

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

CARAVELLE LAND 1, LLC,

Plaintiff,

v.

USVI MANAGEMENT CORP.,

Defendant.

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CIVIL NO. SX-07-CV-598

APPEARANCES:

KEVIN A. RAMES, ESQ.
K.A. Rames, P.C.
Christiansted, St. Croix, VI
Attorney for Plaintiff

ANDREW C. SIMPSON, ESQ.
Law Offices of Andrew Simpson
Christiansted, St. Croix, VI
Attorney for Defendant

MEMORANDUM OPINION

MOLLOY, Judge

THIS MATTER is before the Court on Defendant's Motion and Memorandum of Law in Support of Motion to Dismiss for Failure to Prosecute filed on July 17, 2012. Plaintiff filed an opposition to the motion on August 7, 2012. For the reasons stated below, the Court will deny Defendant's motion.

I. PROCEDURAL BACKGROUND

Caravelle Land 1, LLC ("Plaintiff") is the owner of a piece of property adjacent to the waterfront in downtown Christiansted. USVI Management Corp. ("Defendant") is Plaintiff's tenant at that property. Defendant operates a hotel on the premises and sublets portions of the premises to several retail establishments and a restaurant. On December 21, 2007, Plaintiff filed a Complaint seeking to enjoin Defendant and its subleasees from operating, or permitting public access to the property, until certain allegedly dangerous conditions were

repaired and properly maintained. Plaintiff also filed a separate motion for a Temporary Restraining Order that would have immediately shut down the operations of Defendant and its subleasees. On April 29, 2008, this Court denied Plaintiff's Motion for a Temporary Restraining Order after analyzing the likelihood that Plaintiff would succeed on the merits, the extent to which Plaintiff would suffer irreparable harm without injunctive relief, the extent to which Defendant would suffer irreparable harm, and the public interest.

On February 25, 2008, LPP Mortgage Inc., holder of a leasehold mortgage on the subject property, sought to intervene as a defendant whose interests might be impaired by the litigation. Defendant answered the Complaint on June 4, 2008. Plaintiff sought to amend the complaint on June 5, 2008. On October 27, 2008, the Court approved Plaintiff's Stipulation for Substitution of Counsel. On March 13, 2011, this Court denied LPP Mortgage Inc.'s motion to intervene and granted Plaintiff's motion to amend the complaint. Defendant answered the amended complaint on April 6, 2011. The record does not reflect any action by Plaintiff to move this matter forward since substituting counsel in October 2008. The record contains no notices related to discovery such as filing of initial disclosures or scheduling of depositions.

On July 17, 2012, Defendant filed its Motion and Memorandum of Law in Support of Motion to Dismiss for Failure to Prosecute. The basis for that motion was that Plaintiff had taken no steps to advance the case in the four years since substituting counsel and that the Plaintiff's failings, when viewed in light of the *Halliday / Poulis* factors, warranted dismissal. On August 7, 2012, Plaintiff took its first action of record in almost four years by filing its Opposition to Defendant's Motion to Dismiss the Complaint with Prejudice for Failure to

Prosecute.

II. LEGAL STANDARD

Rule 41(b) of the Federal Rules of Civil Procedure authorizes a court to dismiss an action "if the plaintiff fails to prosecute or to comply with these rules or a court order." Fed. R. Civ. P. 41(b). When considering a motion to dismiss for failure to prosecute, the Court must consider the following factors:

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

Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984); *see also Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511 (V.I. 2010) (opining that "the Superior Court may not dismiss an action for failure to prosecute unless these six factors strongly weigh in favor of dismissal as a sanction.")

It is not necessary that all factors weigh toward dismissal, however, "the court must explicitly consider all six factors, balance them, and make express findings." *Molloy v. Independence Blue Cross*, 56 V.I. 155, 186 (2012). Dismissal for failure to prosecute is a serious sanction, which is reserved for extreme cases. *Shelley v. Patrick*, 427 Fed.Appx. 66, 69 (3d Cir. 2011).

