FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ELI CHARLES MCKENZIE and SYBIL MCKENZIE,	)	**CASE NO. SX-06-CV-653**
	)	
Plaintiffs,	)	
	)	**ACTION FOR DAMAGES**
v.	)	
	)	
HESS OIL VIRGIN ISLANDS CORPORATION; HOVENSA, LLC; AMERADA HESS CORPORATION; LITWIN CORPORATION individually and as successor-in-interest to LITWIN PAN-AMERICAN CORPORATION; FLUOR ENGINEERS & CONSTRUCTORS, INC.; RIGGERS & ERECTORS INTERNATIONAL, INC.; RARITAN SUPPLY COMPANY, individually and as successor-in-interest to BRIDGE SUPPLY COMPANY; 3M a/k/a MINNESOTA MINING & MANUFACTURING COMPANY; CLEMCO INDUSTRIES, INC.; INGERSOLL RAND CORPORATION; and JOHN DOE DEFENDANTS,	)	**COMPLEX LITIGATION DIVISION**
	)	
	)	*** * ***
	)	
	)	**GROUPED UNDER *IN RE: SANDBLASTER SILICOSIS CASES*, MASTER CASE NO. SX-19-MC-023**
	)	
	)	
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	)	
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	)	
Defendants.	)	
	)	

Cite as: 2019 VI Super 31

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MEMORANDUM OPINION

MOLLOY, *Judge*

¶1 **BEFORE THE COURT** is a motion to dismiss for insufficient service of process filed by Fluor Engineers & Constructors, Inc. ("Fluor"). For the reasons stated below, the Court will deny the motion and grant a discretionary extension of time, but rather than order service now, the Court will instead deem the late service on Fluor timely.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 The plaintiffs, Eli Charles McKenzie ("Mr. McKenzie") and Sybil McKenzie ("Mrs. McKenzie") (collectively "the McKenzies" or "the Plaintiffs"), filed a complaint in the Superior Court of the Virgin Islands on October 13, 2006 for damages, including punitive damages, concerning Mr. McKenzie's 2005 diagnosis of pulmonary silicosis, allegedly from his work as a sandblaster at the oil refinery on St. Croix where Mr. McKenzie worked between 1971 and 2000. He and his wife sued, among others, Clemco and Fluor for negligence, strict product liability, supplying a chattel dangerous for its intended use, and intentional and negligent infliction of emotional distress. Mrs. McKenzie also sued for loss of consortium. Fluor appeared and filed a pre-answer motion to dismiss for insufficient service of process, which the Plaintiffs failed to respond to.

¶3 By order dated August 30, 2018, the Presiding Judge of the Superior Court of the Virgin Islands designated this case as complex and transferred this case to the Complex Litigation Division and reassigned it to the undersigned judicial officer. A review of the file reveals that Fluor's motion is still pending.

II. DISCUSSION

¶4 When the McKenzies filed their complaint, "service of process in the Superior Court of the Virgin Islands was governed by Superior Court Rule 27, which provided that summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure." *Hurtault v. Hess Oil V.I. Corp.*, SX-05-CV-791, 69 V.I. ___, ___; 2018 V.I. LEXIS 114, at *9 (V.I. Super. Ct. Oct. 24, 2018) (quotation marks and citations omitted). The McKenzies had 120 days after they filed their complaint to serve the defendants. *See* Fed. R. Civ. P. 4(m) (2006 ed.); *cf.* V.I. R. Civ. P. 4(m) (retaining the 120-day service period). The complaint was filed on October 13, 2006.

Accordingly, the McKenzies had until Saturday, February 10, 2007 to serve all defendants, including Fluor.

¶5 In its motion, Fluor asserts that "[t]he Plaintiff[s] failed to accomplish service of the summons and complaint upon Fluor within the allotted 120 days. Instead, the summons and the complaint were received by mail at Fluor on April 11, 2007, two months [late]." (Fluor's Mot. to Dismiss for Insufficient Serv. of Process 2, filed May 15, 2007 ("Motion").) Consequently, the McKenzies claims against Fluor must be dismissed, Fluor argues. In support, Fluor attached a copy of an affidavit given by Amy Shultz, "a Customer Service Associate in the Litigation Management Department of Corporation Service Company (hereinafter referred to as "CSC")." (A. Schultz Aff. ¶ 1 (May 2, 2007), *attached to* Mot.) Shultz states that "CSC received by certified mail, a Summons and Complaint addressed to Fluor" "[o]n April 11, 2007." *Id.* ¶ 3. "CSC forwarded a Notice of Service of Process" the next day to "Fluor Corporation" in Irving, Texas. *Id.* ¶ 4. Shultz attached a copy of the April 12, 2007 notice to her affidavit and Fluor later filed the original affidavit with the Superior Court on May 21, 2007. The McKenzies failed to file a response and failed to provide proof of service for Fluor or any of the other defendants.

