

FOR PUBLICATION

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

LEE J. ROHN,	)	CASE NO. SX-04-CV-158
Plaintiff,	)	
	)	ACTION FOR
vs.	)	DEFAMATION
	)	
DAILY NEWS PUBLISHING COMPANY,	)	
INC., JEFFREY PROSSER,	)	JURY TRIAL REQUESTED
INNOVATIVE COMMUNICATION	)	
CORPORATION, LOWE DAVIS, JASON	)	
ROBBINS, LEE WILLIAMS, and EDWIN	)	
CROUCH,	)	
Defendants.	)	
	)	

APPEARANCES

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Cite as 19 V.I. Super 176

MEMORANDUM OPINION

¶1 **THIS MATTER** is before the Court on Plaintiff Lee Rohn's November 17, 2015 Motion to Dismiss, and Defendant Daily News Publishing Company's ("Daily News") Motion for Attorney Fees and Costs pursuant to 5 V.I.C. § 541. The parties dispute

whether Daily News is entitled to an award of attorneys' fees in light of Rohn's Motion to Dismiss her action with prejudice. Specifically, the parties dispute whether Daily News is a prevailing party and whether defamation is a personal injury for purposes of § 541. Both parties submitted briefing. The Court requested supplemental briefing on the latter issue. For the reasons set forth below, the Court will grant the Motion to Dismiss with prejudice but finds that Daily News is not entitled to an award of costs and attorneys' fees.

FACTS

¶2 Plaintiff Lee Rohn is an attorney licensed in the U.S. Virgin Islands. Defendant Daily News Publishing Company, Inc. ("Daily News"), publishes *The Virgin Islands Daily News* a local newspaper. In March 2003, Rohn was arrested after screening officials at the Henry E. Rohlsen airport in St. Croix discovered marijuana in her luggage. On March 29, 2004, a year after Rohn's arrest, the *Daily News* printed three articles on Rohn. One concerned her 2003 arrest and was sub-headlined *V.I. officials handling of case raises questions of preferential treatment for aggressive lawyer*. Def.s' Statement of Material Facts ¶ 5. The second article reported on a nine-count civil action against Rohn, which alleged Rohn had committed nine professional negligence and breach of trust violations. *Id.* ¶ 11. The third article, titled *From Judges to opponent, Rohn has no Shortage of Harsh Critics* [sic], "delved into various disputes involving Rohn, including a grievance filed against Rohn by the parent company of The Daily News[.]" *Id.* ¶ 12.

¶3 On March 30, 2004, Rohn filed a one-count, 15-page Complaint asserting that the *Daily News* defamed her in its reporting. Rohn alleges that the *Daily News* articles contained falsities and were inaccurate. She alleges that the articles were published because Defendant Jeffrey Prosser, then-owner of the holding company that owned the *Daily News*, had a personal vendetta against her because of cases she had previously filed against him and his companies. She alleges that Prosser had previously threatened to ruin her reputation. Compl. ¶ 17. She alleges that because of the articles, she suffered damage to her reputation, mental anguish, pain and suffering, physical injuries, and loss of enjoyment of life.

¶4 On March 28, 2006 Defendants moved to stay this matter pending resolution of criminal charges against Rohn for possession of marijuana connected to her arrest at the St. Croix airport. The Court granted the stay. The criminal matter was resolved in late 2011 and the Court lifted the stay on June 11, 2012.

¶5 After several unsuccessful attempts to obtain discovery, Defendants filed a Motion to Dismiss for Failure to Prosecute and a Motion for Summary Judgment on June 28, 2013. On October 21, 2015, the Court denied both motions, but imposed sanctions on Rohn, barring her from offering any testimony at trial that Defendants could have elicited from her in deposition had she made herself available to be deposed. On November 16, 2015, Rohn filed a Motion to Dismiss her case with prejudice. On November 25, 2015, Defendant Daily News filed a Response to Rohn's Motion to Dismiss, requesting that the Court dismiss the matter but subject only to

Rohn paying all Daily News' costs and fees.¹ With its Response it filed a Motion for Attorney's Fees and Costs pursuant to 5 V.I.C. § 541.

¶6 The Court will now consider Rohn's Motion to Dismiss and Daily News' Motion for Attorney's Fees and Costs.

