

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

DWAYNE HARVEY,	)	
	)	
Plaintiff,	)	CIVIL NO. SX-07-CV-005
	)	
v.	)	ACTION FOR DAMAGES
	)	
	)	(JURY)
DEREK RAWLINS d/b/a PLAYER'S	)	
CLUB and DIAMOND CREST, LTD,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Derek Rawlins d/b/a/ Player's Club's ("Rawlins") Renewed Motion to Dismiss with Prejudice ("Motion"), filed April 22, 2015;¹ and Jeffery B.C. Moorhead's Motion to be Relieved as Counsel for Rawlins, filed June 2, 2015, and Jeffery B.C. Moorhead's Third Motion to be Relieved as Counsel for Rawlins, filed August 17, 2015.² For the reasons that follow, the Court grants Rawlins' Motion and denies Attorney Moorhead's motions as moot.

I. BACKGROUND

On January 3, 2007, Plaintiff filed his Complaint, followed by Amended Complaint, filed February 8, 2007, adding Rawlins as defendant, alleging that on or about March 12, 2005, after leaving a nightclub located at the shopping mall of Defendant Diamond Crest, Ltd ("Diamond"), Plaintiff was assaulted and stabbed by several assailants while still on Diamond's property. Amended Complaint ¶¶ 5, 6. Plaintiff alleges that Defendants were each negligent, because each Defendant knew or should have known of the dangerous nature of the area and should have provided security or taken other precautions to make the premises reasonably safe for invitees. *Id.* at ¶¶ 8, 13. Plaintiff seeks damages for his injuries. *Id.* at ¶¶ 11,

¹ Rawlins's original Motion to Dismiss with Prejudice was filed on March 4, 2015. On April 24, 2015, Diamond Crest, Ltd. filed a Notice of Joinder in Derek Rawlins d/b/a Players Club's Motion to Dismiss.

² There is no second motion to be relieved as counsel in the Court's file.

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16. Diamond filed an Answer on March 21, 2007 and Rawlins filed an Answer on March 28, 2007.³ By Stipulation filed April 18, 2007, The Law Offices of John A. Sopuch III substituted for Joel H. Holt, Esq. as attorney for Plaintiff.

Diamond filed its Motion for Summary Judgment on April 14, 2008. Plaintiff did not timely respond. Rawlins filed his Notice of No Objection to Motion for Partial Summary Judgment on September 4, 2008.⁴ On February 3, 2009, Plaintiff filed his Motion for Leave to File Opposition to Diamond's Motion for Summary Judgment, together with his substantive Opposition to Diamond's Motion for Summary Judgment, joined by Rawlins on February 20, 2009. The following day, February 4, 2009, Diamond filed its Opposition to Plaintiff's Motion for Leave to File Opposition to its Motion for Summary Judgment. Plaintiff's Reply in Support of his Motion for Leave to File his Opposition was also filed February 4, 2009.⁵

Defendant Rawlins filed his Motion for Summary Judgment and Memorandum of Law in Support of Summary Judgment on March 30, 2010, and identical filings a second time on April 6, 2010. Plaintiff filed no response and there was not further activity in the case until Attorney Eszart A. Wynter moved on August 16, 2011 to withdraw as counsel for Rawlins, citing a breakdown in the attorney-client relationship relating to payment for legal services. Approximately a year and a half after it was filed, Plaintiff submitted a Motion to Strike Rawlins Motion for Summary Judgment, dated August 25, 2011.⁶

³ Initial disclosures were timely filed and a stipulated pre-trial discovery order entered. On August 9, 2007, Rachelle M. Shocklee, Esq. on behalf of Diamond filed a declaration stating that Plaintiff had failed to meet and confer relative to Plaintiff's failure to respond to outstanding discovery. Following Plaintiff's untimely response to discovery, the parties submitted their stipulated Pretrial Discovery Schedule, filed October 16, 2007, accepted by the Court by Order entered October 25, 2007. Appropriate notices of depositions were then filed, followed by notices naming experts.

⁴ By Motion filed May 16, 2008, Diamond sought an order deeming all material facts undisputed and its Motion for Summary Judgment conceded.

⁵ Plaintiff's Motion for Leave to File Opposition was granted by Order entered December 15, 2014.

⁶ The original of Plaintiff's Motion to Strike is in the Court's file, yet it was never properly date and time-stamped by the Clerk's office, and it is not found on the Court's electronic docket.

Thereafter, there was no activity in the file until the Court's Order, entered December 15, 2014, conditionally granting Attorney Wynter's Motion to Withdraw, denying Plaintiff's Motion to Strike, and scheduling a February 9, 2015 status conference and hearing on both Defendants' Motions for Summary Judgment. *See* Order entered December 5, 2014. On January 8, 2015, Attorney Moorhead entered his appearance as counsel for Rawlins.

