

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

**DR. TYLUR ARVIDSON and
DR. TYGUE ARVIDSON,**

Plaintiffs,

V.

DR. WILLIAM L. BUCHAR,

Defendant.

CASE NO. ST-16-CV-410

MEMORANDUM OPINION

Pending before the Court is Defendant's September 22, 2016, Second Motion to Extend Time to Answer¹, Plaintiffs' September 29, 2016, Motion for Entry of Default and Order Deeming Complaint Admitted², Defendant's October 4, 2016, Revised Motion to Extend Time to Answer³, and Plaintiffs' October 11, 2016, Motion to Strike Defendant's Answer, Affirmative Defenses, and Counterclaim.⁴ For the following reasons, Defendant's September 22, 2016, Motion will be denied as moot, Plaintiffs' September 29, 2016, Motion will be denied, Defendant's October 4, 2016, Motion will be granted, and Plaintiffs' October 11, 2016, Motion will be denied.

FACTUAL & PROCEDURAL HISTORY

Plaintiffs filed a Verified Complaint on July 12, 2016, alleging breach of fiduciary obligations by Defendant, as manager of VI Chiropractic, LLC, to Plaintiffs, as members of the Company. On September 19, 2016, Defendant moved for an extension of time to answer the

¹ Plaintiffs responded on September 26, 2016.

² Defendant responded on October 4, 2016, to which Plaintiffs replied on October 7, 2016.

³ Plaintiffs responded on October 6, 2016.

⁴ Defendant responded on October 19, 2016.

Complaint, which the Court denied without prejudice as inadequate on September 27, 2016.⁵ The Court explained that, although no proof of service of the Summons and Verified Complaint on Defendant had been filed with the Court, Defendant's Motion was not accompanied by a proposed Order and failed to indicate any basis for the request. Notably, Defendant filed a Second Motion to Extend Time to Answer, to which Plaintiffs responded before the Court's September 27, 2016, Order was entered. After receiving the Court's Order, Defendant then filed his third motion, the October 4, 2016, Revised Motion to Extend Time to Answer. Additionally, Plaintiffs filed a Motion for Entry of Default and Order Deeming the Complaint Admitted on September 29, 2016, before Defendant filed his October 4, 2016, Motion. Plaintiffs' then moved on October 11, 2016, for the Court to Strike Defendant's Answer, Affirmative Defenses, and Counterclaims alleging that the responsive pleading was untimely and that the case was in default.

STANDARDS

I. Motion for Enlargement of Time.

According to Super. Ct. R. 10(a)(2), "[t]he court for cause shown may at any time in its discretion . . . order the period enlarged if application . . . is made before the expiration of the period [or] . . . [o]n 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."⁶ "Excusable neglect is determined by all attendant circumstances that demonstrate a genuine need for an extension of time after the initial specified

⁵ Although the Order was signed by the Superior Court Judge on September 23, 2016, the Clerk did not enter the Order until September 27, 2016. See V.I.S.Ct.R. 5(a)(9) ("A judgment or order is entered within the meaning of this Rule when it is entered in the docket in compliance with Superior Court Rule 49.").

⁶ SUPER. CT. R. 10(a)(2); see *Charles v. CBI Acquisitions, LLC*, 2016 V.I. LEXIS 62, *4-5 (V.I. Super. Ct., May 9, 2016).

period.”⁷ In making a finding regarding excusable neglect, the Supreme Court of the Virgin Islands has found that:

[the determination is] an equitable one, where the [C]ourt should take into account all relevant circumstances surrounding the omission 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 it was within the reasonable control of the movant, and whether the movant acted in good faith.⁸

Further, if a party fails to establish excusable neglect the Court is permitted to rule on a motion without a response in opposition or a reply.⁹

II. Motion for Entry of Default.

Under Superior Court Rule 47, the clerk shall enter default “[w]hen a party against whom affirmative relief is sought has failed to appear, plead or otherwise defend”¹⁰ Further, “[a]lthough the entry of default in the Superior Court is governed exclusively by Superior Court Rule 47, and not Federal Rule of Civil Procedure 55(a), because these rules are nearly identical we may look to federal decisions interpreting Rule 55(a) for persuasive authority.”¹¹

ANALYSIS

I. Motion for Extension of Time to Answer

The Court will consider Defendant’s October 4, 2016, Revised Motion to Extend Time to Answer first, since Defendant did not receive the Court’s September 27, 2016, Order, before filing the September 22, 2016, Motion, but the Court notes it had not yet received Defendant’s September

⁷ *Barshinger v. Legislature of the V.I. of the United States*, 2014 V.I. LEXIS 99, *7 (V.I. Super. Ct., Nov. 10, 2014) (citation omitted).

