

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ANDREA LEE Plaintiff)
)
)
)
)
 vs)
)
)
)
JAMES SMITH)
CARIBBEAN AUTO MART)
DERRICK FREDERICKS)

Defendant

CASE NO. ST-02-CV-0000521

ACTION FOR: DAMAGES - CIVIL

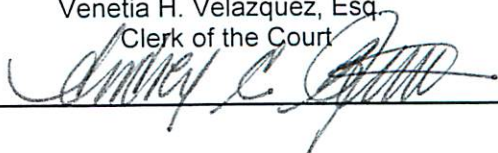
**NOTICE OF ENTRY OF
MEMORANDUM OPINION**

TO: KYLE R. WALDNER, ESQ. 12/01/2010 4:47:39 PM
KENTH ROGERS, ESQ.
DENISE FRANCOIS, ESQ.
DEREK HODGE, ESQ.
SUPERIOR COURT JUDGES AND MAGISTRATES
LOG BOOK, IT AND CLERK OF THE COURT

Please take notice that on November 10, 2010 a(n) MEMORANDUM
OPINION dated November 08, 2010 was entered by the Clerk in the
above-entitled matter.

Dated: November 10, 2010

Venetia H. Velazquez, Esq.
Clerk of the Court



AUDREY BRIN
COURT CLERK II

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

ANDREA LEE,)	CIVIL NO. ST-02-CV-521
)	
	Plaintiff,	
)	
vs.)	ACTION FOR DAMAGES
)	
JAMES SMITH, DERRICK FREDERICK,)	JURY TRIAL DEMANDED
and MARY WILLIAMS,)	
)	
	Defendants.	
)	
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MEMORANDUM OPINION

THIS MATTER is before the Court on a number of pending motions. Plaintiff Andrea Lee (“Lee”) is represented in this action by Kenth Rogers, Esq.¹ The Court entered the default of Defendant James Smith (“Smith”) on September 24, 2003, and he is now represented by Henry Smock, Esq., of Smock & Moorehead. The Court entered Defendant Derrick Frederick’s default on September 24, 2003, and he has not made an appearance in this action. The Court entered the default of Defendant Mary Williams (“Williams”) on September 24, 2003, and she is now represented by Denise Francois, Esq., of Hodge & Francois.

Lee filed the Complaint in this matter on October 22, 2002. Unfortunately, because of several reassignments of this case, it has suffered from neglect and confusion. Although the Court ordered the parties to mediate on June 24, 2003, a motion to vacate that order was never decided, and the parties have never mediated or set down a discovery schedule. The Court will consider and decide some of the pending motions in this matter, and require the parties to appear for a scheduling conference. A number of the motions filed by Lee and then-Defendant Caribbean-Auto-Mart, Inc., in 2003 and 2004 are now moot because the Court granted then-Defendant Caribbean Auto-Mart,

¹ When the Complaint was filed, Edith Lee was also a Plaintiff. However, on October 14, 2003, she filed a Motion to Dismiss her own claims against all defendants. On May 18, 2004, the Court determined that Edith Lee was no longer in the case.

Inc.'s Motion to Dismiss on May 18, 2004.

I. WILLIAMS' MOTION FOR RELIEF FROM ENTRY OF DEFAULT.

As noted above, Lee filed her Complaint on October 22, 2002. Williams failed to timely respond or defend. On September 24, 2003, the Court entered Williams' default. On May 21, 2004, Williams' counsel entered an appearance on her behalf, and on May 27, 2004, Williams filed a Motion for Relief from Entry of Default. On July 9, 2004, Lee filed an untimely Opposition.

Rule 50 of the Rules of the Superior Court provides that:

For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications.

"Good cause" is a determination left within the sound discretion of the Court. *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 244 (3d Cir. 1951). Although Rule 50 does not expressly incorporate Rule 55(c) of the Federal Rules of Civil Procedure, which governs applications for relief from entries of default, the standard in the Virgin Islands' jurisprudence remains the same.

The Court will grant a motion to set aside an entry of default if:

- (1) the non-faulting party will not be prejudiced by the reopening,
- (2) the default was not the result of inexcusable neglect or willful act, and
- (3) the defaulting party has a meritorious defense.

Sea Chest Inc. v. Santa Cruz Shores and Spas, Inc., 16 V.I. 557, 559 (Terr. Ct. 1979)); *see also James v. Williams*, 26 V.I. 20 (Terr. Ct. 1990). Courts generally disfavor judgments by default, preferring to decide cases on their merits. *Deal Furniture & Appliance Inc. v. Four Winds Plaza P'ship*, 36 V.I. 151, 153 (D.V.I. 1997). "In a close case, doubts should be resolved in favor of

setting aside the default and obtaining a decision on the merits. *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982).

