

DIVISION OF ST. THOMAS AND ST. JOHN

Respondent.

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) **CASE NO. ST-11-CV-024**
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Pending before the Court is Defendant's December 12, 2012, Motion to Dismiss.¹ For the following reasons, Defendant's Motion to Dismiss will be denied.

Plaintiff was elected as an at-large senator for the 26th, 28th, and 29th Legislatures of the Virgin Islands. Plaintiff claims that during the term of the 26th Legislature, Plaintiff expended \$19,153.65 of his own funds for the purposes of maintain his offices and was not reimbursed for those expenditures by the Legislature. During the 28th Legislature, Plaintiff purportedly expended \$11,723.36 that was also not reimbursed. Plaintiff asserts he expended an additional amount of \$9,513.91 in 2010 and \$5,310.64 during a period of forced administrative leave, also without reimbursement. On January

¹ Plaintiff did not respond to Defendant's December 12, 2012, Motion to Dismiss within the period provided in the Federal Rules of Civil Procedure, applicable to this Court through Rule 7 of the Rules of the Superior Court.

14, 2011, Plaintiff filed a Complaint seeking a total reimbursement of \$45,701.47 exclusive of interest and costs under 2 V.I.C. §76.²

MOTION TO DISMISS

Defendant argues that Plaintiff has exhibited a repeated failure to comply with this Court's orders as well as failed to prosecute the action because (1) Plaintiff has not retained counsel, (2) Plaintiff has not filed an amended complaint, and (3) Plaintiff has not cooperated in good faith with Defendant to formulate and file a proposed scheduling order and proceed with discovery. Here, while the Court in an October 28, 2011, Order "strongly suggest[ed] to both parties that it would be to their benefit to be represented by attorneys licensed to practice in the Virgin Islands . . .", the Plaintiff has no obligation to do so, and may choose to proceed *pro se*.³ Further, while the Court in a September 28, 2012, Order, gave Plaintiff the opportunity to file a motion for leave to amend the pleadings, the Plaintiff again was under no obligation to do so.⁴ Thus, Defendant's argument that Plaintiff's failure to retain counsel and file an amended complaint constitutes a failure to comply with Court orders and in any way prejudices the Defendant is without merit. The Court will now address Defendant's remaining argument.

² On September 28, 2012, the Court dismissed all Plaintiff's claims based under 2 V.I.C. §76(d) because the claims present a non-judicial political question. However, the Court found that Plaintiff's January 14, 2011, Complaint states a claim upon which relief can be granted under 2 V.I.C. §76(a). The September 28, 2012, Order also gave Plaintiff the opportunity to amend his pleadings, but, to date, Plaintiff has declined to do so.

³ Order, October 28, 2011, at 2 (noting, however, that "[r]egardless of whether they appear in a *pro se* capacity or through counsel, the parties must follow the pleading and practice rules of this Court.")

⁴ Order, September 28, 2012, at 1.

Because “dismissal for failure to prosecute constitutes an extreme sanction that the . . . Court may not impose lightly,”⁵ the Court must balance the *Poulis v. State Farm Fire and Cas. Co.*⁶ factors, as adopted by this jurisdiction in *Halliday v. Footlocker Specialty, Inc.*,⁷ when considering whether to grant a motion to dismiss pursuant to Fed. R. Civ. P. 41(b).⁸ The six *Poulis* factors are:

- [1] the extent of the plaintiff’s personal responsibility,
- [2] the prejudice – if any – to the other parties in the litigation,
- [3] whether the plaintiff has demonstrated a history of dilatoriness,
- [4] whether the plaintiff or attorney’s conduct was willful or in bad faith,
- [5] the effectiveness of sanctions other than dismissal, and
- [6] the meritoriousness of the plaintiff’s claim.⁹

Here, Defendant contends that Defendant is “unable to defend this action” because Plaintiff has willfully disobeyed this Court’s Orders.¹⁰ Specifically, Defendant argues that Plaintiff demonstrated his unwillingness to comply with the Court’s October 1, 2012, Scheduling Order when he allegedly stated during a party conference, “any fool can see the judge is conflicted.”¹¹ Defendant also notes that Plaintiff failed to respond to Defendant’s October 18, 2012, letter that proposed a scheduling order, which resulted in no agreement between the parties on a proposed scheduling order before the deadline set forth in the Court’s October 1, 2012, Order.¹²

⁵ *Watts v. Two Plus Two, Inc.*, 2010 WL 4962902, 54 V.I. 286, 294 (V.I. 2010); see also *Molloy v. Independence Blue Cross*, S. Ct. Civ. No. 2009-0102, at 27 (V.I. Jan. 9, 2012) (“Although a trial court is not required to find that all the factors weigh in favor of dismissal to warrant dismissal of the claim, the court must explicitly consider all six factors, balance them, and make express findings.”).

⁶ 747 F.2d 863, 868 (3d Cir. 1984).

⁷ 53 V.I. 505, 510 (V.I. 2010).

⁸ Fed. R. Civ. P. 41(b) (“If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.”)

⁹ *Watts*, 54 V.I. at 290 (citing *Halliday*).

¹⁰ Defendant’s Motion to Dismiss, Dec. 12, 2012, at 1.