⁸ *Fuller v. Browne*, 59 V.I. 948, 954 (V.I. 2013) (internal quotation marks omitted) (citations omitted).

⁹ LRCi 7.1(e) (3), made applicable as a rule of last resort through the operation of SUPER. CT. R. 7 (“Nothing herein shall prohibit the Court from ruling without a response or reply when deemed appropriate”).

¹⁰ SUPER. CT. R. 47; *see also Appleton v. Harrigan*, 61 V.I. 262, 269 (V.I. 2014).

¹¹ *See Appleton*, 61 V.I. at 269 n.8, compare SUPER. CT. R. 47 with FED. R. CIV. P. 55(c).

22, 2016, Motion when issuing its September 27, 2016, Order.¹² Although the Court recognizes Plaintiffs filed their Motion for Entry of Default and Order Deeming Complaint Admitted on September 29, 2016, before Defendant's October 4, 2016, Revised Motion, the Court believes the result will be the same regardless of in which order it considers the motions. Further, "as a matter of law, trial judges have the inherent power 'to control the disposition of the causes on [the court's] docket with economy of time and effort for itself, for counsel, and for litigants' . . . [and therefore,] legally, the Superior Court c[an] consider motions in whichever order it cho[oses]."¹³

Defendant seeks an extension of time to answer the July 12, 2016, Complaint under Super. Ct. R. 10, from September 19, 2016, until October 5, 2016. Notably, Defendant simultaneously filed his answer, affirmative defenses, and counterclaims against Plaintiffs on October 4. Both parties agree that on August 19, 2016, counsel for Defendant signed a waiver of service on behalf of Defendant, which indicated that Defendant had until September 19, 2016, to respond to the Complaint. On September 19, 2016, Defendant moved for an extension of time to answer the Complaint in a one sentence motion, which the Court denied without prejudice as inadequate, giving Defendant the opportunity to file an amended motion. Although the September 19, 2016, motion was filed before the expiration of the period, since the current motion was filed after the deadline the Court must consider whether the delay was the result of excusable neglect.

According to Defendant, Plaintiffs were on notice of Defendant's need for an extension of time to answer the Complaint as early as September 14, 2016, and Defendant further confirmed

¹² Although the parties refer to the Court's Order by both the date it was signed, September 23, 2016, and the date it was entered, September 27, 2016, the Court will refer to the Order by the date it was entered.

¹³ *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511, 527 (V.I. 2015) (Gomez, J., dissenting in part) (quoting *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005) (citation omitted)).

his intention to answer by filing his motion for extension of time on September 19, 2016.¹⁴ Defendant alleges the parties have been working towards a settlement since June 17, 2016, with the most recent counteroffer due from Defendant on September 30, 2016, in hopes of reaching a settlement that would result in a joint motion to dismiss. Additionally, Defendant's counsel alleges that he needed additional time to contact his client, a resident of Illinois, to be able to raise all necessary affirmative defenses and counterclaims. Further, Defendant points to challenges in calculating damages for his counterclaim, which required insurance and patient reimbursement data and unavailable bookkeeping from June and July, as well as complicated issues regarding the rights of the LLC involved in the action, including whether the Company could be dissolved.

Plaintiffs assert that Defendant's Revised Motion for Extension of Time is in fact a motion for reconsideration of the Court's September 27, 2016, Order. Plaintiffs highlight the fact that Defendant's October 4 Revised Motion merely repeats the same seven paragraphs of Defendant's September 22 Second Motion, with an additional six paragraphs. The Court disagrees and finds Defendant's motion to be proper because the Court did not consider Defendant's September 22, motion when it issued its September 27, 2016, Order, and Super. Ct. R. 10 permits motions for enlargement of time after the expiration of a period.

Plaintiffs next argue that Virgin Islands law prohibits an extension of time relying on *Martinez v. Colombian Emeralds, Inc.*¹⁵ In *Martinez* the Court found that "[t]he trial court was within its discretion to deny the motion for extension without prejudice due to the absence of the

¹⁴ Without providing a copy of the communication, Defendant's counsel alleges that he sent an email on September 14, 2016, regarding the active efforts made by him to Answer Plaintiffs' Complaint and the settlement offer, and contacted Plaintiff's counsel again on September 19, 2016, when he realized he needed an extension. Allegedly, Plaintiff's counsel responded and did not object to the need for an extension. Def.'s Oct. 4, 2016, Revised Motion to Extend Time to Answer, at 3.