ANALYSIS

I. Rohn's Motion to Dismiss

¶7 Rohn moved to dismiss with prejudice pursuant to Federal Rule of Civil Procedure 41, which sets forth the procedure for a plaintiff's voluntary dismissal. In her Motion to Dismiss, Rohn states that "she does not wish to further pursue this matter against Defendants as recent Court decisions have changed the law on defamation," Mot. to Dismiss 1, though she does not specify what changes in law or decisions of Virgin Islands courts bear on her decision. Daily News argues that "it is instead reasonable to presume that Attorney Rohn has moved to dismiss this matter solely because the [Court's October 21, 2015] . . . sanctioned her . . . by barring her from taking any discovery in this cause or from offering any testimony at trial that Defendants could have elicited from her in deposition." Resp. to Mot. to Dismiss 3. Daily News argues that as a result of the Court's sanction, Rohn cannot make a showing of defamation and cannot survive summary judgment.

¹ Daily News' Motion for Attorney's Fees and Costs contends that it financed the case for most of the other defendants.

¶8 Federal Rule 41 was previously applicable to this Court through Superior Court Rule 7. However, “effective March 31, 2017, this Court adopted the Virgin Islands Rules of Civil Procedure, which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal Rules of Civil Procedure that had been applicable through former Superior Court Rule 7.” *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017). “[The Virgin Islands] rules govern ... proceedings in any action pending on the effective date of the rules or amendments, unless ... the Supreme Court ... specifies otherwise by order ... or ... the Superior Court makes an express finding that applying them in a particular previously pending action would be infeasible or work an injustice.” V.I. R. Civ. P. 1-1(c). For this reason, the Court applies V.I. R. Civ. P. 41 to Rohn’s Motion. However, because V.I. R. Civ. P. 41 and Fed. R. Civ. P. 41 are substantively identical, the change of the rule applied is merely nominal. *See Yearwood Enterprises, Inc. v. Antilles Gas Corp.*, 69 V.I. 863, 867 n.2 (V.I. 2018) (finding “Virgin Islands Rule of Civil Procedure 41 is identical to the previously applicable federal rule”); *Victor-Perez v. Diamondrock Frenchman’s Owner, Inc.*, No. ST-15-CV-387, 2017 WL 4538920, at *7 n. 50 (V.I. Super. Ct. Aug. 31, 2017) (finding “decisions interpreting the [Fed. R. Civ. P.] are persuasive authority where the V.I. R. Civ. P. and the [Fed. R. Civ. P.] are substantively identical”). Therefore, the application of V.I. R. Civ. P. 41 will not prejudice either party.

¶9 V.I. R. Civ. P. 41 allows a plaintiff to dismiss an action without a court order if the opposing party has not filed an answer or a motion for summary judgment, or if all parties stipulate to dismissal. *See Yearwood Enterprises, Inc. v. Antilles Gas Corp.*, 69 V.I. 863, 867 (V.I. 2018). In all other circumstances, “an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.” V.I. R. Civ. P. 41(a)(2). The “main purpose” of requiring the Court’s approval under 41(a)(2) “is to prevent voluntary dismissals which unfairly affect the rights of the defendant.” *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 618 (V.I. 2012); *see also Beaver Associates v. Cannon*, 59 F.R.D. 508, 1973 U.S. Dist. LEXIS 13708, at *2 (S.D.N.Y.) (“[A] motion . . . for a voluntary dismissal of a suit, Fed. R. Civ. P. 41(a)(2), calls for the exercise of judicial discretion to avoid an unfair effect on anyone else incident upon such a termination of the suit.”). Accordingly, if a dismissal would not unfairly affect the rights of the defendant, the Court should grant the motion. *See Island Tile*, 57 V.I. at 618. Where a party moves for dismissal pursuant to 41(a)(2) and moves to dismiss without prejudice the Court has discretion to permit dismissal. However, where a party seeks to dismiss with prejudice, the Court’s discretion to deny dismissal is appreciably more limited. *Island Tile*, 57 V.I. at 618.

