IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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CARIBBEAN ISLAND ADVENTURES, INC., a Delaware Corporation, and COMMONWEALTH INVESTMENT CORP., a Delaware Corporation, Plaintiffs, vs. **CARLO A. MARZANO and CHRISTIAN F. ROSENBERG,** Defendants.	**CIVIL NO. ST-07-CV-467** ACTION FOR SPECIFIC PERFORMANCE, BREACH OF CONTRACT, AND DAMAGES JURY TRIAL DEMANDED

MEMORANDUM OPINION

It appears that Plaintiffs have effectively abandoned their case. Plaintiffs have not taken any action to move this matter forward nor have they responded to the Motion for Involuntary Dismissal.[1] The *Poulis* factors are met and the matter will be dismissed without prejudice for failure to prosecute.

BACKGROUND

Plaintiffs Caribbean Island Adventures, Inc., and Commonwealth Investment Corp. filed this Complaint for specific performance of a land purchase contract on September 12, 2007, at a time when they were represented by the law firm of A.J. Weiss & Associates. Defendants Carlo A. Marzano and Christian F. Rosenberg filed an Answer on October 10, 2007.[2] The Court transferred the matter to the jury division, directed the parties to complete mediation by April 4, 2008, and set the matter down for a pretrial conference on August 11, 2008.

However, on June 5, 2008, Marzano and Rosenberg filed a Notice, informing the Court that Plaintiffs had initiated Chapter 11 bankruptcy proceedings.[3] To that end, Marzano and Rosenberg requested that the Court stay this proceeding, in compliance with automatic bankruptcy stay set forth in 11 U.S.C. § 362 (2006). That request was denied by Order dated June 16, 2008, as the Court observed that the automatic stay provisions of Section 362 only

[1] The Motion for Involuntary Dismissal was field on March 17, 2011.

[2] At that time, Defendants were represented by Ruth Miller, Esq., now the Honorable Magistrate Judge for the District Court of the Virgin Islands.

[3] Caribbean Island Adventures, Inc.'s bankruptcy petition was docketed on March 12, 2008, as Case No. 3:08-BK-30003-JFK, and Commonwealth Investment Corp.'s petition as docketed on the same date in Case No. 3:08-BK-30004-JFK.

applies to actions against a debtor, not to actions by a bankruptcy petitioner against another. The Court required the parties to brief the issue.

On July 7, 2008, Benjamin Currence, Esq., filed a Notice of Special Appearance for the purpose of filing a brief regarding the automatic stay on behalf of Plaintiffs. He filed a brief on that same day. Defendants filed their brief on July 7, 2008. Following the briefing, the Court granted the request and stayed the case by Order dated July 23, 2008.[4]

By Order dated December 14, 2010, the Court directed the parties to advise it of the status of the bankruptcy proceedings. In response, on January 19, 2011, counsel for Plaintiffs informed the Court that the bankruptcy court had approved a final report and accounting and closed the bankruptcy case on June 22, 2010. He also indicated that he had a pending Motion to Withdraw as counsel. He wished to withdraw because of nonpayment of fees and because of a deterioration in the attorney-client relationship. He also noted that his firm had not had contact with the Plaintiffs since July 2008, when the Motion to Withdraw was filed.

The Court set the matter down for a status conference to be held on June 7, 2011, directed Plaintiffs to appear with counsel, and ordered Plaintiffs' counsel to see to it that a copy of the Order be directed to Plaintiffs. In the interim, Defendants moved for involuntary dismissal, pursuant to Rule 41. The Court issued an order on March 29, 2011, reserving decision on Attorney Moskowitz's Motion to Withdraw and on the Motion for Involuntary Dismissal, until such time as the parties appeared for the status conference.

Despite the fact that Attorney Moskowitz proved that Plaintiffs had received a copy of the Order directing their representatives to appear at the June 7, 2011 status conference, no one appeared on their behalf. By Order dated June 10, 2011, the Court granted the Motion to Withdraw, and directed Plaintiffs to file any response they might have to the Motion for Involuntary Dismissal within twenty days. On June 28, 2011, Attorney Moskowitz filed proof that the Plaintiffs received a copy of the June 10, 2011 Order. However, Plaintiffs never filed any response to the Motion for Involuntary Dismissal.

