IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

WAYNE CALLWOOD,PE **Plaintiff**)		CASE NO. ST-09-CV-0000499
vs)		ACTION FOR: BREACH OF CONTRACT - CIVIL
SUPERIOR COURT OF THE VIRGIN ISLANDS)		
Defendant		

NOTICE OF ENTRY OF ORDER

TO: WAYNE CALLWOOD, PRO SE
PAUL GIMENEZ, ESQ.

Please take notice that on November 05, 2014 a(n) ORDER dated October 29, 2014 was entered by the Clerk in the above-entitled matter.

Dated: November 05, 2014

Estrella H. George
Acting Clerk of the Court

Tisha Laurencin

TISHA LAURENCIN-ORTIZ
COURT CLERK II

NOT FOR PUBLICATION

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

WAYNE D. CALLWOOD, PE, PLAINTIFF, v. SUPERIOR COURT OF THE VIRGIN ISLANDS, DEFENDANT.	ST-09-CV-499 ACTION FOR BREACH OF CONTRACT

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Superior Court of the Virgin Islands' (hereinafter "Defendant") Motion to Dismiss, filed April 5, 2013. The Motion has been fully briefed. For the reasons set forth below, the Court shall deny Defendant's Motion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that he entered into a verbal contract with Defendant to renovate Defendant's facilities at Barbel Plaza. St. Thomas. Plaintiff began work on the renovations, and thereafter was sent a contract from Defendant memorializing the parties' verbal agreement. According to Plaintiff, the terms of Defendant's proposed contract did not accurately reflect the circumstances for the work that had already been completed, so Plaintiff prepared his own proposed contract and sent it to the Defendant to sign. After sending the proposed contract to Defendant, Plaintiff received a letter from Judge Darryl Dean Donohue, Sr., the Presiding Judge of the Superior Court, telling him to cease and desist from further work.[1] Plaintiff then sought payment in the amount of $21,016.00 for the work he had already completed on Defendant's facilities. Plaintiff contends that he never received the payment allegedly owed to him and, as a result, he filed suit against the Defendant raising breach of contract and unjust enrichment claims.

[1] At the time Plaintiff commenced his suit, the Honorable Judge Darry Dean Donohue, Sr. was Presiding Judge of the Superior Court. He has since retired and the Honorable Judge Michael C. Dunston is now Presiding Judge of the Superior Court.

Plaintiff commenced this action on October 23, 2009. On November 19, 2009, Defendant made a special appearance and filed its Motion to Quash arguing insufficient and defective service of process. Plaintiff filed his Opposition to Defendant's Motion on November 25, 2009, after which the case remained dormant for a few years.[2] On April 5, 2013, Defendant filed a notice of substitution of counsel and Motion to Dismiss. A status conference was held in this matter on April 19, 2013. Counsel for Plaintiff informed the Court that he was appearing on a limited status on behalf of Plaintiff. The Court then gave Plaintiff until May 31, 2013 to obtain new counsel and, once obtained, new counsel was to respond to Defendant's Motion to Dismiss by June 14, 2013. On May 6, 2013, Defendant renewed its Motion to Quash, and on June 26, 2013, Defendant filed a Motion for Ruling on its Motion to Dismiss. Plaintiff then filed his Opposition to Defendant's Motion to Dismiss, pro se, on July 5, 2013. Defendant responded to Plaintiff's Opposition on July 8, 2013.

DISCUSSION

Defendant has raised several arguments to support its assertion that Plaintiff's case should be dismissed. Defendant's arguments are: (1) Plaintiff's pleading fails to show that he is entitled to relief; (2) the Court lacks jurisdiction due to Plaintiff's failure to name the Government of the Virgin Islands as a party in this action; (3) the Court lacks jurisdiction due to Plaintiff's failure to properly serve the Government with sufficient process; (4) Plaintiff's action should be dismissed for failure to affect proper service of process within the 120 day period; and (5) Plaintiff's action should be dismissed for failure to prosecute. With respect to Defendant's fourth argument, the issue regarding sufficiency of service was addressed in the Court's Order on Defendant's Motion to Quash. In that Order, Plaintiff was granted leave to amend the summons

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[2] A number of Superior Court judges have recused from this case since Plaintiff filed his Complaint in 2009. This case ultimately did not come before this Court until February 2013.

and was given additional time to properly serve Defendant, thus, Defendant's fourth argument is moot. The Court will first address Defendant's jurisdiction argument, then address the remaining arguments in turn.

