

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

WALTER GARDINER, M.D.,	)	
Plaintiff,	)	
v.	)	
	)	
VIRGIN ISLANDS HOSPITALS AND	)	CIVIL NO SX-14-CV-112
HEALTH FACILITIES CORPORATION;	)	
LYNNE MILLIN MADURO, in her capacity as	)	
chairperson of the corporation; ST CROIX	)	
DISTRICT GOVERNING BOARD;	)	ACTION FOR WRONGFUL
ANTHONY RICKETTS, M.D., in his capacity	)	TERMINATION AND BREACH OF
as chairperson of the board; THE GOVERNOR	)	CONTRACT
JUAN F. LUIS HOSPITAL AND MEDICAL	)	
CENTER; KENDALL GRIFFITH, M.D., in his	)	
capacity as Chief Executive Officer of the	)	
Hospital; and JOHN DOES 1-10,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court for a hearing on September 13, 2016 on Motion to Dismiss, filed by Defendant Virgin Islands Government Hospitals and Health Facilities Corporation (VIGHHFC) on September 19, 2014. Plaintiff Walter Gardiner, M.D.'s Opposition was filed October 20, 2014; and VIGHHFC's Reply was filed November 17, 2014. By filings both entitled "Motion for Judgment on the Pleadings," filed May 12, 2016 and May 13, 2016 respectively, Defendants Governor Juan F. Luis Hospital and Medical Center (JFL) and Kendall Griffith, M.D., and Defendants St. Croix Governing Board of Directors (Board) and Anthony Ricketts, M.D. joined in the Motion to Dismiss. Neither Plaintiff nor counsel of record for Plaintiff appeared at the hearing or otherwise notified the Court. For the reasons that follow, the Motion to Dismiss will be granted.

Background

Defendants seek dismissal of this action, alleging that the Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and for reason that Plaintiff has failed to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). The action stems from the termination of Plaintiff's hospital privileges and his termination as a Staff Physician II at JFL on

February 29, 2012. Complaint ¶¶ 11, 21, 25.¹ Plaintiff alleges that he was a regular, classified, non-exempt employee of the Government of the Virgin Islands and that as a condition of his employment, he had to obtain medical privileges from the Board to work at JFL. *Id.* ¶¶ 22, 23. Plaintiff states that he was granted a temporary restraining order by the Superior Court of the Virgin Islands to prevent his termination. *Id.* ¶ 26. However, on April 13, 2012, Superior Court Judge Darryl Donohue denied Plaintiff's request to extend the injunctive relief. *Id.* at ¶ 27. Plaintiff alleges that he has exhausted his administrative remedies by requesting a "fair hearing" that took place on June 7, 2012, and then by requesting an appeal. *Id.* ¶¶ 11-13, 28-32. Plaintiff alleges that "On or about August 8, 2012, Plaintiff timely delivered a notice of appeal to the Chief Executive Officer of the Hospital and receipt of the same was acknowledged." *Id.* ¶ 33. Plaintiff alleges that "the CEO continued to communicate with him about the status of his appeal until May 15, 2013 when the new CEO, Kendall M. Griffith, M.D., responded that Plaintiff's undersigned attorney 'will receive a written report of the Appellate Review Body's deliberations and decision in due course.'" *Id.* ¶ 34.

Plaintiff alleges that as of the date of the filing of his Complaint, he had not been provided with a decision of the appeal panel, yet on January 17, 2014, counsel for JFL stated regarding a related case that "Dr. Gardiner did not appeal the Appellate Panel decision to the Superior Court," implying that although a copy had not been provided to Plaintiff, the panel had made its decision, which was not in Plaintiff's favor. *Id.* ¶¶ 14-16, 35. Plaintiff alleges three counts: Count I: Wrongful Termination; Count II: Breach of Contract; Count III: Civil Conspiracy. *Id.* ¶¶ 75-88.