III. DISCUSSION

A. The Extent of the Party's Personal Responsibility

Plaintiff brought its complaint with great urgency in December 2007. Plaintiff alleged that, absent immediate injunctive relief, it would suffer irreparable harm and that a temporary

restraining order was needed to protect the public from unsafe conditions on the property. After the Court denied Plaintiff's request for a temporary restraining order, Plaintiff filed an amended complaint adding causes of action for breach of contract and ejectment for which Plaintiff sought immediate possession of the property. Despite asking the Court for immediate and extraordinary relief, Plaintiff has failed to take steps to move this matter forward for over six years.

Defendant argues that Plaintiff is a sophisticated litigant and bears personal responsibility for failing to move this case forward. In Defendant's motion to dismiss, it notes that Savvas Savopoulos, Plaintiff's principal, is a lawyer on inactive status with the Maryland State Bar Association and also the president of American Iron Works. Def.'s Mot. and Mem. of Law in Supp. of Mot. to Dismiss for Failure to Prosecute, 4. Given Savopolos's business acumen and legal training, Defendant argues that Plaintiff should be held to a higher standard than the typical plaintiff in "personal responsibility" analysis because it cannot claim ignorance of "the basic precepts of legal practice." *Id.* (citing *Andrews v. Government of the Virgin Islands*, 132 F.R.D. 405, 412 (D.V.I. 1990)).

In Plaintiff's opposition, it argues that the delay in prosecution is the result of inaction by both parties. Pl.'s Opp'n to Def.'s Mot. to Dismiss the Compl. With Prejudice for Failure to Prosecute, 3. Both parties failed to satisfy their Federal Rule of Civil Procedure 26(f) obligations. *Id.* Plaintiff also points out that it has not violated any of the Court's orders or deadlines. *Id.* Plaintiff argues that because both parties have failed to act, this factor weighs against dismissal.

By Plaintiff's own admission, it ignored the most basic of discovery requirements for over six years despite believing "the Defendant has put the public health and safety and the health

and safety of its hotel guests at risk, and has likewise put the legitimate, investment-backed expectations of the Plaintiff at risk.” *Id.* at 5. In its opposition to the motion to dismiss, Plaintiff noted that “[t]his matter appears to ‘have fallen between the cracks’, a situation that can be easily remedied.” *Id.* at 4. Plaintiff further indicated “its willingness to set the required schedules and to undertake the necessary discovery.” *Id.* Plaintiff, however, has taken no action in the two years that have passed since filing the opposition. No proposed scheduling order has been filed, no depositions have been noticed, and there is no indication that Plaintiff intends to pursue further action.

Plaintiff is a sophisticated litigant familiar with the legal system and is surely aware that the filing of a lawsuit necessitates discovery.¹ Sophisticated litigants are presumed to understand their role in moving forward litigation that they initiate. *See Andrews v. Government of the Virgin Islands*, 132 F.R.D. 405, 412 (D.V.I. 1990); *See also Quiroli v. Lieber*, 1993 WL 497966, *3 (E.D. Pa. Dec. 1, 1993). Plaintiff has failed to move this matter past the pleadings even after assuring the Court that it was willing to undertake the necessary discovery and set the required schedules. This Court finds that the Plaintiff bears personal responsibility for the delays in this matter. Accordingly, this factor weighs in favor of dismissal.

B. Prejudice to the Adversary

Prejudice to the adversary “is generally demonstrated by either increased expense to the opposing party arising from the extra costs associated with filings responding to dilatory

¹ Plaintiff’s admission that “Plaintiff has a substantial caseload with older cases taking priority over recently filed ones” provides strong support to Defendant’s assertion that Plaintiff is a sophisticated litigant that cannot claim unfamiliarity with basic precepts of the practice of law. *See* Pl.’s Opp’n to Def.’s Mot. to Dismiss the Compl. With Prejudice for Failure to Prosecute, 4.

behavior or increased difficulty in the opposing parties' ability to present or defend their claim(s) due to improper behavior." *Molloy*, 56 V.I. at 189. Examples of prejudice that hamper a party's ability to defend their claim include, "the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive or possibly irremediable burdens or costs imposed on the opposing party." *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984). A finding of prejudice to the adversary bears "substantial weight in support of a dismissal or default judgment." *Id.*

In its motion, the Defendant contends that it has been egregiously prejudiced by Plaintiff's failure to diligently proceed with this action. For more than five years, the cloud of uncertainty surrounding an action for eviction has hampered its efforts to secure financing and effectively manage its business. Defendant also argues that Plaintiff's delay has resulted in a loss of evidence as to the condition of the property at the time the suit was filed and that it would be a near impossibility to document those conditions at this point in time.