¹¹ Defendant’s Motion to Dismiss, Dec. 12, 2012, at 2.

¹² Defendant’s Motion to Dismiss, Dec. 12, 2012, at 2.

Assuming *arguendo* Defendant's allegations against Plaintiff are true, Plaintiff's alleged conduct indicates that Plaintiff may have been dilatory in his obligations before this Court and has not engaged in a good faith effort to comply with this Court's October 1, 2012, Order. Even assuming that conclusion, however, the Court does not find that Plaintiff's alleged failure to abide by only one scheduling order is so egregious that it merits the imposition of the severe sanction of dismissal at this juncture. Consequently, the Court finds it unnecessary to engage in a full *Poulis* factor analysis.

But, in so ruling, the Court does not condone Plaintiff's alleged failure to cooperate with Defendant in developing a proposed final discovery plan and puts Plaintiff on notice that, if he fails to fulfill his obligations before the Court, the Court may consider, after engaging in a *Poulis* factor analysis, that imposition of sanctions is necessary to obtain Plaintiff's compliance.¹³ The Court also reiterates its previous suggestion to Plaintiff that it would be to his benefit to be represented by an attorney licensed to practice in the Virgin Islands in these proceedings.

Accordingly, Defendant's Motion to Dismiss is denied without prejudice. The Court has also taken under advisement Plaintiff's March 17, 2011, Motion for Injunctive Relief, and Plaintiff's December 18, 2012, Second Motion for Injunctive Relief, to neither of which Defendant has responded. Since the parties' submissions, or lack thereof, are currently insufficient to enable the Court to make a determination on the merits, the

¹³ See Fed. R. Civ. P. 37; 4 V.I.C. § 243 ("Every court shall have power . . . [t]o compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in all actions or proceedings pending therein. . ."); 4 V.I.C. § 244 ("Any person who willfully violates, neglects or refuses to observe or perform any lawful order of a court shall be guilty of contempt of court and upon being found guilty of such contempt may be punished as provided by law.")

Court will need to conduct a hearing on Plaintiff's motions.¹⁴ An Order consistent with this Opinion shall follow.

Dated: February 19, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by

for Donna D. Donovan

Court Clerk Supervisor

2 20, 2013


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

¹⁴ When considering a motion for injunctive relief, the Court must balance the following factors: "(1) the threat of irreparable harm to the [plaintiff] if the injunction is denied, (2) the balance of the harm between the parties if granted, (3) the probability of the [plaintiffs] success on the merits, and (4) the public interest." *Gov't of the V.I. v. United Indus., Serv., Transp., Prof'l, and Gov't Workers of N. Am. Seafarers Int'l Union*, 2011 WL 4703089, at *3 (V.I. Super. Aug 1, 2011); see also *McBean v. Guardian Ins. Agency*, 52 F.Supp 2d 518, 520 (D.V.I. 1999). However, "where the relief ordered by the preliminary injunction is mandatory and will alter the status quo, the [moving] party . . . must meet a higher standard of showing irreparable harm in the absence of an injunction." *Bennington Foods, LLC v. St. Croix Renaissance, Group, LLP*, 528 F.3d 176, 179 (D.V.I. 2008).

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

CRAIG W. BARSHINGER,

Plaintiff,

vs.

**LEGISLATURE OF THE UNITED STATES
VIRGIN ISLANDS**

Respondent.

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) **CASE NO. ST-11-CV-024**
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ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Defendant's December 12, 2012, Motion to Dismiss is DENIED
WITHOUT PREJUDICE; and it is

ORDERED that the deadlines set forth in the October 30, 2012, Scheduling Order
are extended as follows:

1. All remaining fact discovery, including all depositions of fact witnesses shall be completed by March 15, 2013;
2. If Plaintiff has not done so already, Plaintiff shall disclose his experts and provide expert Rule 26 materials by March 31, 2013;
3. If Defendant has not done so already, Defendant shall disclose its experts and provide expert Rule 26 materials by April 15, 2013;
4. Expert depositions shall be completed by June 3, 2013;
5. Dispositive motions shall be filed by June 17, 2013;

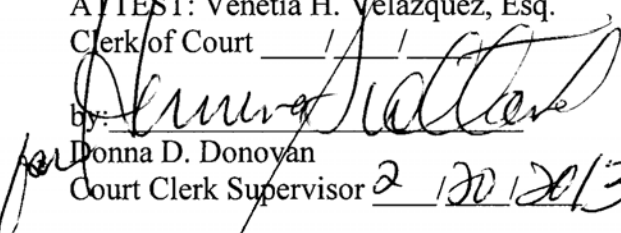
6. A status conference is scheduled for Monday, July 1, 2013, at 11:45 A.M., at which this the Court will consider scheduling jury selection and trial, as well as dates for submission of a fully completed and executed joint final pretrial order, together with trial briefs, proposed voir dire questions, proposed instructions, and motions in limine;

7. **The parties should assume these dates will not be extended;** and it is

ORDERED that copies of this Order and accompanying Memorandum Opinion shall be directed to Plaintiff, *pro se*, and to counsel of record for Defendant.

Dated: February 19, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court / /

by: 

Donna D. Donovan
Court Clerk Supervisor 2 19 20 13


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