¶6 Filing proof of service with the Superior Court of the Virgin Islands is mandatory. *See* 5 V.I.C. § 114(a); *see also* V.I. R. Civ. P. 4(l)(1). And "'service of process—unless waived by a general appearance—is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant.'" *Ross v. Hodge*, 58 V.I. 292, 311 n.22 (2013) (quoting *Joseph v. Daily News Pub. Co., Inc.*, 57 V.I. 566, 580 n.4 (2012)). Objections to service can also be waived unless they are raised in a pre-answer motion. Here, Fluor preserved the defense of insufficient service of process when it filed its pre-answer motion on May 15, 2007. The question now is whether to grant the motion.

¶7 "In general, actual notice of a law suit is not a substitute for proper service and absent proper service, a case must be dismissed for lack of personal jurisdiction over the defendant." *Ross*, 58 V.I. at 310 (citation omitted). Here, Fluor was served, but after the 120-day period expired. The McKenzies filed their complaint on Friday, October 13, 2006. So, Fluor is correct that the deadline for them to serve all defendants, including Fluor, was Saturday, February 10, 2007. Fluor was served, but not until Wednesday, April 11, 2007, sixty-one days after the 120-day period expired, or 181 days after the complaint was filed. Service was untimely. Consequently, the McKenzies claims against Fluor are subject to dismissal without prejudice.[1]

¶8 Generally, "before a court may dismiss a complaint against a party for lack of service, it must consider whether good cause exists to extend the 120 day time limit for service." *Ross*, 58 V.I. at 310 (citation omitted). In the context of service of process,

> courts have considered three factors in determining the existence of good cause: (1) reasonableness of plaintiff's efforts to serve (2) prejudice to the defendant by lack of timely service and (3) whether plaintiff moved for an enlargement of time to serve prior to the expiration of the period prescribed by the rule.

Charles v. Woodley, 47 V.I. 202, 210 (Super. Ct. 2005) (quotation marks, brackets, and citations omitted). In all instances, however, "it is the plaintiff's burden to show good cause." *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 713 (V.I. 2010).

¶9 Good cause can be shown by affidavit. *Cf. id.* at 714; *accord Charles*, 47 V.I. at 210 ("[C]ourts should consider whether reasonable efforts were made to effect service." (citing *Tourism Indus., Inc.*

[1] Case law and rules of procedure speak of the complaint or the action being dismissed without prejudice when service is untimely or insufficient. However, in cases with multiple defendants, the failure to timely serve one defendant will not result in the dismissal of the complaint in its entirety as to all. *Accord* V.I. R. Civ. P. 4(m) ("If a defendant is not served within 120 days after the complaint is filed, the court . . . must dismiss the action without prejudice *against that defendant*." (emphasis added)); *see also* 5 V.I.C. § 133(2) ("If the action is against the defendants severally liable, [t]he [plaintiff] may proceed against the defendants served in the same manner as if they were the only defendant."). To avoid confusion, the Court refers to the dismissal of the *claims* rather than dismissal of the complaint or action.

v. Prof'l Underwriters Ins. Co., 149 F.R.D. 515, 517 (D.V.I. 1992)). But relying on third parties or process servers does not suffice. *Cf. Petrucelli v. Bohringer and Ratzinger, GMBH*, 46 F.3d 1298, 1307 (3d Cir. 1995) ("We have previously held that reliance upon a third party or on a process server is an insufficient basis to constitute good cause for failure to timely serve, and is also an insufficient basis for granting an extension of time to effect service." (citation omitted)).[2] And "half-hearted efforts . . . to effect service of process prior to the deadline do not necessarily excuse a delay." *Id.* (quotation marks, brackets, and citation omitted).

