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

NANCY ANDERSON,	)
	) CIVIL NO. ST-08-CV-545
Plaintiff,	)
vs.	) ACTION FOR PRELIMINARY
	) INJUNCTIVE RELIEF, BREACH OF
BASIL BRYAN,	) CONTRACT, DECLARATORY
	) RELIEF, NUISANCE AND DAMAGES
Defendant.	)
	) JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff's Motion for Relief from Judgment, filed on August 13, 2010. Karin A. Bentz, Esq., of the Law Firm of Karin Bentz, represents Plaintiff Nancy Anderson and former-Plaintiff Moonpath, LLC. Joseph Arellano, Esq., of Arellano & Associates, represents Defendant Basil Bryan.

In its July 29, 2010 Memorandum Opinion ("Opinion"), the Court granted Bryan's Motion to Dismiss Moonpath as a plaintiff. On August 13, 2010, Moonpath moved for a Motion for Relief from Judgment, "pursuant to Rules 59(e) and 60(b)(6) of the Federal Rules of Civil Procedure." Bryan filed his Opposition on September 1, 2010. Moonpath filed its Reply on September 17, 2010.

As an initial matter, Moonpath's reliance on Rule 59(e) is misplaced. If a motion for reconsideration is filed within ten days of the order to be reconsidered, the parties may rely on Rule 59(e). *Ruiz v. Jung*, S. Ct. 2008-035, 2009 WL 3568182, at *3 (V.I. Oct. 19, 2009). However, if it is filed more than ten days after entry of the order, it is considered a Rule 60(b) Motion. The Motion was filed eleven days after the Opinion was entered. Therefore, 59(e) is inapplicable.

Rule 60(b) authorizes the Court, "on motion and just terms," to relieve a party from a "final judgment, order, or proceedings" for, *inter alia*, "any other reason that justifies relief." FED. R. CIV. P. 60(b). Such a motion must "be fully substantiated by adequate proof and its exceptional character must be clearly established." *A.P. v. Virgin Islands ex re C.C.*, 36 V.I. 158 (D.V.I. App. Div. 1997). Relief is appropriate "only 'under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur.'" *Judi's of St. Croix Car Rental v. Weston*, S.Ct. Civ. No. 2007-050, 2008 WL 901485, *5 (V.I. 2008) (quoting *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140-41 (3d Cir. 1993)). Moonpath argues that the Court was in error when it, according to Moonpath, *sua sponte* raised the statute of limitations bar as justification for dismissing Moonpath as a plaintiff. Moonpath argues that Bryan waived the

statute of limitations defense when he failed to raise it in his Answer.

The Court's Opinion dismissed Moonpath because it lacked any interest in this matter and, therefore, was an improper party. Moonpath transferred its interest in the subject easement to Anderson more than three years before the Complaint in this action was filed, and Moonpath never contracted with Bryan for the sale of the property. The Court noted in its Opinion that Moonpath also sought money damages for the loss of use and enjoyment of the subject easement during the time that Moonpath had an interest in the easement, before that easement was transferred to Anderson. However, the Court determined that these claims were barred by the statute of limitations for nuisance and contract.

Moonpath is correct that, as a general rule, affirmative defenses, including the statute of limitations defense, must be raised in an Answer. FED. R. CIV. P. 8(c). A failure to raise the defense in an answer generally constitutes a waiver of that defense. However, in its Motion, Moonpath fails to apply the Third Circuit Rule. The Third Circuit Rule permits parties to raise a statute of limitations defense in a Rule 12(b)(6) Motion to Dismiss. *See, e.g.*, *Robinson v. Johnson*, 313 F.3d 128, 135 n.3 (3d Cir. 2002).[1] The Third Circuit Rule applies if "'the time alleged *in the statement of a claim* shows that the cause of action has not been brought within the statute of limitations.'" *Robinson*, 313 F.3d at 135 (quoting *Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975)).

In this case, Bryan raised the statute of limitations argument in its Reply to Moonpath's Opposition to Bryan's Motion to Dismiss, rather than in the Motion to Dismiss itself. Moonpath is correct that, generally speaking, the arguments ought to be raised, in the first instance, in the motion itself. However, Moonpath was on notice that Bryan was raising the claim, and could have sought leave, which it would have received, to file a sur-reply to argue against the statute of limitations. It did not. Moreover, Moonpath's Motion for Relief from Order asserts the arguments which Moonpath presumably would have raised had Bryan asserted the statute of limitations defense in his Motion, rather than his Reply. As the Court discusses below, these arguments are unconvincing. Therefore, Moonpath cannot now move, "in the interest of justice," for the extraordinary remedy of an order granting relief from the Opinion.

