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

FRANK DOSPIVA and JIRINA DOSPIVA d/b/a FRANK DOSPIVA ASSOCIATES, LAND SURVEYORS,)	CIVIL NO. SX-07-CV-350
Plaintiffs,)	ACTION FOR DEBT AND FORECLOURE
v.)	COUNTERCLAIM FOR BREACH OF CONTRACT AND FRAUD
ANTOINE MURRAY, ANN MARIE PATRICIA MURRAY and PEPPERTREE HILL LANDOWNERS ASSOCIATION, INC.,)	
Defendants.)	

APPEARANCES:

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Groner Law, P.C.
Christiansted, St. Croix, VI
Attorney for Plaintiffs

PAUL A. COVELL, ESQ.
Law Office of Paul A. Covell
Christiansted, St. Croix, VI
Attorney for Defendants Antoine and Ann Murray

FLAVIA E. LOGIE, ESQ.
Law Offices of Flavia E. Logie, P.C.
Christiansted, St. Croix, VI
Attorney for Defendant Peppertree Hill Landowners Association, Inc.

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER comes before the Court on the Motion to Dismiss Complaint of Frank Dospiva & Jirina Dospiva filed by Defendants Antoine Murray and Ann Marie Murray on April 28, 2014.[1] Plaintiffs' counsel filed a response on April 30, 2014 indicating that he has lost contact with Plaintiffs and has no authority to agree to a dismissal. For the reasons stated below, the Court will grant the motion to dismiss.

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[1] Defendant Peppertree Hill Landowners Association, Inc. has taken no position on this motion.

I. PROCEDURAL BACKGROUND

On July 11, 2007, Plaintiffs Frank Dospiva and Jirina Dospiva (the "Dospivas") commenced this action for debt and foreclosure by filing a complaint. The complaint alleges that Antoine and Ann Marie Patricia Murray (the "Murrays") executed and delivered a promissory note to the Dospivas in the principal sum of $21,881, and that the note was secured by a mortgage covering Plot 60 Estate Ruby on St. Croix. Defendant, Peppertree Hill Landowners Association, Inc. (the "Association") subsequently recorded two junior liens on the property. The complaint alleges that the Murrays are in default on the note and mortgage and sought judgment and foreclosure.

On August 24, 2007, the Murrays filed an answer and counterclaim against the Dospivas alleging breach of contract and fraud. Therein, the Murrays allege that the note and mortgage were made in consideration of the Dospivas' promise to perform survey work to divide thirty-six acres into 120 plots. The Murrays further allege that the Dospivas did not complete the survey work and as a result, they lost the opportunity to develop those thirty-six acres. The Association answered the Dospivas' complaint on August 27, 2007. On October 16, 2007, the Dospivas answered the Murrays' Counterclaim.

After three and a half years of inactivity, on February 15, 2011, the Court issued a mediation referral order, a scheduling order, and an order warning the parties that they risked dismissal for failure to prosecute. The Dospivas' counsel filed a motion to stay proceedings on April 4, 2011, requesting sixty days to locate them. The Court granted the motion on December 28, 2011.

Over two years later, on April 8, 2014, the Court issued an order directing the parties to inform the Court as to the status of this matter and to detail their efforts to comply with the Court's February 15, 2011, orders. The Dospivas' counsel filed a response to the Court's order on April 14, 2014, indicating that the Dospivas had been unresponsive to his attempts to communicate with them by phone, mail, and email. On April 28, 2014, the Murrays moved to dismiss the complaint for failure to prosecute. The Dospivas' counsel responded to the motion to dismiss on April 30, 2014, by indicating that he had lost contact with them and had no authority to agree to a dismissal.

