

CATMAC, INC.,

Plaintiff,

vs.

BALTHAZAR MANAGEMENT
VIRGIN ISLANDS, LLC, JOSEPH CIRIGLIANO,
KARENA KEFALAS, AND NICOLE KEFALAS,

Defendants.

Pending before the Court is Plaintiff's Motion to Dismiss Defendants' Counterclaim for Declaratory Judgment. For the following reasons, Plaintiff's Motion will be granted.

This matter arises out of a Complaint Catmac, Inc., filed January 24, 2017, against Defendants alleging breach of contract. On December 12, 2012, Catmac, Inc., sold to Balthazar Management Virgin Islands, LLC, the business and assets of Beach Café¹ for \$1.8 million.² The sale was governed by (1) an Asset Purchase Agreement providing that a portion of the purchase would be funded by two promissory notes,³ (2) a Personal Guarantee for the payment of those notes,⁴ (3) a Lease Agreement between the Landlord and Balthazar executed on March 18, 2013, (“2013 Lease”),⁵ and most significantly with respect to the instant motion, (4) a Miscellaneous Items Agreement providing that Catmac would agree to pay fifty percent of the assignment fee

² *Id.*

⁴ *Id.* at ¶ 18. On March 18, 2013, Joseph Cirigliano, Karena Kefalas, and Nicole Kefalas personally guaranteed the payment of the notes with regard to the Asset Purchase Agreement and its Amendment dated March 1, 2013.

⁵ *Id.* at ¶ 21. The lease was executed on March 18, 2013, between Wharfside Village Limited Partnership as Landlord and Balthazar as Tenant.

imposed by the Landlord under Section 10.01 of the 2013 Lease in the event that Balthazar assigned or otherwise transferred the lease within five years of closing.⁶

Under the 2013 Lease, Defendants rented spaces numbers “1” and “1A”, comprising 1,100 square feet, for a base rent of \$8,552.61.⁷ On November 19, 2014, all Defendants signed a new lease with the same Landlord (“2014 Lease”), expanding Defendants’ rented space to 1,913.25 square feet, designated as spaces numbers “1”, “1A”, and “2”, for a base rent of \$13,381.54.⁸ The 2014 Lease contained a Section 10.01, identical to its counterpart in the 2013 Lease, requiring that the Tenant pay the Landlord a processing fee of fifteen percent of the gross sale price, provided the conditions for a transfer were met.⁹ The 2014 Lease superseded and cancelled the 2013 Lease, and Catmac was not privy to the 2014 Lease.¹⁰

In October 2016, Balthazar sold Beach Café for \$2.64 million,¹¹ and consequently, the Landlord required in writing that Balthazar pay a transfer fee of \$400,000.00¹² with respect to the 2014 Lease.¹³ Further, because Balthazar owed Catmac \$372,412.56 on the March 18, 2013, promissory note, including principal and interest,¹⁴ in a letter dated October 31, 2016, Balthazar proposed to Catmac that Balthazar would pay Catmac \$72,412.56, on the basis that Catmac was

⁶ *Id.* at ¶ 21. *See also* Exhibit E.

⁷ *Id.* at ¶ 21 and Exhibit F, page 1

⁸ *Id.* at ¶ 27 and Exhibit G, pgs. 1-2.

⁹ *Id.* at ¶¶ 25-26, and 29. *See also* Exhibit G [2014 Lease], Article 10, Section 10.01. *See also* Complaint, Exhibit F [2013 Lease], Article 10, Section 10.01.

¹⁰ *Id.* at ¶¶ 28, 30.

¹¹ *Id.* at ¶ 31. \$2.64 million was the gross sale price.