DISCUSSION

Before dismissing a case for lack of prosecution pursuant to Rule 41[5], the Court must consider a number of factors, which are set out by the Third Circuit Court of Appeals in *Poulis v. State Farm Fire and Cas. Co.*:

(1) the extent of the *party*'s personal *responsibility*;
(2) the *prejudice* to the adversary caused by the failure to meet scheduling orders

[4] Soon after, on July 25, 2008, Alan R. Feuerstein, Esq., entered an appearance for Defendants Carlo Marzano and Christian F. Rosenberg, substituting himself for then-Attorney Miller.
[5] FED. R. CIV. P. 41(b). The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure of the District Court of the Virgin Islands apply to matters before this Court whenever they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

and respond to discovery;
(3) a *history* of dilatoriness;
(4) whether the conduct of the party was *willful* or in *bad faith*;
(5) the effectiveness of sanctions other than dismissal, which entails analysis of *alternative sanctions*; and
(6) the *meritoriousness* of the claim or defense.[6]

Dismissal, as a sanction for failure to prosecute, is inappropriate unless the Court makes findings as to the *Poulis* factors and concludes that, on balance, dismissal is warranted.[7]

A. **Plaintiffs' Personal Responsibility for the Failure to Prosecute.**

In this case, the Court has evidence that the responsibility for the failure to prosecute rests entirely with Plaintiffs. Attorney Moskowtiz informed the Court that Plaintiffs have not had contact with him since July 2008. In addition, Plaintiffs received copies of the orders directing them to appear at the June 7, 2011 status conference and to respond to the Motion for Involuntary Dismissal. Despite such notice, Plaintiffs have not taken any action in the year since their bankruptcy case ended to prosecute their case or otherwise made contact with the Court. Therefore, all the evidence before the Court indicates that the responsibility for the failure to prosecute lies entirely with the Plaintiffs.

B. Prejudice to the Adversary.

Defendants indicate that they have been prejudiced by Plaintiffs' failure to prosecute because they have been denied a conclusion to this matter, which has remained pending for nearly four years. Furthermore, the Court can assume that Defendants would be prejudiced by the significant passage of time, in which memories fade and evidence disappears. Therefore, the Court finds that this factor weighs towards dismissal.

C. History of Dilatoriness.

As described above in the Background section of this Opinion, the Plaintiffs have made few efforts to move this matter forward. After filing the Complaint, they argued that the matter should not be stayed during bankruptcy proceedings. However, they did not maintain contact with their attorney; they failed to timely inform the Court or opposing counsel of the conclusion of the bankruptcy proceedings; they failed to appear at a properly-noticed status conference; and they failed to respond to the Motion for Involuntary Dismissal. In fact, they have taken no action to move this matter forward in the more than twelve months that have passed since their bankruptcy action concluded. Therefore, this factor weighs strongly towards dismissal.

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[6] *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984) (emphases in original); *see Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 510-11 (2010) (reaffirming that the Superior Court is bound to follow the Third Circuit's decision in *Poulis* when considering motions to dismiss for failure to prosecute).
[7] *Halliday*, 53 V.I. at 510-11.

D. Whether the Conduct Was Willful or In Bad Faith.

Unfortunately, because the Defendants lost contact both with counsel and the Court, it is impossible to assess the reasonableness of the Plaintiffs' excuse for their failure to prosecute. Therefore, this factor weighs neither towards nor against dismissal.

E. The Effectiveness of Alternative Sanctions.

Because Plaintiffs refused to appear at the Court's properly noticed status conference, there is no reason to believe they would appear for a show cause hearing. Moreover, the issuance of attorney's fees as a sanction would likely be ineffective, as Defendants point out, because there is little indication that Plaintiffs—who emerged from bankruptcy proceedings just over a year ago—would respond to the order or otherwise pay the sanction. Therefore, the Court does not find that any alternative sanction would be effective.

F. The Meritoriousness of the Claim or Defense.

It is too early, at this stage of the litigation, to say with much certainty whether the Plaintiffs' claims are meritorious. Because of Plaintiffs' initiation of bankruptcy proceedings and the resultant stay, there has been little discovery and no evidence presented to the Court on the meritoriousness of the claim. Therefore, this factor weighs neither towards nor against dismissal, as the Court has too little information before it to make a determination.

CONCLUSION

Considering and weighing all of the *Poulis* factors, the Court finds that dismissal is an appropriate sanction for the Plaintiffs' failure to prosecute in this matter. Plaintiffs have lost contact with counsel and the Court, have not made an appearance since their attorney withdrew, and failed to defend against the Motion for Involuntary Dismissal. They have taken no action to prosecute this action in the more than twelve months that have passed since they emerged from bankruptcy proceedings. The Court will, therefore, dismiss this matter for failure to prosecute by separate order issued today.

DATED: August 25, 2011

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

ATTEST: **VENETIA H. VELAZQUEZ, ESQ.**
Clerk of the Court
BY:

LORI BOYNES-TYSON
Court Clerk Supervisor 8/29/11

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ORDER

AND NOW, pursuant to the Memorandum Opinion issued today in this matter, it is hereby

ORDERED that Defendants' March 17, 2011 Motion for Involuntary Dismissal is **GRANTED**; and it is further

ORDERED that this matter is **DISMISSED without prejudice**; and it is further

ORDERED that copies of this Order shall be directed to counsel of record, and copies thereof shall be served on corporate officers or other responsible representatives for Plaintiffs.

DATED: August 25, 2011

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

ATTEST: **VENETIA H. VELAZQUEZ, ESQ.**
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