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

GREAT ST. JIM, LLC,	)	
	)	**CIVIL NO. ST-18-CV-293**
Plaintiff,	)	
	)	**ACTION FOR ENFORCEMENT**
v.	)	**OF COVENANT, INJUNCTIVE**
	)	**RELIEF, PRIVATE NUISANCE,**
CHRISTIAN KJAER *in personam*, &	)	**DIMINUTION OF VALUE,**
PARCEL 11, ESTATE NAZARETH,	)	**UNJUST ENRICHMENT &**
ST. THOMAS, U.S. VIRGIN ISLANDS *in rem*,	)	**ACCOUNTING**
	)	
Defendant.	)	
	)	

OPPOSITION TO MOTION TO DISMISS

COMES NOW, Plaintiff **GREAT ST. JIM, LLC**, by and through its undersigned counsel KELLERHALS FERGUSON KROBLIN PLLC, and hereby opposes Defendants Christian Kjaer and Parcel 11's Motion to Dismiss and in support thereof states as follows:

I. Intro

Plaintiff Great St. Jim, LLC ("GSJ") acquired title to Great. St. James Island ("Great St. James") in 2016. Great St. James is located off the eastern end of St. Thomas. As set forth in the Complaint, Defendants Christian Kjaer ("Kjaer") is the record owner of certain real property described as Parcel 11 Estate Nazareth, Red Hook Quarter, St. Thomas, Virgin Islands. Complaint at ¶¶ 2-3. Parcel 11, which is located on St. Thomas itself, is subject to a restrictive covenant that benefits the owner of Great St. James. The covenant provides that Parcel 11

> shall be used exclusively for a dock, wharf, or landing facilities for boats of owners or occupants of premises situation on Great St. James Island, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use.

Complaint at ¶¶ 7-8.

Kjaer is using Parcel 11 in the operation of a business, from which he derives income, that is not for the purpose of benefiting Great St. James. His use of Parcel 11 violates the restrictive covenant because, in sum, the restrictive covenant limits the use of Parcel 11 to the "exclusive" use of the owners and occupants of Great St. James for purposes of transportation to and from Great St. James. Accordingly, GSJ filed a Complaint asserting five causes of action: Enforcement of Restrictive Covenant Against Kjaer & Parcel 11 (Count One); Private Nuisance Against Kjaer and Parcel 11 (Count Two); Action for Declaratory Judgment Against Kjaer & Parcel 11 (Count Three); Diminution of Value of Plaintiff's Property Against Kjaer & Parcel 11 (Count Four); and Unjust Enrichment & Action for Accounting Against Kjaer (Count Five).

Defendants Christian Kjaer ("Kjaer") and Parcel 11 formally appeared in this action and filed what purports to be a Motion to Dismiss. Defendants' Motion is more akin to a motion for summary judgment because it improperly attempts to refute the factual basis of the Complaint. Defendant's Motion is also premised on the old, no longer applicable plausibility standard of review.

As set forth below, Defendants' Motion must be denied as it fails to identify any valid basis for dismissal pursuant to the Virgin Islands Rules of Civil Procedure.

II. Complaint More Than Meets Notice Pleading Standard

The Complaint more than adequately states causes of action for enforcement of restrictive covenant, private nuisance, declaratory judgment, diminution of value of Plaintiff's property, and unjust enrichment, and an action for accounting. Under the current Virgin Islands notice pleading standard the Complaint is clearly sufficient. Accordingly, Defendants' Motion to Dismiss must be denied.

A. Applicable Standard of Review

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Rule 8 of the Virgin Islands Rules of Civil Procedure governs motions to dismiss. Rule 8(a) provides that "a pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief" and expressly recognizes that "this is a notice pleading jurisdiction."

Defendants' Motion erroneously suggests that the plausibility test articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) is the standard applicable to motions to dismiss in the Virgin Islands.

Rule 8 of the Virgin Islands Rules of Civil Procedure, which became effective on March 31, 2017 well before the instant Complaint was filed on May 22, 2018, "expressly states that the Virgin Islands 'is a notice pleading jurisdiction,' and the Reporter's Note eliminates any doubt that this language is calculated to 'apply [ ] an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.'" *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017) (citing V.I. R. CIV. P. 8 Reporter's Note (emphasis added) (internal citations omitted)). The commentary following V.I. R. CIV. P. 8 explains that "[l]anguage has been included in Rule 8(a) to note that practice in the Virgin Islands continues to adhere to the traditional "notice" pleading ethos as many states and territories have chosen to do, applying an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief." Therefore, as the Supreme Court of the Virgin Islands has observed, "going forward, it is clear that the adoption of Rule 8 of the Virgin Islands Rules of Civil Procedure supersedes our prior precedents which imposed the *Twombly* plausibility standard by virtue of the now-amended Superior Court Rule 7, and restores the notice pleading regime that had previously been in effect." *Mills-Williams v. Mapp*, 67 V.I. at 585.

