

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

ST. CROIX FEDERATION OF TEACHERS,)
LOCAL 1826, obo RASHELD BOUGH and)
LEROY HEYWOOD,)

Plaintiff,)

v.)

GOVERNMENT OF THE VIRGIN ISLANDS,)
DEPARTMENT OF EDUCATION,)

Defendant.)

CIVIL NO. SX-14-CV-386

ACTION TO CONFIRM AN
ARBITRATION AWARD

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff's Informative Motion, filed June 2, 2017, in response to the May 25, 2017 Order requiring Plaintiff to show cause why this matter should not be dismissed per V.I. R. Civ. P. 41(b) for failure to prosecute the action or take any steps to move the matter forward in more than three years. Defendant did not file a response to the Informative Motion, but submitted its Opposition to 'Action' to Confirm an Arbitration Award & Affirmative Defenses, filed June 7, 2017, also in response to the May 25, 2017 Order. For the reasons that follow, the Court will dismiss this action with prejudice.

"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).¹ 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 41.² 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 While Rule 41(b) references only a defendant's right to move for dismissal, the Court unquestionably possesses the inherent power to review matters for dismissal for the reasons contemplated by the Rule. Both the decisions of Supreme Court of the Virgin Islands in *Halliday v. Footlocker Specialty Inc.*, 53 V.I. 505 (V.I. 2010) and the Third Circuit in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984) concerned appeals of trial court orders dismissing each plaintiff's complaint *sua sponte*.

² Although *Halliday* predated the adoption of the Virgin Islands Rules of Civil Procedure, the provisions of the then applicable Federal Rule 41(b), through Superior Court Rule 7, are identical, such that the analysis of the *Poulis* factors remains unchanged. The factors are: (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; and (5) the effectiveness of other sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. at 510.

Plaintiff's Action to Confirm an Arbitration Award (Complaint) was filed September 30, 2014. Plaintiff's present and former counsel jointly filed "Substitution of Counsel" on February 18, 2015, "inform[ing] the court as to the substitution of" present counsel. By its Informative Motion, Plaintiff's counsel advises that on May 12, 2015, "being unaware of this action to confirm the October 1, 2013 award of Arbitrator Lewis G. Brewer, [he] filed a second action to confirm Arbitrator Brewer's award [SX-15-CV-178]." Informative Motion ¶ 5.³ Counsel explains that although he assumed the representation of Plaintiff, he was unaware of the nature and substance of this action because "neither the motion to substitute nor the order granting the motion [entered March 10, 2016] clearly identified in the case caption that plaintiff American Federation of Teachers, Local 1826, had filed the instant action on behalf of Rasheld Bough and Leroy Heywood," and because counsel had "never received the actual case file in this matter." *Id.* ¶ 4. Plaintiff's counsel concedes that if "the undersigned was aware that this action to confirm was on behalf of Rasheld Bough and Leroy Heywood, he would have never filed a second action to confirm. The undersigned would have instead continued the prosecution of this action. The undersigned's lack of action in the instant matter was not willful but rather the result of an excusable mistake." *Id.* ¶ 9.

By its Informative Motion in response to the May 25, 2017 Order, Plaintiff cites no legal authority yet asserts that its failure to prosecute, arising from the fact that its attorney never obtained the case file and had no knowledge of the substance of the case or even the identity of the real parties in interest, constitutes "an excusable mistake," shielding it from dismissal under V.I. R. Civ. P. 41(b). Plaintiff fails to engage in an analysis of (or to even acknowledge) the *Halliday/Poulis* factors, or to provide any explanation to address why there has been no activity in the case for the past three years. In light of the history of the case and Plaintiff's lack of substantive response to the May 25, 2017 Order, the Court engages in a *Halliday/Poulis* analysis to determine whether the extreme sanction of dismissal is appropriate pursuant to V.I. R. Civ. P. 41(b).

³ Case No. SX-15-CV-178 was dismissed by Memorandum Opinion and Order entered December 21, 2016 for failure of service of process, pursuant to then applicable rules: Super. Ct. R. 27(b) and Fed. R. Civ. P. 4(m); Super. Ct. R. 7 and Fed. R. Civ. P. 12(b)(2) and (5). That decision was not appealed.

