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-16-CV-268
Plaintiff,	)	*Cite as: 2019VI SUPER 4U*
vs.	)	
JOHN HYPOLITE D/B/A MOTOR TREND and ALFRED CANNONIER, individually	)	ACTION FOR DEBT
Defendants.	)	

MEMORANDUM OPINION

¶1 **THIS MATTER** is before the Court on Defendant John Hypolite's Motion to Dismiss. and John Hypolite's Motion to Strike the Sur-Reply or in the Alternative, For Leave to File Additional Briefing.[1] The issue is whether the EDA is exempt from the six-year statute of limitations for a debt action. Current law exempts EDA from the statute of limitations, but that law was enacted in 2014, after the statute of limitations had run on Hypolite's debt to the EDA. Therefore, Defendant Hypolite's Motion to Dismiss will be granted, and the Motion to Strike will be denied.

FACTS

¶2 Plaintiff Economic Development Authority ("EDA") filed this action for debt against Defendants John Hypolite d/b/a Motor Trend ("Hypolite") and Alfred Cannonier, individually ("Cannonier") on May 17, 2016 (the "Complaint"). According

[1] Plaintiff's Opposition to Defendant's Motion to Dismiss was filed on August 16, 2016, and Defendant filed a Reply on August 30, 2016. Plaintiff subsequently filed "Plaintiff's Sur-Reply to Motion to Dismiss on September 20, 2016 (the "Sur-Reply"), which prompted Hypolite to file the Motion To Strike. Plaintiff did not respond to the Motion to Strike.

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to the Complaint, on March 3, 2000, the Government Development Bank (now the Economic Development Bank) ("EDB"), a subsidiary of EDA, entered into an agreement to loan Hypolite the sum of One Hundred Forty-One Thousand Six Hundred and 00/100 Dollars ($141,600.00) (the "Loan").[2] The loan agreement called for monthly payments beginning on May 1, 2000. Hypolite made one payment of Eight Thousand Five Hundred Fifty-Four and 21/100 Dollars ($8,554.21) on March 7, 2002 and has since made no further payments on the Loan. Fourteen (14) years after receiving the sole payment, EDA filed its Complaint. Hypolite then filed the instant Motion to Dismiss, arguing that EDA's claim was time-barred under the statute of limitations and therefore, EDA's Complaint fails to state a claim for which relief might be granted.[3] Def.'s Mot. to Dismiss 1. EDA's Opposition argues that (i) V.I. CODE ANN. tit. 29, § 902(J)[4] expressly exempts the EDB from the statute of limitations and (ii) EDA is a government entity and as such is not bound by the

[2] At the same time, Cannonier executed a personal guarantee as security for the Loan. However, default was entered against Defendant Cannonier on July 29, 2016. Hypolite brings the instant Motion to Dismiss and Motion to Strike on behalf of himself, only.

[3] Hypolite's Motion To Dismiss is filed pursuant to Fed. R. Civ. P. 12(b)(6) and his Motion To Strike is filed pursuant to LRCi 7.1(a). However, effective March 31, 2017 the Supreme Court adopted the Virgin Islands Rules of Civil Procedure, which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal and Local Rules of Civil Procedure. Under the V.I. R. Civ. P., the rule that corresponds to Fed. R. Civ. P. 12(b)(6) is V.I. R. Civ. P. 12(b)(6) and the rule that corresponds to LRCi 7.1(a) is V.I. R. Civ. P. 6-1(c). Per V.I. R. Civ. P. 1-1(c)(2)(B) "These rules, and subsequent amendments, govern: proceedings in any action pending on the effective date of the rules or amendments, unless: the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice." Applying the new rules here is feasible and would not "work an injustice" to the parties. Finally, the Court notes that the only change in LRCi 7.1(a) is that the words "counsel **will** be sanctioned" found therein have been altered to read, "counsel **may** be sanctioned". V.I. R. CIV. P. 6-1(c). (emphasis added).

[4] Although EDA references "29 V.I.C. § 902(J)" in its Opposition (and Hypolite repeats this error in his Reply), the correct citation for the provision quoted is to Paragraph 9 of the Charter of the GDB, as set forth in § 902. (Although other paragraphs in the statute are divided into subsections, there is no "(J)" in the portion referenced by the parties.)

statute of limitations without an express waiver of sovereign immunity. In his Reply, Hypolite asserted the government had expressly waived its right to immunity under V.I. CODE ANN. tit. 5, § 34. EDA filed its Sur-Reply in response to the argument on waiver of immunity and Hypolite then filed the instant Motion to Strike, arguing that (i) EDA had not received the requisite permission of the Court to file a Sur-Reply and (ii) a Sur-Reply was not warranted.