A. Whether Lee Will Be Prejudiced.

Lee filed an Opposition to Williams' Motion to Set Aside Default. However, she did not attempt in her response to argue that she would suffer from any prejudice if the Court grants Williams' Motion to Set Aside. The Court itself cannot discern any prejudice that would result. Williams filed her Motion about eight months after her default was entered. At that time—and to this day—no discovery had begun and no mediation had taken place. In fact, the only matter of any significance to have been addressed by the Court until now is the dismissal of former-Plaintiff Edith Lee and former-Defendant Caribbean Auto Mart, Inc. Certainly Williams should not be held responsible for the Court's delay in deciding her Motion. Therefore, the Court finds that Lee will not suffer any prejudice if the Court grants Williams' Motion.

B. Whether the Default Was the Result of Inexcusable Neglect or Willful Act.

In her Motion, Williams states that she found the Summons and Complaint under her door one day and did not understand what the documents were.² She later discarded them. At the time that Williams was served, Guardian Insurance Company, her insurer, was actively negotiating with Lee's counsel to settle the claims relating to the car accident. It is reasonable to assume that Williams believed that her insurance company would address the court matter as well. If Williams was properly served, she was under an obligation to respond to the Complaint and to notify her insurance company that she had received the Summons and Complaint. Nonetheless, while not absolving Williams for her omissions which have caused some delay in these proceedings, the Court

² The Court notes that, if this true, it would not constitute adequate service under FED. R. CIV. P. 4(e)(2).

cannot find that her failure to respond is inexcusable, willful or otherwise the result of bad faith.

C. Whether the Defaulting Party Has a Meritorious Defense.

In her Motion, Williams argues that she has a meritorious defense. Specifically, she states that Lee will be unable to prove either that Frederick, the driver of the automobile in question, acted in a negligent manner or that Williams entrusted him with her vehicle. She provides an affidavit by Williams' son that Frederick took the car keys without her knowledge. In addition, she refers to the police report of the accident which does not conclude that Frederick was negligent, but instead simply states that the officer could not determine what happened.

It appears from the evidence Williams provides in connection with her Motion that she has a defense which may well be meritorious. This, along with the other factors described above, weighs towards a determination that the Court should hear the matter on its merits. *Deal Furniture & Appliance Inc.*, 36 V.I. at 153. Therefore, the Court will grant Williams' Motion to Set Aside Default.

II. SMITH'S MOTION TO VACATE ENTRY OF DEFAULT.

As noted above, Lee filed her Complaint on October 22, 2002. Smith failed to timely respond or defend. On September 24, 2003, the Court entered Smith's default. On May 28, 2004, Smith's counsel entered an appearance on his behalf, and on January 24, 2007, Smith filed a Motion to Vacate Entry of Default and to Dismiss Pursuant to 12(b)(5). On February 14, 2007, Lee filed an untimely Opposition.

A. Whether Lee Will Be Prejudiced.

Whereas Williams waited only eight months after entry of her default to move to set it aside,

Smith waited almost three and a half years. However, the fact of delay alone is insufficient to make out a case of prejudice. *Deal Furn. & Appliances, Inc.*, 36 V.I. at 154 (“[M]ere delay in final resolution was never contemplated as a factor to be considered in determining prejudice.”). Lee argues that she suffers prejudice because there is an “increased potential for fraud or collusion between the defendants.” However, she does not describe why she believes setting aside the default would lead to fraud or collusion, especially as she acknowledges in her Opposition that both Smith and Williams have been represented by the same insurer since the action began. Any “collusion” that might have occurred would have occurred years ago. Moreover, there does not appear to be any other evidence of prejudice. As noted above, although this case is eight years old, it is at an early stage and mediation and discovery have not yet begun. Therefore, it does not appear that Lee would suffer any prejudice if the Court sets aside Smith’s default.

B. Whether the Default Was the Result of Inexcusable Neglect or Willful Act.

The reasons for which the Court finds that Williams’ default was not the result of inexcusable neglect or any willful act on her behalf apply with equal force to Smith’s default. Therefore, the Court finds that this factor has been met.

C. Whether the Defaulting Party Has a Meritorious Defense.

Smith argues that Lee was contributorily negligent, and that her negligence caused her injuries. A defense of contributory negligence would be a meritorious defense. Smith submitted a copy of a statement by an “impartial witness,” Dennis Sewer, who stated that Lee’s car “made a sudden stopped [sic] with no indicators on.” It would appear, therefore, that Smith may well be able

to make out a defense of contributory negligence.

Considering the factors above, the Court will grant Smith's Motion to Vacate.

III. SMITH'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS.

Along with his Motion to Vacate, Smith also filed a Motion to Dismiss for Insufficient Service of Process on January 24, 2007. Although Lee responded to Smith's Motion to Vacate, she did not respond to his Motion to Dismiss.

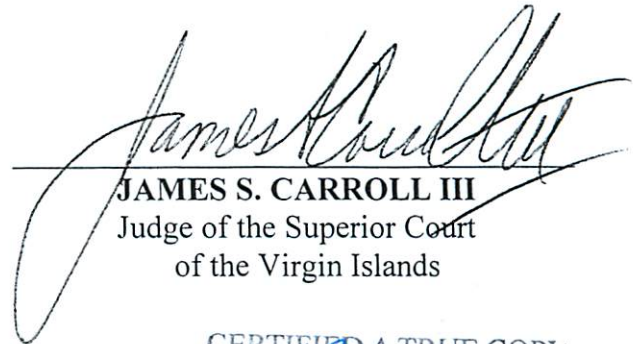
Lee filed her Complaint on October 22, 2002. Accordingly, she had until February 19, 2003, to serve Smith. FED. R. CIV. P. 4(m) ("If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without 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."). However, Lee did not complete service on him until April 10, 2003, nor did she ever move for an extension of time in which to complete service, as is required by the rules. FED. R. CIV. P. 4(m); SUPER. CT. R. 10.

Lee bears the burden of demonstrating good cause why she could not effect service on Smith in a timely fashion. *Bryant v. Caribbean Sun Airlines*, 49 V.I. 93, 95 (V.I. Super. Ct. 2007). Even in the absence of good cause, the Court, in its discretion, may decide not to dismiss. *Id.*

In this case, Lee, who never responded to Smith's Motion to Dismiss, has not attempted to make out a case of good cause why she could not timely effect service on Smith. Nonetheless, the Court retains discretion to decline to dismiss the matter, even in the absence of good cause. *Id.*; see *Untied States v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006) (noting that a plaintiff who has

missed the service deadline and cannot show good cause “throws himself on the mercy” of the court). The interests of this particular case dictate that the Court not sanction Lee with dismissal when Smith failed to take any action to set aside his own default for three years after he received the Summons and Complaint. Coming to the Court with unclean hands, Smith cannot complain of a delay of less than two months. Lee’s counsel is cautioned, however, that his failure to timely serve defendants without first seeking an enlargement of time is a serious one. While the equities of this particular case weigh towards lenity, such circumstances will not recur in every matter before this Court. To move this matter forward expeditiously, by separate Order of even date the Court will set this matter down for a scheduling conference to be held on December 15, 2010, at 11:00 a.m.

DATED: November 8, 2010


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 11/19/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk

ATTEST: VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY: 
ROSALIE GRIFFITH
Court Clerk Supervisor 11/9/10

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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ANDREA LEE,)	CIVIL NO. ST-02-CV-521
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vs.)	ACTION FOR DAMAGES
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JAMES SMITH, DERRICK FREDERICK,)	JURY TRIAL DEMANDED
and MARY WILLIAMS,)	
)	
Defendants.)	
)	

ORDER

AND NOW, pursuant to the Memorandum Opinion of even date, it is hereby

ORDERED that Defendant Mary Williams' Motion to Set Aside Default is **GRANTED**; and

it is further

ORDERED that the September 24, 2003 entry of Defendant Mary Williams' Default is **SET**

ASIDE; and it is further

ORDERED that Defendant James Smith's Motion to Set Aside Default is **GRANTED**; and

it is further

ORDERED that the September 24, 2003 entry of Defendant James Smith's Default is **SET**

ASIDE; and it is further

ORDERED with Defendant James Smith's Motion to Dismiss is **DENIED**; and it is further

ORDERED that copies of this Order shall be directed to counsel of record for the parties.

DATED: November 8, 2010

CERTIFIED A TRUE COPY

Date: 11/9/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By: [Signature]
Court Clerk

[Signature]
JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST: VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY: [Signature]
ROSALIE GRIFFITH
Court Clerk Supervisor 11/9/10