

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

THE ESTATE OF RELEATHA BURNETT,	)	
	)	
Plaintiff,	)	SX-12-CV-139
	)	
v.	)	ACTION FOR DAMAGES
	)	
KAZI FOODS OF THE VIRGIN ISLANDS,	)	JURY TRIAL DEMANDED
d/b/a KENTUCKY FRIED CHICKEN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff Estate of Releatha Burnett (Burnett)'s Motion for Leave to File Out of Time (Motion), filed August 9, 2016. Although Defendant has not, as of the date of entry of this Order, filed any response, the Court will nonetheless deny Plaintiff's Motion as Plaintiff has not demonstrated that its failure to submit its Second Amended Complaint within the time provided by Court Order and its failure to timely move for extension of time were the result of excusable neglect. By Memorandum Opinion and Order entered May 25, 2016, the Court deferred ruling on Defendant's fully briefed Motion to Dismiss with regard to Counts II, III, IV, V and VI of Plaintiff's Amended Complaint. That Motion to Dismiss will now be granted.

The Order entered May 25, 2016 granted Defendant's Motion to Dismiss with respect to Counts I and VII of Plaintiff's Amended Complaint and, after explaining the significant legal deficiencies in each of the remaining counts of Plaintiff's Amended Complaint, the Court, *sua sponte*, granted Plaintiff leave to amend those remaining counts of her Amended Complaint to be filed and served within fourteen days.¹

Superior Court Rule 10(a)(2) provides that "The court for cause shown may at any time in its discretion... (2) On motion, permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect." Thus, because the specified time period for Plaintiff to file and serve her Amended Complaint has expired, the Court will only exercise its

¹ The factual and procedural background of this matter is detailed in the Memorandum Opinion and Order entered May 25, 2016.

discretion to extend the deadline upon finding that Plaintiff's failure to comply was the result of excusable neglect.

The Supreme Court of the Virgin Islands has established that in this jurisdiction "excusable neglect" is essentially synonymous with "good cause."

The determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances... including... the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether or not it was within the reasonable control of the movant, and whether the movant acted in good faith.

Fuller v. Browne, 59 V.I. 948, 955 (V.I. 2013) (citation and internal quotations omitted).

The general preference "is to decide cases on their merits" and accordingly, "any doubts should be resolved in favor this preference." *Id.*² However, trial courts have significant discretion in ruling on motions to extend deadlines pursuant to the language of Rule 10. *See* Super. Ct. R. 10(a)(2).

Evaluating the factors articulated in *Fuller*, the Court finds that Plaintiff's proffer is insufficient to permit a finding that its failure to comply with the June 8, 2016 deadline for submission of its Second Amended Complaint was the result of excusable neglect. In its Motion, Plaintiff does not even attempt to demonstrate that its failure to act was the result of excusable neglect. In its entirety, Plaintiff's explanation for the untimeliness of the submission consists of the following:

Undersigned Counsel is in the process of transitioning from private practice and recently met with counsel to substitute in this matter. While there was a delay in securing alternate counsel, the substitution will take at least thirty to forty-five days as alternate counsel is out of the territory due to medical. In the interim, Undersigned Counsel will remain in this matter until substitution is effected. Under the circumstance, The Estate is seeking relief to file its response out of time... The parties in this matter will not be prejudiced by the granting of this request which would allow the matter to proceed on its merits.

In determining the extent to which Defendant would be prejudiced by granting Plaintiff's Motion, the Court first notes that Defendant has already once suffered delay in this case as a result

² *Fuller* addressed a matter arising "under Super. Ct. R. 322.5(b)(2) which authorizes the Appellate Division to 'consider a motion to set aside a dismissal order and to reopen the matter that is dismissed... upon a showing of good cause or excusable neglect.'" However, the definition of "excusable neglect" outlined therein is equally applicable to the present Rule 10(a)(2) analysis.

of Plaintiff's failure not only to comply with filing deadlines, but to request extension of a deadline prior to its expiration. Plaintiff commenced this action by filing its Verified Complaint on April 10, 2012. Following the death of Plaintiff Releatha Burnett and the appointment of a personal representative of Plaintiff's estate, an Amended Complaint was filed April 28, 2014. Defendant subsequently filed its Motion to Dismiss and Incorporated Memorandum of Law on May 22, 2014, and on July 16, 2014, more than a month after the time for filing a response had passed, Plaintiff filed its Motion for Extension of Time to Reply to Defendant's Motion to Dismiss. And although the Court accommodated Plaintiff in granting the July 16, 2014 Motion, Plaintiff now comes before the Court more than two months after the expiration of the June 8, 2016 Court ordered deadline for amending its Amended Complaint with no explanation for its failure to request an extension of the deadline in a timely fashion.

Additionally, in the May 25, 2016 Order, the Court found that "each of the seven counts of Plaintiff's Amended Complaint [was] legally deficient in some respect," and as Defendant points out in its Notice to the Court of Plaintiff's Failure to File and Serve Amended Pleading, filed July 18, 2016, as Plaintiff never sought leave to further amend its complaint, the Amended Complaint was "actually subject to dismissal save for the Court's *sua sponte* action." Thus, viewed in light of Plaintiff's history of dilatory behavior, and in light of Plaintiff's apparent disregard for the Court's repeated attempts to provide Plaintiff with an opportunity to prosecute its claims on the merits despite its failure to adhere to relevant deadlines, any further delay in these four year old proceedings would be unduly prejudicial to Defendant. Similarly, for these same reasons, granting Plaintiff's Motion in this second instance would not only negatively impact judicial proceedings in this particular matter, but would also potentially undermine the integrity of judicial proceedings more generally by tacitly permitting, if not actively fostering, a culture of casual disregard for deadlines established by Order of the Court.