ANALYSIS

I. THE EDA IS NOT EXEMPT FROM THE STATUTE OF LIMITATIONS

¶3 Hypolite's Motion to Dismiss is premised on the argument that the six (6) year statute of limitations ran before EDA filed its Complaint, and therefore there is no claim for which relief may be granted. He 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. Title 5 further provides "[w]henever 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 first monthly payment on the Loan was due on May 1, 2000. However, the one and only payment on the Loan was made two years later, on March 7, 2002. Therefore, if no other law or principle applies, the statute of limitations would have run in March 2008. EDA, however, asserts that it is not bound by the statute of limitations as (i) the EDB is expressly exempted by statute, and (ii)

the EDA is a government entity and is therefore protected by the doctrine of sovereign immunity. Opp. 2. EDA is incorrect on both claims.

A. V.I. CODE ANN. tit. 29, § 902 May Not Be Applied Retroactively in This Matter.

¶4 EDA relies on 29 V.I.C. § 902 to assert that the EDB is expressly exempted from the statute of limitations in this matter. The current charter of the Economic Development Bank reads in relevant part:

> **Ninth**: Loans procured from the [Economic Development] Bank . . . are not subject to the statute of limitations as stated in Virgin Islands Code, title 5, chapter 3, § 31. The Economic Development Bank . . . 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.[5]

29 V.I.C. § 902.

¶5 Hypolite argues that this provision was enacted in 2014, six years after the statute of limitations would have otherwise run, and therefore it should not be applied retroactively. "[R]etroactivity is not favored in the law." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 264 (1994) (internal citations omitted). "A statute is presumed to be prospective only and will not be applied retroactively in the absence of clear legislative intent." *Virgin Islands ex rel. Suarez v. Suarez*, 24 V.I. 3, 8 (V.I. Terr. Ct. 1988) (citing *United States v. Security Industrial Bank*, 459 U.S. 70, (1982)). "However, where no such specific intent is found, a statute may be retrospectively applied if it is remedial in nature." *Id.* (citing *Silverlight v. Huggins*, 347 F. Supp.

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

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895, 9 V.I. 123 (D.V.I. 1972), aff'd, 10 V.I. 638, 488 F.2d 107 (3d Cir. 1973)); *Drayton v. Drayton*, 65 V.I. 325, 334 (V.I. 2016) ("[T]he presumption that statutes are to be applied prospectively can be overcome where 'the statute is remedial or procedural in nature.'" (quoting *Workplace Sys., Inc. v. CIGNA Prop. & Cas. Ins. Co.*, 143 N.H. 322, 723 A.2d 583, 584 (N.H. 1999)). "A remedial, or curative, statute is one that attempts to accomplish a previously enacted design, which has failed to achieve their expected legal consequences by reason of some statutory inadequacy." *Richards v. Llanos*, 43 V.I. 125, 128 (V.I. Terr. Ct. 2001) (citing *Silverlight*, 347 F. Supp. 895, 9 V.I. 123). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270 (internal citations omitted).

¶6 The 2014 amendment to 29 V.I.C. § 902 does not expressly indicate that the statute should apply retroactively to loans where the general statute of limitations set forth in 5 V.I.C. § 31(3)(A) had already run. The new provision does appear to be remedial, in that it (i) serves to clarify that loans procured from the EDB are not subject to the statute of limitations and (ii) is intended to facilitate the EDA in collecting debts owed. Therefore, the Court must examine the possible retroactive effects of applying the statute to the instant matter. "[T]he court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct,

or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. "Essentially, [where] there is no impairment of the rights of the parties, increased liability, or imposition of new duties upon the parties" there is no retroactive effect. *Thompson v. Thompson*, 64 V.I. 71, 78 (Super. Ct. 2016). Here, however, applying the 2014 amendment to 29 V.I.C. § 902 would most certainly impair Hypolite's rights as it would increase his outstanding liability for past conduct and impose new duties with respect to transactions already completed, in that Hypolite would become liable on the Loan long after the previously existing statute of limitations had run. Therefore, the Court finds the statute "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. As a result, the Court finds that applying 29 V.I.C. § 902 in this matter would work an injustice to Hypolite and therefore, it should not be applied retroactively here.

