

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

INGRID GILBERT,

PLAINTIFF,

SX-15-CV-508

v.

FRANKLIN GILBERT,

DEFENDANT.

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiff Ingrid Gilbert's (hereinafter "Plaintiff") motion to re-open, filed on June 26, 2017. No opposition has been filed in response.

BACKGROUND¹

On October 16, 2015, Plaintiff commenced a lawsuit in the small claims division to evict her brother, Defendant Franklin Gilbert (hereinafter "Defendant") from Plot No. 466 Estate Strawberry, St. Croix, U.S. Virgin Islands (hereinafter "Subject Property"). On October 27, 2015, this matter was transferred to the general civil division. Subsequently, this matter came before the Court for a hearing on May 20, 2016, whereby Plaintiff failed to appear.² In an order entered on June 1, 2016, the Court ordered Plaintiff to appear for a show cause hearing to state why this matter should not be dismissed for failure to prosecute. Thereafter, Defendant filed several motions—motion for injunctive relief, motion for leave to file counterclaim, and motion to dismiss³—in which Plaintiff, as a pro se party, failed to timely respond to any of the motions. This matter came before the Court for a hearing on February 2, 2017, whereby Defendant

¹ This memorandum opinion recites the factual background only to the extent necessary to explain the present issues and the bases of the Court's decision.

² Plaintiff was appearing in this matter pro se at this point of the proceeding.

³ These motions were filed on August 31, 2016.

advised the Court that Defendant is claiming he has ownership interest in the Subject Property and Plaintiff advised the Court that this matter cannot be resolved through mediation. As such, the Court ordered Plaintiff to obtain counsel within thirty days and scheduled a hearing in this matter for May 11, 2017. On April 3, 2017, Attorney Lydia L. Moolenaar filed a notice of appearance on behalf of Plaintiff.

At the May 11, 2017 hearing, both parties were present when the Court scheduled the bench trial to take place on June 12, 2017. On June 12, 2017, Defendant appeared with his counsel, Attorney Shelby King Gaddy, but neither Plaintiff nor her counsel, Attorney Lydia L. Moolenaar, appeared. As such, Defendant moved for the Court to dismiss Plaintiff's claim and enter a judgment in his favor as to his counterclaim. As to Defendant's motion for a judgment in his favor as to his counterclaim, the Court took it under advisement. As to Defendant's motion to dismiss Plaintiff's claim, the Court noted that Plaintiff has a history of dilatoriness in pursuing her claims against Defendant in this matter. Thus, in an order entered June 13, 2017, the Court dismissed Plaintiff's claim against Defendant for failure to prosecute but granted Plaintiff fifteen days to file a motion to re-open with good cause shown for her failure to appear at the bench trial. On June 26, 2017, Plaintiff filed this instant motion to re-open.

STANDARD OF REVIEW

The Supreme Court of the Virgin Islands (hereinafter, "Supreme Court") clearly stated that "the Superior Court may not dismiss an action for failure to prosecute unless these six [Poulis]⁴ factors strongly weigh in favor of dismissal as a sanction." *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511(V.I. 2010). The Supreme Court instructed that, in determining

⁴ *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

whether to dismiss an action for failure to prosecute, the Superior Court must examine the following six *Poulis* factors:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary cause 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 meritoriousness of the claim or defense; and (6) the effectiveness of sanctions that serve as an alternative to dismissing the case. *Molloy v. Independence Blue Cross*, 56 V.I. 155, *184-85 (V.I. 2012) (citing *Poulis*, 747 F.2d at 868)

The Supreme Court further instructed that, “[a]lthough 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.” *Molloy*, 56 V.I. at *186.

DISCUSSION

With regards to her failure to appear at the bench trial, Plaintiff simply claimed in her motion that “no written Order was issued regarding extending or scheduling the mater [sic] for a June 12, 2017 hearing.” (Motion, p. 2) However, it has been the practice of this Court for past several years to not issue a written order after a hearing date has been scheduled orally at the hearing if all parties involved are present, unless there are special circumstances or additional directives needs to be included. In fact, the Court continued this matter from May 11, 2017 to June 12, 2017 because Plaintiff requested additional time to respond to Defendant’s motion to dismiss, which was filed almost over a year ago. As such, the fact that “no written order was issued regarding extending or scheduling the mater [sic] for a June 12, 2017 hearing” is not a good cause. Furthermore, Attorney Lydia L. Moolenaar was on island when the bench trial was scheduled to take place on June 12, 2017—while Plaintiff noted that Plaintiff’s counsel, Attorney Lydia L. Moolenaar had to leave island on May 17, 2017, Attorney Lydia L. Moolenaar retuned

back on island on June 6, 2017. (Id.) Accordingly, Plaintiff failed to show good cause for her failure to appear at the bench trial.