Legal Standard

Despite the fact that the motions of Defendants JFL and Griffith and of Defendants Board and Ricketts are labeled as motions for judgment on the pleadings filed pursuant to Fed. R. Civ. P. 12(c), both motions provide no substantive argument or analysis, but rather simply join in VIGHHFC's Motion to Dismiss. As such, the Court treats the pending motions as motions to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state

¹ Plaintiff has filed at least two prior actions relating to his termination from JFL: Case No. SX-12-CV-084, styled Action for an Injunction, Declaratory Relief and Damages; and Case No. SX-12-CV-277, Petition for Writ of Review. According to the Court's electronic docket, the former action appears to remain open, the last substantive activity being Plaintiff's counsel's Motion to Withdraw, filed December 31, 2014. The latter was closed by the Court's Order entered September 23, 2013, granting the Petition for Writ of Review, remanding the matter to the Public Employees Relations Board for evidentiary hearing on the merits of Petitioner's claims.

a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).² See *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611-612 (V.I. 2012) (holding that the substance of a motion, and not its caption, shall determine under which rule that motion is construed).

Failure to State a Claim

The Supreme Court of the Virgin Islands has articulated a three-prong analysis in reviewing motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6):

First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. 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 of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

Joseph v. Bureau of Corrections, 54 V.I. 645, 649-650 (V.I. 2011) (internal quotations and citations omitted); see also *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471-472 (V.I. 2013).

Subject Matter Jurisdiction

In *Martinez v. Colombian Emeralds, Inc.*, the Supreme Court of the Virgin Islands implicitly endorsed the Third Circuit's framework for evaluating challenges to subject matter jurisdiction under Rule 12(b)(1). 51 V.I. 174, 188 (V.I. 2009) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891-92 (3d Cir. 1977)). Under this framework, a court must first determine whether the 12(b)(1) challenge is facial or factual in nature; that is to say whether the motion to dismiss is based purely upon the sufficiency of the allegations in the complaint or also upon additional facts and evidence.³ *Mortensen*, 549 F.2d at 891-92.

Here, the Court considers Defendants' Motion as a facial attack since, although Defendants filed answers prior to filing the Motion to Dismiss and the parties have had the opportunity to conduct discovery, no party has submitted any facts in the discovery record, but rather base their

² The Motion to Dismiss also seeks dismissal for insufficient service of process on Defendant VIGHHFC pursuant to Fed. R. Civ. P. 12(b)(4), based upon failure to comply with Fed. R. Civ. P. 4(j), applicable per Super. Ct. R. 27(b). Motion, at 3. As the case will be dismissed for other reasons, this argument is not addressed.

³ This distinction is critical. While facial challenges to subject matter jurisdiction under Rule 12(b)(1) are subject to essentially the same standard of review as Rule 12(b)(6) motions and require the Court to accept all well pleaded allegations as true, factual challenges require the Court to evaluate all evidence presented in the record. See *Martinez*, 51 V.I. at 188 (citing *Mortensen*, 549 F.2d at 891-92).

arguments solely upon the allegations of Plaintiff's Complaint. *See James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, at *8 (V.I. Super. Ct. 2015) ("Defendants filed their motions to dismiss prior to filing an answer. Thus, the Court will consider Defendants' motion to dismiss for lack of subject matter jurisdiction as a facial attack").

Discussion

Count I: Wrongful Discharge

Defendants argue that because Plaintiff was a public employee, he is not entitled to statutory relief under the Virgin Islands Wrongful Discharge Act (WDA). Motion, at 2. In his Opposition, Plaintiff simply recites the allegations of his Complaint, stating "That a case and controversy exists is crystal clear. That DR. GARDINER is the proper party with standing to sue is equally clear as he was the terminated employee." Opposition, at 5 (emphasis in original). Plaintiff does not cite any relevant law or facts in the record to support any of his assertions, but simply restates the allegations of his Complaint. *See id.* at 6-7.

The WDA is codified in 24 V.I.C. § 76.⁴ The WDA provides no remedy for claims against a public employer. 24 V.I.C. § 62.⁵ "Public employer" is defined in 24 V.I. Code Chapter 14 as:

⁴ Title 24 V.I.C. § 76 states:

- (a) Unless modified by union contract, an employer may dismiss any employee:
 - (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
 - (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
 - (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
 - (4) who willfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
 - (5) who performs his work assignments in a negligent manner;
 - (6) whose continuous absences from his place of employment affect the interests of his employer;
 - (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
 - (8) who is dishonest; or
 - (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.
- (b) The Commissioner may by rule or regulation adopt additional grounds for discharge of an employee not inconsistent with the provisions enumerated in subsection (a) of this section.
- (c) Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged; however, nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protected by this title.

