

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

GUARDIAN INSURANCE COMPANY,

Plaintiff.

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**ESTATE OF VALERIE KNIGHT-DAVID,
EUSTON DAVID, JESSICA GRELL, and
MYRTLE KNIGHT,**

Defendants.

CASE NO. ST-08-CV-189

MEMORANDUM OPINION

Pending before the Court is Plaintiff's October 9, 2014, Motion for Sanctions Against Defendant Jessica Grell¹, and Defendant Euston David's August 6, 2015, Motion for Reconsideration.² For the following reasons, Guardian's Motions for Sanctions Against Defendant Jessica Grell will be denied, and David's Motion for Reconsideration will be denied.

FACTUAL & PROCEDURAL HISTORY

Plaintiff filed a Complaint on April 18, 2008, alleging that Defendants engaged in a conspiracy to defraud Plaintiff of insurance premiums. Specifically, Plaintiff alleges that between 2003 and 2006 Val's Insurance Agency, operated by Defendant Euston David's late wife, Valerie Knight-David, collected insurance premiums from customers and provided the customers with insurance policies without remitting the appropriate funds to Plaintiff.

¹ Plaintiff filed an Informational Motion Regarding Sanctions Against Defendant Jessica Grell on August 7, 2015.

² Plaintiff responded on August 20, 2015, to which Defendant David replied on September 1, 2015.

Guardian initially requested discovery of certain documents from David on June 5, 2014. Defendant failed to respond, prompting Plaintiff to file a motion to compel on July 16, 2014, and Defendant to file a motion for protective order on July 31, 2014. On September 2, 2014, the Court largely granted Plaintiff's motion to compel and denied Defendant's motion for a protective order, finding David's arguments unpersuasive, containing ridiculous assertions with no merit, and supported by little or no citation to relevant authority. Thereafter, the Court ordered Defendant to produce all requested documents dating from 2003 through 2008, by September 19, 2014, subsequently granting David an extension of time until October 4, 2014. Defendant failed to produce any documents by October 4, 2014, instead producing some documents on October 15, 2014.

Plaintiff, maintaining that Defendant failed to fully comply with the Court's Order, filed a motion for sanctions and contempt finding against David on December 10, 2014, for violating the Court's September 2, 2014, Order.³ Thereafter, on July 21, 2015, the Court imposed sanctions on David in the amount of Five hundred dollars (\$500.00) and his counsel in the amount of One hundred dollars (\$100.00) and awarded Guardian attorney's fees and costs in the amount of Three thousand six hundred seventy-two dollars (\$3,672.00).

³ The documents requested included: 1) copies of bank statements, cancelled checks, and deposit slips for Banco Popular Account No. 192-031139; 2) copies of bank statements, cancelled checks, and deposit slips for any bank account in the name of E.D. Plumbing [sic] or containing funds for E.D. Plumbing [sic]; 3) copies of all tax returns and gross receipts tax returns filed by or on behalf of E.D. Plumbing, Inc. [sic]; 4) copies of all tax returns and gross receipts tax returns filed by or on behalf of Euston David, alone or jointly with Valerie Knight-David; and 5) copies of all documents delivered at or in connection with the closing of the sale of the Leasehold by E.D. Plumbing Contractors, Inc., to the Government of the Virgin Islands on December 5, 2008.

STANDARD

Since no provision of the Virgin Islands Code or rule of this Court authorizes the filing of a motion for reconsideration, a motion for reconsideration of an interlocutory order is properly filed under LRCi 7.3, made applicable to the Superior Court of the Virgin Islands under Super. Ct. R. 7. A motion under LRCi 7.3 may only be based on “(1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice.”⁴ A motion for reconsideration “is not a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not.”⁵

ANALYSIS

I. Sanctions Against Jessica Grell

On July 21, 2015, the Court held Plaintiff's October 9, 2014, Motion for Sanctions Against Jessica Grell in abeyance. Guardian filed the Motion for Sanctions against Grell pursuant to Fed. R. Civ. P. 37(d)(1)(a)(i), for failure to appear at her October 7, 2014, deposition. The deposition was then re-scheduled for October 20, 2014. Since Grell never responded to the Motion for Sanctions, the Court ordered Plaintiff to file an informational motion indicating whether Defendant appeared for her re-scheduled deposition. On August 7, 2015, Plaintiff filed a motion informing the Court that Grell did appear for her rescheduled deposition taken on October 20, 2014.