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[1] The Court notes that Moonpath actually cites *Robinson v. Johnson*. However, it does so as a direct citation, without any signal, thereby implying that *Robinson* contains the quotation which its citation follows. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 54 (Columbia Law Review Ass'n et al. eds. 19th ed. 2010) ("[no signal] Cited authority (i) directly states the proposition, (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text. Use no signal, for example, when directly quoting an authority or when restating numerical data from an authority.") *Robinson v. Johnson* has nothing to do with the quotation if follows, which actually cites to rules of the Territorial Court, and *Robinson* also very clearly lays out the Third Circuit Rule. Counsel for Moonpath either did not read *Robinson*, or chose not to cite its clear language regarding the Third Circuit Rule. Either way, counsel violated Local Rule 11.1, which states in relevant part that "[b]y signing a motion or . . . brief, an attorney certifies to the Court that: (a) the applicable law in this jurisdiction has been cited, including authority for and against the position being advocated by counsel."

Turning to the question of whether the statement of Moonpath's money claims clearly shows that the cause of action has not been brought within the statute of limitations, the Court considers Moonpath's First Amended Complaint. In paragraph ten (10) of the First Amended Complaint, Moonpath states that it transferred its interest in the parcel to Anderson in 2005. Moonpath does not state in its Complaint on what date this occurred. However, even if transfer had occurred on December 31, 2005, Moonpath's November 10, 2008 Complaint would still have been filed outside the two-year statute of limitations for nuisance claims. V.I. CODE ANN. tit. 5, § 31(5)(A) (1997). Therefore, that aspect of Moonpath's claim for money damages that sounds in nuisance is subject to a statute of limitations defense raised in a Rule 12(b)(6) Motion. *Richardson*, 313 F.3d at 135.

Similarly, it is clear from the face of Moonpath's First Amended Complaint that the aspect of its money damages Complaint that sounds in contract is also time-barred. The First Amended Complaint states, in paragraph 12 that Bryan executed an express easement in favor of Moonpath, and it incorporates by reference Exhibit A to the First Amended Complaint, which is a copy of the Grant of Easement. That Grant of Easement is dated May 9, 2002, and it expressly states that the easement must be paved within ninety days. Therefore, it is clear from the face of the First Amended Complaint that the contract claim accrued on August 7, 2002. The time for filing of this claim expired on August 7, 2008, and the claim is, therefore, time-barred.[2]

The case law cited by Moonpath is not to the contrary. Moonpath relies on *In re Estate of Sewer*, which based its holding on Territorial Court Rule 190. *In re Estate of Sewer*, F. Supp. 2d 817, 826 (D.V.I. App. Div. 2004) ("Territorial Court Rule 190 provides that Federal Rule 8(c)'s designation of a statute of limitations defense as a waivable affirmative defense must be abrogated by a specific provision of Virgin Islands law or another Territorial Court Rule."). That Rule no longer exists. Therefore, *In re Estate of Sewer* is inapplicable.

Moonpath also cites *Harris v. V.I. Housing Authority.* 27 V.I. 61 (Terr. Ct. 1992). *Harris* affirms that "[i]n our jurisdiction, the Third Circuit has ruled that all affirmative defenses including the defense of Statute of Limitations, may be presented by a motion to dismiss the complaint." *Harris*, 27 V.I. at 64 (citing, *inter alia*, *Brown v. Maschinenbeau*, 104 F.R.D. 585

[2] Moonpath argues, in essence, that the contract claim did not accrue on August 7, 2001, and that the statute of limitations should have been tolled. Even construing the factual allegations in the First Amended Complaint in the light most favorable to Moonpath, Moonpath still does not state a claim for relief plausible on its face. *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009) (establishing the plausibility standard for motions to dismiss). A claim that the statute of limitations should be tolled must fail because "a successful equitable estoppel argument cannot toll the statute of limitations beyond the date of a plaintiff's actual knowledge of the injury giving rise to his claim." *Lutz v. Philips Elec. North America Corp.*, 347 Fed. App'x 773 (3d Cir. 2009) (citing *Bohus v. Beloff*, 950 F.2d 919, 925-26 (3d Cir. 1991)). Assuming that Moonpath's factual allegations are true, Moonpath still could not possibly make out an equitable estoppel argument that would toll the statute of limitations.

(D.Pa. 1985)).

Moonpath also objects that the Court permitted Bryan to amend its Answer to the First Amended Complaint by including certain affirmative defenses, in addition to counterclaims. However, this objection is now moot, as the First Amended Complaint is no longer the operative Complaint, and Bryan has already filed a pleading responsive to the Second Amended Complaint.

Moonpath transferred all of its interest in the easement to Anderson in 2005, and none of its claims survive the statute of limitations. Because Moonpath does not have an interest in this matter, it does not have standing. Because the Court does not find that there are any "extraordinary circumstances" that justify relief from the Opinion dismissing Moonpath as plaintiff, the Court will deny Moonpath's Motion.

DATED: December 6, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:
ROSALIE GRIFFITH
Court Clerk Supervisor 12/13/10

CERTIFIED A TRUE COPY
Date: 12/16/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By:
Court Clerk

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CLERK OF THE SUPERIOR COURT

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ORDER

AND NOW, pursuant to the Memorandum Opinion issued on this date, it is hereby

ORDERED that former-Plaintiff Moonpath, LLC's August 13, 2010 Motion for Relief from Order is **DENIED**; and it is further

ORDERED that copies of this Order shall be directed to the parties' counsel of record.

DATED: December 6, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

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VENETIA H. VELAZQUEZ, ESQUIRE
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