

DIVISION OF ST. THOMAS AND ST. JOHN

Defendant.

) CIVIL NO. ST-15-CV-185

³ Dr. Assefa filed an Answer on August 11, 2015.

Lack of Subject Matter Jurisdiction and Failure to State a Claim Due to Statute of Limitations.⁴

In an Opinion dated November 8, 2017, this Court denied the portion of Defendant's motion to dismiss asserting lack of subject matter jurisdiction, finding subject matter jurisdiction under 27 V.I.C. § 166i(b).⁵ Further, the Court characterized Dr. Assefa's post-answer motion for failure to state a claim as a motion for judgment on the pleadings, denied that motion without prejudice, and converted it to one for summary judgment, since the issue of failure to state a claim could not be determined based upon the pleadings alone.⁶ Finally, because the statute of limitations had expired, the Court notified the parties to supplement their briefing as to whether equitable tolling was merited.⁷ This Opinion follows the Court's receipt and review of the parties' supplemental briefs.⁸

STANDARD

Motions for summary judgment are governed by V.I. R. CIV. P. 56, under which the Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."⁹ "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the

⁴ Dr. Assefa filed the Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Due to Statute of Limitations on June 14, 2016. On August 12, 2016, Raymond filed an Opposition to Motion to Dismiss, to which Dr. Assefa replied on August 25, 2016. Following a Mediation on August 3, 2017, at which the parties reached an impasse, Dr. Assefa filed a Second Motion for Ruling on his pending June 14, 2016, Motion to Dismiss.

⁵ See *Raymond v. Assefa*, 2017 V.I. LEXIS 153 (V.I. Super. Ct. 2017).

⁶ See *id.*

⁷ See *id.*

⁸ On December 4, 2017, Dr. Assefa filed a Supplemental Memorandum of Law in Support of Plaintiff's [sic] Motion to Dismiss. On January 4, 2018, Raymond filed an Opposition to Defendant's Motion for Summary Judgment and a Statement of Facts in Opposition to Motion for Summary Judgment.

⁹ V.I. R. CIV. P. 56(a).

nonmoving party[.]”¹⁰ and a fact is material only where it “might affect the outcome of the suit under the governing law[.]”¹¹

“[T]he party moving for summary judgment possesses the initial burden of identifying evidence indicating that there is an absence of any issue of material fact.”¹² “If the moving party does so, the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in [its] favor.”¹³ But, “[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial.”¹⁴

“The [C]ourt must credit all reasonable inferences from the evidence on record in favor of the nonmoving party in considering whether there are any disputed issues of material fact”¹⁵ and “must take the non-moving party's conflicting allegations as true if supported by proper proofs.”¹⁶ Further, the Court “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.”¹⁷ “The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits.”¹⁸ The Court must deny summary judgment where a

¹⁰ *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 73, (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986)).

¹¹ *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

¹² *United Corp. v. Hamed*, 64 V.I. 297, 309 (V.I. 2016) (quoting *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010)) (citations omitted).

¹³ *Hawkins v. Greiner*, 66 V.I. 112 (V.I. Super. Ct. 2017) (citation and internal quotation marks omitted).

¹⁴ *United Corp.*, 64 V.I. at 309-10 (citing *Martin*, 54 V.I. at 391) (internal quotation marks omitted).

¹⁵ *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) (citing *Burd v. Antilles Yachting Servs.*, 57 V.I. 354, 358 (V.I. 2012) and *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011)).

¹⁶ *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (citations and internal quotation marks omitted).

¹⁷ *Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).

¹⁸ *Hawkins*, 66 V.I. at 117 (citing *Williams*, 50 V.I. at 195).

factual dispute exists¹⁹ and must grant summary judgment if the non-moving party cannot establish an essential element of its claim.²⁰

ANALYSIS

I. The statute of limitations has expired on Plaintiff's claim.

Raymond argues that the discovery and fraudulent concealment tolling doctrines apply, tolling the two-year limitations period for her medical malpractice claim to October 14, 2013.²¹ Assuming for argument that those tolling doctrine apply, and the limitations period expired on October 14, 2013, Raymond filed the current Verified Complaint on April 23, 2015, and accordingly, the statute of limitations still would have expired prior to the commencement of this suit.²² Given the expiration of the statute of limitations, the issue before the Court is whether there exists a genuine issue of material fact regarding whether the equitable tolling of the limitations period is merited.

