

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

JULIAN WILLIAMS,	)	
	)	
Plaintiff,	)	CASE NO. ST-13-CV-449
	)	
v.	)	ACTION FOR DAMAGES
	)	
BERNICE LEERDAM, ELVET A. POTTER,	)	JURY TRIAL DEMANDED
MYRON E. POTTER, BENNETTE L. POTTER,	)	
and BYRON LEERDAM,	)	
	)	
Defendants.	)	
	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION
(Filed: December 16, 2015)

Before the Court is the "Motion to Dismiss and/or Strike Plaintiff's Third Amended Complaint" filed by Defendant Bernice Leerdam on August 14, 2015. Plaintiff submitted "Plaintiff's Opposition to Defendant Bernice Leerdam's Motion to Dismiss Plaintiff's Third Amended Complaint and Plaintiff's Incorporated Memorandum in Support Thereof" on September 8, 2015. For the reasons set forth below, Defendant Bernice Leerdam's motion will be denied.

I. Factual and Procedural Background.

The proposed amended pleading alleges that on or about April 29, 2013, Plaintiff was a pedestrian and crossing the Weymouth Rhymer Highway, a public road in St. Thomas, U.S. Virgin Islands, within the designated crosswalk. At the same time, Defendant Bernice Leerdam was operating a motor vehicle on the same road and struck Plaintiff. As a result of this accident, Plaintiff claims he suffered injuries that required medical treatment.

Plaintiff filed his initial complaint, alleging a claim of negligence against Defendant Bernice Leerdam, in the Superior Court on September 6, 2013. Defendant Bernice Leerdam filed

an answer to the complaint on October 1, 2013. Then, on December 13, 2013, Plaintiff filed a motion to amend the first complaint, seeking to add a new count alleging that Defendant Bernice Leerdam fraudulently conveyed certain real property. The Court denied Plaintiff's motion to amend because he failed to join the additional necessary parties for the fraudulent conveyance claim.¹ On February 4, 2015, Plaintiff filed another motion seeking to amend the complaint, again alleging claims for negligence and a fraudulent conveyance of the same real property. The Court rejected Plaintiff's proposed second amended complaint because it alleged multiple causes of action in a single count, in violation of the rules of procedure followed by this tribunal.² Therefore, the Court directed that Plaintiff submit a third amended complaint by August 3, 2015. Plaintiff complied, and filed the present pleading on July 29, 2015. Plaintiff's Third Amended Complaint alleges causes of action for negligence and fraudulent conveyance of real property, and corrects the other deficiencies previously noted by the Court. In the Third Amended Complaint, Plaintiff specifically asserts that Defendant Bernice Leerdam fraudulently transferred her interests in the real property known as No. 18A Agnes Fancy, Queens Quarter, St. Thomas, Virgin Islands ("Subject Property"), to her children after she injured him.³ He avers that the transfer was made to protect the Subject Property from execution in the event Plaintiff obtains a judgment on his negligence claim against Defendant Bernice Leerdam.

On August 14, 2015, Defendant Bernice Leerdam filed her Motion to Dismiss and/or Strike Plaintiff's Third Amended Complaint for two reasons. First, Defendant Bernice Leerdam argues that Plaintiff failed to file a motion for leave to file the Third Amended Complaint, as usually required by the procedural rules observed by this Court. Second, and the crux of Defendant Bernice Leerdam's motion, is the contention that Plaintiff's Third Amended Complaint fails to state a claim for fraudulent conveyance upon which relief can be granted.⁴

II. Legal Discussion.

a. Standard of Review.

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim,⁵ a trial court must apply the three-part test articulated in the United States Supreme Court decision, *Ashcraft v. Iqbal* ("*Iqbal*").⁶ This test requires the trial judge to "1) take note of the legal elements

¹ See, Court Order entered on January 10, 2014.

² See, SUPER. CT. R. 29; FED. R. CIV. P. 10(b).

³ Third Amended Complaint at ¶¶ 16-19.

