

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

GERALD H. HILLS and MARTHA L. HILLS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. ST-12-CV-395
	)	
WHITECAP INVESTMENT CORP. d/b/a	)	
PARADISE LUMBER, PUTNAM LUMBER and	)	
EXPORT COMPANY, PUTNAM FAMILY	)	
PROPERTIES INC. AND GREAT SOUTHERN	)	
WOOD PRESERVING, INCORPORATED	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Pending before the Court are Plaintiffs' January 8, 2016, Motion for Extension of Time¹, and February 1, 2016, Second Motion for Extension of Time.

PROCEDURAL HISTORY

At a scheduling conference held on February 11, 2015, all parties agreed to the order of discovery established in the Court's May 12, 2014, Amended Scheduling Order and indicated that the deadlines were manageable. Soon thereafter the Court issued an Order, on March 11, 2015, setting the deadline for dispositive motions for November 16, 2015, with responses due by December 14, 2015, and replies by December 23, 2015. Defendants timely filed their dispositive motions by the Court ordered deadline. On December 17, 2015, the Court extended all unexpired deadlines, but the deadline for responses to dispositive motions was not affected by the Court's

¹ Defendants responded on January 22, 2016.

Order. On January 8, 2016, Plaintiffs filed a motion for extension of time until January 31, 2016, to respond to the motions for summary judgment after which on February 1, 2016, Plaintiffs filed a second motion for extension of time until February 19, 2016.

STANDARD

Superior Court Rule 10(a)(2) provides the standard for enlargement of time as follows:

When an act is required or allowed to be done at or within a specified time-

- (a) The court for cause shown may at any time in its discretion:
 - (1) With or without notice, order the period enlarged if application therefore is made before the expiration of the period originally prescribed or as extended by a previous order of the court.
 - (2) On 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.²

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 court 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.³

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.⁴

² SUPER. CT. R. 10.

³ *Fuller v. Browne*, 59 V.I. 948, 954 (2013)(internal quotations and citations omitted).

⁴ 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.”); *see also Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 190 (2009) (“The trial court was within its discretion to deny the motion for extension without prejudice due to the absence of the required showing of excusable neglect.”).

ANALYSIS

While Plaintiffs' responses to dispositive motions were due on December 14, 2015, Plaintiff waited until January 8, 2016, to file their first motion for extension of time. Since it is undisputed that Plaintiffs' motion was filed after the deadline, an extension of time under Superior Court Rule 10(a)(2) may only be granted for excusable neglect.⁵

Plaintiffs allege that an extension is needed because the record is extensive and more time is needed to provide the Court with a competent response. Further, Plaintiffs argue that the brief extension to January 31, 2016, would not disrupt the Court's scheduling order and would not prejudice Defendants given their request for a new scheduling order.⁶ Plaintiffs' counsel claims in a footnote that the motion was intended to be filed prior to the December 14, 2015, deadline, "and [counsel] thought she communicated that this motion was ready to be filed. However, it was discovered, to [counsel's] horror... that [counsel] did not give instructions to file this instant motion."⁷ The Court finds unconvincing Plaintiffs' counsel's argument that she mistakenly failed to timely file the motion for an extension of time.

Defendants argue that Plaintiffs' motion is not the result of excusable neglect, but rather is an example of Plaintiffs' "refusal to abide by deadlines and instead file things at their convenience." Defendants claim that Plaintiffs' failure to timely respond is not an isolated incident and has prejudiced Defendants by forcing the trial date to be continued and causing them to engage

⁵ *Barshinger v. Legislature of the V.I. of the United States*, 2014 V.I. LEXIS 99, *1 (V.I. Super. Ct., Nov. 10, 2014)(a court should consider "all attendant circumstances that demonstrate a genuine need for an extension of time after the initial specified period. However, a busy schedule of counsel, by itself, does not establish excusable neglect."); *People of the V.I. v. Rivera*, 54 V.I. 116, 124 (V.I. Super. Ct. 2010)(finding excusable neglect from the brief delay due to a hurricane passing through the Territory)

⁶ The extension would enlarge the response time to seventy-six (76) days. Plaintiffs' January 8, 2016, Motion for Extension of Time, at 2.

⁷ *Id.* at footnote 1.

in costly motion practice, including a Motion to Strike, Motions for Protective Orders, and a Motion to Continue. While the Court agrees that Plaintiffs have exhibited a clear disregard for Court ordered deadlines at points in this case⁸, the failure of Plaintiffs to timely respond to Defendants dispositive motions was not the primary reason that the trial date was continued or that Defendants were required to file the specified motions.

Defendants further refute Plaintiffs' claim that delay was necessitated because the record is extensive, explaining that Plaintiffs have had nearly two years to review the record with respect to the issues raised in the motions for summary judgment because they are largely based on Plaintiffs' testimony. The Court agrees with Defendants and is somewhat mystified that Plaintiffs represent they were prepared to file their response by January 31, 2016, but waited until February 1, 2016, to file a second motion for extension of time, now asserting for the first time the need to perform numerous Banks' analyses involving the gist of the action doctrine and economic loss doctrine. Further, Plaintiffs state that the final draft still needs to be reviewed by the lead attorney who will be off island the week of February 8th, indicating to the Court that Plaintiffs' actions are the result of poor organization and case management. The Court struggles to find excusable neglect or good faith on the part of Plaintiffs and finds that the ability to file a timely response was within Plaintiffs' reasonable control. The Court reminds Plaintiffs' attorney that a "[a] moving party must show more than merely being 'too busy' to have responded"⁹ to establish excusable neglect.

⁸ "Plaintiffs' untimely expert disclosures and refusal to cooperate regarding their expert depositions has resulted in the Scheduling Order and trial date being unmanageable." Defendants' December 16, 2015, Motion to Continue, at 6.

⁹ See *GRS Dev. Co. v. Jarrett*, 2003 V.I. LEXIS 18, *6-7 (V.I. Terr. Ct. 2003)(citing *Kansas Packing Co. v. Lavilla*, 39 V.I. 71 (Terr. Ct. St. T. & St. J. 1998) (stating that being an extremely busy attorney with other matters may qualify as "cause shown" but not excusable neglect as required by SUPER. CT. R. 10 (a)(2))).

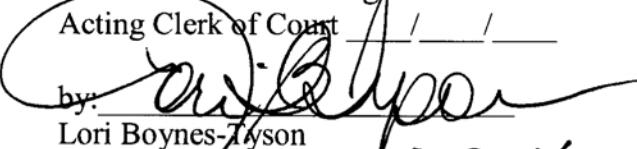
Only after taking into account all of the relevant circumstances, including the danger of prejudice to the opposing party, the length of the delay and its impact on judicial proceedings, and the entry of a new amended scheduling order on February 4, 2016, delaying trial until August, 2016, does the Court reluctantly find that it is appropriate to grant this one-time extension in an effort to narrow the issues for trial. However, the Court warns Plaintiffs that future deadlines will be strictly enforced and the Plaintiffs' failure to follow future deadlines or further delay of trial will result in sanctions.

CONCLUSION

For the foregoing reasons, Plaintiffs' January 8, 2016, Motion for Extension of Time, and February 1, 2016, Second Motion for Extension of Time, will be granted. An Order consistent with this Opinion shall follow.

Dated: February 8, 2016

ATTEST: Estrella George
Acting Clerk of Court

by: 

Lori Boynes-Tyson

Court Clerk Supervisor

2/9/16


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