

NOT FOR PUBLICATION

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

Atanya Springette, Terrance)
Clestine, Ruth Simon, as)
Adminstratrix of the Estate of) Civ. No. 2001-131
Tisha Simon, and Wilma Philips,)
Administratrix of the Estate of)
Monica Martin,)
)
Plaintiffs,)
)
v.)
)
Better Roads Asphalt Company, Inc.,)
Deleuw Cather and Company, Bermudez)
& Longo, Inc., Susan Roe, ABC)
Corporation, Inc., and John Doe,)
)
Defendants.)

ATTORNEYS:

Robert L. King
St. Thomas, U.S.V.I.
For the plaintiffs

Wilfredo A. Geigel
St. Croix, U.S.V.I.
For defendant Bermudez and Longo, Inc.

MEMORANDUM

Moore, J.

Defendant Bermudez and Longo, Inc. has moved to dismiss itself from this lawsuit. For the reasons stated below, I will deny the motion without prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 2001, the plaintiffs filed a complaint against Better Roads Asphalt Company, Inc., Deleuw Cather and Company, XYZ Corporation, Inc., Susan Roe, ABC Corporation Inc., and John Doe. The complaint alleged a claim for breach of contract, and separate claims for negligent and willful construction of an unreasonably dangerous light post. The light post at issue allegedly contributed to the deaths of Tisha Simon and Monica Martin and to injuries sustained by Atanya Springette and Terrance Celestine as passengers in a car that veered off Veterans Drive and slammed into the light post on August 7, 1999.

On January 23, 2003, the plaintiffs filed a motion to amend their complaint to add Bermudez and Longo as a defendant in substitution for the fictitious XYZ Corporation. On November 20, 2003, the magistrate judge granted the plaintiffs' motion to "identify Bermudez-Longo Inc. as a party defendant." On December 15, 2003, the plaintiffs served Bermudez and Longo with the amended complaint and, on January 12, 2004, Bermudez and Longo moved to dismiss the amended complaint. Below I address the merits of Bermudez and Longo's motion to dismiss.

II. ANALYSIS

In arguing that I must dismiss the plaintiffs' amended

complaint, Bermudez and Longo relies substantially on Rule 4(m) and also briefly refers to the relation back doctrine of Rule 15(c). Rule 4(m) states in relevant part:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Bermudez and Longo argues that I should dismiss the amended complaint pursuant to Rule 4(m) because it was not served within 120 days of the filing of the plaintiffs' motion to amend their complaint. This argument is without merit because the filing of a motion to amend a complaint does not trigger the plaintiffs' duty to serve newly-named parties in the proposed amended complaint. Instead, the time limit for service of an amended complaint on a newly named defendant begins to run only when the court grants the plaintiffs' motion to amend. Bermudez and Longo was served within 120 days of that date.

In making its argument, Bermudez and Longo also invokes the "relation back" requirements contained in Rule 15(c) of the Federal Rules of Civil Procedure. The defendant cites and quotes several cases discussing these requirements, but fails to fully explain how Rule 15(c) supports its motion to dismiss.

The plaintiffs' amended complaint asserts claims against Bermudez and Longo for negligent and willful construction of an unreasonably dangerous light post. Such claims sounding in tort would normally be barred because they were filed more than three years and five months after the car accident, well beyond the two-year statute of limitations for such actions.¹ Rule 15(c), however, can ameliorate the running of the statute of limitations by treating the claims against Bermudez and Longo as though they were filed on the date of the original complaint. See, e.g., *Sier v. A.H. Riise Inc.*, 19 V.I. 335, 337 (D.V.I. 1982) (holding that the running of the statute of limitations did not prevent adding defendant named in amended complaint because plaintiff satisfied requirements of Rule 15(c)).

The amended complaint bringing Bermudez and Longo into this case will relate back to the date of the original complaint only if the three conditions of Rule 15(c)(3) are satisfied.² First,

¹ The Virgin Islands Code provides a two-year statute of limitations for tort actions "not arising on contract." 5 V.I.C. § 31(5)(A). The defendant has not addressed the plaintiffs' breach of contract claim, which is well within the six-year statute of limitations for contract actions. See 5 V.I.C. §31(3)(A).

² The pertinent part Rule 15(c) states:

An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision

the claims against Bermudez and Longo must arise out of the same "conduct, transaction, or occurrence" set forth in the original complaint. Second, Bermudez and Longo must have received sufficient notice of the pendency of the action within the 120 days allowed by Rule 4(m) after the filing of the original complaint so that it will not be prejudiced in maintaining a defense on the merits. Third, Bermudez and Longo must have known, or should have known within the same 120 day period that "but for a mistake" made by the plaintiffs concerning its identity, Bermudez and Longo would have been named in the original complaint.

The first requirement is clearly met in this case, as the claims against Bermudez and Longo in the amended complaint are identical to the claims presented in the original complaint. It is far less clear, however, if Bermudez and Longo received sufficient notice and knew or should have known that it would have been named in the original complaint. Other than the conclusory statement in the defendant's reply brief that "Defendant has no notice or a way of knowing that this action

(2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

would be filed against them," neither party discusses these considerations. Because neither party has sufficiently addressed the question of whether Bermudez and Longo received sufficient notice and knew or should have known that it would be brought into this litigation, I have no basis upon which to grant this motion to dismiss. Accordingly, I will deny the motion without prejudice. An appropriate order follows.

ENTERED this 8th day of September, 2004.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copies to:
Hon. G.W. Barnard
Robert L. King, Esq.
Wilfredo A. Geigel, Esq.
Mrs. Jackson
Jeffrey Corey

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Wilfredo A. Geigel
St. Croix, U.S.V.I.
For defendant Bermudez and Longo, Inc.

ORDER

Moore, J.

For the reasons stated in the memorandum of even date, it is
hereby

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ORDERED that defendant Bermudez and Longo's motion to
dismiss is denied without prejudice.

ENTERED this 8th day of September, 2004.

For the Court

____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:____/s/_____
Deputy Clerk

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