⁴ Defendant Bernice Leerdam does not argue that the negligence cause of action fails to state a claim on which relief may be granted. Therefore, she has waived that argument.

⁵ In the past, to determine a motion to dismiss a pleading for failure to state a claim, the Superior Court utilized the standards developed under FED. R. CIV. P. 12(b)(6) through Superior Court Rule 7. Recently, however, the Supreme Court of the Virgin Islands has stated that this tribunal should not adopt the Federal Rules of Civil Procedure and the Local Rules of Civil Procedure wholesale. See, *Vanterpool v. Gov't of the V.I.*, S. Ct. Civ. No. 2013-0072, 2015 V.I. Supreme LEXIS 33 at * 15-31 (V.I. Aug. 10, 2015). Nevertheless, the Supreme Court also applies the *Iqbal* version of the 12(b)(6) standard to test the sufficiency of pleadings on appeals from this Court. See, e.g., *Fleming v. Cruz*, 62 V.I. 702, 713-14 (V.I. 2015) (citations omitted). Therefore, in light of the precedent established by the Supreme Court with respect to a motion to dismiss for failure to state a claim, this Court will apply those same *Iqbal* standards to the instant motion.

⁶ 556 U.S. 662 (2009).

of the asserted cause of action; 2) identify and disregard naked factual contentions and legal conclusions framed as allegations of fact; and 3) review the well-pleaded facts against the necessary legal elements to determine whether the claims are plausible.”⁷ With regards to a claim’s plausibility, the trial court must accept the well-pleaded facts as true,⁸ but no presumption of truth attaches to allegations that state conclusions as opposed to facts.⁹ The trial court then conducts a “context-based” inquiry based on “judicial experience and common sense.”¹⁰ Furthermore, for a claim to be plausible, the plaintiff must allege facts in the complaint that permit the court to infer more than a possibility of misconduct.¹¹ Finally, all reasonable inferences derived from the well-pleaded facts should be viewed in favor of the plaintiff.¹²

b. Plaintiff Pleads Sufficient Facts to State a Claim under the Virgin Islands Uniform Fraudulent Transfer Act (“VIUFTA”).

1. The Particularity Requirement of Rule 9(b) of the Federal Rules of Civil Procedure is Inapplicable to a VIUFTA Cause of Action.

Defendant Bernice Leerdam’s primary argument is that Plaintiff fails to properly allege a claim for fraud. She posits that he must meet the requirements of Federal Rules of Civil Procedure (“Federal Rules”) Rule 9(b), which requires that fraud allegations be pleaded with particularity.¹³ Plaintiff counters that he adequately pleaded his cause of action under VIUFTA pursuant to Rule 8(a) of the Federal Rules.

The Supreme Court of the Virgin Islands has not definitively set the parameters for pleading a cause of action for fraud. Turning to persuasive precedent, the United States Court of Appeals for the Third Circuit (“Third Circuit”) interprets the particularity requirement of Rule 9(b) to mean that a plaintiff must clearly plead, the “circumstances” of the alleged fraud in order to place the defendant on notice of the precise misconduct alleged, and to safeguard the defendant against spurious charges of immoral and fraudulent behavior.¹⁴ “Date, place or time” allegations can fulfill these functions, but nothing in Rule 9(b) requires them.¹⁵ Notably, there is a split of judicial authority regarding whether the particularity pleading requirements of Rule 9(b) apply to claims brought under the Uniform Fraudulent Transfer Act (the “Uniform Act”). Some courts have held that Rule 9(b) applies to all claims of fraud including those brought under the Uniform

⁷ *Benjamin v. Bennerson*, Case No. ST-11-CV-220, 2012 V.I. LEXIS 7 at * 3-4 (V.I. Super. Ct. 2012) (citations omitted).

⁸ *Metro. Edison Co. v. Pa. Pub. Utils. Comm’n*, 767 F.3d 335, 341 n. 1 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 2372 (2015).

⁹ *See, Joseph v. Bureau of Corrs.*, 54 V.I. 644, 649-50 (V.I. 2011).