B. The EDA is Not Protected by the Doctrine of Sovereign Immunity

¶7 Hypolite asserts that the EDA is a public corporation and that it has expressly waived sovereign immunity under 5 V.I.C. § 34 (and is thus subject to the statute of limitations under 5 V.I.C. § 31(3)(A)). EDA counters that it is a semi-autonomous instrumentality of the Government of the Virgin Islands, subject to the general supervision of the Governor and the control of its governing board, and is therefore protected by sovereign immunity. The Court disagrees. Under V.I. CODE ANN. tit. 29, § 1101(a), the EDB was created as ". . . a public corporation **and** semi-autonomous instrumentality of the Government of the Virgin Islands." (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." V.I. CODE ANN. tit. 29, § 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." V.I. CODE ANN. tit. 29, § 1103.

¶8 The Supreme Court of the United States has held that "[t]he words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings." *Federal Housing Admin. v. Burr*, 309 U.S. 242, 243, (1940) (finding that the Federal Housing Administration was not protected by sovereign immunity, as the "sue or be sued" clause of the National Housing Act served to waive immunity). Courts in the Virgin Islands have found the power "to sue and be sued" instructive, regarding the waiver of sovereign immunity for government entities. "Wherever it has been the purpose of the legislature to authorize any of the agencies of government to proceed independently of parent municipality, the power to sue or be sued has been expressly given." *Juan F. Luis Hosp. & Med. Ctr., & Gov't of the V.I. ex rel. Governor Juan F. Luis Hosp. & Med. Ctr. v. Titan Med. Group, LLC*, 2018 V.I. Supreme LEXIS 33, *15 (quoting *Des Moines Park Bd. v. City of Des Moines*, 228 Iowa 804, 228 Iowa 904, 290

N.W. 680, 681 (Iowa 1940)). "Corporations . . . are creatures of statute and therefore require statutory authority to sue and be sued." *Sekou v. Moorhead*, 2017 V.I. LEXIS 141, *9 (V.I. Super. Ct. 2017).

> Ordinarily, when the Legislature seeks to authorize an agency created by statute to have the power to sue and be sued, it has expressly done so. *See, e.g.*, 29 V.I.C. § 496(d) (establishing the Virgin Islands Waste Management Authority as an autonomous instrumentality of the Government of the Virgin Islands with the power "to sue and be sued in its corporate name").

Gov't Emples. Ret. Sys. of the V.I. v. Juan F. Luis Hosp. & Med. Ctr., 2016 V.I. LEXIS 128, *7-8 (V.I. Super. Ct. 2016). "By including the language allowing WAPA 'to sue and be sued,' the legislature waived WAPA's sovereign immunity." *Hodge v. Virgin Islands Water & Power Auth.*, 55 V.I. 460, 461 (V.I. Super. Ct. 2011) (citing *Cyprian v. Butcher*, 53 V.I. 224, 230 (V.I. Super. Ct. 2010). "[B]y creating VIHA as a public body corporate and politic, and decisively conferring it with the power to sue and be sued, the government was clearly and unequivocally waiving sovereign immunity with respect to VIHA in its capacity as a 'separate entity' from the government." *Rosa v. V.I. Hous. Auth.*, 43 V.I. 131, 135-136 (V.I. Terr. Ct. 2001). *See also Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 590 (V.I. 2015) ("Importantly, numerous courts have interpreted similar 'sue or be sued' clauses, as contained in the Revised Organic Act, as waiving immunity for quantum meruit claims."); *Contra, Gov't Emples. Ret. Sys. of the V.I. v. Juan F. Luis Hosp. & Med. Ctr.*, 2016 V.I. LEXIS 128, *1 ("Because the Legislature *has not* authorized JFL to sue or be sued in a civil action, JFL is not a proper defendant in this case") (emphasis added).