The Extent of a Party's Personal Responsibility

In addressing the personal responsibility factor, *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 its claim. Here, there is no information in the record concerning the interaction between Plaintiff and its counsel, and the Court cannot extrapolate any information regarding Plaintiff's desire to prosecute the case. While one may infer that individuals responsible for initiating this action on behalf of Plaintiff AFT Local 1826 must have participated in communications leading to the substitution of its counsel, nothing in the record points to the personal responsibility of Plaintiff for the failure to move the case forward. Therefore, this factor is considered to be neutral.

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. Prejudice to Defendant here is likely as the “delay 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). However, Defendant has not alleged any specific prejudice that it may suffer as the result of Plaintiff's lack of timely action. Further, the issues involved are largely legal and not dependent upon factual findings, such that the effect of any prejudice should be limited to additional expense and delay. This factor weighs slightly in favor of dismissal.

The Offending Party's History of Dilatoriness

Unlike in *Molloy*, where “the Molloy's' counsel expressly stated that no action was taken because all pending motions had been ruled on and that the only remaining step the case required was the setting of a trial date,” the instant case contains no evidence of any activity by Plaintiff or its counsel since the case was filed. *See Molloy*, 56 V.I. at 190. Plaintiff's present counsel filed a stipulation to enter the case on February 14, 2015, and Plaintiff has failed to advance the case in any manner in the two and a half years since then. The record fails to show that service of process has been properly effectuated on the Government. Despite Defendant's lack of response to the

Complaint, Plaintiff has not filed proof of service or sought entry of default. Offered the opportunity by the May 25, 2017 Order to show cause why the case should not be dismissed for lack of prosecution, Plaintiff claimed only that its counsel never obtained the case file and did not know that the case was being prosecuted on behalf of union members Bough and Heywood. This factor of Plaintiff's history of dilatoriness weighs heavily in favor of dismissal.

Offending Party/Attorney's Conduct Willful or in Bad Faith

A trial court must point to specific evidence to justify a determination of willfulness or bad faith attributable to a party or its counsel. *Molloy*, 56 V.I. at 192. It is not apparent that Plaintiff or its counsel has engaged in bad faith conduct, but the record does establish the willful neglect of Plaintiff, acting through its counsel. Plaintiff's Informative Motion in response to the Court's May 25, 2017 Order states explicitly that counsel "never received the actual case file in this matter," and as a result was not "aware that this action to confirm was on behalf of Rasheld Bough and Leroy Heywood." Informative Motion, ¶¶ 4, 9. That is, counsel stipulated to assume the prosecution of this action by the filing of February 14, 2015, yet willfully failed to obtain a copy of the case file and to educate himself regarding the substance of the action and the real parties in interest. By its Informative Motion, Plaintiff concedes that its counsel remained without information about the case for more than two years, until receiving the May 25, 2017 Order. ("It is now clear that the first action to confirm was filed by plaintiff's previous counsel on September 30, 2014." *Id.* ¶ 8.) These facts demonstrate a willful neglect and lack of diligence in failing to obtain the case file to enable the prosecution of the action to proceed for the benefit of Plaintiff and its members. This particularly egregious behavior has resulted in the waste of governmental and judicial resources by forcing the Court to oversee and Defendant to defend two identical cases. The Court finds that Plaintiff, through counsel, has allowed the case to languish without action for three years as the result of a willfulness in neglecting to obtain and becoming familiar with the case file to permit the prosecution of the action. This factor weighs heavily in favor of dismissal.

The Meritoriousness of the Claim or Defense

"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. In its Opposition to ‘Action’ to Confirm an Arbitration Award & Affirmative Defenses, filed June 7, 2017, Defendant asserts that the “instant action is barred due to improper service.” The record reflects no service of process on any representative of Defendant. (A copy of the Court’s May 25, 2017 Order was served on Chermaine Hobson, Assistant Commissioner of the Department of Education, but the file contains no proof of service of summons and copy of Complaint in accordance with applicable rules.) Proof of service upon the Governor of the Virgin Islands is required by then applicable Fed. R. Civ. P. 4(j)(2)(A).⁴ Because Defendant has affirmatively pled “improper service,” it is likely that dismissal pursuant to V.I. R. 12(b)(5) (or its predecessor Fed. R. Civ. P. 12(b)(5)) would likely be granted upon Defendant’s motion.

