

FOR OFFICIAL PUBLICATION

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

FREDERICK T. KUYKENDALL, III,	)	CASE NO. SX-05-CV-097
	)	
Plaintiff,	)	COMPLEX LITIGATION DIVISION
	)	
v.	)	* * *
	)	
THOMAS H. HART, III; THOMAS ALKON;	)	CONSOLIDATED WITH SX-04-CV-063¹
JAMES A. MEANEY; JAMES A. MEANEY, P.C.	)	
and THOMAS ALKON, P.C. d/b/a ALKON	)	
MEANEY; MRRM, P.A.; and RICHARDSON,	)	
PATRICK, WESTBROOK & BRICKMAN, LLC,	)	
	)	
Defendants.	)	
	)	

Cite as: 2019 VI Super 69

Appearances:

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¹ Although the Court recently consolidated this case with *Thomas Alkon, et al. v. Frederick T. Kuykendall, III, et al.*, case number SX-04-CV-063, the motion addressed in this Opinion was filed before consolidation. For that reason, the Opinion retains the caption of the 2005 case prior to consolidation.

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MEMORANDUM OPINION

MOLLOY, Judge.

¶1 **BEFORE THE COURT** is a motion filed by Defendant MRRM, P.A. (“MRRM”) to dismiss for failure to prosecute. Defendant Thomas H. Hart, III (“Hart”) orally joined in MRRM’s motion during a status conference held on May 8, 2019. Plaintiff Frederick T. Kuykendall, III (“Kuykendall”) opposes dismissal. Having reviewed the motion papers and the arguments of counsel, the Court will deny the motion.

I. BACKGROUND

¶2 Kuykendall, an attorney licensed to practice law in Alabama, filed this action in the Superior Court of the Virgin Islands in 2005 seeking damages, including punitive damages, he allegedly sustained when lawyers with whom he had an agreement later refused to honor that agreement. Specifically, Kuykendall claims he, Hart, and Michael J. Brickman, an attorney with the law firm Ness, Motley, Loadholt, Richardson & Poole, P.A. based out of Charleston, South Carolina, had agreed to split attorney’s fees recovered from asbestos cases filed in Virgin Islands courts. See *Kuykendall v. Hart*, 2019 VI Super 65, and *Alkon v. Kuykendall*, 2019 VI Super 64, for additional background. Relevant to the instant motion is the following points: Kuykendall filed his complaint on February 23, 2005, later amended on June 15, 2005, the same day that he filed a motion for an extension of time to serve the defendants. The Court (Ross, J.) granted that motion by order dated June 20, 2005,

entered June 21, 2005. Two days later, on June 23, 2005, Defendants Thomas Alkon, James A. Meaney (“Meaney”), and Thomas Alkon, P.C. and James A. Meaney, P.C. (“Meaney, PC”) doing business as Alkon Meaney (collectively “Alkon Meaney”) answered the complaint. A month later, on July 22, 2005, Kuykendall filed a stipulation with Defendant Richardson, Patrick, Westbrook & Brickman, LLC (“RPWB”), agreeing to extend RPWB’s time to answer or respond to the amended complaint. RPWB’s response was a motion, filed on August 23, 2005, to dismiss the complaint based on the prior action pending doctrine, joined by Alkon Meaney the next day, and denied by this Court on May 7, 2019. *See generally Kuykendall*, 2019 VI Super 65. This was RPWB’s first motion to dismiss.

¶3 RPWB filed another motion to dismiss on February 2, 2006, even though the first motion to dismiss was still pending. The second motion was based on Kuykendall, a non-resident plaintiff, having failed to post a bond as security for costs pursuant to section 547 of title 5 of the Virgin Islands Code, which the Court (Donohue, J.)—Judge Ross having recused in August 2005—ordered Kuykendall to post a bond following a demand by Alkon Meaney. Counsel for Kuykendall offered to act as a surety, but RPWB, a non-resident defendant, rejected that offer and moved to dismiss the complaint because Kuykendall failed to comply with the Court’s order. The Court later denied RPWB’s second motion to dismiss on December 6, 2006, order entered December 7, 2006, after Kuykendall posted a bond in the amount of \$3,000. In denying RPWB’s motion, the Court further ordered “the parties to take the appropriate actions to move this matter forward within Thirty (30) Days of this Order.” (Order 1, entered Dec. 7, 2006.) RPWB responded to the December 7, 2006 order by filing a motion to reconsider, objecting to being ordered to take action with its earlier motion to dismiss still pending. Neither motion was ruled on until 2019.