Neither Plaintiff nor his attorney appeared at the duly scheduled and noticed February 9, 2015 hearing. Attorneys Moorhead and Simpson, on behalf of Rawlins and Diamond, respectively, each indicated he had not had contact with Attorney Sopuch. The Court issued an Order entered February 10, 2015, requiring Attorney Sopuch to show cause in writing within 21 days why he should not be held in contempt of court for his failure to appear. Further, the order required Plaintiff to show cause why the matter should not be dismissed for failure to prosecute, pursuant to *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010). *See* Order entered February 10, 2015. Both the December 14, 2014 and February 10, 2015 Orders were served on all counsel. Attorney Sopuch's last filing (August 25, 2011) has a Christiansted, St. Croix address.

On February 13, 2015, Rawlins filed a Notice Requiring Security for Costs, including Affidavit of counsel, stating that Plaintiff moved to Jubia, Saudi Arabia, where he currently resides.⁷

II. LEGAL STANDARD

The Supreme Court of the Virgin Islands applies FED. R. CIV. P. 41 (b) to Motions to Dismiss for failure to prosecute. *See Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 298 (V.I. 2010); *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511, n.8, (V.I. 2010); *Molloy v. Independence Blue Cross*, 56 V.I. 155, 191, n.11 (V.I. 2012).

⁷ Attorney Moorhead's Affidavit further stated that "on February 11, 2015, I went to Harvey's Restaurant on Company Street and spoke to Plaintiff's mother, Ms. Harvey. Ms. Harvey advised that Plaintiff moved to Saudi Arabia several years ago. Later in the day, I received an unsolicited email from Plaintiff stating he was moving a different part of the country on the 20th." *See* Affidavit dated February 12, 2015 accompanying Notice Requiring Security for Costs.

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Rule 41(b) states:

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. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under rule 19 – operates as an adjudication on the merits.

FED. R. CIV. P. 41(b).

Dismissal for failure to prosecute is a sanction of last resort. *Watts*, 54 V.I. at 298. As such, the Supreme Court of the Virgin Islands has clearly stated “that the Superior Court may not dismiss an action for failure to prosecute unless [the] six factors [outlined in *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984)] strongly weigh in favor of dismissal as a sanction.” *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511, (V.I. 2010). The Superior Court

must conduct an analysis and balance six factors; namely (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, 54 V.I. at 298 (citing *Poulis*, 747 F.2d at 868).

“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.” *Molloy*, 56 V.I. at 186.

III. DISCUSSION

The instant case appears to be one of those unusual actions wherein dismissal for failure to prosecute is warranted. Defendants argue that the case should be dismissed because (1) eight years have passed and Plaintiff has repeatedly failed to prosecute his action despite being given numerous opportunities to do so; (2) the Court ordered Plaintiff to show cause within 21 days of the February 10, 2015 Order why the case should not be dismissed; and (3) an additional nine months have passed since the Court's Order and Plaintiff has not responded. Motion, at ¶¶ 1-3.

The Court considers that Plaintiff moved to Saudi Arabia several years ago without notifying the Court. According to Attorney Moorhead's Affidavit, Plaintiff personally confirmed by email stating that he no longer lives in the Virgin Islands. Moreover, Plaintiff's attorney of record has not responded to any motions since February 2009, has filed nothing since August 2011, did not appear at a duly scheduled hearing or otherwise notify the Court, ignored the February 10, 2015 show cause Order and apparently, no longer practices in the Virgin Islands. The case has been languishing for more than eight years. In cases where dismissal has been ordered without review of the six *Poulis* factors, the "Third Circuit has recognized that these opinions are based on particularly egregious behavior of the plaintiff, generally characterized by an affirmative refusal to participate in proceedings." *Molloy*, 56 V.I. at 186. Although, the lack of prosecution here is arguably so egregious, the Supreme Court of the Virgin Islands has directed that the *Poulis* factors must always be considered and balanced in their entirety. *Id.* at 188. As such, those factors are considered below.

A. The Extent of a Party's Personal Responsibility

In addressing the personal responsibility factor, *Poulis* notes that "a client cannot always avoid the consequences of the acts or omissions of its counsel." *Poulis*, 747 F. 2d at 868. *Poulis* guides under the assumption that a plaintiff wants to pursue his claim. Unlike the *Poulis* assumed plaintiff, Plaintiff here has not shown any interest in continuing to litigate his claim. Plaintiff's personal email to opposing counsel advising of his relocation within the Kingdom of Saudi Arabia represents the only communication of any type relative to this action by either Plaintiff or his attorney the case since 2011. In a February 1, 2009 Declaration submitted to excuse a late response to Defendants' Motion for Summary Judgment, Plaintiff described "my reluctance to continue with the case. I told my lawyer that I needed some time to think about everything." Although Plaintiff has not formally abandoned his claim, neither he nor his attorney has taken any steps in the last six years to move the matter forward. The fact is that, for all intents and

purposes, Plaintiff abandoned his claim when he moved to Saudi Arabia several years ago. This factor weighs in favor of dismissal.

