

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, :
ex rel. WALTER M. DRAKE, :
 Plaintiff, :
 :
 :
 v. No. 3:94-CV-963(EBB)
 :
NORDEN SYSTEMS, INC., and :
UNITED TECHNOLOGIES CORP., :
 Defendants. :

Ruling on Defendants' Motion to Strike
Plaintiff's Third Amended Complaint and to Dismiss

Defendants United Technologies Corporation ("UTC") and Norden Systems, Inc. ("NSI") move pursuant to Fed. R. Civ. P. 12(f) and 41(b), and the Local Rules of this Court, to strike relator Walter M. Drake's Third Amended Complaint and to dismiss this case with prejudice. See Motion to Strike Plaintiff's Third Amended Complaint and to Dismiss This Case ["Defendant's Motion"] [Doc. No. 124]. Defendants claim that relator Walter M. Drake's ("Drake") seventeen-month failure to file a third amended complaint conforming to the Court's partial grant of defendants' motion to dismiss has prejudiced defendants' ability to defend against Drake's qui tam action raised on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729, et seq. For the following reasons, the defendants' motion to dismiss is GRANTED.

BACKGROUND

The Court sets forth only those facts deemed necessary to an understanding of the issues raised in, and decision rendered on, this motion. The facts are culled from the numerous pleadings, memoranda of law, and exhibits attached thereto, that have been filed in this matter.

In June 1994, Drake, who was NSI's Supervisor of Facilities Accounting, brought this action under seal on behalf of the United States pursuant to the qui tam provisions of the False Claims Act. The government declined to formally intervene, and the court ultimately unsealed the case. See Notice [Doc. No. 27]. On two occasions in 1997, Drake amended his complaint. See Drake's Amended Complaint [Doc. No. 29]; Drake's Second Amended Complaint [Doc. No. 53]. In January 1998, defendants moved to dismiss the second of these two amended complaints. See Defendants' Motion to Dismiss [Doc. No. 62].

On August 24, 2000, the Court both granted in part and denied in part the defendants' motion to dismiss Drake's Second Amended Complaint. See Ruling on Defendants' Motion to Dismiss [Doc. No. 118]. In its ruling on the defendants' motion to dismiss, the Court stated:

Relator [Drake] shall file within 60 days a final amended complaint to conform the pleadings to this ruling within the confines of Fed. R. Civ. P. 15(c).

Id. The sixty days within which Drake's Third Amended Complaint was due came and went without any response from Drake. In fact, a sixteen-month period ensued in which Drake did not file his amended complaint, at which point the Clerk's office issued a Rule 16 Notice to Counsel [Doc. No. 120], pursuant to the Local Rules of this District.¹ On February 19, 2002, Drake filed a response to the Rule 16 Notice [Doc. No. 121], in which he contended that the matter should not be dismissed. On the same day, seventeen months after his Third Amended Complaint was due, Drake filed his belated pleading. See Drake's Third Amended Complaint [Doc. No. 122].

On February 28, 2002, defendants filed their motion that is now pending before the Court, seeking an order striking Drake's Third Amended Complaint and dismissing the case. A status conference was held in chambers on October 17, 2002,

¹ Rule 16(a) of the Local Rules states:

In civil actions in which no action has been taken by the parties for six (6) months or in which deadlines established by the Court pursuant to Rule 11 appear not to have been met, the Clerk shall give notice of proposed dismissal to counsel of record. If such notice has been given and no action has been taken in the action in the meantime and no satisfactory explanation is submitted to the Court within twenty (20) days thereafter, the Clerk shall enter an order of dismissal. Any such order entered by the Clerk under this Rule may be suspended, altered, or rescinded by the Court for cause shown.

which was followed by additional briefing requested by the Court.

STANDARD

The dismissal of a case for failure to prosecute, as with all sanctions, is a matter consigned to the discretion of the district court. Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962); Dodson v. Runyon, 86 F.3d 37, 39 (2d Cir. 1996). Dismissal being a particularly harsh sanction for a party's dilatory behavior, the Second Circuit has cautioned that "[o]nly on rare occasions should a district judge deprive the languid litigant of his right to a trial on the merits." Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 668 (2d. Cir. 1980); see also Dodson, 86 F.3d at 39 ("We have long recognized that dismissal is a harsh remedy, not to be utilized without a careful weighing of its appropriateness.") (citations omitted).

In assessing whether to dismiss for failure to prosecute, the Court should consider a host of factors that bear on the seriousness of Drake's dilatory behavior and the availability of alternative measures to remedy the situation. As summarized by the Second Circuit, the Court should evaluate the following factors when considering a defendant's motion to dismiss for failure to prosecute pursuant to Federal Rule of

Civil Procedure 41(b)²: (1) the duration of the plaintiff's failures; (2) whether plaintiff had received notice that further delays would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) whether the judge has adequately assessed the efficacy of lesser sanctions. Shannon v. Gen. Elec. Co., 186 F.3d 186, 193-94 (2d Cir. 1999); Dodson, 86 F.3d at 40. No one factor mentioned above is dispositive. See Nita v. Connecticut Dep't of Env'tl. Protection, 16 F.3d 482, 485 (2d Cir. 1994).

