

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MIGDALIA ENCARNACION, individually and on	)	
behalf of her minor child, KALIM LINDQUIST,	)	
	)	
Plaintiff,	)	
	)	CIVIL CASE NO. SX-15-CV-533
v.	)	
GOVERNMENT OF THE VIRGIN ISLANDS and	)	
J. BENTON CONSTRUCTION, LLC,	)	ACTION FOR DAMAGES
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER OF DISMISSAL

THIS MATTER comes before the Court on Defendant J. Benton Construction, LLC's Motion to Dismiss and Memorandum in Support, filed March 6, 2017, for failure of Plaintiff to prosecute the action, and Benton's Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss, filed November 20, 2017. Following Plaintiff's failure to respond to Benton's Motion, the Court entered an Order on May 30, 2017, requiring Plaintiff to show cause in writing within 10 days why this matter should not be dismissed for failure to prosecute. Plaintiff has filed nothing despite the directive of the Court's Order and, to date, has filed nothing in response to Benton's dispositive Motion. Defendant Government of the Virgin Islands has neither joined Benton's Motion nor filed any response to Benton's filings. For the reasons that follow, the Court will grant Defendant's Motion.

PROCEDURAL BACKGROUND

Plaintiff Migdalia Encarnacion, individually and on behalf of her minor child, Kalim Lindquist, filed her Amended Complaint (Complaint) on March 10, 2016. The Complaint alleges that on or about January 23, 2014, Kalim Lindquist was seriously injured when he fell from the Christiansted boardwalk that Plaintiff alleges was negligently designed and constructed by the Government and Benton. Complaint, ¶¶ 7, 8.

Defendant Government filed its Answer on July 15, 2016 and Benton filed its Answer on September 12, 2016. On September 15, 2016, Benton filed its initial Rule 26 disclosures and served its initial discovery on Plaintiff. Plaintiff failed to provide responses to discovery and filed no Rule

26 disclosures. Benton followed up with Plaintiff on December 15, 2016 and Plaintiff responded that she would submit her disclosures and discovery responses by January 15, 2017. On January 30, 2017, without submission of initial disclosures and discovery responses by Plaintiff, Benton sent a proposed scheduling order to Plaintiff, to which Plaintiff never replied. On February 8, 2017, Benton and the Government agreed upon scheduling dates which Plaintiff rejected. A revised proposed scheduling order agreed between Benton and the Government was sent to Plaintiff on February 24, 2017, who agreed to provide a response by March 1, 2017 or March 2, 2017. Plaintiff failed to respond and, to date, has never provided a response to Defendants' proposed scheduling order.

LEGAL STANDARD

Virgin Islands Rule of Civil Procedure 41(b) states that "if the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." V.I. R. Civ. P. 41(b). In *Halliday v. Footlocker Specialty Inc.* and its progeny, the Supreme Court of the Virgin Islands established that the Superior Court must conduct an analysis of the six "*Poulis* factors" before dismissing a case for failure to prosecute under Rule 41. See 53 V.I. 505, 511 (V.I. 2010); see also *Molloy v. Independence Blue Cross*, 56 V.I. 155, 185-86 (V.I. 2012).¹ When considering a motion to dismiss for failure to prosecute, the Court must consider the following factors: (1) the 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. *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984); see also *Halliday*, 53 V.I. at 511 (holding that "the Superior Court may not dismiss an action for failure to prosecute unless these six factors strongly weigh in favor of dismissal as a sanction."). It is not necessary that all

¹ These cases interpreted Fed. R. Civ. P. 41(b), as previously applicable per Superior Court Rule 7. Following the March 31, 2017 implementation of the Virgin Islands Rules of Civil Procedure, such motions are now governed by the identical V.I. R. Civ. P. 41(b). Thus, precedent interpreting the federal rule is equally applicable to the interpretation of V.I. R. Civ. P. 41(b).

factors weigh in favor of dismissal, however “the court must explicitly consider all six factors, balance them, and make express findings.” *Molloy*, 56 V.I. at 186. Dismissal for failure to prosecute is a serious sanction, which is reserved for extreme cases. *Shelley v. Patrick*, 427 Fed.Appx. 66, 69 (3d Cir. 2011).