¶9 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 has 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." As EDA is not protected by the doctrine of sovereign immunity and this action sounds in contract, the six-year statute of limitations provision in 5 V.I.C. § 31(3)(A) applies to EDA in its role as a public corporation.[6]

II. THE SUR-REPLY WAS WARRANTED, IN PART, AND WAS PROPERLY FILED WITH THE COURT

¶10 Hypolite's Motion to Strike asks that (i) EDA's Sur-Reply be stricken from the record, or in the alternative that, (ii) should the Court choose to accept EDA's Sur-Reply, Hypolite might be granted leave to submit a supplemental responsive filing to address the Sur-Reply. Hypolite argues that EDA's Sur-Reply should be stricken from the record as EDA did not move for or receive leave of the Court to file, as

[6] EDA argued that the Government of the Virgin Islands is the real party in interest in this matter and as such it is not subject to the defenses of laches or the statutes of limitations. EDA relies upon *In re Hooper's Estate*, 359 F.2d 569, 578, 5 V.I. 518 (3d Cir.1966) for this argument. However, *In re Hooper's Estate* did not address the language in Title 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 Title 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 and therefore, *In re Hooper's Estate* is not determinative.

required under V.I. R. Civ. P. 6-1(c). "Only a motion, a response in opposition, and a reply may be served on other parties and filed with the court; further response or reply may be made only by leave of court obtained before filing." V.I. R. Civ. P. 6-1(c). "[I]f issues have been raised for the first time in a reply that would warrant a sur-reply in response, [Rule 6-1(c)] is clear that the respondent must first seek leave of court before filing an additional response." *Nature Conservancy, Inc. v. Louisenhoj Holdings, LLC*, 2014 V.I. LEXIS 42, *13 (V.I. Super. Ct. 2014).

¶11 Before addressing the procedural issue, the Court will examine whether or not a sur-reply was warranted in the first place. In general, sur-responses and "[s]urreplies are disfavored because parties are expected to fully and expeditiously address all matters raised in the original motion in their response[s]." *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 122 (V.I. Super. Ct. 2016) (citing *Pate v. Gov't of the V.I.*, 62 V.I. 271, 292-93 (V.I. Super. Ct. 2015)). There are, however, instances when a sur-response or sur-reply is justified. One of those instances is when a party raises a new argument in their reply.[7] "The problem with allowing a new argument to be asserted in a reply in support of the original motion is that it does not give the party opposing the motion the opportunity to respond." *Lorraine Associates, L.L.C. v. Gov't of the V.I.*, 2016 V.I. LEXIS 24, *15 n.43 (V.I. Super. Ct. 2016) (quoting *Lawson v. Mahoning Cty. Mental Health Bd.*, 2010-Ohio-6389 (Ohio Ct. App. 2010). Therefore,

[7] *See Der Weer*, 64 V.I. at 120-121 (addressing the limited use of sur-replies to address new arguments raised for the first time in the reply briefing); *see also Id.* at 122 (further noting that when further response will aid the court by addressing relevant issues, leave to file a sur-reply should be granted).

"[o]rdinarily, when a party raises a new argument in its reply, the argument 'is deemed waived' . . . However, the court, in its discretion, could grant the opposing party leave to respond further, either *sua sponte* when warranted or on motion." *Der Weer*, 64 V.I. at 121 (quoting *Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 528 n.4 (V.I. 2013)).

¶12 Hypolite argues that the Sur-Reply is unwarranted, as no new issues calling for additional briefing were raised in the Reply, but this is not entirely correct. Hypolite's Motion to Dismiss is based on a single claim: EDA's Complaint should be barred because the statute of limitations for filing the claim has run. In his Reply, however, Hypolite goes further, by introducing the argument that the government of the Virgin Islands has expressly waived statute of limitations immunity for public corporations including the EDB (and thus, EDA) under the language of 5 V.I.C. § 34. While Hypolite asserts that these arguments merely serve to expand upon the original statute of limitations argument, this Court disagrees. The waiver issue raised by Hypolite in the Reply went beyond the scope of the original argument and therefore "[i]t is appropriate to grant a sur-reply to allow the non-moving party the opportunity to respond to arguments raised for the first time in the movant's reply." *Amlin Underwriting, Ltd. v. Caribbean Auto Mart of St. Croix, Inc.*, 2010 U.S. Dist. LEXIS 102609, *4 (D.V.I. 2010) (citing *Carlins v. Board of Directors of Gallows Point Condominium Corp.*, 2004 U.S. Dist. LEXIS 27357, *4-5, (D.V.I. 2004)); see also *Sussman v. PCGNY Corp.*, 2015 U.S. Dist. LEXIS 153755, *3 (D.V.I. 2015) (citing *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003)) (finding the district

court properly allowed the plaintiff to file a sur-reply where the defendant raised an issue for the first time in its reply brief).[8]

