

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

CRAIG W. BARSHINGER,

Plaintiff,

vs.

**LEGISLATURE OF THE VIRGIN ISLANDS
OF THE UNITED STATES OF AMERICA
THRU ITS OFFICERS AND/OR MEMBERS,**

Defendant.

)

) CASE NO. ST-2011-CV-0000024

)

) ACTION FOR REIMBURSEMENT OF

) EXPENSES UNDER STATUTE; BEACH

) OF THE COVENANTS OF GOOD

) FAITH AND FAIR DEALING; UNJUST

) ENRICHMENT

)

) JURY TRIAL DEMANDED

)

)

MEMORANDUM OPINION

Pending before the Court are the following:

- 1) Defendant's Motion to Dismiss for Failure to Prosecute, filed on February 19, 2016; and
- 2) Plaintiff's Opposition to Defendant's Motion to Dismiss for Failure to Prosecute, filed on May 9, 2016.¹

Defendant Legislature of the Virgin Islands (the "Legislature") moves this Court to dismiss the instant matter with respect to Plaintiff Craig W. Barshinger ("Barshinger") because of Barshinger's failure to comply with Court orders, to engage in discovery, and to appear in Court.² Upon considering the premises of the Legislature's Motion to Dismiss for Failure to Prosecute, and weighing the parties' positions in light of the six *Poulis* factors adopted by the Supreme Court of the Virgin Islands in *Halliday v. Footlocker Specialty, Inc.*,³ as discussed herein, the Court will grant the Legislature's Motion to Dismiss for Failure to Prosecute.

FACTUAL AND PROCEDURAL BACKGROUND

Barshinger was elected Senator-at-Large for the 26th, 28th, and 29th Legislatures of the U.S. Virgin Islands.⁴ On January 14, 2011, Barshinger filed a Verified Complaint against the Legislature alleging a violation of V.I. CODE ANN. tit. 2, §§ 76(a) and (d). Barshinger asserts that the Legislature failed to reimburse \$45,701.47 to him for expenditures made to carry out his official duties.⁵

¹ Plaintiff is represented by Mark Hodge, Esquire, of Hodge and Hodge. Defendant Legislature of the Virgin Islands is represented by Kye Walker, Esquire, of The Walker Legal Group.

² Mot. to Dismiss for Failure to Prosecute, Feb. 19, 2016.

³ *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010).

⁴ See Verified Compl., Jan. 14, 2011; Barshinger was also reelected as Senator-at-Large for the 30th Legislature.

⁵ Barshinger contends that he expected \$19,153.65, during the 26th Legislature; \$11,723.36 during the 28th Legislature; and an aggregate of \$14,824.55 during the 29th Legislature.

On February 15, 2011, in response to Barshinger's Complaint, the Legislature filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On March 17, 2011, Barshinger filed an Opposition to the Legislature's Motion to Dismiss, along with a Motion for Injunctive Relief. On June 23, 2011, the first mediation report was filed in this matter.

The Court held a motions hearing on September 28, 2012, and partly granted the Legislature's Motion to Dismiss. The Court reasoned that Barshinger's claim under 2 V.I.C. § 76(d)⁶ is a non-justiciable political question that the Court will not address.⁷ However, the Court found that the second claim under 2 V.I.C. § 76(a) is a valid claim upon which relief can be granted.⁸ Title 2, § 76(a) of the Virgin Islands Code states that, "[e]ach member [of the Senate] shall receive a base allotment of 2% of the total budget of the Legislative Branch for the operation of the member's senatorial office." In light of the partial dismissal, the Court granted Barshinger leave to amend his Complaint, and reserved its ruling on Barshinger's Motion for Injunctive Relief. Barshinger did not file an amended Complaint, or take any further action in the case.

On October 1, 2012, the Court ordered the parties to participate in a scheduling conference and to submit a proposed scheduling order by October 17, 2012.

