

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

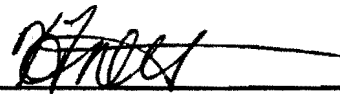
**NOTICE OF ENTRY OF  
MEMORANDUM OPINION  
AND ORDER**

TO: KENTH W. ROGERS, ESQ.  
JUDGES AND MAGISTRATES OF THE SUPERIOR  
COURT  
ORDER BOOK  
IT DIVISION  
LIBRARIAN

Please take notice that on May 12, 2010 a(n) MEMORANDUM OPINION  
AND ORDER dated May 06, 2010 was entered by the Clerk in the above-entitled  
matter.

Dated: May 12, 2010

Venetia H. Velazquez, Esq.  
Clerk of the Court



KHALILA FRETT  
COURT CLERK II

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

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<b>MAXWELL CARTY,</b>	)	
	)	CIVIL NO. ST-06-CV-433
	)	
vs.	)	ACTION FOR DAMAGES
	)	
<b>TRACY MASON,</b>	)	JURY TRIAL DEMANDED
	)	
	)	
	)	
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	)	

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**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** is before the Court upon Defendant’s Motion to Dismiss for failure to complete service, and Plaintiff’s opposition thereto, which the Court construes as a motion for an enlargement of time in which to complete service. Plaintiff Maxwell Carty (“Carty”) is represented in this matter by Kenth W. Rogers, Esq., of the Law Offices of Kenth W. Rogers, P.C. Defendant Tracy Mason (“Mason”) is represented by Emily Shoup, Esq., of Bryant Barnes Beckstedt & Blair, LLP. For the reasons stated below, the Court will deny Defendant’s Motion and will extend the period for service.

**FACTS**

Carty alleges that he and Mason were involved in an automobile accident on September 20, 2004, in St. Thomas, U.S. Virgin Islands. After the accident, an officer of the Virgin Islands Police Department completed a Traffic Accident Report. The report states that Mason was driving a rental vehicle from Discount Car Rental. The report states that he had a “New Mex” driver’s license and the report displays his license number. The report also includes a narrative in which Mason acknowledges that the accident was his fault, as he was driving on the wrong side of the road, a habit he maintains because he is “not from here.”

Carty filed his action in this matter on August 22, 2006. The deadline for service came and

went on December 20, 2006.<sup>1</sup> The Court issued its first order to complete service on June 19, 2007, as ten (10) months had passed without service, and without any motion from Carty to enlarge the period for service. That Order required Carty to complete service by June 29, 2007. That deadline passed without Carty filing proof of service or any other motion or notice with the Court. Only on July 5, 2007, almost a year after the Complaint was filed, did Carty file a motion for publication.

His motion for publication stated that “[p]ersonal service on defendant cannot be made in this territory, and personal service outside this territory is not practicable, in that plaintiff does not know the residence of defendant or where defendant can be found. Plaintiff has made diligent efforts to determine the whereabouts of defendant, as shown in the affidavit of Kenth Rogers, attached and marked Exhibit ‘A’.” Attorney Rogers stated in his affidavit that his process server, James Dietrich, could not find the Defendant in the Territory. However, Carty did not attach any affidavit from the process server stating that he could not find Mason. Attorney Rogers went on to state:

“[a]ffiant does not know the residence or whereabouts of defendant, Tracy Mason. A diligent search was made for defendant, Tracy Mason, having made inquiry of his former landlord, and of all other persons from whom affiant could expect to obtain information about defendant, Tracy Mason, and has examined the phone books and Virgin Islands voter rolls. Affiant has been unable to learn from any of these sources the present whereabouts of defendant, Tracy Mason, either within or without the territory.”

Thereafter, Carty attempted to amend his Complaint to change Mason’s first name from “Nancy” to “Tracy” and change all the uses of “her” to “his.” Because Carty did not fully comply with LRCi. 15.1, the Court denied that amendment by Order entered May 20, 2009. His renewed Motion to Amend was finally granted on September 11, 2009.

From July 5, 2007, until September 11, 2009, Carty apparently made no effort to complete service, as his Motion for Publication was still pending before the Court. He made no motion for an

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<sup>1</sup> Federal Rule of Civil Procedure 4(m), made applicable to the cases of this Court by Superior Court Rules 7 and 27, requires that plaintiffs complete service within one hundred twenty (120) days of filing their complaints.

enlargement of time to complete service. The Court granted the Motion for Publication on September 10, 2009, and *sua sponte* extended the time period in which service was to be completed to November 10, 2009.<sup>2</sup> Carty was required to file proof of that service by November 24, 2009. Carty failed to file such proof by the due date. He also failed to move the Court to enlarge the period for service. Thereafter, by Order dated November 30, 2009, the Court *sua sponte* ordered Carty to file that proof by January 29, 2010, failing which the matter would be dismissed for lack of prosecution.