II. Because no factual dispute exists regarding whether the doctrine of equitable tolling is applicable, Defendant is entitled to summary judgment as a matter of law.

¹⁹ See *id.* (citing *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009)).

²⁰ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (explaining that summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial”).

²¹ See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, page 14. (“Since, the statute of limitations began to run on October 14, 2011[,], when Plaintiff learned the extent of Dr. Assefa's negligence, the limitations period expired on October 14, 2013. The discovery rule and statutory tolling tolls the statute of limitations to the date Plaintiff knew or should have known of her injury, which was October 14, 2011”).

²² Raymond also makes an argument that summary judgment is precluded because “genuine disputes of fact exists [sic] as to when Plaintiff's malpractice claims accrued” (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pgs. 9-14). Whatever the exact date the action accrued is immaterial, because the two-year limitations period expired before Raymond filed the current lawsuit. See 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2725, at 416 (3d ed. 1998) (“[A] dispute as to an immaterial fact does not preclude summary judgment”).

Raymond argues that the doctrine of equitable tolling should be applied to lengthen the period for her to bring this action.²³ In *Pichierri v. Crowley*, 59 V.I. 973 (V.I. 2013), the Virgin Islands Supreme Court adopted the factors set forth in *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 44 V.I. 389 (3d Cir. 2002) that must be satisfied in order to equitably toll a statute of limitation. A court may apply the doctrine of equitable tolling if:

- (1) the first action gave defendant timely notice of plaintiff's claim;
- (2) the lapse of time between the first and second actions will not prejudice the defendant; and
- (3) the plaintiff acted reasonably and in good faith in prosecuting the first action and exercised diligence in filing the second action.²⁴

The *Pichierri* Court underscored that “[t]he *Island Insteel* test is highly fact specific, and its application is generally committed to the discretion of the trial court in the first instance.

Further, one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.”²⁵ Additionally, in *Jensen v. V.I. Water & Power Authority*, 52 V.I. 435 (V.I. 2009), the Virgin Islands Supreme Court noted that the equitable tolling doctrine articulated in *Island Insteel* may apply when a complaint is dismissed for any reason not related to the merits, including for lack of subject matter jurisdiction.²⁶

²³ See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pgs. 15-20.

²⁴ See *Pichierri v. Crowley*, 59 V.I. 973, 978-79 (V.I. 2013).

²⁵ *Id.* at 979 (internal citations and quotations omitted); see also *Estate of Melendez v. Gov't of the V.I.*, No. 1:09-cv-00009, 2010 U.S. Dist. LEXIS 75663, at *10-11 (D.V.I. July 26, 2010) (“The equitable tolling doctrine was designed to protect litigants from being deprived of a right to sue through no fault of their own; not to give a second chance to those who have neglected to diligently pursue their rights”) (citations omitted).

²⁶ See *Jensen v. V.I. Water & Power Auth.*, 52 V.I. 435, n.9 (V.I. 2009) (“Although the original complaint in *Island Insteel Systems* had been dismissed for lack of personal jurisdiction, the same equitable tolling rule applies when a complaint is dismissed for any reason not related to the merits. See *Williams v. Tutu Park Ltd.*, 51 V.I. 701, 706-707, [WL] (D.V.I. App. Div. 2009) (holding that *Island Insteel Systems* test applies to dismissal for lack of subject matter jurisdiction”).