On December 12, 2012, the Legislature filed a Motion to Dismiss for Failure to Prosecute under Fed. R. Civ. P. 41(b). The Legislature argued that Barshinger had not prosecuted his claim, complied with Court orders, retained legal representation, or filed an Amended Complaint.⁹ Barshinger did not respond to the Legislature's Motion to Dismiss for Failure to Prosecute. On February 19, 2013, the Court denied the Legislature's Motion, and found that Barshinger's noncompliance with one scheduling order was not so egregious as to warrant a dismissal.¹⁰

On March 21, 2013, a status conference was scheduled for July 1, 2013. On July 1, 2013, Barshinger failed to appear at the status conference.

On January 22, 2014, both parties failed to appear for a scheduled status conference. On January 23, 2014, the Legislature filed a Notice to the Court explaining its absence from the status

⁶ 2 V.I.C. § 76(d) ("The member elected to the at-large seat, in addition to his base allotment, and in addition to any other allotment for chairing a senate committee, shall receive an additional allotment not to exceed 5% of the total budget of the Legislative Branch to provide for the staffing of member's offices in both districts. In the event the member elected to the at-large senate seat also becomes designated as the President of the Senate, that member's total allotment shall be no more than 3% of the budget of the Legislature Branch.").

⁷ Mem. Op., 3-4, Sept. 28, 2012.

⁸ Order, 1, Sept. 28, 2012 ("While 2 V.I.C. § 76(a) entitles a senator to receive 2% of the total budget of the Legislative Branch in a given year, 2 V.I.C. § 76(d) operates as a cap for the 5% allotment and suggests that the Legislature has the discretion to determine whether a senator shall receive the full amount of the allotment in a given year. As a result, Barshinger states a claim upon which relief can be granted under 2 V.I.C. § 76(a), but presents a non-justiciable political question under 2 V.I.C. § 76(d).").

⁹ Def. Mot. to Dismiss, Dec. 11, 2012.

¹⁰ Mem. Op., Feb. 19, 2013 ("Assuming *arguendo* [that] The Legislature's allegations against Barshinger are true, Barshinger's alleged conduct indicates that Barshinger may have been dilatory in his obligations before this Court and has not engaged in a good faith effort to comply with this Court's October 1, 2012[] Order. Even assuming that conclusion, however, the Court does not find that Barshinger's alleged failure to abide by only one scheduling order is so egregious that it merits the imposition of the severe sanction of dismissal at this juncture. Consequently, the Court finds it unnecessary to engage in a full *Poulis* factor analysis.").

conference. Barshinger made no communication with the Court regarding his failure to appear for the January 22, 2014 status conference.

On June 16, 2014, the Legislature filed a Second Motion to Dismiss for Failure to Prosecute.¹¹ On November 10, 2014, the Court issued an Opinion denying Barshinger's Second Motion to Dismiss for Failure to Prosecute because the *Poulis* factors strongly weighed against dismissal of Barshinger's claims.¹²

On June 1, 2015, the Court issued its First Amended Scheduling Order setting new discovery deadlines, a pretrial conference date, and a trial date. A courtesy copy of the First Amended Scheduling Order was emailed to Barshinger on June 1, 2015. On June 29, 2015, Barshinger was personally served with the First Amended Scheduling Order by a deputy marshal of the Superior Court of the Virgin Islands.

On February 17, 2016, the Court issued an Order describing Barshinger's failure to appear at the February 16, 2016 status conference although he was personally served on June 1, 2015. The Court gave the Legislature leave through Friday, February 19, 2016 to file a motion to dismiss for failure to prosecute. The Court also cancelled jury selection and trial, which were both scheduled in this matter.

On February 19, 2016, the Legislature filed its third Motion to Dismiss for Failure to Prosecute. On May 9, 2016, Barshinger filed his Opposition to the Legislature's Motion to Dismiss for Failure to Prosecute.

ANALYSIS

I. Legal Standard.

Pursuant to Federal Rule of Civil Procedure 41(b),¹³ "[i]f the plaintiff fails to prosecute or to comply with [the Federal Rules of Civil Procedure] or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, dismissal under this subsection . . . operates as an adjudication on the merits."¹⁴ A trial court has the inherent discretion to dismiss a case for want of prosecution to prevent delays and avoid congestion in the courts.¹⁵ However, in using its discretion, the court must consider the six factors set forth in *Poulis v. State Farm Fire and Casualty Co.*,¹⁶ as adopted by the Supreme Court of the Virgin Islands in *Halliday v. Footlocker Specialty, Inc.*¹⁷ In *Halliday*, the Supreme Court provided that—

[p]ursuant to *Poulis*, a trial court must, before ordering the "extreme" sanction of dismissing an action for failure to prosecute, consider and balance "(1) the

¹¹ See Def. Second Mot. to Dismiss for Failure to Prosecute, June 16, 2014.

¹² Mem. Op., 10, Nov. 10, 2014.

¹³ The Federal Rules of Civil Procedure are applicable to this Court by virtue of Superior Court Rule 7.

¹⁴ Fed. R. Civ. P. 41(b).

¹⁵ *V.I. Water & Power Auth. v. V.I. Tel. Corp.*, 18 V.I. 451, 452 (D.V.I. 1981).

¹⁶ 747 F.2d 863, 868 (3d Cir. 1984).

¹⁷ *Halliday*, 53 V.I. at 510.

extent of the party's personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense.¹⁸

Only after the Court has considered all six factors, and concluded that, on balance, the factors “strongly weigh in favor of dismissal,” is it appropriate for a court to order such an extreme sanction.¹⁹

II. Upon weighing the six *Poulis* factors, the Court finds that Barshinger’s history of dilatoriness and failure to engage in discovery warrants dismissal at this juncture.

Here, the Legislature contends that this matter should be dismissed as to Barshinger because of Barshinger’s history of dilatoriness and failure to engage in discovery. Upon considering and weighing the *Poulis* factors, this Court finds that the *Poulis* factors weigh strongly in favor of dismissal as a sanction.

1. Extent of the Barshinger’s personal responsibility

Under the first *Poulis* factor, the Court finds that Barshinger is personally responsible for any dilatoriness and failure to engage in discovery. Prior to recently obtaining counsel, Barshinger was a *pro se* litigant. The Court has the well-known “policy to give *pro se* litigants greater leeway in dealing with matters of procedure and pleading.”²⁰ This greater leeway, however, “does not excuse [a plaintiff’s] failure to appear or respond to the allegations against him when he is properly served and informed of the consequences of such a failure.”²¹ Even as a *pro se* litigant, Barshinger remains obligated to adhere to the rules of this Court and the rules regulating the timely prosecution of any matter.²²

In the instant case, Barshinger failed to appear at the final pretrial conference. Barshinger asserted that “through a clerical error, the February 16, 2016, pretrial conference failed to appear on his calendar.”²³ Further, Barshinger contends that he did not receive notice and was not served with many of the key documents and orders described in the Legislature’s procedural history.²⁴ However, such a justification does not amount to good cause for failure to appear. On June 29, 2015, Barshinger was personally served with the First Amended Scheduling Order, which

¹⁸ *Id.* at 510 (citing *Poulis*, 747 F.2d at 868) (emphases in original).

¹⁹ *Id.* at 511.

²⁰ *Appleton v. Harrigan*, S. Ct. Civ. No. 2013-0002, ___ V.I. ___, 2014 V.I. Supreme LEXIS 45, at *7 (V.I. Sept. 9, 2014) (citations omitted).

²¹ *Id.* (citation omitted).

²² See LRCr 82.1 (“Individuals representing themselves [before the Superior Court] are responsible for performing all duties imposed upon counsel by [the Local Rules of Civil Procedure] and all other applicable federal rules of procedure.”).

²³ Order, 1, Feb. 19, 2016.

²⁴ Pl. Opp. to Def. Mot. to Dismiss for Failure to Prosecute, 3, May 9, 2016.

scheduled the final pretrial conference for February 16, 2016. Accordingly, this factor weighs in favor of dismissal.

2. Prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery

Second, the Legislature must demonstrate evidence of prejudice caused by the delay. “Prejudice to the opposing party is generally demonstrated by either increased expense to the opposing party in the form of extra costs incurred relative to responding to the dilatory party's behavior; or by the increased difficulty experienced by the opposing party in presenting or defending the claims in issue due to the improper behavior and delays.”²⁵

The Legislature relies on *Allahar v. Clinical Lab, Inc.* in which the Court held that Plaintiff Cherie Karima Allahar's failure to provide to Defendant Clinical Lab, Inc. (“Clinical Lab”) her section of the Joint Final Pretrial Order and to file her Trial Brief deprived Clinical Lab of its right to be apprised of the factual and legal theories under which Allahar would be proceeding to trial.²⁶ These actions necessarily impaired Clinical Lab's ability to respond in its written submissions and to prepare for trial. Accordingly, the Court found that Clinical Lab's ability to prepare for trial had been significantly prejudiced by Allahar's failure to file the pretrial documents set forth in the Trial Management Order.

Similarly, the Legislature contends that Barshinger has not engaged in discovery or submitted any pretrial disclosures.²⁷ The Legislature did not receive Barshinger's portion of the Joint Final Pretrial Order in accordance with LRCI 16.1.²⁸ Further, the Legislature contends that the only evidence that has been exchanged is the Legislature's Rule 26 disclosures indicating the witnesses and documents it intends to use for trial.²⁹ Barshinger does not “provide any details regarding receipts as exhibits to his Complaint.” In addition, many of the “receipts are not legible.”³⁰

Barshinger counters that this appears to be tactical decision on the part of the Legislature's counsel to choose not to propound any written discovery requests in this matter, “apparently intending to rely instead upon Barshinger's inexperience and unfamiliarity with the Superior Court Rules and Federal Rules of Civil Procedure to achieve a tactical advantage.”³¹ However, it was Barshinger's responsibility to provide his portion of the Joint Final Pretrial Order in accordance with LRCI 16.1³² and he failed to do so. Therefore, the Court finds that the Legislature has been

²⁵ *Molloy*, 56 V.I. at 189.

²⁶ *Allahar v. Clinical Lab., Inc.*, Civ. No. 2011-000120, ___ V.I. ___, 2016 U.S. Dist. LEXIS 6474, at * 14 (D.V.I. Jan. 20, 2016).

²⁷ Mot. to Dismiss for Failure to Prosecute, 8, Feb., 19, 2016.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Pl. Opp. to Def. Mot. to Dismiss for Failure to Prosecute, 3, May, 9, 2016.

³² In accordance with V.I. R. Civ. P. 1-1(c)(2)(B)(“[T]he Superior Court makes an express finding that applying [Virgin Islands Rules of Civil Procedure] in a particular previously pending action would be infeasible or would work an injustice”).

prejudiced by an inability to present a defense to Barshinger's claims. Accordingly, this factor weighs in favor of dismissal.

3. Barshinger's history of dilatoriness

Next, the record shows a history of dilatoriness on the part of Barshinger. To determine whether there is a history of dilatoriness, the Court must consider Barshinger's "behavior over the life of the case."³³ Courts have described this as a "pattern" of dilatoriness rather than a Plaintiff's failure to respond to one Court Order.³⁴

On two previous occasions, the Legislature has moved to dismiss the instant action for failure to prosecute. With respect to the Legislature's first motion to dismiss for failure to prosecute, the Court held that Barshinger did not demonstrate a history of dilatoriness. The Court found that Barshinger's failure to abide by only one scheduling order was not "so egregious that it merits the imposition of the severe sanction of dismissal at this juncture."³⁵ Thus, the Court found it unnecessary to engage in a full *Poulis* analysis.³⁶

With respect to the second motion to dismiss for failure to prosecute, the Court held that although the Legislature accurately stated several instances of Barshinger's inaction, the Court attributed Barshinger's actions to a lack of notice.³⁷ Barshinger represented that he had not received notice from the Court or the Legislature. The Court also noted that it did not have Barshinger's most recent mailing address on file.³⁸

With respect to the instant motion,³⁹ the Legislature contends that Barshinger has failed to cooperate in submitting a joint scheduling order and other joint submissions, failed to adhere to the scheduling orders, and failed to appear for three status conferences.⁴⁰ Barshinger also failed to submit a settlement demand to the Legislature.⁴¹

The record indicates that Barshinger failed to appear on four occasions. On July 1, 2013, Barshinger failed to appear at a status conference.⁴² The Legislature was present at the status conference. On October 28, 2013, neither Barshinger nor the Legislature appeared at the status conference. On November 14, 2013, the Court entered a show cause order. Barshinger informed the Court that he did not receive notice of the status conferences because service was made upon

³³ Mot. to Dismiss for Failure to Prosecute, 8, Feb., 19, 2016.