In *Brathwaite v. H.D.V.I. Holding Co.*, No. ST-16-CV-764, 2017 WL 2295123, at *2 (V.I. Super. May 24, 2017), the Superior Court, applying the notice pleading standard under V.I. R. CIV. P. 8, considered whether "a complaint adequately alleges facts that put an accused party on notice of claims brought against it." To the extent the "truth" of the facts alleged in the Complaint is considered, the Complaint's allegations are assumed true. *See Finn v. Adams*, No. ST-16-CV-752, 2018 WL 3756421, at *4 (V.I. Super. Aug. 6, 2018) (applying notice pleading standard under V.I. R. CIV. P. 8(a) and assuming truth of facts alleged in complaint). Accordingly, pursuant to V.I. R. CIV. P. 8, when evaluating a motion to dismiss, the Superior Court evaluates whether a complaint adequately alleges facts that put an accused party on notice of the claims brought against it.

In evaluating a motion to dismiss, the Court considers only the pleadings themselves. Pursuant to V.I. R. Civ. P. 12(d):

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

See also Island Tile & Marble, LLC v. Bertrand, 57 V.I. 596, 612 (V.I. 2012) (citing V.I. R. CIV. P. 12(d)). "Matters outside the pleadings" include "unsworn representations of counsel as to factual matters—which are not themselves evidence . . . ." *Island Tile & Marble, LLC*, 57 V.I. at 613. "[U]nsworn representations of counsel as to factual matters—which are not themselves evidence, *see Henry v. Dennery,* 55 V.I. 986, 994 (V.I. 2011)—are sufficient to transform a Federal Rule 12(b)(6) motion to a Federal Rule 56 motion pursuant to Federal Rule 12(d)." *Id.* (citing *McAuley v. Fed. Ins. Co.,* 500 F.3d 784, 787 (8th Cir.2007) ("Such 'matters outside the pleadings' include ... statements of counsel at oral argument raising new facts not alleged in the pleadings.")). Accordingly, the unsworn declarations throughout Defendants' Motion to dismiss must be disregarded. Alternatively, if the Court converts Defendants' Motion to Dismiss to a

motion for summary judgment, pursuant to V.I. R. CIV. P. 12(d), GSJ must be permitted an opportunity to file an appropriate response. *See, e.g., Castillo v. St. Croix Basic Servs., Inc.*, 67 V.I. 26, 30 (V.I. Super. 2016) (citing identical language of FED. R. CIV. P. 12(d) and stating "If the court considers matters outside the pleadings, then a motion for judgment on the pleadings must be treated as one for summary judgment and the parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

B. Complaint Properly Asserts *In Rem* Action

Defendants' Motion argues that the Complaint fails to allege an *in rem* action against Parcel 11 because injunctive relief is sought and title to the property is not in question. Contrary to Defendants' Motion, the Complaint properly asserts an *in rem* action against Parcel 11.

In *Estate of Skepple v. Bank of Nova Scotia*, the Supreme Court of the Virgin Islands explained the scope of actions classified as *in rem*:

> The term "in rem" has multiple meanings, though all related, depending on the issue being discussed when the term is used. An "action in rem" is probably most commonly understood as an "action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." Black's L. Dict., at 32. Another common understanding of this term would also be an "action in which the named defendant is real of personal property." *Id.* "In rem jurisdiction" is a "court's power to adjudicate rights to a given piece of property, including the power to seize and hold it." *Id.* at 869. Whereas to call a proceeding "in rem" is to describe the proceeding as "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing. *Id.* at 809. Interestingly, the archaic term for this was "impersonal." *Id.* A "judgment in rem" then is a "judgment that determines the status or condition of property and that operates directly on the property itself. The phrase denotes a judgment that affects not only interests in a thing but also all persons' interests in the thing." *Id.* at 860. In *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-59 (1810), the Court explained the distinction at common law between service in a proceeding *in personam* versus *in rem*. If the judgment operated directly upon the person, a judgment *in personam*, service in hand directly upon the person when she was within the territorial jurisdiction of the state was essential to valid legal notice—valid service. *McDonald*, 243 U.S. at 91 ("There is no dispute that service by publication does not warrant a personal

> judgment against a nonresident." (citing *Pennoyer*, 95 U.S. at 714; *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 193-94 (1915))).

