

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

MICHAEL HARTLAGE,

Plaintiff,

vs.

**WENDELL J. GORUM, M.D.; GOVERNOR
JUAN F. LUIS HOSPITAL AND MEDICAL
CENTER; AND GOVERNMENT OF THE
VIRGIN ISLANDS,**

Defendants.

SX-09-CV-232

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER came before the Court on Defendant Governor Juan F. Luis Hospital and Medical Center (hereinafter "JFL") and Defendant Government of the Virgin Islands' (hereinafter "GVI") (collectively "Defendants") motion to dismiss for lack of subject matter jurisdiction (hereinafter "Motion"), filed on July 22, 2015.¹ No response was filed in opposition.² For the reasons stated below, the Court will reserve ruling on the Defendants' Motion and order the Plaintiff to file an Amended Verified Complaint and attach proof that the Court has subject matter jurisdiction.

BACKGROUND

On May 4, 2009, Plaintiff Michael Hartlage (hereinafter "Plaintiff") commenced a lawsuit for medical malpractice against Defendant Wendell, J. Gorum, M.D. (hereinafter "Gorum"),

¹ Defendant Wendell J. Gorum, M.D. did not join in the Defendants' Motion.

² On July 7, 2016, Plaintiff was ordered to respond to the Motion within ten days. To date, Plaintiff has not filed a response. *See* V.I. R. CIV. P. Rule 6-1(f)(6). (Nothing herein shall prohibit the court from ruling without a response or reply when deemed appropriate.). Since it is well established that the court must satisfy itself that it has subject matter jurisdiction over a case before proceeding on the merits, *see Brunn v. Dowdye*, 59 V.I. 899, 904 (2013), the Court finds that it is appropriate to rule on JFL's Motion despite Plaintiff's failure to file a response.

Defendant JFL, and Defendant GVI pursuant to the Virgin Islands Medical Malpractice Act, Title 27 V.I.C. §§ 166 *et seq.* (hereinafter "VIMMA") and the Virgin Islands Tort Claims Act, Title 33 V.I.C. §§ 3401 *et seq.* (hereinafter "VITCA"), (Verified Compl. ¶5) Plaintiff alleged in his complaint that that "[t]his Court has jurisdiction over the parties, and over the action pursuant to [Title] 27 VIC. § 166 *et seq.*, and [Title] 33 V.I.C. § 3408 *et seq.* [sic], and Plaintiff has complied with all the filing perquisites [sic] of the Medical Malpractice Act and the Virgin Islands Tort Claims Act." (Compl. ¶5) On July 22, 2015, Defendant JFL and Defendant GVI filed this instant motion to dismiss.

In their motion, the Defendants argued that the Court lacked subject matter jurisdiction over this matter because Plaintiff failed to comply with the pre-filing requirements of the VIMMA and the VITCA. The Defendants attached to their motion, *inter alia*, a copy of the Superior Court's April 14, 2009 order denying Michael A. Hartlage's motion for permission to file a late claim under the VITCA in *In re Michael A. Hartlage as Plaintiff to an action for damages for personal injury*, Misc. Case No. SX-09-MC-002; a copy of the Superior Court's April 30, 2009 order denying Michael A. Hartlage's renewed motion for permission to file a late claim under the VITCA in *In re Michael A. Hartlage as Plaintiff to an action for damages for personal injury*, Misc. Case No. SX-09-MC-002; and a copy of the Superior Court's June 24, 2009 order denying Michael A. Hartlage's motion for reconsideration of the Court's April 30, 2009 order in *In re Michael A. Hartlage as Plaintiff to an action for damages for personal injury*, Misc. Case No. SX-09-MC-002. The Defendants advised the Court that Plaintiff, in Misc. Case No. SX-09-MC-002, subsequently appealed the Superior Court's June 24, 2009 order denying Michael A. Hartlage's motion for reconsideration, but the order was ultimately affirmed by the Supreme Court of the Virgin Islands.

