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

ST. CROIX FEDERATION OF TEACHERS, LOCAL 1826, obo RASHELD BOUGH and LEROY HEYWOOD and all other similarly situated members,[1] Plaintiff, v. GOVERNMENT OF THE VIRGIN ISLANDS, DEPARTMENT OF EDUCATION, Defendant.	CIVIL NO. SX-15-CV-178 ACTION TO CONFIRM AN ARBITRATION AWARD

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Government of the Virgin Islands, Department of Education's (DOE) Motion to Dismiss and Incorporated Memorandum of Law (Motion), filed October 16, 2015; and Plaintiff's Opposition to Defendant's Motion to Dismiss, filed December 17, 2015. For the reasons that follow, the Court will grant Defendant's Motion.

BACKGROUND

Grievants Leroy Heywood and Rasheld Bough filed grievances against DOE on February 29, 2012 upon being notified by DOE that they were being "dismissed," effective March 9, 2012, from their positions as Electronic Technician and Offset Technician, respectively, on account of the "government's lack of funds." Complaint, Exhibit A, at 2. Grievants challenged the terminations as in violation of the Collective Bargaining Agreement (CBA) between Plaintiff and DOE, seeking reinstatement, with compensation for all lost wages and benefits. *Id.* Grievants received partial relief through grievance decisions issued April 3, 2012, to the effect that Grievants were found to be entitled to compensation for two bi-weekly pay periods under the CBA terms. All other relief was denied. *Id.*

On behalf of both Grievants, Plaintiff appealed to arbitration, which was concluded August 16, 2013, following which both parties submitted post-arbitration briefs. The Arbitrator issued his Opinion and Award on October 1, 2013, finding that DOE had violated the CBA by failing to reasonably notify Grievants of their rights to elect to be placed on lay-off or to seek to bump another

[1] The caption to Plaintiff's Action to Confirm an Arbitration Award (Complaint) notes that it is filed on behalf of its named members Leroy Heywood and Rasheld Bough, and on behalf of "all other similarly situated members." Yet, the Complaint is specific to the grievance of Plaintiff's two named members. No other members are identified, by name, position or circumstance, as being similarly situated and no relief is sought other than with regard to the grievance processes initiated on behalf of Plaintiff's named members Heywood and Bough.

employee with less service seniority; and required DOE to permit each Grievant the opportunity to identify one or more positions occupied by other employees with less service seniority which each Grievant reasonably believed he could perform, and then to make a good faith determination whether the position(s) selected by each Grievant meets the criteria of the CBA, into which each may be bumped.[2] Complaint ¶¶ 9-10.

Plaintiff filed its Complaint herein on May 12, 2015, but did not present a form Summons to the Clerk of the Court for issuance until August 20, 2015. Counsel's accompanying letter presented two Summonses and requested that each be served by the Superior Court Marshal, together with a copy of the Complaint, upon Chivonne Thomas Jones, Esq. and Joss Springette, Esq., attorneys within the Government's Office of Collective Bargaining. The Court's file reflects no proof of service of process on behalf of Plaintiff upon any person, although by its Motion, DOE acknowledges that service of Summons and a copy of the Complaint was served on Attorney Thomas Jones at the Office of Collective Bargaining on September 9, 2015. Motion, at 2.

LEGAL STANDARD

A defendant may seek dismissal for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5), through Super. Ct. R. 7, if such service does not comply with Super. Ct. R. 27, which requires that service of process be served in the same manner as required by Fed. R. Civ. P 4. *See Ross v. Hodge*, 58 V.I. 292, 310 (V.I. 2013) (citing Fed. R. Civ. P. 4(m)); *In re Catalyst Litig.*, 2015 V.I. LEXIS 144, at *6 (V.I. Super. Ct. 2015) (finding that service of process was insufficient under Super. Ct. R. 27 and Fed. R. Civ. P. 4(m)). A motion seeking dismissal under Fed. R. Civ. P 12(b)(5) for insufficiency of service of process necessarily invokes Fed. R. Civ. P 12(b)(2) because insufficient service of process precludes the court from obtaining personal jurisdiction over the defendant. *Ross*, 58 V.I. at 310 ("absent proper service, a case must be dismissed for lack of personal jurisdiction over the defendant"). Pursuant to Fed. R. Civ. P. 12(h), an affirmative defense based upon defective service of process is waived if it is not challenged in the first defensive pleading. *Id.* at 311 n.22; *Pate v. Gov't*

[2] DOE filed an Action for Declaratory Judgment and to Vacate Arbitrator's Award on December 20, 2013 relating to the same grievance process and arbitration. (*Gov't of the Virgin Islands, Dep't of Education v. American Federation of Teachers*, (SX-13-CV-492)). That action has been dismissed by Memorandum Opinion and Order, entered contemporaneously herewith, granting AFT's Motion to Dismiss DOE's Complaint.

of the Virgin Islands, 62 V.I. 271, 281 (V.I. Super. Ct. 2015). Here, the issue is raised in DOE's Motion, its initial responsive pleading to the Complaint.[3]

DISCUSSION

Superior Court Rule 27(b) requires that service of process "shall be served in the same manner as required to be served by Rule 4 of the Federal Rule of Civil Procedure." In turn, Fed. R. Civ. P. 4(j)(2) requires that service upon a state or state-created governmental organization subject to suit must be served by delivering a copy of the Summons and Complaint to its chief executive officer.

