

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

**LECLERC PIERRE, on his own and as
PERSONAL REPRESENTATIVE of THE
ESTATE OF WISLINE DOLCY,**

Plaintiff,

vs.

**GOVERNMENT of the VIRGIN ISLANDS
through the GOVERNOR JUAN F. LUIS
HOSPITAL, DR. WALESKA LARICE,
PRACTITIONER ARTHURLYN D.
SULLIVAN, PA, DOCTORS ABC and the
VIRGIN ISLANDS DEPARTMENT OF
JUSTICE**

Defendants.

SX-17-CV-436

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

Appearances:

LEE J. ROHN, ESQ.
Christiansted, St. Croix
For the Plaintiff

CHIVONNE A.S. THOMAS, ESQ.
Virgin Islands Department of Justice
Castle Coakley, St. Croix
For the Defendants

MEMORANDUM OPINION

THIS MATTER is before the Court *sua sponte*. For the following reasons, the Court will order Plaintiff to file an amended verified complaint and to provide proof that the Court has subject matter jurisdiction over this matter.

BACKGROUND

On or about June 10, 2017, Wisline Dolcy (hereinafter "Dolcy") passed away shortly after being released from the Governor Juan F. Luis Hospital. On December 18, 2017, Plaintiff

Leclerc Pierre on his own and as Personal Representative of the Estate of Wisline Dolcy (hereinafter “Plaintiff”) filed a Verified Complaint against the Defendants Government of the Virgin Islands through the Governor Juan F. Luis Hospital, Dr. Waleska Larice, Practitioner Arthurlyn D. Sullivan, PA, Doctors ABC and the Virgin Islands Department of Justice (collectively “Defendants”) alleging medical malpractice, negligent infliction of emotional distress, intentional infliction of emotional distress, and wrongful death.

JURISDICTION¹

It is well established that a court may consider the issue of subject matter jurisdiction *sua sponte*. See *Drayton v. Drayton*, 65 V.I. 325, 332 (2016). Cf. *Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 363 (V.I. 2014); see also *Chavayez v. Buhler*, No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *7 (V.I. June 25, 2009) (a court may consider the issue of subject matter jurisdiction *sua sponte*). “Prior to considering the merits of a matter before it, a court is obligated to examine whether it has subject matter jurisdiction over the dispute.” See *Brunn v. Dowdye*, 59 V.I. 899, 904 (2013) (citing *V.I. Gov't Hosp. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276, 279 (V.I. 2008)). “The plaintiff always bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction.” See *Tyson*, 2017 V.I. LEXIS 79, at *3. See also *Hypolite v. Francois*, 2013 V.I. LEXIS 27, *6 (V.I. Super. Ct. May 10, 2013). See also *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *7 (V.I. Super. Ct. June 25, 2015) (citing *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) (the burden of proving the existence of

¹ *Tyson v. Samuel*, 2017 V.I. LEXIS 79, *2-3.

subject matter jurisdiction lies with the plaintiff). “If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” *See* V.I. R. Civ. P. 12(h)(3).

STANDARDS OF REVIEW

Virgin Islands Medical Malpractice Act

The Virgin Islands Medical Malpractice Act (hereinafter “VIMMA”) sets out specific requirements before a medical malpractice claim can be filed in the Superior Court. *See* 27 V.I.C. § 166i(b). The VIMMA spells out the following pre-filing requirements:

No action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the Committee and the Committee has received the expert opinion as required by this section, provided, that if said opinion is not received by the Committee within ninety days from the date the complaint was filed with the Committee, the claimant may commence his action against the health care provider in court; Provided further, that the commencement of the court action shall not prevent the Committee from obtaining the expert opinion.

“The proposed complaint shall be deemed filed when a copy is delivered or mailed by registered or certified mail to the Commissioner of Health.” 27 V.I.C. § 166i(c). Then “the Committee determines the type of medical expert needed to review the claim and arranges for the expert to review the medical records and legal papers submitted to the Committee.” *See* 27 V.I.C. § 166i(d)(1). “It is only after this process has been completed or ninety days has elapsed since the claimant's proposed complaint was filed with the Committee, that a complainant may commence an action in the Superior Court.” *See* 27 V.I.C. § 166i(b). *See Brady v. Cintron*, 55 V.I. 802, 814 (V.I. 2011).

The Virgin Islands Torts Claim Act

“The VITCA provides the mechanism by which persons may sue the Government in tort in the courts of the Virgin Islands.” *See Fleming v. Cruz*, 62 V.I. 702, 718 (2015). *See Durant*, 28

F.3d at 14 (the VITCA outlines the procedure for limited waiver of the Virgin Islands' sovereign immunity conferred by the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1541(b)).

