

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

CARIBBEAN PETROLEUM, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
BEACHY CLEAN (V.I.), LLC,	)	
	)	
Defendant.	)	
	)	
BEACHY CLEAN (V.I.), LLC and	)	
BRUCE DEVON,	)	
	)	
Counterplaintiffs,	)	CASE NO. ST-09-CV-559
v.	)	
	)	
CARIBBEAN PETROLEUM, INC.,	)	
R&F CONDOMINIUMS, INC.,	)	
JAMES DONOVAN, and JOHN FEOLA,	)	
	)	
Counterdefendants	)	
and Third-Party	)	
Defendants.	)	
	)	
R&F CONDOMINIUMS, INC., and	)	
JOHN FEOLA,	)	
	)	
Third-Party	)	
Plaintiffs,	)	
v.	)	
	)	
BEACHY CLEAN (V.I.) LLC, and	)	
BRUCE DEVON,	)	
	)	
Counterdefendants,	)	
	)	
and	)	
	)	
CAPRI GROUP, LLC,	)	
	)	
Third-Party	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Pending before the Court are (1) R&F Condominiums, Inc., and John Feola's ("Counterdefendants") motion to dismiss¹ Bruce Devon and Beachy Clean (V.I.) LLC's ("Counterplaintiffs") third-party claims; (2) Counterplaintiffs' motion to strike Counterdefendants' reply;² (3) Counterplaintiffs' motion to vacate this Court's August 10, 2011, Order; and (4) Counterdefendants' motion to postpone mediation. For the following reasons, Counterdefendants' motions will be denied and Counterplaintiffs' motions will be granted.

ANALYSIS

Counterdefendants argue that Counterplaintiffs' third-party claims should be dismissed for failure to prosecute because the deadline for conducting written discovery has passed, the deadline for completion of depositions is fast approaching,³ and Counterplaintiffs have conducted no discovery.

A court considers and balances the following factors when analyzing a motion to dismiss for failure to prosecute:

(1) the extent of a party's personal responsibility; (2) the prejudice suffered by an adversary party due to the offending party's failure to comply with scheduling orders and responses to discovery; (3) the offending party's history of dilatoriness; (4) whether the offending party's or attorney's conduct was willful or a result of bad faith; (5) the meritoriousness of the claim or defense; and (6) the effectiveness of sanctions that serve as an alternative to dismissing the case.

Watts v. Two Plus Two, Inc., S.Ct. Civ. No. 2007-0127, 2010 WL 4962902, at *7 (V.I.

¹ Counterdefendants filed their motion on June 14, 2011; Counterplaintiffs filed their opposition on July 6, 2011; and Counterdefendants filed a reply on July 14, 2011.

² Counterplaintiffs filed their motion on August 9, 2011, seeking to strike Counterdefendants' reply to Counterplaintiffs' opposition to Counterdefendants' motion to dismiss for failure to prosecute.

³ The deadline for completion of depositions was June 30, 2011, which has since passed.

2010).

Counterdefendants have provided no evidence demonstrating that Counterplaintiffs have displayed a pattern of dilatoriness. The mere fact that Counterplaintiffs have chosen not to conduct written discovery in this case is not grounds for the harsh sanction of dismissing Counterplaintiffs' claims. See *Andrews v. Government of Virgin Islands*, 132 F.R.D. 405, 411 (D.V.I. 1990) ("to dismiss a complaint with prejudice as a sanction for dilatory conduct is a 'drastic' measure"). In addition, Counterdefendants have not demonstrated they have been prejudiced by Counterplaintiffs' actions. Counterdefendants do suggest that Counterplaintiffs have not answered certain discovery requests, but the proper method of raising this issue is through a motion for an order to compel discovery. Pursuant to Fed. R. Civ. P. 37(a)(1), a party moving to compel discovery must include with their motion a "certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court order." Counterdefendants have not provided a certification, supported by evidence, that they have made good faith efforts to confer with Counterplaintiffs. Accordingly, Counterdefendants' motion to dismiss for failure to prosecute will be denied, Counterplaintiffs' motion to strike Counterdefendants' reply will be granted for failure to comply with Fed. R. Civ. P. 37(a)(1), and Counterdefendants' motion to postpone mediation because of Counterplaintiffs' failure to respond to discovery requests will be denied. In addition, considering that Counterdefendants withdrew their motion to dismiss Counterplaintiffs' third-party claims for failure to include/serve an indispensable party, this Court will vacate its August 10, 2011, Order that required Counterplaintiffs to show

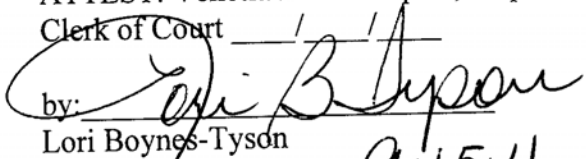
Caribbean Petroleum, Inc. v. Beachy Clean VI, LLC
ST-09-CV-559
Memorandum Opinion, September 16, 2011
Page 4 of 4

cause why they should not be held in contempt for failing to respond to
Counterdefendants' motion. An Order consistent with this Opinion shall follow.

Dated: September 14, 2011

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

by:


Lori Boynes-Tyson
Court Clerk Supervisor

9/15/11


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