¶10 Regarding the first factor—the reasonableness of the plaintiff's efforts to serve—the McKenzies did not file an opposition to Fluor's motion, so the Court does not know what efforts were undertaken. The record also does not contain any information regarding the number of times the McKenzies attempted to serve Fluor before April 11, 2007. But the record does show that the McKenzies did not furnish the Clerk with summons for any defendant until January 8, 2007, eighty-eight days after the complaint was filed. For strategic reasons, a plaintiff may choose not to immediately serve a defendant. But technically, the McKenzies violated the rules in effect in 2006 by not providing the clerk with summons when they filed their complaint.[3] Once the McKenzies furnished the Clerk with summons, the clerk issued it the next day, January 9, 2007. Ninety-three days passed before Fluor was served. This factor does not support finding good cause.

¶11 Regarding the second factor—prejudice to the defendant by lack of timely service—the

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[2] The Supreme Court of the Virgin Islands cited *Petrucelli* with approval in *Beachside Associates*, *see* 53 V.I. at 713. However, the Court did not adopt *Petrucelli* in its entirety. *See id.* at 720 n.14.

[3] *See* Super. Ct. R. 22 ("A civil action is commenced by filing a complaint with the court. The plaintiff *shall* at the same time furnish the clerk with the summons to be issued, and a copy of such summons and of the complaint for each defendant." (emphasis added)), *reprinted in* V.I. Ct. Rules Ann. 26 (2006 ed.), *repealed by In re: Amendments to the Rules Gov. the Super. Ct. of the V.I.*, ST-17-MC-019, 2017 V.I. LEXIS 60, *1 (V.I. Super. Ct. Apr. 6, 2017), *as approved by* S. Ct. Prom. No. 2007-005, 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017). *Contra* V.I. R. Civ. P. 4(b) ("On or after filing the complaint, the plaintiff *may* present a summons to the clerk for signature and seal." (emphasis added)).

Court has no information to consider here because Fluor failed to address prejudice. While a plaintiff must *show* good cause for an enlargement of time to serve, the defendant must also demonstrate *some* prejudice caused by the untimely service. *Cf. Beachside Assocs.*, 53 V.I. at 713 (noting that the trial court *found* that the defendant was not prejudiced by late service). If not, courts would be left to speculate about the "prejudice to the defendant by lack of timely service." *Charles*, 47 V.I. at 210 (quotation marks, citation, and brackets omitted); *cf. Petrucelli*, 46 F.3d at 1314 (finding "'no meaningful *demonstration* of any cognizable prejudice resulting to defendants from the passage of additional time.'" (quoting *United States v. Ayer*, 857 F.2d 881, 885-86 (1st Cir. 1988)); *accord Jones v. Westchester Cty.*, 182 F. Supp. 3d 134, 144 (S.D.N.Y. 2016) ("[T]he unserved Defendants do not cite any prejudice that has resulted from their failure to be served." (citations omitted)); *Charles v. N.Y.C. Police Dep't*, 96-cv-9757 (WHP) (THK), 1999 U.S. Dist. LEXIS 14274, *25 (S.D.N.Y. Sep. 15, 1999) ("[N]o argument has been made, and nothing in the record indicates, that an extension of the time for service will prejudice the defendants in this action."); *Muhammad v. Coughlin*, 89-cv-5088 (PKL), 1994 U.S. Dist. LEXIS 2175, *12 (S.D.N.Y. Feb. 28, 1994) (affirming magistrate judge determination that defendants must demonstrate prejudice). Here, because Fluor failed to address prejudice, the Court is left to speculate how the two-month delay would be prejudicial.

¶12 Regarding the third factor—whether the plaintiff moved for an enlargement of time—this factor weighs against finding of good cause because the McKenzies did not file a motion to enlarge the time to serve Fluor. "[T]the 'absence of prejudice alone can never constitute good cause to excuse late service.'" *Beachside Assocs.* 53 V.I. at 713 (quoting *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995)). Instead, "prejudice may tip the good cause scale, [but] the

primary focus is on the plaintiff's reasons for not complying with the time limit in the first place." *Id.* (quotation marks and citations omitted). Because the McKenzies did not file proof of service, did not respond to Fluor's motion, and failed to file a motion for an extension of time to serve before the 120 days ran out, the Court has nothing to consider.