¹² The Landlord states in its letter to Balthazar that a processing fee for the transfer is due in the amount of \$400,000.00. Further, the Landlord’s letter references the 2014 Lease and does not mention the 2013 Lease (*see* Complaint, Exhibit I (“This letter makes reference to that certain Wharfside Village Lease by and between Wharfside Village Limited Partnership (“Original Landlord”) and Balthazar Management of the Virgin Islands, LLC (“Tenant”) dated November 19, 2014, as amended by First Amendment to Lease dated August 25, 2015 (collectively, the “Lease”) with respect to Spaces 1, 1A, and 2 at Wharfside Village, Parcel 4A”)).

¹³ Complaint ¶ 32 and Exhibit I.

¹⁴ Complaint, Exhibit J.

responsible for what Balthazar indicated as, “Catmac payment of Transaction Assignment Fee” in the amount of \$300,000.00.¹⁵ Nowhere in the letter did Balthazar reference a contractual provision or otherwise explain why Catmac would be responsible for a \$300,000.00 fee.

Catmac seeks damages in the amount of \$371,436.34, plus interest and attorneys’ fees, with respect to the terms of the March 18, 2013, promissory note¹⁶ and appears to reject Balthazar’s proposal that Catmac pay \$300,000.00 with respect to Balthazar’s 2016 sale of Beach Café.¹⁷ Balthazar filed an Answer and Counterclaim on February 21, 2017, seeking a declaratory judgment “that Catmac is obligated to pay the fifty percent (50%) transfer fee paid to the landlord and setting that amount in a sum certain.”¹⁸ In response, Catmac filed the instant Motion to Dismiss Defendants’ Counterclaim for Declaratory Judgment on March 8, 2017.¹⁹

STANDARDS

The Superior Court has jurisdiction over civil actions under 4 V.I.C. §76(a).²⁰ Under Rule 12(b)(6) of the Virgin Islands Rules of Civil Procedure, a party may test the sufficiency of the pleadings against preliminary defenses by seeking dismissal for an opposing party’s “failure to state a claim upon which relief can be granted.”²¹ In considering a motion to dismiss based on failure to state a claim upon which relief can be granted, a court must view all factual allegations

¹⁵ *Id.*

¹⁶ *Id.*, page 8.

¹⁷ See Complaint, ¶¶ 31-41.

¹⁸ Defendants’ Answer & Counterclaims, page 4.

¹⁹ Subsequently, Defendants filed an Opposition to Motion to Dismiss Defendants’ Counterclaim for Declaratory Judgment on April 3, 2017, to which Plaintiffs filed a Reply to Defendants Opposition to Motion to Dismiss Defendants’ Counterclaim for Declaratory Judgment on April 19, 2017.

²⁰ 4 V.I.C. § 76(a) provides, in pertinent part: “Subject to the original jurisdiction conferred on the District Court by section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy.”

²¹ Prior to the promulgation of the Virgin Islands Rules of Civil Procedure, the Supreme Court of the Virgin Islands applied FED. R. CIV. P. 12(b)(6) when considering motions to dismiss for failure to state a claim upon which relief can be granted. See *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-650 (V.I. 2011).

in the pleading as true and must construe the pleading liberally.²² In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the issue is not whether a party will ultimately prevail but whether the party is entitled to offer evidence to support the claim.²³ A motion to dismiss for failure to state a claim upon which relief can be granted does not address the merits of the claim but merely tests whether the claim has been adequately stated in the pleading.²⁴ In considering whether a pleading should be dismissed for failure to state a claim upon which relief can be granted, a court must accept all well-pled allegations in the pleading as true and view them in the light most favorable to the pleader.²⁵ According to the three-pronged analysis employed by the Supreme Court of the Virgin Islands in reviewing motions to dismiss based on Rule 12(b)(6):

First, the court must take note of the elements a plaintiff [party] must plead to state a claim so that the court is aware of each item the plaintiff [party] 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 [party] is liable based on the elements noted in the first step, then the claim is plausible.²⁶

²² *Callender v. Nichtern*, 32 V.I. 96, 1995 V.I. LEXIS 24 (1995).

²³ *Espinosa v. Government of the Virgin Islands*, 20 V.I. 78, 1983 V.I. LEXIS 38 (1983).