¶10 Daily News has filed answers to the Complaint and a motion for summary judgment. Accordingly, Rohn must seek the Court’s approval to dismiss. However, because Rohn seeks to dismiss her action *with prejudice*, the Court has little

discretion to deny her motion. To do so would require the Court to find that the dismissal unfairly affects the rights of the defendants, which it does not here. Therefore, the Court is compelled to grant Rohn's Motion to Dismiss with prejudice.

II. Daily News' Motion for Attorney's Fees and Costs

¶11 Most jurisdictions in the United States employ the American Rule, under which each party to a lawsuit bears responsibility for its own attorney's fees unless provided otherwise by statute. *See Hansen v. Bryan*, 68 V.I. 603, 613 (V.I. 2018) (recognizing "the Virgin Islands [as] the only jurisdiction in the United States that has abrogated the 'American Rule'"); *Kaloo v. Estate of Small*, 62 V.I. 571, 579 (V.I. 2015) (footnote omitted) (recognizing § 541 as an exception to the "American Rule" against shifting fees to the losing party"). However, in the Virgin Islands, courts have discretion to award attorney's fees to prevailing parties. *See* 5 V.I. CODE ANN. tit. 5, § 541(b) 1986 ("there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto."); *Grand Union Supermarkets v. H.E. Lockhart Mgmt., Inc.*, No. 01-44, 2013 U.S. Dist. LEXIS 5039, at *3 (D.V.I. Jan. 10, 2013) ("Virgin Islands law authorizes courts to award to any prevailing party in a civil action costs and fees the party incurred in prosecuting or defending the action."). The relevant statute, title 5, § 541 directs, in pertinent part:

The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its

discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto; provided, however, the award of attorney's fees in personal injury cases is prohibited unless the court finds that the complaint filed or the defense is frivolous.

5 V.I.C. § 541(b).

¶12 The purpose of this provision are “to indemnify the prevailing party,” *Smith v. Virgin Islands Port Auth.*, 2013 WL 152178, at *2 (D.V.I. Jan. 11, 2013), *aff’d* 568 F. App’x 169 (3d Cir. 2014), and to “preserv[e] access to the courts for indigent litigants’ seeking to bring personal injury suits.” 62 V.I. at 583 (quoting *Perez v. Weigers*, 25 V.I. 379, 384 (D.V.I. App. Div. 1990)). Importantly, a court’s discretion under § 541(b) is not unrestricted. *See Ryan v. Ryan*, 53 V.I. 140, 145 (V.I. Super. Ct. 2010). Rather, a court’s discretion to award attorneys’ fees is available only to the prevailing party, in a non-personal injury, civil action, where neither the complaint nor defense is frivolous. *See Kalloo v. Estate of Small*, 62 V.I. 571, 580 (V.I. 2015) (citation omitted) (“Although section 541 expressly permits a prevailing party in a civil action to recover attorney’s fees, it prohibits attorney’s fees awards ‘in personal injury cases. . . unless the court finds that the complaint filed or the defense is frivolous.’”). A plain reading of the statute indicates that all three elements (prevailing party, non-personal injury suit, and non-frivolous) are required for the court to invoke its discretion. Thereafter, the decision to award attorneys’ fees is “entirely discretionary.” 5 V.I. CODE ANN. tit. 5, § 541(b); *Anthony v. Abbot*, 304 Fed. Appx. 66, 69 n. 4 (3d. Cir. 2008) (citing *Lucerne*

Inv. Co. v. Estate Belvedere, Inc., 411 F.2d 1205, 1207 (3d. Cir. 1969)); *see also Hansen*, 68 V.I. at 612-613 (V.I. 2018) (finding § 541 to use “discretionary language”).

¶13 The parties agree that § 541(b) governs their dispute. However, the parties disagree on whether the requirements of § 541(b) are met. Specifically, the parties differ on whether the Defendant is the prevailing party; whether defamation constitutes personal injury; and whether the Plaintiff’s original action was frivolous. For the Court to award the Defendant attorneys’ fees under § 541(b), the Court must find that the Defendant is the prevailing party, and either that defamation does not constitute personal injury, or if it does, that the Plaintiff’s complaint was frivolous.

