

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

EMMET A. PETERSEN, SR.

Plaintiff)

CASE NO. ST-08-CV-0000577

Vs.)

WATER AND POWER AUTHORITY,
ET AL)

ACTION FOR: DAMAGES - CIVIL

Defendant)

**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: ESZART WYNTER, ESQUIRE
DENISE RHYMER, ESQUIRE
JUDGES OF THE SUPERIOR COURT
MAGISTRATES OF THE SUPERIOR COURT
LIBRARIAN
✓ DIVISION
ORDER BOOK

Please take notice that on October 19, 2009 a(n) MEMORANDUM
OPINION AND ORDER dated October 16, 2009 was entered by the Clerk in the
above-entitled matter.

Dated: October 19, 2009

Venetia H. Velazquez, Esq.
Clerk of the Court



DIANE MATTHEW-TURNBULL
COURT CLERK II

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

EMMET A. PETERSEN, SR.)	
)	
Plaintiff,)	
)	
vs.)	
)	
V.I. WATER AND POWER AUTHORITY)	CASE NO. ST-08-CV-577
and EIGEL L. LENHARDT)	
)	
)	
Defendants.)	
)	
)	
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MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants V.I. Water and Power Authority (“WAPA”) and Eigel L. Lenhardt’s (“Lenhardt”) September 3, 2009, Motion to Vacate this Court’s June 17, 2009, Order. For the following reasons, Defendants’ motion will be denied.

FACTUAL AND PROCEDURAL HISTORY

On November 25, 2008, Plaintiff Emmet A. Petersen, Sr. (“Plaintiff”) filed a Complaint alleging that Defendant Lenhardt, while in the employ of Defendant WAPA, negligently operated a motor vehicle owned by WAPA and inflicted injury upon Plaintiff. On December 22, 2008, Defendants filed a motion to dismiss on the grounds that the Court lacked subject matter jurisdiction because Plaintiff had not complied with the provisions of the Virgin Islands Tort Claims Act (“TCA”), V.I. Code Ann. tit. 33 § 3401,

et seq. On March 2, 2009, the Court denied Defendants' motion to dismiss and denied Defendants' March 19, 2009, motion for reconsideration on June 17, 2009. On August 19, 2009, Senior Superior Court Judge Edward D. Ross decided *Theodore Cryprian v. WAPA et al.*, SX-08-CV-515 (T. Ct. 2009), in which he ruled that WAPA is a government instrumentality that enjoys sovereign immunity. Defendants timely filed a motion to vacate this Court's June 17, 2009, Order in response.

ANALYSIS

Pursuant to Fed. R. Civ. P. 60(b), a court may relieve a party from an order for several reasons, including:

- (1) mistake, inadvertence, surprise or excusable neglect
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

A motion to vacate must be made within a year after the date of entry of an order. Fed. R. Civ. P. 60(c)(1).

As a Superior Court ruling, *Cryprian* is not controlling in this matter. Nevertheless, this Court will review *Cryprian* to ascertain if the case is persuasive in the instant matter and whether justice requires that the June 17, 2009, Order should be vacated.

In *Cryprian*, the court determined that because the plaintiff in that case did not comply with the notice provisions¹ of the TCA, WAPA did not waive its sovereign

¹ 33 V.I.C. §3408(a) states: "the Government of the 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 Virgin Islands while acting within the scope of this office or employment, under circumstances where the

immunity. The court's basis for this ruling was in light of the TCA's broad definition of the Government of the Virgin Islands (the "Government"). Pursuant to 33 V.I.C. § 3401, the Government includes "the executive, legislative, and judicial branches of the Government of the Virgin Islands, agencies and instrumentalities of the Government of the Virgin Islands." The *Cyprian* court reasoned that if the Legislature intended the TCA to apply to government instrumentalities but not to "autonomous government instrumentalities" like WAPA (see 30 V.I.C. § 103(b)), it would have indicated so plainly.