DISCUSSION

1. Duration

Consideration of this first factor involves asking (1) whether plaintiff's failure to prosecute is, in fact, attributable to plaintiff, and (2) whether the duration of that failure is significant. See Jackson v. City of New York,

² Rule 41(b) provides, in pertinent part:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

22 F.3d 71, 75 (2d Cir. 1994). As to the first consideration, the record establishes that Drake's Third Amended Complaint was filed following a lengthy delay that was in no way attributable to the defendants.³ As to the second consideration, the length of Drake's delay--seventeen-months--similarly supports dismissal. See, e.g., Chira, 634 F.2d at 666-68 (noting that although dismissal based on a failure to prosecute is a "pungent" remedy, even a six-month delay by the plaintiff may warrant such a measure).

Notably, Drake's counsel stresses that the delay in filing was attributable not to Drake but rather solely to Drake's attorneys. Although "a client is ordinarily bound by the acts of his lawyer," a delay occasioned by an attorney's behavior, rather than a client's own acts or omissions, favors a sanction less drastic than that of dismissal. See Dodson, 86 F.3d at 40 (noting that "the more the delay was occasioned

³ Drake suggests that while "the blame for the delay in filing the Third Amended Complaint rests with relator's counsel, at the same time it is clear that defendants do not have completely clean hands in this matter." Drake's Memorandum in Opposition to Defendants' Motion to Strike Third Amended Complaint and Dismiss, at 24. Specifically, Drake contends that "[d]efendants deliberately chose, when contacted by relator, to refuse to go forward with discovery," thereby violating the Court's May 31, 2000 Order lifting the prior stay in the case. Id. (emphasis in original). According to both sides, Drake twice attempted to arrange a scheduling order with the defendants. However, according to the defendants, one of those attempts occurred only after the issuance of the January 31, 2002 Rule 16 Notice to Counsel.

by the lawyer's disregard for his obligation toward his client, the more this factor argues in favor of a less drastic sanction imposed directly on the lawyer"). According to sworn affidavits from Drake and his lead attorney, Drake was "unaware" that his attorneys had failed to file a timely amended complaint, see Affidavit, Walter M. Drake, ¶ 5, and "personally[] bears no fault or responsibility for the delay." See Affidavit, David S. Golub, ¶ 3. Rather, Drake's lead attorney claims that Drake's counsel shoulders "full responsibility for the delay," and that a variety of factors, including the "time-consuming and difficult" nature of preparing the third amended complaint and the many separate matters that Drake's attorneys' were involved with, caused this matter to be delayed. Id. ¶¶ 2-3.

That Drake's lead counsel is willing to take complete responsibility for the seventeen-month delay, does not, in and of itself, preclude the Court from dismissing this matter. It is Drake who retains the ultimate burden of prosecuting his case. As noted by the Supreme Court, "[K]eeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant." Link, 370 U.S. at 634 n.10. Indeed, it would appear that Drake and his counsel are

attempting to have it both ways. If Drake was so uninvolved that he had no idea that a seventeen-month delay in filing on the part of his attorneys had ensued, the Court might reasonably conclude that dismissal of this matter is not, in fact, such a harsh sanction against Drake himself. On the other hand, if Drake was, as he claims, an involved litigant who "has, from the outset, done everything in his power to try to vindicate his claims," Relator's Memorandum in Opposition to Defendants' Motion to Strike Third Amended Complaint and Dismiss, at 16, he must take a measure of responsibility for ignoring such an egregious delay.

2. Notice

In the appropriate case, notice of the impending dismissal for failure to prosecute and a prior hearing are not required. See Link, 370 U.S. at 633; Lyell Theatre Corp. v. Loews Corp., 682 F2d. 37, 42 (2d Cir. 1982). However, because dismissal is a harsh sanction, it is more appropriate that parties be given both a warning of impending dismissal and the opportunity to be heard on the matter. Here, Drake received notice that further delays would result in dismissal of his case for failure to prosecute. The Clerk's January 31, 2002 Notice to Counsel advised Drake that, pursuant to Rule 16 of the Local Rules, his case would be dismissed absent action

taken and a satisfactory explanation submitted to the Court within twenty days of the notice being filed. In addition, the Court held a status conference and received pleadings on the matter.

The Court does note that here, unlike some other cases in which cases have been dismissed for failure to prosecute, Drake responded to the Court's threat of dismissal by filing a timely response to the Rule 16 Notice, as well as the laggard third amended complaint.⁴ See, e.g., Peart, 992 F.2d at 460-61 (detailing numerous instances where dilatory attorney "failed to respond to two court orders and otherwise demonstrated a lack of respect for the court").

3. Prejudice

Prejudice stemming from unreasonable delay may be presumed as a matter of law. See id., 992 F.2d at 462; Lyell, 682 F.2d at 43. As explained by the Second Circuit, prejudice may be presumed "because delay by one party increases the likelihood that evidence in support of the other party's

⁴ That said, Drake's Third Amended Complaint does lack certain indicia of substantive compliance. For example, Drake's Third Amended Complaint so closely resembles his Second Amended Complaint with respect to those claims dismissed by the Court in its August 24, 2000 ruling that the Court questions whether Drake's filing in response to the Rule 16 Notice sacrificed compliance with the substance of the Court's earlier order for expediency brought on by the threat of dismissal.

position will be lost and that discovery and trial will be made more difficult." Shannon, 186 F.3d at 195 (citing Romandette v. Weetabix Co., 807 F.2d 309, 312 (2d Cir. 1986)). While prejudice may be presumed in certain instances, however, "in cases where delay is more moderate or excusable, the need to show actual prejudice is proportionately greater." Id. (citations omitted).

Prejudice is properly presumed in this case because of Drake's lengthy and inexcusable delay in filing his Third Amended Complaint. Drake's delay in filing his Third Amended Complaint--seventeen-months--was prolonged, extending even further the number of years that have passed since the occurrence of the alleged events at issue in this matter. As detailed in Drake's Third Amended Complaint, the defendants' culpable acts generally occurred between 1987 and 1994. Drake's immoderate delay thereby significantly increases the likelihood that the defendants have been prejudiced in their ability to defend against this prosecution. See id. ("Because the events at issue in this lawsuit took place more than a decade before the district court dismissed the case, the likelihood that evidence in support of the federal defendants' position had become unavailable and that their witnesses' recollection had diminished was quite large."). Moreover, as

noted, Drake himself offers only a weak excuse for the lengthy delay. Likewise, Drake's counsel offers no compelling reason for his and his firm's lengthy delay.

In addition to a presumption of prejudice to the defendants as a matter of law, the Court also finds persuasive defendants' argument that they will be actually prejudiced by further delay. To date, pursuant to the Court's request, defendants have expended time and expense attempting to show what, if any, actual prejudice stems from Drake's delay. The examples proffered by the defendants indicate that meaningful prejudice presently exists, and strongly suggests that further delay will exacerbate these hardships. For example, it is quite likely that some of the defendants' witnesses are now unavailable as a result of two layoffs at Norden since Drake's Third Amended Complaint was due in October 2000. In addition, at least one key defense witness' memory has dimmed, and it is likely that the memories of other witnesses key to the defendants' case have been dimmed during the interim period. Furthermore, physical evidence important to the defendants' defense has been sold off since the October 2000 date by which Drake's complaint was due.

Defendants also contend that while their ability to defend against Drake's prosecution has deteriorated as a

result of Drake's delay, Drake has, in contrast, gained certain advantages. Whereas Drake claims to have essentially completed the discovery he needs, the defendants contend that they are far from near completion. Indeed, whereas Drake notes that seventeen depositions have heretofore been completed (ostensibly mitigating the defendants' claim of lost witnesses and dimmed memories), the defendants note that they themselves merely defended thirteen of those depositions, hardly constituting adequate discovery and investigation.

Lost witnesses, dimmed memories and missing physical evidence will indisputably impede the defendants' ability to adequately and fairly defend against Drake's prosecution. Accordingly, the Court finds that prejudice, either presumed and/or actual, exists as a result of Drake's delay, thereby inhibiting defendants' ability to fully prepare their defense.

4. Striking the Balance Between Alleviating Court Calendar Congestion and Protecting Drake's Right to Due Process and a Fair Chance to Be Heard

Drake's delay has not impacted the Court's trial calendar or otherwise impeded the Court's work. That said, the Court must be careful to protect against litigants' abuses of the system. See Chira, 634 F.2d at 668 ("Delays have dangerous ends and unless district judges use the clear power to impose the ultimate sanction when appropriate, exhortations of

diligence are impotent."). While certainly not dispositive, this factor militates against dismissal.

5. Efficacy of Lesser Sanctions

Drake contends that reimbursement of any additional costs attributable to the delay in the filing of Drake's Third Amended Complaint would be the more appropriate sanction, if any, for the Court to impose. The Court would impose such a sanction in order to recompense the defendants for the extra work compelled by Drake's counsel's delay, as well as stimulate the prosecution of this action. However, in light of the foregoing discussion, particularly the prejudice that flows from Drake's delay, the Court finds that no lesser sanction would adequately suffice here.

CONCLUSION

The Court proceeds with substantial caution in ruling on whether to dismiss this case for failure to prosecute. Although not every factor discussed above favors dismissal, the Court concludes that the record on the whole nevertheless amply justifies dismissal in this case. Thus, the Court hereby GRANTS the defendants' motion to dismiss this case with prejudice [Doc. No. 124].

SO ORDERED.

Ellen Bree Burns,
Senior District Judge

Dated at New Haven, Connecticut, this ____ day of February,
2003.