DISCUSSION

1. The extent of Plaintiff’s personal responsibility.

Poulis notes that “a client cannot always avoid the consequences of the acts or omissions of its counsel.” *Poulis*, 747 F. 2d at 868. *Poulis* guides under the assumption that a plaintiff wants to pursue her claim. Here, however, Plaintiff has shown a distinct disinterest in pursuing the litigation of her claim. Exhibits to Benton’s filings reveal email communications from Plaintiff’s counsel describing her futile efforts to communicate with Plaintiff Encarnacion. On separate occasions spanning several months, counsel for Plaintiff informed Benton’s counsel in May 2016 that she has “not yet reached Ms. Encarnacion;” in June 2016 she “will try again to reach Ms. Encarnacion;” and in July 2016, that “My client obviously doesn’t have same contact numbers. I sent her a letter yesterday. Hopefully, same PO box.”² The record does not reflect whether contact was ever made between Plaintiff and her counsel but, ultimately, the client bears responsibility for pursuing the prosecution of her matter in litigation. Because Plaintiff had apparently changed her contact information without informing her counsel, did not personally reach out to counsel for purposes of moving the case forward, and was unavailable and unresponsive to communications from her counsel, Plaintiff has demonstrated no interest in pursuing this matter. As such, this factor weighs heavily in favor of dismissal.

2. Prejudice to the opposing party.

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. *See Molloy*, 56 V.I. at 189. Benton describes the prejudice suffered through Plaintiff’s dilatory behavior, incurring costs to

² Motion, Ex. A, E.

seek disclosures and discovery, including the need to file motions to compel Plaintiff to comport with basic civil rules and procedural requirements. Prejudice to Defendants is inevitable with undue delay, which generally “could cause memories to fade and perceptions of events to be altered.” *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 292 (V.I. 2010). Here, Plaintiff’s inactivity prejudices Defendants’ ability to defend against Plaintiff’s now 4-year-old claim, generally due to the potential loss of evidence and dimming of memories associated with the passage of time. More specifically, Plaintiff’s counsel was unable to conduct a site visit for Defendants of the area on the boardwalk where Defendants’ alleged design and construction defects led to injury to the minor Plaintiff because counsel was apparently unaware of the location of the occurrence and was unable to make contact with her client. The record does not reflect whether conditions existing on the boardwalk in 2018 are the same as they were at the time of the incident of which Plaintiff complains. As such lack of disclosure and discovery seriously prejudices Defendants’ ability to defend the claims against them, this factor weighs heavily in favor of dismissal.

3. History of dilatoriness.

Here, Plaintiff has engaged in a history of dilatoriness such that “litigation has been characterized by a consistent delay.” *Poulis*, 747 F.2d at 868. Conduct that merely occurs once or twice does not demonstrate a history of dilatoriness. *Briscoe v. Klaus*, 538 F.3d 252, 261 (3d Cir. 2008). Rather, it is “[e]xtensive or repeated delay or delinquency [that] constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders.” *Adams v. Trs. of N.J. Brewery Employees’ Pension Trust Fund*, 29 F.3d 863, 874 (3d Cir. 1994). Order entered May 30, 2017 required Plaintiff to show cause within ten days why the matter should not be dismissed for failure to prosecute. Plaintiff failed to comply with the Order, filed nothing in response and has never acknowledged the Order entered more than a year ago. On repeated occasions, Plaintiff’s counsel indicated that she had lost contact with her client. In the nearly four years that this case has been pending, Plaintiff has done virtually nothing to move this case forward. Accordingly, Plaintiff has engaged in a history of dilatoriness that weighs in heavily favor of dismissal.

4. Whether conduct of Plaintiff or her attorney was willful or in bad faith.

In evaluating whether to dismiss this action for failure to prosecute, the Court must examine whether Plaintiff or her counsel has engaged in willful or flagrantly bad faith behavior. *Poulis*, 747 F.2d at 868. “Willfulness involves intentional or self-serving behavior.” *Adams*, 29 F.3d at 875. Specific evidence in the record must be found that justifies a determination of willfulness or bad faith. *See Molloy*, 56 V.I. at 192. When there is no evidence of willfulness on the record, the Court “must presume that [a party’s] failure to respond to the prompting order was not willful and that this factor also does not favor dismissal.” *Id.* at 174. Upon a review of the record of this case, notwithstanding substantial evidence of dilatoriness and neglect in failure to follow procedural rules and requirements, the Court finds no specific evidence of intentional or self-serving behavior arising to the level of willfulness or bad faith on behalf of Plaintiff or her counsel. While, arguably, Plaintiff’s decision to change contact information without advising her attorney could be deemed willful, in these circumstances such conduct is considered neglectful, such that this factor does not weigh in favor of dismissal.