Plaintiff argues, in its opposition, merely that there is no demonstrable prejudice and that Defendant does not claim any evidence has been lost. However, the Defendant did provide specific examples as to the type of evidence lost and the excessive burdens that had been imposed on the Defendant as a result of delay. It is clear that Plaintiff's failure to prosecute has prejudiced Defendant. This factor weighs in favor of dismissal.

C. History of Dilatoriness

The third *Poulis* factor requires the Court to consider whether the Plaintiff has engaged in a history of dilatoriness such that "litigation has been characterized by a consistent delay." *Poulis*, 747 F.2d at 868. Conduct that merely occurs once or twice does

not demonstrate a history of dilatoriness. *Briscoe v. Klaus*, 538 F.3d 252, 261 (3d Cir. 2008). Rather, it is “[e]xtensive or repeated delay or delinquency [that] constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders.” *Adams v. Trs. Of N.J. Brewery Employees’ Pension Trust Fund*, 29 F.3d 863, 874.

Plaintiff has never violated a court order related to this matter. The record does not indicate that Plaintiff ignored attempts by Defendant to pursue discovery. Instead, the record shows extensive periods of inaction after the Plaintiff failed in its bid for a temporary restraining order. It would appear that the sense of urgency that precipitated the filing of a lawsuit alleging dangerous and unsafe conditions that demanded repair evaporated entirely. Plaintiff failed to pursue discovery even after assuring the Court that it would engage in the necessary discovery and set the required schedules. This litigation has been characterized by extensive periods of delay and inaction. The Court finds that this factor also weighs in favor of dismissal.

D. Whether the Attorney’s Conduct Was Willful or in Bad Faith

In evaluating whether to dismiss an action for failure to prosecute, the Court must examine whether Plaintiff’s counsel has engaged in willful or flagrantly bad faith behavior. *Poulis*, 747 F.2d at 868. “Willfulness involves intentional or self-serving behavior.” *Adams*, 29 F.3d at 875. The Court must find specific evidence on the record that justifies a determination of willfulness or bad faith. *Molloy*, 56 V.I. at 192. However, when there is no evidence of willfulness on the record, the Court “must presume that [a party’s] failure to respond to the prompting order was not willful and that this factor also does not favor dismissal.” *Id.* at 174.

Defendant notes that the timing of ejectment effort suspiciously coincided with a period of soaring property values as investors bought up large tracts of Christiansted and posits that the length of Defendant's lease was an obstacle to Plaintiff selling the property at a significant profit. Def.'s Mot. and Mem. of Law in Supp. of Mot. to Dismiss for Failure to Prosecute, 6. Defendant also notes that after initial efforts to obtain a Temporary Restraining Order failed, Plaintiff lost all sense of urgency regarding conditions which "present clear and present health, safety and fire dangers which endanger the guests, invitees and visitors to the Property." *Id.* (quoting Complaint at ¶9). Defendant argues that the inconsistency between the exigencies with which the claim was filed and the inertia in prosecuting the matter is evidence of bad faith.

Plaintiff claims that it has a substantial caseload and has given priority to older cases at the expense of more recently filed cases. Plaintiff argues that the inertia in this case is not evidence of willfulness or bad faith, but rather, it is simply a product of the matter having "fallen between the cracks." Pl.'s Opp'n to Def.'s Mot. to Dismiss the Compl. With Prejudice for Failure to Prosecute, 4. Plaintiff proposed to remedy its failings by setting the required schedules and initiating discovery, but in the two years that have passed since filing its opposition Plaintiff has done nothing to move this matter past the pleadings.