⁴ *In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008) (quoting LRCi 7.3).

⁵ *Worldwide Flight Services v. Gov't of the V.I.*, 51 V.I. 105, 110 (2009)(citing *Bostic v. AT&T of the Virgin Islands*, 312 F. Supp. 2d 731, 733-34 (D.V.I. 2004) (noting that, when a Court is considering a motion for reconsideration of an order – not a final judgment – the Court enjoys wider discretion in determining what may constitute ‘manifest injustice’)).

Here, while the Court recognizes that Defendant failed to appear at her October 7, 2014, deposition, without a response from Grell, the Court is unable to conclude that Grell, as a *pro se* party, fully understood her responsibility to appear without a Court summons. Since the Court attempts to provide guidance and leniency to *pro se* parties, and considering that Grell appeared for her October 20, 2014, deposition, the Court finds that sanctions are not appropriate at this time. Nevertheless, the Court warns Defendant Grell that as a *pro se* party she is not excused from abiding by the Court's rules of procedure and must fully comply in the future.

II. Motion for Reconsideration

Defendant filed his Motion for Reconsideration on August 6, 2015, within fourteen (14) days of the Court's July 21, 2015, Order, as required by LRCi 7.3, and therefore the Motion is timely. Pursuant to an August 11, 2015, scheduling order, Defendant was permitted to reply to Plaintiff's response to his Motion, by August 31, 2015. While Defendant's response is dated as August 31, 2015, it was not filed with the Court until September 1, 2015. Defendant simultaneously filed a Motion for Enlargement of Time to File Response on September 1, 2015, stating that the one day delay was a result of preparations for Tropical Storm Erika, which prevented Defendant's attorney's systems from being operational until late Monday, August 31, 2015. While the Court believes Defendant's attorney should have foreseen the possibility of the delay, in the interest of justice the Court will grant the Motion for Enlargement of Time and consider Defendant's reply.

Considering the requirements of LRCi 7.3, there has not been an intervening change in the controlling law nor any new evidence presented before the Court as a basis for granting Defendant's motion. Instead, Defendant premises his motion on the need to correct "clear error

or manifest injustice.” A motion to correct “clear error or manifest injustice” is “appropriate when a court overlooked dispositive factual or legal matters presented to it.”⁶ Defendant alleges that he did not willfully and deliberately refuse to comply with the Court’s Orders. Defendant states that the Court overlooked the record retention policy of Banco Popular and the Internal Revenue Bureau of the Virgin Islands (“IRB”), failed to take into consideration the eight (8) year delay of Plaintiff in requesting the documents, and overlooked the fact that Plaintiff failed to send a preservation letter to the corporation (E.D. Plumbing Contractors, Inc.) in 2006 after the Government’s audit.

A. Bank Statements, Income Tax Returns and Gross Receipts tax returns filed by or on behalf of E.D. Plumbing Contractors, Inc., from 2003-2008.

In David’s Response to Plaintiff’s Opposition, Defendant alleges for the first time that Defendant is unable to produce some of the ordered documents for E.D. Plumbing Contractors, Inc., because Plaintiff failed to submit a preservation letter to E.D. Plumbing. While Plaintiff claims that improprieties occurred from 2003 to 2006, Defendant states that Guardian did not seek any documents from E.D. Plumbing until June 14, 2014. David believes that Plaintiff knew about the alleged improprieties in 2006, and neither Plaintiff nor counsel sent a preservation letter or requested the legal or business relationship between Val’s Insurance and E.D. Plumbing to inform E.D. Plumbing to retain any relevant material.

While the Court would have considered the lack of a preservation letter as a valid argument in opposition to the motion to compel or the motion for sanctions, the Court will not consider in a motion for reconsideration arguments that could have been raised before, but were not.⁷ In

⁶ *Brunn v. Dowdye*, 2009 V.I. LEXIS 19, *3 (V.I. Super. Ct. Oct. 19, 2009)(citations omitted).

⁷ See *In re Adoption of Sherman*, 49 V.I. 452, 457-58 (2008).

Defendant's opposition to Plaintiff's motion to compel, David contended that E.D. Plumbing had a right to privacy under the Privacy Act of 1974, 5 U.S.C. 552a. The Court concluded in its September 2, 2014, Opinion, that "Defendant's arguments that E.D. Plumbing is considered a 'person' for the purposes of the First Amendment [had] no relevancy to the facts presented in this case."⁸ Defendant sought a protective order "claiming that E.D. Plumbing, Inc.'s [sic] tax returns and other financial documents [were] confidential and privileged because they contain[ed] "trade secrets."⁹ The Court found that "such generalized statements were insufficient to demonstrate the financial documents requested [were] privileged."¹⁰ Additionally, the Court determined that:

Defendant David solely owned E.D. Plumbing, Inc., [sic] and operated the businesses with the help of his late wife Valerie Knight-David, one of Defendant David's alleged co-conspirators in the embezzlement scheme. As a result, considering E.D. Plumbing, Inc., [sic] may have been used to conceal the assets allegedly embezzled by the Defendants, the Court finds that financial documents from 2003 to 2008 are relevant.¹¹

Defendant's main contentions regarding E.D. Plumbing do not involve changes in case precedent or new evidence. Since the Court previously addressed the relevancy of the requested financial documents and denied the motion for a protective order, the Court will not allow Defendant to have a second opportunity to argue the motion to compel.

B. Copies of all income tax returns and gross receipts tax returns filed by or on behalf of Euston David, alone or jointly with Valerie Knight-David, and by or on behalf of E.D. Plumbing Contractors, Inc., from 2003-2008

Defendant notes in his Motion for Reconsideration that "with the exception of one year, [2003] certified tax returns for [E.D. Plumbing] were produced."¹² The Court recognizes that

⁸ September 2, 2014, Memorandum Opinion, at 8.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Defendant's August. 6, 2015, Motion for Reconsideration, at 2.

Defendant produced the 2004 and 2005 certified corporate tax returns on January 12, 2015, and the 2006-2008 certified returns on February 13, 2015. Although David attached a “Request for Copy of Tax Return” form to Defendant’s January 12, 2015, notice of supplemental production, the request form itself was blank. Now, for the first time, David alleges in his reply that he requests tax documents for 2003 from the IRB on June 14, 2014, but did not retain a copy of the request form.

Simultaneously, Defendant now states that a copy of the 2003 return does not exist because David does not have a copy, his accountant does not have a copy, and the IRB does not have the original. While the Court understands the delay associated with obtaining records from the IRB and its retention policy, counsel should have informed his client to keep a record of the request and should have explained the details of David’s attempt to secure the return in his opposition to the motion for sanctions. Again, this is an argument that Defendant could have made before, but failed to present to the Court. As a result, the Court is unwilling to now consider this argument as part of the Motion for Reconsideration.

The parties continue to disagree on whether David has produced any gross receipt tax returns for himself, alone or jointly with Valerie Knight-David. In Defendant’s counsel’s declaration attached to the Motion for Reconsideration, counsel indicates that the corporate tax returns produced “have information on gross receipts paid by the company.” Plaintiff continues to contest this fact and believes that Guardian cannot be expected to search the information on gross receipts paid by the company from the corporate tax returns, especially since Plaintiff alleges that David admitted that the company regularly filed gross receipts tax returns. Previously, in his response to Plaintiff’s July 16, 2014, motion to compel, Defendant argued that the discovery

demand was unduly burdensome and that he did not file any gross receipts taxes or joint tax returns. The Court found those arguments to be unpersuasive and directed Defendant to produce all of the requested documents dating from 2003 through 2008, finding the original date range of the document request too broad and not relevant.