¹⁵ 51 V.I. 174 (V.I. 2009).

required showing of excusable neglect.”¹⁶ Some of the circumstances in *Martinez* were similar to this case. For example, defendant’s initial motion for extension of time in *Martinez* was also denied without prejudice. But, unlike this case, the defendant in *Martinez* then proceeded to file a pre-answer motion to dismiss without first filing another motion for leave of court with the requisite showing of excusable neglect.¹⁷ Further, Plaintiffs believe that “a motion for relief under Rule 55(c) [setting aside a default or a default judgment], is required when a defendant has failed to answer within the required time period[,] even when a formal entry of default has not been made by the court.”¹⁸ However, this was not a holding in *Martinez*, but rather was dicta mentioned in a footnote¹⁹, and the suggested approach directly contradicts the Court’s discretion under Super. Ct. R. 10.²⁰

Further, Plaintiffs argue Defendant’s failure to timely respond to the Complaint was purposeful and not the result of excusable neglect. Plaintiffs allege that the Complaint was filed because the settlement negotiations were unsuccessful and that, contrary to Defendant’s assertions,

¹⁶ *Id.* at 190 (citation omitted) (“A restrictive interpretation of the time limits is justified when, as in this case, a defendant agrees to a stipulated due date for pleading but ignores that date, and after the plaintiff moves for entry of default, the defendant files an untimely motion for extension of time to plead without showing excusable neglect.” *Id.* at 190, n.11)

¹⁷ *Id.* (“At that posture of the case, absent the granting of a proper motion by CEI to plead out of time filed with the requisite showing of excusable neglect, no further pleading was permitted by CEI, and, consequently, the filing of a pre-answer motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) was not permitted.”).

¹⁸ *Id.* at 190, n.9 (citations omitted).

¹⁹ See *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 418 (V.I. 2016) (“And while this Court has cited to *Daubert* in more recent cases for other propositions of law, it has never held that *Daubert* applies in Virgin Islands courts to the exclusion of other approaches. See *Bryan v. Fawkes*, 61 V.I. 201, 224 n.15 (V.I. 2014) (“That this Court acknowledged *Chevron*’s existence by citing to it in an opinion ... is certainly not evidence that this Court intended to extend *Chevron* to the Virgin Islands.”); *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 591 n.10 (V.I. 2014) (rejecting claim that this Court adopted Restatement (Third) of Property: Servitudes in a prior case simply by acknowledging its existence); accord *Walters v. Walters*, 60 V.I. 768, 777 n.11 (V.I. 2014) (“This citation to the Restatement [in a prior case] was not necessary to the result in that case, and therefore was merely dictum.”)).

²⁰ *Martinez*, 51 V.I. at 190 (“courts have discretion to permit an act to be done after expiration of the original prescribed period only upon motion of the party desiring to act timely and only upon a showing that the failure to act was the result of excusable neglect”).

Defendant failed to communicate with Plaintiffs for months. Additionally, Plaintiffs believe Defendant's assertion regarding the need to calculate specific damages to be meritless because in the Virgin Islands a damage calculation is unnecessary when pleading an answer or counterclaim.²¹ Lastly, Plaintiffs believe the need to determine questions regarding dissolution of the company to be independent of Defendant's ability to timely file a pleading.

This Court has wide discretion in exercising its authority regarding a finding of excusable neglect according to Super. Ct. R. 10(a)(2), and this jurisdiction has a strong preference for deciding cases on their merits rather than dismissing them for a failure to follow purely procedural rules.²² However, the Court is generally unwilling to make a finding of excusable neglect because of an attorney's failure to manage a conflicting or hectic schedule, and an attorney should not automatically expect a Court to grant an extension of time.²³ Here, while some of the reasons for the delay offered by Defendant are questionable as highlighted by Plaintiffs, since Defendant did in fact file his answer on October 4, 2016, the Court finds the length of delay from September 19, 2016, and the danger of prejudice to Plaintiffs, to be minimal. Moreover, it is unlikely this brief

²¹ 5 V.I.C. § 5 ("Notwithstanding any provision of law, in any cause of action based on tort, contract law, or otherwise to recover damages for injury or death to the person or for harm to the plaintiff resulting from the defendant's wrongful conduct, no complaint or cross-complaint shall specify the amount of damages but shall contain a prayer for general relief and shall state that the damages are within the jurisdictional limits of the court to which the pleading is addressed. Nothing in this section shall be construed as preventing a party from asking for a specific amount of damages at the trial.").

