

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

MAXWELL CARTY **Plaintiff**)
)
)
)
vs)
)
)
)
NANCY MASON)
)
)

Defendant

CASE NO. ST-06-CV-0000433

ACTION FOR: DAMAGES - CIVIL

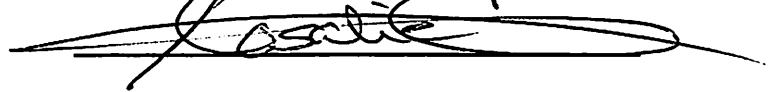
**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: KENTH W. ROGERS, ESQ.
EMILY SHOUP, ESQ.
JUDGES & MAGISTRATES, SUPERIOR COURT
ORDER BOOK
LIBRARIAN
IT DIVISION
LAWCLERKS STT-STX

Please take notice that on December 14, 2010 a(n) MEMORANDUM
OPINION AND ORDER dated December 07, 2010 was entered by the Clerk in
the above-entitled matter.

Dated: December 14, 2010

Venetia H. Velazquez, Esq.
Clerk of the Court



ROSEALIE GRIFFITH
COURT CLERK SUPERVISOR

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

MAXWELL CARTY,)	
)	CIVIL NO. ST-06-CV-433
)	
Plaintiff,)	
)	ACTION FOR DAMAGES
vs.)	
)	
TRACY MASON,)	JURY TRIAL DEMANDED
)	
)	
Defendant.)	
)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion for Dismissal for Failure to Prosecute and his Motion to Compel, both of which were filed on October 4, 2010. Plaintiff Maxwell Carty is represented in this matter by Kenth W. Rogers, Esq., of the Law Offices of Kenth W. Rogers, P.C. Defendant Tracy Mason is represented by Emily Shoup, Esq., of Bryant Barnes Beckstedt & Blair, LLP. For the reasons stated below, the Court will deny the Motion to Dismiss and grant the Motion to Compel.

PROCEDURAL HISTORY

Carty alleges that he and Mason were involved in an automobile accident on September 20, 2004, in St. Thomas, U.S. Virgin Islands. Carty filed his Complaint in this matter on August 22, 2006. He subsequently failed to comply with a series of Orders issued by this Court to complete service. His egregious failures to comply are detailed in the Court's May 6, 2010 Memorandum Opinion and need not be repeated here, except that the Court incorporates by reference the facts as stated in that Opinion. Recognizing the tortured history of this case, the fault for which rests entirely with Carty, the Court included in that Opinion an admonition reminding the litigants "of the potentially serious consequences for their cases and claims should they fail to comply with the orders and rules of this Court in the future."

On June 27, 2010, following a scheduling conference, the Court entered a Scheduling Order. Mason now alleges that Carty has failed entirely to take any action to move the case forward, and has not propounded, responded to or served any discovery. Therefore, Mason moves to Dismiss the claims for failure to prosecute. Carty never filed a response to the Motion to Dismiss.

I. MASON'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE.

Standard

Motions to dismiss for failure to prosecute are governed by Rule 41 of the Federal Rules of Civil Procedure.¹ Rule 41(b) states:

¹ The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure apply to matters before this Court whenever they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

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.

FED. R. CIV. P. 41(b).

When considering a motion to dismiss for failure to prosecute, the Court must weigh a number of factors, which are set out by the Third Circuit Court of Appeals in *Poulis*:

- (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 was *willful* or in *bad faith*;
- (5) the effectiveness of sanctions other than dismissal, with entails an analysis of *alternative sanctions*; and
- (6) the *meritoriousness* of the claim or defense.

Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984) (emphases in original); see *Halliday v. Footlocker Specialty, Inc.*, S. Ct. Civ. No. 2009-0053, 2010 WL 1576436, at *3 (V.I. April 12, 2010) (reaffirming that the Superior Court is bound to follow the Third Circuit's decision in *Poulis* when considering motions to dismiss for failure to prosecute).

Dismissal, as a sanction for failure to prosecute, is inappropriate unless the Court makes findings as to the *Poulis* factors and concludes that, on balance, dismissal is warranted. *Halliday*, 2010 WL 1576436, at *3.

A. **Carty's Personal Responsibility for the Failure to Prosecute.**

In this case, there is no evidence that Carty himself is responsible for the delay in serving Mason, or for the failure to engage in discovery practice. Mason does not allege that the fault for noncompliance rests with the individual client, but rather that the delay is Plaintiff's responsibility. However, *Poulis* makes clear that this factor focuses not on which party is responsible for delay, but whether it was the client or the counsel who is responsible. See *Poulis*, 747 F.2d at 868 (observing that plaintiffs' counsel took responsibility for the delay, which weighed against a decision to dismiss, although also noting that "the *Poulis*' lack of responsibility for their counsel's dilatory conduct is not dispositive, because a client cannot always avoid the consequences of the acts or omissions of counsel").

Scheduling orders, such as the Court's June 27, 2010 scheduling order, are directed to the parties. However, it is understood that the obligation to comply (or to timely seek relief or an

enlargement of time) rests primarily with counsel. *See, e.g.*, LRCi. 37.3 (“The failure of any counsel to comply with or cooperate in, or the abuse of counsel of, the foregoing [discovery] procedures may result in the imposition of sanctions.”) Therefore, this factor weighs against the Motion to Dismiss.