While the parties agree that the first two tolling requirements are satisfied, since the first action gave Dr. Assefa timely notice of Raymond's claim, and the lapse of time between the first and second lawsuit will not prejudice Dr. Assefa,²⁷ Dr. Assefa argues that Raymond failed to file her first action reasonably or in good faith.²⁸ Specifically, Dr. Assefa contends that Raymond has offered no reasonable explanation for why she failed to comply with the Virgin Islands Medical Malpractice Act in filing her first action, observing that Raymond ignored the ninety-day waiting period under VIMMA and failed to allege in the Verified Complaint of her first action that she had submitted the proposed complaint to the Committee that was necessary to commence a medical malpractice action in court.²⁹

At summary judgment, "the nonmoving party cannot be required to definitively prove its case . . . or to even provide the most convincing evidence supporting its case"³⁰ and only after the moving party has first met its initial burden of identifying evidence indicating that there is an absence of any issue of material fact,³¹ the nonmoving party is required to submit sufficient evidence to create a genuine issue of material fact for a jury to resolve.³² Here, the issue before the Court is whether there is evidence in the record that creates a genuine issue of material fact for a jury to resolve regarding whether Raymond has shown reasonable conduct and good faith

²⁷ See Defendant's Supplemental Memorandum of Law In Support of Plaintiff's Motion to Dismiss [sic], page 5; see also Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pgs. 15-16.

²⁸ See Defendant's Supplemental Memorandum of Law In Support of Plaintiff's Motion to Dismiss [sic], page 5.

²⁹ See *id.*, pgs. 6-7.

³⁰ *United Corp. v. Hamed*, 64 V.I. 297, 311 (V.I. 2016) (citing *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014)).

³¹ See *Pickard-Samuel v. Gov't of the V.I.*, No. 2008-0031, 2010 V.I. Supreme LEXIS 19, at *7 (V.I. 2010).

³² See *Hamed*, 64 V.I. at 311 (citing *Machado*, 61 V.I. at 379).

in filing the first action. As to this issue, the *Island Insteel* Court implied that a plaintiff's prosecution of the first action "reasonably and in good faith" requires "diligence."³³

Dr. Assefa asserts that Raymond offers no reasonable explanation for why she failed to comply with the VIMMA in filing her first action, and thus, he has met his initial burden in moving for summary judgment to identify an absence of evidence that rationally supports Raymond's claim that she filed the first action reasonably and in good faith. Consequently, the burden has shifted to Raymond to point to evidence to show otherwise.

In response, Raymond argues that she filed her first action reasonably and in good faith, because she filed it before the statute of limitations ran.³⁴ Even assuming for argument that Raymond timely filed the first action as to the two-year limitations period, the Court recognizes that Raymond filed the first action before the Court obtained subject matter jurisdiction, in violation of the terms of the VIMMA.³⁵ A review of the record indicates that:

³³ See *Island Insteel Sys., Inc.*, 296 F.3d 200 at 205, 44 V.I. 389 at 392 (3d Cir. 2002) ("This doctrine of equitable tolling preserves the protections that statutes of limitations are intended to afford to defendants. At the same time, it avoids the unfairness to plaintiffs that would occur if plaintiffs who diligently but mistakenly prosecute their claims in a court that lacks personal jurisdiction find their claims time-barred when they refile in a proper jurisdiction").

³⁴ See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, page 16-17 ("Defendant cannot prove any bad faith or unreasonableness by Plaintiff in prosecuting the first action. Defendant's sole basis for claiming bad faith is that Plaintiff was trying to evade the two-year statute of limitations by filing *Raymond I* with the Court before the ninety day period had expired in which the Verified Complaint is solely under the jurisdiction of the Medical Malpractice Review Committee. The facts show differently and Plaintiff was not trying to evade the two-year statute of limitations. Plaintiff's Complaint in *Raymond I* was filed well before the two-year statute of limitations expired and because the discovery rule would establish October 2013 as the date the limitations ran, Plaintiff would have sufficient time to file under the SOL if Plaintiff had waited the 90 days before filing the complaint in *Raymond I*") and page 20 ("Plaintiff was not evading the statute of limitations in bad faith because a jury could find that the limitations period did not end until after the ninety days had passed under both the discovery and fraudulent concealment tolling doctrines").

³⁵ See 27 V.I.C. § 166i(b)-(c) of the VIMMA, which provides:

(b) No action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the Committee and the Committee has received the expert opinion as required by this section, provided, that if said opinion is not received by the Committee within ninety days from the date the complaint was filed with the Committee, the claimant may commence his action against the health care provider in court; Provided further, That the commencement of the court action shall not prevent the Committee from obtaining the expert opinion.