S. Ct. Civ. No. 2014-0050, 2018 WL 4024983, at *9 n.13 (V.I. Aug. 17, 2018).

Accordingly, pursuant to *Estate of Skepple*, an "action in which the named defendant is real o[r] personal property" and a proceeding "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing" are *in rem* actions. *Id*. Here, GSJ named Parcel 11, which is real property, as a defendant in the action for, among other things, the purpose of obtaining a judgment declaring the rights of GSJ with respect to Parcel 11. Accordingly, the Complaint properly asserts an *in rem* action.

The citation in Defendants' Motion to *Bryan v. Fawkes*, 61 V.I. 416 (V.I. 2014) does not advance the position of Defendants' Motion. To the contrary, *Fawkes* finds that the case before it, which concerned a challenge to the inclusion of a certain senatorial candidate on the ballot, is an *in rem* proceeding. *Id*. at 437. In so finding, *Fawkes* notes that "numerous decisions from other courts expressly hold[ ] that an election contest is, in fact, an *in rem* proceeding, with the '*res*' being the election itself." Given the holding in *Fawkes*, the suggestion in Defendants' Motion that the instant action may not proceed against Parcel 11 in rem because the title to the property is not in question is erroneous.

C. Parcel 11 Restrictive Covenant Claims

In a deed dated June 30, 1965, William Houston Evans, James Alderman Evans, Jr., Executors of the Last Will and Testament of Charles Redfield Vose, conveyed title to property, including Parcel 11, to Irving L. Young, William Houston Evans, and James Alderman Evans, Jr. as Trustees under the Last Will and Testament of Charles Redfield Vose. The deed contains the following restrictive covenant:

> It is understood and agreed that this conveyance is made an accepted upon the following covenants, conditions, restrictions and reservations which shall run with the land and which are made for the benefit of the present and future owner or owners of any lot of lots comprising the premises known as Tract Nos. 1 and 2, Estate Nazareth (Benners) No. 1 Red Hook Quarter, St. Thomas, V.I., as delineated on P.W.D. File No. F 9-372-T59, viz:
>
> Said premises shall be used exclusively for a dock, wharf or landing facilities for boats of owners or occupants of premises situated on Great St. James Island, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use.

In 1979, Parcel 11 and Great St. James were conveyed to Karen Kjaer. Following Karen Kjaer's death, Parcel 11 and Great St. James were distributed to the four heirs of her estate, one of whom was Christian Kjaer. In 2016, Christian Kjaer conveyed title to Great St. James to Plaintiff GSJ.

The Complaint seeks to enforce the restrictive covenant regarding the exclusive use of Parcel 11. To allege that a covenant affecting land exists, a plaintiff must allege the following:

> (1) the grantor and the grantee intended the covenant to run with the land
> (2) the covenant is one that "touches" or "concerns" the land with which it runs; and
> (3) there is privity of estate between the party claiming the benefit of the covenant and the right to enforce it, and the party who rests under its burden.

Estate Carlton Home & Prop. Owners Ass'n v. Daas, 16 V.I. 500, 504 (Terr. V.I. 1979) (citing *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank,* 15 N.E.2d 793 (N.Y., 1938); Clark on Covenants and Interests Running with Land, p. 74).

The Complaint alleges each of the required elements. At paragraph 8, the Complaint quotes the restrictive covenant. The Complaint further notes that "[t]he Deed expressly provides that the grantor and grantee intended the covenant to run with the land." Complaint at ¶ 10. Regarding the second element, the Complaint alleges that "[t]he covenant touches or concerns the land with which it runs because it benefits Plaintiff and imposes a burden on Parcel 11." In satisfaction of the last element, the Complaint alleges that "[t]here is privity of estate between Plaintiff and Defendant Kjaer because there is a mutual or successive relationship to the same

property rights between Plaintiff as successor in interest of the original covenantees, and Defendant Kjaer, whose predecessors in interest were the original covenantors." Accordingly, GSJ's Complaint properly alleges the existence of a covenant running with the land and a cause of action to enforce the same.

D. Private Nuisance Claim

The Complaint also properly asserts a private nuisance claim against Defendants. Section 331 of Title 28 of the Virgin Islands Code "creates a private right of action against one who causes damages to another by private nuisance, but the statute does not define what constitutes a private nuisance." *Cifre v. Daas Enterprises, Inc.*, 62 V.I. 338, 359 (V.I. Super. 2015).

