FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

RAPHAEL HURTAULT and RUTHINA HURTAULT,	)	**CASE NO. SX-05-CV-791**
Plaintiffs,	)	**ACTION FOR DAMAGES**
v.	)	
HESS OIL VIRGIN ISLANDS CORPORATION; HOVENSA, LLC; AMERADA HESS CORPORATION; LITWIN CORPORATION, individually and as successor-in interest to LITWIN PAN-AMERICAN CORPORATION; FLUOR ENGINEERS & CONSTRUCTORS, INC.; RIGGERS & ERECTORS INTERNATIONAL, INC.; RARITAN SUPPLY COMPANY, individually and as successor-in-interest to BRIDGE SUPPLY COMPANY; 3M a/k/a MINNESOTA MINING & MANUFACTURING COMPANY; CLEMCO INDUSTRIES, INC.; INGERSOLL RAND CORPORATION; and JOHN DOE DEFENDANTS,	)	**COMPLEX LITIGATION DIVISION**
Defendants.	)	

Appearances:

THEODORE H. HUGE, ESQ.
Harris & Huge, LLC
Charleston, SC 29403
For Plaintiffs

LEE J. ROHN, ESQ.
Lee J. Rohn & Associates, LLC
Christiansted, VI 00820
For Plaintiffs

CARL A. BECKSTEDT, III, ESQ.
Beckstedt & Associates
Christiansted, VI 00820
For Hess Oil Virgin Islands Corporation, HOVENSA, LLC, and Amerada Hess Corporation

W. MARK WILCZYNSKI, ESQ.
Law Office of W. Mark Wilczynski, P.C.
St. Thomas, VI 00804
For Litwin Corporation

JAMES L. HYMES, III, ESQ.
Law Office of James L. Hymes, P.C.
St. Thomas, VI 00802
For Litwin Corporation

MICHAEL J. SANFORD, ESQ.
Sanford, Amerling & Associates
Christiansted, VI 00820
For Riggers & Erectors International, Inc.

RICHARD H. HUNTER, ESQ.
Hunter & Cole
Christiansted, VI 00820
For Raritan Supply Company

SIMONE R.D. FRANCIS, ESQ.
Ogletree, Deakins, Nash, Smoak & Stewart, LLC
St. Thomas. VI 00802
For 3M

EDWARD L. BARRY, ESQ.
Law Offices of Edward L. Barry
Christiansted, VI 00820
For Clemco Industries, Inc.

JOHN H. BENHAM, ESQ.
Law Office of John H. Benham, P.C.
St. Thomas, VI 00801
For Fluor Engineer & Constructors, Inc. and Ingersoll Rand Corporation

MEMORADUM OPINION

MOLLOY, Judge.

BEFORE THE COURT is a motion filed by Defendant Fluor Engineers & Constructors, Inc. ("Fluor") to dismiss for insufficient service of process. Plaintiffs Raphael Hurtault ("Mr. Hurtault") and Ruthina Hurtault ("Mrs. Hurtault") (collectively "the Hurtaults" or "the Plaintiffs") did not respond. For the reasons stated below, the motion will be granted and the Hurtaults' claims against Fluor will be dismissed without prejudice.

I. BACKGROUND

The Hurtaults filed a complaint through Theodore H. Huge, Esq. ("Attorney Huge") against several named companies and several unknown companies sued as John Does. Mr. Hurtault alleged exposure to silica dust between 1968 and 1986 when he worked at St. Croix oil refinery owned and operated by Hess Oil Virgin Islands Corporation. Proof of service was never filed for any of the defendants. However, a process server, Pauline Purvis with National Registered Agents, Inc. ("NRAI"), notified Attorney Huge, by letter dated April 18, 2006, that legal documents received by NRAI for service on Fluor were being returned because "the name of the entity must be identical to that of the State Authority responsible for maintaining the records of this type entity transacting business in the state" and because "the status (active on the record of the state authority responsible for maintaining said records) of the entity must permit service on the registered agent and the registered agent's authority to receive summons must not have been withdrawn." (Letter from P. Purvis to T. Huge (Apr. 18, 2006), filed May 1, 2006.) A copy of the April 18, 2006 letter was mailed to the Superior Court of the Virgin Islands and docketed in this case by the Clerk's Office on May 1, 2006.