¶13 Having considered all factors, the Court cannot find good cause to grant the McKenzies an extension of time to serve. However, "[e]ven if the court finds that no good cause exists to warrant an extension, the court must at least consider whether any other factors warrant a discretionary extension." *Ross*, 58 V.I. at 310-11 (citation omitted). And courts must consider a discretionary extension when the statute of limitations bars the filing of a new complaint. *See Beachside Assocs.*, 53 V.I. at 718. That is, courts can "deny a discretionary extension of time even if the statute of limitations would bar a plaintiff from re-filing its claims." *Id.* (citing *Petrucelli*, 46 F.3d at 1306; *Boley v. Kaymark*, 123 F.3d 756, 759 (3d Cir. 1997)). But whether to grant a discretionary extension must be considered first. *Cf. Petrucelli*, 46 F.3d at 1306 ("If the district court determines that good cause does not exist, *only then* may it consider whether the running of the statute of limitations would warrant granting an extension of time." (emphasis added)). Here, the Court finds that a discretionary extension is warranted. Two reasons support this conclusion.

¶14 First, Fluor failed to articulate how a two-month delay was prejudicial. Instead, Fluor offered only its own *ipse dixit* that the McKenzies claims must be dismissed just because they served Fluor late. But Fluor forgets that "how courts approach situations in which service is not accomplished within 120 days" changed in 1993. *Charles*, 47 V.I. at 207. "Prior to the 1993 amendment, Rule 4(j) required dismissal of a case if a party was not served with process within 120 days, unless plaintiff showed good cause." *Id.* (citing *Petrucelli*, 46 F.3d at 1304). After 1993, "the amended, re-designated

Rule 4(m) requires a court to extend the 120-day period for good cause . . . and [further] supplies courts with discretion to either dismiss the case or extend the time period for service when there is no showing of good cause." *Id.* (citations omitted). "In this respect, the application of Rule 4(m) is less severe than its predecessor, as the Court can permit an extension even if there is no 'good cause' to explain why service was not timely completed." *Id.*; *accord Ross*, 58 V.I. at 310-11 ("Even if the court finds that no good cause exists to warrant an extension, the court must at least consider whether any other factors warrant a discretionary extension." (emphasis added) (citing *Beachside Assocs.*, 53 V.I. at 717-18).

¶15 Second, the statute of limitations has run. The Plaintiffs filed their complaint on October 13, 2006 in which Mr. McKenzie claimed he was diagnosed with pulmonary silicosis in December 2005. Personal injury claims are subject to a two-year statute of limitations in the Virgin Islands. *See* 5 V.I.C. § 31(5)(A). The Court takes judicial notice that Mrs. McKenzie filed a petition with the Probate Division of the Superior Court to be appointed personal representative for her husband,[4] who passed away on December 17, 2010. Clearly the statute of limitations has run on Mr. McKenzie's personal injury claims and possibly on a newly-filed survival action to continue those claims.

¶16 The statute of limitations has also run on Mrs. McKenzie's claims. Construing the complaint in the light most favorable to her, she appears to have joined her husband in claiming intentional and negligent infliction of emotional distress. Both claims would be subject to a two-year statute of limitations. *See* 5 V.I.C. § 31(5)(A). But even if she did not join assert either claim, she did assert a loss of consortium claim. Many jurisdictions view loss of consortium as a derivative claim. But the

[4] *See King v. Appleton*, 61 V.I. 339, 348 (V.I. 2014) ("[T]he Superior Court may take judicial notice of the existence of a document that has been filed with it in another proceeding" (quotation marks and citation omitted)).

Virgin Islands has not considered the issue yet. In the absence of binding precedent, courts applying Virgin Islands law must undertake a *Banks* analysis to determine the soundest rule. *See, e.g., Isaac v. Crichlow*, 63 V.I. 38, 58-59 (Super. Ct. 2015) ("A *Banks* analysis . . . balance[es] . . .three non-dispositive factors: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." (citation omitted)).[5] Assuming for the sake of this opinion only that the soundest rule for the Virgin Islands would be to recognize loss of consortium as a stand-alone claim, the statute of limitations would also have passed on Mrs. McKenzie's loss of consortium claim.