⁵ "As used in this chapter... 'employer' includes any person acting in the interest of an employer, directly or indirectly, but not a 'public employer' as defined in chapter 14 of this title."

the executive branch of the *Government of the Virgin Islands and any agency or instrumentality thereof including, but not limited to*, the Virgin Islands Port Authority, the Virgin Islands Water and Power Authority, the Virgin Islands Housing Authority, the University of the Virgin Islands, the Economic Development Bank and the Virgin Islands Public Broadcasting System.

24 V.I.C. § 362(i) (emphasis added).

Although VIGHHFC and JFL are not explicitly listed as a public employer in the Title 24 definitions, Chapter 16 of Title 19 of the V.I. Code created VIGHHFC:

There is hereby created the Virgin Islands Government Hospitals and Health Facilities Corporation. The corporation is a body corporate and politic constituting a public benefit corporation of the Government of the Virgin Islands.

19 V.I.C. § 243(a).

The VIGHHFC is administered by a Board of Directors and two district governing boards, including one for the District of St. Croix. 19 V.I.C. §§ 243 (b), (g). The corporation has the power to “manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government.” 19 V.I.C. § 244(e). Further, it is a specified duty of the corporation “to operate the hospitals and health care facilities under its jurisdiction in accordance with guidelines established by the Joint Commission on Accreditation of Healthcare Organizations.” 19 V.I.C. § 246(d); *See also Titan Med. Group v. Governor Juan F. Luis Hosp. & Med. Ctr.*, 2015 V.I. LEXIS 79, *9-10 (V.I. Super. Ct. July 14, 2015) (finding that a suit against JFL is a suit against the Government of the Virgin Islands and that VIGHHFC is merely a management arm of JFL in partnership with the Government) (citing *Hospital Resource Management, L. C. v. Governor Juan F. Luis Hospital & Medical Center, et al.*, Civil No. 2003-0056, slip opinion June 7, 2004 (D.V.I. 2004); *Doolin v. Kasin*, 424 Fed. Appx. 106, 110 (3d Cir. 2011)).⁶

⁶ By his Opposition (at 12), Plaintiff claims that he “never claimed to bring his action pursuant to the Virgin Islands Wrongful Discharge Act and the CORPORATION’S arguments regarding the Act are irrelevant.”

However, no common law action for wrongful discharge exists in the Virgin Islands. Absent a statute or specific contractual provision to the contrary, Plaintiff is presumed to be an at-will employee. The Superior Court has addressed at-will employment termination claims:

[A]bsent a different interpretation by the Supreme Court of the Virgin Islands, the Superior Court is required to follow prior interpretations of local law issued by the Third Circuit Court of Appeals and the Appellate Division of the District Court. In 2014, the Third Circuit stated that an at-will employee is an individual whose employment could be terminated at any time, without cause, as long as the termination does not violate the Virgin Islands Wrongful Discharge Act. ... Therefore, as an at-will employee, Edwards could be terminated at any time for any or even no reason.

Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc., 2015 V.I. LEXIS 13, *6 (V.I. Super. 2015), citations omitted.

Plaintiff does not differentiate among the Defendants, but generally alleges all counts against all Defendants. Although Plaintiff fails to allege by which Defendant he was employed, it is unnecessary to make that determination here. As to the Defendant entities, JFL, VIGHHFC and the Board, all are considered public employers. As public employers, these Defendants are expressly exempted from the provisions of the WDA. *See Chapman v. Cornwall*, 58 V.I. 431, 443 (V.I. 2013) (finding that 29 V.I.C. § 496(a) defined the Virgin Islands Waste Management Authority as “an autonomous instrumentality of the Government of the Virgin Islands”) (citing *Frorup-Alie v. V.I. Hous. Fin. Auth.*, Civ. No. 2000-0086, 2003 U.S. Dist. LEXIS 25395, at *18 (D.V.I. 2003) (declaring that public employers are exempt from 24 V.I.C. § 76); *cf. Smith v. V.I. Water & Power Auth.*, Civ. No. 04-148, 2008 U.S. Dist. LEXIS 95852, at *26 (D.V.I. 2008) (holding that no common law action for wrongful discharge based on public policy existed where plaintiff was unable to state a claim under the Wrongful Discharge Act because her employer was a “public employer”); *Hansen v. Gov. Juan F. Luis Hosp. & Med. Ctr.*, 2016 V.I. LEXIS 88, *4 (V.I. Super. Ct. 2016) (stating that plaintiff employee of JFL “may not be entitled to invoke the Wrongful Discharge Act”). By the terms of the Act, as confirmed by case law, Plaintiff may not maintain an action against the Defendant entities under the WDA.