Fluor appeared through counsel on June 19, 2006 and filed a motion to dismiss for insufficient service of process. Fluor represented in its motion that "summons and complaint were received by mail at Fluor on May 15, 2006, a full 31 days after expiration of the 120-day period," (Fluor's Mot. to Dismiss 2, filed June 19, 2006 ("Mot.")), when calculated from "December 16, 2005," the date "[t]he complaint in the instant action was filed in this Court." *Id.* at 1. Because more than 120 days had passed, Fluor moved to dismiss pursuant to Superior Court Rules 7 and 27(b) and Federal Rule of Civil Procedure 4(m) and 12(b)(4). The Hurtaults did not file a response.

On August 16, 2010, the Court (Donohue, P.J.) directed counsel to provide an update regarding the status of the case, including a list of all pending motions, indicating whether any had been rendered moot, and whether any parties had been dismissed. The case had remained dormant for over three years, the Court cautioned, and was "subject to dismissal for lack of prosecution." (Order 1, entered Aug. 17, 2010 (citing Fed. R. Civ. P. 41(b)).) Fluor responded on September 20, 2010, to alert the Court to an unfiled stipulation from October 2006 between the Hurtaults and Fluor, 3M, Riggers & Erectors International, Inc. ("R&E"), and Ingersoll-Rand Corporation ("Ingersoll-Rand"), agreeing to a dismissal without prejudice. Fluor attached a copy of the stipulation to its response but did not indicate whether its June 19, 2006 motion was moot. The Plaintiffs also responded, but through Lee J. Rohn, Esq. ("Attorney Rohn"), who filed a motion for an extension of time on September 15, 2010. That motion was never ruled on, however, and neither Attorney Rohn nor Attorney Huge responded to the Court's request for information regarding the status of the Hurtaults' claims, notwithstanding the pendency of the Plaintiffs' motion.

Further to responses filed by other parties regarding the August 16, 2010 Order, the Court (Donohue, P.J.), issued orders on April 3, 2012, dismissing the Hurtaults' claims against Hess Oil Virgin Islands Corporation, Amerada Hess Corporation, HOVENSA, LLC, and Raritan with prejudice, and Clemco Industries and R&E without prejudice. The Hurtaults' claims against Litwin and 3M had been dismissed in February 2007. By separate order issued the same day, the Court summarized the status of the case as follows:

> [A]t this time only . . . Ingersoll-Rand . . . and . . . Fluor . . . and the John Doe Defendants remain parties to this matter. However, in September 2010, both . . . Ingersoll-Rand and . . . Fluor apprised the Court that four years earlier Plaintiffs were considering dismissing all claims against them as well. If the parties did execute stipulations for dismissal, they did [not] file them with the Court. Thus, this matter has remained pending for over six years but without movement as to . . . Fluor . . . and . . . Ingersoll-

> Rand. Moreover, to date, Plaintiffs have not moved pursuant to Rule 26 to "set forth the true name of the" John Doe Defendants.

(Order 2, entered Apr. 10, 2012 (quoting Super. Ct. R. 26) (internal citations omitted).) The Court once again ordered the Plaintiffs to advise as to the status of their claims against Fluor, Ingersoll-Rand, and the John Doe Defendants. All four orders were served on Attorneys Huge and Rohn, among others.

Attorney Rohn responded by filing a motion on May 4, 2012 for an extension of time, which the Court granted by order dated May 12, 2012, entered May 15, 2012. However, the Clerk's Office did not serve Attorney Rohn or Attorney Huge with the May 12, 2012 order. To date, nothing further has occurred, except that by order dated August 30, 2018, the Presiding Judge of the Superior Court transferred this case to the newly-created Complex Litigation Division. That order has yet to be entered, however.

II. DISCUSSION

A. Status of Fluor's Motion to Dismiss

"In general, every motion filed remains pending until 'ruled upon, dismissed, or withdrawn.'" *Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 98 (Super. Ct. 2014) (quoting 56 Am. Jur. 2d *Motions, Rules, and Orders* § 31 (2010)). Here, Fluor's motion to dismiss is still pending, notwithstanding that its attorney filed the September 20, 2010 response representing that the Hurtaults had agreed to settle but without referencing the June 19, 2006 motion to dismiss for insufficient service of process. "[S]ervice of process—unless waived by a general appearance—is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant." *Ross v. Hodge*, 58 V.I. 292, 311 n.22 (V.I. 2013) (quoting *Joseph v. Daily News Pub. Co., Inc.*, 57 V.I. 566, 580 n.4 (V.I. 2012)). "A general appearance in a case is a waiver of process, equivalent to personal service of process, and confers jurisdiction of the person on the court; but to have this effect the appearance must have been authorized." *Najawicz*, 52 V.I. at 338 (quotation marks, brackets, and citation omitted). However, "a client may be bound by his or her attorney's general appearance although the authority actually granted was to make only a special appearance." *Id.* (quotation marks and citation omitted). But then only if the attorney did not assert the defense of lack of personal jurisdiction first, because it is "[t]he attorney's appearance *without* asserting the defense of lack of personal jurisdiction [that] confer[s the court's] personal jurisdiction over his client," *id.* (emphasis added) (quotation marks and citation omitted), since service of process is a prerequisite to the Superior Court obtaining personal jurisdiction over the defendant.

Here, Fluor appeared through counsel on June 19, 2006, and filed a pre-answer motion to dismiss for insufficient service of process. Over four years later, and notwithstanding that its motion had not been ruled on, Fluor's attorney filed a response to an order, but without stating that its motion was still pending. "A motion can be deemed withdrawn based on action or inaction by the movant," *People v. Rivera*, 68 V.I. 393, 415 (Super. Ct. 2018) (citing *Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 277-78 (Super. Ct. 2017)), but not by filing a response to an order. *Contra Mitchell*, 67 V.I. at 283 ("By failing to oppose Mitchell's second motion to amend, Alcoa essentially consented to the amendments Mitchell was proposing. By not renewing the motion to dismiss as to the amended complaint, Alcoa essentially abandoned it."); *accord Allen v. HOVENSA, L.L.C.,* 59 V.I. 430, 437 (V.I. 2013 ("[F]or a waiver to occur, the party must have engaged in extensive discovery or sought a judicial disposition on the merits, such as by filing a motion to dismiss for failure to state a claim." (quotation marks and citations omitted)). So, even though Fluor did not alert the Court to its June 19, 2006 motion to dismiss when it filed its September 20, 2010 response, the Court cannot find that Fluor abandoned its motion. And the Court cannot ignore it. *Cf. Joseph*, 57 V.I. at 580 n.4 ("This Court is particularly concerned about the Superior Court's failure to rule on Williams's motion to be dismissed for lack of service because service of process—unless waived by a general appearance—is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant." (citing 5 V.I.C. § 115, and *In re: Najawicz*, 52 V.I. 311, 338 (V.I. 2009)). Because the June 19, 2006 motion has not been ruled on, withdrawn or dismissed, it is still pending. For the following reasons, it must be granted.

B. Motion to Dismiss for Insufficient Service of Process

When the Hurtaults filed their complaint, service of process in the Superior Court of the Virgin Islands was governed by Superior Court Rule 27, which provides that "summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure." Super. Ct. R. 27(b), *reprinted in* V.I. Ct. Rules Ann. 26 (2006 ed.), *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), *as approved by* S. Ct. Prom. No. 2007-005, 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017); *accord In re: Catalyst Third-Party Litig.*, 67 V.I. 16, 24 (Super. Ct. 2015) (concluding that "service of process was insufficient under Virgin Islands Superior Court Rule 27 and Federal Rules of Civil Procedure 4(m)."). Rule 4(m) requires the plaintiff to serve the defendants within 120 days from the date the complaint is filed.

Fluor argues that the Hurtaults' complaint must be dismissed because they failed to effect service within 120 days from "December 16, 2005," the date when "[t]he complaint . . . was filed in this Court." (Mot. 1.) Fluor is correct, insofar as the Clerk's Office was in receipt of the Hurtaults' complaint on December 16, 2005. But the Clerk's Office did not process the complaint until

December 28, 2005, the date the filing fee was paid. In this instance, regardless of which date controls,[1] the Plaintiffs did not serve Fluor until "May 15, 2006 . . . after expiration of the 120-day period." (Mot. 2.) In other words, even if the Court were to assume that a complaint is not filed until the filing fee is paid—which in this case would have been December 28, 2006—it would not bring the Hurtaults within the 120-days service period. It would only reduce their lateness by eighteen days.

"However, before a court may dismiss a complaint against a party for lack of service, it must consider whether good cause exists to extend the 120 day time limit for service." *Ross*, 58 V.I. at 311 (citing Fed. R. Civ. P. 4(m)). And "[e]ven if the court finds that no good cause exists to warrant an extension, the court must at least consider whether any other factors warrant a discretionary extension." *Id.* at 310-11 (citing *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 717-18 (V.I. 2010). In other words, it is mandatory that the court "*must* consider whether any other factors warrant extending time even though good cause was not shown." *Id.* at 717 (quotation marks and citation omitted). The trial court cannot "refuse to at least consider the appropriateness of such an extension." *Id.* at 718. But "the trial court may still deny a discretionary extension of time even if the

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[1] Filing fees are important because "a party's failure to pay a filing fee required by law implicates interests beyond those of the parties." *Mustafa v. Camacho*, 59 V.I. 566, 571 n.2 (V.I. 2013) (*per curiam*). The date when the filing fee is paid is likewise important because it could be dispositive. *Cf. Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) ("Federal practice deems a suit 'commenced' when the complaint is filed, *see* Fed. R. Civ. P. 3, but some states may deem it commenced when the filing fee is paid."); *see also Margetan v. Super. Chair Craft Co.*, 963 P.2d 907, 908 (Wash. Ct. App. 1998) ("We conclude a complaint is not filed until the filing fee is paid."); *S. Chester Cty. Concerned Citizens Org. v. Zoning Bd.*, 937 A.2d 1141, 1143 (Pa. Commw. Ct. 2007) ("[T]he filing fee was paid on November 3, 2006, and the prothonotary docketed the appeal on that date. There is no dispute that the thirty-day appeal period expired on November 1, 2006."); *accord Garza v. Garcia*, 137 S.W.3d 36, 38 (Tex. 2004) ("We have held that absent emergency or other rare circumstances a motion for new trial should not be considered until the filing fee is paid." (quotation marks and footnoted citation omitted)). *But see V.I. Hous. Fin. Auth. v. Smith*, 26 V.I. 248, 254 (D.V.I. App. Div. 1991) ("[L]ate payment of fees will not require dismissal of an appeal for lack of appellate jurisdiction." (citations omitted)); *Ayala v. Goad*, 531 N.E.2d 1040, 1043 (Ill. Ct. App. 1988) ("Although a filing fee has not been paid, the clerk has the authority to file a complaint, and it is now clear that the payment in advance of a filing fee is not a condition precedent to the filing of a complaint for statute of limitations purposes." (citing *Hanks v. Floyd*, 367 N.E.2d 483, 484 (Ill. 1977)). Virgin Islands courts have not considered the question directly.

statute of limitations would bar a plaintiff from re-filing its claims." *Id.* (citing *Petrucelli v. Bohringer and Ratzinger, GMBH*, 46 F.3d 1298, 1306 (3d Cir. 1995); *Boley v. Kaymark*, 123 F.3d 756, 759 (1997)).

The Court cannot find good cause here and no factors warrant extending the time to serve. First, "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." *Beachside Assocs.*, 53 V.I. at 716. As noted, this is mandatory. But it is also mandatory that the plaintiff must "show" good cause before the court must extend the time to serve. It is not the responsibility of the court to scour its files and look for good cause in support. In this case, the Hurtaults did not make any showing. They did not file a motion for an extension of time after NRAI returned the summons and complaint and failed to file a response in opposition to Fluor's motion to dismiss for insufficient service of process. They also failed to respond to numerous orders the Court issued inquiring into the status of their claims. Assuming, *arguendo*, that Fluor is correct and the Hurtaults did agree in October 2006 to dismiss their claims without prejudice, granting them an extension of time now to serve their complaint would be futile.

CONCLUSION

For the reasons stated above, the Court finds that Fluor's motion to dismiss for insufficient service of process is still pending and must be granted. An appropriate order follows.

Date: October 24, 2018

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ______________
Court Clerk Supervisor
Dated: 10/24/18