I. Defendant's Federal Rule of Civil Procedure 12(b)(7) Argument – Failure to Join a Party Under Rule 19

Defendant argues that this Court should dismiss Plaintiff's action because the Government of the Virgin Islands has not been named as a party in this case, nor has it been served with process. According to Defendant, the Government is an indispensable party, pursuant to Federal Rule of Civil Procedure 19. Defendant further argues that the Government of the Virgin Islands is the only proper party to this action.

Federal Rule of Civil Procedure 17(a)(1)[3] provides that "[a]n action must be prosecuted in the name of the real party in interest." Further, "[c]apacity to sue or be sued is determined . . . by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). There is no Virgin Islands Law that explicitly gives the Superior Court the capacity to be sued. In fact, Section 2(b) of the Revised Organic Act of 1954 states that "[t]he government of the Virgin Islands . . . shall have the right to sue by such name and in cases arising out of contract, to be sued." The word "government" encompasses the three branches of government: executive, legislative, and judicial. *Turnbull v. Twenty-Sixth Legislature of the Virgin Islands*, 48 V.I. 190, 202 (Super. Ct. 2007). As the District Court stated in *Kendall v. Superior Court*, Civil No. 2010–109, 2013 WL 785518, at *6 (D.V.I. Mar. 1, 2013), "[m]uch like the branches of a tree, neither of these branches can truly exist without the other." Hence, it appears that, under Section 2(b), a party suing the Court, or any other branch of government, under a breach of contract claim must sue in the name of the Government of the Virgin Islands.

[3] The Federal Rules of Civil Procedure are made applicable to this Court through Rule 7 of the Rules of the Superior Court.

Although there seems to be no Virgin Islands law that explicitly gives the Court the capacity to be sued, Plaintiff argues that the Superior Court has established the precedence of suing in its own name. The Superior Court has certainly sued and been sued in its own name. *See Kendall v. Superior Court*, Civil No. 2010–109, 2013 WL 785518 (D.V.I. Mar. 1, 2013); *see also Estate of Thomas Mall, Inc. v. Territorial Court*, 923 F.2d 258 (3d Cir. 1991). The Legislature has done the same. *See Creque v. Roebuck*, 16 V.I. 197 (Terr. Ct. 1979).[4] Also, it would seem that since Title 4, Section 72b(b) of the Virgin Islands Code gives the Presiding Judge the power to enter into contracts, the Presiding Judge, as administrative head of the Court, would also have the power to sue and be sued in the name of the Court. Title 4, Section 72(c), however, states that "[t]he judges of the Superior Court shall be officers of the Government of the Virgin Islands." This supports the contention that the Government must be sued in cases against the Court because the Presiding Judge acts as an officer of the Government when he enters into contracts on behalf of the Court.

A reading of Section 2b of the Revised Organic Act of 1954 along with Title 4, Sections 72(c) and 72b(b) of the Virgin Islands Code necessitate the joinder of the Government of the Virgin Islands as a party to this action. Federal Rule of Civil Procedure 19(a)(1)(A) also mandates that a party "subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction" must be joined to an action if in their absence, "the court cannot accord complete relief among existing parties."[5] Once one of the grounds for joinder under Rule 19(a) has been established, the proper remedy is to order joinder. *See George v. George*, 59 V.I. 1092, 1099 (D.V.I. 2013); see also Fed. R. Civ. P. 19(a)(2).

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[4] Though both the Court and the Legislature have sued and been sued more times than noted in this Opinion, the Court has limited its listing of cases to those concerning contract disputes.