Given that WAPA's description as an "autonomous government instrumentality" is rather paradoxical, it has been a cause of confusion in this jurisdiction. In *Virgin Islands Press Association v. WAPA et al.*, 17 V.I. 329, 331 (D.V.I. 1980), the District Court emphasized that WAPA is "wholly separate and apart from the Government." Accordingly, the court determined that without an amendment to WAPA's charter, the Legislature could not include WAPA within the meaning of a "Governmental agency" or an "agency" as it had done in the Government in the Sunshine Act. *Id.* Nevertheless, in *Gabrielle Eddy v. WAPA et al.*, the same court determined that WAPA is the "alter ego"² of the Government and that the actions taken by WAPA are "state action."³

As a result, this Court will examine the Third Circuit's test for determining whether an entity is an arm or "alter ego" of the Government for Eleventh Amendment

Government of the 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 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."

² 35 V.I. 441, 454

³ 35 V.I. 441, 452

purposes. See *Febres v. The Camden Board of Education*, 445 F.3d 227, 229 (3d Cir. 2005) citing *Urbano v. Bd. Of Managers*, 415 F.2d 247, 250-251 (3d Cir. 1969). The nine factor test in *Urbano* was subsequently condensed to three primary criteria. See *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989). The *Fitchik* test considers the following criteria: (1) whether the payment of the judgment assessed against the sued entity would come from the state, (2) the status the entity has under state law, and (3) the degree of autonomy enjoyed by the entity. In addition, criteria (2) has four sub-factors to be considered: (i) how the Government treats the entity generally, (ii) whether the entity can sue or be sued, (iii) whether the entity is separately incorporated, and (iv) whether the entity is immune from state taxation. *Febres, supra*, at 230.

a) The Entity's Status under Territorial Law

With regard to WAPA's legal status, WAPA is "a corporation having legal existence and personality separate and apart from the Government." 30 V.I.C. § 103(b). WAPA has the right to have "perpetual existence as a corporation." 30 V.I.C. § 105(1). In addition, WAPA has the right "to sue and be sued in its corporate manner." 30 V.I.C. § 105(4). Moreover, the "debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, facilities, and property of the authority shall be deemed to be those of said Authority and not to be those of the Government of the Virgin Islands." 30 V.I.C. § 103(b). As a result, WAPA has complete control and supervision over its assets. See *Chiang v. Turnbull*, 43 V.I. 49, 64 (T. Ct. 2000). WAPA has the right to acquire property necessary or desirable to carry out its purposes,⁴ and the right to sell,

⁴ 30 V.I.C. § 105(6)

lease, exchange, transfer, assign, mortgage, pledge, or otherwise dispose of said property.⁵ WAPA also has the power to “make contracts and execute all instruments necessary or convenient in the exercise of any of its powers.” 30 V.I.C. § 105(5). WAPA is also exempt from all taxes and special assessments of the Virgin Islands. 30 V.I.C. § 111. Finally, 30 V.I.C. § 122 states that WAPA is not exempted “from any law made specifically applicable thereto or generally applicable to independent instrumentalities of the Government of the United States Virgin Islands ...” See also *Virgin Islands Public Service Commission v. WAPA*, S. Ct. Civ. No. 2007-027, Slip opinion at 12 (V.I. June 9, 2008) (the language of 30 V.I.C. § 122 “subjects WAPA only to laws that are specific to WAPA and those that apply generally to independent instrumentalities”). Thus, only laws that explicitly state they apply to WAPA are deemed applicable to it.

The Court finds that other than WAPA’s tax exempt status, WAPA’s legal status weighs against recognizing that WAPA has immunity. See *Febres, supra*, at 231.

b) The Entity’s Degree of Autonomy

With respect to WAPA’s autonomy, WAPA is managed by a Governing Board of nine individuals, six of which are “non-government members” appointed by the Governor of the Virgin Islands with the advice and consent of the Legislature, and three of which are appointed by the Governor “from among the heads of cabinet-level executive departments or agencies.” 30 V.I.C. § 103. The fact that the Governor appoints the Board members and that three are government employees weighs “slightly” in favor of

⁵ 30 V.I.C. § 105(7)

immunity. See *Febres, supra*, at 231 citing *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995).