B. Prejudice to the Adversary.

Mason argues that he is prejudiced by Carty’s current failure to prosecute as well as his previous failures to serve Mason in a timely fashion. He states that, should the motion not be granted, he “would now be forced to base his defense on faded witness recollections and stale evidence, especially given that the accident that is the basis of this occurred over six years ago.” The Court agrees that Mason has been prejudiced by Carty’s history of dilatoriness, as the Court discussed in its May 6, 2010 Order. Scheduling orders are established to ensure an efficient discovery process. When a party expends time developing a scheduling plan, complying with its own obligations, and attempting to obtain cooperation from the opposing party, it certainly suffers the prejudice of lost time and resources. Therefore, the Court finds that Mason has been prejudiced by Carty’s consistent failure to comply with the orders and rules of this Court, and, in particular, its Scheduling Order.

C. History of Dilatoriness.

As described above in the Procedural History section of this Opinion, Carty has been remarkably consistent in his failure to timely comply with the rules and orders of this Court. In fact, the Court cannot find a single order with which Carty timely complied in the four-year history of this case.² Significantly, Carty failed even to timely reply to Mason’s Motion to Dismiss for Failure to Prosecute. There are very few litigants before this Court whose “history of dilatoriness” has been so long and pronounced. Therefore, this factor weighs strongly towards granting Mason’s Motion.

D. Whether the Conduct Was Willful or In Bad Faith.

Unfortunately, because Carty failed to respond to Mason’s Motion, it is difficult to assess the reasonableness of Carty’s excuse for his complete failure to engage in any discovery. However, in its March 6, 2010 Order, the Court did find that Carty’s efforts to complete service on Mason were unreasonable. In addition, the Court can assume from counsel’s failure to seek relief from the Scheduling Order, or otherwise to challenge the discovery deadlines to which he previously agreed, that counsel’s neglect is at least willful, if not in bad faith. Therefore, this factor weighs towards a dismissal. However, it is not a strong factor because, as discussed above, the Court finds it likely that the delay was counsel’s responsibility and not that of the individual plaintiff.

E. The Effectiveness of Alternative Sanctions.

Along with his Motion to Dismiss for Failure to Prosecute, Mason filed a Motion to Compel.

² After denying a motion to amend the Complaint because Carty failed to comply with LRCi. 15, the Court instructed Carty to file a Renewed Motion on or before June 19, 2009. He did so. However, his Renewed Motion also violated Rule 15, as it did not “note prominently on the first page the numbered amendment it represents.” LRCi. 15(a).

In that Motion, Mason alleges a number of discovery violations. Pursuant to Rule 16(f)(1)(c), (f)(2) of the Federal Rules of Civil Procedure, the Court is empowered to sanction a party or counsel for failure to comply with a scheduling order. Among other possible sanctions, the Court may exclude evidence, preclude witnesses, strike portions of pleadings, or impose monetary sanctions to compensate the harmed party for his reasonable expenses, including attorney's fees, caused by the noncompliance. Because the Court has a number of less drastic alternative sanctions at its disposal, this weighs against entering an order of dismissal. However, Carty is cautioned that, upon further failures to comply with orders of this Court, or upon a failure to move this matter forward in a diligent manner, the Court will be inclined to dismiss the matter for failure to prosecute.

F. The Meritoriousness of the Claim or Defense.

It is too early, at this stage of the litigation, to say with much certainty whether Carty's claims are meritorious. However, the Court does note that the police report filed at the time of the accident reflects a notation purportedly made by Mason stating that he is at fault for the accident. Therefore, this factor weighs against dismissal.

II. MASON'S MOTION TO COMPEL.

Mason filed a Motion to Compel on October 4, 2010, requesting that the Court compel Carty to respond to the Interrogatories and Request for Production of Documents propounded by Mason on June 22, 2010. Mason has complied with the provisions of LRCi. 37.1 and 37.2, by attaching to his Motion to Compel an affidavit stating that, although Mason's counsel attempted to meet with Carty's counsel to confer regarding the discovery dispute, Carty's counsel never responded to Mason's letter.

The Court will grant the Motion to Compel. The Court's June 17, 2010 Scheduling Order required the parties to exchange Rule 26 disclosures by June 30, 2010, and to complete written discovery by September 30, 2010. Instead, Carty has not produced *any* discovery.