Instead of filing proof in January 2010 that service had indeed been completed in November 2009 in compliance with the Court's September 11, 2009 Order, Carty filed Notice of Service by Publication demonstrating that service by publication did not begin until January 8, 2010. While Carty complied with this Court's November 30, 2009 Order to file *proof* of service by January 29, 2010, it is clear that Carty did not comply with the Court's September 10, 2009 Order to complete that service by November 10, 2009. Indeed, the proof Carty filed reflected that the summons had been published in the newspaper only one (1) week, rather than once each week for the four (4) weeks ordered by the Court.

## **DISCUSSION**

### *Standard*

To overcome a Federal Rule of Civil Procedure 12(b)(5) Motion to Dismiss, Plaintiff carries the burden of proving that service was properly completed. *Grand Entm't Group, Ltd. V. Star Media Sales*, 988 F.2d 476, 488 (3d Cir. 1993). In this case, the question is whether Carty served Mason within the deadlines provided by Federal Rule of Civil Procedure 4(m) and this Court's numerous

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<sup>2</sup> The Court did not determine that there was good cause to extend the period for service. Rather, the Court enlarged the period for service in its discretion, as permitted by Fed. R. Civ. P. 4(m). *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995); *Bryant v. Caribbean Sun Airlines*, 49 V.I. 93 (V.I. Super. Ct. 2007).

orders and, if not, whether the matter should be dismissed. Plaintiff bears the burden of demonstrating good cause why he could not effect service on Mason 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 to grant an enlargement of time to complete service. *Id.*

**I. CARTY HAS NOT DEMONSTRATED GOOD CAUSE FOR HIS FAILURE TO COMPLETE SERVICE.**

Courts generally consider three factors in determining whether good cause exists to excuse a failure to comply with Rule 4(m). *Id.* (citing *Charles v. Woodley*, 47 V.I. 202, 210 (V.I. Super. Ct. 2005)). The Court considers (1) the reasonableness of plaintiff's efforts to serve the defendant; (2) the prejudice, if any, to the defendant by the lack of timely service; and (3) whether plaintiff moved for an enlargement of time to serve prior to the expiration of the period prescribed by the Rule. *Id.* The primary focus should be on the reasonableness of plaintiff's efforts to complete service. *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). The Court notes at the outset that Carty does not attempt to address these factors. Indeed, his Opposition to the Motion to Dismiss fails entirely to cite any case law support, and does not even cite the applicable rule.

**A. Carty's Efforts to Serve Defendant Have Been Unreasonable.**

The Court finds that Carty has not made reasonable efforts to serve Mason. First, the initial summons was issued for "Nancy Mason," rather than "Tracy Mason," even though the accident report clearly stated the Defendant's name.<sup>3</sup> Although Attorney Rogers never produced an affidavit from a process server, it is probable that the misnaming of the Defendant interfered with the process server's search. Second, although the accident report<sup>4</sup> clearly states Mason's driver's license number

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<sup>3</sup> A summons with the Defendant's correct name was not issued until December 2009, when Blyden sought to serve him by publication.

<sup>4</sup> Blyden never produced the accident report. The Defendant did, when he filed his Motion to Dismiss.

and the state abbreviation of “New Mex.,” Carty made no efforts to locate him in New Mexico.<sup>5</sup> In fact, he contended that “[i]t would be outrageous for plaintiff to be checking the whole of New Mexico for a defendant, who left the Territory.” However, the Virgin Islands Code provides for service in foreign jurisdictions precisely because the Legislature generally expects plaintiffs’ to meet their burden of service on defendants by locating and serving them in other locales. Third, Carty repeatedly failed to follow Court orders to attempt and complete service, including orders relating to his motion for publication. Whatever his protestations about the legibility of the police report, or his inability to locate Nancy or Tracy Mason in Cowpet Bay, none of these excuses explain why he was unable to timely publish the summons in the newspaper.

The Federal Rules provide a timeline for service that plaintiffs should respect as they would respect a “time bomb.” *Braxton v. U.S.*, 817 F.2d 238, 241 (3d Cir. 1987). Carty missed that “time bomb” deadline and missed a number of subsequent Court-imposed deadlines in the intervening three and a half years.<sup>6</sup> The Court finds that Carty’s efforts have so lacked the due diligence required of the Rule that they are categorically unreasonable.

**B. Mason May Be Prejudiced By Carty’s Repeated Failures to Complete Service.**

Mason has not addressed the question of prejudice, and so the Court cannot make a definite

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<sup>5</sup> Carty contends that he was unable to read the state on the report. However, the Court is able to determine that it reads “New Mex.,” clearly an abbreviation for New Mexico. Even if Carty had been unable to read the officer’s handwriting, nothing prevented Carty from contacting the Virgin Islands Police Department to determine what the report said. The report also indicates that Mason was driving a rental vehicle from Discount Car Rental. Armed with this information, Carty could have attempted to obtain contact information from Discount Car Rental. There is no evidence that he has done so.

<sup>6</sup> The Court recognizes that for two of those three years, Carty awaited a decision on his Motion for Publication. However, there is no evidence that he took any further steps during that period of time to request an enlargement of time or to locate Mason.

finding one way or the other on this factor.