¶13 Regarding the procedural issue, EDA included a request for leave to file in the preamble of the Sur-Reply itself, thereafter attaching the proposed filing. "[EDA] hereby requests the Court's leave to submit its sur-reply . . . ." Plt.'s Sur-Reply 1. As EDA submitted the Sur-Reply without first obtaining leave to file, the filing is technically in violation of V.I. R. Civ. P. 6-1(c), and this Court has the authority to strike the document from the record. *See NRDC v. United States FDA*, 884 F. Supp. 2d 108, 115 n.5 (S.D.N.Y. 2012) (quoting *In re Bear Stearns Cos., Inc., Securities, Derivative, and ERISA Litig.*, 763 F. Supp. 2d 423, 581 (S.D.N.Y. 2011) ("a court has 'inherent authority to strike any filed paper which it determines to be abusive or otherwise improper under the circumstances.'") However, this does not mean the Court is under an obligation to strike. "Courts do have the discretion . . .to allow further 'response or reply' when necessary or warranted." *Der Weer*, 64 V.I. at 122 (quoting V.I. R. Civ. P. 6-1(c)). Moreover, courts have found this method of filing to be both beneficial and permissible, at the court's discretion. "Attaching a proposed sur-reply to arguments raised for the first time in the movant's reply may or not be helpful to the Court. Accordingly, the non-movant is neither required nor prohibited from attaching her proposed sur-reply to her motion for leave to file it." *Carlins v.*

[8] The Court notes that the Sur-Reply was improper as to the arguments presented regarding 29 V.I.C. § 902. This issue was raised in EDA's Opposition and no further briefing was warranted.

Bd. of Dirs. of Gallows Point Condo. Corp., 2004 U.S. Dist. LEXIS 27357, *5 (D.V.I. 2004).

¶14 In this instance, the Court finds that EDA's failure to obtain leave to file the Sur-Reply prior to filing does not give cause to strike the filing in its entirety. The Sur-Reply directly addresses the new argument raised in Hypolite's Reply and the Court finds it useful and judicially expeditious to see the proposed Sur-Reply together with the request for leave to file. In light of the above, the Sur-Reply will be allowed as to the 5 V.I.C. § 34 issue.

¶15 Finally, in the Motion to Strike, Hypolite asks that if the Sur-Reply is allowed, he be granted leave to file a supplemental responsive pleading.[9] As EDA did not raise any new issues in the Sur-Reply, the Court sees no reason for additional pleadings, particularly since the opinion grants the relief Hypolite seeks. The request for leave to file an additional briefing will be denied.

CONCLUSION

¶16 This debt action was filed in 2016. The last payment on the loan was made in March 2002. The six-year statute of limitations ran in May 2008. EDA is a public corporation and it has expressly waived sovereign immunity under 5 V.I.C. § 34 and is thus subject to the six-year statute of limitations. Title 29 V.I.C. § 902, Paragraph 9 specifically provides that EDA is not subject to the statute of limitations

[9] Similarly, in his Reply, Hypolite requested leave to file an additional briefing to address the issue of the applicability of sovereign immunity in the context of *Banks*. (*See, Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011). As the question of whether or not the statute of limitations applies to the EDA has now been determined by statute, there is no reason for a *Banks* analysis on this matter.

in Title 5, § 31. However, Title 29 V.I.C. § 902, Paragraph 9 was enacted in 2014, long after the statute of limitations on Hypolite's loan had run. Therefore, Title 29 V.I.C. § 902 would attach new legal consequences to Hypolite's loan, which is disfavored. Title 29 V.I.C. § 902 may not be applied retroactively.

¶17 As a result, EDA does not have a claim for which relief might be granted in this matter. Therefore, the Court will grant Defendant Hypolite's Motion to Dismiss.

¶18 The Court finds no need for additional briefings on the Motion to Dismiss or the Motion to Strike. The Court will allow the Sur-Reply and deny Defendant Hypolite's Motion to Strike the Sur-Reply or, In the Alternative, For Leave to File Additional Briefing.

¶19 An Order consistent with this Memorandum Opinion will be entered.

DATED: January 28, 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 1/30/2019