

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

NOLASCO COMMUNICATIONS, INC.

Plaintiff,

SX-15-CV-0220

vs.

Cite as: 2019 VI SUPER 7U

**BONNEVILLE GROUP VIRGIN ISLANDS
CORPORATION,**

Defendants.

**ACTION FOR DECLARATORY
JUDGMENT, DEBT, UNJUST
ENRICHMENT, QUANTUM MERUIT**

Appearances:

Dudley Topper, Esq.
Dudley, Topper & Feuerzeig, LLP
St. Thomas, USVI
For Defendant

MEMORANDUM OPINION

WILLOCKS, Administrative Judge.

THIS MATTER comes before the Court on Defendant Bonneville Group Virgin Islands Corporation's (hereinafter "Bonneville or Defendant"), Motion to Dismiss Pursuant to Virgin Islands Rule of Civil Procedure 41(b) (hereinafter "Motion"), filed on June 11, 2018. Plaintiff Nolasco Communications, Inc (hereinafter "Nolasco or Plaintiff") did not file a motion in opposition. For the following reasons, the Court shall grant the Defendant's Motion.

BACKGROUND

On June 15, 2015, Plaintiff filed a Complaint alleging that the Defendant breached a subcontract agreement by failing to pay certain invoices for a construction project on St. Croix.¹

¹ Mot. 1

On July 17, 2015, Defendant moved to dismiss the case based on a mandatory arbitration clause in the subcontract agreement with Plaintiff.² Plaintiff never responded to Defendant's Motion to Dismiss.³ On November 10, 2015, both parties filed a Joint proposed Scheduling Plan.⁴ However, there is nothing in the record that indicates any further action taken by the Plaintiff since that time.⁵ In March 2016, the Court granted Attorney Washburn's motion to withdraw as counsel for the Plaintiff.⁶ On February 13, 2018, Plaintiff was ordered to obtain new counsel and file an appearance on or before May 31, 2018, however, the Plaintiff failed to comply.⁷ On April 30, 2018, the Plaintiff was again ordered to obtain new counsel and file a notice of appearance by May 31, 2018, and again the Plaintiff failed to comply.⁸

DISCUSSION

Rule 41(b) of the Virgin Islands Rules of Civil Procedure, which governs dismissal of an action for lack of prosecution, states that: "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."⁹ Moreover, the decision to dismiss a case is within the sound discretion of the trial court.¹⁰ The

² *Id.*

³ See Order entered October 9, 2015.

⁴ Mot. 1.

⁵ Mot. 1.

⁶ See Order entered March 11, 2016.

⁷ See Order entered February 13, 2018

⁸ See Order entered May 31, 2018.

⁹ Federal Rule of Civil Procedure 41(b). 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

¹⁰ *Berry v. St. Thomas Gas Co.*, 1997 WL 252820, at *2(Terr. Ct.1997)(citing *Burns v. Glick*, 158 F.R.D. 354 (E.D. Pa. 1994).

Supreme Court of the Virgin Islands has articulated six factors the Superior Court must consider in determining whether to dismiss a case for failure to prosecute:¹¹

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.¹²

As a result, the Court may not dismiss an action for failure to prosecute unless these six factors strongly weigh in favor of dismissal.¹³ Dismissal of a case pursuant to Rule 41 is a drastic measure and should be reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff.¹⁴ However, the Court does not have to find that all six factors weigh against the opposing party in order to find that a dismissal is warranted.¹⁵

Here, the Defendant contends that all six factors weigh against the Plaintiff and warrant dismissal. The Plaintiff offered no opposition to the Defendant's Motion.

The first factor requires the Court to determine the party's personal responsibility. Here, the Plaintiff is responsible for moving this matter forward and has failed to do so. Over the last three years since filing the case, the Plaintiff has failed to respond to the Defendant's Motion to

¹¹ *Halliday v. Footlocker Specialty, Inc.* 53 V.I. 505, 510-13 (V.I. 2010) (citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984) (emphases in original)); see also *Molloy v. Independence Blue Cross*, 56 V.I. 155, 2012 WL 78942 at *15 (V.I. 2012) (The Superior Court must consider all six factors each time it seeks to dismiss a case for failure to prosecute.).

¹² *Halliday v. Footlocker Specialty, Inc.* 53 V.I. 505, 510 (V.I. 2010)

¹³ *Id.* at 3.

¹⁴ *Poulis*, 747 F.2d at 866.

¹⁵ *Andrews v. Gov't of Virgin Islands*, 132 F.R.D. 405, 409 (D.V.I. 1990) *aff'd*, 935 F.2d 1280 (3d Cir. 1991) (citing *Hicks v. Feeney*, 850 F.2d 152, 156 (3d Cir.1988), *cert. denied*, 488 U.S. 1005, 109 S.Ct. 786, 102 L.Ed.2d 777 (1989)).

