IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

VIAN TOUTOUYOUTE, Plaintiff,	)	CASE NO. SX-16-CV-457
v.	)	
ST. CROIX TRADING COMPANY, INC., and LUZ RODRIQUEZ, Defendants.	)	ACTION FOR BREACH OF CONTRACT, CONVERSION and DEFAMATION

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant St. Croix Trading Company, Inc. (St. Croix Trading)'s Motion to Dismiss (Motion), filed October 25, 2016. When Plaintiff failed to respond, the Court ordered that the matter come on for hearing on January 19, 2017, which hearing was continued to February 2, 2017. Plaintiff's counsel failed to appear at the hearing or to otherwise advise the Court. Four days later, by Notice to the Court and Opposing Counsel, filed February 6, 2017, counsel stated that he had been unable to attend the February 2 hearing, citing "an emergency at our law office" and "rotating power outages." By Order entered March 20, 2017, Plaintiff was ordered to show cause within ten days "why the Court should not rule on Defendant St. Croix Trading Co.'s Motion to Dismiss without response from Plaintiff." More than a year has passed and Plaintiff has failed to respond to St. Croix Trading's Motion, and has not sought leave to amend his Verified Complaint (Complaint) to address the claimed deficiencies. Neither has Plaintiff filed anything else or taken action of any type to prosecute his case. On April 30, 2018, Plaintiff filed a Notice of No Objection to Mediation.

This controversy arises from Plaintiff's agreement to build a porch on Defendant Luz Rodriquez's home. Complaint, ¶ f. Plaintiff alleges that he received a "down payment to secure materials and begin the construction," then "purchased materials from St. Croix Trading company and retained the receipt." *Id.* ¶¶ g-h. Defendant Rodriquez was unhappy with the way construction was proceeding and went to St. Croix Trading to discuss Plaintiff's work, at which time both Defendants allegedly exchanged then later spread false information ultimately impacting Plaintiff's income and damaging his professional reputation. *See id.* ¶¶ i-m.

Legal Standard

The Motion was filed prior to the March 31, 2017 effective date of the Virgin Islands Rules of Civil Procedure, and is based upon Fed. R. Civ. P. 12(b)(6), then applicable through Super. Ct. R. 7.[1] The Virgin Islands is a notice pleading jurisdiction which, following the adoption of the Virgin Islands Rules of Civil Procedure, determines the sufficiency of a plaintiff's complaint upon whether it "adequately alleges facts that put an accused party on notice of claims brought against it." *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, at *11, 12 (V.I. 2017) (citing V.I. R. Civ. P. 8(a)). Contrary to the former *Iqbal/Twombly* plausibility standard,[2] the new rule endorses "an approach that *declines* to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief." *Id.* (emphasis in original) (quoting V.I. R. Civ. P. 8, Reporter's Note). However, this more relaxed pleading standard does not completely preclude dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6). A complaint still must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." V.I. R. Civ. P. 8(a)(2).

In his Complaint, Plaintiff pleads three causes of action: 1) breach of contract, 2) conversion, and 3) defamation. The Complaint generally fails to distinguish between Defendants St. Croix Trading and Luz Rodriquez. A fair and deferential reading reveals no statement of Plaintiff's claims against St. Croix Trading sufficient to show "that the pleader is entitled to relief" on Counts I and II. As such, for the reasons set forth below, St. Croix Trading's Motion will be granted as to Counts I and II, and denied as to Count III.

Count I: Breach of Contract

To succeed on a breach of contract claim, a plaintiff must show four elements: "(1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages." *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 620 (V.I. 2017) (collecting cases). At the pleading stage as to his breach of contract claim against St. Croix Trading, Plaintiff's Complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," sufficient to put St.

[1] The Motion is nonetheless determined pursuant to V.I. R. Civ. P. 12(b)(6), as the Court makes no finding that its application in this case would be infeasible or work an injustice. *See* V.I. R. Civ. P. 1-1(c)(2).

[2] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Both decisions and the pleading standards articulated therein were explicitly endorsed and applied by the Supreme Court in *Brady v. Cintron*, 55 V.I. 802, 822-23 (V.I. 2011) and subsequent cases.

Croix Trading on notice of that claim against it. Because the Complaint fails to meet this notice pleading standard as to Count I, the breach of contract claim against St. Croix Trading will be dismissed.

All three counts of the Complaint are glaringly imprecise, failing to differentiate between Defendants. A liberal reading of the Complaint's breach of contract claim against St. Croix Trading includes the following:

> h. Plaintiff purchased materials from St. Croix Trading company and retained the receipt….
>
> k. As a result of the defendants actions they made a false report to the Department of Licensing and Consumer Affairs, tarnished plaintiff's name and breached the contract….
>
> COUNT I: BREACH OF CONTRACT BY DEFENDANTS
>
> n. Defendants breached its contract with Plaintiff by failing to pay him pursuant to the agreement.
>
> o. Defendants failed to acknowledge the work done and the time spent.
>
> p. As a direct and proximate result of defendants actions, Plaintiff has been damaged by the loss of income. Complaint, ¶¶ h, k, n-p.