²⁴ *Hans Lollik Corporation v. Government of the Virgin Islands*, Terr. Ct. St. T. and St. J. 1981, *Hans Lollik Corporation v. Government of the Virgin Islands*, 17 V.I. 220, 1981 V.I. LEXIS 79 (Terr. Ct. St. T. and St. J. 1981).

²⁵ *In re Tutu Water Wells Contamination Litig.*, 40 V.I. 279, 32 F. Supp. 2d 800, 1998 U.S. Dist. LEXIS 20082 (1998).

²⁶ *Joseph*, 54 V.I. at 649-650 (internal quotation marks omitted) (citations omitted).

The Virgin Islands Supreme Court has further instructed that “[t]he plausibility determination is a ‘context-based’ determination which should be guided by the court’s ‘judicial experience and common sense.’”²⁷ “Plausibility requires that the plaintiff [pleader] allege facts that are more than simply ‘consistent with a defendant’s liability’ and must permit the court to infer more than the mere possibility of misconduct.”²⁸ 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’”²⁹ and “give the defendant [party] fair notice of what the . . . claim is and the grounds upon which it rests.”³⁰ Only after satisfying this multi-step analysis can a party survive a motion to dismiss under Rule 12(b)(6).³¹ Finally, a court “may consider, without requiring the conversion of a motion to dismiss to [a motion for] summary judgment: (1) exhibits attached to the pleadings, (2) matters that the court can take judicial notice of, and (3) items of unquestioned authenticity that are referred to in the challenged pleading and are integral to the pleader’s claim for relief.”³²

ANALYSIS

As a preliminary matter, Defendants argue that Catmac’s Motion to Dismiss must be denied on the grounds that “the Virgin Islands Declaratory Judgment Act prohibits objections to a request for declaratory relief.”³³ The Virgin Islands Declaratory Judgment Act, 5 V.I.C. §§ 1261-1272, vests the Superior Court with the discretionary “power to declare the rights, status,

²⁷ *Id.* at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950)).

²⁸ *Id.* (citing *Fowler*, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949)).

²⁹ *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 54 (V.I. Super. Ct. 2013) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008)); *See also Twombly*, 127 S. Ct. at 1965 & n.3.

³⁰ *Twombly*, 127 S. Ct. at 1964.

³¹ With respect to whether the facts pled must plausibly entitle the pleader to relief, the Court recognizes the conflict between V.I. R. Civ. P. 8(a)(2) (requiring a pleading to contain “a short and plain statement of the claim showing that the pleader is entitled to relief—because this is a notice pleading jurisdiction”) and the plausibility requirement articulated by the Virgin Islands Supreme Court in *Joseph v. Bureau of Corrections*, 54 V.I. 644 (V.I. 2011).

³² *In re Kelvin Manbodh Asbestos Litigation Series*, 47 V.I. 375, 382 (V.I. Super. Ct. Mar. 3, 2006).

³³ Defendants’ Opposition to Motion to Dismiss Defendants’ Counterclaim for Declaratory Judgment, page 2.

and other legal relations whether or not further relief is or could be claimed³⁴ and “[t]he declaration may be either affirmative or negative in form and effect”³⁵ with “the force and effect of a final judgment or decree.”³⁶ Specifically, 5 V.I.C. § 1261 provides, “[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for”,³⁷ which Defendants contend precludes a motion to dismiss an opposing party’s request for a declaratory judgment.³⁸ But, the language of 5 V.I.C. § 1261 merely indicates that a request for declaratory relief does not foreclose an action or proceeding.³⁹ Thus, Catmac’s Motion to Dismiss is not proscribed under the Virgin Islands Declaratory Judgment Act.

Catmac asks the Court to dismiss Defendants’ counterclaim for declaratory judgment as substantively improper since damages have already accrued.⁴⁰ A declaratory judgment is a

³⁴ 5 V.I.C. § 1261.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Defendants’ Opposition to Motion to Dismiss Defendants’ Counterclaim for Declaratory Judgment, pgs. 1-2.