Both parties recognize that David has produced uncertified copies of his tax returns for 2005-2007. In his reply to Plaintiff's Opposition to the Motion for Reconsideration, Defendant alleges that his accountant generated the documents on October 6, 2014. Further alleging that "[g]iven the time that it took the CPA to generate the documents, it is fair to state that the request was made in advance of the production."¹³ Here, it was the responsibility of David and Defendant's counsel to ensure that the accountant was aware of the Court ordered deadline of October 4, 2014. Based on this simple assertion, the Court is unable to determine when the request was made and is not persuaded by yet another excuse, made for the first time, as to why Defendant failed to meet the discovery deadline.

Defendant further argues that the Court overlooked the retention policy of the IRB. This is not the case. The Court noted in its July 21, 2015, Memorandum that "[a]lthough the Court is understanding of any delay associated with the IRB, without evidence by Defendant demonstrating that a timely request for documents was made, the Court is unable to find that Defendant made all reasonable efforts...."¹⁴ Further, in his opposition to Plaintiff's motion for sanctions Defendant stated that the IRB has a document retention period of seven or ten years depending on the documents, but David did not attach a copy of the policy. When Guardian correctly identified that

¹³ Defendant's September 1, 2015, Response to Plaintiff's Opposition to Defendant David's Motion for Reconsideration, at 8.

¹⁴ July 21, 2015, Memorandum Opinion, at 12.

the IRB's retention policy was not provided to the Court, David simply replied that the Virgin Islands tax system is the same as the United States Internal Revenue Code.¹⁵

Defendant's main assertion in his January 8, 2015, opposition to Plaintiff's motion for sanctions was that he did not have the information in his possession, custody, or control, but that he had contacted the IRB to secure certified copies of the tax returns. David remains unable to provide the Court with a date of when Defendant requested the gross receipt tax returns from the IRB, but has provided a date for when Defendant requested the 2003 return for E.D. Plumbing.¹⁶ The Court's decision to impose sanctions was not based on the fact that copies of some of the tax returns are no longer available from the IRB. Instead, the Court was unable to find that David took all reasonable measures to secure the documents by the Court ordered deadline and, for that reason, the Court determined that sanctions were appropriate.

C. Copies of all documents delivered at or in connection with the closing of the sale of the Leasehold by E.D. Plumbing Contractors, Inc., to the Government of the Virgin Islands

David maintains that the transaction with the Virgin Islands Government involved public documents and that the "Government refused to provide a copy to the defendant."¹⁷ Defendant relies on the assertion that "it is no secret that the Government of the Virgin Islands openly defies requests for public documents,"¹⁸ and "the powers that were at Property and Procurement refused to provide a copy of the transaction."¹⁹ Again, Defendant raises an argument that could have and should been raised in its opposition to either the motion to compel or the motion for sanctions,

¹⁵ The Court recognizes that Defendant attached a copy of the IRS policy to Defendant's reply to Plaintiff's opposition to the motion for reconsideration.

¹⁶ Def.'s Aug. 6, 2015, Mot. for Reconsideration, at Caines Dec. at ¶¶ 10-12.

¹⁷ Def.'s Aug. 6, 2015, Mot. for Reconsideration, at 4.

¹⁸ Def.'s Sept. 1, 2015, Response to Pl.'s Opp. to Def. David's Mot. for Reconsideration, at 4.

¹⁹ Def.'s Aug. 6, 2015, Mot. for Reconsideration, at Caines Dec. at ¶¶ 28-31.

while continuing to be unable to provide the Court with a date the request was made to the Government.

D. Copies of all bank statements, cancelled checks, and deposit slips for Banco Popular Account No. 192031139 from 2003-2008 and for any bank account in the name of E.D. Plumbing Contractors, Inc., or containing funds of E.D. Plumbing Contractors, Inc., from 2003-2008.

Defendant emphasizes that the Court overlooked the record retention policy of Banco Popular and claims that Plaintiff incorrectly states that David failed to provide evidence of this policy. The Court recognizes that Defendant provided a copy of the record retention policy as an exhibit to Defendant's January 8, 2015, opposition to Plaintiff's motion for sanctions. In fact, the Court considered the seven year retention policy in its July 21, 2015, opinion and found that, if Banco Popular adhered to its policy, the documents from 2003, 2004, 2005, and 2006 would not be available.²⁰ However, the Court also noted that, "if the bank's retention policies are as represented by counsel for Defendant, evidence has been lost as a result of Defendant's failure to make timely disclosures."²¹ The Court recognized in its July 21, 2015, Memorandum Opinion that Defendant was unable to produce some of the documents ordered by the Court, the bank documents from 2003-2006, and the Court did not issue sanctions based on that fact.

Defendant's attorney alleges in his Response to Plaintiff's Opposition to the Motion for Reconsideration that he was unaware of the bank's policy and that it was "after repeated questions to Mr. David about the records and his assertions that he was not having any success in getting the documents from the bank that [he] went to the bank and requested to speak to the manager."²² The

²⁰ July 21, 2015, Memorandum Opinion, at 9.

²¹ *Id.*

²² Def.'s Sept. 1, 2015, Response to Pl.'s Opp. to Def. David's Mot. for Reconsideration, at 3.

Court acknowledges the efforts of Defendant's attorney's to meet with the branch manager of Banco Popular to discuss retrieval of the bank records, which requires the date, year, and amount of the check, and the Court is not questioning that Defendant's attorney met with the branch manager. Nevertheless, Defendant failed to provide evidence of the retention policy in his opposition to the motion to compel, instead referring to the policy in his opposition to the motion for sanctions as the reason most of the documents were destroyed. Further, Defendant failed to inform the Court of the impossibility prior to the Court ordered discovery deadline of October 4, 2014. The fact remains that Defendant was unable to provide the Court with a date of these efforts and failed to provide evidence in his opposition to the motion for sanctions that Defendant took all reasonable steps to secure these documents prior to the October 4, 2014, discovery deadline.

E. Sanctions

Pursuant to 4 V.I.C § 243,²³ a Court may impose sanctions against a party or an attorney for failure to follow the Court's orders, so long as the party upon whom sanctions are imposed has had notice and a reasonable opportunity to be heard.²⁴ When considering Fed. R. Civ. P. 37 discovery sanctions, the Court has adopted the balancing test set forth in *Poulis v. State Farm Fire and Case. Co.*²⁵ Here, Defendant's Motion for Reconsideration fails to identify any error of the Court in applying and analyzing the *Poulis* factors in relation to the determination of sanctions,

²³ 4 V.I.C. § 243 provides that "[e]very court shall have power . . . [t]o compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in all actions or proceedings pending therein. . ." See also 4 V.I.C. § 244 ("Any person who willfully violates, neglects or refuses to observe or perform any lawful order of a court shall be guilty of contempt of court and upon being found guilty of such contempt may be punished as provided by law.")

²⁴ See *Molloy v. Independence Blue Cross*, 2012 WL 78942, FN11 (V.I. Jan. 9, 2012); *Saldana v. Kmart*, 43 V.I. 361, 371 (3d Cir. 2001) (citing *Martin v. Brown*, 63 F.3d 1252, 1262 (3d Cir. 1995)).

²⁵ 747 F.2d 863, 868 (3d Cir. 1984). See *Molloy*, 2012 WL 78942 (finding that a court must make specific findings on all six *Poulis* factors, although no one is dispositive, in order to support dismissal in a motion for failure to prosecute); *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 510 (V.I. 2010).

and fails to even mention the *Poulis* factor analysis conducted by the Court. Instead, David maintains that his failure “to comply is due to his inability, and not willfulness, bad faith, or fault.”²⁶ Sanctions were not imposed because the Court failed to acknowledge that the documents were not within Defendant’s immediate possession or that production was delayed by Government agencies. Rather, sanctions were raised on Defendant’s failure to provide substantial justification, beyond mere assertions, that he took all reasonable steps to comply with the Court ordered deadline. Further, the Court did not hold “Attorney Caines responsible for Defendant David’s failure to maintain business records in the form of bank statements and contracts, and his failure to thoroughly search through his business documents as admitted in his deposition.”²⁷

In determining the appropriate amount of sanctions, the Court took the least severe action necessary to address the discovery violation.²⁸ Although the Court is cognizant of the purpose of issuing sanctions, the Court remains unable to ignore the fact that Defendant was irresponsible in managing discovery deadlines. While, the Court considered more serious sanctions including striking David’s denials in his Answer, or prohibiting David from introducing any evidence, dismissal of the case, striking of the pleadings, and/or additional monetary fines, the Court chose the lesser monetary sanction in hopes that David and his counsel would comply regarding future deadlines and orders of the Court. Here, Plaintiff claims “that Defendant’s Motion for Reconsideration is frivolous and Defendant’s continued failure to comply with the Court’s order of production of documents warrants the conclusion that more serious sanctions are warranted.”²⁹

²⁶ Def.’s Sept. 1, 2015, Response to Pl.’s Opp. to Def. David’s Mot. for Reconsideration, at 7.

²⁷ July 21, 2015, Memorandum Opinion, at 15.

²⁸ *People of the Virgin Islands v. Rodriguez*, 2010 V.I. Supreme LEXIS 15, *16-17 (V.I. 2010).

²⁹ Plaintiff alleges that Defendant has still failed to “produce a signed, certified copy of U.S. Corporation Income Tax Return for E.D. Plumbing for 2003, gross receipts tax returns for E.D. Plumbing, copies of all bank statements, canceled checks, and deposit slips for Banco Popular Account No. 192031139 and for any bank account in the name

While the Court recognizes that David has disclosed the documents in his possession, the Court will not issue additional sanctions at this time, but the Court will consider more serious sanctions in the future if appropriate.

III. Attorney's Fees and Costs

David argues the award of attorney's fees and costs is unjust and should be vacated because Defendant's failure to produce the documents was justified. On July 21, 2015, the Court awarded Plaintiff attorney's fees and costs in the amount of Three thousand six hundred seventy-two dollars (\$3,672.00) regarding not only the Motion for Sanctions, but also the Motion to Compel and the Opposition to Defendant's Motion for Protective Order. While David does not contest the fact that the Court did not provide a detailed explanation for the award of attorney's fees and costs, in light of *Mahabir v. Heirs of George*,³⁰ the Court will clarify its decision to award Three thousand six hundred seventy-two dollars (\$3,672.00) in attorney's fees and costs.

Previously, the Court largely granted the Motion to Compel in a September 2, 2014, Memorandum Opinion, and found that a partial award of attorney's fees and costs was appropriate. The Court ordered Guardian to file an itemized application for fees incurred as a result of having to file the motion to compel as well as having to respond to David's motion for a protective order. Pursuant to Fed. R. Civ. P. 37(a)(5)(A), if a motion to compel is granted, with few exceptions, the court must award "the movant's reasonable expenses incurred in making the motion, including

of E.D. Plumbing or containing funds of E.D. Plumbing; copies of all tax returns and gross receipts tax returns filed by or on behalf of Euston David, alone or jointly with Valerie Knight David, from January 1, 2003 to 2008; and copies of all documents delivered in connection with the closing of the sale of the Leasehold by E.D. Plumbing to the Government of the Virgin Islands on December 5, 2008." Pl.'s Aug. 20, 2015, Opp. to Def. David's Motion for Reconsideration, at 4-5.

³⁰ S. Ct. Civ. No. 2014-0025, __ V.I. __ (V.I. Sept. 25, 2015).

attorney's fees."³¹ While Plaintiff is not a "prevailing party" under 5 V.I.C. § 541³², the Court is guided by Virgin Islands jurisprudence calculating the "lodestar"³³ amount for determining the reasonableness of the fees and costs by examining the following relevant factors:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.³⁴

On September 26, 2014, Plaintiff's attorney filed an Affirmation Regarding Fees and Costs requesting Attorney's Fees in the amount of Seven thousand seven hundred ten dollars (\$7,710.00) and costs incurred in the amount of Eight hundred sixty-four dollars and ninety-two cents (\$864.92) for work performed in connection with this matter for the period from June 18, 2014, through August 12, 2014. The attorney's fees included lead counsel, Maria Tankenson Hodge, a partner with Hodge & Hodge, who billed three (3) hours at an hourly rate of \$200.00, and Hayley Cotter, an associate attorney with Hodge & Hodge, who billed thirty-nine and a half (39.5) hours at an hourly rate of \$180.00. The Court gave Defendant an opportunity to respond and David filed

³¹ Fed. R. Civ. P. 37(a)(5)(A).

³² 5 V.I.C. § 541(b); see *Creative Minds v. Reef Broad.*, 2014 V.I. LEXIS 82, n. 2 (V.I. Super. August 12, 2014) ("In a civil action, a party in whose favor a decision and judgment is rendered may recover reasonable costs and attorney's fees pursuant to 5 V.I.C. §§ 541-547. Awards of attorney's fees under section 541(b) are a matter within the discretion of the ... Court.") (citations omitted).

³³ LODESTAR, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A reasonable amount of attorney's fees in a given case, usu. calculated by multiplying a reasonable number of hours worked by the prevailing hourly rate in the community for similar work, and often considering such additional factors as the degree of skill and difficulty involved in the case, the degree of its urgency, its novelty, and the like. Most statutes that authorize an award of attorney's fees use the lodestar method for computing the award").

³⁴ VIRGIN ISLANDS RULES OF PROFESSIONAL CONDUCT RULE 211.1.5(a)).

an opposition to Plaintiff's application for fees on October 3, 2014, arguing that "the time extended [sic] on researching and drafting the motions by the associate appears to be exorbitant."³⁵ Defendant points to July 6, 2014, as an example when the associate "claims that on the 6th [s]he spent over six hours working on the motion opposing defendant,"³⁶ and "July 7, 2014 and July 8, 2014 when the associate claims that [s]he worked on the motion to compel."

Plaintiff's attorneys' hourly rates are customary and comparable to the prevailing market rates for attorneys in the Virgin Islands. Rather than reducing the hourly rate for Attorney Hodge and Attorney Cotter, the Court reviewed each billed entry and description of the work performed and reduced the time accordingly. The Court based the reductions on "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly."³⁷ While the Court agreed with Defendant that some of the billed time appeared to involve comparable tasks and was slightly excessive, the Court also determined that a significant amount of time and labor was required for Guardian to properly respond to some of Defendant's meritless arguments.

For example, in instances where Plaintiff seeks reimbursement for the legal work prepared by Attorney Cotter, as well as Attorney Hodges' review of that legal work, for the purpose of determining a reasonable award of attorney's fees, the Court found Attorney Hodges' review of the work performed by Attorney Cotter to be duplicative. Accordingly, the Court deducted from the total hours charged by Attorney Hodge One hundred sixty-eight dollars (\$168.00) for the duplicative conferences and review of legal work, as well as for administrative tasks performed by

³⁵ Defendant's October 3, 2014, Opposition to Plaintiff's Application for Fees, at 6.

³⁶ *Id.* at 5-6.

³⁷ VIRGIN ISLANDS RULES OF PROFESSIONAL CONDUCT RULE 211.1.5(a)).

Attorney Hodge.³⁸ Further, the Court reduced Attorney Cotter's time by Three thousand eight hundred seventy dollars (\$3,870).³⁹ The Court did not award attorney's fees for the time billed on June 18, 2014, and June 19, 2014, because the Court found the work performed was precursory to the motion to compel.⁴⁰ The Court reduced the fees for time charged in the performance of administrative tasks, such as preparing the motion and exhibits,⁴¹ as well as for duplicative entries for research and drafting the motions.⁴²

Plaintiff also sought reimbursement of Eight hundred sixty-four dollars and ninety-two cents (\$864.92) in costs. The Court declined to award One hundred forty-seven dollars and fifty-six cents (\$147.56) of the requested costs for photocopying and mailing, as they constitute general overhead costs.⁴³ The Court also declined to award the remaining cost of Seven hundred seventeen dollars and thirty-six cents (\$717.36.00), for research, as this cost was incorporated in the research costs awarded for attorney's fees.

A motion for reconsideration "is not a vehicle for registering disagreement with the court's initial decision [or] for rearguing matters already addressed by the court...."⁴⁴ Here, Defendant's

³⁸ Plaintiff's September 26, 2014, Attorney's Affirmation Regarding Fees and Costs, Ex. 1, *see* MH entry for 6/20/14, 7/8/2014, and 7/14/2014.

³⁹ *Id.*, *see* HMC entry for 6/18/2014, 6/19/2014, 6/20/2014, 7/7/2014, 7/8/2014, 7/14/2014, 7/15/2014, 8/4/2014, 8/5/2014, 8/6/2014, 8/7/2014, 8/8/2014, and 8/11/2014.

⁴⁰ *See* HMC entry for 6/18/2014 and 6/19/2014.

⁴¹ *See Berne Corp. v. Gov't of the V.I.*, 2010 U.S. Dist. LEXIS 105265, *15-18 (D.V.I. Sept. 30, 2010) (citation omitted); *see* HMC entry for 7/15/2014.

⁴² *See, e.g.*, HMC entry for 8/4/2014 and 8/5/2014.

⁴³ *See Pedro v. Huggins*, 2010 V.I. LEXIS 18, *11-12, 53 V.I. 98, 105-106 (V.I. Super. Ct. 2010) (citation omitted)("Local courts consistently held that expenditures for messenger services, photocopying, phone calls and other normal office overhead expenses are not awardable pursuant to § 541") (citations omitted). The Court again notes that 5 V.I.C. § 541, while not specifically applicable here, is a useful resource in assessing the reasonableness of the requested fees and costs.

⁴⁴ *Worldwide Flight Services v. Gov't of the V.I.*, 51 V.I. 105, 110 (2009)(citing *Bostic v. AT&T of the Virgin Islands*, 312 F. Supp. 2d 731, 733-34 (D.V.I. 2004) (noting that, when a Court is considering a motion for reconsideration of an order – not a final judgment– the Court enjoys wider discretion in determining what may constitute 'manifest injustice')).

assertion that the award of fees is unjust is similar to the assertions made in Defendant's opposition to Plaintiff's application for fees. Notably, the award of fees of Three thousand ~~six~~ hundred seventy-two dollars (\$3, 672) was less than half of the fees requested by Plaintiff. The Court considered the affirmation and Defendant's opposition, but since David was ordered to produce the documents and failed to do so by the Court ordered deadline, and since the Court denied the motion for a protective order, the award of partial attorney's fees and costs in the amount of Three thousand six hundred seventy-two dollars (\$3,672.00) was reasonable and just.

CONCLUSION

While the Court recognizes the impossibility of Defendant producing certain documents, this does not change the Court's analysis regarding the appropriateness of the minimal monetary sanctions imposed against Defendant Euston David and Defendant's attorney. Additionally, the award of attorney's fees to Plaintiff in the amount of Three thousand six hundred seventy-two dollars (\$3,672.00) is more than justified. For the foregoing reasons, Defendants' Motion for Reconsideration of the Court's Order of July 21, 2015, is denied, and Plaintiff's Motion for Sanctions Against Defendant Jessica Grell is denied.

An Order consistent with this Memorandum Opinion shall issue.

Dated: September 30, 2015

ATTEST: Estrella H. George
Acting Clerk of Court

by:


Lori Boynes-Tyson

Court Clerk Supervisor 10/1/15


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS