

DIVISION OF ST. THOMAS AND ST. JOHN

VS.

Defendants.

Cite as: 2019 VI SUPER 11U

¹ Defendant opposed the motion on November 9, 2018, and Plaintiff replied on November 19, 2018.

2015, she determined that Daniel's invoices were not sufficiently specific and suspended payments to Daniel.

Daniel filed this action on June 30, 2017, alleging breach of contract and breach of the duty of good faith and fair dealing. After Defendants filed an Answer and Affirmative Defenses on August 31, 2017, the Court entered a Case Management Order on October 26, 2017, that scheduled a motions hearing for October 17, 2018, with the final pretrial conference on January 9, 2019, and jury selection on March 11, 2019. The Case Management Order also directed the parties to conduct a Rule 26(f) planning meeting and submit a proposed scheduling order by November 10, 2017. The resultant Stipulated Scheduling Order entered by the Court on November 16, 2017, as modified by the Court, set a deadline of September 1, 2018, for filing dispositive motions.

On May 18, 2018, the parties filed a Joint Motion for Leave of Court to File Out of Time and Attached Proposed Amended Scheduling Order; and on May 22, 2018, the Court entered an Amended Scheduling Order extending, among others, the deadline for dispositive motions to September 15, 2018, while leaving the dates of the motions hearing, pretrial conference and jury selection undisturbed. At the pretrial conducted on January 9, 2019, another pretrial conference was set for February 22, 2019.

Neither party filed a dispositive motion or sought an extension of time to do so before the expiration of the September 15, 2018, deadline. On October 24, 2018, 39 days after the dispositive motions deadline had passed, Plaintiff filed the motion now under consideration, asserting that, as a solo practitioner with a large caseload, Plaintiff's counsel has been "fully tasked" for the past two months, which load has been exacerbated by the withdrawal of co-counsel from a number of cases, leaving Plaintiff's counsel temporarily overwhelmed. Because

of this heavy caseload, counsel requests that the Court “pardon his unintended tardiness” and permit him to file Plaintiff’s motion for summary judgment.

In opposition, Defendants point out that (1) paragraph 7(b) of the Case Management Order provides that motions for enlargement of deadlines that do not meet the criteria of Superior Court Rule 10 “may be summarily denied”; (2) Superior Court Rule 10 permits enlargement after a deadline has expired only if “the failure to act was the result of excusable neglect”; (3) that case law in this jurisdiction² has held that an attorney’s busy work schedule “does not fall within the definition of excusable neglect”; and (4) Plaintiff’s motion was filed after the deadline passed without sufficient justification for the delay.

STANDARD

With the promulgation of the Virgin Islands Rules of Civil Procedure, V.I. R. Civ.

P. 6(b)(1) governs whether a court may extend the date for the filing of a motion, providing:

(1) In General. When an act is required or allowed to be done by or within a specified period, the court may upon a showing of good cause or excusable neglect, extend the date for doing that act. The court may consider whether the request to extend time is made before or after the required date; the reason for the movant’s delay; whether the reason for delay was within the reasonable control of the movant; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party’s failure to meet the originally prescribed deadline.

Courts have equated ‘good cause’ with the concept of ‘excusable neglect,’ which requires a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.”³ The determination of excusable neglect is “at bottom an equitable one, where the court should take into account all

² (citing *Kansas Packing Co. v. Lavilla*, 39 V.I. 71 (T.Ct. 1998)).

³ *In re Adoption of the V.I. Rules of Civil Procedure*, 2017 V.I. Supreme LEXIS 22, at *39-40 (V.I. Apr. 3, 2017) (Reporter’s Note to Rule 6, quoting *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 713 (V.I. 2010) (internal quotation omitted)). See also, *Fuller v. Brown*, 59 V.I. 948 (V.I. 2013).

relevant circumstances surrounding [the] omission...includ[ing]...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.”⁴

In addition, V.I. R. Civ. P. 6-2 provides that the party requesting more time must also “include ... [a] statement” indicating “that the moving party has conferred with opposing parties and [that] there is agreement or objection or that despite diligent effort, the moving party cannot ascertain opposing counsel's position”.

DISCUSSION

Reviewing the factors enumerated in V.I. R. Civ. P. 6(b)(1) and *Brown*, the Court determines that a discretionary extension is not appropriate. First, it is clear that the request for an extension was not made before the expiration of the prescribed period for filing dispositive motions, a deadline that had already been extended 15 days and of which the parties had notice since the entry of the Amended Scheduling Order on May 22, 2018. Moreover, the motion was made after October 17, 2018, the date upon which dispositive motions were scheduled to be heard. Thus, the request comes after the passage of the deadline, and Plaintiff is required to demonstrate excusable neglect.

The reason for the movant's delay is counsel's busy schedule. The court is sympathetic regarding the circumstances facing Plaintiff's counsel and understands that too often the unfortunate byproduct of a successful legal practice is an overwhelming work load. In this instance it appears that workload has been unexpectedly increased by the withdrawal of co-counsel from portions of counsel's caseload. But, Virgin Islands Superior Court judges have

⁴ *Brown v. People of the Virgin Islands*, 49 V.I. 378, 383 (V.I. 2008) (quoting *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993)).

consistently held that “a busy schedule of counsel, by itself, does not establish excusable neglect.”⁵ “A moving party must show more than merely being too busy to have [complied].”⁶

While counsel’s predicament may have unexpectedly been exacerbated by the withdrawal of co-counsel from a part of his caseload, the Court still must find that the reason for delay was within the reasonable control of the movant. Management of one’s workload is a key factor in the practice of law, and sometimes that management requires counsel to turn down work that would adversely affect counsel’s ability to advance the interests of all of counsel’s clients. Even when factors like the withdrawal of co-counsel create unanticipated complications, counsel may meet those challenges by getting help, through affiliation with new co-counsel, the hiring of an associate, or taking temporary measures like the addition of part time staff or research assistants.

While the length of the delay in filing the motion is not extraordinary, the delay that would result from the granting of an extension would be more extensive and would come at a critical time in the life of this litigation. The Joint Final Pretrial Order was filed on December 18, 2018, the final pretrial conference was conducted on January 9, 2019, another pretrial conference was set for February 22, 2019, because of the pendency of Plaintiff’s motion, and this case is set for jury selection on March 11, 2019. It would be disruptive of Defendants’ trial preparation were they to be required to defend and brief a summary judgment motion at the same time, potentially resulting in prejudice to the Defendants. Further, were the Court required to research and issue an opinion on the summary judgment motion at this late date, the potential for further delay and postponement of the trial would be evident, especially if the Court were in need of argument for the parties beyond that presented in their moving papers.

⁵ *Barshinger v. Legislature of the V.I. of the U.S.*, ST-11-CV-24, 2014 LEXIS 99, *7 (V.I. Super. Ct. Nov. 10, 2014) (footnote omitted) (unreported) (quoting *People v. Rivera*, 54 V.I. 116, 124 (V.I. Super. Ct. 2010). *Edwards v. Hess Oil Virgin Islands Corporation*, SX-15-CV—382, 2017 V.I. LEXIS 94* (V.I. Super. Ct. June 28, 2017).
⁶ *GRS Dev. Co. v. Jarrett*, 45 V.I. 211, 216 (V.I. Terr. Ct. 2003) (citing *Kansas Packing*). Accord *Hills v. Whitecap Inv. Corp.*, ST-12-CV-395, 2016 V.I. LEXIS 11, *6 & n.9 (V.I. Super. Ct. Feb. 8, 2016); *Edwards v. Hess Oil Virgin*.

The Court does not doubt that counsel for Plaintiff has made the request for an extension in good faith and that counsel has been diligent in attempting to cope with the crushing workload under which he apparently labors. But, given that being busy, by itself, has been uniformly rejected as demonstrative of excusable neglect so as to compel the Court to permit the post-deadline filing of a motion for summary judgment, the request for an extension does not provide any persuasive basis for noncompliance with the Court's scheduling order. Weighing the factors detailed in V.I. R. Civ. P. 6(b)(1) and *Brown*, the motion must be denied.⁷


CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Leave to File Out of Time and for Partial Summary Judgment will be denied. An Order consistent with the Opinion shall issue.

Dated: January 31, 2019

ATTEST: Estrella George
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor


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

⁷ After a brief review of the substantive allegations of the summary judgment motion, the Court is compelled to conclude that, even were the Court to find excusable neglect and deem the motion for summary judgment timely, the Court would likely ultimately be required to deny the motion for summary judgment on the merits. It is clear that the record before the Court demonstrates genuine issues of material fact that would prevent the entry of summary judgment for Plaintiff. For example, the determination of whether the invoices presented by Plaintiff adequately complied with the requirements of the contract is a question of fact to be decided by the jury. Given this likely result, it would appear to be a poor use of the trial preparation time of the parties and the Court to spend substantial effort and resources on an ill-fated request for summary judgment.