¶4 Four years later, on August 26, 2010, MRRM filed a one-page motion to dismiss for failure to prosecute, which Kuykendall opposed on November 29, 2011. In the interim, after PRWB moved to dismiss this case based on a prior action having been filed first, i.e., *Alkon, et al. v. Kuykendall, et al.*, case number SX-04-CV-063, and before MRRM moved to dismiss, MRRM had amended its answer, with leave of court, to assert crossclaims against Meaney and Meaney, P.C. And Judge Donohue, who became the Presiding Judge of the Superior Court, reassigned this case to Judge Francis J. D'Eramo, pursuant to the presiding judge's authority to balance the case load among the judges. Judge D'Eramo recused and the Clerk's Office reassigned the case to Judge Julio A. Brady, who also recused. Rather than return the case to Judge Donohue, the Clerk's Office treated Judge Donohue's order of reassignment as a recusal and transferred the case to the St. Thomas / St. John Division. The case was assigned at random to Judge Leon A. Kendall. Following Judge Kendall's retirement in October 2009, the case was reassigned to Judge Adam G. Christian, who issued an order on June 22, 2010, entered June 23, 2010, giving the parties twenty days to provide initial disclosures, twenty days after that to convene a discovery conference, and ten days after the conference to file a proposed scheduling order. RPWB responded to the June 22, 2010 Order by filing a motion, on July 8, 2010, for an extension of time, until September 1, 2010, so that it could retain new counsel. That motion was granted, but not until October 4, 2010. In the interim, MRRM filed its August 26, 2010 motion to dismiss for failure to prosecute. None of the other defendants joined in the motion, except Hart who joined through counsel in open court on May 8, 2019.

II. DISCUSSION

¶5 In its motion, which is one page in length and cites no case law in support, MRRM points out that "[t]his action has been pending for years without any substantial efforts to prosecute." (Def.

MRRM, P.A.'s Notice & Mot. for Rule 41(b) Involuntary Dismissal 1, filed Aug. 26, 2010 ("Mot.")
MRRM further notes that the Court (Christian, J.) had issued a scheduling order in June 2010, "setting deadlines for Rule 26(a) disclosures and for the parties' attorneys to convene for a discovery meeting pursuant to Rule 26(f) before filing a proposed discovery order." *Id.* According to MRRM, however, Kuykendall failed to comply with that order and failed to respond to MRRM's counsel's inquiries as to whether Kuykendall intends "to pursue or dismiss this action." *Id.*

¶6 In his opposition, which was filed over a year after the motion was filed and without leave of court, Kuykendall concedes that "this case has been languishing on the Court's docket for over six years." (Pl.'s Opp'n to MRRM, P.A.'s Mot. for Dismissal 1, filed Nov. 29, 2011 ("Opp'n").) But Kuykendall contends that the delay stems from the pendency of "several non-substantive motions, along with the refusal of the defendants [RPWB and Alkon Meaney] . . . to conduct discovery based upon the position that discovery is automatically stayed until such time as the Court decides the pending First Motion To Dismiss." *Id.* Yet MRRM now "has taken the contrary position," Kuykendall points out, namely that he "has failed to actively pursue the prosecution of this matter." *Id.* But "dismissal is a sanction of last resort," Kuykendall counters, "and should be imposed when all other alternatives have been evaluated and deemed insufficient." *Id.* at 5 (quoting *Brunn v. DaimlerChrysler Corp.*, Civ. No. 2001-0125, 2007 WL 6027820, *4 (D.V.I. Nov. 26, 2007)). And in ruling on MRRM's motion, the Court must also consider the merits of his claims, Kuykendall argues, *see id.*, as well as "the procedural history of this case." *Id.* at 4. Further, there is no prejudice here, Kuykendall claims. *See id.* ("Clearly, the Defendants have not, and cannot be, prejudiced by the pace this matter has taken, nor can blame be placed upon the Plaintiff or, its' counsel.").

¶7 In ruling on a motion to dismiss for lack of prosecution, the Superior Court must consider

and weigh six 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.”