Finally, while Plaintiff's proffered reason for delay—Plaintiff's counsel's transition from private practice—may well be sufficient to justify or excuse its inability to draft, file and serve its Second Amended Complaint within the time period established by Court Order, critically Plaintiff ~~has offered no reason or excuse to explain its failure to move for an extension until two months after the deadline had expired.~~ While there is no indication that Plaintiff has acted in bad faith, there is also no indication that Plaintiff's failure to timely request extension of the deadline to file

its Second Amended Complaint resulted from anything other than Plaintiff's own inadvertence and inattention. Even if Plaintiff's inability to submit its Second Amended Complaint before expiration of the deadline was outside of its direct control, its failure to timely move for extension of the deadline was not.

Thus, for the reasons discussed above, the Court concludes that both Plaintiff's failure to submit its Second Amended Complaint and in particular Plaintiff's failure to timely move for extension of the deadline were not the result of excusable neglect. Therefore, Plaintiff's Motion must be denied.³

Consequently, the Court turns to the remaining counts of Plaintiff's Amended Complaint—Counts II, III, IV, V, and VI—with respect to which ruling on Defendant's Motion to Dismiss was deferred in the Memorandum Opinion and Order entered May, 25, 2016. For the reasons set forth in that Opinion, which the Court adopts by reference herein, the remaining counts of Plaintiff's Amended Complaint will be dismissed.

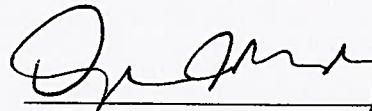
³ Even if the Court were to grant Plaintiff's Motion, the allegations contained in Plaintiff's Second Amended Complaint are still insufficient to survive a motion to dismiss which would surely follow. Although the Court's May 25, 2016 Order dismissed Counts I (Discrimination in Violation of 10 V.I.C. § 64) and VII (Punitive Damages) of Plaintiff's Amended Complaint, in drafting her Second Amended Complaint Plaintiff apparently elected instead to voluntarily dismiss former Count II (Discrimination in Violation of the ADA) and to ignore the Court's Order dismissing former Count VII which now appears, unchanged, as Count V of the Second Amended Complaint. Counts III and IV of the Second Amended Complaint, reiterate without revision, former Counts V and VI of the Amended Complaint. In fact, aside from the omission of former Count II and the renumbering of the remaining Counts the only difference between the Amended Complaint and the Second Amended Complaint is the addition of paragraphs 17, 18, and 19 in the context of Count I (formerly Count III) alleging breach of contract. Paragraph 17 states only that "Plaintiff was a permanent employee of Defendant and had a vested interest in her employment," which has no legal effect on the sufficiency of Plaintiff's allegations. Paragraphs 18 and 19 allege that "Plaintiff's employment was governed pursuant to the terms of and conditions set forth as rules and regulations contained in Defendant's Employee Manual... and... in addition to the express contractual agreement between the Parties, the Parties had an implied contract of employment which Plaintiff relied on and had a reasonable expectation to retire with the company after serving the required amount of years." However, to the extent that these allegations constitute anything more than unadorned legal conclusions, they are expressly refuted by the clear language of the employee handbook itself—the authenticity of which Plaintiff does not challenge—which states unequivocally that "the handbook is not intended to be a contract (express or implied), nor is it intended to create any legally enforceable obligations on the part of the company or its employees." See Defendant's Reply in Support of Its Motion to Dismiss, at 5. Thus, for the same reasons set forth in the Court's Memorandum Opinion and Order entered May 25, 2016, Plaintiff's Second Amended Complaint fails to state a claim upon which relief may be granted, and therefore granting Plaintiff's Motion for Leave to File Out of Time would, in effect, represent nothing more than an exercise in futility.

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Plaintiff's Motion for Leave to File Out of Time is DENIED. It is further

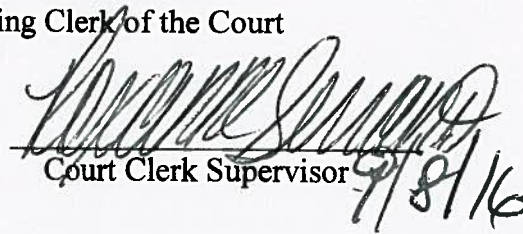
ORDERED that Defendant's Motion to Dismiss Counts II, III, IV, V, and VI of Plaintiff Amended Complaint is GRANTED, and Plaintiff's Amended Complaint is DISMISSED with prejudice.

Dated: September 8, 2016.


DOUGLAS A. BRADY, JUDGE

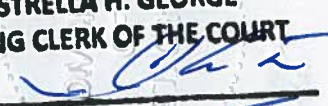
ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor 9/8/16

CERTIFIED A TRUE COPY

DATE: Sept. 8, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: 
COURT CLERK

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:)
) MISC NO. DAB 011/2018
ORDER DESIGNATING CERTAIN)
OPINIONS FOR PUBLICATION.)

**TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw**

ORDER

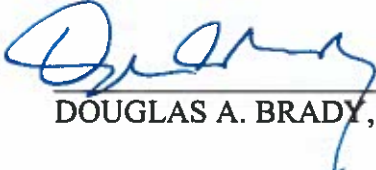
THE PREMISES considered, it is hereby

ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyoute v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned matters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.

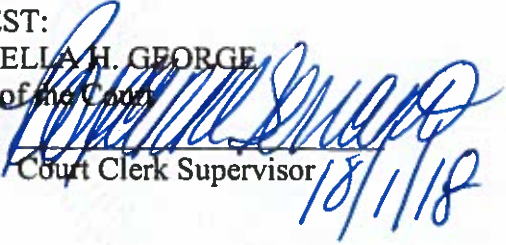

DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

By:


Court Clerk Supervisor 10/1/18