

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO  
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EVELYN AROCHO, ISMAEL TORRES,  
ANGELICA CORTES, DAVID TORRES,  
MIRTA MORENO, CAPT. EDWIN  
CINTRON,

Plaintiffs,

v.

KELLNER'S FIREWORKS, INC.,

Defendant.

Civil No. 14-1556 (JAF)

5  
6 **OPINION AND ORDER**

7 Plaintiffs Evelyn Arocho, Ismael Torres, Angélica Cortés, David Torres, Mirta  
8 Moreno, and Captain Edwin Cintrón (collectively “Plaintiffs”) are suing Defendant  
9 Kellner’s Fireworks, Inc. (“Kellner’s”) in diversity jurisdiction, pursuant to 28 U.S.C.  
10 1332, for injuries allegedly caused by defective products. (Docket No. 1.) Defendant  
11 asks that we dismiss the complaint. (Docket No. 12.) For the following reasons, we find  
12 that the complaint is time-barred and, therefore, we grant the dismissal.

13 **I.**

14 **Background**

15 When considering a motion to dismiss, we must construe the complaint in the  
16 plaintiff’s favor, accept all non-conclusory allegations as true, and draw any reasonable  
17 inferences in favor of the plaintiff. *Rodríguez-Ramos v. Hernández-Gregorat*, 685 F.3d  
18 34, 39-40 (1st Cir. 2010) (internal citations omitted). Therefore, to the extent that any  
19 facts are disputed, the facts set forth below represent Plaintiffs’ version.

1 Plaintiffs attended a party on December 28, 2011, in Rancho Grande, San  
2 Sebastián, Puerto Rico, at the home of Luis Torres-Rivera and his wife Blanca Ríos. As  
3 part of the festivities, the Torres family hired Cortés International Fireworks to perform a  
4 fireworks display. Cortés International Fireworks provided a pyrotechnician, Eliud  
5 González, to perform the fireworks display, and provided aerial fireworks manufactured  
6 and/or distributed by Kellner's. The first firework ascended into the air and exploded as  
7 expected. The second firework ascended into the air but did not detonate until it returned  
8 to land. When it exploded near the ground, the party guests panicked and ran away.  
9 Some guests tripped and fell, and some guests trampled other guests. The explosion  
10 allegedly burned some guests and deafened other party guests to various degrees, with  
11 some guests bleeding from the ears. Allegedly, the plaintiffs have permanent emotional  
12 damage from the experience. (Docket No. 1 at 3-4.)

13 Evelyn Arocho was taken to the Emergency Room for treatment for burns and a  
14 cut to her left ankle. She continued medical treatment for damage to her skin and  
15 hearing, and she received psychiatric treatment after the event. Her husband, Ismael  
16 Torres, alleges that he suffered emotional damages from the fireworks and from his  
17 wife's medical and emotional treatment. (Docket No. 1 at 4.) Angelica Cortés was taken  
18 to the Emergency Room for burns and for damage to her skin and right hand. She was  
19 diagnosed with a non-displaced fracture of the fourth metacarpal and her right arm was  
20 bandaged. She broke her glasses. After the event, she had her eyesight and hearing  
21 examined and replaced her glasses. She alleges that she suffered great pain in her right  
22 hand and received approximately twenty-four physical therapies to regain movement of

1 her hand. She was allegedly diagnosed with Post-Traumatic Stress Disorder. Her  
2 husband, David Torres, allegedly suffered emotional damages from the fireworks  
3 explosion and from his wife's medical and emotional treatment. (Docket No. 1 at 4-5.)  
4 Mirta Moreno was taken to the Emergency Room for treatment for burns and abrasions.  
5 She had her eyesight tested because she allegedly saw flashes through her right eye. She  
6 also had her hearing checked after allegedly experiencing problems. Her husband, Edwin  
7 Cintrón, allegedly bled from his left ear after the incident and had an episode of elevated  
8 blood pressure. Edwin Cintrón alleges that after the incident, he continued to have  
9 uncontrolled blood pressure and a perforated eardrum. (Docket No. 1 at 5.)