II. STANDARD OF REVIEW

Rule 41(b) of the Federal Rules of Civil Procedure authorizes a court to dismiss an action "if the plaintiff fails to prosecute or to comply with these rules or a court order." Fed. R. Civ. P. 41(b). 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 v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511 (V.I. 2010) (opining 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 factors weigh in favor of dismissal, however, "the court must explicitly consider all six factors, balance them, and make express findings." *Molloy v.*

Independence Blue Cross, 56 V.I. 155, 186 (V.I. 2012). Dismissal for failure to prosecute is a serious sanction, which is reserved for extreme cases. *Shelley v. Patrick*, 427 F. App'x. 66, 69 (3d Cir. 2011).

III. DISCUSSION

1. The Extent of the Plaintiff's Personal Responsibility

The first factor requires the Court to assess the extent of the Plaintiffs' personal responsibility in the delay of this case. The record reflects that Plaintiffs have refused to participate in the proceedings. On December 28, 2011, the Court issued an order staying these proceedings for sixty days to allow Plaintiffs' counsel to locate and contact his clients. On April 2, 2011, Plaintiffs' counsel sent an email and letter to the Plaintiffs' last known addresses. In the communications, Plaintiffs' counsel indicated that he had tried calling his clients on numerous occasions and that he needed to talk to them about the matter. Resp. to Ct.'s Order, April 14, 2014, Exs. 1 & 2. In the letters, Plaintiffs' counsel informed the Plaintiffs that:

> I am trying to reach you in the referenced matter. I know that you asked me not to proceed with the lawsuit and declined to pay my bill. However, when the lawsuit was filed, the Murrays filed a counterclaim against you claiming that you owed them money. I can't dismiss that counterclaim so it has just sat.
>
> The Court has now noticed the file and is setting deadlines and that the matter be mediated. I want to talk to you about what you can do but can't reach you.

Resp. to Ct.'s Order, April 14, 2014, Exs. 1 & 2.

Plaintiffs' counsel notes that the neither the email nor the letter were returned as undeliverable and that the Plaintiffs did not respond to his efforts. Resp. to Ct.'s Order, at 2. Because Plaintiffs are unresponsive to communications from their counsel of record and have shown no interest in pursuing this matter, this factor weighs heavily in favor of dismissal.

2. Prejudice to the Adversary

Prejudice to the adversary "is generally demonstrated by either increased expense to the opposing party arising from the extra costs associated with filings responding to dilatory behavior or increased difficulty in the opposing parties' ability to present or defend their claim(s) due to improper behavior." *Molloy*, 56 V.I. at 189. Examples of prejudice that hamper a party's ability to defend their claim include, "the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive or possibly irremediable burdens or costs imposed on the opposing party." *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984). A finding of prejudice to the adversary bears "substantial weight in support of a dismissal. . ." *Id.*

Here, Defendants have suffered prejudice in this matter. This prejudice extends beyond the time and money spent on filings pursuant to Plaintiffs' three years of inactivity. Plaintiffs' inactivity prejudices Defendants' ability to defend against Plaintiffs' claim and assert their counterclaims due to the loss of evidence and dimming of memories associated with the passage of time. Over nineteen years have passed since the oral agreement that lies at the heart of Defendants' defense and counterclaims was made, and since the note and mortgage underlying Plaintiffs' complaint were signed. As Defendants' defenses and counterclaims are based on an oral agreement, they are more vulnerable to the effects of time's passage than are Plaintiffs, who base their claim on a written instrument. It seems very little discovery has occurred, and it is unclear what has been lost to time. Defendants have suffered prejudice due to Plaintiffs' behavior that hampers their ability to defend the claim and pursue their counterclaims. Consequently, this factor weighs against Plaintiffs and in favor of dismissal.

3. History of Dilatoriness

The third *Poulis* factor requires the Court to consider whether the 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).

On February 15, 2011, this Court, noticing that this matter had sat idle since it was initiated, issued a mediation referral order and a scheduling order to move the case forward. The parties failed to comply with the orders. Neither party took action until the Court issued an order on April 8, 2014, over three years later. Plaintiffs' counsel responded that he had lost contact with Plaintiffs years ago and Defendants moved to dismiss. In the nearly-seven years that this case has been pending, Plaintiffs have done virtually nothing to move this case forward. Accordingly, Plaintiffs have engaged in a history of dilatoriness that weighs in favor of dismissal.

4. Whether the Attorney's Conduct Was Willful or in Bad Faith

In evaluating whether to dismiss an action for failure to prosecute, the Court must examine whether the plaintiff's 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. The Court must find specific evidence on the record that justifies a determination of willfulness or bad faith. *Molloy*, 56 V.I. at 192. However, 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, the Court does not find any specific evidence of intentional or self-serving behavior arising to the level of willfulness or bad faith on behalf of Plaintiffs' counsel. Thus, this factor does not favor dismissal.

5. Alternative Sanctions

Because dismissal is a sanction of last resort, courts must look to effective alternative methods of sanctioning before 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). Alternative sanctions include excluding evidence, precluding witnesses from testifying, striking portions of pleadings, or imposing monetary sanctions to compensate the harmed party for his reasonable expenses. *See Carty v. Mason*, 2010 V.I. LEXIS 88, 8 (V.I. Super. Dec. 7, 2010) (identifying a possible list of alternative sanctions when considering a motion to dismiss for failure to prosecute).

The Court issued three orders on February 15, 2011. The first order put the parties on notice that failure to move the case forward would result in dismissal under the Court's inherent authority and Federal Rule of Civil Procedure 41(b). The second order, a scheduling order, informed that parties that failure to adhere to the order could lead to the imposition of sanctions. The third order, a mediation referral order, also put the parties on warning that failure to proceed as ordered would result in appropriate sanctions. Repeated warnings did not impact how Plaintiffs have proceeded with this case. Instead of moving this case forward, Plaintiffs have abandoned this case. Because Plaintiffs have abandoned the case and refuse to communicate with counsel, a lesser sanction here, such as an assessment of costs and fees, would not better serve the interests of justice. This factor weighs in favor of dismissal.

6. Meritoriousness of the Claim

The sixth and final factor requires the Court to consider the meritoriousness of Plaintiffs' claim. "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. However, "[w]here a plaintiff makes out a *prima facie* case, but the defendant raises a *prima facie* defense, the [sixth] factor may not weigh in favor of the plaintiff." *Adams*, 29 F.3d at 876-77.

Plaintiffs' complaint alleges that Defendants have defaulted on a note and mortgage. Defendants asserted affirmative defenses and claim that an oral agreement to perform survey work was the reason the note existed, and that the Plaintiffs did not perform the work. Plaintiffs have pled facts that, if true, establish prima facie cases of debt and foreclosure, and Defendants have raised prima facie affirmative defenses. The Court finds this factor to be neutral.

IV. CONCLUSION

After a careful consideration and balancing of the *Poulis* factors, the Court finds that four factors weigh in favor of dismissal, one factor is neutral, and one factor weighs against dismissal. The Court concludes the sanction of dismissal is warranted in this case and will grant the Defendants' motion to dismiss for failure to prosecute. An appropriate Order follows. Defendants' counterclaims are addressed in a separate Order.

Dated: March 30, 2015

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: ______________________
Court Clerk Supervisor
Dated: 4/1/15

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Defendants.	)	

ORDER

This matter comes before the Court pursuant to the Motion to Dismiss Complaint of Frank Dospiva & Jirina Dospiva filed by Defendants Antoine Murray and Ann Marie Murray on April 28, 2014. Plaintiffs' counsel filed a response on April 30, 2014 indicating that he has lost contact with Plaintiffs and has no authority to agree to a dismissal. After careful consideration and review, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Motion to Dismiss Complaint of Frank Dospiva & Jirina Dospiva is **GRANTED**; it is further

ORDERED that Plaintiffs' claims are **DISMISSED WITH PREJUDICE**; it is further

ORDERED that copies of this Order will be provided to Attorney Gerald T. Groner and Attorney Paul A. Covell.

DONE AND SO ORDERED.

Dated: March 30, 2015

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: ____________________
Court Clerk Supervisor
Dated: 4/1/15