Greene v. V.I. Water & Power Auth., 67 V.I. 727, 741 n.7 (2017) (quoting *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 510 (2010)). This six-factor test was adopted by the Supreme Court of the Virgin Islands in *Halliday*. See 53 V.I. at 511 (“Accordingly, this Court holds 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.” (footnote omitted)). And *Halliday* took the six factors from *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863 (3d Cir. 1984). See 53 V.I. at 510-11. *Halliday* was decided in 2010, a year before MRRM filed its motion. Yet, MRRM did not cite *Halliday*, or even *Poulis*, which Virgin Islands courts have followed for decades. See, e.g., *Andrews v. Gov’t of the V.I.*, 25 V.I. 284, 293-94 (D.V.I. 1990), *aff’d* 935 F.2d 1280 (3d Cir. 1991); *Berry v. St. Thomas Gas Co.*, 36 V.I. 64, 68 (Terr. Ct. 1997). So, the first reason why MRRM’s motion is denied is its failure to carry its burden of persuasion.

¶8 Nonetheless, and more importantly, none of the six *Halliday* factors weigh in favor of dismissal. First, the Court has little to point to regarding the first and third factors: Kuykendall’s personal responsibility for the delay and the history of dilatoriness. Before MRRM filed its August 26, 2010 motion to dismiss for failure to prosecute, Kuykendall had only filed one motion and joined in two stipulations. The first motion, filed June 16, 2005, was filed before any parties were served because Kuykendall sought an extension of time to effect service. So, the delay between February 23, 2005, when the complaint was filed, and June 16, 2005, when the motion was filed, is irrelevant.

Regarding the stipulations Kuykendall joined, which were filed with RPWB, the first stipulation consented to RPWB having additional time to respond to the complaint and the second consented to Kuykendall having additional time to respond to RPWB's motion to dismiss the complaint based on the prior action pending doctrine. Further delay occurred after Alkon Meaney demanded that Kuykendall post a bond RPWB filed its second motion to dismiss when Kuykendall did not. The Court later denied the second motion to dismiss after Kuykendall did post a bond. But RPWB then moved for reconsideration because the first motion to dismiss had not been ruled on.

¶9 Kuykendall is correct, insofar as he takes issue with the defendants' "position that this matter is stayed," (Opp'n 4), until the pre-answer motions are decided. That is not correct. "[F]iling a motion does not entitle the movant to a stay." *McKenzie v. Hess Oil V.I. Corp.*, 2019 VI Super 31, ¶ 17 (citing *Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 287 (Super. Ct. 2017); V.I. R. Civ. P. 12(a)(4)). But Kuykendall also cannot have it both ways. He cannot complain that his case "languished in a mire created by inconsequential motion practice," (Opp'n 4), while also not seeking a ruling on those motions, whether favorable or unfavorable to him. "[U]nlike a plaintiff, a defendant possesses no affirmative duty to take any steps to bring a case to trial prior to filing a motion to dismiss for failure to prosecute." *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 292 (2010) (citations omitted). Moreover, only Alkon Meaney joined in RPWB's first motion to dismiss based on the prior action pending doctrine. MRRM and Hart did not. So, they would not have had any basis to refuse to engage in discovery. So, for them, and even for all the defendants, Kuykendall could have moved to compel discovery or for sanctions if his discovery demands went unanswered. A plaintiff cannot sit back and do nothing but wait on pre-answer motions to be decided and then cry foul when a defendant moves to dismiss for failure to prosecute.

¶10 Nonetheless, the Court cannot find that the first or third factors weigh in favor of dismissal in part because some of the history of delay is attributable to the Superior Court. No scheduling order has issued in this case yet in part because RPWB responded to the June 23, 2010 Order by filing a motion, on July 8, 2010, for an extension of time, until September 1, 2010, so it could retain new counsel. That motion was granted, but not until October 4, 2010. In the interim, MRRM filed its August 26, 2010 motion to dismiss for failure to prosecute. Moreover, RPWB's first motion to dismiss and its reconsideration motion (as well as the second stipulation between Kuykendall and RPWB) were all pending when MRRM moved to dismiss. This Court recently recognized "that dismissing a case for failure to prosecute is not proper when motions are pending." *Albert v. Hess Oil V.I. Corp.*, 2019 VI Super 45, ¶ 26 (citations omitted). The Court also recognizes that it is not "just, speedy, [or] inexpensive," V.I. R. Civ. P. 1, to ask parties to expend significant costs and fees engaging in discovery, taking depositions, and preparing for trial with motions that may dispose of the case pending for years, that is, not unless the court defers ruling on the motions until trial. *Cf.* V.I. R. Civ. P. 12(i); *accord* Fed. R. Civ. P. 12(a)(4)(A) (2006 ed.). This is not to say that filing a motion acts as a *de facto* stay. It does not. But if the plaintiff is the only party who has an "affirmative duty" to move a case, *Watts*, 54 V.I. at 292, and if filing a motion does not impose a *de facto* stay, *cf. McKenzie*, 2019 VI Super 31 at ¶ 17, then defendants cannot file a motion and also refuse to participate in discovery, and then claim prejudice because the plaintiff was delayed in prosecuting his case. Here, MRRM's motion was filed after the June 23, 2010 Order sought to get this case back on track. That fact cannot be overlooked.

