SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

BANK OF NOVA SCOTIA,	)
Plaintiff/Counterclaim Defendant,	)
vs.	) **CASE NO. ST-16-CV-29**
LOREDON L. BOYNES, JR.,	)
Defendant/Counterclaim Plaintiff.	)

MEMORANDUM OPINION

Pending before the Court is Scotia Bank's motion to dismiss Counts I, III, IV, and V of Loredon Boynes' Counterclaim. For the following reasons, Scotia Bank's motion will be granted in part and denied in part, and Boynes will be granted leave to file a First Amended Counterclaim consistent with this Opinion.

STANDARD

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."[1]

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

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."[2]

FACTUAL AND PROCEDURAL HISTORY

On January 25, 2016, Scotia Bank filed a debt and foreclosure action based on a promissory note executed by Boynes for the principal amount of $100,300.00. The note was secured by a mortgage covering real property owned by Boynes on St. John. Boynes filed an Answer and Counterclaim on February 18, 2016.

ANALYSIS

A) Counts I, III, IV

In Count I of the Counterclaim, Boynes asserts a claim of fraud. A claimant must "state with particularity the circumstances constituting fraud"[3] and plead the "the time, place and contents of the false representation, as well as the identity of the person making the misrepresentations."[4] The purpose of the "particularity rule is to place a defendant on notice of the precise misconduct with which he or she is being charged."[5]

Boynes asserts that Scotia Bank "prepared its loan documents to conceal [a balloon payment] ... obligation from the borrower."[6] Boynes also alleges that Scotia Bank "made repeated

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[2] *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).
[3] Fed. R. Civ. P. 9(b).
[4] *Tradewinds, Inc. v. Citibank, N.A.*, 20 V.I. 152, 160 (D.V.I. 1983).
[5] *Jefferson v. Bay Isles Assocs., L.L.L.P.*, 2011 V.I. LEXIS 7, *27, 59 V.I. 31, 49, 2011 WL 3853332 (V.I. Super. Ct. 2011) (citing *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007)).
[6] Counterclaim at paragraph 12(A). See also paragraphs 3 and 4.

representations and statements ... in terms of the Note that were and are inconsistent with a 'balloon loan.'"[7]

These allegations are "insufficient to meet the requirement that corporate fraud allegations be accompanied by the identity of the corporate officials who actually conducted the fraud."[8] Similarly, Boynes has not alleged the time, place, and contents of the false representations that were inconsistent with the loan documents. As a result, Boynes has not adequately pled a counterclaim for fraud.

In Count III of the Counterclaim, Boynes asserts a claim of intentional infliction of emotional distress ("IIED"), which requires a showing that a 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 intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress.[9]

Boynes has made "no specific factual allegations concerning what form of emotional distress or 'mental anguish' [he] suffered, and makes no attempt to illustrate precisely how [Scotia Bank] caused that suffering."[10] In addition, Boynes has not made factual allegations indicating that Scotia Bank has engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society. As a result, the Court finds that Boynes has not stated a claim upon which relief may be granted in Count III.

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[7] *Id.*, at Affirmative Defense, paragraph 1.
[8] *Lewis v. BNC Mortg., Inc. (In re Lewis)*, 2005 Bankr. LEXIS 375, *21 (Kans. Bankr. 2005).
[9] *Donastorg v. Daily News Publishing Co., Inc.*, 2015 V.I. LEXIS 105, *149-150, 63 V.I. 196, 294-295 (V.I. Super. Ct. 2015).
[10] *Estate of Burnett v. Kazi Foods of the V.I.*, 2016 V.I. LEXIS 57, *16-17 (V.I. Super. Ct. May 24, 2016).

In Count IV of the Counterclaim, Boynes asserts a claim of negligent infliction of emotional distress ("NIED"), which requires a showing:

> (1) that the defendant owed the plaintiff a duty of care to ensure the plaintiff does not suffer serious or severe emotional injury ...; (2) that the defendant breached ... its duty; and (3) that, as a direct and proximate result of defendant's breach, the plaintiff suffered a serious or severe emotional injury.[11]

Boynes' NIED claim fails for the same reason his IIED fails because he made no factual allegations concerning his emotional distress or mental anguish, showing how Scotia Bank caused that suffering, or indicating that Scotia Bank engaged in extreme and outrageous conduct exceeding all possible bounds of decency in a civilized society.

Notwithstanding Boynes' pleading deficiencies, leave to amend "should be freely given in the absence of any apparent or declared reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment."[12]

While there is no evidence of undue prejudice, undue delay, or bad faith on the part of Boynes, Scotia Bank asserts that Counts I, III, and IV of the Counterclaim are subject to dismissal pursuant to the "gist of the action doctrine"[13] and the "economic loss doctrine,"[14] which calls into

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[11] *Donastorg v. Daily News Publ. Co.*, 2015 V.I. LEXIS 105, *185-86.
[12] *Mountaintop v. Colombian Emeralds Int'l*, 2001 V.I. LEXIS 11, *18-19, 43 V.I. 193, 203-204, 2001 WL 883585 (V.I. Terr. Ct. 2001) (quoting *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).
[13] *V.I. Port Auth. v. Callwood*, 2014 V.I. LEXIS 11, *10, 2014 WL 905816 (V.I. Super. Ct. Feb. 28, 2014) ("The gist of the action doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on terms of a contract").
[14] *Turnbull v. Univ. of the V.I.*, 2016 V.I. LEXIS 22, *14-15 (V.I. Super. Ct. Mar. 2, 2016) ("The economic loss doctrine forbids a party from suing or recovering in tort for economic or pecuniary losses that arise only from breach of contract or are associated with the contract relationship").

question the futility of amendment. On the other hand, this Court is not able to determine the applicability of the "gist of the action doctrine" and the "economic loss doctrine" until Boynes repleads his Counterclaim. As a result, the Court will grant Boynes leave to amend Counts I, III, and IV of his Counterclaim.

B) Count V

In Count V of the Counterclaim, Boynes asserts a claim of prima facie tort under Restatement (Second) of Torts § 870, which recognizes that liability may be imposed when one "intentionally causes injury to another ... if his conduct is generally culpable and not justifiable under the circumstances." The Restatement indicates that § 870 is not a "specific rule[,]" but rather a "unifying principle" from which "several established intentional torts developed" and is "the basis for the development of the more recently created intentional torts."[15]

In the Virgin Islands, prima facie tort is recognized as a cause of action.[16] However, "prima facie tort claims ... provide relief only where the defendant's conduct 'does not come within the requirements of one of the well established and named intentional torts.'"[17] Courts in the Virgin

[15] Given that Comment A to Restatement (Second) of Torts § 870 identifies § 870 as a "general principle rather than [a] specific rule[]," it is questionable whether it is necessary for this Court to conduct an analysis pursuant to *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011). See also *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, *15-17 (V.I. Super. Ct. Jan. 29, 2015) ("the term 'prima facie tort' basically refers to the creation of a new, or expansion of an existing, tort; thus, performing a *Banks* analysis on what could conceivably be an immeasurable concept would be fruitless."). But see, footnote 16 for a *Banks* analysis of prima facie tort as a cause of action.

[16] *Glenn v. Dunlop*, 423 Fed. Appx. 249, 255, 2010 U.S. App. LEXIS 27207, *15-17 (3d Cir. V.I. 2010). While the Supreme Court of the Virgin Islands has not yet weighed in on the issue, the Third Circuit, the District Court of the Virgin Islands, and the Superior Court have all recognized prima facie tort as a viable cause of action. In addition, many other jurisdictions also recognize prima facie tort as actionable. See, e.g., *The Modern Prima Facie Tort Doctrine*, 79 Ky. L.J. 519, 525-27 (1990/1991) ("twenty-one states, including New Jersey, plus the Virgin Islands and District of Columbia recognize prima facie tort"). Given that prima facie tort fills in gaps in the law and grants relief where there may not be any available, the Court finds that recognition of prima facie tort as a cause of action represents the soundest rule for the Virgin Islands and is in accord with local public policy.