²² See *Adams v. North West Co., Inc.*, 2015 V.I. LEXIS 123, *18-19 (V.I. Super. Ct., Oct. 6, 2015) (citing *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011)).

²³ "In general, conflicting or hectic schedules do not constitute sufficiently good cause to justify or excuse a failure to comply with deadlines established by rules of the Superior Court." *Christopher v. Gov. Juan F. Luis Hospital & Medical Center*, 2016 V.I. LEXIS 165, *4-5 (V.I. Super. Ct., Oct. 12, 2016) (citing *Hills v. Whitecap Investment Corp.*, 2016 V.I. LEXIS 11, at *6 (V.I. Super. Ct., Feb. 8, 2016); *Kan. Packing Co. v. Lavilla*, 39 V.I. 76 (V.I. Super. Ct. 1998) (citations omitted)).

delay will largely impact judicial proceedings in this case.²⁴ As a result, considering all of the attendant circumstances, while the Court does not consider one fact alone to constitute excusable neglect, given the preference of this jurisdiction to decide cases on their merits, the Court will grant the extension of time.

II. Motion for Entry of Default

Even assuming *arguendo* that the Court denied the motion for extension of time, entry of default would not be appropriate in this case. Although this jurisdiction disfavors motions for extension of time filed after the expiration of a period, the Court must balance this policy with this jurisdiction's preference for determining cases on the merits.

Plaintiffs' motion for entry of default is premised on the fact that Defendant has willfully failed and refused to answer Plaintiffs' Complaint, arguing Defendant admitted the Complaint under Fed. R. Civ. P. 8(b)(6), and is in default and prohibited from responding to the Complaint absent leave of Court. Similar to the reasoning in their opposition to Defendant's Motion for extension of time, Plaintiffs maintain that the Virgin Islands Supreme Court has established that "a motion for relief under Rule 55(c) is required when a defendant has failed to answer within the required time period even when a formal entry of default has not been made by the court."²⁵ While the Court agrees with Plaintiffs that Defendant must seek leave of Court to file an answer, nothing in the Superior Court rules or its precedent requires a party to move for relief from default before

²⁴ See *Christopher v. Gov. Juan F. Luis Hospital & Medical Center*, 2016 V.I. LEXIS 165, *6 (V.I. Super. Ct., Oct. 12, 2016) ("The Court notes that while the length of the delay in Plaintiffs filing was brief — only fourteen days — and unlikely to significantly prejudice Defendants or negatively impact judicial proceedings, equity is unoffended by the denial of Plaintiffs Motion as, even without considering Plaintiff's Opposition, the Court nonetheless denies Primary Care PLLC's Motion Requesting Dismissal on the basis of controlling provisions of the Virgin Islands Code which the briefs of both parties fail to address.").

²⁵ *Martinez*, 51 V.I. at 190, n.9 (V.I. 2009) (citations omitted).

default has in fact been entered by the Court, and the Court is unwilling to adopt such a policy now. Further, more recent precedent from the Virgin Islands Supreme Court has clarified any confusion that may have resulted from the footnote in the *Martinez* case, and the Supreme Court of the Virgin Islands has clearly held that the Federal Rules only apply in the absence of a Superior Court Rule adequately addressing the issue.²⁶

Additionally, Plaintiffs attempt to misconstrue the record in this case to imply that the Court denied both Defendant's September 19, 2016, Motion, as well as the September 22, 2016, Motion, in its September 27, 2016, Order, asserting that Defendant was in default and was required to move to vacate default before proceeding. However, this was not the case as the September 22, 2016, motion was filed before Plaintiffs' motion for entry of default and remains outstanding before the Court.²⁷ Although Defendant has failed to address any of Plaintiffs' legal arguments in his response, the standard for entry of default is clear. Under Superior Court Rule 47, the clerk shall enter default "[w]hen a party against whom affirmative relief is sought has failed to appear, plead or otherwise defend"²⁸ A party "appears" in an action by making a written submission in which the party acquiesces to the jurisdiction of the Court with an intent to defend against the civil action.²⁹ Here, Defendant has clearly made an appearance and has demonstrated his

²⁶ The "entry of default in the Superior Court is governed exclusively by Superior Court Rule 47." *See Appleton*, 61 V.I. at 269 n.8; *see also Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (V.I. 2015) (citation omitted).