The Complaint's only reference to a contractual agreement with St. Croix Trading states that "Plaintiff purchased materials from St. Croix Trading company and retained the receipt." *Id.* ¶ k. The Complaint does not allege that St. Croix Trading was a party to Defendant Rodriguez's "agreement with Plaintiff to do construction work on her home." *Id.* ¶ d. Imprecise references in the Complaint, e.g. "Plaintiff made an agreement with defendant to build a porch on her property" (*id.* ¶ f); and "Defendants [sic] breached its [sic] contract with Plaintiff" (*id.* ¶ n), necessarily relate only to the individual Defendant Rodriguez and not to St. Croix Trading. *See generally id.* ¶¶ a-p.

The Complaint's only allegation of contractual interaction between Plaintiff and St. Croix Trading describes Plaintiff's purchase of construction materials from St. Croix Trading, for which he "retained the receipt." *Id.* ¶ h. There is no claim that St. Croix Trading failed to deliver the materials or delivered defective materials or otherwise breached the construction materials purchase contract in any manner. Indeed, Plaintiff's receipt and retention of a receipt permits the inference that Plaintiff received satisfactory delivery of those materials.

As Plaintiff has not responded in opposition to the Motion and has not sought leave to amend the Complaint to address its deficiencies, the allegations of the Complaint as filed must stand for themselves. Even liberally construing the pleading in the light most favorable to Plaintiff as to his breach of contract claim against St. Croix Trading, Plaintiff has not presented "a short and plain statement of the claim showing that the pleader is entitled to relief" from St. Croix Trading, nor does the pleading "adequately allege facts that put an accused party on notice of claims brought against it." *Mills-Williams,* 2017 V.I. Supreme LEXIS 35, at *12 (citation omitted). Accordingly, Count I of Plaintiff's Complaint will be dismissed as to Defendant St. Croix Trading.

Count II: Conversion

Plaintiff further fails to "adequately allege facts that put an accused party on notice of claims brought against it" regarding his conversion claim against St. Croix Trading. Conversion in the Virgin Islands is defined as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Isaac v. Crichlow*, 63 V.I. 38, 59 (V.I. Super. 2015) (adopting RESTATEMENT (SECOND) OF TORTS § 222A following a thorough *Banks* analysis,[3] which the Court adopts here); *see also Ross v. Hodge*, 58 V.I. 292, 308 (V.I. 2013).[4]

By his Complaint, Plaintiff sets forth in full his conversion allegations against both Defendants, as follows:

> COUNT II: CONVERSION BY DEFENDANTS
>
> q. Defendants converted or contributed to the conversion of the funds legally due Plaintiff.
>
> r. Defendant St. Croix Trading, Inc. claimed that the plaintiff did not pay for the materials and retained the money that plaintiff had paid for the materials.
>
> s. As a direct and proximate result of the actions of Defendants, Plaintiff has been damaged. Complaint, ¶¶ q–s.

From the Complaint's allegations, it is not possible to discern any acts of St. Croix Trading that can be seen as "an intentional exercise of dominion or control over a chattel" of Plaintiff.

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[3] In the absence of statutory or binding case law precedent on a particular matter, the Superior Court possesses "the ability to shape the common law" of the Virgin Islands. *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 977-78 (V.I. 2011). A "*Banks* analysis" weighs "three non-dispositive factors" to determine Virgin Islands common law: "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014) (quoting *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013)).

[4] Although decided after *Banks* and *Connor*, the Supreme Court in *Ross* did not conduct a *Banks* analysis, but rather "automatically and mechanistically follow[ed] the Restatements" (*Banks*, 55 V.I. at 979) to determine the elements of conversion in Virgin Islands law.

Plaintiff pleads only with regard to this Defendant that he "purchased materials from St. Croix Trading company and retained the receipt," with which materials he subsequently "began construction" on Defendant Rodriquez's porch. *Id.* ¶¶ h.-i. That is, Plaintiff paid for and received from St. Croix Trading construction materials not alleged to be defective or incomplete. From the Complaint's description of the transaction between Plaintiff and St. Croix Trading, or otherwise, there is no plain statement of any claim that St. Croix Trading owes money to Plaintiff or in any manner intentionally exercised dominion or control over any chattel of Plaintiff or of "the funds legally due Plaintiff." *Id.* ¶ q. The only funds allegedly legally due Plaintiff were funds claimed due from Defendant Rodriguez for the construction project that she allegedly refused to pay. *See id.* ¶ n ("Defendants breached its contract with Plaintiff to pay him pursuant to the agreement.").