Further, Plaintiff’s Complaint alleges the Court’s jurisdiction (¶ 1); identifies the parties and their relationship (¶¶ 3-6); reviews the history of the grievance procedure (¶¶ 7-9); and reviews the substance of Arbitrator Brewer’s opinion and award (¶ 10 a.-g.). The Complaint prays for, but does not allege facts and a recitation of applicable legal standards entitling Plaintiff to the relief it seeks. Because the allegations of Plaintiff’s Complaint, if established at trial, do not necessarily allege needed factual and legal support sufficient to support recovery by Plaintiff, it cannot be said that Plaintiff’s claim may be deemed meritorious. Because the Complaint merely recites the Arbitrator’s findings, and also because the record is devoid of proof of proper service of process upon Defendant, this factor weighs heavily in favor of dismissal.

⁴ Fed. R. Civ. P. 4(j)(2)(A) requires that service upon a state or state-created governmental organization subject to suit must be served by delivering a copy of the Summons and Complaint to its chief executive officer. Defendant Department of Education is “an executive department in the Government of the United States Virgin Islands.” 3 V.I.C. § 91. “The executive power of the Virgin Islands shall be vested in an executive officer whose official title shall be the ‘Governor of the Virgin Islands.’” Revised Organic Act of 1954, § 11, 48 U.S.C. § 1591. “Where an agency of the Government of the Virgin Islands is named as a defendant, the Governor — as chief executive officer — must be served.” *Legrand v. V.I. Bureau of Internal Revenue*, 2015 U.S. Dist. LEXIS 31612, *2 (D.V.I. 2015) (citing *Christopher v. Dir. of V.I. Bureau of Internal Revenue*, 2014 U.S. Dist. LEXIS 103120, at *6-7 (D.V.I. 2014) (stating that proper service in an income tax re-determination case requires service on the Governor and the Director of the VIBIR). See also *St. Croix Fedn. of Teachers, Local 1826 v. Gov’t of the V.I., Dep’t of Ed.*, 2016 V.I. LEXIS 213, at *4-5 (V.I. Super. Ct. 2016). That referenced case (SX-15-CV-178) is the “second action to confirm Arbitrator Brewer’s award,” deemed necessary because Plaintiff’s counsel was “unaware of this action to confirm the October 1, 2013 award of Arbitrator Lewis G. Brewer.” Informative Motion, ¶ 5.

Alternatives to Dismissing the Case

To cure the merits deficiencies referenced above, Plaintiff may need to amend its Complaint and certainly must establish that it has properly served Defendant with process. Plaintiff has not sought leave to amend its Complaint, nor has it sought leave to extend the time within which it might establish proper service of process on Defendant. This is not a case where Plaintiff has been dilatory in providing disclosures or in conducting or completing discovery. Rather, there has been a complete and abject failure of Plaintiff to take *any* action following the filing of its Complaint to prosecute its claims. 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.

Conclusion

Having examined the *Poulis/Halliday* factors to determine whether the extreme sanction of dismissal is proper, the Court finds that one factor is neutral, one factor slightly favors dismissal, and four factors strongly favor dismissal. As such, this case sets forth such an instance where the balancing of all the factors strongly favors dismissal; thus, the “extreme sanction of dismissal ... is justly merited.” *Halliday*, 53 V.I. at 511. Therefore, Plaintiff’s Action to Confirm An Arbitration Award will be dismissed.

Based on the foregoing, it is hereby

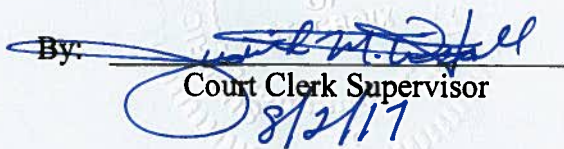
ORDERED that Plaintiff’s Action to Confirm An Arbitration Award is DISMISSED with prejudice for failure to prosecute, pursuant to V.I. R. Civ. P. 41(b). It is further

ORDERED that this Matter is CLOSED.

DATED: August 1, 2017.


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By: 
Court Clerk Supervisor