The Court will now consider and balance the six *Poulis* factors and determine whether these factors support a dismissal for failure to prosecute.

1. The Extent of the Party's—Ingrid Gilbert⁵—Personal Responsibility

This factor focuses on whether it was the client or his/her counsel who is responsible for the delay. *See Poulis*, 747 F.2d at 868 (observing that the plaintiff's counsel took responsibility for the delay, which is separate from the plaintiff's personal responsibility, and thus weighed against dismissal). In her motion, Plaintiff stated that "[t]his was the first and only hearing that Plaintiff or Plaintiff's Counsel had ever missed before the Court" and that "the dismissal of Plaintiff's case for Failure [sic] to prosecute based should fall short on the personal responsibility basis." (Motion, p. 5) However, that is incorrect. As noted above, Plaintiff, while appearing in this matter pro se, failed to appear for a hearing on May 20, 2016.

Furthermore, there are ample evidence that Ingrid Gilbert herself is personally responsible for the delay in this matter. Plaintiff commenced this lawsuit to evict Defendant on October 16, 2015. Since the filing of her complaint, Plaintiff has taken very little actions to move this case along. Despite being aware of Defendant's motion for injunctive relief, motion for leave to file counterclaim, and motion to dismiss, all filed on August 31, 2016, Ingrid Gilbert failed to respond and failed to retain counsel to assist her in the matter. In fact, Ingrid Gilbert did not retain counsel in this matter until advised to do so by the Court at the February 2, 2017 hearing. Although the Court advised Ingrid Gilbert to retain counsel within thirty days, her counsel, Attorney Lydia L. Moolenaar, did not file a notice of appearance until April 3, 2017,

⁵ When the Court refers to "Ingrid Gilbert," the Court is referring solely to Ingrid Gilbert.

more than thirty days after the February 2, 2017 hearing. While the Court is cognizant that Ingrid Gilbert was proceeding without the assistance of counsel prior to April 3, 2017, a pro se litigant is still “expected to comply with the rules of civil procedure, and a pro se plaintiff’s apparent lack of familiarity with the rules of the Court does not provide good cause to excuse failure to comply with those rules.” *Griffith v. Carpenter*, 2012 V.I. LEXIS 84 * (V.I. Super. Ct. June 7, 2012) (citing *Sykes v. Blockbuster Video*, 205 Fed. Appx. 961, 963 (3rd Cir. 2006) (unpublished) (pro se plaintiff failed to show good cause for failure to timely serve). Accordingly, this factor weighs strongly in favor of dismissal.

2. The Prejudice to the Adversary

In *Molloy*, the Supreme Court stated that “[p]rejudice to the opposing party is generally demonstrated by either increased expense to the opposing party arising from the extra costs associated with filings responding to dilatory behavior or increased difficulty in the opposing parties’ ability to present or defend their claim(s) due to the improper behavior.” 55 V.I. at *189 (citing *Poulis*, 747 F.2d at 868). As noted above, Plaintiff has taken very little actions to move this case along since the filing of her complaint on October 16, 2015. While it has only been approximately two years since the commencement of this lawsuit, the issue of ownership over the Subject Property traces back to 1992, when a warranty deed for the Subject Property was executed in favor of Plaintiff on March 24, 1992 and recorded on April 10, 1992. With the passage of time, witnesses may disperse and become unavailable, memories may fade, and evidence may be lost. As with any case, it is certain that a lengthy delay will make it more difficult for Defendant to defend against Plaintiff’s claims. Accordingly, this factor weighs in favor of dismissal.