³⁴ *Cf. Poulis*, 747 F.2d at 868 (finding a history of dilatory behavior because "[u]nlike the *Donnelly* [v. *Johns-Manville Sales Corp.*, 677 F.2d 339 (3d Cir. 1982)] case, for example, where there was *only one failure to comply in a timely manner*, i.e. in obtaining local counsel, in this case there has been a pattern of dilatoriness.") (*emphasis added*).

³⁵ Mem. Op., 4, Feb. 19, 2013.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Mem. Op., 9, Nov. 10, 2014.

³⁹ Barshinger could not provide an adequate response to this factor without further review of the record. *See* Pl. Opp. to Def. Mot. to Dismiss for Failure to Prosecute, 4, May, 9, 2016.

⁴⁰ Mem. Op., 9, Nov. 10, 2014.

⁴¹ *Id.*

⁴² Order, July 22, 2013.

Legislative Assistant Amrika Williams. The Legislature's counsel provided good cause for why she could not attend the status conference and as such the Court vacated the Order to Show Cause.⁴³

On January 22, 2014, neither Barshinger nor the Legislature appeared at the status conference. However, the Legislature's counsel filed a notice informing the Court that there were flight delays on Seaborne Airlines and that she was unable to attend the status conference.⁴⁴

Finally, on February 16, 2016, Barshinger failed to appear at the final pretrial conference. Unlike the previous appearances, Barshinger was personally served with notice of the pretrial conference and had eight (8) months advance notice of the scheduled date.⁴⁵ Further, in previous Opinions, Barshinger had been warned that his failure to comply with Court orders could result in sanctions and that it would be to his benefit to hire an attorney.⁴⁶ Therefore, this factor weighs in favor of dismissal.

4. Whether Barshinger's conduct was willful or in bad faith

Turning to the next factor, the Court finds that Barshinger's conduct was willful and in bad faith. To determine if Barshinger's behavior is willful, "the trial court must point to specific evidence to justify its determination of willfulness or bad faith."⁴⁷ Barshinger argues that any delay in this matter was not born of willfulness or bad faith but was based upon not receiving or being served with key documents or orders in this case and the destruction of his electronic calendar.⁴⁸ The Legislature counters that Barshinger actively engaged in bad faith conduct. When he realized that he failed to appear at the final pretrial conference, Barshinger sent the following email to the Court:

Dear Ms. Williams,

I did not have a Feb 16, 2016 court date on my calendar. I apologize for not attending as apparently I was expected to. Did the Defendant attend?

I will come to St. Thomas tomorrow to review the case files, getting copies of all filings. I will file a number of Motions, as well.

May I ask that you check and report back on the following matters, in order to allow me to cogently prepare my Motions:

- Defendant pledged to provide an item-by-item response to the claims for reimbursement within weeks of the Court meeting. The Court affirmed that

⁴³ Order, Jan. 2, 2014.

⁴⁴ Notice to the Court Regarding Status Conference, Jan. 23, 2014.

⁴⁵ *Id.*

⁴⁶ See Mem. Op., 4., Feb. 19, 2013 ("The Court also reiterates its previous suggestion to Plaintiff that it would be to his benefit to be represented by an attorney licensed to practice in the Virgin Islands in these proceedings.").

⁴⁷ *Molloy*, 56 V.I. at 192 (citation omitted).

⁴⁸ Pl. Opp. to Motion to Dismiss for Failure to Prosecute, 5, May 9, 2016.

this was the next step, potentially leading to settlement rather than trial. I never received these documents. What is the status?

- I have asked the Court in previous motions to move the case to a jurisdiction where there is no conflict of interest. Expressly discussed in Court, I need to know that status of this issue.
- Is the transcript of the Court meeting last year ready?
- Failing that, is the audio file now available?