Under the VITCA, *no judgment shall be granted in favor of any claimant unless* such claimant shall have complied with the provisions of this section applicable to his claim:

a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the United States Virgin Islands while acting as such officer or employee, shall be filed within *ninety days after the accrual of such claim* unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

33 V.I.C. § 3409(c) (emphasis added).

DISCUSSION

A. Virgin Islands Medical Malpractice Act

The requirements of Section 166i are non-waivable jurisdictional conditions that must be satisfied in order to vest the trial court with subject matter jurisdiction to hear an individual's medical malpractice claims. *See Fleming*, 62 V.I. at 815-16 (explaining that pre-filing requirements under the Virgin Islands Medical Malpractice Act, 27 V.I.C. §§ 166-166l, were jurisdictional because that statutory scheme “specifically seeks to prevent actions from being filed in courts until after the statutory requirements ... are fulfilled”). In other words, if the Plaintiff fails to comply with these jurisdictional requirements before filing the instant action with the Superior Court, then the Court must dismiss the case for lack of subject-matter jurisdiction.

In the case at bar, the Plaintiff makes a conclusory allegation that “[t]his Court has jurisdiction over this action pursuant to the medical malpractice act....” (Compl. ¶1). “In order to plead a plausible claim under the VIMMA, [the plaintiff] was required to plead facts

demonstrating the date he timely filed a proposed complaint with the Committee, the date the Committee forwarded the proposed complaint to any experts for review, or the date when the experts rendered an opinion on his claim (or that ninety days has elapsed since the filing of his proposed complaint).” See *Yuxiang Peng v. Williams*, 2017 V.I. LEXIS 118, *3 (V.I. Super. Ct. July 24, 2017) (citing *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *12-13 (V.I. Super. Ct. June 25, 2015)).

Upon review of the record, the Court does not see any proof that the Plaintiff complied with the pre-litigation requirements of Section 166i before filing his medical malpractice claim. The pre-filing requirements under Section 166i(c) are specific. When filing a copy of the proposed complaint, the document must be delivered or mailed by registered or certified mail to the Commissioner of Health. These methods provide the sender with proof of the date the document was sent and a signature of the party who received the document. An executed return of service would also be sufficient proof of compliance with the statute.

The statutory filing requirements are stringent because without the required proof of service, this Court would have no way to determine whether it has jurisdiction over the matter. See *In re L.O.F.*, 62 V.I. 655, 661 n.6 (VI. 2015) (citations omitted) (“mindful of the separation of powers,” this Court “lacks the authority to amend the Virgin Islands Code”). Here, there is no proof that the Plaintiff complied with the stringent jurisdictional pre-litigation requirements of the Medical Malpractice Act.

B. The Virgin Islands Torts Claim Act

In addition, because the Plaintiff is suing the Virgin Islands Government in tort, Plaintiff must also provide proof of compliance with the Virgin Islands Tort Claims Act.² Under the VITCA, “tort claims or written notices of intent to file a claim against the Government must be filed within 90 days of the accrual of such claims.” *See* 33 V.I.C. § 3409(c). *See also Fleming v. Cruz*, 62 V.I. 702, 719 (2015). In *Fleming*, the Supreme Court of the Virgin Islands (hereinafter “Supreme Court”) affirmed the trial courts’ holding that dismissal was proper for failure to comply with the VITCA’s claim-filing requirements yet alluded that there was some basis to support a finding that the VITCA’s prerequisites are not jurisdictional. *See id.* Ultimately, *Fleming* declined to review whether the pre-filing requirements of the VITCA were jurisdictional or claims-processing. *See Fleming*, 62 V.I. at 718 (“In this case, we do not decide whether the VITCA’s claim-filing requirements are jurisdictional ... We leave a decision on whether the VITCA’s claim-filing mandates are jurisdictional for another day.”).

In *Yuxiang Peng v. Williams*, this Court determined that the Third Circuit’s affirmation in *Richardson v. Knud Hansen Mem’l Hosp.*, 744 F.2d 1007, 1010 (3d Cir. 1984), that the

² The Revised Organic Act grants sovereign immunity to the Government of the Virgin Islands for tort claims. Title 48 U.S.C. § 1541(b) (“That no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature constituted by this Act [48 USCS § 1541 et seq.].” By enacting the VITCA, the government of the Virgin Islands waived its sovereign immunity to tort claims, assuming that the plaintiff satisfies certain procedural requirements. Title 33 V.I.C. § 3408(a) (“Subject to the provisions of section 3416 of this chapter, the Government of the United States Virgin Islands hereby waives its immunity from liability and action and hereby assumes liability with respect to injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government of the United States Virgin Islands while acting within the scope of his office or employment, under circumstances where the Government of the United States Virgin Islands, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The Government consents to have the liability determined in accordance with the same rule of law as applied to actions in the courts of the Virgin Islands against individuals or corporations; Provided, That the claimant complies with the provisions of this chapter.”).

VITCA's pre-filing requirements are jurisdictional, is still binding on the Superior Court.³ The majority of courts in the Virgin Islands hold that the pre-filing requirements of the VITCA are jurisdictional.⁴ "In light of its finding that compliance with the pre-filing requirements under the VITCA are jurisdictional, the Third Circuit concluded that a challenge to such compliance may be raised at any stage of the proceedings." See *Yuxiang Peng*, 2017 V.I. LEXIS 118, at *4 n.3. (citing *Richardson*, 744 F.2d at 1010). Here, the Plaintiff fails to state in his Verified Complaint or attach supporting documentation that he complied with the pre-filing requirements of the VITCA. In addition, there are no allegations that the VITCA governs the claims.

CONCLUSION

Based on the foregoing analysis, pursuant to Virgin Islands Rule of Civil Procedure 15-2, the Court will *sua sponte* grant Plaintiff an opportunity to amend his Verified Complaint and attach proof of compliance with the pre-filing requirements under the VIMMA and the VITCA.

³ 2017 V.I. LEXIS 118, *2,4 n.2. (In *Richardson*, the Third Circuit Court of Appeals — exercising its power as the final arbiter of Virgin Islands local law — 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 and "It follows that the terms may not be waived." 744 F.2d at 1010. The Supreme Court of the Virgin Islands has made it clear that decisions rendered by the Third Circuit while serving as the *de facto* court of last resort in the Virgin Islands "are binding upon the Superior Court of the Virgin Islands even if they would only represent persuasive authority when [the Supreme Court] considers an issue." *Najawicz v. People of the Virgin Islands*, 58 V.I. 315, 327-28 (V.I. 2013) (internal citation omitted); see also *In re People of the Virgin Islands*, 51 V.I. 374, n. 9 (V.I. 2009). Thus, the Third Circuit's holding in *Richardson* remains binding on this Court.).

⁴ See, e.g., *Christopher v. Gov. Juan F. Luis Hosp. & Med. Ctr.*, 2016 V.I. LEXIS 165, *11 (Super. Ct. Oct. 12, 2016) (following the Third Circuit Court of Appeal's holding in *Richardson*). *Thomas v. Gov't of the V.I.*, 2015 V.I. LEXIS 46, *1 (opining that the court did not have subject-matter jurisdiction over her tort claim against the Government of the Virgin Islands because a mother failed to file a notice of intention or claim prior to the expiration of the 90-day filing period of V.I. Code Ann. tit. 33, § 3409(c)); *James-St. Jules*, 2015 V.I. LEXIS 74, *1 (deciding that the court lacked subject matter jurisdiction because plaintiff failed to state whether she had filed a notice of intent to file a claim under the Virgin Islands Tort Claims Act, as required by V.I. Code Ann. tit. 33, § 3409(c), and the provisions of the act were jurisdictional); *Brunn v. Dowdye*, 59 V.I. 899, 905 n.6 (V.I. 2013) (assuming without deciding that section 3408(a) of the VITCA was jurisdictional); *Brewley v. Government of the Virgin Islands*, 59 V.I. 100, 103 (V.I. Super. Ct. 2012) (opining that "the requirements of section 3409 of the VITCA are jurisdictional and that they must be strictly followed"); *Speaks v. Gov't of the Virgin Islands*, 2009 U.S. Dist. LEXIS 3565, *16 (D.V.I. Jan. 14, 2009) ("Timely compliance with the VITCA's notice requirement is a jurisdictional prerequisite to bringing suit on a plaintiff's tort claims."); *Samuel v. Gov't of the V.I.*, 44 V.I. 201, 202 (2002) (the court lacked subject matter jurisdiction. Because plaintiff did not comply with the jurisdictional pre-filing procedures of the Virgin Islands Tort Claims Act, 33 V.I. Code Ann. § 3409 et seq.).

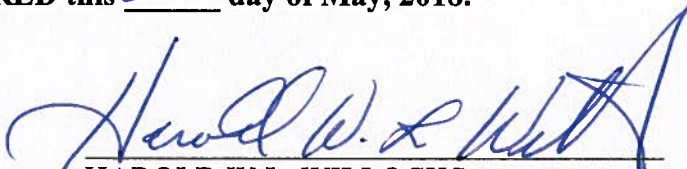
See V.I. R. Civ. P. 15-2. The Amended Verified Complaint must comply with Virgin Islands

Rule of Civil Procedure 15-1. *See* V.I. R. Civ. P. 15-1. The Court will enter an Order consistent with this Memorandum Opinion.

DONE and so ORDERED this 21st day of May, 2018.

ATTEST:

Estrella H. George
Clerk of the Court


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

By:


Court Clerk Supervisor

Dated:

5/24/18