³⁸ *Id.* Additionally, in support of this assertion, Defendants cite *Jefferson v. Bay Isles Assocs., L.L.P.*, 2011 V.I. LEXIS 7 (V.I. Super. Ct. Feb. 1, 2011), which provides, “[d]uring the Court’s determination of rights, status, and other legal relations between the [**55] parties, objections to declaratory relief by an opposing party is not permissible. 5 V.I.C. § 1261 states: No action or proceeding shall be opened to objection on the grounds that a declaratory judgment or decree is prayed [**38] for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” Although the Court’s interpretation of 5 V.I.C. § 1261 in *Jefferson* supports Defendants’ arguments, this Court disagrees with, and is not bound by, that interpretation, since the plain text of 5 V.I.C. § 1261 indicates that a request for declaratory relief does not proscribe an action or proceeding. See *People of the Virgin Islands v. Rosario*, 62 V.I. 429, 443 n.8 (Super. Ct. 2015) (“This Court is not bound by decisions of the Superior Court, which are only persuasive authority”) (citing *In re Q.G.*, 60 V.I. 654, 661 n.8 (V.I. 2014) (“[T]he decision of a single Superior Court judge ... is not binding precedent on other Superior Court judges”)); see also *Willie v. Ameruda Hess Corp.*, 2017 V.I. LEXIS 37, *21-22 (Super. Ct. Feb. 28, 2017) (“[D]ecisions of one Superior Court judge do not bind the...other Superior Court judges.’ ...Such decisions are ‘merely persuasive’”) (citing *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014)).

³⁹ See *Dan Nelson Auto., Inc. v. Viken*, 2005 SD 109 (S.D. Nov. 2, 2005) (“This Court rejects the trial court’s reasons for dismissing the action for declaratory relief. A request for declaratory relief may be allowed even when another adequate remedy exists. As a general matter, the Uniform Declaratory Judgments Act provides: “No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for”).

⁴⁰ Plaintiff’s Motion to Dismiss Defendants’ Counterclaim for Declaratory Judgment, page 2 (“declaratory judgment is substantively improper because damages have already accrued”). See also *Id.*, pgs. 2-3 (“This request is improper at this stage in the proceedings...because claimed damages are certain, the parties’ dealings are over, and there is no ‘present behavior’ to affect...these dealings”).

statutory remedy for the determination of a justiciable controversy where a party is in doubt as to his or her legal rights.⁴¹ The Court may construe a party's rights under a contract pursuant to 5 V.I.C. § 1262, which provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Further, the Court may construe such rights either before or after there has been a breach,⁴² and "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."⁴³ Here, Defendants request that the Court render a judgment declaring that Catmac is obligated to pay fifty percent of the transfer fee owed to the Landlord with respect to Defendants' 2016 sale of Beach Café.⁴⁴ Defendants appear to contend that Catmac is obligated to pay this fee on the basis that Catmac entered into the Miscellaneous Items Agreement and the 2013 Lease.⁴⁵ Additionally, Defendants request that the Court declare a "sum certain" that Catmac allegedly owes to Defendants.⁴⁶ Although Defendants do not specify the "sum certain" in their counterclaim, Defendants' October 31, 2016, letter to Catmac proposes that Catmac is responsible for \$300,000.00 of the transfer fee owed to the Landlord.⁴⁷

⁴¹ *Hill v. De Jongh*, 2012 V.I. LEXIS 11, 13 (V.I. Super. Ct. Apr. 19, 2012) (citing *Tip Top Constr. v. Dep't of Prop. & Procurement*, 41 V.I. 72, 78 (Terr. Ct. 1999) (citation omitted)).

⁴² 5 V.I.C. § 1263 provides, "[a] contract may be construed either before or after there has been a breach thereof."

⁴³ 5 V.I.C. § 1269.