Please do not dismiss this case. This case is unusual, with little precedent. But it is important, both to me financially and in the larger picture. In order to prosecute this case I am arranging to attend law school in Colorado to remedy the prosecutorial problems previously discussed. I selected this course of action because I believed after multiple failures of the settlement process that trial is inevitable.

Thank you.

Appreciatively awaiting your expedited response,

Craig Barshinger

Barshinger had more than eight months' notice regarding the final pretrial conference and he made no effort to submit a Joint Final Pretrial Order. The Court also reminded Barshinger on previous occasions that he was required to comply with Court Orders.⁴⁹ Therefore, this factor weighs in favor of dismissal.

5. Effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions

Under the fifth factor, the Court must weigh alternative sanctions short of dismissal. Barshinger contends that the Legislature fails to identify the efficacy of alternative lesser sanctions.⁵⁰ This claim does not excuse Barshinger's repeated failure to appear in Court when ordered to do so. Barshinger further contends that the Court was on notice of Barshinger's efforts to retain counsel.⁵¹ The Legislature counters that an alternative sanction would not be effective in this case and that two prior motions to dismiss for failure to prosecute should have placed Barshinger on notice that the Legislature intended to pursue the severe sanction of dismissal.⁵²

⁴⁹ See e.g., First Amended Scheduling Order, June 1, 2015 ("[Barshinger] is reminded of his obligation to comply with all Court Orders, familiarize himself with all applicable rules and procedures despite his status as a self-represented litigant. Pursuant to Local Rule of Civil Procedure 82.1, which is applicable to this Court by virtue of Superior Court Rule 7, "[i]ndividuals who are representing themselves are responsible for performing all duties imposed upon counsel by these Rules and all other applicable federal rules of procedure." This includes complying with all Court Orders that are issued in this matter. If [Barshinger] fails to Comply with any future Orders issued by this Court, and if he fails to initiate communication with [the Legislature] to actively prosecute this matter, his action may be dismissed for failure to prosecute.").

⁵⁰ Pl. Opp. to Mot. to Dismiss for Failure to Prosecute, 4-5, May 9, 2016.

⁵¹ *Id.*

⁵² Mot. to Dismiss for Failure to Prosecute, 10-11, Feb. 19, 2016.

One alternative sanction is the imposition of “excess costs directly upon the attorney, with an order that such costs are not to be passed on to the client, directly or indirectly.”⁵³ Here, since Barshinger is a *pro se* litigant, any imposition of a monetary penalty would be suffered directly by Barshinger. As the Court mentioned in a previous Opinion, Barshinger’s claim is based on a reimbursement of funds, it is more fitting that the penalty be directly related to the desired recovery.⁵⁴ However, at this stage in the proceeding, the Court concludes that other sanctions short of dismissal will not be effective on Barshinger. Accordingly, this factor weighs in favor of dismissal.

6. Meritoriousness of the claim or defense

In light of the last *Poulis* factor, the Barshinger has provided nothing for the Court to find a meritorious claim. “A claim, or defense, will be deemed meritorious where the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense.”⁵⁵ The Legislature contends that the remaining claim requires the Court to analyze the internal rules, policies and procedures of the Legislature and thereby rendering the claim non-justiciable.⁵⁶ The Legislature further argues that Barshinger’s failure to engage in discovery or participate in the pre-trial process bars him from calling any witnesses or entering any documents into evidence, as such Barshinger would be unable to prevail at trial.⁵⁷

Barshinger counters that the “clear wording of 2 V.I.C. § 76(a) clearly prevents the Legislature from adopting a regulation, policy, or procedure that empowers the President of the Legislature or anyone else to withhold a portion of a Senator’s statutorily mandated allotment.”⁵⁸ Barshinger further argues that that Legislature made a “tactical” decision not to propound discovery in this matter in an effort to “capitalize upon the inexperience” of an unrepresented litigant and “preventing the introduction of any evidence at trial.”⁵⁹ Barshinger argues “[h]ad [the Legislature] propounded discovery even an inexperienced *pro se* plaintiff would then know he could do likewise.”⁶⁰ Finally, Barshinger contends that the Legislature failed to file a final pretrial statement or final pretrial order in this case and thus the Legislature will be unable to present any witnesses at trial.⁶¹

