

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELIA MCGARY,

Plaintiff,

v.

J.S. CARAMBOLA, L.L.P.

d/b/a RENAISSANCE ST. CROIX

CARAMBOLA BEACH RESORT & SPA,

Defendant.

Case No. SX-13-CV-289

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant J.S. Carambola, L.L.P. (Carambola)'s Motion for Summary Judgment (Motion), filed June 15, 2016; Plaintiff Elia McGary (McGary)'s Opposition to Defendant's Motion for Summary Judgment (Opposition), filed August 4, 2016; and Defendant's Reply thereto, filed August 18, 2016. Because there exists a genuine dispute of material fact as to whether the risk of harm to Plaintiff was reasonably foreseeable to Defendant such that Defendant was obligated to take reasonable steps to guard against it, summary judgment is inappropriate and Defendant's Motion will therefore be denied.

Also pending are Plaintiff's Motion for Extension of Time, filed July 12, 2016; and Defendant's Response in Opposition, filed July 20, 2016. Because Plaintiff has failed to demonstrate that her failure to move for an extension of time prior to the expiration of the deadline for submitting her Opposition to Defendant's Motion for Summary Judgment was the result of excusable neglect, Plaintiff's Motion for Extension of Time will be denied.

Defendant's Motion for a Ruling on its Unopposed Motion for Summary Judgment and for Sanctions, filed July 19, 2016, is also pending. However, the only sanction Defendant seeks is the denial of Plaintiff's Motion for Extension of Time. Because the Court addresses these arguments in the context of ruling on Defendant's Motion for Summary Judgment and Plaintiff's Motion for

Extension of Time, Defendant's Motion for Ruling, to the extent that it constitutes an independent motion, is summarily denied.

Background

Plaintiff alleges that on or about June 26, 2012, while staying at Defendant's resort, she was injured when the lounge chair in which she was sitting "unexpectedly collapsed," as a result of Defendant: "1) failing to properly maintain the lounge chair; 2) failing to properly inspect the lounge chair before allowing it to be used; 3) failing to properly inspect the lounge chair after it was put into use to see if it remained safe for invitees to use; and 4) negligently supplying a chattel for use by another." Complaint, at 2.

For purposes of the Defendant's Motion for Summary Judgment, the following facts are not in dispute. On June 26, 2012, Plaintiff and her husband attended their vow renewal ceremony at an outdoor deck area at Carambola at approximately 11:00am. Carambola's Response to Plaintiff's Counter Statement of Facts in Opposition to Defendant's Motion for Summary Judgment (SOF Response), at ¶ 5. At approximately 5:15pm, Plaintiff and her husband returned to the same wooden deck where they had earlier renewed their vows to take a walk. *Id.* at ¶ 6. When Plaintiff went to seat herself in a wicker lounge chair on the deck area,¹ the chair collapsed and Plaintiff fell to the ground.² *Id.* at ¶ 8. As a result, Plaintiff found herself, "in significant pain," and she "could not move at all for about fifteen minutes." *Id.* at ¶ 9. After helping his wife into another chair, Plaintiff's husband, Richard McGary, "turned the collapsed subject chair over and examined it and found a loose bolt on the rod that connected the collapsible legs of the chair." *Id.*

¹ Defendant agrees "that the photo of the chair depicted in Exhibit 3 [to Plaintiff's Opposition] appears to be the same type of chair as the 'subject' chair for the purpose of ruling on Carambola's Motion for Summary Judgment only."

² More precisely, for the purpose of its Motion, Defendant agrees with ¶ 8 of Plaintiff's Statement of Facts (SOF) that the chair collapsed and Plaintiff fell along with and on top of the collapsing chair, such that her body did not make contact with the wooden deck surface directly but only through the seating surface of the wicker lounge chair.

at ¶¶ 10-12. After tightening the loose bolt with his hands, he was able to sit in the chair without incident.” *Id.* at ¶¶ 11-12. Plaintiff still experiences pain as a result of her fall, “making it awkward and uncomfortable to sit down.” *Id.* at ¶ 19.

Plaintiff’s Motion for Extension of Time

Superior Court Rule 10(a)(2) provides that “The court for cause shown may at any time in its discretion... (2) On motion, permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect.” Thus, because the specified time period for Plaintiff to submit her expert disclosures has expired, the Court will only exercise its discretion to extend the deadline upon finding that Plaintiff’s failure to comply was the result of excusable neglect.

The Supreme Court of the Virgin Islands has established that in this jurisdiction “excusable neglect” is essentially synonymous with “good cause.”

The determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances... including... the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether or not it was within the reasonable control of the movant, and whether the movant acted in good faith.

Fuller v. Browne, 59 V.I. 948, 955 (V.I. 2013) (citation and internal quotations omitted).