¶17 But as noted earlier, even though the statute of limitations has run, courts are not obligated to grant an extension of time to serve. *Cf. Petrucelli*, 46 F.3d 1306 n.7 ("[W]e are troubled by the language in the note which may be interpreted by some to mean that good cause exists every time

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[5] Here, a *Banks* analysis would entail deciding first, whether to recognize loss of consortium claims, *cf. Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 675 (Cal. 1974) ("[A] new common law rule has arisen, granting either spouse the right to recover for loss of consortium caused by negligent injury to the other spouse. Accordingly, to adopt that rule in California at this time would not constitute . . . an extension of common law liability, but rather a recognition of that liability as it is currently understood by the large preponderance of our sister states and a consensus of distinguished legal scholars." (quotation marks and footnote omitted)), and then, whether to recognize loss of consortium as a derivative claim or a stand-alone claim. *Compare Guye v. Lutheran Soc. Servs. of the V.I.*, No. SX-10-CV-119, 2011 V.I. LEXIS 92, *19 (V.I. Super. Ct. Feb. 10, 2011) ("A loss of consortium claim cannot be a standalone claim."); and *Alvarez v. Pueblo Int'l*, 24 V.I. 141, 148 (Terr. Ct. 1989) ("Such an action is a derivative right; it is dependent upon and accrues only if the injured spouse has a cause of action against the same defendant. The loss of consortium action of Luisa Alvarez accordingly does not survive the dismissal of the claims of her husband." (citation omitted)), *with Oltman v. Holland Am. Line USA, Inc.*, 178 P.3d 981, 989-90 (Wash. 2008) ("The loss of consortium claim is separate and independent rather than derivative. Under state law, a loss of consortium claim is not barred simply because no claim can be brought based on the injury of the injured spouse." (citations omitted)); and *Perry v. SNH Dev.*, No. 2015-CV-00678, 2017 N.H. Super. LEXIS 32, *35 (N.H. Super. Ct. Sept. 13, 2017) ("In New Hampshire, loss of consortium claims are not derivative claims, but are independent causes of action." (citing *Brann v. Exeter Clinic*, 498 A.2d 334 (N.H. 1985))). Loss of consortium claims may not be exclusive to wives or spouses. *Cf. N. Pac. Ins. Co. v. Stucky*, 338 P.3d 56, 61 (Wyo. 2014) ("We conclude that Montana law recognizes a loss of consortium claim by the adult child of an injured parent, and that such a claim, deriving from the common law, is supported by our statutes and Constitution."). Nonetheless, the Court does note that for nearly a century, the Virgin Islands has recognized that wives may prosecute and defend their own claims. *See* 5 V.I.C. § 72 ("A wife may receive the wages of her personal labor, and maintain an action therefor in her own name and hold the same in her own right, and she may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried.").

the statute of limitations has run and the refiling of the action would be barred. We caution against such a myopic reading of the Advisory Committee note."). Rules of procedure

> are meant to be applied in such a way as to promote justice. Often that will mean that courts should strive to resolve cases on their merits whenever possible. However, justice also requires that the merits of a particular dispute be placed before the court in a timely fashion so that the defendant is not forced to defend against stale claims.

McCurdy v. Am. Bd. of Plastic Surgery, 157 F.3d 191, 197 (3d Cir. 1998) (citation omitted). Concerns about forcing Fluor to defend against stale claims years after the complaint was filed would be relevant here if the McKenzies had moved for an extension of time and that motion was the motion that remained pending all this time. But instead what has been pending is Fluor's motion to dismiss for insufficient service of process. And filing a motion does not entitle the movant to a stay. *Cf. Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 287 (Super. Ct. 2017) ("[F]iling a motion does not stay discovery, suspend deadlines, or automatically excuse the movant from complying with prior court orders." (collecting cases)); *see also* V.I. R. Civ. P. 12(a)(4) (court can postpone disposition of 12(b) motions until trial). Therefore, because Fluor was served, albeit late, and because Fluor had notice of the McKenzies' claims, the Court must deny Fluor's motion and grant the McKenzies a discretionary extension.