JURISDICTION³

It is well established that a court may consider the issue of subject matter jurisdiction *sua sponte*.⁴ “Prior to considering the merits of a matter before it, a court is obligated to examine whether it has subject matter jurisdiction over the dispute.”⁵ “The plaintiff always bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction.”⁶ If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.⁷

STANDARDS OF REVIEW

Virgin Islands Medical Malpractice Act

The VIMMA sets out specific requirements before a medical malpractice claim can be filed in the Superior Court.⁸ The VIMMA spells out the following pre-filing requirements:

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.

³ *Tyson v. Samuel*, 2017 V.I. LEXIS 79, *2-3.

⁴ See *Drayton v. Drayton*, 65 V.I. 325, 332 (2016). Cf. *Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 363 (V.I. 2014); see also *Chavayez v. Buhler*, No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *7 (V.I. June 25, 2009) (a court may consider the issue of subject matter jurisdiction *sua sponte*).

⁵ See *Brunn*, 59 V.I. at 904 (citing *V.I. Gov't Hosp. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276, 279 (V.I. 2008)).

⁶ See *Hypolite v. Francois*, 2013 V.I. LEXIS 27, *6 (V.I. Super. Ct. May 10, 2013). See also *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *7 (V.I. Super. Ct. June 25, 2015) (citing *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) (the burden of proving the existence of subject matter jurisdiction lies with the plaintiff).

⁷ See V.I. R. Civ. P. 12(h)(3).

⁸ 27 V.I.C. § 166i(b).

The proposed complaint shall be deemed filed when a copy is delivered or mailed by registered or certified mail to the Commissioner of Health. 27 V.I.C. § 166i(c). Then the Committee determines the type of medical expert needed to review the claim and arranges for the expert to review the medical records and legal papers submitted to the Committee. *See* 27 V.I.C. § 166i(d)(1). It is only after this process has been completed or ninety days has elapsed since the claimant's proposed complaint was filed with the Committee, that a complainant may commence an action in the Superior Court. *See* 27 V.I.C. § 166i(b).⁹

The Virgin Islands Torts Claim Act

The Revised Organic Act grants sovereign immunity to the Government of the Virgin Islands for tort claims.¹⁰ "The VITCA provides the mechanism by which persons may sue the Government in tort in the courts of the Virgin Islands."¹¹ Under the VITCA states that *no judgment shall be granted in favor of any claimant unless* such claimant shall have complied with the provisions of this section applicable to his claim:¹²

a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the United States

⁹ *See Brady v. Cintron*, 55 V.I. 802, 814 (V.I. 2011).

¹⁰ 48 U.S.C. § 1541(b) ("That no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature constituted by this Act").

¹¹ *See Fleming v. Cruz*, 62 V.I. 702, 718 (2015). *See Durant*, 28 F.3d at 14 (the VITCA outlines the procedure for limited waiver of the Virgin Islands' sovereign immunity conferred by the Revised Organic Act of the Virgin Islands, 48 U.S.C. §§ 1541(b) *et seq.*). By enacting the VITCA, the government of the Virgin Islands waived its sovereign immunity to tort claims, assuming that the plaintiff satisfies certain procedural requirements. Title 33 V.I.C. § 3408(a) ("Subject to the provisions of section 3416 of this chapter, the Government of the United States Virgin Islands hereby waives its immunity from liability and action and hereby assumes liability with respect to injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government of the United States Virgin Islands while acting within the scope of his office or employment, under circumstances where the Government of the United States Virgin Islands, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The Government consents to have the liability determined in accordance with the same rule of law as applied to actions in the courts of the Virgin Islands against individuals or corporations; Provided, That the claimant complies with the provisions of this chapter.").

¹² 33 V.I.C. § 3409(c).

Virgin Islands while acting as such officer or employee, shall be filed within *ninety days after the accrual of such claim* unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

Here, because Plaintiff alleged a claim for medical malpractice against Defendant GVI, Defendant JFL, a government-owned facility, and Defendant Gorum, a physician working for Defendant JFL, the provisions of both the VIMMA and the VITCA² are applicable to the facts of this case.

DISCUSSION

A. VIMMA

Section 166(i) of the VIMMA provides that "[n]o action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the [Medical Malpractice Action Review] Committee and the [Medical Malpractice Action Review] Committee has received the expert opinion as required by this section, provided, that if said opinion is not received by the [Medical Malpractice Action Review] Committee within ninety days from the date the complaint was filed with the [Medical Malpractice Action Review] 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." Title 27 V.I.C. § 166i(b). The Supreme Court of the Virgin Islands has made it clear that the pre-filing requirements under Title 27 V.I.C. § 166i are jurisdictional. *See Brady v. Cintron*, 55 V.I. 802, 802 (V.I. 2011). Thus, "the requirements of [S]ection 166i are non-waivable jurisdictional conditions that must be satisfied in order to vest the Superior Court with subject matter jurisdiction to hear an individual's medical malpractice claims." *Id.*

Here, Plaintiff simply stated a single conclusory allegation in his complaint that he complied

with the filing prerequisites of the VIMMA. This unsupported assertion is not entitled to the presumption of truthfulness. "In order to plead a plausible claim under the VIMMA, [the plaintiff was required to plead facts demonstrating the date she timely filed a proposed complaint with the Committee, the date the Committee forwarded her proposed complaint to any experts for review, or the date when the experts rendered an opinion on her claim (or that ninety days has elapsed since the filing of her proposed complaint)."] *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *12.- 13 (Super. Ct. June 25, 2015).

In the case at bar, Plaintiff's Verified Complaint is devoid of these procedural prerequisites. Furthermore, there is no proof that Plaintiff complied with the jurisdictional filing prerequisites of the VIMMA.

B. VITCA

Section 3409(c) of the VITCA provides that:¹³

a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the United States Virgin Islands while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

Unlike the VIMMA, the Supreme Court of the Virgin Islands has yet to definitively rule whether the pre-filing requirements under the VITCA are jurisdictional or non-jurisdictional claims-processing rules. *See Fleming v. Cruz*, 62 V.I. 702, 718 (V.I. 2015) ("In this case, we do not decide whether the VITCA's claim-filing requirements are jurisdictional...We leave a decision on whether the VITCA's claim-filing mandates are jurisdictional for another day."). However, in *Richardson*

¹³ 3 V.I.C. § 3409(c).

v. *Knud Hansen Mem'l Hosp.*, 744 F.2d 1007, 1010 (3d Cir. 1984),¹⁴ the Third Circuit Court of Appeals found that compliance with the pre-filing requirements under the VITCA are jurisdictional, and thus concluded that a challenge to such compliance may be raised at any stage of the proceedings. The majority of Virgin Islands courts have similarly held that failure to comply the pre-filing requirements under the VITCA precludes a court from exercising subject matter jurisdiction over such claims.¹⁵

In the instant matter, Plaintiff simply stated a single conclusory allegation in his complaint that he complied with the filing prerequisites of the VITCA. Consequently, this unsupported assertion, without more, is insufficient proof of compliance with the pre-filing requirements of the VITCA.

¹⁴ In *Richardson*, the Third Circuit Court of Appeals—exercising its power as the final arbiter of Virgin Islands local law—held that the terms under which the Government of the Virgin Islands consented to waive its immunity from tort liability, as embodied in the VITCA, are jurisdictional and "[i]t follows that the terms may not be waived." 744 F.2d at 1010. The Supreme Court of the Virgin Islands has made it clear that decisions rendered by the Third Circuit while serving as the *de facto* court of last resort in the Virgin Islands "are binding upon the Superior Court of the Virgin Islands even if they would only represent persuasive authority when {the Supreme Court] considers an issue." *Najawicz v. People of the Virgin Islands*, 58 V.I. 315, 327-28 (V.I. 2013) (internal citation omitted); see also, *In re People of the Virgin Islands*, 51 V.I. 374, n. 9 (V.I. 2009). Thus, the Third Circuit's holding in *Richardson* remains binding on this Court.

The Court notes that, while the case in *Richardson* originated in the District Court of the Virgin Islands in 1980, the District Court was acting as a territorial court when it adjudicated Richardson's claim for wrongful death. See *Celliwood v. Enos*, 43 V.I. 293, 297-98 (3d Cir. 2000) (The District Court of the Virgin Islands used to have general original jurisdiction over all civil actions arising under territorial law in which the amount in controversy was more than \$500); see also *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1057, 19 V.I. 641 (3d Cir. 1982) (characterizing jurisdiction of the District Court of the Virgin Islands under the Revised Organic Act prior to the 1984 amendments as "more like a state court of general jurisdiction than a United States district court."). For a detailed description of the development of the judiciary of the Virgin Islands, see *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74 at *16-20.

In light of its finding that compliance with the pre-filing requirements under the VITCA are jurisdictional, the Third Circuit concluded that a challenge to such compliance may be raised at any stage of the proceedings. *Richardson*, 744 F.2d at 1010.

¹⁵ See e.g., *Brunn v. Dowdye*, 59 V.I. 899, 905 n.6 (V.I. 2013) (assuming without deciding that section 3408(a) of the VITCA was jurisdictional); *Brewley v. Government of the Virgin Islands*, 59 V.I. 100, 103 (V.I. Super. Ct. 2012) (opining that "the requirements of section 3409 of the VITCA are jurisdictional and that they must be strictly followed"); *Speaks v. Gov't of the Virgin Islands*, 2009 U.S. Dist. LEXIS 3565, *16 (D.V.I. Jan. 14, 2009) ("Timely compliance with the VITCA's notice requirement is a jurisdictional prerequisite to bringing suit on a plaintiff's tort claims."); *Christopher v. Gov. Juan F. Luis Hosp. & Med. Ctr.*, 2016 V.I. LEXIS 165, *11 (Super. Ct. Oct. 12, 2016) (following the Third Circuit Court of Appeal's holding in *Richardson*).

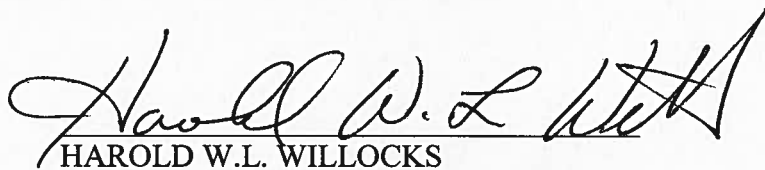
CONCLUSION

Based on the foregoing, the court will reserve ruling on the Defendant's Motion. There is insufficient information on the record to satisfy this Court that it retains subject matter jurisdiction over this action. As mentioned above, the Plaintiff bears the burden to convince the court that it has subject matter jurisdiction.¹⁶ As such, the Court will grant Plaintiff leave to amend his complaint and attach proof of compliance with the pre-filing requirements of the VIMMA and the VITCA. The Amended Verified Complaint must comply with Virgin Islands Rule of Civil Procedure 15-1. Failure to provide proof of compliance with the jurisdictional pre-filing requirements of the VIMMA will result in this matter being dismissed for lack of subject matter jurisdiction. The Court will enter an Order consistent with this Memorandum Opinion.

DONE and so ORDERED this 20 day of February, 2018.

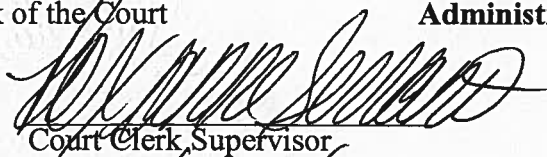
ATTEST:

Estrella H. George
Clerk of the Court



HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

By:


Court Clerk Supervisor

Dated:

2/22/18

¹⁶ See *Tyson*, 2017 V.I. LEXIS 79, at *3.