The Supreme Court of the Virgin Islands has not yet defined the precise elements of a private nuisance claim, but the Superior Court has published opinions analyzing the required elements. *See Alleyne v. Diageo USVI, Inc.*, 63 V.I. 384, 403-405 (V.I. Super. Sept. 17, 2015) (defining private nuisance as "a substantial, unreasonable, interference with another's interest in the private use and enjoyment of their property."); *Cifre*, 62 V.I. at 362 (defining private nuisance "as a substantial and unreasonable nontrespassory interference with another's interest in the private use and enjoyment of land."). There is consensus in the Superior Court that a private nuisance is a substantial, unreasonable interference with another's interest in the private use and enjoyment of land but a difference of opinion regarding whether the interference must be non-trespassory. *Compare Alleyne*, 63 V.I. at 403-405 *with Cifre*, 62 V.I. at 362.

The Complaint more than adequately alleged a private nuisance claim. It alleges that Kjaer's violation of the restrictive covenant to which Parcel 11 is subject is an intentional and unreasonable invasion of Great St. Jim's interest in Parcel 11. *See* Complaint at ¶¶ 18-22. The restrict covenant provides that Parcel 11 shall be "exclusively" used by the owners and occupants

of Great St. James for the purposes of transportation to and from Great St. James. Kjaer's use of Parcel 11 to operate a business is an unreasonable interference with the owner of Great St. Jim's exclusive right to use Parcel 11. Accordingly, the Complaint states a claim for private nuisance.

E. No Diminution of Value of GSJ

"The measure of damages for breach of a restrictive covenant is the diminution in the value of the benefitted parcel by reason of the breach." *New York City Econ. Dev. Corp. v. T.C. Foods Imp. & Exp. Co.*, 46 A.D.3d 778, 847 N.Y.S.2d 669, 670 (2007) (citing *Flynn v. New York, Westchester & Boston Ry. Co.,* 218 N.Y. 140, 112 N.E. 913; *Binghamton Plaza v. Gilinsky,* 32 A.D.2d 994, 301 N.Y.S.2d 921)); *see also Cobb v. Gammon*, 389 P.3d 1058, 1074 (N.M. Ct. App. 2016) (describing "diminution of value" as "relevant as a measure of damages for injury to real property.").

Defendants' Motion overstates the relevance of *Schindel v. Pelican Beach Inc.*, 16 V.I. 237, 261 (Terr. V.I. 1979) to the instant case. In *Schindel*, the Territorial Court assessed the damages to a property owner who had been deprived of direct access to the beach from her property. 16 V.I. at 261. In its analysis, the Court quoted *Brannigan v. Verne La Crosse*, a 1967 opinion of the District Court of the Virgin Islands sitting in its appellate capacity, which states:

> It has been held that where the injury to real property is temporary the measure of damages, if the property is occupied by the owner, is limited to the diminution in the value of its use by the owner during the period of its injury. *Norwood v. Sheen,* 1933, 126 Ohio St. 482, 186 N.E. 102, 87 A.L.R. 1375. Since there is no permanent injury in such a case evidence as to diminished value of the property resulting from the injury is not relevant.

6 V.I. 96, 98 (D.V.I. 1967).

Schindel and *Brannigan* do not stand for the proposition that diminution of value damages are unavailable to a plaintiff for a "temporary" injury to property. Instead, those cases merely aligned the amount of damage to the diminution of value sustained by the property owner for the

duration of the wrongful conduct. Here, Great St. Jim asserts a cause of action for diminution of value for the ongoing violation of the restrictive covenant. The passage cited in *Schindel* nor *Brannigan* is therefore not relevant to whether Great St. Jim has placed Defendants on notice of the fact that it seeks diminution of value damages.

Additionally, the unsworn assertions set forth in Defendants' Motion regarding the substance of Great St. Jim's diminution of value claim are disregarded on a motion to dismiss. Accordingly, Great St. Jim has properly alleged a diminution of value claim.

F. Unjust Enrichment Claim

Count Five adequately places Defendants on notice of Great St. Jim's unjust enrichment claim.

An unjust enrichment claim consists of four elements: "(1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff." *Walters v. Walters*, 60 V.I. 768, 779-780 (V.I. 2014) (adopting elements of unjust enrichment pursuant to a *Banks* analysis).

The Complaint alleges that "Defendant Kjaer has wrongfully earned income through the operation of a business on Parcel 11, in violation of the clear and express terms of said restrictive covenant" and that "[i]ncome is a thing of value which Defendant Kjaer is not entitled to receive by his use of Parcel 11." Complaint at ¶¶ 33-34. The first element is therefore satisfied because the Complaint alleges that Kjaer was enriched by his receipt of income he would not otherwise have, but for the violation of the restrictive covenant. The Complaint further explains that Kjaer has earned income at Great St. Jim's expense because the income is generated in violation of the

restrictive covenant, and the restrictive covenant limits the uses of Parcel 11 to serving the transportation needs of owners or occupants or premises situated on Great St. James Island. Complaint at ¶ 35. These allegations satisfy the second and third elements of unjust enrichment. Moreover, Defendants' Motion to Dismiss does not deny knowledge of the income described in the Complaint.