¶18 However, rather than order that service be effected now, the Court will instead excuse the untimely service. Several courts have concluded that strict adherence to the deadline is unwarranted if a party is served, but just served late. *E.g., In re: Reliance Sec. Litig.*, 91 F. Supp. 2d 706, 719 (D. Del. 2000) ("[T]he Financial Advisors have not shown that they were harmed by the untimely service of process. . . . Presumably, all that would be gained from a dismissal without prejudice on this ground would be that the Graham Plaintiffs would file an identical complaint against the Financial Advisors. Because the court finds that dismissing the complaint would not be

productive and would cause unnecessary expense, the court will accordingly deny the Financial Advisors' motions to dismiss pursuant to Rule 4(m)." (citation omitted)); *Vax v. Comm'r of Int. Rev. Serv.*, 156 F.R.D. 272, 274 (N.D. Ga. 1994) ("All that would be gained from a dismissal without prejudice on this ground would be that Plaintiff could just file suit again in this court using the amended complaint and providing the same service of process he has executed with the amended complaint already. Enforcement of the 120–day period therefore would be unnecessarily wasteful.").

¶19 It follows, then, that if a court can either "'dismiss . . . without prejudice . . . or order that service be made within a specified time,'" *Beachside Assocs.*, 53 V.I. at 716 (quoting Fed. R. Civ. P. 4(m)), that a court can also excuse untimely service out of concerns for judicial economy. *Accord Kevelighan v. Trott & Trott, P.C.*, 771 F. Supp. 2d 763, 767-68 (E.D. Mich. 2010) (requiring dismissal without prejudice and refiling of the complaint "would only disrupt judicial economy" when service occurred on the 121st day). As then-District Court Judge Pierre N. Leval explained, sitting by designation on the United States Court of Appeals for the Second Circuit:

> What is not clear from the language of this mandatory rule is whether it is intended to apply only to complaints that have never been served, or also to complaints that have been served within the limitation period but after the passage of 120 days. Unquestionably the Rule contemplates dismissal of unserved complaints. It expressly instructs the court to dismiss "upon the court's own initiative." This has the beneficial effect of clearing the court's docket of stale unperfected filings and relieving putative defendants of the stigma of publicly filed but unprosecuted charges that have not been served.
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> To construe the rule as requiring in addition the dismissal of served complaints can lead to bizarre and draconian results that may not have been intended. Assume a complaint served 125 days after filing, within the limitations period. The defendant then moves under Rule 4(j) to dismiss. The broader construction of the rule would impose meaningless expensive paperwork on the court, requiring it to process first the dismissal and then the reopening of the case; it would also require the plaintiff to pursue the silly and wasteful exercise of preparing a new complaint, refiling, paying

> a new filing fee and embarking once again on the quest to make personal service on the defendant. It is hard to imagine the rule was intended to require such a round of useless activity. Far worse, however, are the consequences in this hypothetical case if the limitation period were to expire before the court orders the dismissal. Then the plaintiff may find himself barred from prosecuting a valid cause of action, notwithstanding that he both filed and served within the limitation period.

Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1096-97 (2d Cir. 1990) (Leval, D.J., concurring) (footnote omitted); *see also Gallien v. Guth Dairy, Inc.*, 136 F.R.D. 110, 112 (W.D. La. 1991) (citing the concurrence in *Santos* and observing that the concerns raised therein "may not arise in the future provided that a proposed amendment to Rule 4 becomes effective. The judicial conference has recommended that the language of Rule 4(j), to be renumbered as Rule 4(m), be amended to allow the court to dismiss an action without prejudice for failure to serve within 120 days after filing, *or* direct that service be effected within a specified time.").

¶20 Accordingly, after careful consideration and review, the Court agrees with the concurrence in *Santos* and finds that the sounder course here is to deem the April 11, 2007 service on Fluor proper. Fluor did not address prejudice in its motion and the Court cannot see how a two-month delay could be prejudicial. Fluor had notice of the McKenzies lawsuit in 2007 and, other than litigation over who can represent the Plaintiffs, *see McKenzie v. Hess Oil V.I. Corp.*, SX-06-CV-653, 2013 V.I. LEXIS 101 (V.I. Super. Ct. Jan. 30, 2013), the passage of time cuts equally for and against all parties. No scheduling order has issued. No status conferences have been held. So far as the record shows, very little discovery has been conducted. *Accord In re: Catalyst Third-Party Litig.*, 67 V.I. 16, 25 (Super. Ct. 2015) (granting extension of time notwithstanding the age of the case) ("[G]iven the circumstances of the case, namely, it is still in the early stage of litigation due to minimal movement since its commencement, the Court believes that it is in the interest of justice to grant Third-Party Plaintiffs a brief extension to serve HTI.").

