

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

)
)
)
)
)
) **CASE NO. ST-16-CV-158**
)
)
)
)
)
)
)
)

Pending before the Court are motions filed by Defendant Gary Hicks and Defendant Deft, Inc. For the following reasons, the Court will deny Defendant Hicks' motion for reconsideration, will deny Deft, Inc.'s motion to dismiss, will hold Defendant Hicks' motion to dismiss in abeyance, and will grant Plaintiffs leave to amend the Complaint.

On March 17, 2016, Plaintiffs filed a Complaint regarding an automobile accident that occurred on April 2, 2014, alleging that Defendant Hicks negligently and recklessly operated an automobile owned by Defendant Deft, Inc., and crashed into Plaintiff Ishmael Todman's vehicle. On August 23, 2016, the Court issued an Order granting Plaintiffs an enlargement of time to serve Defendants.

a) Defendant Hicks' Motion for Reconsideration

Motions for reconsideration are governed by LRCi 7.3, which provides that:

such motion shall be filed within fourteen (14) days after the entry of the order or decision unless the time is extended by the Court ... A motion to reconsider shall be based on:

1. intervening change in controlling law;
2. availability of new evidence, or;
3. the need to correct clear error or prevent manifest injustice.

Hicks moves for reconsideration of the Court's August 23, 2016, Order that had granted Plaintiffs an enlargement of time to serve Defendants. Citing *Beachside v Fishman*,¹ Hicks asserts that the Court abused its discretion because Plaintiffs did not demonstrate good cause for failing to serve him in a timely manner.

First, Defendant's motion is untimely as it was filed on September 20, 2016, more than fourteen days from the entry of the August 23, 2016, Order. Second, while the Supreme Court of the Virgin Islands has stated that the "absence of prejudice alone can never constitute good cause to excuse late service"² the Supreme Court has also found that a "court abused its discretion when it failed to properly analyze whether a permissive extension of time was warranted despite the lack of good cause."³ Plaintiffs have not demonstrated good cause for failing to timely serve Defendant Hicks. However, Plaintiffs have submitted proof that Defendant Hicks was served on September 1, 2016, in compliance with the Court's August 23, 2016, Order, and Defendant has failed to demonstrate that he has been prejudiced by the late service. In addition, an extension of time for

¹ *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 713, 2010 V.I. Supreme LEXIS 33, *19-21, 2010 WL 4962905 (VI. 2010).

² *Id.*

³ *Id.*, at *31-32.

service was appropriate in this case because the statute of limitations would bar the re-filing of Plaintiffs' claims. As a consequence, Defendant's motion for reconsideration will be denied.

b) Defendant Hicks' Motion to Dismiss

Fed. R. Civ. P. 12(b), made applicable to the Superior Court through SUPER CT. R. 7, provides that upon motion by the pleader, a claim, counterclaim, cross-claim, or third party claim shall be dismissed when there is a "failure to state a claim upon which relief can be granted" to the claimant. When determining whether the allegations in a complaint are sufficiently pled, a court must engage in a three step inquiry:

First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim.".... Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth".... Finally, "where there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."⁴

A motion to dismiss a complaint should be denied if the factual allegations are "enough to raise a right to relief above the speculative level."⁵

Defendant Hicks moves to dismiss Counts IV and VI of the Complaint on the ground that Plaintiffs have failed to allege sufficient facts in support of their gross negligence claim and their claim for intentional infliction of emotional distress.

In order to state a claim for intentional infliction of emotional distress, a plaintiff must allege defendant: "(1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly

⁴ *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 (3d Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 881 (2009)).