5. Availability of alternative sanctions.

Dismissal is a sanction of last resort. Accordingly, courts must look to effective alternative methods of sanctioning a dilatory litigant before ordering dismissal for failure to prosecute. *Poulis*, 747 F.2d at 869. “The court should consider whether a lesser sanction would better serve the interests of justice.” *Guyer v. Beard*, 907 F.2d 1424, 1429–30 (3d Cir. 1990). However, in the instant case, there has been a complete and abject failure of Plaintiff to take any action to prosecute her claim following the filing of her Complaint. Plaintiff has ignored the Court’s Order to show cause why dismissal is inappropriate. Neither Plaintiff nor counsel has demonstrated any interest in moving the case, such that imposition of monetary or alternative sanctions would be unavailing, and the setting of an early trial date to bring the matter to conclusion is not appropriate as Plaintiff has stymied Benton’s attempts to obtain discovery to be ready to defend at trial. In these circumstances, there is no lesser sanction that may be applied that will lead to the speedy resolution of this matter. Accordingly, this factor weighs heavily in favor of dismissal.

6. Meritoriousness of Plaintiff's claim.

"In considering whether a claim or defense appears to be meritorious for this inquiry, we do not purport to use summary judgment standards. A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." *Poulis*, 747 F.2d at 869–70. Plaintiff's Complaint alleges that Defendants were negligent in the design and construction of the Christiansted boardwalk. Specifically, Plaintiff alleges that Defendants were negligent on account of the lack of railings, adequate lighting and signs warning of the existence of the concrete form over which the minor Plaintiff allegedly tripped, generally failing to provide a safe passageway for pedestrians invited to use the boardwalk. While Benton argues that its role as contractor did not extend to the design of the boardwalk, by her Complaint, Plaintiff has pled facts that, if true, establish a prima facie case of negligence in that Defendants breached the duty of reasonable care proximately causing damages to Plaintiff. At this stage, the allegations of the Complaint are sufficiently meritorious that this factor does not weigh in favor of dismissal.

CONCLUSION

Having examined the *Poulis/Halliday* factors to determine whether the extreme sanction of dismissal is proper, the Court finds that four factors strongly favor dismissal and two factors do not favor dismissal. As such, balancing the factors, the "extreme sanction of dismissal ... is justly merited." *Halliday*, 53 V.I. at 511.

Defendant Government has not joined Benton's Motion or otherwise affirmatively sought dismissal or any relief. Nonetheless, the same considerations that apply to Benton's Motion are equally applicable to Plaintiff's lack of prosecution of her claim against the Government, and the Court will *sua sponte* dismiss Plaintiff's Complaint against Defendant Government.

On the basis of the foregoing, Benton's Motion will be granted, and Plaintiff's Complaint will be dismissed against both Defendants. Accordingly, it is hereby

ORDERED that Defendant J. Benton Construction, LLC's Motion to Dismiss is GRANTED. It is further

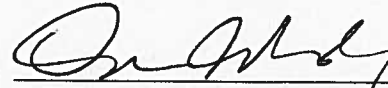
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ORDERED that Plaintiff's Amended Complaint is DISMISSED with prejudice against Defendant J. Benton Construction, LLC and against Defendant Government of the Virgin Islands for failure to prosecute, pursuant to V.I. R. Civ. P. 41(b).

Dated: July 31, 2018

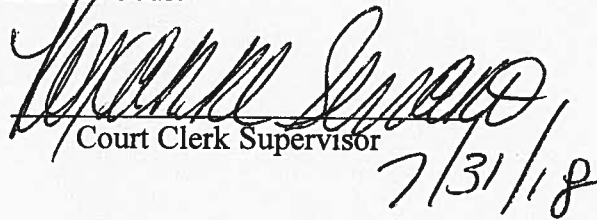


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By:


Court Clerk Supervisor
7/31/18