The record indicates that Plaintiff alleged that the dangerous conditions on the property warranted shutting down Defendant's hotel and its subleasees business operations immediately. Rather than prosecute the case to address dangerous conditions, Plaintiff chose to give priority to other portions of its "substantial caseload" for an extensive period of time. When faced with dismissal, Plaintiff assured the Court that it was ready to remedy its schedule and discovery failings. Plaintiff then failed to take any concrete action. However, mere delay is not

evidence of willfulness or bad faith. *Adams*, 29 F.3d at 876. Absent evidence on the record that Plaintiff has repeatedly ignored the Court's orders or flouted the Court's authority, delay is insufficient for a finding of willfulness or bad faith. *Id.* The record does not indicate such behavior. Consequently, this factor weighs against dismissal.

E. Effectiveness of Alternative Sanctions

It is clear to the Court that, to date, Plaintiff has not taken much interest in moving this case forward. However, because it is a sanction of last resort, courts must look to effective alternative methods of sanctioning before dismissal for failure to prosecute. *Poulis*, 747 F.2d at 869. "The court should consider whether a lesser sanction would better serve the interests of justice." *Guyer v. Beard*, 907 F.2d 1424, 1429-30 (3d Cir. 1990).

In its opposition to the motion to dismiss, Plaintiff indicated a willingness to finally undertake discovery and set required schedules. Defendant argues that there is no appropriate sanction that can remedy the loss of evidence as to the condition of the property at the time the complaint was filed. However, the condition of the property at the time the complaint was filed is irrelevant to the claims for breach of contract (addressing an alleged failure to purchase insurance required by the lease contract) and ejectment (alleging default related to breach of contract). If it becomes an issue as to those claims, there are other sources of information that can be relied on such as repair orders, fire inspection reports, etc. Subsequent fixes and reports of the current condition of the property could also have mooted the claim for injunctive relief.

There has never been a scheduling order and Plaintiff has never violated a court order in this case. There is no evidence that alternative sanctions will be ineffective going forward.

The Court will require the parties to submit a stipulated scheduling order. Upon approval of the Court, the Order will set strict deadlines that must be observed by both parties. Failure to comply with this, or any, Order will be met with sanctions. Plaintiff is warned that further delays will result in dismissal and an award of costs and fees. In short, because the Court finds that alternative sanctions can still be effective in this case, this factor weighs against dismissal.

F. Meritoriousness of the Claim

The sixth and final factor requires the Court to consider the meritoriousness of Plaintiffs' claim. "A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." *Poulis*, 747 F.2d at 869-70. However, "[w]here a plaintiff makes out a *prima facie* case, but the defendant raises a *prima facie* defense, the [sixth] factor may not weigh in favor of the plaintiff." *Adams*, 29 F.3d at 876-77.

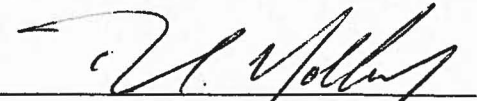
Here, taking the amended complaint at face value, the allegations of the pleading would, if established at trial, support a right to legal remedy. However, Defendant raises a *prima facie* defense in its answer to the amended complaint. Consequently, this factor weighs neutrally.

IV. CONCLUSION

After a careful consideration and balancing of the *Poulis* factors, the Court concludes that three factors weigh in favor of dismissal, two factors weigh against dismissal, and one factor weighs neutrally. Though this case has sat idle for most of the past six years, the Court does not find that this matter warrants such a drastic sanction as dismissal. However, the

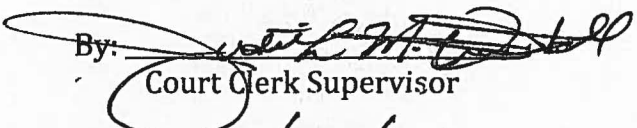
Court reminds Plaintiff that it has the burden to move this case forward if it seeks to preserve its claims. Accordingly, for the reasons stated above, the Court will deny Defendant's motion in an Order of even date.

Dated: July 29, 2014



ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 7/30/14