⁵ *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress.”⁶

To state a claim for gross negligence, a plaintiff must allege that the defendant engaged in conduct demonstrating “a conscious indifference to the health and safety of persons or property.”⁷

In the Complaint, Plaintiffs assert that Defendant Gary Hicks “violated 20 V.I.C. § 503 by driving on the right side of the road” in the face of “oncoming” traffic.⁸ Plaintiffs also contend that Defendant Hicks “made a right turned and slammed into” Plaintiff Ishmael Todman’s vehicle,⁹ and, as result of the accident, Ishmael Todman was injured and suffered “pain, anguish, humiliation, inconvenience, and loss of the enjoyment of life.”¹⁰

While they have stated a claim for negligence, Plaintiffs have alleged no facts suggesting that Defendant Gary Hicks intentionally or recklessly engaged in extreme and outrageous conduct exceeding all possible bounds of decency or acted with a conscious indifference to the health and safety of persons or property. Similarly, Plaintiffs have failed to allege facts sufficient to sustain a claim for punitive damages.

However, the Court will defer ruling on Defendant Hicks’ motion to dismiss and will grant Plaintiffs leave to amend their Complaint, within thirty (30) days of the date of entry of this Order, to address these deficiencies, failing which the Court will rule on Defendant's motion.

c) Defendant Deft, Inc.’s Motion to Dismiss

Defendant Deft, Inc. moves to dismiss the Complaint because Plaintiffs did not timely serve Defendant in compliance with Fed. R. Civ. P. 4 (m).

⁶ *Donastorg v. Daily News Publishing Co., Inc.*, 2015 V.I. LEXIS 105, *149-150, 63 V.I. 196, 295 (V.I. Super. Ct. 2015).

⁷ *Turnbull v. Parris*, 2016 V.I. LEXIS 185, *7-9 (V.I. Super. Ct. Nov. 3, 2016).

⁸ Complaint, at page 4.

⁹ *Id.*, at page 2.

¹⁰ *Id.*, at page 3.

While Plaintiffs failed to serve Defendant Deft, Inc., within 90 days from the date the Complaint was filed in compliance with Fed. R. Civ. P. 4 (m),¹¹ Defendant's president, Adrien Austin filed an affidavit acknowledging that he received a copy of the Complaint on June 29, 2016.¹² In addition, an extension of time for service was appropriate in this case because the statute of limitations would bar the re-filing of Plaintiffs' claims. As a result, the Court will not dismiss the Complaint for Plaintiffs' failure to comply with Fed. R. Civ. P. 4 (m).

Defendant Deft, Inc. also moves to dismiss the Complaint on the grounds that it was not the owner of the vehicle driven by Defendant Hicks at the time of the accident. Defendant Deft, Inc. submits an affidavit from its president Adrien Austin in support of its defense.

"A challenge to the sufficiency of the pleader's claim supported by extra-pleading material triggers the conversion of a [Fed. R. Civ. P.] 12(b)(6) motion into a summary judgment motion under [Fed. R. Civ. P.] 56."¹³ Courts have "complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion."¹⁴

The Court notes that Defendant's brief references an Assets Purchase Agreement pertaining to the vehicle driven by Hicks that was not attached to the motion to dismiss or otherwise filed with the Court. Given that the record is insufficiently developed, the Court

¹¹ Fed. R. Civ. P. 4 (m) provides that "If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A)."

¹² Defendant Deft, Inc.'s resident agent was served with a copy of the Summons and Complaint on June 29, 2016.

¹³ *Callender v. Nichtern*, 1995 V.I. LEXIS 24, *15, 32 V.I. 96, 105, 1995 WL 409028 (V.I. Terr. Ct. 1995).

¹⁴ *Id.*

summary judgment. And, because the Court must assume that the factual allegations in the Complaint are true at this stage in the proceedings, Defendant Deft, Inc.'s motion to dismiss will be denied.

An Order consistent with this Opinion shall follow.

Dated: February 2, 2017

ATTEST: Estrella H. George
Acting Clerk of Court

by:

Lori Boynes-Tyson

Court Clerk Supervisor

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY
DATE: 02-03-17
ESTRELLA H. GEORGE
Acting Clerk of the Court

By: Camell A. Clarke