The Complaint also sets forth facts supporting the fourth element of unjust enrichment, that the circumstances are such that in equity or good conscience Kjaer should return the money or property to Great St. Jim. The clear terms of the restrictive covenant limit the use of Parcel 11 to serving as a launching point and landing spot for the owners and occupants of Great St. James. The Complaint alleges that Kjaer, who is not an owner or occupant of Great St. James, is using Parcel 11 for purposes other than those set forth in restrictive covenant. As set forth in the Complaint, the income Kjaer has earned through his use of Parcel 11 in violation of the restrictive covenant has reduced the value of Great St. James Island, which Great St. Jim owns. Accordingly, equity dictates that the income Kjaer owned through his violation of the restrictive covenant should be awarded to Great St. Jim.

III. Claimed Affirmative Defenses are Unavailing

No applicable statute of limitations bars the Complaint. The continued violation of the restrictive covenant constitutes a recurring breach. "Consequently, the statute of limitations begins to run anew as each breach occurs." *Christmas v. Virgin Islands Water & Power Auth.*, 527 F. Supp. 843, 848 (D.V.I. 1981).

Defendants' Motion also alleges various substantive defenses to enforcement of the restrictive covenant, including abandonment, that the covenant is "overly burdensome," changed circumstances, and that an "additional use" of Parcel 11 is not excluded. None of these alleged

defenses constitute grounds for dismissal under V.I. R. CIV. P. 12(b)(6). Accordingly, those affirmative defenses must be disregarded in determining whether the Complaint properly places Defendants on notice of its claims relating to the restrictive covenant.

Regarding the assertion in Defendants' Motion that GSJ's private nuisance suit is time-barred, such assertion is mistaken. The restrictive covenant has been violated on a continuous basis. Accordingly, each violation of the restrictive covenant re-starts the limitations period. Therefore, Great St. Jim's private nuisance claim was timely filed.

Lastly, Great St. Jim's claim is not, as Defendants' Motion asserts, barred by the gist of the action doctrine. There is a split of authority within the Virgin Islands judiciary as to whether the Virgin Islands recognizes the gist of the action doctrine.[1] Even assuming the gist of the action doctrine applies, it does not bar Great St. Jim's nuisance claim. Rule 8(a)(2) of the Virgin Islands Rules of Civil Procedure expressly permit a plaintiff to plead causes of action in the alternative. *See* V.I. R. CIV. P. 8(a)(2) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically, in separate counts or defenses.").

Accordingly, Great St. Jim's Complaint properly alleged a private nuisance claim.

III. Conclusion

Defendants' procedurally improper motion must be denied because it fails to set forth any valid basis for dismissal of the Complaint for failure to meet V.I. R. CIV. P. 8(a)'s liberal notice

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[1] In *Whitecap Inv. Corp. v. Putnam Lumber & Exp. Co.*, No. 2010-139, 2013 WL 1155430, at *11 (D.V.I. Feb. 19, 2013), *report and recommendation adopted in part, rejected in part,* No. 2010-139, 2013 WL 1155241 (D.V.I. Mar. 21, 2013), the Magistrate's Report & Recommendation noted a split within the Virgin Islands judiciary as to whether the Virgin Islands recognizes the gist of the action doctrine. More recently, in *Pollara v. Chateau St. Croix, LLC*, No. SX-06-CV-423, 2016 WL 2865874, at *8 (V.I. Super. May 3, 2016), the Superior Court of the Virgin Islands conducted a *Banks* analysis and ultimately found that adopting the gist of the action doctrine was the soundest rule for the Virgin Islands. *See Pollara*, 2016 WL 2865874, at *6.

pleading standard. The Complaint more than adequately alleges that a restrictive covenant exists and that Kajer is violating the restrictive covenant by using it for purposes other than those set out in the restrictive covenant, i.e., for the transportation needs of the owners and occupants of Great St. James. The Complaint also properly asserts claims for private nuisance, diminution of value, and unjust enrichment. Accordingly, Defendants' Motion to Dismiss must be denied.

Respectfully,

Dated: October ____, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of October, 2018, I caused a true and exact copy of the foregoing **Opposition to Motion to Dismiss** to be served via first class mail, postage prepaid, upon:

Gaylin Vogel, Esq.
Kevin F. D'Amour, P.C.
P.O. Box 10829
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[redacted]

_____