[5] "If a party is necessary, but joinder would divest the court of jurisdiction, the court must next decide if the absent party is "indispensable." *Richards v. Legislature of the V.I.*, 49 V.I. 1086, 1091 (D.V.I. 2008). In this case, the Court need not determine whether the Government of the Virgin Islands is an indispensable party because joinder of the Government will not divest the court of jurisdiction.

The Court cannot accord complete relief amongst the existing parties because Defendant, on its own, is not a suable entity. Defendant is one co-equal branch of the government whose existence is dependent upon the other two. Defendant receives funding from the Legislature, and the Governor, as head of the Executive Branch, appoints Defendant's administrative head – the Presiding Judge. The Presiding Judge has the power to enter into contracts, but does so acting as a Government official. If Plaintiff were to succeed in its suit against Defendant, the funds needed to repay him would be funds allocated from the Government. As a result, this matter cannot move forward unless the Government of the Virgin Islands is added as a party.

Defendant believes the Government of the Virgin Islands is the only proper party in this case. Though Virgin Islands law is void of any explicit statement granting the Superior Court the authority to be sued, this Court will not go as far as to say that Defendant is an improper party in this case. However, it is the Court's belief that joinder of the Government of the Virgin Islands is required in order for a suit against Defendant to stand. Based on this Court's interpretation of the applicable law, a case against Defendant without the involvement of the Government of the Virgin Islands would make Defendant an improper party.

II. Defendant's Federal Rule of Civil Procedure 12(b)(6) Argument – Failure to State a Claim Upon Which Relief can be Granted

The second issue before the Court is whether Plaintiff's Complaint meets the sufficiency standards of Federal Rule of Civil Procedure 8(a)(2).[6] Defendant argues that because Plaintiff has acknowledged that no written contract existed between the parties the Court must conclude that Plaintiff's claim for relief is not plausible. Plaintiff counters that he has plead sufficient facts to maintain a plausible breach of contracts claim.

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[6] Federal Rule of Civil Procedure 8(a)(2) reads: "A pleading that states a claim for relief must contain…a short and plain statement of the claim showing that the pleader is entitled to relief."

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the requirements of Rule 8 are not met, a party may move to dismiss the claim(s) under Federal Rule of Civil Procedure 12(b)(6). In *Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011), the Supreme Court of the Virgin Islands articulated a three-step analysis for courts to use in determining whether a complaint meets Rule 8 sufficiency standards:

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

A. Elements Plaintiff Must Plead to State a Claim for Unjust Enrichment

"Unjust enrichment is an equitable quasi-contract cause of action, imposing liability where there is no enforceable contract between the parties 'but fairness dictates that the plaintiff receive compensation for services provided.'" *Cacciamani and Rover Corp. v. Banco Popular*, S. Ct. Civ. No. 2013–0063, 2014 WL 4262098, at *2 (V.I. Aug. 29, 2014). The elements of unjust enrichment were recently reformulated by the Supreme Court of the Virgin Islands in *Walters v. Walters*, S. Ct. Civ. No. 2010-0040, 2014 WL 1681319, at *5 (V.I. Apr. 28, 2014). In *Walters*, the Supreme Court held that a Plaintiff must prove the following to succeed on an unjust enrichment claim:

> (1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff.

Id. Unjust enrichment is an equitable remedy, thus, such a claim cannot be used when a valid contract concerning the same subject matter in dispute exists between the parties. *Cacciamani and Rover Corp.*, 2014 WL 4262098, at *2.

According to the facts alleged in Plaintiff's Complaint, the parties entered into a verbal contract. Plaintiff then began working on renovating Defendant's facilities based on the parties' verbal contract. Each party drafted a proposed contract, but neither were signed. Plaintiff received a letter from the Presiding Judge telling him to cease and desist from further work. Plaintiff sought payment for the work he had already completed, but was never paid.