[17] *Glenn*, 423 Fed. Appx. at 255 (quoting Restatement (Second) of Torts § 870 cmt. a.).

Islands "have dismissed prima facie tort claims that they deem insufficiently 'distinct' from plaintiffs' other, more established tort claims."[18] As a result, a prima facie tort claim cannot be alternatively pled with other tort claims, nor can it be asserted by itself "if the action complained of fits within another category of tort."[19]

Here, it is evident that Boynes relies on the same set of factual allegations to support his prima facie tort claim as he does to support his fraud, IIED, and NIED counterclaims.[20] As a result, Count V of the Counterclaim will be dismissed.

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[18] *Id.* See also *Moore v. A.H. Riise Gift Shops*, 659 F. Supp. 1417, 1426, 23 V.I. 227 (D.V.I. 1987) (reversed on other grounds); *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 463, 35 V.I. 356 (D.V.I. 1997) ("[N]o claim for prima facie tort lies if the action complained of fits within another category of tort." (citation omitted)); *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, *17 (V.I. Super. Ct. Jan. 29, 2015).

[19] *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 463, 35 V.I. 356 (D.V.I. 1997). See also *Deutsch v. Backus Corp.*, 2012 Conn. Super. LEXIS 1165, *36, 2012 WL 1871398 (Conn. Super. Ct. May 2, 2012) ("[T]he prima facie tort doctrine is not intended to supplant traditional tort elements or traditional tort defenses. Plaintiffs have shown, by the impressive array of torts they allege, that the conduct at issue here is adequately governed by existing torts, even if it is not actionable"); *Belsky v. Lowenthal*, 418 N.Y.S.2d 573, 392 N.E.2d 560 (1979) ("Prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its legs"); *Taylor v. Metzger*, 152 N.J. 490, 523, 1998 N.J. LEXIS 92, *54 (N.J. 1998) ("Prima facie tort should not be invoked when the essential elements of an established and relevant cause of action are missing"). Conversely, New York, Missouri, and New Mexico permit prima facie tort to be pled with other torts. However, these jurisdictions has established specific elements for pleading prima facie tort. For instance, New York courts have established that prima facie tort consists of four elements: "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful." *A. Terzi Prods. v. Theatrical Protective Union, Local No. One*, 2 F. Supp. 2d 485, 495, 1998 U.S. Dist. LEXIS 5734, *24, 158 L.R.R.M. 2550 (S.D.N.Y. 1998). In addition, a plaintiff "must allege that defendants' sole motivation . . . was disinterested malevolence." *Id.* However, even New York courts recognize that "it seems inadvisable to lump all malicious and intentional harms into a grab bag labelled 'prima facie tort ', especially since it is impossible to tabulate the infinite varieties of misconduct that give rise to actionable wrongs. It is generally accepted that '[t]here is no necessity whatever that a tort must have a name. New and nameless torts are being recognized constantly.'" *Diehl & Sons, Inc. v. International Harvester Co.*, 445 F. Supp. 282, 290, 1978 U.S. Dist. LEXIS 19932, *22, 1978-1 Trade Cas. (CCH) P61,940 (E.D.N.Y. 1978) (quoting Prosser, Torts, 2d Ed., p. 3). Accordingly, this Court determines that it is not advisable to establish specific elements for prima facie tort, since it is merely the embodiment of the principle stated in Restatement (Second) of Torts § 870. Instead, prima facie tort should only be a basis for relief when the claimant establishes that the conduct at issue is not adequately governed by existing torts.

[20] In Count V, Boynes restates and realleges paragraphs 1 through 27 of the Counterclaim as though they were stated therein.

An Order consistent with this Opinion shall follow.

Dated: October 18, 2016

ATTEST: Estrella H. George
Acting Clerk of Court __/__/__

by: __________
Donna D. Donovan
Court Clerk Supervisor 10/21/2016

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

CERTIFIED A TRUE COPY
DATE: Oct. 25, 2016
ESTRELLA H. GEORGE
Acting Clerk of the Court

By: __________
Cameil A. Clarke
Court Clerk II