the Court denied without prejudice the portion of Cheetham's motion to dismiss for failure to state a claim and converted it to a motion for summary judgment, since the issue of failure to state a claim could not be determined based upon the pleadings alone.

II. LEGAL STANDARD

¶3 Virgin Islands Rule of Civil Procedure 56 governs motions for summary judgment. "A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."² The party moving for summary

¹ *Hawkins v. Greiner*, 66 V.I. 112, 116 (V.I. Super Ct. 2017).

² V.I. R. Civ. P. 56(a).

judgment bears the burden of demonstrating that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law.³ This burden may be met by pointing out that there is an absence of evidence to support an element of the nonmoving party's case.⁴ "A fact is material if it can affect the outcome of the case,"⁵ and a genuine dispute of material fact exists if the evidence is such that a reasonable jury could find in favor of the nonmoving party on the disputed fact. Summary judgment shall be granted if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law.⁶

III. ANALYSIS

¶4 Racz argues that the Verified Complaint and Racz's supplemental responses to Cheetham's First Set of Interrogatories demonstrate that his claims are not barred by the statute of limitations. Essentially, Racz reiterates the allegations set forth in the Verified Complaint as evidence that his medical malpractice claim is timely. On the other hand, Cheetham argues that Racz's "self-serving and conclusory" claims cannot create a genuine issue of material fact regarding the "vague allusions to treatment."⁷

¶5 "[W]hen considering a motion for summary judgment, a trial judge can consider material outside the pleadings, including affidavits, responses to discovery, and other evidence to determine if there is a genuine issue of material fact."⁸ "It is well-settled that 'a single, nonconclusory affidavit or witness's testimony, when based on personal knowledge and directed at a material issue, is sufficient to defeat summary judgment or judgment as a matter of law.'"⁹ "This remains true even if the affidavit is 'self-serving' in the sense of supporting the affiant's own legal claim or interests."¹⁰ "However, a party cannot merely rely on allegations of denials in its own pleadings, but rather must set forth specific facts to support the allegations."¹¹

¶6 For example, in *Burd*, the Supreme Court of the Virgin Islands, in deciding whether the trial court erred when it granted summary judgment, found that a self-serving affidavit met the summary judgment standard when the affiant detailed specific circumstances of duress when he signed three different agreements, rendering the agreements voidable.¹² The Supreme Court further found summary judgment was inappropriate because the affidavit was not sufficiently contested by the opposing party.¹³

³ V.I. R. Civ. P. 56(a).

⁴ *Williams v. United Corp.*, 50 V.I. 191, 193–95 (V.I. 2008).

⁵ *Burd v. Antilles Yachting Servs., Inc.*, 57 V.I. 354, 360 (V.I. 2012).

⁶ V.I. R. Civ. P. 56(a).

⁷ Suppl. Memo. in Supp. of Def. Dr. Brian Cheetham's Mot. to Dismiss, 4.

⁸ *Burd*, 57 V.I. at 360.

⁹ *Id.* (citing *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180, 189–90 (3d Cir.2011)).

¹⁰ *Id.*

¹¹ *Id.* (citing *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir.1985)).

¹² *Id.* at 361 (citing *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161–63 (3d Cir.2009)).

¹³ *Id.*

¶7 In the present case, the Court finds that Racz failed to set forth specific facts that would establish that his Verified Complaint is not time-barred by the statute of limitations.¹⁴ Section 166d(a) requires that a medical malpractice claim be commenced within two (2) years from the date of the alleged act, omission or neglect or within two years of the last treatment, in cases where there was continuous treatment for the same illness, injury, or condition giving rise to the malpractice claim.¹⁵ Racz's Verified Complaint does not provide the Court with any dates for which he sought medical advice from Cheetham.¹⁶

¶8 Unlike the appellant in *Burd* detailing the specific facts surrounding the signing of the agreements, which evidenced duress, Racz's Verified Complaint does not provide sufficient details to persuade the Court that his medical malpractice claim is timely.¹⁷ Specifically, the appellant in *Burd* stated that, "[he] was approached by Plaintiff, along with his attorney . . . , who demanded that [he] sign a Termination Agreement, Promissory note, and General Security Agreement or risk certain criminal prosecution."¹⁸ Here, however, Racz avers that "in or about late 2016, [he] felt a painful sensation in his feet" and that he "sought medical care, diagnosis, and advice from Cheetham."¹⁹ Racz then avers that Cheetham "rendered medical services to [him] with respect to [his] medical condition involving his feet," and that Cheetham diagnosed him with having plantar warts.²⁰ Racz further avers that "for a period of approximately eight (8) to ten (10) weeks" he was seen by Cheetham "two (2) to three (3) times per week, and during those visits [Cheetham] cut into [his] feet."

¶9 Without making any credibility determinations,²¹ the record shows that Racz's self-serving Verified Complaint does not support his own claims.²² For example, Racz states in the Verified Complaint that after having felt a painful sensation in his feet sometime in 2016, he sought medical advice from Cheetham, who diagnosed him with plantar warts. However, medical records submitted by Racz, dated March 20, 2017, indicate that he had a "[three (3)] year history of nonhealing ulcerations to the plantar aspect of both 1st metatarsal heads" and that he saw a "Dr. Rucker" several times with the last being in August 2016.²³

¹⁴ *Id.* at 360-61.

¹⁵ 27 V.I.C. § 166d(a) ("No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect[.]").

¹⁶ *See* Verified Compl.

¹⁷ *Burd*, 57 V.I. at 361.

¹⁸ *Id.*

¹⁹ Verified Compl. ¶ 6.

²⁰ *Id.* at ¶ 7.

²¹ *Williams v. United Corp.*, 50 V.I. 191, 197 (V.I. 2008) ("It is a basic principle, however, that trial judges should not weigh the evidence, make credibility determinations, or draw "legitimate inferences" from the facts when ruling upon summary judgment motions because these are the functions of the jury.").

²² *Burd*, 57 V.I. at 360.

²³ Suppl. Br. in Supp. of Opp'n to Mot. [sic] Dismiss Pl.'s Verified Compl. Ex. B.

¶10 Furthermore, the Court also finds that Cheetham sufficiently contests Racz's allegations.²⁴ Unlike the appellee in *Burd* failing to contest the appellant's defense that he was under duress, Cheetham has attached a declaration, an affidavit by Cheetham's administrative secretary during the period in question, and medical records supporting that Racz's Verified Complaint is barred by the statute of limitations.²⁵ The evidence submitted establishes that Cheetham provided medical advice to Racz lastly on December 19, 2011, which was nearly six (6) years before the filing of the Verified Complaint.²⁶ Therefore, the Court finds that there is no genuine issue of material fact that Racz's last date of treatment by Cheetham was December 19, 2011.²⁷ Consequently, Racz's Verified Complaint is barred by the statute of limitations.

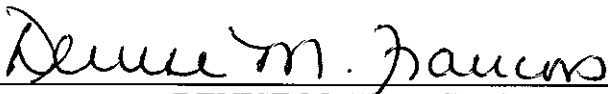
¶11 In response to Cheetham's evidence, Racz only restated his Verified Complaint and failed to properly set forth specific facts to support that his claims are not barred by the statute of limitations.²⁸ As a result, the Court finds that Racz failed to establish a genuine issue of material fact.²⁹ Therefore, the Court will grant the converted motion for summary judgment.

IV. CONCLUSION

¶12 Because Racz has failed to support an essential element of his case – that he filed his Verified Complaint within the statute of limitations – there is an absence of genuine issues of material fact. Therefore, Cheetham is entitled to summary judgment, and his motion will be granted.

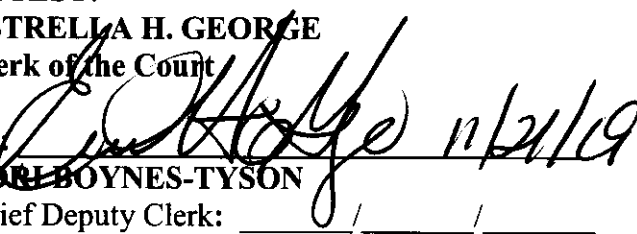
An appropriate judgment follows.

DATED: 11/21/2019


DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

By:  11/21/19
LORI BOYNES-TYSON
Chief Deputy Clerk: _____

²⁴ *Burd*, 57 V.I. at 361.

²⁵ *Cf. Id.* ("[Appellant] has not filed any affidavits, answers to interrogatories, or depositions in opposition to Burd's allegations that he was coerced into signing the promissory note and agreements or that he acted under duress.").

²⁶ Suppl. Br. in Supp. of Opp'n to Mot. [sic] Dismiss Pl.'s Verified Compl. Ex. 1-2, A-B.

²⁷ V.I. R. Civ. P. 56(a).

²⁸ *Burd*, 57 V.I. at 360.

²⁹ V.I. R. Civ. P. 56(a).