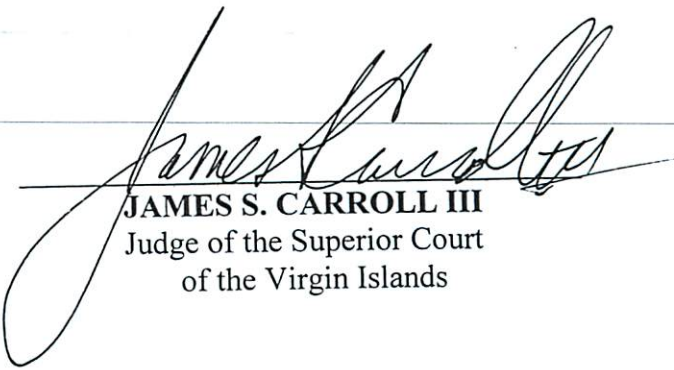
In addition to granting the Motion to Compel, the Court will also issue sanctions against Carty's counsel. The Court is empowered to issue a number of alternative sanctions, some of which are discussed in Section IA above. At a minimum, however, the Court *must* require Carty's counsel to pay the "reasonable expenses," including attorney fees, caused by noncompliance with Rule 16, unless the Court finds that the noncompliance was "substantially justified" or other circumstances make such an award "unjust." FED. R. CIV. P. 16(f)(2).

In this case, Carty has failed to provide any justification for his failure to comply with the Scheduling Order, and has not filed a response to the Motions to Compel or Dismiss. Therefore, the Court has no basis from which to conclude that the noncompliance was justified or that an award of expenses would be unjust. Therefore, in addition to granting the Motion to Compel, the Court will issue sanctions against Carty's counsel. Before doing so, the Court will require Mason to provide evidence regarding the expenses he suffered as a result of Carty's noncompliance, which shall be provided in an affidavit of costs and fees to be filed in this Court on or before December 20, 2010.


CONCLUSION


Carty has failed to fulfill his obligation to his client, this Court and opposing counsel to diligently prosecute this case. He failed for years to timely serve Mason, and he is now failing to engage in discovery or otherwise cooperate with opposing counsel. His lack of diligence and attention to this matter have increased the costs of the Court and added to Mason's legal expenses. Indeed, Carty's noncompliance has most likely increased his own attorney's fees. However, because his failure to comply with the Court orders and failure to engage in discovery are likely attributable to his counsel's dilatoriness and not his own, and because there are less drastic alternative sanctions available, the Court will exercise its discretion not to dismiss the matter at this time. A separate Order of even date will issue.

DATED: December 7, 2010


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

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

BY: 
ROSALIE GRIFFITH
Court Clerk Supervisor 12/13/10

CERTIFIED A TRUE COPY
Date: Dec. 16, 2010
Venetia H. Velazquez, Esq.
Clerk of the Court
By: 
Court Clerk

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

MAXWELL CARTY,)
) CIVIL NO. ST-06-CV-433
)
) Plaintiff,)
)
 vs.) ACTION FOR DAMAGES
)
)
 TRACY MASON,) JURY TRIAL DEMANDED
)
)
) Defendant.)
)

ORDER

AND NOW, pursuant to the Memorandum Opinion issued on today's date, it is hereby

ORDERED that Defendant Tracy Mason's October 4, 2010 Motion to Dismiss for Failure to Prosecute is **DENIED**; and it is further

ORDERED that Defendant Tracy Mason's October 4, 2010 Motion to Compel is **GRANTED**; and it is further

ORDERED that Plaintiff Maxwell Carty shall provide responses to Defendant Tracy Mason's First Set of Interrogatories and Request for Production of Documents **on or before Monday, December 20, 2010**; and it is further

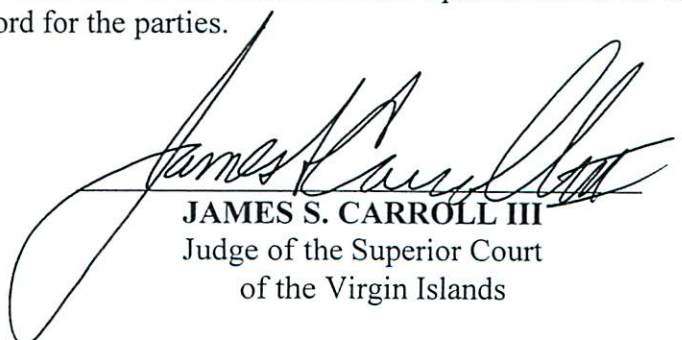
ORDERED that Defendant Tracy Mason shall **FILE** an affidavit of costs and fees **on or before Monday, December 20, 2010**, demonstrating the expenses incurred by Mason as a result of Carty's noncompliance with the Scheduling Order; and it is further

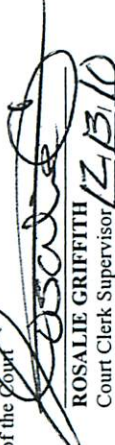
ORDERED that Attorney Kenth Rogers shall **PERSONALLY SERVE** a copy of this Order and of the Memorandum Opinion issued on this date on his client, Maxwell Carty; and it is further

ORDERED that Attorney Kenth Rogers shall file proof of service on his client with the Court **on or before Monday, December 20, 2010**; and it is further

ORDERED that copies of this Order and of the Memorandum Opinion issued on today's date shall be directed to counsel of record for the parties.

DATED: December 7, 2010


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

ATTEST: VENEZIA H. VELAZQUEZ, ESQ.
Clerk of the Court
BY: 
ROSALIE GRIFFITH
Court Clerk Supervisor

CERTIFIED A TRUE COPY
Date: Dec. 16, 2010
Venezia H. Velazquez, Esq.
Clerk of the Court