**C. Carty Never Moved to Enlarge the Period of Time for Service.**

The third factor in the “good cause” analysis is also not satisfied. Carty has never moved to enlarge the period of service. The enlargements he has enjoyed were granted by the Court *sua sponte* to ensure that Plaintiff’s claims were not dismissed unnecessarily, and these enlargements were granted long after each period for service had expired. His complete failure to request even one enlargement demonstrates a disdain for the rules and for the orders of the Court.

Because Carty has failed to satisfy any of the factors courts consider when they determine whether good cause exists to excuse a failure to comply with Rule 4(m), the Court will decide whether, in an exercise of its own discretion, it should nonetheless deny Mason’s Motion to Dismiss and extend the period of service.

**II. DESPITE CARTY’S FAILURE TO DEMONSTRATE GOOD CAUSE, THE COURT WILL EXERCISE ITS DISCRETION TO EXCUSE THE FAILURE TO COMPLETE SERVICE AND WILL GRANT A PERMISSIVE EXTENSION OF THE PERIOD FOR SERVICE.**

Because Carty has not demonstrated good cause, the Court is not required to grant him an extension of time in which to complete service. However, the Court nonetheless retains discretion to do so. *Bryant*, 49 V.I. at 96. Although Carty has missed multiple deadlines to complete service, the Court finds that the “interests of justice dictate a retroactive enlargement of time” in this case. *Id.* at 97; *see also U.S. v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006) (noting that a plaintiff who has missed the deadline and cannot show good cause “throws himself on the mercy” of the court).

The Court recognizes that “relief may be justified, for example, if the applicable statute of limitations would bar the refiled action.” *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995); *Bryant*, 49 V.I. at 97 (extending the period of service because, in the absence of such an extension, the running of the statute of limitations would prevent the court from deciding the

matter on the merits). Such is the case here. *See Lepone-Dempsey v. Carroll County Comm'rs*, 476 F.3d 1277, 1282 (11th Cir. 2007) (noting that the running of the statute of limitations does not require a court to extend the period for service of process, but holding that the courts of that circuit must at least consider the factor). Should the Court grant Mason's Motion to Dismiss, Carty will be forever barred from having his case heard on the merits before the Court. *See Charles v. Woodley*, 47 V.I. 202, 214 (Sup. Ct. 2005) (observing that the drafters of the amendment to Federal Rule of Civil Procedure 4(m) contemplated that an extension might be granted in circumstances such as those presented here, in which the "statute of limitations would bar the refiled action").

In this case, there is an additional factor warranting an extension. Some courts have considered whether an improperly served defendant has admitted liability. *See, e.g., McLaughlin*, 470 F.3d at 700 (observing that to allow a defendant who has admitted liability escape the litigation process because of plaintiff's failure to serve would allow a probable wrongdoer to gain a "windfall."). In this case, the police report reflects a notation purportedly made by Mason stating that he is at fault for the accident. Although liability is a matter that will be definitively determined at a later stage of the litigation, it is appropriate to the question of service to preliminarily consider the fact that there is evidence that the defendant has admitted such liability.

The Court notes that the decision whether to extend the period for service is a close one, as other factors weigh against an exercise of that discretion in Carty's favor. There is no evidence that Mason evaded service. FED. R. CIV. P. 4(m), Advisory Committee Note, 1993 Amendments. In addition, Carty has an attorney and does not appear *pro se*. *Id.* Moreover, although service by publication was eventually completed, it was only completed many years after the Complaint was filed and after the Court-ordered deadline for such service had expired.

Nonetheless, the law favors dispositions of cases on their merits, rather than on procedural



technicalities. *Bryant*, 49 V.I. at 97; *Harrison v. Bornn, Bornn & Handy*, 200 F.R.D. 509, 513 (D.V.I. 2001). Because a dismissal at this stage of the litigation would forever bar Carty from prosecuting his case, the Court will exercise its discretion and enlarge the time for service. The Court takes the opportunity, however, to remind 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.

**CONCLUSION**

Carty has failed to demonstrate good cause for his repeated failures to complete service. However, considering the equities of the case, the Court will exercise its discretion on Carty's behalf and, denying the Motion to Dismiss, will grant Carty an extension of time to complete service.

Accordingly, it is hereby

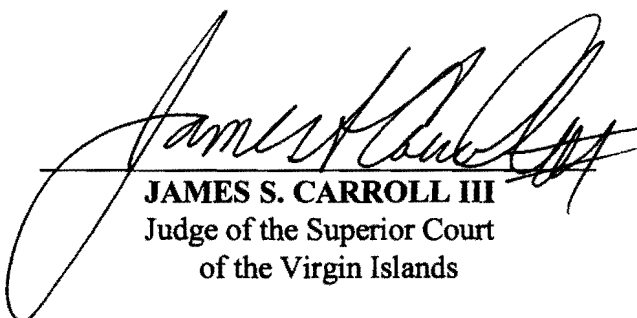
**ORDERED** that Defendant Tracy Mason's Motion to Dismiss is **DENIED**; and it is further

**ORDERED** that the period of time for service on Defendant Tracy Mason is **EXTENDED**

*nunc pro tunc* to February 5, 2010; and it is further

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


DATED: May 6, 2010

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

CERTIFIED A TRUE COPY

Date: 5/14/10  
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 5/17/10