Dismiss due to the arbitration clause in the subcontract. The Plaintiff has also failed to comply with the Scheduling Order as well as the Court's last two orders requiring the Plaintiff to obtain new counsel. As a result, the Plaintiff is personally responsible for the case not moving forward.

As to the second factor, the Court must evaluate the prejudice to the adversary due to failure to meet scheduling orders and respond to discovery. The Plaintiff has failed to comply with the Scheduling Order, and the Court's Orders on February 13, 2018, and on April 30, 2018, that the Plaintiff obtain new counsel. As a result, the discovery process has not been initiated because the Plaintiff has failed to obtain counsel. Therefore, the adversarial process has been prejudiced due to the case being stalled for three-years.¹⁶

The third factor requires the Court to analyze whether the Plaintiff has a history of dilatoriness. Here, the Plaintiff has delayed in prosecuting the claim as there has been no further action taken on the part of the Plaintiff since the Complaint was filed on June 15, 2015. As a result, the case has remained stagnate for three years. In addition, the Plaintiff has also prevented the case from moving forward by failing to obtain new counsel.

As for the fourth factor, willful or bad faith conduct is described as being deliberate and contumacious or more simple stated the intentional or self-serving conduct.¹⁷ While there is no clear evidence that the Plaintiff acted in bad faith the Plaintiff did willfully disregard the Scheduling Order and the Court's Orders. Prior to the Defendant's Motion, on two occasions the Court ordered the Plaintiff to obtain new counsel. However, the Plaintiff has failed to comply

¹⁶ *Virgin Islands Taxi Ass'n v. Virgin Islands Port Auth.*, 67 V.I. 643, 696 (V.I. 2017) ("Some examples of prejudice include the irretrievable loss of evidence, an inevitable demining of witnesses' memories or excessive or excessive burdens or cost imposed on an opposing party.")

¹⁷ *Watts v. Two Plus Two, Inc.*, 541 V.I. 286, 308 (V.I. 2010).

with both requests. Therefore, under the fourth factor, dismissal of the Plaintiff's Complaint is appropriate.

The fifth factor requires the Court to consider alternative sanctions to outright dismissal. In *St. Croix Federation, Local 1826*, this Court held that it was not a case where the "Plaintiff had been dilatory in providing disclosures or in conducting or completing discovery."¹⁸ Rather, there had been a complete and abject failure of the Plaintiff to take any action after filing the Complaint."¹⁹ Similarly, here the Plaintiff has not been dilatory in providing disclosures or in conducting or in completing discovery. Rather, there has been a complete and abject failure by the Plaintiff to take any action following filing the Complaint. As result, other remedies such as excluding evidence or precluding witnesses from testifying are not applicable due to the Plaintiff's failure to take any further action. Therefore, as to the fifth-factor dismissal is the best course of action.

For the sixth and final factor, the Court must consider whether the claim has merit. "[A] claim is deemed meritorious where the pleadings if established at trial, would support recovery."²⁰ Here, the allegations of the pleading, if established at trial would support recovery for the Plaintiff. The Plaintiff's filed a seven-page Complaint detailing the breach of contract allegation. The Complaint filed on June 15, 2015, not only states that the Defendant failed to pay the Plaintiff, but it also detailed the agreement between the two parties. In addition, the Plaintiff also set forth the breach of contract action as well as the cause of action for damages. Therefore,

¹⁸ *St. Croix Fed'n of Teachers, Local 1826 obo Bough v. Gov't of Virgin Islands, Dep't of Educ.*, No. SX-14-CV-386, 2017 V.I. LEXIS 122, at *9-10 (V.I. Super. Ct., Aug. 1, 2017).

¹⁹ *Id.*

²⁰ *Id.* at 700.

under the *Bell Atlantic Corp. v. Twombly* the Plaintiff has stated a meritorious claim.

Nonetheless, as previously stated the Court does not have to find that all six factors weigh against the Plaintiff in order to dismiss. Therefore, the Court finds that although the claim has merit the other five factors weigh in favor of dismissal.

CONCLUSION

After careful consideration, the Court must grant the Defendant's Motion to Dismiss Pursuant to Virgin Islands Rule of Civil Procedure 41(b). An order consistent with this Memorandum Opinion is forthcoming.

DATED this 28th day of January, 2019.

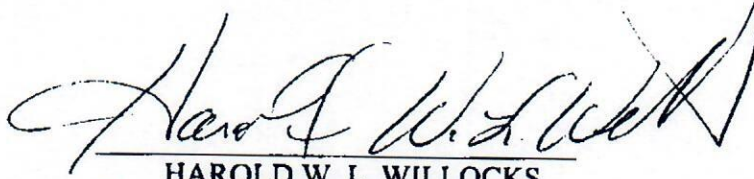
ATTEST:

Estrella George
Clerk of the Court

By: 

Deputy Clerk

Dated: 1/28/19



HAROLD W. L. WILLOCKS

Administrative Judge of the Superior Court