10 On March 13, 2012, Evelyn Arocho, Ismael Torres, Angelica Cortés, David  
11 Torres, and Mirta Moreno wrote letters to Prime Insurance, the company that insures  
12 Cortés International Fireworks, asserting their claims from this incident. (Docket  
13 Nos. 16-1, 16-2, 16-3.) The letters state that,

14 this accident was due solely to the fault and negligence of  
15 Cortes International Fireworks and/or their employees,  
16 because of a careless and irresponsible not control and/or  
17 safely handled the aforementioned explosions of fireworks,  
18 causing an explosion early, and create a condition unduly  
19 hazardous to the safety of persons who were at the residence  
20 of Mr. Luis Torres Rivera and Mrs. Blanca Rios, which was  
21 the direct cause of the accident that motivates this claim.

22  
23 (Docket Nos. 16-1 at 2; 16-2 at 2; 16-3 at 2) (sic). On October 19, 2012, Edwin Cintrón  
24 similarly wrote to the insurer for Cortés International Fireworks asserting a claim for the  
25 December 28, 2011, incident. (Docket No. 16-4.)

1           On February 20, 2013, Prime Insurance wrote to Kellner's "to inform you of a  
2   bodily injury claim which has been filed against our insured's commercial general  
3   liability policy" and to "ask that you put your commercial general liability carrier on  
4   notice of this claim." (Docket No. 12-2.)

5           On April 18, 2013, Evelyn Arocho, Ismael Torres, Angelica Cortés, David Torres,  
6   Mirta Moreno, and Edwin Cintrón wrote their first letters to Kellner's alerting Kellner's  
7   of their claims. (Docket No. 12-1.) On August 5, 2013, Crawford & Company, the  
8   insurer for Kellner's, wrote that they had concluded their investigation of the claim and  
9   found no evidence that the fireworks used were defective or that the alleged injuries were  
10   caused by a manufacturing defect or product malfunction. They wrote that "Due to this  
11   reason, our principals have decided to deny the claim based on lack of evidence to the  
12   effect," and that, unless evidence was presented within the applicable statute of  
13   limitations, "our file will remain closed." (Docket No. 16-5.) On January 27, 2014, a  
14   representative from Crawford & Company wrote to the attorney for Plaintiffs, stating that  
15   they believed that the liability for the accident fell on Cortés due to the mishandling of  
16   the fireworks at the time they were detonated. (Docket No. 16-6.)<sup>1</sup> The January 27 letter,  
17   without accepting liability, offered to pay one-hundred twenty-five dollars (\$125) for  
18   each claimant, for a total of five-hundred dollars (\$500). (Docket No. 16-6.)

19           On July 14, 2014, Plaintiffs filed a federal complaint against Kellner's. (Docket  
20   No. 1.) On November 18, 2014, Kellner's filed the instant motion to dismiss. (Docket

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<sup>1</sup> Plaintiffs failed to submit an English translation of this document and we ordered the court-certified interpreters to prepare a translation of the same. (Docket No. 16-7.) The court assesses the cost of the court-ordered translation against Plaintiffs and **ORDERS** them to pay the amount of \$210.00, in a check payable to the Clerk, U.S. District Court, to be deposited in the court's registry **within the next twenty (20) days**.

1 No. 12.) On December 5, 2014, Plaintiffs replied in opposition. (Docket No. 16.)  
2 Kellner's replied on December 11, 2014. (Docket No. 21.)

## 3 II.

### 4 Time Bar

5 As a federal court sitting in diversity, we apply the local laws of Puerto Rico,  
6 including "Puerto Rico's statute of limitations, as well as the concomitant tolling  
7 provisions of those statutes." *Montalvo v. Gonzalez-Amparo*, 587 F.3d 43, 46 (1st Cir.  
8 2009). Under Puerto Rico law, an action demanding civil liability for injuries stemming  
9 from fault or negligence must be filed no later than one year after the aggrieved person  
10 knew of the injury. 31 L.P.R.A. § 5298. In this case, the accident occurred on  
11 December 28, 2011, and Plaintiffs sought medical treatment for their injuries that night.  
12 (Docket No. 1 at 3-5.) Therefore, the statute of limitations expired December 28, 2012,  
13 long before the complaint was filed on July 14, 2014. (*See* Docket No. 1.)