²⁷ "Every motion filed remains pending until 'ruled upon, dismissed, or withdrawn.'" *SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC*, 62 V.I. 168, 203 (Super. Ct. 2015) (citation omitted).

²⁸ SUPER. CT. R. 47; *see also Appleton*, 61 V.I. at 269.

²⁹ *See Lettsome v. VI Sea Trans*, 52 V.I. 109, 115 (Super. Ct. 2009); *see also James v. Williams*, 26 V.I. 20, 22 (V.I. Terr. Ct. 1990) ("An appearance is a formal proceeding by which the defendant submits himself to the jurisdiction of the court."); *Enterprise Assets, LLC v. Pinnacle Development & Investments, LLC*, 2016 V.I. LEXIS 29, *3 (V.I. Super. Ct., Mar. 29, 2016); *Seashells Holding, LLC v. Camilo*, S. Ct. Civ. No. 2011-01, (V.I. Feb. 22, 2011) (unpublished).

willingness to defend based on his active participation in filing and responding to motions since September 19, 2016, and the Court is unable to find Defendant in default.³⁰

Furthermore, while Plaintiffs maintain that all allegations in the Complaint should be deemed admitted because an allegation “is admitted if a responsive pleading is required and the allegation is not denied,”³¹ here, although Defendant failed to file a responsive pleading before Plaintiffs filed their motion for entry of default, Defendant is not in default. Therefore, Defendant is permitted to respond to the allegations in the Complaint, at which point Plaintiffs can challenge his responses under Fed. R. Civ. P. 8. Even assuming *arguendo* that the Court had entered default, this would not automatically result in default judgment since when “default judgment has not yet been entered... an even more liberal standard [is] employed when reviewing a Motion to set aside default because it is more appropriate to address an action on its merits whenever possible.”³²

Therefore, in the interest of judicial economy, the Court will deem Defendant’s Answer, Affirmative Defenses, Counterclaims, and Action for Contribution filed as of October 4, 2016, and will deny Plaintiffs’ October 11, 2016, Motion to Strike as moot since the arguments in that motion are premised on the fact that Defendant was in default and was unable to file a motion for extension of time to file his responsive pleading.³³ The Court will address deficiencies, if any, in Defendant’s affirmative defenses and counterclaims when addressing Plaintiffs’ October 20, 2016, Conditional Motion to Dismiss. Further, the Court notes that any request by VI Chiropractic, LLC, to join this

³⁰ See *Hansen v. Beni Iguana's, Inc.*, 2016 V.I. LEXIS 187, *8 (V.I. Super. Ct., Nov. 4, 2016) (“[T]he Court believes that, if default judgment has not been entered, a party’s response and willingness to defend, in and of itself, supports a finding of good cause to proceed to a determination on the merits.”).

³¹ FED. R. CIV. P. 8(b)(6).

³² Under Superior Court Rule 50, incorporating Federal Rules of Civil procedure 59 to 61, “[f]or good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default...” SUPER. CT. R. 50.

³³ Plaintiffs relied on FED. R. CIV. P. 55(c) and SUPER. CT. R. 34 governing counterclaims to support their motion.

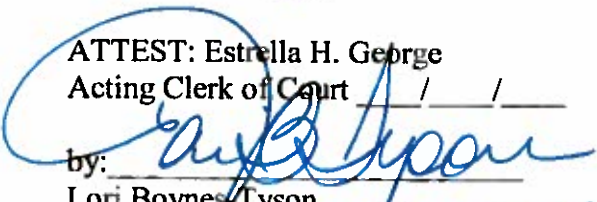
action must be filed as a separate motion with appropriate legal analysis and citation supporting the representation of the company.

CONCLUSION

For the forgoing reasons, Defendant's September 22, 2016, Second Motion to Extend Time to Answer is denied as moot, Plaintiffs' September 29, 2016, Motion for Entry of Default and Order Deeming Complaint Admitted is denied, Defendant's October 4, 2016, Revised Motion to Extend Time to Answer is granted, and Plaintiffs' October 11, 2016, Motion to Strike Defendant's Answer, Affirmative Defenses, and Counterclaim is denied. An Order consistent with this Memorandum Opinion shall issue.

Dated: January 11, 2017

ATTEST: Estrella H. George
Acting Clerk of Court / /

by: 

Lori Boynes-Tyson
Court Clerk Supervisor 1 / 13 / 17


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