DOE is "an executive department in the Government of the United States Virgin Islands." 3 V.I.C. § 91. "The executive power of the Virgin Islands shall be vested in an executive officer whose official title shall be the 'Governor of the Virgin Islands.'" Revised Organic Act of 1954, § 11, 48 U.S.C. § 1591. DOE argues that Plaintiff's claim must be dismissed because the chief executive officer of the Government of the Virgin Islands, Governor Kenneth E. Mapp, was not served with process, as mandated by Super. Ct. R. 27(b) and Fed. R. Civ. P. 4(j)(2). Motion, at 3. DOE contends that service of the Summons and a copy of the Complaint on the Assistant Attorney General at the Office of Collective Bargaining of the Government is not proper service, and thus the action is subject to dismissal. *Id*; Motion, Exhibit B.

"Where an agency of the Government of the Virgin Islands is named as a defendant, the Governor — as chief executive officer — must be served." *Legrand v. V.I. Bureau of Internal Revenue*, 2015 U.S. Dist. LEXIS 31612, *2 (D.V.I. 2015) (citing *Christopher v. Dir. of V.I. Bureau of Internal Revenue*, 2014 U.S. Dist. LEXIS 103120, at *6-7 (D.V.I. 2014) (stating that proper service

[3] DOE also seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(6), applicable through Super. Ct. R. 7, for failure to state a claim upon which relief can be granted. Specifically, DOE asserts that Plaintiff's action was untimely filed pursuant to Section 9 of the Federal Arbitration Act (FAA). An applicable statute of limitations is a presumptively non-jurisdictional, claims processing statute that provides a potential affirmative defense that may be waived if not timely asserted and may be equitably modified by a court. *See Brady v. Cintron*, 55 V.I. 802, 817 n. 15 (V.I. 2011). Section 9 of the FAA requires that within one year after an arbitration award is made, any party to the arbitration may apply for an order of court to confirm the award. Here, the Arbitrator's Opinion and Award was issued October 1, 2013, but Plaintiff's action was filed May 12, 2015, more than 20 months later. The Supreme Court has expressed reservations concerning the application of the FAA to disputes in the Virgin Islands. *See Gov't of the V.I. v. United Indus., Svc., Transp., Prof. & Gov't Workers of N.A.*, 64 V.I. 312, 321 n.3 (V.I. 2016); *Allen v. Hovensa, L.L.C.*, 59 V.I. 430, 443 n.2 (V.I. 2013). Because we resolve this dispute on other grounds, we need not address the issue of the applicability of the limitations period set forth in Section 9 of the FAA to this case.

in an income tax re-determination case requires service on the Governor and the Director of the VIBIR).[4]

Plaintiff does not claim to have served the proper party in compliance with applicable rules, nor has it sought in the one and one-half years since filing its Complaint to extend the time within which to effectuate proper service of process. Rather, Plaintiff argues that precise compliance with the letter of Fed. R. Civ. P. 4 is not necessary here because DOE had notice of the lawsuit through service on its statutory representative, the office of the Attorney General of the Virgin Islands. Plaintiff asserts that even if compliance with specific service provisions of Fed. R. Civ. P. 4 had been accomplished, "the end result would be the same—the action would have been forwarded by the Office of the Governor to the Attorney General for response." Opposition, at 3. Plaintiff concludes, without citation to relevant authority or binding case law, that since the end result is the same, and the purpose of Fed. R. Civ. P. 4 is to provide defendant notice of the lawsuit, strict compliance with Fed. R. Civ. P. 4 is unnecessary. *Id.*

Yet, the Supreme Court has recognized that "actual notice of a law suit is not a substitute for proper service." *Ross* 58 V.I. at 310. The inquiry does not end here, however. Before a court may dismiss a complaint against a party for lack of service, it must consider whether good cause exists for the failure to timely serve that would permit service out of time. *Id.*, citing Fed. R. Civ. P. 4(m).[5] Since Plaintiff failed to timely serve DOE, the Court must consider (1) whether plaintiff has shown good cause for its failure to serve; or (2) whether, despite a lack of good cause, any other factors warrant this Court granting a discretionary extension. *Ross* 58 V.I. at 310-11.