⁴⁴ Defendants' Answer & Counterclaims, pgs. 3-4.

⁴⁵ *Id.*

⁴⁶ *Id.*, page 4.

⁴⁷ See Complaint, Exhibit J.

The Complaint and its attached exhibits indicate that Defendants' 2016 sale of Beach Café relates to the 2014 Lease, since the 2014 Lease "supersedes and cancels" the 2013 Lease.⁴⁸ Consequently, because the Miscellaneous Items Agreement was signed on March 18, 2013, solely with respect to the 2013 Lease, because the 2014 Lease did not incorporate the Miscellaneous Items Agreement, and because Catmac was not privy to the 2014 Lease, the transfer fee charged to the Tenant specified in Section 10.01 of the 2014 Lease bears no relationship to the Miscellaneous Items Agreement requiring Catmac to pay fifty percent of such transfer fee to the Landlord. Moreover, even if the Miscellaneous Items Agreement had been incorporated into the 2014 Lease, \$300,000.00 would not be the amount that Catmac would owe under the terms provided in the Miscellaneous Items Agreement, as construed together with Section 10.01 of the 2014 Lease.⁴⁹ Accordingly, Defendants have not pled sufficient facts to demonstrate entitlement to a declaratory judgment, and further, Defendants' requested declaratory relief would not terminate any of the uncertainty giving rise to this proceeding.⁵⁰

The issue in this case is whether the Miscellaneous Items Agreement applies to the 2016 sale of

⁴⁸ Complaint, ¶ 28. *See also* Complaint Exhibit G [2014 Lease], Section 17.07(a).

⁴⁹ The Court takes judicial notice that fifteen percent of \$2,640,000.00 is \$396,000.00, of which fifty percent is \$198,000.00. Thus, \$300,000.00 appears to have been calculated based on a different formula, which Defendants fail to show. *See* Complaint, Exhibit E [Miscellaneous Items Agreement] ("3. ASSIGNMENT FEE: Seller agrees to pay Fifty percent (50%) of the assignment fee imposed by the Landlord in Section 10.01 of the lease between Landlord and Buyer in the event Buyer assigns or otherwise transfers the said lease within Five (5) years of closing."). *See also* Complaint, Exhibit G [2014 Lease] ("SECTION 10.01: ASSIGNMENT AND SUBLETTING. Tenant may not transfer, assign, sublet, enter into license or concession agreements, or management agreements which disguise a transfer, or mortgage or hypothecate this Lease or the Tenant's interest in and to the Premises or any part thereof (herein collectively referred to as "Transfer") without first obtaining prior written consent of Landlord, which consent shall not be unreasonably withheld or delayed. The sale or transfer, by merger or otherwise, of more than fifty (50%) percent of the current equity interest in Tenant during any five year period shall constitute a Transfer. In the event that Tenant obtains Landlord's consent to the Transfer of Tenant's Interest in the Premises or the sale, merger or other transfer of an interest of more than 50% of the Tenant, Tenant shall pay a processing fee to the Landlord or its agent in an amount equal to fifteen (15%) percent of the gross sale price.").

⁵⁰ 5 V.I.C. § 1266 Discretionary, provides, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Beach Café, considering that the 2014 Lease superseded and cancelled the 2013 Lease.

Moreover, the square footage added in the 2014 Lease likely increased the gross sale price of Beach Café, which would have in turn increased the amount of any transfer fee owed by Catmac.

Accordingly, Defendants' request for declaratory relief will be denied.

CONCLUSION

Because the factual allegations contained in the Answer and Counterclaim are not sufficient to state a claim for declaratory relief, the Court will not grant Defendants' request for a declaratory judgment, and Plaintiff's Motion to Dismiss Defendants' Counterclaim will be granted. An Order consistent with this Memorandum shall follow.

Dated: June 29, 2017

ATTEST: Estrella George
Clerk of Court

by

Lori Boynes-Tyson
for Lori Boynes-Tyson
Court Clerk Supervisor


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

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