

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

UNITED STATES VIRGIN ISLANDS)	
ECONOMIC DEVELOPMENT AUTHORITY,)	Case No. ST-17-CV-383
)	
Plaintiff,)	
vs.)	
)	
THE PLAYPEN, INC., JONATHAN)	ACTION FOR DEBT
SPENCELEY and CINDY L.G. SPENCELEY,)	AND FORECLOSURE
Individually)	OF LIEN
)	
Defendants.)	
)Cite as 2019 V.I. Super 17U

MEMORANDUM OPINION

¶1 **THIS MATTER** is before the Court on Defendant Jonathan Spenceley's Motion to Dismiss. He argues Plaintiff has failed to state a claim upon which relief may be granted because the matter is time barred. The allegations in the Complaint only state when the subject loan matured; it is silent on when the last payment on the loan was made. Therefore, the Court cannot determine if the statute of limitations expired prior to the filing of the Complaint. Similarly, the Court cannot determine, from the Complaint, if a statute enacted in 2014 exempts this case from any statute of limitations. Therefore, Defendant Jonathan Spenceley's Motion to Dismiss will be denied.

FACTS

¶2 Defendant The Playpen, Inc. received a loan for \$15,269.75 from the Small Business Development Agency (SBDA) (a division of Plaintiff VI Economic Development Agency). The Promissory Note was executed on February 19, 1988, and

Defendant Jonathan Spenceley simultaneously executed a Personal Guarantee Agreement, whereby he unconditionally guaranteed payment to SBDA for the indebtedness of the Borrower, The Playpen, Inc. The loan was amortized over 60 months with a maturity date of March 1, 1993. Defendants defaulted on the loan. Plaintiff Economic Development Authority (“EDA”) filed this action for debt against the Defendants on August 24, 2017 (the “Complaint”).

¶3 Spenceley argues that the statute of limitations expired long before Plaintiff filed the Complaint. EDA responds and argues it has not waived sovereign immunity and the general six-year statute of limitations does not apply.¹

ANALYSIS

A. General Statute of Limitations

¶4 Spenceley relies on V.I. CODE ANN. tit. 5, § 31(3)(A), which reads in relevant part that the statute of limitations for “[a]n action upon a contract or liability, express or implied, excepting those mentioned in paragraph (1)(C) of this section” shall be six (6) years. Thus, he argues the statute of limitations started to run when the loan matured on March 1, 1993, and it expired on March 1, 1999.

¹ EDA attached copies of the Promissory Note and Personal Guarantee to its Opposition to Motion To Dismiss. Spenceley argues attaching those documents was improper as the Court’s consideration of a motion to dismiss is limited to the pleadings, although Spenceley hastens to add that nothing in the attachments defeats his argument that the statute of limitations is expired. The Court agrees. It may not consider attachments to an Opposition when considering a Rule 12(b)6 Motion To Dismiss. However, even if it were permitted to do so, nothing in the attachments resolves the issue of when the statute of limitations started to run, if at all.

¶5 However, Title 5 further provides “[w]hensoever any payment of principal or interest has been or shall be made upon an existing contract . . . if such payment be made after the same shall have become due, the limitation shall commence *from the time the last payment was made.*” V.I. CODE ANN. tit. 5, § 40 (Emphasis added.) The Complaint clearly asserts the loan was for the sum of \$15,269.75, and the principal balance is now \$8,061.45. Therefore, it is evident that payments were made on the loan. However, nothing in the Complaint alleges the date of the last payment. Without an assertion of the date the last payment was made, the Court cannot ascertain when the statute of limitations began to run nor if the matter is time barred.

B. Sovereign Immunity.

¶6 The Economic Development Authority (“EDA”) was created as “. . . a public corporation **and** semi-autonomous instrumentality of the Government of the Virgin Islands.” V.I. CODE ANN. tit. 29, § 1101(a) (emphasis added). The EDA is explicitly described as “having legal existence and personality separate and apart from the Government of the Virgin Islands” and “the debts, obligations contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, facilities and property of the Authority shall be deemed to be those of the Authority and not to be those of the Government.” 29 V.I.C. § 1101(b). The charter of the EDA establishes that, among other things, the EDA will have the power, “on behalf of itself or its subsidiary corporations and entities,” to acquire and dispose of property, enter into contracts,

make and repeal its own rules and regulations and – critically – “to sue and be sued.”

29 V.I.C. 1103.²

¶7 Although EDA is both a public corporation and a semi-autonomous government entity, by granting it the power to sue and be sued, the legislature definitively waived the protection of sovereign immunity for EDA. Therefore, EDA must be treated as a public corporation, subject to 5 V.I.C. §34: “[t]he limitations prescribed in this chapter shall apply to actions brought in the name of any public corporation in the Virgin Islands, or for its benefit in the same manner as to actions by private parties.” The EDA is not protected by the doctrine of sovereign immunity. *United States V.I. Econ. Dev. Auth. v. Hypolite*, Super Ct. Civ. No. ST-16-CV-268, 2019 V.I. LEXIS 10 (V.I. Super Ct. Jan. 28, 2019) (unpublished).

New Law Enacted in 2014.

¶8 The Government Development Bank of the Virgin Islands was created as a discrete but integral part of the Economic Development Authority. V.I. CODE ANN.

² EDA relies upon *In re Hooper's Estate*, 359 F.2d 569, 578, 5 V.I. 518 (3d Cir.1966) to argue that its loans are not subject to the six year statute of limitations. However, *In re Hooper's Estate* did not address the language in 5 V.I.C. § 34 that specifically states the six-year statute of limitations applies to **any public corporation**. *In re Hooper's Estate* simply addressed the general six-year statute of limitations in 5 V.I.C. § 31, finding that “[i]n the absence of an express waiver of its immunity, the Government of the Virgin Islands is not bound by the general statute of limitations.” 359 F.2d at 578. Here, the government has expressly waived sovereign immunity for the EDA by giving it the ability to sue and be sued. Therefore, *In re Hooper's Estate* is not determinative.

tit. 29 V.I.C. § 901. The current charter of the Government Development Bank reads in relevant part:

Ninth: Loans procured from the [Economic Development] Bank or the Small Business Development Agency are not subject to the statute of limitations as stated in Virgin Islands Code, title 5, chapter 3, § 31. The Economic Development Bank or the Small Business Development Agency may bring an action for default against a Loan recipient at any time; as per the rules of civil procedure and the agreement between the parties.

29 V.I.C. § 902.³

¶9 This current charter of the EDA modifies the applicability of 5 V.I.C. § 40, as it exempts EDA, including loans from the Small Business Development Agency—the agency that made the loan to The Playpen, Inc.—from the statute of limitations. However, the new charter that protects the EDA from any statute of limitations is not retroactive *United States V.I. Econ. Dev. Auth. v. Hypolite*, Super Ct. Civ. No. ST-16-CV-268, 2019 V.I. LEXIS 10 (V.I. Super Ct. Jan. 28, 2019) (unpublished). The exemption only applies to loans where the statute of limitations had not yet expired on the day the new charter was enacted. *Id.*

¶10 The Complaint in this matter does not state the date of the last payment made on the subject loan. Therefore, the Court cannot ascertain the date the six-year statute of limitations began to run. Neither then can the Court determine if the six-year statute of limitations had expired prior to June 18, 2014, or if the EDA's new charter protects EDA's claim in this case from a statute of limitations.

³ Enacted June 18, 2014, Act No. 7632, § 3(a), Sess. L. 2014, p. 166-172.

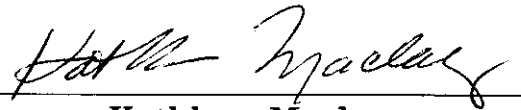
CONCLUSION

¶11 The Complaint is silent on the date the last payment was made on the loan that Spenceley guaranteed. As a result, the Court cannot determine when the general six-year statute of limitations began to run, or whether the current charter of the EDA, enacted on June 18, 2014, exempts EDA's claim in this case from any statute of limitations.

¶12 The Complaint alleges that Spenceley guaranteed payment of the loan made to The Playpen, Inc. and the loan is in default. Therefore, it states a claim for which relief may be granted.

¶13 Therefore, the Motion to Dismiss will be denied and Spenceley will be directed to file an Answer to the Complaint. An Order consistent with this Memorandum Opinion will be entered.

DATED: February 19, 2019




Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

BY:


DONNA DONOVAN
Court Clerk Supervisor 2/20/2019