3. A History of Dilatoriness

A history of dilatoriness is characterized by a consistent delay by the plaintiff's counsel. *See Poulis*, 747 F.2d at 868 (observing that a history by the plaintiff's counsel of ignoring the time limits is intolerable). As noted above, Attorney Lydia L. Moolenaar appeared on behalf of Plaintiff in this matter on April 3, 2017. A preliminary review of the file and the docket would have revealed to Attorney Lydia L. Moolenaar that there are outstanding motions—motion for injunctive relief, motion for leave to file counterclaim, and motion to dismiss, filed on August 31, 2016, and should have prompted Attorney Lydia L. Moolenaar to file a motion for leave to respond. Instead, nothing was done until after the May 11, 2017 hearing. At the May 11, 2017 hearing, the Court granted Plaintiff an additional week to file her response to Defendant's motion for leave to file counterclaim and motion to dismiss. On May 15, 2017, Plaintiff filed a motion whereby she requested for additional time to respond to Defendant's motion to dismiss due to the fact that Plaintiff has not been served with a copy of Defendant's motion to dismiss. However, according to the certificate of service attached to Defendant's motion to dismiss, Plaintiff was served with a copy on August 31, 2016. Nevertheless, on May 25, 2016, the Court entered an order whereby the Court ordered Defendant to serve another copy of his motion to dismiss on Plaintiff. Up to the date of the June 12, 2017 hearing, Plaintiff has not filed a response to Defendant's motion to dismiss.⁶ In sum, Attorney Lydia L. Moolenaar remained dilatory with regards to Defendant's motion to dismiss. Accordingly, this factor weighs in favor of dismissal.

4. Offending Party/Attorney's Conduct Willful or in Bad Faith

In *Molloy*, the Supreme Court stated that “the trial court must point to specific evidence to justify its determination of willfulness or bad faith.” 56 V.I. at *192. Thus, if there is no

⁶ On May 16, 2017, Plaintiff filed her response to Defendant's motion for leave to file counterclaim.

evidence of willfulness or bad faith on the record, the Court must presume the party/attorney's conduct was not willful or in bad faith. *Id.* Here, there are no specific direct evidence to justify a determination that Ingrid Gilbert or her counsel acted willfully or in bad faith. According, this factor weighs against dismissal.

5. The Meritoriousness of the Claim or Defense

“In considering whether a claim or defense appears to be meritorious for this inquiry, we do not purport to use summary judgment standards. 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. Here, Plaintiff sought to evict Defendant from the Subject Property. As the Magistrate of the Superior Court pointed out in an order entered on November 7, 2015, “there may be a good faith argument as to title of the premises.” Accordingly, this factor weighs against dismissal.

6. The Effectiveness of Alternative Sanctions

Courts must look to other appropriate methods of sanctioning before dismissal for failure to prosecute because “[d]ismissal must be a sanction of last, not first, resort.” *Poulis*, 747 F.2d at 869. Alternative sanctions include excluding evidence, precluding witnesses, striking portions of pleadings, or imposing monetary sanctions to compensate the harmed party for reasonable expenses, including attorney's fees, caused by the noncompliance. *See Carty v. Mason*, ST-06-CV-433, 2010 V.I. LEXIS 88, 8 (Super. Ct. Dec. 7, 2010) (unpublished). The Court finds that alternative sanctions, such as monetary sanctions, may be appropriate in this matter. Accordingly, this factor weighs against dismissal.

CONCLUSION

Having examined the six *Poulis* factors regarding the dismissal of this matter for failure to prosecute, the Court finds that three factors weigh against dismissal and three factors weigh in favor of dismissal (with one factor—the extent of the party’s personal responsibility—weighing strongly in favor). In this instance, the Court finds the *Poulis* factors do not support the extreme sanction of dismissal. *See Molloy*, 56 V.I. at *186 (“a trial court is not required to find that all the factors weigh in favor of dismissal to warrant dismissal of the claim”). Accordingly, the Court will grant Plaintiff’s motion to re-open and impose monetary sanctions. An Order consistent with this Memorandum Opinion will follow.

DONE and so ORDERED this 11th day of September, 2017.

ATTEST:
Estrella H. George
Clerk of the Court


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

By: 
Court Clerk Supervisor
Dated: 9/12/17

CERTIFIED TO BE A TRUE COPY
This 12th day of SEPT 20 17
ESTRELLA GEORGE
CLERK OF THE COURT

By:  Court Clerk