¶21 One final point bears mention, that denying Fluor's motion is inconsistent with prior rulings this Court issued in other cases recently grouped together with this case under a master case. *See generally Hurtault*, 69 V.I. at ___; 2018 V.I. LEXIS 114 at *2; *Victor v. Hess Oil V.I. Corp.*, SX-05-CV-790, 69 V.I. ___; 2018 WL 5619689 (V.I. Super. Ct. Oct. 30, 2018). In all three cases, Fluor was served late and filed a motion to dismiss for insufficient service of process. And in all three cases, the statute of limitations had run on the plaintiffs' claims. The Court granted Fluor's motion in *Hurtault* and in *Victor* but is denying it here. The reason why is because the circumstances of this case differ from the other two cases.

¶22 First, unlike in *Hurtault* or *Victor*, there is no indication here that the plaintiffs were on notice *before* Fluor filed its motion to dismiss that Fluor had been served late. The fact that the plaintiffs had been put on notice of the insufficient service on Fluor *before* Fluor filed its motion was a factor that weighed in favor of granting Fluor's dismissal motion in those cases. *See Hurtault*, 69 V.I. at ___; 2018 V.I. LEXIS 114 at *2-3 (process server notified plaintiffs' counsel and the court that summons was returned unserved); *see also Victor*, 69 V.I. at ___; 2018 WL 5619689 at *1 (same). That factor is not preset here.

¶23 Second, and more importantly, Fluor notified the Superior Court in *Victor* and *Hurtault* after filing its motion to dismiss, that the plaintiffs had agreed to settle their claims. *See Hurtault*, 69 V.I. at ___; 2018 V.I. LEXIS 114 at *4 ("Fluor responded on September 20, 2010, to alert the Court to an unfiled stipulation from October 2006 between the Hurtaults and Fluor, 3M, Riggers & Erectors International, Inc., and Ingersoll-Rand Corporation, agreeing to a dismissal without prejudice." (parenthetical abbreviations omitted)); *Victor*, 69 V.I. at ___; 2018 WL 5619689 at *2 ("Fluor responded on September 20, 2010 to alert the Court to an unfiled stipulation from October 2006

between the Victors and Fluor, 3M, Riggers & Erectors International, Inc., and Ingersoll-Rand Corporation, agreeing to a voluntary dismissal without prejudice."). Consequently, excusing late service or granting an extension of time to serve would have been futile in both cases and wasteful of judicial resources since Fluor and the plaintiffs had agreed to settle. Here, however, Fluor never gave notice of settlement with the McKenzies. So, the Court must assume Mrs. McKenzie intends to proceed with her and her husband's claims against Fluor, which distinguishes this case from *Victor* and *Hurtault*.

¶24 One of the reasons the Complex Litigation Division was established was to "avoid[] inconsistent rulings in similarly-situated cases." *Victor*, 69 V.I. at ___; 2018 WL 5619689 at *3 ("[Generally,] the same motion papers, seeking the same relief, and filed by the same parties with the same attorneys [should not be] decided differently in different, but similar, cases."). Establishing a complex litigation division cannot overrule existing precedent, however, or consolidate similarly-situated cases into the same action. While inconsistent rulings should be avoided if possible, each case must also proceed on its own merits. Here, Mr. McKenzie's death, Mrs. McKenzie's notice of her intent to continue her claims and her husband's claims as his personal representative, the absence of any indication that the McKenzies and Fluor have reached a settlement, and the lack of notice before Fluor filed its motion that service was ineffective distinguish this case from *Victor* and *Hurtault* and counsel in favor of excusing the untimely service on Fluor.

III. CONCLUSION

For the reasons stated above, the Court cannot find good cause to grant the Plaintiffs an extension of time to serve Fluor. The Court will grant a discretionary extension because the statute of limitations has run and Mr. McKenzie has passed away. However, rather than order that service

be made within a specific time, the Court will instead enlarge the time to serve by sixty-one days and excuse the untimely service on Fluor. Accordingly, Fluor's motion to dismiss for insufficient service of process must be denied. An appropriate order follows.

Date: March 6, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: _____
Court Clerk
Dated: 3/6/2019