The general preference “is to decide cases on their merits” and accordingly, “any doubts should be resolved in favor this preference.” *Id.*³ However, trial courts have significant discretion in ruling on motions to extend deadlines pursuant to the language of Rule 10. *See* Super. Ct. R. 10(a)(2).

³ *Fuller* addressed a matter arising “under Super. Ct. R. 322.5(b)(2) which authorizes the Appellate Division to ‘consider a motion to set aside a dismissal order and to reopen the matter that is dismissed... upon a showing of good cause or excusable neglect.’” However, the definition of “excusable neglect” outlined therein is equally applicable to the present Rule 10(a)(2) analysis.

Evaluating the factors articulated in *Fuller*, the Court finds that Plaintiff's proffer is insufficient to permit a finding that her failure to file her Opposition by the July 5, 2016 deadline⁴ was the result of excusable neglect. Plaintiff's attempt to demonstrate that her failure was the result of excusable neglect is accurately summarized by Plaintiff's own Motion for Extension of Time as follows: "Defendant's failure to present its alleged evidence in the context of current and binding law in order for Plaintiff to adequately respond to the motion and this Court to evaluate the merits of the arguments, renders it incapable of meeting its initial burden under *Pickard-Samuel*. This failure, in essence, places the initial burden on Plaintiff which runs afoul of the established summary judgment standards." Assuming *arguendo* that Defendant's failure to cite current and binding authority in its Motion would be sufficient to excuse Plaintiff's inability to draft and file her Opposition within the allotted time, any additional burden placed upon Plaintiff in drafting her response to Defendant's legally deficient Motion is irrelevant in considering Plaintiff's failure to move for an extension of time prior to expiration of the deadline. As to this second and more significant failure, Plaintiff's Motion for Extension is silent.

Throughout the course of this litigation, Plaintiff has repeatedly demonstrated a general disregard for the deadlines established by applicable rules and by Orders of the Court. *See, e.g.*, Order of June 24, 2016; Order of August 11, 2016. While Plaintiff has arguably been justified in seeking extensions of most, if not all, of these deadline for various reasons, Plaintiff has, on more than one occasion, failed to request extension of the relevant deadlines until after those deadlines have expired without offering any justification or excuse for doing so. *See id.* In this light, even though Plaintiff's one month delay in filing her Opposition⁵ would not appear to be significantly

⁴ Local Rule Civil Procedure 56.1 applies as a rule of last resort, pursuant to Superior Court Rule 7, establishing that "any party adverse to a motion [for summary judgment] may file a response... within twenty (20) days of the filing of the motion."

⁵ Plaintiff's Opposition was due July 5, 2016 but was not filed until August 4, 2016.

prejudicial to Defendant, considered in the context of Plaintiff's repeated disregard for deadlines in this matter, granting Plaintiff's untimely request for extension could be seen as an expression of the Court's tacit approval of such dilatory behavior thereby inviting future delay. Additionally, repeatedly granting such untimely requests for extension of time would frustrate the intention of the Superior Court rules to secure the elimination of unjustifiable expense and delay. Super. Ct. R. 1.

Even if Plaintiff's inability to timely draft and file her Opposition was outside of her control—in that Defendant's failure to cite current and binding legal authority necessitated extension of the twenty day period within which to respond to the dispositive Motion—her failure to timely file her Motion for Extension of Time was not. Plaintiff has offered no justification or excuse for her failure to file her Motion for Extension prior to the expiration of the deadline to respond. Therefore, the Court cannot find that this failure was the result of excusable neglect, and under Rule 10(a)(2), the Court will not exercise its discretion to extend the deadline for the submission of Plaintiff's Response to the Motion. Accordingly, Plaintiff's Motion for Extension of Time will be denied.

Motion for Summary Judgment

Despite the fact that the Court will deny Plaintiff's untimely Motion for Extension of Time and will therefore not consider Plaintiff's Opposition as such, the Supreme Court of the Virgin Islands, in *Vanterpool v. Gov't of the Virgin Islands*, has directed that the Superior Court “may not accept as true the moving party's itemization of undisputed facts; instead, the court must satisfy itself that the evidence in the summary judgment records supports this relief.” 63 V.I. 563, 583 (V.I. 2015). Accordingly, the Court must conduct an independent evaluation of the factual record to determine whether there exists any genuine issue of material fact such that summary judgment

would be inappropriate. Because the Court concludes that the record in this matter does present an issue of material fact with respect to whether an accident such as that which befell Plaintiff was reasonably foreseeable to Defendant, Plaintiff's Motion for Summary Judgment will be denied.

"Summary Judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact," and judgment is appropriate as a matter of law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). In ruling a motion for summary judgment, the Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Id.*; see also *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citations and quotations omitted). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado*, 61 V.I. at 391-92. In evaluating the evidence of record, the Court must draw all justifiable inferences in favor of the nonmoving party, and accept the non-moving party's allegations as true if properly supported by the record. *Id.* at 379. The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin*, 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the non-moving party to introduce some evidence showing the existence of a genuine issue of material fact. See *Perez*, 59 V.I. at 527-28.

To succeed on a claim of negligence a plaintiff must establish the following elements: 1) defendant owed plaintiff a legal duty of care; 2) defendant breached that duty; 3) and defendant's breach constituted the proximate cause of 4) damages to plaintiff. *Machado*, 61 V.I. at 380. In *Machado*, the Supreme Court of the Virgin Islands eschewed the traditional premises liability

framework in which the scope of a landowner's duty to individuals injured on their property was determined by the individual's classification as either an invitee, licensee, or trespasser upon the premises. *Id.* at 385-86. Instead, *Machado* definitively established that "the foreseeability of harm 'is the touchstone of the existence of [a land possessor's] duty of reasonable or ordinary care.'" *Id.* (citing *Perez*, 59 V.I. at 533).

As a preliminary matter, the Court notes that Defendant's Motion for Summary Judgment generally fails to cite current and binding Virgin Islands precedent, relying almost entirely on federal caselaw despite the existence of a relatively well developed body of relevant, local jurisprudence governing summary judgment and actions for negligence in the Virgin Islands.⁶ Throughout Defendant's Motion, as well as other submissions to the Court, Defendant correctly asserts that "Plaintiff must offer evidence that Carambola had actual or constructive notice of a dangerous condition, that the dangerous condition created an unreasonable risk of harm, and that Carambola failed to protect against that harm." Motion, at 8. Defendant also argues, incorrectly, that Plaintiff may only demonstrate that Carambola had actual or constructive notice by providing evidence that Carambola was either aware of previous similar incident occurring on its premises, or otherwise aware of some particular defect of the chair in question that would render the chair unsafe or unfit for use. *See* SOF Response, at ¶ 15 (Defendant's Motion for Summary Judgment is "predicated on the fact that Carambola did not have notice of the allegedly defective condition of the subject chair *prior* to the incident in question.") (emphasis in original), *id.* at ¶ 16; ("The issue is whether Carambola had notice of the allegedly defective condition of the subject chair *before* the incident occurred.") (emphasis in original), *id.* at ¶ 22; ("The undisputed and

⁶ In fact, other than one citation to *Perez*, 59 V.I. 522, which appears only as an internal citation within a primary citation to a 2014 case decided in the District Court of the Virgin Islands, the only citations to applicable precedent of the Supreme Court of the Virgin Islands appear within block quotes excerpted from previous Orders of this Court. *See* Motion, at 8, 11-12, 14.

relevant evidence here is that there were no reports of prior, similar accidents involving defective or collapsing lounge chairs”) (emphasis in original). However, such a restrictive interpretation of the notice requirement, no matter how emphatically it may be presented, finds no support in the law of the Virgin Islands.

In *Machado*, the Supreme Court of the Virgin Islands established that a possessor of land owes a duty to those individuals on the premises to guard them against the risk of reasonably foreseeable harm. 61 V.I. at 390-92. In turn, the risk of any given harm is reasonably foreseeable where the possessor of land has actual or constructive notice of such risk at the time of the incident. *Id.* at 392-93 (in order to demonstrate that Defendant “breached its duty to take reasonable steps to protect [Plaintiff] against foreseeable harm,” Plaintiff “was required to produce evidence that could support a finding that Yacht Haven had actual or constructive notice of a dangerous condition”).

Here, Defendant argues that Plaintiff may only meet her burden of demonstrating actual or constructive notice by providing evidence that Defendant either knew that the particular chair in question was broken or defective at the time of the accident—presumably Defendant’s conception of actual notice—or knew of previous similar incidents involving chairs of the same type as the subject chair—presumably Defendant’s conception of constructive notice. However, in *Machado*, the Supreme Court established that “another way that notice of a dangerous condition can be imputed to a land possessor is through evidence that the condition persisted over a long enough period of time that the owner should have become aware of it through the exercise of reasonable care.” *Id.* at 393.

Plaintiff has introduced evidence that following her fall, her husband “turned the collapsed chair over and examined it and found a loose bolt on the rod that connected the collapsible legs of

the chair.” Opposition, Exhibit 1, Richard McGary Depo. 25-29. Furthermore, Plaintiff has introduced evidence that after tightening the loose bolt, her husband was able to sit in the chair without incident. *Id.* at 71-72. Viewed in the light most favorable to Plaintiff, this evidence permits an inference that the chair in question collapsed as a result of a mechanical failure stemming from a loose bolt on the underside of the chair. In turn, one might reasonably infer that this mechanical failure was the result of a dereliction of Carambola’s duty to shield resort guests from the reasonably foreseeable risk of harm inherent in providing for them lounge chairs for use, that guests may freely move about, and that are susceptible to general wear and tear such as the gradual loosening of bolts, screws, or other fasteners of readily apparent structural significance.⁷

In this case, as in *Machado*, although Plaintiff has provided no evidence that Defendant had actual notice of the risk of harm to Plaintiff, sufficient evidence exists in the record to permit an inference that Defendant had constructive notice of the potential risk of harm. Specifically, the record supports an inference that Defendant should have known that providing such chairs for use by guests would lead to ordinary wear and tear which, over a sufficiently lengthy period of time, could lead to structural failure of the chairs, and in turn, injury to guests. In this light, genuine issues of material fact exist with respect to whether the risk of harm to Plaintiff was reasonably

⁷ Defendant argues that any evidence tending to show that the mechanical failure of the chair resulted from a failure on the part of Defendant to adequately inspect and maintain the structural stability of the chairs should not be considered as it is a theory derived from and dependent upon the expert opinion and report of Steve Belmonte. As Plaintiff originally disclosed Belmonte as an expert witness, but subsequently withdrew her expert disclosure, Defendant argues that any evidence related to this theory of the case should not be considered by the Court. *See* Response, at ¶ 22. While expert testimony may well aid Plaintiff in persuading a trier of fact of the credibility of this theory, the Court finds that the general principles of every-day mechanics at the heart of this theory—that nuts, bolts, and screws may come loose over time and require periodic tightening, and that chairs may collapse if their legs are not properly and securely fastened—are not so far afield from the realm of ordinary human experience as to be incomprehensible to jurors without the assistance of an expert. Jurors may conclude solely on the basis of the evidence of record discussed above—particularly the deposition testimony of Mr. and Mrs. McGary—that Carambola breached its duty to protect Plaintiff from a reasonably foreseeable risk of harm by failing to adequately inspect and maintain the structural stability of lounge chairs provided for guest use. The Court expresses no opinion on the admissibility of the expert opinions of Steve Belmonte as no formal motion has been made, the issue has not been fully briefed and, in any event, it is immaterial to the Court’s decision herein.

foreseeable to Defendant such that Defendant was obligated to take reasonable steps to guard against it and, if so, what those reasonable steps might entail.

Conclusion

Because Plaintiff has not demonstrated that her failure to move for an extension of time prior to the expiration of the deadline for submitting her Opposition was the result of excusable neglect, Plaintiff's Motion for Extension of Time will be denied. Nonetheless, in accordance with the mandate established by the Supreme Court of the Virgin Islands in *Vanterpool*, the Superior Court may not simply accept Defendant's characterization of the facts, but must independently evaluate all evidence of record to satisfy itself that no genuine issue of material fact exists before granting summary judgment. Here, evaluating all evidence in the light most favorable to Plaintiff, the non-moving party, a dispute of material fact exists as to whether the risk of harm to Plaintiff was reasonably foreseeable to Defendant such that Defendant was obligated to take reasonable steps to guard against it. Therefore, Defendant's Motion for Summary Judgment will be denied.

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Plaintiff's Motion for Extension of Time is DENIED. It is further

ORDERED that Defendant's Motion for a Ruling on its Unopposed Motion for Summary Judgment and for Sanctions is DENIED. It is further

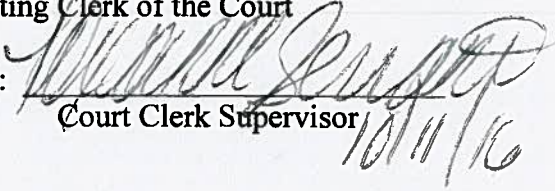
ORDERED that Defendant's Motion for Summary Judgment is DENIED.

Dated: October 7, 2016.


DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor 10/11/16

CERTIFIED A TRUE COPY

DATE: Oct 11, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: 
COURT CLERK

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:)
) MISC NO. DAB 011/2018
ORDER DESIGNATING CERTAIN)
OPINIONS FOR PUBLICATION.)

**TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw**

ORDER

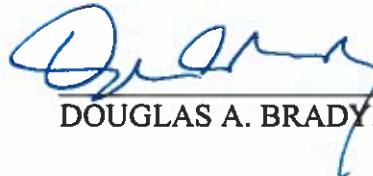
THE PREMISES considered, it is hereby

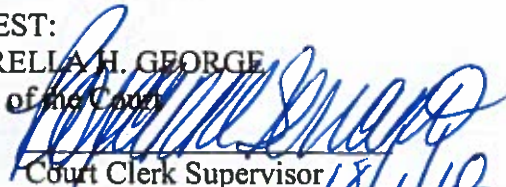
ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyouthe v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned matters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.


DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: 
Court Clerk Supervisor 10/1/18