¹⁰ *Id.*

¹¹ *Id.* at 650. *See also, Iqbal*, 556 U.S. at 678.

¹² *See, Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 174 (3d Cir. 2015) (citations omitted); *Gallivan v. Power Save, VI*, Case No. ST-09-CV-294, 2011 V.I. LEXIS 30 at * 4-5 (V.I. Super. Ct. Apr. 28, 2011) (citations omitted).

¹³ SUPER. CT. R. 7; FED. R. CIV. P. 9(b).

¹⁴ *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. N.J. 1984).

¹⁵ *Id.*

Act.¹⁶ Others have held the contrary.¹⁷ Moreover, some courts have applied the more stringent Rule 9(b) pleading obligations to situations where actual fraud is alleged under the Uniform Act, and not to claims of constructive fraud brought thereunder.¹⁸

Because the VIUFTA does not address how claims should be pleaded, and in light of the conflicting views on this subject, the Court looks to the purpose of the heightened pleading requirement of Rule 9(b). The requirement to plead claims of fraud with particularity in Rule 9(b) is derived from the English common law and codified procedures which were followed when the Federal Rules of Civil Procedure were first adopted.¹⁹ The rationale for imposing a more stringent pleading standard for fraud claims is rooted in concerns about the nature, breadth, and consequences of fraud allegations. The reasons identified by many courts included: 1) erecting a safeguard to protect putative defendants from unsupported claims of acts of moral turpitude; 2) the advancement of nuisance claims made primarily, or solely, for the purpose of forcing settlements; 3) to protect the finality of private economic transactions; 4) the use of fraud suits to enable a “fishing expedition” for information of the defendants; and 5) the wide swath of types of conduct which could potentially be the basis for a claim of fraud.²⁰ While these judicially-based concerns have validity, particularly in the realm of the common law, they must give way to legislatively-established policies under our three-branch system of governance. Further, a claim of fraudulent transfer under the VIUFTA is limited to those specifically enumerated circumstances. The fears of abusive common law fraud lawsuits which underlie the pleading requirements of Rule 9(b), are greatly abated under a statutory scheme such as VIUFTA. Thus, the purposes of Rule 9(b) are not furthered by requiring plaintiffs to meet the particularity pleading requirement when alleging a VIUFTA cause of action. In fact, imposing the additional pleading requirements of Rule 9(b) in a VIUFTA case may force a plaintiff to allege facts which need not be proved to succeed on the claim.

Therefore, when a statutory cause of action, like that created by the VIUFTA, is at issue, the key consideration when defining what must be alleged is not what a court pleading rule requires, but to: 1) discern the statutory elements created by the Legislature; and 2) determine whether the well-pleaded facts averred plausibly meet those essentials. This view is consistent with venerable principle that a statute is construed in accordance with the plain and unambiguous language of the law.²¹ Importantly, when reviewing whether a complaint sufficiently pleads a

¹⁶ See, e.g., *MSKP Oak Grove, LLC v. Venuto*, 875 F. Supp. 2d 426, 434 (D.N.J. 2012) (“Rule 9(b) applies to claims under the NJUFTA”); *Paloian v. Greenfield (In re Rest. Dev. Group, Inc.)*, 394 B.R. 171, 180-81 (Bankr. N.D. Ill. 2008) (applying Rule 9(b) to fraudulent transfer claims under the Illinois Uniform Fraudulent Transfer Act).

¹⁷ See, *Pearlman v. Alexis*, Case No. 09-208652-CIV, 2009 U.S. Dist. LEXIS 88546 at * 13-14 (S.D. Fla. Sept. 29, 2009) (Rule 9(b) particularity requirement is not applicable to claims brought under Florida’s Uniform Fraudulent Transfer Act); *Carter-Jones Lumber Co. v. Denune*, 725 N.E.2d 330, 333-34 (Ohio Ct. App. 1999) (applying Ohio Uniform Fraudulent Transfer Act).

¹⁸ See, *Larson Mfg. Co. of S.D., Inc. v. Conn. Greenstar, Inc.*, 929 F. Supp. 2d 924, 934-935 (S.D. 2013) (collecting cases and ultimately adopting the position that Rule 9(b) only applies to fraudulent transfers involving claims of actual fraud); *Friedman v. Wahrsager*, 848 F. Supp. 2d 278, 291-94 (E.D.N.Y. 2012) (concluding that Rule 9(b) only applies to fraudulent transfers involving claims of actual fraud).

¹⁹ 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296 (2004).

²⁰ *Id.*

²¹ See, e.g., *Lopez v. People*, 60 V.I. 534, 537-38 (V.I. 2014); *Sonson v. People*, 59 V.I. 590, 608 (V.I. 2012).

statutory cause of action, the trial court must presume that "...the Legislature intended that [the governing law] be construed to simply mean what it says."²² Thus, Plaintiff need only plead facts, using the general pleading standards of Rule 8(a), which, when superimposed upon the statutory framework of the VIUFTA, give Defendant Bernice Leerdam notice of a plausible claim under the statute.²³

2. Plaintiff has Adequately Pleaded Two Causes of Action Under the VIUFTA.

The VIUFTA identifies two categories of voidable transfers: 1) those that are fraudulent as to present and future creditors; and 2) those which are fraudulent only as to present creditors.²⁴ Plaintiff makes his claim as a future creditor, because it is contingent on succeeding on his underlying negligence claim against Defendant Bernice Leerdam. The pertinent provisions of the VIUFTA provide,

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.²⁵

Upon review of the statutory language, to plausibly plead a cause of action under Section 174(a)(1) of the VIUFTA, a plaintiff must allege facts which demonstrate that: 1) he is a creditor; 2) the defendant transferred an asset or incurred an obligation; 3) with the actual intention of hindering, delaying, or defrauding any creditor; and 4) before or after the obligation to the plaintiff was incurred.

²² *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 544 (V.I. 2015) (construing the Virgin Islands Wrongful Discharge Act, 24 V.I.C. § 76(a)).

²³ The Virgin Islands is a "notice pleading" jurisdiction. *Joseph v. Bureau of Corrs.*, 54 V.I. at 650 (citations omitted).

²⁴ 28 V.I.C. §§ 174, 175.

²⁵ 28 V.I.C. § 174(a).

In the Third Amended Complaint, Plaintiff plausibly alleges that he is a creditor because he asserts a claim.²⁶ The claim is the potential judgment against Defendant Bernice Leerdam on Plaintiff's action for negligence, which is recognized under the VIUFTA.²⁷ Plaintiff also alleges that Defendant Bernice Leerdam transferred the Subject Property at issue to shield it from execution in the event that a judgment is entered against her on the asserted tort claim.²⁸ Further, Plaintiff alleges in the Third Amended Complaint that the accident occurred in April 23, 2013, and Defendant transferred the subject property on June 30, 2013.²⁹

Additionally, and contrary to Defendant Bernice Leerdam's arguments, Plaintiff also pleads, facts which implicate several of the statutory "badges of fraud" listed in the VIUFTA.³⁰ Plaintiff alleges that Defendant Bernice Leerdam transferred the Subject Property to her children to protect it from being subjected to execution to satisfy a potential judgment in favor of Plaintiff.³¹ Similarly, Plaintiff states that Defendant Bernice Leerdam conveyed all of her rights, title and interest in the Subject Property to her children.³² The transfer of property to an "insider" is also a factor which the VIUFTA explicitly adopts as one indicator of improper intent.³³ Another indicator of intent to defraud is found in Plaintiff's allegation that Defendant Bernice Leerdam's transfer of the Subject Property to her children was accomplished as a gift. The plausible inference drawn from this allegation is that said Defendant transferred the Subject Property for less than "reasonably equivalent value," which is another statutory consideration relevant to actual intent.³⁴ Taken together, Plaintiff has adequately pleaded a cause of action under Section 174(a)(1) of the VIUFTA against Defendant Bernice Leerdam.