A. Defendant is not a Prevailing Party for Purposes of 5 V.I.C. § 541.

¶14 The District Court of the Virgin Islands has held that the general rule under Virgin Islands law is that a “prevailing party” is “the one in whose favor a decision or verdict is rendered, and a judgment is entered,” *Involdstad v. Kings Wharf Enterprises Inc.*, 20 V.I. 314 (D.V.I. 1983), *aff’d*. 734 F.2d 5 (3d Cir. 1983).² However, on occasion, Virgin Islands courts have construed this definition more broadly-. *See Delagarde v. Roy Lester Schneider Hosp.*, No. ST-12-CV-470, 2013 V.I. LEXIS 38, at *2 (V.I. Super. Ct. June 6, 2013) (a prevailing party is considered to be the one in whose favor a decision or verdict is rendered and a judgment is rendered); *Chapa v. Sepe*, No. ST-12-CV-504, 2013 V.I. LEXIS 72, at *1 (V.I. Super. Ct. June 3, 2013);

² A prevailing party “can be the plaintiff or the defendant.” *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 750 (3d Cir. 1997),

Melendez v. Rivera, 24 V.I. 63, 65 (V.I. . Ct. 1988) (the test is whether a party has achieved at least some of the benefits which were sought in the litigation, even if a judgment is not finally obtained) (citing *Involdestad v. Kings Wharf Enterprises Inc.*, 20 V.I. 314 (D.V.I. 1983), *aff'd*. 734 F.2d 5 (3d Cir. 1983)).³ The test adopted by the Superior Court includes “whether a party has achieved at least some of the benefits. . . sought in litigation.” *Isaac v. Crichlow*, No. SX-12-CV-065, 2016 WL 5468371, at *1 (V.I. Super. Ct. Sept. 29, 2016) (quoting *Melendez*, 24 V.I. at 65). Under this standard, “[t]he operative criteria for an award of attorney’s fees is success at the conclusion of proceedings, rather than the means by which success is achieved.” *Melendez*, 24 V.I. at 65 (quoting *Brown v. Moran*, 1979 St. Thomas Supp. 309 (D.V.I. July 23, 1979)); *see also Benoit v. Panthaky*, 21 V.I. 174, 176 (V.I. Super. Ct. 1984) (discerning “prevailing parties for attorneys’ fees purposes” as having achieved success on “any significant issue in litigation” (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Accordingly, a prevailing party may exist “even if a judgment is not finally obtained.” *Melendez*, 24 V.I. at 65 (finding “a prevailing party in a settlement is equally deserving of an award” (citing *Involdestad*, 20 V.I. at 317)); *cf. Bell v. Radcliffe*, No. ST-13-CV-392, 2015 WL 5773561, at *3 (V.I. Super. Ct. Apr. 30, 2015)

³ 5 V.I.C. § 541 was modeled after federal statutes. *Terrell v. Coral World*, 55 V.I. 580, 588 (V.I. 2011) (citing *Dr. Bernard Heller Foundation v. Lee*, 874 F.2d 83, 87 (3d Cir. 1988)). Accordingly, the V.I. Supreme Court has used “judicial decisions interpreting the federal statutes. . . [to] assist. . . in interpreting the same clause found in [the] local statute.” 55 V.I. 588 (quoting *People v. Pratt*, 50 V.I. 318, 322 (V.I. 2008)). *But see, Hansen*, 68 V.I. at 613-14 (Virgin Islands courts should consider decisions from other jurisdictions to interpret Virgin Islands statutes only where such decisions interpret foreign statutes that are substantially similar to the local statute (citing *Ottley v. Estate of Bell*, 61 V.I. 480, 494 n.10 (V.I. 2014))).

(“Attorneys’ fees are awarded ‘at the conclusion of litigation,’ not in the beginning or in the midst of it.” (quoting *Richardson v. Port. Auth.*, No. 2009-136, 2013 WL 1686338, at *2 (D.V.I. Apr. 16, 2013))).⁴