¶11 Turning to the second factor: prejudice to the defendant, technically MRRM cannot show prejudice. *Cf. Greene*, 67 V.I. at 741 n.7 ("[P]rejudice to the adversary caused by the *failure to meet*

scheduling orders and respond to discovery." (emphasis added) (quotation marks and citations omitted)). Here, the Superior Court shares in some of the blame because, to date, no scheduling order has issued. And at the time when this case was commenced, "[p]re-trial procedure, as provided by Rule 16 of the Federal Rules of Civil Procedure," was not "mandatory in the superior court, but may be employed in the discretion of the presiding judge, the trial judge or on motion of any party." Super. Ct. R. 38, *repealed by In re Amendments to the Rules Gov. the Super. Ct. of the V.I.*, ST-17-MC-019, 2017 V.I. LEXIS 60, *1 (V.I. Super. Ct. Apr. 6, 2017), *approved by* S. Ct. Prom No. 2017-006, 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017), *reprinted in* V.I. Ct. Rules Ann. 29 (2006 ed.). MRRM does state in its motion that its attorney reached out to Kuykendall's attorney in an attempt to schedule the discovery conference mandated by the June 23, 2010 Order, "but . . . received no response from Plaintiff's counsel." (Mot. 1.) But MRRM does not say when its counsel reached out Kuykendall's counsel or whether the attempts to schedule the conference came before or after RPWB filed its July 8, 2010 Motion. What's more, MRRM does not point to any discovery demands Kuykendall failed to respond to or any prejudice, generally-speaking, apart from the overall delay of this case.² So, the Court cannot find prejudice to MRRM here.

¶12 Of the other Defendants, only Hart joined MRRM's motion, but orally through counsel in open court and eight years after the motion was filed. Yet, Hart failed to articulate any grounds in support of dismissal as to him. Instead, he merely joined in the same relief MRRM sought – dismissal. But dismissal for failure to prosecute is specific to each party and the Superior Court must weigh all six

² Arguably MRRM, like Kuykendall, would also have an affirmative duty here, the duty to take steps to ready its own crossclaims for trial. In its amended answer, MRRM asserted four crossclaims against Meaney and Meaney PC and asked the Court to "[r]ealign MRRM as a party-plaintiff in this action in the interests of justice." (Amend. Ans. & Crosscl. 13, filed Oct. 31, 2005.) Yet, MRRM has not acted on that request or stated how the prosecution of its crossclaims have been stymied by Kuykendall's delay.

factors for each defendant. *Cf. Watts*, 54 V.I. at 290-91 (summarily reversing dismissal of co-defendant for not weighing and considering the *Halliday* factors separately as to that defendant). In other words, the factors that might weigh in favor of dismissing one defendant might be different, or might not support dismissal at all, for another defendant. It is not enough, on a motion to dismiss for failure to prosecute, for a defendant to say “me too” to a co-defendant’s motion. Instead, each defendant must articulate why the “extreme sanction of dismissal . . . is justly merited” as to him. *Id.* at 290 (quotation marks and citation omitted). Here, Hart did not do that, and this Court cannot scour its records to find how Hart might have been prejudiced by the delay. Consequently, the second factor, prejudice to the adversary, does not support dismissal as to Hart either.