Plaintiff's only relationship with St. Croix Trading alleged in his Complaint involved the agreed payment for and delivery of construction materials. No claim is presented that St. Croix Trading retained materials for which Plaintiff had paid, or otherwise controlled money or property properly due Plaintiff. As such, construing the pleadings in the light most favorable to Plaintiff, the Complaint fails to "adequately allege facts that put an accused party on notice of claims brought against it." *Mills-Williams,* 2017 V.I. Supreme LEXIS 35, at *12 (citation omitted). Accordingly, Count II of Plaintiff's Complaint must be dismissed as to Defendant St. Croix Trading.

Count III: Defamation

Plaintiff has pled sufficient facts to put St. Croix Trading on notice of the defamation claim against it. "In the Virgin Islands, a claim of defamation requires: '(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'" *Kendall v. Daily News Pub. Co.,* 55 V.I. 781, 787 (V.I. 2011) (quoting RESTATEMENT (SECOND) OF TORTS § 558).[5]

St. Croix Trading argues that Plaintiff's pleading is deficient, citing a District Court of the Virgin Islands case, claiming that "a complaint must 'specifically identify what allegedly

[5] The elements of a defamation claim as set out in *Kendall* were adopted in *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 586-87 n.10 (V.I. 2012), wherein the Supreme Court applied the three non-dispositive *Banks* factors, and saw no reason to depart from its decision in *Kendall,* which followed the approach set forth in the Restatement (Second) of Torts.

defamatory statements were made by whom and to whom.'" Motion, at 6 (quoting *Manns v. Leather Shop Inc.*, 36 V.I. 214, 218 (D.V.I. 1997) ("An allegation of defamation in a complaint is subject to a more stringent standard of pleading under Rule 8 than is usually the case.... A complaint of defamation must, on its face, specifically identify what allegedly defamatory statements were made by whom and to whom.") (Internal citations omitted.)

This more stringent standard for defamation claims is inconsistent with binding precedent and current Virgin Islands law. St. Croix Trading's claim is "without merit, because it effectively suggests that Plaintiff's defamation claim is subject to the heightened pleading requirements of [V.I. R. Civ. P. 9], which requires a party to state with particularity the circumstances surrounding the alleged tort." *Bizni, LLC v. Olive,* 2015 V.I. LEXIS 57, at *4 (V.I. Super. 2015). Defamation is not included within the causes of action subject to the heightened pleading standard of Rule 9, and thus a complaint must only comply with general pleading requirement of Rule 8(a)(2) that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

While Plaintiff's Complaint does not specifically identify what allegedly defamatory statements were made by whom, to whom and when, St. Croix Trading is put on notice of the alleged defamation by the assertion that "St. Croix Trading, Inc. falsely claimed that plaintiff did not pay for the materials." Complaint, ¶ l. On notice generally as to the content of the allegedly defamatory communications, St. Croix Trading may determine the specifics of such statements in discovery.

Construing the Complaint in the light most favorable to Plaintiff, Plaintiff alleges that St. Croix Trading knowingly made a false statement to Luz Rodriquez, to Department of Licensing and Consumer Affairs, and perhaps to others concerning Plaintiff's nonpayment for materials. *Id.* ¶¶ k-m, r, u-v. The Complaint further alleges that St. Croix Trading's defamatory statements were made knowingly (*id.* ¶v), and that Plaintiff was harmed as a result of such defamation. *Id.* ¶¶ m, x, y. By his allegations of these facts, Plaintiff has sufficiently put St. Croix Trading on notice of all of the elements of his defamation claim. Therefore, St. Croix Trading's Motion will be denied with respect to Count III of the Complaint.

On the basis of the foregoing, it is hereby

ORDERED that Defendant St. Croix Trading Company, Inc.'s Motion to Dismiss is GRANTED as to Counts I and II and DENIED as to Count III. It is further

ORDERED that Counts I and II of Plaintiff's Verified Complaint are DISMISSED without prejudice with regard to Defendant St. Croix Trading Company, Inc. It is further

ORDERED that the parties shall meet and confer within 21 days of the date of entry of this Order, pursuant to V.I. R. Civ. P. 26(f), and shall consider, among other things, (1) the nature and basis of the claims of Plaintiff and the defenses of Defendants (and the claims of Defendant Rodriguez on her Counterclaim and the defenses of Plaintiff as to the same); (2) the possibilities for promptly settling or otherwise resolving the case; (3) making or arranging for the disclosures required by V.I. R. Civ. P 26(a)(1); (4) any issues relating to preservation of discoverable information; and (5) development of a proposed discovery plan. Each party is jointly responsible for arranging the conference and for attempting in good faith to agree on the proposed discovery plan, to include the date by which mediation will be concluded, and the date by which the case may be scheduled for trial, no later than the end of this calendar year. Each party is also jointly responsible for submitting to the Court a written report outlining the parties' discovery plan and proposed joint scheduling order, to be filed no later than 30 days from the date of entry of this Order.

DATED: May 31, 2018.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

~~By:~~
Court Clerk Supervisor
6/1/18

Distribution List:
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SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:	)
	) **MISC NO. DAB 012/2018**
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;
Toutouyoute 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 maters, 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