Concerning Plaintiff’s claims against the Defendants VIGHHFC Chair Millin Maduro, JFL CEO Griffith, and Board Chair Ricketts, the Supreme Court’s determination in an action against the V.I. Waste Management Authority is controlling:

Moreover, even if we were to assume — without deciding — that a public employee may pursue a wrongful discharge claim against a supervisor in her individual capacity [in this case, plaintiff named May Adams Cornwall, VIWMA’s Executive Director as a defendant], we agree with the Superior Court that Cornwall is also entitled to qualified immunity from tort liability. Under section 497(d), “[t]he Board and its individual members, and the officers, agents or employees of the Authority, shall not incur civil liability for any action taken in good faith in the performance of their duties and responsibilities pursuant to the provisions of this chapter.” 29 V.I.C. § 497(d). Moreover, the “directors, officers, and employees [of VIWMA] shall be immune from tort liability for acts and omissions constituting the exercise of their official functions” 29 V.I.C. § 496(d).

Chapman, 58 V.I. at 443.

Here, VIGHHFC Chair Millin Maduro, JFL CEO Griffith and Board Chair Ricketts are similarly entitled to qualified immunity for actions they took while they were employed and acting in furtherance of their duties and responsibilities as employees of the Government of the Virgin Islands. Title 19 V.I.C. § 248(a) provides: “Members of the Board, committees and employees of

the hospital while acting within the scope of their authority as directors, officers, committee members or employees shall not be subject to any personal or civil liability resulting from the exercise of any of the corporation's purposes, duties or responsibilities, unless such conduct is determined by a Court of competent jurisdiction to constitute willful wrongdoing, gross negligence or reckless disregard."

Plaintiff has not asserted that the acts of any individual Defendant constituted willful wrongdoing, gross negligence, or reckless disregard or that such acts were outside their duties and responsibilities in their respective public capacities.

Since Plaintiff cannot assert a claim under the WDA, since the Virgin Islands does not recognize a common law claim for wrongful discharge, and since the individual Defendants are immune from liability, Defendants' Motion to Dismiss for failure to state a claim must be granted as to all Defendants. Accordingly, Count I of Plaintiff's Complaint will be dismissed.

Count II: Breach of Contract

To succeed on a breach of contract claim, a plaintiff must show the existence of: (1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages. *Molloy v. Gov't of the V.I. & Dep't of Educ.*, 2016 V.I. LEXIS 76, *11 (V.I. Super Ct. 2016) (citing *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134-35 (V.I. 2009)); *see also Pollara v. Chateau St. Croix, LLC*, 58 V.I. at 473; *Rainey v. Hermon*, 55 V.I. 875, 881 (V.I. 2011).

Defendants contend that since Plaintiff was a "regular, classified" employee of the government, he was by statute not a contract employee. Without a contract, Defendants claim that Plaintiff's claim for breach of contract cannot survive. Motion, at 2-3.

Without referencing a specific contract or contractual provisions, Plaintiff alleges that he has been deprived of a property interest without due process, that Defendants' actions were unfounded and unsupported by credible evidence, that Defendants' actions were arbitrary and capricious, that Plaintiff did not have the opportunity to confront or examine the evidence and witnesses against him, and that Defendants "acted on the recommendation of another body, subordinate to the Defendants – the Medical Executive Committee – which body failed and refused to provide ANY notice to Plaintiff or ANY opportunity to be heard when it considered action against the Plaintiff that the Defendants adopted in terminating the Plaintiff." Complaint ¶¶ 36-42 (emphasis in original).

In his Opposition, Plaintiff argues:

The employment contract was, as Plaintiff clearly alleged in ¶ 76, the contracts, rules, bylaws, promises, and other documents that comprised an employment contract. The Medical Staff bylaws are part of the contract. The Juan F. Luis Employee Handbook is part of the contract....

As a permanent classified employee of the Government of the Virgin Islands, subject to negotiated agreements including collective bargaining agreement, and protected for discharge as in an at-will employment situation, and guaranteed due process before discharge, DR. GARDINER has the full panoply of rights provided by an employment contract.

Opposition, at 12 (emphasis in original).

The foregoing reference to Plaintiff being subject to a collective bargaining agreement is asserted for the first time in his Opposition. No such allegation is asserted in his Complaint, nor is any proof of such status otherwise presented.

Plaintiff's Complaint refers to no specific documents that constitute an employment agreement. While Plaintiff may allege contradictory theories of liability and he is not required to allege "detailed factual allegations" in order to survive a motion to dismiss, the complaint "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"A well-pleaded Complaint may proceed" even where "actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Pollara*, 58 V.I. at 472 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). However, "[i]t is not enough that there is a mere possibility" that one or more of the Defendants entered into an employment agreement with Plaintiff and subsequently breached that agreement." *Cintron v. Polston*, 62 V.I. 144, 150 (V.I. Super. Ct. 2015) (citing *Jones v. L.S. Holdings, Inc.*, 53 V.I. 48, 55 (V.I. Super. Ct. 2010)); see also *Canton v. Gov't of the V.I.*, 2016 V.I. LEXIS 31, at *13 (V.I. Super. Ct. 2016).

Plaintiff's allegations of the existence of a contract are as follows: "Plaintiff was employed by the Defendants pursuant to contracts, rules, bylaws, promises and other documents comprising an employment contract." Complaint ¶ 76. No terms of the substance of "an employment contract" are set forth, except as follows: "The employment contract entitled the Plaintiff to salary, benefits and other compensation." *Id.* ¶ 77.

Despite several years of litigation, Plaintiff has not produced any documentation to support the Complaint's conclusory allegations that a contract or employment agreement did indeed exist between Plaintiff and Defendants. Plaintiff's Opposition references "the Hospital's Employee

Handbook” and the “Medical Staff Bylaws,” but fails to cite or quote any provisions to support his assertions that these terms formed or were a part of an employment agreement that created a duty that was subsequently breached by Defendants’ actions.⁷

The Court’s inquiry does not delve into the other elements of a breach of contract claim, since Plaintiff has failed to plausibly allege the existence of an employment agreement that established duties that Defendants allegedly breached. Plaintiff’s breach of contract claim “must be dismissed because Plaintiff has failed to allege sufficient facts to ‘nudge’ his claim ‘across the line from conceivable to plausible.’” *Cintron*, 62 V.I. at 150 (citing *Jones*, 53 V.I. at 55; *Twombly*, 550 U.S. at 570)); *see, also, Canton v. Gov’t of the V.I.*, 2016 V.I. LEXIS 31, at *13. Therefore, the Court will grant Defendants’ Motion to Dismiss for failure to state a claim for breach of contract, and Count II of Plaintiff’s Complaint will be dismissed.

Count III: Civil Conspiracy

“Under the [Virgin Islands Tort Claims Act] VITCA, the Government waives its sovereign immunity from liability for actions involving loss of property, personal injury or death resulting from ‘the negligent or wrongful act or omission of an employee of the Government of the United States Virgin Islands.’” *Fleming v. Cruz*, 62 V.I. 702, 717 (V.I. 2015) (quoting 33 V.I.C. § 3408(a)). The VITCA requires that a party seeking to bring a tort claim against the Government must either file his claim in court or file a written notice of intent to file such a claim within ninety (90) days of accrual. 33 V.I.C. § 3409, *et seq.* If proper written notice is filed with both the Governor’s office and the Attorney General, the claimant is then allowed two years from the date of accrual to file his claim in court. *Id.* Late filings may be permitted if the claim was “filed within two years after the accrual of the cause of action, if reasonable excuse for late filing is shown, if the late filing does not cause substantial prejudice to the Government, and if the late filing contains the information required by 33 V.I.C. § 3410.” *Fleming*, 62 V.I. at 719.

⁷ Had Plaintiff proffered documents containing terms and conditions as evidence of the existence of an employment contract imposing duties on Defendants, matters outside the pleadings, it may have been proper to treat the Motion to Dismiss as one for summary judgment pursuant to Fed. R. Civ. P. 12(d). However, despite references to an employee handbook and bylaws and Notice of Personnel Action (*see* Opposition, at 13), no matters outside the pleadings have been presented, and the Motion may be determined pursuant to Rule 12(b)(6) jurisprudence. Without allegations of an agreement creating a specific duty that Defendants breached, the Court cannot find that the Complaint is sufficient to state a claim for breach of an employment agreement.

Defendants argue that the Court lacks subject matter jurisdiction to address Plaintiff's civil conspiracy claim because Plaintiff failed to follow the statutory pre-filing requirements of the VITCA as set forth in 33 V.I.C. § 3401-3416. Motion, at 3.

Although the Supreme Court of the Virgin Islands has repeatedly declined to decide whether the pre-filing requirements of the VITCA are jurisdictional, the Court did note in *Fleming* that it “has never endorsed this legal principle,” and that “[m]oreover, persuasive precedent exists which counsels otherwise.” 62 V.I. at 718 (internal citations omitted). However, in *Richardson v. Knud Hansen Mem'l Hosp.*, the Third Circuit—while sitting in its capacity as the *de facto* court of last resort in the Virgin Islands⁸ — 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 in nature and not subject to waiver. 744 F.2d 1007, 1009-10 (3d Cir. 1984). Therefore, despite the contrary *dicta* from the Supreme Court, this Court is bound by the Third Circuit's precedent in *Richardson*,⁹ and must consider challenges to the VITCA's pre-filing requirements as challenges to subject matter jurisdiction unless and until the Supreme Court of the Virgin Islands conclusively determines otherwise. *Accord, James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74.

Plaintiff does not address the issue of subject matter jurisdiction in his Opposition. Rather, he appears to abandon his claim for relief sought in Count III by suggesting that he has not pled a tort action:

The Corporation fails to recognize the action regardless of the use of the term ‘civil conspiracy’ in one of the three counts, is a simple breach of contract claim, with associated denial of due process, not a tort claim. The case concerns an employment contract that was breached. In that breaching of the contract, the defendants and other conspired together. This is not a tort action. There is no claim of pain and suffering or other damage not related to the breaking of a contract and the denial of due process affiliated with that breach. ...

The case concerns wrongful termination and breach of contract, including the retirement funding breach. The conspiracy only speaks to the breach of contract and the related denial of medical privileges. This is an appeal of the fair hearing and lack of due process. The Defendants invited the jurisdiction of the Court after

⁸ For a detailed description of the procedural background of *Richardson*, see *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, at *16.

⁹ See *Najawicz v. People of the V.I.*, 58 V.I. 315, 327-28 (V.I. 2013) (explaining that Third Circuit decisions in which that court was sitting as the “*de facto* court of last resort in the Virgin Islands” are binding upon the Superior Court even though they would only represent persuasive authority if the Supreme Court of the Virgin Islands were to consider the issue).

they required the Fair Hearing process where they submitted evidence and presented witnesses.

Opposition, at 10-11.

Plaintiff's Complaint fails to allege any attempt to comply with the procedural prerequisites of VITCA, which is vital to establishing this Court's subject matter jurisdiction over a tort claim of civil conspiracy against Government actors. In his Opposition, Plaintiff concedes that he has not asserted allegations to support a civil conspiracy tort claim, but that his allegations amount to "a simple breach of contract claim ... not a tort claim." Opposition, at 10. Accordingly, Plaintiff's Count III will be dismissed for lack of subject matter jurisdiction.

Amendment

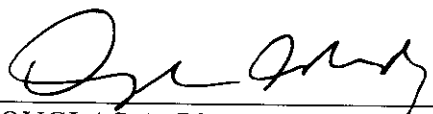
In his Opposition (at 2), Plaintiff argues that "[e]ven if a complaint is found to be lacking the plaintiff needs to be given an opportunity to amend the complaint to comply." Yet, Plaintiff has presented no proposed amended pleading nor filed a motion seeking leave to amend. He does not cite Superior Court Rule 8 that governs amendments to pleadings, but relies upon Federal and Local Rules of Civil Procedure and federal case law. As neither Plaintiff nor his counsel appeared at the September 13, 2016 hearing on Defendants' Motion to Dismiss to propose viable amendments that would set forth plausible claims consistent with local rules and binding case law, the Court declines to exercise its discretion to allow Plaintiff to amend his Complaint.

The Court having considered the premises, it is hereby:

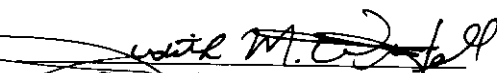
ORDERED that Defendants' Motion to Dismiss is GRANTED. It is further

ORDERED that Plaintiff's Complaint is DISMISSED with PREJUDICE.

DATED: October 4, 2016.


DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor
10/5/16