Plaintiff also appears to allege a cause of action under Section 174(a)(2)(B) of the VIUFTA. To make out a claim under this provision, the plaintiff must allege facts which show that: 1) that he is a creditor; 2) the defendant transferred an asset or incurred an obligation; 3) for less than reasonably equivalent value; 4) before or after the obligation to the plaintiff was incurred; and 5) the defendant believed, or would reasonably have believed, it would be incurring debts she beyond its ability to pay. Here, although the lawsuit did not commence until September 6, 2013,

²⁶ 28 V.I.C. § 171(4).

²⁷ 28 V.I.C. § 171(3) ("Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.").

²⁸ Third Amended Complaint at ¶¶ 18, 19.

²⁹ In his opposition memorandum, Plaintiff attaches a copy of a deed of Gift between Defendant Bernice Leerdam and the remaining Defendants. As a general rule, when deciding a motion to dismiss for failure to state a claim, the trial court may not consider items not made a part of the complaint. *See, e.g., Inland Container Corp. v. Continental Ins. Co.*, 726 F.2d 400, 401 (8th Cir. 1984). However, when a document is referenced in the complaint with the express intention of substantiating a plaintiff's claim, the court may take that document into account. *See, e.g., Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006). The June 30, 2013, Deed of Gift is expressly referenced in paragraphs 16 and 17 of the Third Amended Complaint, and is relied upon to establish the necessary element of a transfer under the VIUFTA. In fact, the Third Amended Complaint states that the Deed of Gift is attached as Exhibit A, though it is not so appended. Under these circumstances, the court may rely upon the Deed of Gift without converting the motion into one for summary judgment.

³⁰ *See*, 28 V.I.C. §§ 174 (b)(1) - (11).

³¹ *See*, 28 V.I.C. § 174(b)(4).

³² Third Amended Complaint at ¶ 3.

³³ *See*, 28 V.I.C. § 174(b)(1).

³⁴ *See*, 28 V.I.C. § 174 (b)(8).

the Plaintiff alleges that Defendant Bernice Leerdam struck him with her car while he was a pedestrian in a crosswalk, and that she had notice that Plaintiff sustained injuries as a result of the accident. Such circumstances give rise to a reasonable inference that Defendant Bernice Leerdam knew that Plaintiff might initiate litigation against her over the incident. Taking all of these allegations together, and drawing reasonable inferences in favor of Plaintiff at this stage of the proceeding, it is a plausible conclusion that Defendant Bernice Leerdam divested herself of a valuable asset for less than appropriate value, and knew, or should have known, she was about to incur a substantial financial liability which she could not pay. Therefore, Plaintiff also sufficiently alleges a cause of action under Section 174(a)(2)(B) of the VIUFTA.

Defendant Bernice Leerdam argues that the Third Amended Complaint is deficient because Plaintiff does not assert any present interest in the Subject Property, and fails to allege that she has insufficient insurance coverage to cover any judgment which may be issued in this case. However, a plain reading of the statutory language, despite Defendant Bernice Leerdam's assertions to contrary, does not reveal that such allegations are required to state a cause of action under the VIUFTA.³⁵ Defendant Bernice Leerdam also argues that Plaintiff has not yet obtained a judgment, or made a demand for judgment. However, in light of the statutory definition of a "claim" under the VIUFTA, Plaintiff need not wait until a judgment is obtained to bring an action under this law.³⁶ Defendant Bernice Leerdam additionally argues that Plaintiff has not pleaded that the real property was transferred for less than fair value. But, as noted above, the inferences drawn from Plaintiff's explicit allegations plainly refute this contention. Finally, Plaintiff is not required to allege Defendant Bernice Leerdam's insolvency to state a claim under the VIUFTA. The insolvency or the transfer of substantially all of a putative defendant's assets are only 2 of the 11 indicia of fraudulent intent. A plaintiff need not allege all of the badges of fraud contained in the VIUFTA. The listed indicia are non-exclusive because they stated in the alternative, and the statute only states that they "may" be considered. As noted above, when one takes the entire pleading into consideration, Plaintiff has alleged more than enough facts to put Defendant on notice of the claims against her. Hence, I agree with other courts that if the plaintiff's allegations plausibly show that the questioned transfer is fraudulent, and also point to the statutory bases to support the claimant, a VIUFTA cause of action is properly pleaded.³⁷

c. Plaintiff Properly Filed his Third Amended Complaint Pursuant to the Order of this Court.