The Supreme Court noted in *Beachside Assocs., LLC v. Fishman,* that trial courts nationwide have generally equated the "good cause" requirement of Fed. R. Civ. P. 4(m) with the concept of "excusable neglect" found in Fed. R. Civ. P. 60(b)(2), requiring both a demonstration of good faith and reasonable basis for noncompliance with the statutory deadline. 53 V.I. 700, 713 (2010) (citing *MCI Telecomms. Corp. v. Teleconcepts, Inc.,* 71 F.3d 1086, 1097 (3d Cir. 1995)). Additionally, while

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[4] *See also Foster v. V.I. Bureau of Internal Revenue*, 2015 U.S. Dist. LEXIS 41207, at *12 (D.V.I. 2015); *O'Neil v. Dir. of the V.I. Bureau of Internal Revenue*, 2014 U.S. Dist. LEXIS 4542 (D.V.I. 2014); *U.S. Dep't of Agric. Rural Hous. Serv. v. Penn.*, 2009 U.S. Dist. LEXIS 30981, at *4-5 (D.V.I. 2009).

[5] "If a defendant is not served within 120 days after the complaint is filed, the court-on motion or on its own after notice to the plaintiff-must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).

relevant to the analysis, the absence of prejudice to the Defendant, by itself, will never constitute good cause to excuse late service. *Id.* Rather, "the primary focus is on plaintiff's reasons for not complying with the time limit in the first place." *Id.* (quoting *MCI Telecomms., Corp.,* 71 F.3d at 1097).

Plaintiff bears the burden of proof to show good cause for failure to timely serve. *Id.* As noted, Plaintiff has never attempted to properly serve process on the Governor as required by the letter of the applicable rules, and has not provided any justification for failing to do so. In the context of arguing for the equitable tolling of the statutory limitation for filing pursuant to Section 9 of the FAA, Plaintiff states that its former counsel "was transitioning" to a new position "around the time this action should have been filed," but that as soon as its current counsel inherited the case, the complaint was "immediately filed." Opposition, at 2. However, even if those circumstances could have constituted grounds for equitable tolling of the limitation period for filing the action, no justification is offered for the failure to effectuate proper service of process during the one and one-half years following the filing of the action.[6]

Instead, Plaintiff simply admits its noncompliance and, rather than arguing that good cause exists to extend the deadline, Plaintiff seems to argue a lack of prejudice to DOE. Because by statute, the Attorney General is empowered and required "to appear for and represent the executive branch of the Government of the United States Virgin Islands, and all departments, boards, commissions, agencies, instrumentalities, or officers thereof before administrative tribunals or bodies of any nature, in all legal or quasi-legal matters, hearings or proceedings,"[7] Plaintiff argues that service upon an Assistant Attorney General accomplished the "primary function" of giving the Government notice of the commencement of the action. Opposition, at 3. However, the Court finds that neither Plaintiff's former counsel's transitioning to a new position nor former or present counsel's lack of diligence in failing to properly, timely serve DOE, constitutes good cause sufficient to justify or excuse Plaintiff's failure to properly serve Defendant DOE.

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[6] "It is well-settled that an attorney's inadvertence, neglect, or mistake does not suffice to establish good cause for failure to make proper service within 120 days." *Myers v. Sec'y of the Treasury*, 173 F.R.D. 44, 47 (E.D.N.Y. 1997).

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client … each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-634 (1962).

[7] 3 V.I.C. § 114(a)(6).

Furthermore, in its own review, the Court finds the record devoid of evidence of any other factors which would warrant this Court granting a discretionary extension of the deadline within which to effectuate service. Plaintiff freely admits that, to date, it has made no attempt to comply with the requirement of Fed. R. Civ. P. 4(m) that service of process be made upon the Governor of the Virgin Islands. Moreover, Plaintiff has never sought, and still does not seek an extension of the deadline for service, arguing only that service upon the Assistant Attorney General is the functional equivalent of service upon the Governor.

Accordingly, because Plaintiff has failed to demonstrate that good cause exists for its failure to properly, timely serve DOE, and because the Court finds that no other factors exist which would justify a discretionary extension of the time within which to serve, Plaintiff's claim is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(5). As a result of Plaintiff's failure to effectuate proper service of process on DOE, the Court lacks personal jurisdiction over DOE, and therefore DOE's Motion will be granted and Plaintiff's Complaint dismissed.

Based on the foregoing, it is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED. It is further

ORDERED that Plaintiff's Action to Confirm An Arbitration Award is DISMISSED.

DATED: December 21, 2016.

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: _____
Court Clerk Supervisor
12/21/16