¶13 Finally, regarding the fourth, fifth, and sixth factors—willfulness, availability of other sanctions, and merit of the claims—none support dismissal. MRRM does not contend that Kuykendall or his counsel acted willfully to delay this case and the Court does find any party has acted in bad faith. For this reason, there is no need to consider any other sanction because, even though Kuykendall should have taken some steps to further this case, notwithstanding the pending pre-answer motions, and even if only to request a ruling or a case management conference, the Court does not believe the delay—in light of the overall history of the case, including the number of judges who were assigned—is sanctionable. Lastly, and perhaps most importantly, Kuykendall’s claims might have merit, assuming the legal questions raised by the facts are resolved in his favor. *Cf. Potter v. Peirce*, 688 A.2d 894, 896 (Del. 1997) (“[A] Delaware lawyer’s non-compliance with Rule 1.5(e) may not be used by him as a shield to avoid his contractual obligations with a Pennsylvania attorney.”). *But cf. Holstein v. Grossman*, 616 N.E.2d 1224, 1232 (Ill. Ct. App. 1993) (“It makes the law too much of a business if you are practicing the way you would as a broker. The lawyer is not

supposed to get paid for anything but the legal services that he renders, and selling a man a client is not a legal service.” (quoting *Corti v. Fleisher*, 417 N.E.2d 764, 773 (Ill. Ct. App. 1981)). See also generally *Daynard v. Ness Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp. 2d 9 (D. Mass. 2001) (reviewing law of various jurisdictions on fee splitting in quantum meruit lawsuit). But equally important here is the fact that Kuykendall asserted the same claims against the same persons and law firm in another case, *Alkon, et al. v. Kuykendall, et al.*, case number SX-04-CV-063, which the Court recently consolidated with this case. While consolidation would not preclude the Court from dismissing Kuykendall’s claims against MRRM or Hart for failure to prosecute if dismissal were warranted, even if the Court were to find that dismissal is warranted here, Kuykendall would still be able to pursue the same claims against MRRM and Hart in the *Alkon* case. So, dismissal here would be a hollow victory.

¶14 In its report and recommendations to the Conference of Chief Justices regarding how courts historically approached civil litigation, the Civil Justice Improvement Committee observed that:

[o]ur civil justice system has historically expected litigants to drive the pace of civil litigation by requesting court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court—be it for rulings on motions, a requested hearing, or even setting a trial date. The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self-represented litigants who are trying to understand and navigate the system. The party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.

It is time to shift this paradigm. . . . [C]ourts ultimately must be responsible for ensuring access to civil justice. Once a case is filed in court, it becomes the **court’s** responsibility to manage the case toward a just and timely resolution. When we say “courts: must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system. Primary case responsibility means active and continuing court oversight that is proportionate to case needs. This right-

sized case management involves having the most appropriate court official perform the task at hand and supporting that person with the necessary technology and training to manage the case toward resolution. At every point in the life of a case, the right person in the court should have responsibility for the case.

Nat'l Ctr. for St. Cts., Civ. Just. Improvements Comm., *Call to Action: Achieving Civil Justice for All* 19 (2016), <https://www.ncsc.org/~media/microsites/files/civil-justice/ncsc-cji-report-web.ashx>.

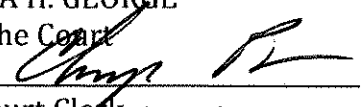
Clearly, this case has languished. No one disputes that point. It was filed in 2005 and fourteen years later it remains pending. One factor for the delay is that no fewer than six judges were assigned to this case before MRRM filed its failure to prosecute motion in 2010 and RPWB's motion to dismiss based on the prior action pending doctrine, filed five years before, was still pending. Kuykendall could have been more proactive in drawing attention to this case and in prosecuting their claims since, historically, the parties have set the pace of litigation. But "[t]here is little the parties can do when the trial court fails to discharge its responsibilities." *Albert*, 2019 VI Super 45 ¶ 31 (quotation marks and citation omitted). Under these circumstances, the Court cannot place all the blame on Kuykendall. But Kuykendall is on notice now that further delays will not be excused.

III. CONCLUSION

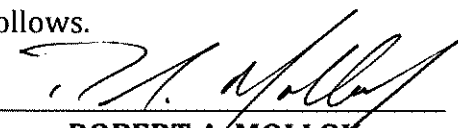
¶15 For the reasons stated above, the Court finds the extreme sanction of dismissal unwarranted here. Accordingly, after careful consideration and review, the Court will deny the motion for failure to prosecute as to MRRM and Hart. An appropriate order follows.

Date: May 15, 2019

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: 
Court Clerk

Dated: 5/15/2019


ROBERT A. MOLLOY
Judge of the Superior Court