B. Plaintiff's Factual Allegations Plausibly Give Rise to an Entitlement of Relief

Plaintiff's assertion that the parties entered into a verbal contract is a conclusion that is not entitled to the assumption of truth. In his Complaint, Plaintiff concedes that the parties never signed a written contract. Plaintiff, however, also alleges that he performed work on Defendant's facilities, yet was never paid for his work. Plaintiff also provided documentation evidencing that the Presiding Judge advised him to discontinue the work he had begun on Defendant's facilities. These are well-pleaded factual allegations. At the end of the Complaint, Plaintiff requests that he be awarded damages because Defendant's failure to pay constitutes a breach of contract and unjust enrichment.

Unjust enrichment is an equitable quasi-contract cause of action. Hence, contrary to Defendant's assertion, Plaintiff does not have to plead facts that indicate that a valid contract existed between the parties. Plaintiff met the Rule 8 sufficiency standards for unjust enrichment when he plead that: (1) he provided services for Defendant, which Defendant did not pay for – Defendant was enriched at the expense of Plaintiff; (2) the Presiding Judge advised him to discontinue his services until further notice – Defendant had knowledge of the benefit; and (3) he expended $21, 016.00 for the services he provided for Defendant – the circumstances are such that in equity Defendant should repay Plaintiff. These well-pleaded factual allegations plausibly give rise to an entitlement of relief. Accepting Plaintiff's facts as true, this Court finds that Plaintiff has plead sufficient facts to maintain his breach of contract and unjust enrichment claims.

III. Defendant's Failure to Prosecute Argument

The final issue before the Court is whether Plaintiff's case should be dismissed for failure to prosecute. Federal Rule of Civil Procedure 41(b) states: "If the plaintiff fails to prosecute or comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." In *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (2010), the Supreme Court of the Virgin Islands held that, because dismissal for failure to prosecute is an extreme sanction, the Superior Court may not dismiss a case for failure to prosecute unless an analysis of six factors strongly weigh in favor of dismissal. These six factors are:

> [T]he extent of the plaintiff's personal responsibility, the prejudice—if any—to the other parties in the litigation, whether the plaintiff has demonstrated a history of dilatoriness, whether the plaintiff or attorney's conduct was willful or in bad faith, the effectiveness of sanctions other than dismissal, and the meritoriousness of the plaintiff's claim.

Id. at 513. This Court will review Defendant's failure to prosecute argument using the *Halliday* factors.

A. Extent of the Party's Personal Responsibility

Dismissal is a drastic sanction that should not be used to punish a party who has not personally contributed to the delinquency against the Court, hence the first factor that this Court must balance focuses on the personal responsibility of the party itself. *See Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 866-68 (3d. Cir. 1984).*[7]

After this matter commenced, all of the judges in the St. Thomas Division recused from the case. The case was then transferred to the St. Croix Division. The matter ultimately did not come before this Court until February 2013. The Plaintiff bears no personal responsibility for the delay in this case.

B. Prejudice to the Adversary

Prejudice may "consist of the extra costs of repeated delays and filing of motions necessitated by the improper behavior on the part of plaintiffs." *Andrews v. Government of the Virgin Islands*, 132 F.R.D. 405, 412 (D.V.I. 1990).

Plaintiff's actions have not resulted in prejudice to the Defendant. Both parties have been active in this matter since the Complaint was filed in 2009. When Defendant filed its initial Motion to Quash, Plaintiff responded to the Motion within one week. Both parties complied with the Court's Order to appear for a status conference in April 2013. At that status conference Plaintiff was given time to secure permanent counsel and was also granted leave to respond to Defendant's Motion to Dismiss out of time. Though it seems Plaintiff was unable to obtain new counsel and filed his Opposition beyond the Court's deadline, Plaintiff was still able to respond to Defendant's Motion, pro se. Defendant has not shown how these actions on the part of Plaintiff have prejudiced him, thus, this *Halliday* factor does not weigh in favor of Defendant.

C. History of Dilatoriness

The record reflects that there has only been one incident of dilatoriness on the part of the Plaintiff in this case. The history of dilatoriness factor is to be evaluated in light of the Plaintiff's behavior throughout the pendency of this action. *Molloy v. Independence Blue Cross*, 56 V.I.