¶15 However, where a judgment or judicial decision has not been rendered “a defendant may not recover fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances.” *Delagarde*, 2013 V.I. LEXIS 38, at *2 (citing to *Grand Union Supermarkets*, 2013 U.S. Dist. LEXIS 5039, at *3); *Cornell v. Pirates’ Pension Bd. of Dirs.*, No. 2006-100, 2008 U.S. Dist. LEXIS 93369, at *4 (D.V.I. Oct. 27, 2008) (quoting *Aerotech, Inc. v. Estes*, 100 F.3d 1523, 1528 (10th Cir. 1997); see also *EEOC v. Hesco Parts Corp.*, 57 F. App’x 518, 523 (3d Cir. 2003) (holding the defendant, as the prevailing party under 42 U.S.C. § 1211, could not obtain attorneys’ fees from a plaintiff that had dismissed its claims with prejudice prior to trial); but see *Yearwood*, 69 V.I. at 870 (upholding defendant’s award for attorneys’ fees after plaintiff’s dismissal with prejudice, but declining to examine defendant’s status as the prevailing party after plaintiff failed to raise it at trial); *Island Tile*, 57 V.I. at 619 n.6 (V.I. 2012) (discussing costs to which the defendant may have been entitled under § 541 had the plaintiff-estate obtained a voluntary dismissal and the parties not agreed to bear their own costs). This rule exists because “when a plaintiff dismisses

⁴ This broad interpretation is not unlike the U.S. Supreme Court’s “generous formulation” of the “prevailing party,” appearing in federal statutes for attorneys’ fees purposes. See *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (“plaintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983))).

an action with prejudice. . .the defendant cannot be made to defend again.” *Cornell*, 2008 U.S. Dist. LEXIS 93369, at *4 (citing *Aerotech*, 100 F.3d at 1528). Conversely, where a plaintiff dismisses an action without prejudice, the court may seek to award the defendant attorneys’ fees because it “faces a risk that the plaintiff will refile. . . and impose duplicative expenses.” *Id.* (quoting *Cauley v. Wilson*, 754 F.2d 769, 771-72 (7th Cir. 1985)). The court may also award attorneys’ fees in exceptional circumstances, including where “a litigant makes a repeated practice of bringing claims and then dismissing them with prejudice after inflicting substantial litigation costs on the opposing party and the judicial system.” *Aerotech*, 100 F.3d at 1528 (recognizing such practice as an exceptional circumstance).

¶16 In light of Rohn’s Motion to Dismiss, Daily News argues that “by definition,” under *Melendez* and *Delagarde*, “the Daily News Parties have prevailed in this litigation.” Rohn contests Daily News’ proposition. Specifically, Rohn argues that Daily News is not a “prevailing party” for purposes of § 541 because she moved to dismiss her case with prejudice and exceptional circumstances do not exist. The Court agrees. Neither a judgment nor judicial decision has been rendered in Daily News’ favor. Rather, Rohn has moved to voluntarily dismiss her action with prejudice. Daily News, as the defendant, may not recover fees absent exceptional circumstances. *Delagarde*, 2013 WL 2996437 at *1. Daily News does not argue that exceptional circumstances exist, and the Court finds none. Accordingly, the Court finds that Daily News is not the prevailing party. Since the Court finds that Daily News is not the

prevailing party, it is not necessary to analyze the latter two issues. Therefore, the Court finds that Daily News is not entitled to an award of attorneys' fees under §541.

CONCLUSION

¶17 Based upon the foregoing analysis, the Court finds that Daily News is not the prevailing party in this matter, and that Daily News is not entitled to costs and fees under § 541. An order consistent with this Opinion will be immediately entered.

DATED: December 19, 2019

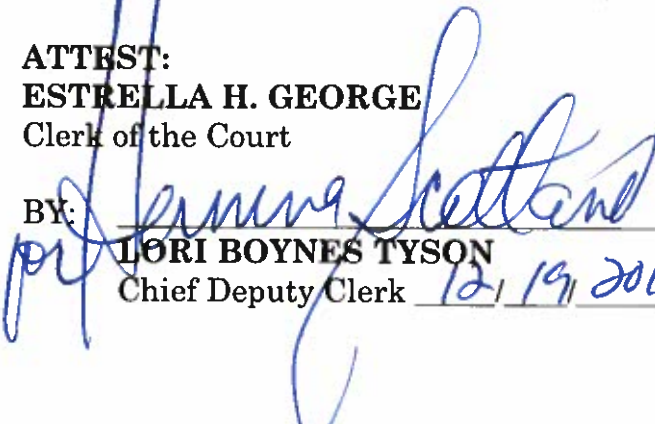


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

BY:



LORI BOYNES TYSON
Chief Deputy Clerk

12/19/2019