- Dr. Assefa performed surgery on Raymond's eye on July 25, 2011.³⁶
- Raymond submits that she discovered her injury regarding Dr. Assefa's alleged negligence on September 27, 2011,³⁷ and contends that a jury could find that her claim accrued as late as October 14, 2011, when she discovered the extent Dr. Assefa's alleged negligence.³⁸ Thus, Raymond argues, the two-year statute of limitation expired on October 14, 2013, at the latest.³⁹
- Raymond wrote a complaint letter to the Medical Board at the Schneider Regional Medical Center on October 6, 2011, alleging negligence against Dr. Assefa.⁴⁰
- Raymond did not file her proposed complaint with the Committee until June 21, 2013,⁴¹ which required her to wait to file her action in the Superior Court until either the Committee received the expert opinion or until ninety days elapsed.⁴²
- Raymond filed the first action, Case No. ST-13-CV-308, in the Court three days later, on June 24, 2013,⁴³ before the Court obtained subject matter jurisdiction.

(c) The proposed complaint shall be deemed filed when a copy is delivered or mailed by registered or certified mail to the Commissioner of Health, who shall immediately forward a copy to each health care provider named as a defendant at his last and usual place of residence or his office and said health care provider may file a proposed answer to the complaint to the committee within twenty (20) days. The proposed answer shall be deemed filed when a copy is delivered or mailed by registered or certified mail to the Commissioner of Health, who shall immediately forward a copy to the plaintiff.

The Virgin Islands Supreme Court has held that these pre-filing requirements are jurisdictional, such that the Superior Court lacks subject matter jurisdiction to hear a plaintiff's medical malpractice claim until either the Committee receives the expert opinion or ninety days passes. *See Brady v. Cintron*, 55 V.I. 802, 817 (V.I. 2011).

³⁶ See Plaintiff's Statement of Facts in Opposition to Motion for Summary Judgment, page 4.

³⁷ See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pgs. 4-5, ¶¶ 21-27.

³⁸ See *id.* pgs. 12-13.

³⁹ See *id.* page 17.

⁴⁰ See *id.* page 12.

⁴¹ See Plaintiff's Statement of Facts in Opposition to Motion for Summary Judgment, pgs. 10-11, ¶ 55.

⁴² See *Brady*, 55 V.I. at 817.

⁴³ See Plaintiff's Statement of Facts in Opposition to Motion for Summary Judgment, page 11, ¶ 57.

- The Court dismissed the first action without prejudice for lack of subject matter jurisdiction on June 17, 2015.⁴⁴
- Raymond filed this second action on April 23, 2015.⁴⁵
- Raymond initially alleged in the Verified Complaint of her first action that the VIMMA did not apply to her claim but did not support that allegation with any evidence.⁴⁶

Thus, Raymond discovered the alleged malpractice and resulting injury well within the two-year statute of limitations. There is an absence of any evidence in the record demonstrating that it was not possible for Raymond to file her claim both within the statute of limitations and within the jurisdictional requirements of the VIMMA. Although the record shows that Raymond initially alleged in the Verified Complaint of her first action that the VIMMA did not apply to her claim, there exists no evidence to support that allegation; thus, to that end, a reasonable jury could not find that Raymond acted reasonably in failing to comply with the jurisdictional requirements of the VIMMA.⁴⁷ Additionally, the October 6, 2011, complaint that Raymond made to the hospital does not meet the requirements under the VIMMA for filing a proposed complaint with the Committee. That complaint, addressed to the Medical Board of the Schneider

⁴⁴ See Defendant's Supplemental Memorandum of Law In Support of Plaintiff's Motion to Dismiss [sic], page 1.

⁴⁵ See Verified Compl., page 1.

⁴⁶ See Plaintiff's Statement of Facts in Opposition to Motion for Summary Judgment, Exhibit 16: Verified Complaint from Case No. ST-13-CV-308 (alleging that the Medical Malpractice Act afforded the Court with subject matter jurisdiction and at the same time that the Medical Malpractice Act did not apply to the action) ("1. This Court has jurisdiction pursuant to Title 4 V.I.C. § 76 and Title 27 V.I.C. § 166, et. seq. 2. This is an action for malpractice. The malpractice statute and its limitations are not applicable to this cause of action as the government has failed to fulfill the conditions precedent for limitations of damages to include not setting up an independent fund from the premiums paid into malpractice insurance, not hiring a manager to invest said funds, not setting up a self insurance plan, not properly setting up and appointing the proper members to the medical malpractice review committee, not hiring experts to review proposed claims, not properly reviewing proposed claims prior to suit being filed and other violations of the statute").