Defendant Bernice Leerdam also asserts that Plaintiff did not comply with the procedural rules governing motions to amend pleadings. In her view, this provides another basis on which to

³⁵ To the extent Defendant contends that she has adequate insurance coverage, she is relying on information that is outside of the proposed pleading and cannot be considered on a Rule 12(b)(6) motion. *E.g., Cerome v. Moshannon Valley Corrs. Center*, 2010 U.S. App. LEXIS 24938 at * 9 (3d Cir. Dec. 7, 2010) ("Generally, a district court may not consider matters outside of the Complaint when ruling on a motion to dismiss.").

³⁶ *See, Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 428 (S.D.N.Y. 2006) (Under New York's Uniform Fraudulent Conveyances Act "...one who has a right to maintain a tort action but has not recovered judgment at the time of the transfer is a creditor..." (citing *Marcus v. Kane*, 18 F.2d 722, 723 (2d Cir. 1927))).

³⁷ *See, United States v. Rocky Mt. Holdings, Inc.*, 2009 U.S. Dist. LEXIS 52203 at * 14-16 (E.D. Pa. Mar. 3, 2009). *See also* 12 PA. CONS. STAT. § 5104 (applying the Pennsylvania Fraudulent Transfer Act which contains identical language to Virgin Islands version).

dismiss the Third Amended Complaint. These arguments are not supported in light of the record in this case.

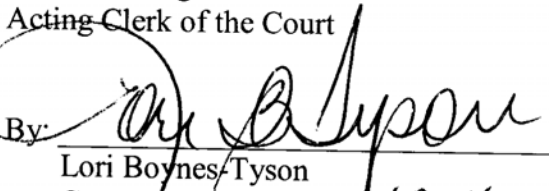
Rule 15 of the Federal Rules of Civil Procedure states that a party may amend its pleadings with opposing party's written consent or the court's leave.³⁸ Defendant Bernice Leerdam complains that Plaintiff failed to file a motion requesting leave to file the proposed pleading. However, the Court specifically ordered Plaintiff to file a third amended complaint in the July 15, 2015, Order. The plain language of a court order is given effect in the same fashion as a court rule or a legislative statute.³⁹ Thus, in light of the Court's explicit directive in the July 15, 2015, Order, Plaintiff was not required to file a separate motion with the Third Amended Complaint, or comply with Rule 15.1 of the Local Rules of Civil Procedure. Therefore, Defendant Bernice Leerdam's motion will not be granted on this procedural ground.

III. Conclusion.

Contrary to Defendant Bernice Leerdam's assertions, Plaintiff has adequately pleaded a claim for fraudulent conveyance under the Virgin Islands Uniform Fraudulent Transfer Act. Moreover, the July 15, 2015, Court Order obviated Plaintiff's usual requirement to file a motion requesting leave to file the newly-amended pleading. For the foregoing reasons, the Court will deny Defendant Bernice Leerdam's motion to dismiss, and issue other appropriate directives, in an order of even date.

Dated: December 16, 2015

ATTEST:
Estrella George
Acting Clerk of the Court

By: 
Lori Boynes-Tyson
Court Clerk Supervisor 12/16/15


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

³⁸ FED. R. CIV. P. 15(a)(2).

³⁹ *Marsh-Monsanto v. St. Thomas-St. John Bd. of Elections*, 60 V.I. 41, 54 (V.I. Super. Ct. 2014) (citations omitted).