c) Government Liability for the Payment of a Judgment

With regards to the state-treasury criterion, WAPA is legally responsible for payment of judgments⁶ assessed against it. After the Government transferred⁷ its water supply system to WAPA on January 1, 1988, "WAPA became completely responsible ... and independently liable for any lawsuit filed with reference to that system." *Lombardi v. Government of the Virgin Islands*, 33 V.I. 3, 7 (T. Ct. 1995). In addition, although a plaintiff cannot force WAPA to pay a judgment entered against it, the plaintiff can rely on WAPA's liability insurance. *Turbe v. Government of the V.I.*, 938 F.2d 427, 429 (3d Cir. 1991). The Third Circuit has also held that the "general waiver of governmental immunity in 33 V.I.C. § 3408 does not affect the special statutory provisions concerning [WAPA]." *Concepcion v. Cruz Soto*, 12 V.I. 200, 203 (3d Cir. 1975).

In addition, several similarly situated quasi-governmental entities in the Virgin Islands do not enjoy the protection of sovereign immunity. The Virgin Islands Housing Authority ("VIHA") is described as an "agency of the Government of the Virgin Islands." 29 V.I.C. § 31 Ann. 1. Nevertheless, as a "separate and distinct legal entity," VIHA is "liable on its debts and responsible for its torts, to the exclusion on the part of the Government." *Greaux v. Gov't of the V.I.*, 14 V.I. 160, 166 (T. Ct. 1977). Similarly, the

⁶ As the Virgin Islands' only utility company, WAPA generates substantial revenue from its customers such that it is unlikely that practical necessity would require the Government to replenish any funds used by WAPA to satisfy a judgment entered against it.

⁷ The Government did not "delegate [its] obligations with respect to the water supply system to WAPA" but rather "transferred all assets, rights, and responsibilities relating to the water supply to WAPA." *Lombardi v. Government of the Virgin Islands*, 33 V.I. 3, 9 (T. Ct. 1995).

Virgin Islands Port Authority ("VIPA") is characterized as "a public corporation and an autonomous governmental instrumentality of the Government." 29 V.I.C. § 541. VIPA, however, is not the "alter ego" of the Government because the Government has immunized itself from VIPA debts and any judgments that may be entered against VIPA would not technically affect the funds of the Government. *Virgin Islands Port Auth. v. Balfour Beatty, Inc.*, 30 V.I. 289 (D.V.I. 1994). Accordingly, "the Tort Claims Act ... which applies to the government to insulate it from liability under certain circumstances--does not apply to VIPA." *Ballentine v. Virgin Islands Port Authority*, 955 F. Supp. 480, 484 (D.V. I. 1997).

In light of the foregoing, WAPA's responsibility to pay its obligations weighs against WAPA's immunity. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994) (eleventh amendment's core concern is not implicated when the state is not obligated to pay the debts of the sued entity).

d) The Totality of the Factors

Considering the totality of the factors, WAPA is not an arm of the Government of the Virgin Islands. WAPA's exclusive control over its assets and its employees, through the contracts it forms with them, makes WAPA, and not the Government, liable for a WAPA employee's negligent operation of property owned by WAPA. As a distinct and separate corporate entity, WAPA does not enjoy the privilege of sovereign immunity and Plaintiff's failure to comply with the notice provisions of the TCA does not deprive this Court of subject matter jurisdiction over this matter.

CONCLUSION


The Court being advised in the premises,

IT IS HEREBY ORDERED that Defendants' Motion to Vacate is **DENIED**,

and it is further


ORDERED that copies of this Order be directed to counsel of record.

Dated: October 16, 2009


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

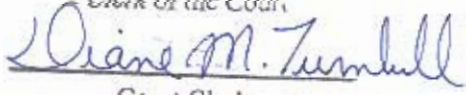
Date: October _____, 2009

Venetia H. Velazquez, Esq.
Clerk of the Court

by:  10/19/09
Rosalie Griffith
Court Clerk Supervisor

CERTIFIED A TRUE COPY

Date: 10/19/09
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk