

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

AZIEWE CALLWOOD,

Plaintiff,

v.

**FERDI'S FOREST, INC., ABRAHAM
FERDINAND, SARAH FERDINAND,**

Defendants.

1:19-cv-00033-WAL-EAH

**TO: Aziewe Callwood, *Pro Se*
Kevin A. Rames, Esq.**

REPORT AND RECOMMENDATION

THIS MATTER comes before the Court following a Show Cause hearing on August 5, 2022 that ordered Plaintiff Aziewe Callwood, appearing pro se, to appear and show cause why this action should not be dismissed for failure to prosecute. Mr. Callwood did not appear at that hearing, and the Court issued an Order directing him to pay a \$250.00 sanction by September 9, 2022 and recommended that the complaint be dismissed for failure to prosecute. Dkt. No. 34. However, that Order was filed as an Order Imposing Sanctions and not as a Report and Recommendation recommending dismissal. *Id.* As a result, and in order to insure that the record is clear, the Court issues this Report and Recommendation to the district court, recommending that this matter be dismissed for failure to prosecute.

BACKGROUND

In July 2019, Plaintiff commenced this action by filing a Complaint alleging various federal and local employment-related and constitutional claims. Dkt. No 1. Defendants filed a motion to dismiss. Dkt. No. 8. Callwood filed an opposition in October and November 2019,

Callwood v. Ferdi's Forest
1:19-cv-00033-WAL-EAH
Report and Recommendation
Page 2

Dkt. Nos. 10, 12, followed by a motion to set a scheduling conference, Dkt. No. 13. Magistrate Judge Cannon denied the motion to set a scheduling conference in May 2020, Dkt. No. 14. In October 2020, Callwood filed a notice of a change of address. Dkt. No. 16.

In November 2021, the district court granted in part and denied in part the motion to dismiss.¹ Dkt. Nos. 18, 19. In May 2022, the Clerk's Office sent a copy of the November 2021 memorandum opinion and order to Callwood via certified mail. Dkt. No. 21. The return receipt was signed for on May 15, 2022.²

The Court issued an Order setting a status conference in this matter for June 23, 2022, Dkt. No. 23, but the Order was not mailed to Callwood. As a result, the Court excused his non-appearance, and rescheduled the status conference for July 21, 2022. Dkt. No. 24. This Order setting the new status conference was sent to Callwood's address on file, Dkt. No. 26, and the return receipt showed that someone had signed for it on July 11, 2022, Dkt. No. 27.

Callwood did not appear at the July 21, 2022 status conference. As a result of his non-appearance, and due to his failure to advance his case since March 2020, the Court issued an Order to Show Cause. Dkt. No. 31. The Order directed Callwood to appear at a hearing on August 5, 2022 to show cause why he should not be sanctioned for failure to appear at the July 2022 status conference, and why the Court should not recommend to the district judge

¹ The district judge held that the Court lacked subject matter jurisdiction over Plaintiff's *Bivens* and 42 U.S.C. § 1983 claims but had jurisdiction over Plaintiff's Federal Labor Standards Act claim and supplemental jurisdiction over Plaintiff's local claims. Dkt. No. 19.

² The Court sent the Memorandum Opinion and Order to Callwood at the address indicated on his change of address form, Dkt. No. 16: P.O. Box 2031, Frederiksted, VI 00841. A person other than Callwood signed the return receipt.

Callwood v. Ferdi's Forest
1:19-cv-00033-WAL-EAH
Report and Recommendation
Page 3

that the matter be dismissed for failure to prosecute. *Id.* This Order was sent to Callwood by certified mail to the address on file with the Court. Dkt. No. 32. An individual signed the return receipt on August 8, 2022. Dkt. No. 36.

Callwood did not appear at the August 5, 2022 hearing. Dkt. No. 34. The Court imposed a \$250.00 sanction on him for his non-compliance with the June 2022 Order, Dkt. No. 24, and with the Order to Show Cause, Dkt. No. 31. The Order also stated that the case was referred to the district judge with a recommendation that Plaintiff's claims be dismissed for failure to prosecute. *Id.* The Court sent the Order to Callwood by certified mail at the address on file. Dkt. No. 35. The mail was returned as unclaimed, unable to forward. Dkt. No. 37. Nothing else appears on the docket. Callwood has not filed any document or made any appearance since filing his notice of change of address in October 2020. Dkt. No. 16.

DISCUSSION

Under Rule 41(b), a district court may dismiss an action if a litigant has failed to prosecute or to comply with a court order. *See* Fed. R. Civ. P. 41(b). Unless otherwise stated, a dismissal for failure to prosecute under Rule 41(b) results in dismissal of the action with prejudice. *Matta v. Gov't of the V.I.*, No. 11-cv-0091, 2016 WL 122954, at *1 (D.V.I. Jan. 8, 2016). A court must justify its decision under the multi-factor test set forth in *Poulis v. State Farm Fire & Casualty Company*, 747 F.2d 863 (3d Cir. 1984). Under *Poulis*, a court must weigh:

[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

Callwood v. Ferdi's Forest
1:19-cv-00033-WAL-EAH
Report and Recommendation
Page 4

other than dismissal, which entails an analysis of alternative sanctions; and
(6) the meritoriousness of the claim or defense.