14 Plaintiffs argue that the statute of limitations was properly tolled. (Docket No. 1.  
15 at 5.) Pursuant to Article 1873 of the Puerto Rico Civil Code, a plaintiff can interrupt the  
16 prescriptive period in one of three ways: (1) by instituting an action "before the courts,"  
17 (2) "by extrajudicial claim of the creditor," or (3) "by any act of acknowledgment of the  
18 debt by the debtor." *Tokyo Marine and Fire Ins. Co. Ltd. v. Perez & Cia., De Puerto*  
19 *Rico, Inc.* 142 F.3d 1, 4 (1st Cir. 1998) (quoting P.R. Laws Ann. Tit. 31 § 5303 (official  
20 translation 1991)).<sup>2</sup>

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<sup>2</sup> We note that although the English translation of the Puerto Rico Laws uses the terms "creditor" and "debtor," the laws refer to general tortfeasors and victims, not only to those disputing contracts.

1 First, it is undisputed that the prescriptive period was not tolled by an action  
2 before the courts.

3 Second, Plaintiffs did not make a valid extrajudicial claim of the creditor. *See*  
4 *Tokyo Marine* 142 F.3d at 4. For an extrajudicial claim to toll the statute of limitations,  
5 the extrajudicial letter must be “‘identical’ to a subsequently filed complaint.” *Santana-*  
6 *Castro v. Toledo-Davila*, 579 F.3d 109, 114 (1st Cir. 2009) (internal citation omitted).  
7 To satisfy this identity requirement (1) the extrajudicial letter and the later complaint  
8 “must seek the same form of relief”; (2) “[t]he causes of action asserted [in the  
9 complaint] must be based on the same substantive claims as asserted in the extrajudicial  
10 letter”; and (3) provided that the claim is not rescued on other grounds, the claims “must  
11 be asserted against the same defendants in the same capacities.” *Id.* (internal citations  
12 omitted). Plaintiffs’ claims in this case were not asserted against Kellner’s until after the  
13 expiration of their claims. In the March 2012 letters, Plaintiffs asserted their claims only  
14 against Cortés International Fireworks. (Docket Nos. 16-1, 16-2, 16-3.) In fact, those  
15 letters state that,

16 [t]his accident was due solely to the fault and negligence of  
17 Cortes International Fireworks and/or their employees,  
18 because of a careless and irresponsible not control and/or  
19 safely handled the aforementioned explosions of fireworks,  
20 causing an explosion early, and create a condition unduly  
21 hazardous to the safety of persons who were at the residence  
22 of Mr. Luis Torres Rivera and Mrs. Blanca Rios, which was  
23 the direct cause of the accident that motivates this claim.

1 (Docket Nos. 16-1 at 2; 16-2 at 2; 16-3 at 2) (sic).<sup>3</sup> When the statute of limitations  
2 expired -- December 28, 2012 -- Plaintiffs had not notified Kellner's of any claim against  
3 them.

4 Third, no evidence has been submitted that the debtor made an act of  
5 acknowledgment of the debt within the statute of limitations. *See Tokyo Marine* 142 F.3d  
6 at 4.

7 Plaintiffs argue that there should be an equitable tolling of the statute of  
8 limitations. They cite to *Velilla v. Pueblo Supermarkets*, 111 D.P.R. 585, 587-588  
9 (1981), which, in Plaintiffs' own words, states that "a defendant that lures plaintiffs to  
10 continue negotiating, by itself or by a third party such as an insurance company or claims  
11 adjuster, cannot raise the defense of prescription." (Docket No. 16 at 5.) However,  
12 Plaintiffs show no evidence that Kellner's or Kellner's insurance company ever "lured"  
13 them into negotiations. Plaintiffs point to their letters addressed to the company that  
14 insures Cortés International Fireworks. (Docket No. 16 at 5.) However, that company  
15 does not insure Kellner's. Plaintiffs then point to the August 5, 2013, letters from the  
16 company that insures Kellner's as proof that Kellner's lured them into foregoing a  
17 judicial claim within the statute of limitations. (Docket No. 16 at 5-6.) However, those  
18 letters were written in August 2013, and the statute of limitations had already expired on  
19 December 28, 2012. Therefore, Plaintiffs have not made a valid argument for equitable  
20 tolling of the statute of limitations.

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<sup>3</sup> Edwin Cintrón did assert his claim against Cortés International Fireworks until October 19, 2012. (Docket No. 16-4.)