⁴⁷ See *Simpson*, 56 V.I. at 605 ("When reviewing the record, this Court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party, and we must take the non-moving party's conflicting allegations as true if supported by proper proofs") (citations and internal quotations omitted).

Regional Medical Center and received by the hospital's Patient Relations Director, was neither addressed to the Medical Malpractice Action Review Committee under 27 V.I.C. § 166i(a)-(b), nor delivered to the Commissioner of Health as required by 27 V.I.C. § 166i(c).⁴⁸ Accordingly, the record lacks evidence to allow a jury to find that Raymond has shown reasonable conduct and good faith in filing the first action, and so, Raymond has failed to identify a genuine issue of material fact that would require trial.

CONCLUSION

Because Raymond has failed to support an essential element of her case—that she filed her first action reasonably and in good faith—upon which she bears the burden of proof, there is

⁴⁸ See Plaintiff's Statement of Facts in Opposition to Motion for Summary Judgment, page 8, ¶ 43, and Exhibit 12: Plaintiff's Letter to the Medical Board at SRMC, dated October 6, 2011; *see also* 27 V.I.C. § 166i(a)-(c) (regarding the procedures for filing a proposed complaint):

§ 166i. Medical Malpractice Action Review Committee

(a) There is established within the Office of the Commissioner of Health a Medical Malpractice Action Review Committee (referred to in the rest of this section as "the Committee") the purpose of which shall be to arrange for expert review of all malpractice claims before actions based upon such claims are commenced in court. The members of the Committee shall be the:

- (1) Commissioner of Insurance who shall be the Chairman
- (2) President of the Virgin Islands Bar Association or his designee who shall be an attorney admitted to practice in the territory, and
- (3)
 - (i) President of the Virgin Islands Medical Society or his designee who shall be a health care provider licensed under the laws of the territory, and, if a nurse is named as a defendant, the President of the Virgin Islands Nurses' Association or his designee, or
 - (ii) President of the Virgin Islands Nurses' Association or his designee if only a nurse, or a nurse and institution, is named as defendant.

(b) No action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the Committee and the Committee has received the expert opinion as required by this section, provided, that if said opinion is not received by the Committee within ninety days from the date the complaint was filed with the Committee, the claimant may commence his action against the health care provider in court; Provided further, That the commencement of the court action shall not prevent the Committee from obtaining the expert opinion.

(c) The proposed complaint shall be deemed filed when a copy is delivered or mailed by registered or certified mail to the Commissioner of Health, who shall immediately forward a copy to each health care provider named as a defendant at his last and usual place of residence or his office and said health care provider may file a proposed answer to the complaint to the committee within twenty (20) days. The proposed answer shall be deemed filed when a copy is delivered or mailed by registered or certified mail to the Commissioner of Health, who shall immediately forward a copy to the plaintiff.

an absence of a genuine, triable issue of fact for a jury to resolve⁴⁹ in order to determine whether inequitable circumstances prevented Raymond from filing her second action until after the expiration of the limitations period. Accordingly, the Court need not reach the issue of whether Raymond exercised diligence in filing the second action. Defendant is entitled to summary judgment, and his motion will be granted. An Order consistent with this Opinion shall follow.

Dated: January 29, 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

⁴⁹ See *Celotex Corp.*, 477 U.S. at 322-23 ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof"). Since V.I. R. CIV. P. 56(c) is sufficiently similar to FED. R. CIV. P. 56(c) as applied in *Celotex*, the Court determines that it may reference this precedent when applying V.I. R. CIV. P. 56(c). See V.I. R. CIV. P. 56(c)(1) ("**Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must (A) make a written certification, in good faith, to that effect in the motion or opposition papers; and (B) support the assertion by:

- (i) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (ii) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

See also *Celotex Corp.*, 477 U.S. at n.4 ("Rule 56(c) provides: 'The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages'").