With respect to the merits of Barshinger’s claim, this Court previously held that Barshinger has a valid claim under 2 V.I.C. § 76(a). Therefore, the only remaining question is whether Barshinger will be able to sufficiently establish that the Legislature has violated Section 76(a) by failing to reimburse him for expenditures made using his personal funds. But, Barshinger has conducted no discovery and done little else, but demand reimbursement for expenses the Legislature finds questionable and lacking in documentation. For its part, the Legislature asserts it

⁵³ 747 F.2d at 869.

⁵⁴ Mem. Op., 9, Nov. 10, 2014.

⁵⁵ *Molloy*, 56 V.I. at 188 (citing *Poulis*, 747 F.2d at 869-70).

⁵⁶ Mot. to Dismiss for Failure to Prosecute, 11, Feb.19, 2016.

⁵⁷ *Id.* at 12.

⁵⁸ Pl. Opp. to Mot. to Dismiss for Failure to Prosecute, 6-7, May 9, 2016.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ *Id.*

must be a steward of its funds. One point of contention is that Barshinger seeks to be reimbursed for taking his staff on a cruise. He claims the staff received training during the cruise, but offers no proof thereof, according to the Legislature. Instead, the record reflects that this matter was scheduled for a trial on February 22, 2016, Barshinger failed to submit his portion of the required Joint Final Pretrial Order, and he failed to appear at the final pretrial conference.

Further, the Court is unpersuaded by Barshinger's argument that the Legislature failed to submit a final pretrial statement or final pretrial order. In accordance with the First Amended Scheduling Order dated June 1, 2015, Barshinger was directed to submit his portion of Joint Final Pretrial Order to the Legislature on January 11, 2016. The Legislature was directed to submit its portion of the Joint Final Pretrial Order to Barshinger on January 25, 2016. Finally, the Court directed Barshinger to file the fully integrated Joint Final Pretrial Order on or before February 8, 2016. By Court Order, the *burden was placed on Barshinger* to file the Joint Final Pretrial Order and he failed to do so.

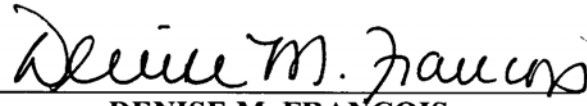
The Court is also unpersuaded by Barshinger's argument regarding a purported "tactical" decision made on the part of the Legislature to withhold discovery. Specifically, Barshinger contends "[h]ad [the Legislature] propounded discovery even an inexperienced pro se plaintiff would then know he could do likewise."⁶² A motion to dismiss for failure to prosecute requires the Court to weigh the six *Poulis* factors to determine whether the plaintiff failed to prosecute the case. The burden, here, is not on the Legislature to prosecute this matter, especially when the First Amended Scheduling Order was served personally upon Barshinger and informed him of the Court ordered deadlines.

CONCLUSION

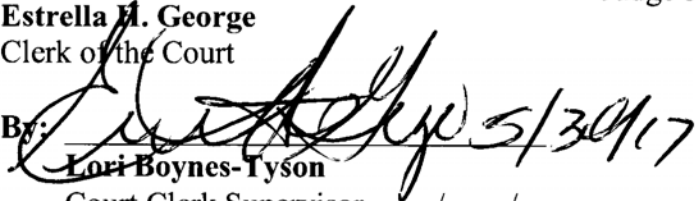
Upon considering and balancing all six *Poulis* factors, this Court finds that the factors "strongly weigh in favor of dismissal as a sanction."⁶³ Therefore, Defendant's Motion to Dismiss for Failure to Prosecute will be granted.

An Order consistent with this Opinion will follow.

DATED: 5/26/2017


DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:
Estrella M. George
Clerk of the Court

By:  5/30/17
Lori Boynes-Tyson
Court Clerk Supervisor

⁶² Pl. Opp. to Def. Mot. to Dismiss for Failure to Prosecute, 7, May 9, 2016.

⁶³ *Halliday*, 53 V.I. at 511.