IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

VERON MATTHEW,	)	
	)	
Plaintiff,	)	**CIVIL NO. 988/1992**
	)	
v.	)	**ACTION FOR NEGLIGENCE**
	)	**AND BREACH OF CONTRACT**
GREGORY MILLER,	)	
	)	**JURY TRIAL DEMANDED**
Defendant.	)	
	)	

MEMORANDUM

THIS MATTER came on as scheduled and noticed for trial on April 29, 1996. Before trial, plaintiff moved to strike defendant's answer as a result of defendant's failure to respond to plaintiff's interrogatories as last ordered by the court on March 27, 1996. For the reasons that follow, plaintiff's motion was granted by order dated April 29, 1996.

FACTS:

Plaintiff filed her ***first*** motion to compel complete answers in July of 1993. Judge Eltman denied plaintiff's motion on August 3, 1993. Plaintiff filed her ***second*** motion to compel complete answers to the same interrogatories on April 28, 1994. Over defendant's opposition, the court on May 6, 1994, granted plaintiff's motion and ordered defendant: (1) to "state the persons with knowledge and the documents that support the facts set out in its answers to Interrogatories Nos. 2, 3, 6, 7, 8, 9 and 10"; (2) "state how long after February 10, 1992, he learned that summary judgment was entered in plaintiff's case;" and (3) "state whether defendant did or did not tell his client that the case had been lost as a result of summary judgment." Defendant failed to comply with the court's order and on August 16, 1994, plaintiff filed her ***third*** motion to compel and requested the court enter sanctions against defendant for his failure to comply with discovery requests and orders of the court.

On November 8, 1995, the court, in addition to granting plaintiff an award of costs, again ordered defendant to comply with the May 6, 1994 court order by November 22, 1995, and indicated that upon defendant's failure to do so, his "answer may be stricken and plaintiff's complaint deemed admitted." On March 5, 1996, when defendant once again failed to comply with the orders of this court, plaintiff filed her ***fourth*** motion to compel answers to her November 17, 1992 interrogatories.

On March 27, 1996, the court gave defendant another opportunity to comply with plaintiff's discovery requests and did not strike defendant's answer as previously threatened, but again ordered defendant to respond to plaintiff interrogatories by April 9, 1996, as the matter was set for jury selection and trial commencing on April 29, 1996. Believe it or not, defendant again failed or refused to comply with the court's order.

On April 16, 1996 plaintiff filed a motion to strike defendant's answer and served defendant, an attorney, by mail. Defendant responded on April 18, 1996 by letter indicating plaintiff should serve defendant's attorney. Defendant nor his attorney otherwise responded to plaintiff's motion.

On April 29, 1996, the matter came on for jury selection and trial. Plaintiff thereat informed the court that to date she had not received any cooperation from the defendant in response to the court's orders and asked the court to grant her motion to strike. Additionally, plaintiff indicated she had personally forwarded a copy of the motion to strike to the defendant. Defendant Miller, an attorney at law, was also present in the courtroom on antoher matter and answered that plaintiff had improperly communicated with him by sending him a copy of the court's order since he was represented by counsel, and, moreover, he was unaware of the trial date. Defendant offered no other reasons for his non-compliance except to add that "he left everything up to his attorney."

DISCUSSION:

Courts are granted broad discretion in imposing sanctions for failure to comply with discovery requests. **Callwood v. Zurita, 31 V.I. 157(D.C.V.I. 1994).** Rule 37 of the Federal Rule of Civil Procedure gives the court broad authority to impose any of a wide range of sanctions for discovery abuses against both counsel and party - from the award of costs to dismissal of the action. The fashioning of the appropriate sanction is committed to the sound discretion of the judge. **In re Tutu Wells(3) 31 V. I. 250, 162 F.R.D 46 (D.C.V.I. 1995)**. However, dismissal must be a sanction of last, not first, resort. **Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863. (3rd Cir. 1984)**

Dismissals with prejudice, or defaults, are drastic sanctions and should be reserved for cases where there is a clear record of delay and "contumacious" conduct. Alternatives are appropriate when a party did not personally contribute to the delinquency. A court in dismissing a matter with prejudice, should consider alternative sanctions that may be imposed which will prevent ***the innocent*** from bearing the brunt of counsel's dereliction. (Emphasis supplied.) **Poulis at 868.** Dismissal of an action with prejudice as a sanction against plaintiff for dilatory conduct was appropriate where defendants, who were forced to incur costs in an effort to compel plaintiffs to comply with basic procedural requirements necessary to move their case forward, were "prejudiced", without regard to whether they suffered irremedial harm. **Andrews v. Government of the Virgin Islands. D.C.V.I. 1990, 25 V.I. 284, 132 F.R.D. 405 Aff'd, C.A.3d, 935 F.2d 1280**.

In **Andrews,** the court determined that dismissal of his civil action was warranted as a sanction for plaintiff's dilatory conduct. Andrews was an attorney, as is the defendant in this case, and was personally responsible for the dilatory conduct and offered no plausible explanation for the bad faith demonstrated. In **Andrews**, the court opined that Attorney Andrews had exercised bad faith, was egregiously dilatory and contumacious in responding to defendants' motions and complying with the court's threat of sanctions and concluded that there was no equally effective alternative lesser sanction to dismissal with prejudice.

Under Federal Rule of Civil Procedure 37, a negligent refusal or failure to comply with discovery is a sufficient basis for sanctions, and thus unlike sanctions imposed pursuant to the court's inherent power, wilfulness is relevant only to the selection of sanctions, if any, to be imposed however, once culpable conduct is found, the court is required to impose such sanctions that are just. **In re Tutu Wells(3) D.C.V.I. 1995, 31 V. I. 250, 162 F.R.D 46.**

The factors to be considered when imposing sanctions for failure to comply with discovery orders are: 1) the extent of the party's personal responsibility; 2) a history of dilatoriness; 3) whether the attorney's or party's conduct was willful or in bad faith; 4) meritoriousness of the claim; 5) prejudice to other party; and (6) appropriateness of alternative sanctions. **Fed.R.Civ.P. 37(b). Ali v. Sims, 788 F.2d 954, (3rd Cir. 1986) citing Poulis.**

The court granted plaintiff's motion to strike defendant's answers. It is obvious from the history of the case that the defendant has failed to comply with several orders of this court. Though represented by counsel, he has failed to comply with plaintiff's many requests for discovery and with at least at least three court orders, two threatening sanctions. The most recent court order, issued on March 27, 1996, again requested that defendant comply with plaintiff's discovery request or show cause to the court why his answers should not be stricken. No response was forthcoming.

Normally the court is not inclined to penalize a client for dereliction of his attorney. The record here shows a motion to strike was sent directly to the defendant/client and the defendant/ client responded to the plaintiff that the motion should have been sent to his attorney. The court cannot ignore the fact that the defendant herein, is in fact an attorney and should have recognized that the motion to strike his answer carried serious consequences. Defendant has to date made no response to the court. While the court recognizes that counsel may have abandoned defendant's representation, the court cannot excuse the defendant himself for not, at least, taking some action once he was personally advised that a motion to strike had been made.

Additionally, this matter has been pending since November of 1992. A calendar call was had on March 8, 1996 where the parties appeared in court and indicated they would be ready for trial on April 29, 1996. As an officer of the court, as in **Andrews**, Attorney Miller is held to be more aware of court proceedings than the ordinary man in the street and should have taken more of an interest in the disposition of this matter filed against him, especially where attorney for plaintiff extended him the courtesy of informing him of the threatened sanctions against him. The court therefore, upon considering the record before it, has no choice but to view Attorney Miller's refusal to comply with discovery request and several orders of the court requesting that he do so, as an exercise of bad faith and contumacious conduct. And for these reasons, the court granted the motion to strike and proceeded as if by default.

DATED: June 10th, 1996

Edgar D. Ross
EDGAR D. ROSS
Judge

ATTEST:
YVONNE V. WESSELHOFT,
CLERK OF THE COURT
By: Delores A. Allen
Dep - **Deputy Clerk**
6/11/96