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[7] The *Halliday* factors were adopted from the Third Circuit's *Poulis v. State Farm* case.

155, 191 (V.I. 2012). Plaintiff was given until June 14, 2013 to respond to Defendant's Motion Dismiss. Plaintiff did not file his Opposition until July 5, 2013, and did so pro se. When evaluated in light of Plaintiff's behavior throughout the pendency of this action, this one incident of dilatoriness does not support Defendant's argument for dismissal for failure to prosecute.

D. Whether the Attorney's Conduct was Willful or in Bad Faith

Plaintiff is currently without counsel. This Court has already determined that the delay in this matter cannot be attributed to Plaintiff. As a result, this factor is inapplicable to this case.

E. Alternative Sanctions

Neither dismissal nor an alternative sanction is warranted in this case. The record does not indicate that Plaintiff has failed to prosecute this case. The effectiveness of alternative sanctions factor is also inapplicable to this case.

F. Meritoriousness of the Claim

A review of the pleadings indicates that Plaintiff's claim is meritorious. "A claim, or defense, will be deemed meritorious where the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." *Molloy*, 53 V.I. at 188 (citing *Poulis*, 747 F.2d at 869-70). In his Complaint, Plaintiff alleges that Defendants never paid him for the work he performed on its facilities. If established at trial, Plaintiff's breach of contract and unjust enrichment claims would support recovery.

G. Dismissal on Failure to Prosecute Grounds is Unwarranted in This Case

Defendant does not consider any of the *Halliday* factors in making its failure to prosecute argument to the Court. Defendant merely asserts that Plaintiff's action should be dismissed because Plaintiff has made no attempt to "diligently pursue his cause of action" (see page 9 of Defendant's Reply to Opposition to Motion to Dismiss). To support this assertion, Defendant argues that Plaintiff made no effort to cure its service of process within 120 days and never sought a ruling on the matter from the Court. Plaintiff, however, opposed Defendant's insufficient service of process argument in its Opposition to Defendant's Motion to Quash. Plaintiff was not required to cure service until the Court made a ruling ordering him to do so. The fact that Plaintiff never filed a Motion for Ruling does not demonstrate a history of dilatoriness. In addition, an analysis of the *Halliday* factors indicate that disimissing Plaintiff's case pursuant to Federal Rule of Civil Procedure 41(b) is unwarranted.

CONCLUSION

Though this Court has determined that the Government of the Virgin Islands is a necessary party to this case, such joinder does not necessitate the dismissal of Defendant. Dismissal based on Federal Rule of Civil Procedure 12(b)(6) grounds is also unwarranted because Plaintiff's Complaint contains a plausible claim for relief. Finally, Plaintiff has not demonstrated a history of delinquency necessary for dismissal as a sanction, therefore his case will not be dismissed for failure to prosecute. Based on the foregoing, the Court will deny Defendant's Motion to Dismiss. The Court will issue an order consistent with this Memorandum Opinion.

Dated: 10-29-14

HAROLD W. L. WILLOCKS
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court

By: Court Clerk Sup

Dated: 11/3/14

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

WAYNE D. CALLWOOD, PE, **PLAINTIFF,** **v.** **SUPERIOR COURT OF THE VIRGIN ISLANDS,** **DEFENDANT.**	**ST-09-CV-499** **ACTION FOR BREACH OF CONTRACT**

ORDER

THIS MATTER is before the Court on Defendant Superior Court of the Virgin Islands' (hereinafter "Defendant") Motion to Dismiss. In accordance with the Memorandum Opinion of even date, it is hereby:

ORDERED that Defendant's Motion to Dismiss is **DENIED**; and it is further:

ORDERED that the Government of the Virgin Islands be joined as a party to this case; and it is further:

ORDERED that within thirty (30) days of the entry of this Order the parties are to submit to the Court a Stipulated Scheduling Order. Failure to submit a stipulated scheduling order will result in a show cause hearing and possible sanctions.

DONE and so ORDERED this 29 day of October, 2014.

Harold W.L. Willocks
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court

By:
Court Clerk Supervisor

Dated: 11/5/14