Id. at 868 (emphasis removed). These factors must be balanced, and not all factors need to be satisfied for the trial court to dismiss a claim. *See Ware v. Rodale Press, Inc.*, 322 F.3d 218, 221 (3d Cir. 2003). “Pro se litigants are not excused from being tested under the *Poulis* factors.” *Marin v. Biros*, 663 F. App’x 108, 110 (3d Cir. 2016). Moreover, a Court “must provide the plaintiff with a full and fair opportunity to be heard regarding his failure to comply with the court’s orders. Only after providing that opportunity should the District Court conduct an analysis of the *Poulis* factors to determine whether it should dismiss the plaintiff’s case.” *Briscoe v. Klaus*, 538 F.3d 252, 264 (3d Cir. 2008).

However, “when a litigant’s conduct makes adjudication of the case impossible, [] balancing under *Poulis* is unnecessary.” *Sebrell ex rel. Sebrell v. Phila. Police Dep’t*, 159 F. App’x 371, 374 (3d Cir. 2005) (affirming dismissal without assessment of *Poulis* factors where plaintiff refused to cooperate with court’s order that she complete required forms to effect service despite clear instructions and warning that she would face dismissal for failure to comply with court’s order); *see also Jackson v. U.S. Bankr. Ct.*, 350 F. App’ 621, 624 (3d Cir. 2009) (per curiam) (plaintiff’s disappearance and failure to oppose motions and communicate with the court for more than one year rendered assessment of *Poulis* factors unnecessary).

Here, Callwood’s conduct has made adjudication of this case impossible, such that the Court need not engage in balancing the *Poulis* factors when assessing whether to dismiss the

Callwood v. Ferdi's Forest
1:19-cv-00033-WAL-EAH
Report and Recommendation
Page 5

complaint. Callwood has not had any contact with the Court since October 2020, when he filed a notice of change of address form. Dkt. No. 16. Although Callwood did not personally sign the return receipts sent to him with the Orders in June and July 2022 at the address he placed on file with the Court, Dkt. Nos. 27, 36, the mailings were received at his address and signed for, and thus the Court considers that he had notice of the July 2022 hearing which he failed to attend and also learned of the August 2022 show cause hearing that, inter alia, stated that the purpose of the hearing was for Callwood to argue why the undersigned should not recommend that the action be dismissed for failure to prosecute. Dkt. No. 31. Even if Callwood had received the Show Cause Order after the hearing took place, the text of the Order should have spurred him to make some contact with the Court if he wished to ensure that his case would not be dismissed. His failure to act after receiving that order, and in the three years since his last communication with the Court, has kept this case open but not litigated.

The August 2022 Order Imposing Sanctions—providing that this Court would recommend to the district judge that Callwood's complaint be dismissed for failure to prosecute—was sent to his address on file, but this time the mail was returned unclaimed/unable to forward. Dkt. No. 37. This could mean that Callwood either changed his address and did not update it with the Court, or that he had reason not to sign for it, since this was the first time any mailing to him from the Court went unclaimed. In the former instance, all litigants are “personally responsible for supplying the court with an address that would foster direct and timely communication with the court.” *Marin*, 663 F. App'x at 110-

Callwood v. Ferdi's Forest
1:19-cv-00033-WAL-EAH
Report and Recommendation
Page 6

11. Failing to do so would not be consonant with desiring to continue to litigate his case. *Mains v. Harper*, 2022 WL 2671727, at *3 (W.D. Pa. June 9, 2022) (plaintiff's failure to keep address up to date, such that neither the court nor defendants had any way to serve documents on him, was sufficient evidence of dilatoriness, indicating that plaintiff no longer desired to proceed with the action).

Given the above background, the Court recommends dismissal of Callwood's Complaint for failure to prosecute.³ See *Adams v. Tr. of N.J. Brewery Emps. Pension Tr. Fund*, 29 F.3d 863, 875 (3d Cir. 1994) ("Failure to prosecute under . . . Rule 41(b) does not mean that the plaintiff must have taken any positive steps to delay the trial or prevent it from being reached. . . . It is quite sufficient if he does nothing, knowing that until something is done there will be no trial.") (internal quotation marks and alteration omitted)). The failure to prosecute is Callwood's alone because the docket shows that he has completely forsworn involvement in this case. His apparent "unwillingness to prosecute the case leaves a reasonable court with no other choice but to dismiss it." *Marin*, 663 F. App'x at 111.

Accordingly, the Court **RECOMMENDS** that Plaintiff Aziwe Callwood's claims against the Defendants be **DISMISSED WITH PREJUDICE for failure to prosecute**.

³ As indicated above, in the August 8, 2022 Order, entitled Order Imposing Sanctions, this Court also recommended to the district judge that this case be dismissed for failure to prosecute. Dkt. No. 34. However, the August 8, 2022 Order was not filed as an Order and Report and Recommendation. Since that Order was improperly docketed, the Court revisits and updates that earlier recommendation of dismissal for failure to prosecute here so it is properly presented to the district judge.

Callwood v. Ferdi's Forest
1:19-cv-00033-WAL-EAH
Report and Recommendation
Page 7

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must “specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection.” LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of Court shall send a copy of this R&R to Callwood via certified mail, return receipt requested.

ENTER:

Dated: October 25, 2023

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE