

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

JOHN HYPOLITE

Plaintiff,

v.

**PEDRITO E. FRANCOIS, JR., VIRGIN
ISLANDS LOTTERY COMMISSION,**

Defendants.

CIVIL NO. ST-12-CV-534

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER came before the Court for a hearing on Plaintiff John Hypolite's Motion for Leave to File a Late Claim Under the Virgin Islands Tort Claims Act on May 9, 2013.¹ Defendants Pedrito E. Francois, Jr., and Virgin Islands Lottery Commission's Motion to Dismiss, filed on January 30, 2013, is also before the Court. Hypolite has failed to comply with the procedural requirements established in the Virgin Islands Tort Claims Act because he waited too long to file his notice of intention to sue, and his motion to submit a claim beyond the ninety-day period was itself not timely. Therefore, the Court will deny the Plaintiff's Motion and grant the Defendants' Motion to Dismiss.

FACTS

On January 26, 2011,² Plaintiff John Hypolite was involved in a motor vehicle accident with a vehicle owned by Defendant Virgin Islands Lottery Commission and operated by Defendant Pedrito E. Francois, an employee of the Lottery Commission. All parties concede that Francois was operating the vehicle within the scope of his employment at the time of the incident. On that day, Yvonne Webster, a Lottery Commission Police Officer arrived at the scene of the collision. Webster then advised Hypolite to obtain an estimate as to the damages to his vehicle, and assured him that his medical bills would be paid by the Lottery Commission.

About two weeks after the incident, Hypolite contacted Webster to submit his estimate and Accident Report. Webster directed him to submit his information to Family Insurance, who then forwarded the documents to a claims adjuster. During the ninety day period subsequent to the incident, Hypolite contacted Webster, Family Insurance, the insurance adjuster, and Conrad Francois, the director of Virgin Islands Lottery . On June 8, 2011, Hypolite submitted a letter to

¹ Terri Griffiths, Esq., of Lee J. Rohn and Associates, LLC, appeared on behalf of Plaintiff John Hypolite. Ariel M. Smith Francois, Assistant Attorney General, represents the Government of the U.S. Virgin Islands, Virgin Islands Lottery Commission.

² The Complaint incorrectly states that the date of the incident is June 26, 2011.

the insurance adjuster regarding his claim. On September 24, 2012, Hypolite filed a Complaint, within two years of the incident.

On January 30, 2013, the Defendants filed a Motion to Dismiss, raising the issue of Hypolite's failure to adhere to the procedure required for filing claims against the Government of the U.S. Virgin Islands and its agencies. Nearly two years and one month after the date of the incident, Hypolite requested leave to file his late claim. The Court is persuaded that Hypolite has failed to comply with the procedural requirements of the V.I. Tort Claims Act concerning the filing of a claim before commencement of suit, and because of this, the Court lacks jurisdiction. Therefore, the Plaintiff's Motion for Leave to File a Late Claim will be denied, Defendant's Motion to Dismiss will be granted, and the Complaint will be dismissed.

DISCUSSION

I. THE VIRGIN ISLANDS TORT CLAIMS ACT'S PROCEDURAL REQUIREMENTS DEFINE THE JURISDICTION OF THE COURT IN A TORT ACTION AGAINST THE GOVERNMENT AND ITS INSTRUMENTALITIES.

The Virgin Islands Lottery and the Virgin Islands Lottery Commission are instrumentalities of the Government of the U.S. Virgin Islands³ and do not have the right to sue or be sued;⁴ therefore, the Government would have been the proper party in this suit. Nevertheless, the Government⁵ has, through the Virgin Islands Tort Claims Act,⁶ conditionally waived its immunity as to certain tort claims.⁷ Individuals who wish to recover on those tort claims must strictly comply with the provisions of the Act.⁸ Their failure to do so deprives the Court of subject-matter jurisdiction.⁹

The Act specifies that a litigant must file either a claim or a notice of intention to file a claim within ninety days of the accrual of the claim.¹⁰ If the litigant chooses to file a notice of intention to file a claim, then he or she must proceed to file the actual claim within two years of the claim's accrual date.¹¹ These strict timelines reflect the Virgin Islands' public policy goal of preventing stale claims and promptly addressing claims against the Government and its

³ V.I. Code Ann. tit. 32, § 243 (2000).

⁴ The right to sue or be sued is not a power or duty expressed in the Code. tit. 32, § 246.

⁵ "Government of the Virgin Islands" includes the executive, legislative, and judicial branches of the Government of the Virgin Islands, agencies and instrumentalities of the Government of the Virgin Islands" V.I. Code Ann. tit. 33, § 3401 (1994).

⁶ tit. 33, §§ 3401-3416.

⁷ See *Walters v. Gov't of the Virgin Islands*, 30 V.I. 36, 38-39 (Terr. Ct. 1994) (stating that the Government's waiver of immunity is strictly conditioned on compliance with the Tort Claims Act provisions).

⁸ *Id.* at 39.

⁹ *Id.*

¹⁰ Tit. 33, § 3409(c).

¹¹ *Id.*

instrumentalities.¹² The claim or notice of intention to file a claim must be filed in the Office of the Governor and a copy must be served on the Attorney General.¹³

A litigant who fails to timely comply with the notice or claim period of ninety days may, nonetheless, petition the Court for leave to file the claim within two years after the claim's accrual.¹⁴ The litigant must accompany the motion by affidavits showing "reasonable excuse" for the failure and that the government agency had actual knowledge of the facts constituting the claim within the ninety days for the filing of the notice of intention.¹⁵ Regardless of whether the litigant meets this burden, the motion must be denied if the Court finds that the Government has been "substantially prejudiced" by the delay.¹⁶

II. THE COURT LACKS JURISDICTION BECAUSE HYPOLITE DID NOT FILE HIS MOTION FOR LEAVE TO FILE HIS CLAIM WITHIN TWO YEARS OF THE CLAIM'S ACCRUAL.

The Defendants' Motion to Dismiss, which was filed on January 30, 2013, argues that the Court lacks subject matter jurisdiction over Hypolite's Complaint. When a party files a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure,¹⁷ the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence.¹⁸ In this case, Hypolite must prove that he either filed his claim or notice of intention within ninety days of the claim's accrual, or that he ought to receive permission to file that claim outside the ninety-day period.

There is no question that Hypolite did not file his claim or his notice of intention within ninety days as required by section 3409(c). He argues that he followed all of the requirements of filing a notice of intention under section 3410(c) other than actually filing the notice with the Office of the Governor and the Attorney General. Specifically, he argues that he had discussions with representatives of the Lottery Commission and provided his estimate and the Accident Report to the Lottery Commission's insurer within the ninety-day period.

Since Hypolite failed to file a claim or a notice of claim within ninety days, Hypolite had the option of filing an application with the Court to obtain permission to file a notice of claim out of time. On February 13, 2013, Hypolite filed a Motion for Leave to File a Late Claim Under the Virgin Islands Tort Claims Act. In order for his Motion to be successful under 3409(c), it must establish a reasonable excuse for the failure and show that the Government had actual knowledge of the facts of the claim.¹⁹

¹² *Walters*, 30 V.I. at 39.

¹³ tit. 33, § 3410.

¹⁴ tit. 33, § 3409(c).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure apply to matters before this Court whenever they are not inconsistent with the Rules of the Superior Court. Super. Ct. R. 7.

¹⁸ *See Doe v. Goldstein's Deli*, 82 Fed. App'x. 773, 775 (3d Cir. 2003) ("The plaintiff always bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction.")

¹⁹ These requirements must be established by affidavit. tit. 33, § 3409(c).

However, the Court need not reach the questions of whether Hypolite's excuse is reasonable or whether the Lottery Commission had actual knowledge of the facts. Courts interpreting Section 3409(c) have established that the motion to file the claim out-of-time must itself be filed within two years of the accrual of the claim.²⁰ Hypolite's Motion was filed about a month after the two-year time period had expired. Hypolite argues that he did not "formally" file his notice of intent because he had not yet obtained counsel and he believed that his claim was being handled by the Lottery Commission's insurer. However, this argument could have been presented for the Court's consideration under Section 3409(c) within two years of the claim's accrual. Hypolite, however, chose not to do this, and waited about a month too long to present this argument to the Court. Because Hypolite has not complied with the Virgin Islands Tort Claims Act by filing the notice of intent on time, or by asking for a waiver of the requirements for filing a claim or notice of intent in a timely manner, the Court lacks jurisdiction over his case and must deny his Motion for Leave to File a Late Claim. Consequently, the Lottery Commission's Motion to Dismiss must be granted.

III. FRANCOIS IS ABSOLUTELY IMMUNE FROM TORT LIABILITY UNDER THE VIRGIN ISLANDS TORT CLAIMS ACT.

Section 3408 of the Tort Claims Act states that the Government waives its immunity from liability and action and assumes liability with respect to injury or loss of property or personal injury caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment.²¹ Further, section 3416 states that the remedy against the Government as provided by section 3408 for injury or loss of property or for personal injury, "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his or her office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his or her estate whose act or omission gave rise to the claim." This section provides absolute immunity to government employees who fall within its breach, and, therefore, insulates government employees from liability and litigation.²²

Hypolite has conceded in his Motion for Leave to File a Late Claim and during the hearing on May 9, 2013 that Francois was an employee of the Lottery Commission and operating a vehicle owned by the Lottery Commission within the scope of his employment at the time of the accident. Therefore, Francois is absolutely immune from liability and litigation in this

²⁰ See *Van Putten v. Gov't of the Virgin Islands*, 19 V.I. 265, 268-70 (D.V.I. 1982) ("If, as the statute expressly provides, 'application for such permission shall be made upon motion,' and if the grant of such motion would thereby enable the claimant 'to file [the administrative] claim at any time within two years after the accrual thereof,' how is it possible for the Court to properly entertain the application once that two-year period has elapsed?"); *Mercer v. Gov't of the Virgin Islands*, 18 V.I. 171 (Terr. Ct. 1982) (a request to file a late claim is a "nullity" if it is not filed within the two-year period, even though the government had actual and timely knowledge of the facts and there was no prejudice).

²¹ tit. 33, §3408(a)

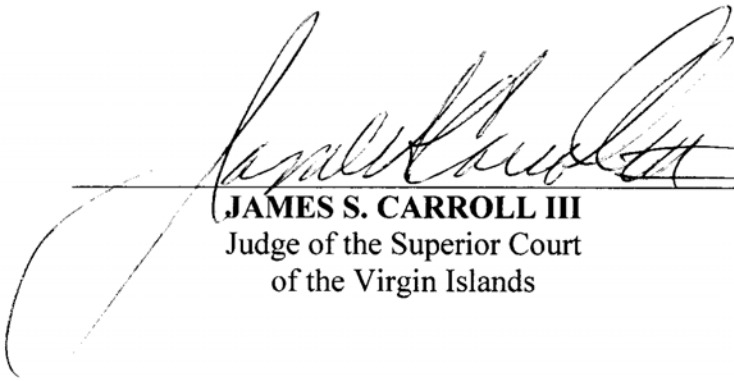
²² *Varlack v. Mahoney*, 41 V.I. 115, 119 (Terr. Ct. 1999).

matter, and Hypolite has failed to state a claim against Francois. Accordingly, the Court will grant his Motion to Dismiss and dismiss the Complaint against him.

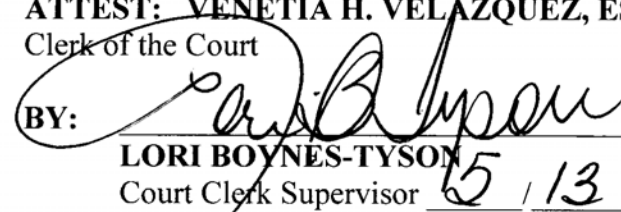
CONCLUSION

Plaintiff John Hypolite did not file his claim or notice of intention to file a claim within ninety days of the claim's accrual. The claim accrued on the date of the accident because Hypolite was aware of his injury and knew its cause. Although he moved the Court for leave to file his claim out of time, the Motion was filed more than two years after the claim's accrual and is, therefore, untimely. Accordingly, the Motion must be denied. As the Virgin Islands Tort Claims Act's procedural requirements are jurisdictional, Hypolite's failure to comply deprives the Court of jurisdiction and Defendant Virgin Islands Lottery Commission's Motion to Dismiss must be granted. Additionally, Defendant Pedrito E. Francois, Jr., was an employee of the Lottery Commission when operating the Lottery Commission's vehicle at the time of the incident and acting within the scope of his employment. Therefore, Francois is absolutely immune from liability in this matter pursuant to the Tort Claims Act and his Motion to Dismiss must be granted.

DATED: May 10, 2013


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 

LORI BOYNES-TYSON
Court Clerk Supervisor

15 / 13 / 2013