B. Prejudice to the Opposing Party

Prejudice to the opposing party is generally demonstrated by either increased expense to the opposing party in the form of extra costs incurred relative to responding to the dilatory party's behavior; or by the increased difficulty experienced by the opposing party in presenting or defending the claims in issue due to the improper behavior and delays. *See Molloy*, 56 V.I. at 189. Here, Defendants have not set forth any substantive prejudice or additional expense they will incur in defendant against Plaintiff's claims. Yet, in addition to the "inevitable dimming of witnesses' memories,"⁸ further expense and delay to the prejudice of Defendants are also inevitable in light of Plaintiff's relocation to Saudi Arabia. This factor weighs in favor of dismissal.

C. The Offending Party's History of Dilatoriness

Unlike in *Molloy*, where "[a]t the July 9, 2007 hearing, the Molloy's counsel expressly stated that no action was taken because all pending motions had been ruled on and that the only remaining step the case required was the setting of a trial date," the instant case contains no evidence of any activity by counsel or Plaintiff since 2011. *Molloy*, 56 V.I. at 190. Plaintiff has ignored time guidelines set by applicable rules for responses to motions and discovery. Most egregious is Plaintiff's disregard of Orders of the Court, evidenced by the failure of Plaintiff or counsel to attend or otherwise advise the Court with regard to the February 9, 2015 status conference and hearing on Defendants' motions for summary judgment, and by the failure to show cause or to even respond to or acknowledge the Order of February 10, 2015. This factor weighs strongly in favor of dismissal.

⁸ *See Watts*, 54 V.I. at 300.

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

The trial court must point to specific evidence to justify its determination of willfulness or bad faith. *Id.* at 192. Although it is not apparent that Plaintiff has actively engaged in bad faith conduct, he willfully left the jurisdiction with this matter pending. Likewise, Plaintiff's counsel has ignored mandatory rules applicable to Virgin Islands' attorneys engaged in the active practice of law in the Virgin Islands and has willfully ignored Orders of December 15, 2014 and February 10, 2015. This factor weighs in favor of dismissal.

E. 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 both Defendants have filed motions for summary judgment that remain pending. Plaintiff filed an Opposition (albeit out of time) to Diamond's motion, suggesting that genuine issues of material fact remain in dispute. The allegations of Plaintiff's Amended Complaint, if proven, suggest that Plaintiff may have presented meritorious claims. Yet, both Defendants argue that the facts not disputed require entry of judgment against Plaintiff. At this stage, the meritoriousness of Plaintiff's claim is an open question and this factor is neutral.

F. Alternatives to Dismissing the Case

The Court is specifically authorized by SUPER. CT. R. 38 and FED. R. CIV. P. 16(f) to impose on a party or attorney various sanctions, including dismissal (FED. R. CIV. P. 37(b)(2)(A)(v)) for failure to appear at a pretrial conference or failure to obey a scheduling or other order. Imposition of monetary sanctions awarding Defendants reimbursement of costs incurred by Plaintiff's delay and inaction over the eight years the case has been pending may effectively result in the dismissal of the action. *See Andrews v.*

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Gov't of the Virgin Islands, 25 V.I. 284, 295 (D.V.I. 1990) (citing *Poulis*, 747 F. 2d at 868). Imposition of monetary sanctions in lieu of dismissal with imposition of an expedited scheduling order would push this 2007 case well into 2016. In light of the practical reality that Plaintiff and his attorney both appear to have abandoned this case, no sanctions other than dismissal will lead to the speedy resolution of this matter. Accordingly, this factor weighs in favor of dismissal.

Having examined the *Poulis/Halliday* factors to determine whether the extreme sanction of dismissal is proper, the Court finds that one factor is neutral, four factors favor dismissal, and one factor strongly favors dismissal. As such, this case sets forth such an instance where the "extreme sanction of dismissal ... is justly merited." *Halliday*, 53 V.I. at 511.

On the basis of the foregoing, it is hereby

ORDERED that Rawlins' Renewed Motion to Dismiss with Prejudice is GRANTED; it is further

ORDERED that Motions for Summary Judgment of both Defendants are DENIED as MOOT; it is further

ORDERED that Jeffery B.C. Moorhead's Third Motion to be Relieved as Counsel for Defendant Derek Rawlins is DENIED as MOOT; it is further

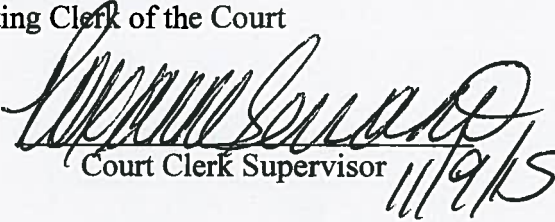
ORDERED that Plaintiff's Amended Complaint is DISMISSED WITH PREJUDICE.

November 5, 2015


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor 11/9/15

CERTIFIED A TRUE COPY

DATE: Nov. 9, 2015
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: 
COURT CLERK TI