

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

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

MEMORANDUM OPINION

THIS MATTER is before the Court on the Defendant's Second Motion to Dismiss for Failure to Prosecute, filed on September 19, 2011, Defendant's Motion for Protective Order Quashing Plaintiff's Discovery Requests, filed on October 4, 2011, and a Motion for Sanctions and Dismissal under Federal Rule of Civil Procedure 37, filed by Defendant on March 28, 2012. The Court will deny all three of the Motions.

DISCUSSION

I. SECOND MOTION TO DISMISS FOR FAILURE TO PROSECUTE AND MOTION FOR THE SANCTION OF DISMISSAL FOR VIOLATION OF COURTS ORDER

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 v. State Farm Fire and Cas. Co.*:

- (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, which entails an analysis of *alternative sanctions*; and
- (6) the *meritoriousness* of the claim or defense.¹

Moreover, 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.²

¹ *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir.1984) ; see *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511-512 (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).

² *Halliday*, 53 V.I. at 511-512.

Here, the Defendant argues that the case should be dismissed since the Plaintiff did not produce Rule 26 disclosures or the Plaintiff's medical records in over a year, has repeatedly failed to adhere to the scheduling plan, and has not responded to outstanding discovery requests. Counsel for Plaintiff states that the delay in prosecuting the case has been due to the fact that he has had trouble maintaining contact with Maxwell Carty at his residence in Anguilla and that Carty has been receiving extensive medical treatment in the States.

a. *CARTY'S PERSONAL RESPONSIBILITY FOR HIS FAILURE TO PROSECUTE*

The Court notes that much of the delay in this case is attributable to the dilatoriness of Plaintiff's former counsel Kenth Rogers, Esq., and this delay cannot be attributable to Carty. This aspect of the delay is of not the Plaintiff's fault. In addition, Carty has had trouble maintaining contact with his current counsel in this case, which is primarily due to the fact that Carty has been receiving extensive medical treatment in the States. Carty is therefore, not directly responsible for much of the delay in prosecuting this case and this factor does not weigh in favor of dismissal. As to Carty's failure to respond to demands for production and submit medical authorization forms, the Court has given Carty until May 17, 2012 to submit the requested documents.³

b. *PREJUDICE TO THE ADVERSARY*

The Court finds that the Defendant has not been significantly prejudiced by Carty's dilatoriness. The Court recently granted the Defendant's Request for Order of Deposit, which if not posted, could result in dismissal of this case within thirty days. The Court will order the Defendant to produce the medical authorization forms and other outstanding discovery by May 17, 2012 so that the Defendants may proceed in mounting their defense. This factor, therefore, does not weigh in favor of dismissal.

c. *HISTORY OF DILATORINESS*

This matter has been pending since 2006. The Court denied a Motion for Failure to Prosecute on December 6, 2010. As previously alluded to, a great portion of the delay over the last few years can be attributed to the inaction of Kenth Rogers and the frail condition that the Plaintiff is currently in. The Court however, in its Order dated December 16, 2011 specifically ordered Carty to turn over the medical authorization forms requested by Defendants by January 19, 2012 and Carty has failed to do so. While this factor weighs in favor of dismissal, the Court has given Carty until May 17, 2012 to produce medical authorizations and discovery requests.

³ During the April 17, 2012 status conference in this matter, Counsel for Plaintiff claimed that he had responded to the Defendant's request for discovery. The Plaintiff meanwhile, stated at the conference that he has not provided the medical authorizations due to the constant pain that he is in due to his injuries.

d. *WHETHER THE CONDUCT WAS WILLFUL OR IN BAD FAITH*

Carty has insisted in recent months that he wants to prosecute the case but his injuries caused by the accident have prevented him from taking certain steps to do so. While Carty must at some point take a more active role in prosecuting the case, the Court does not believe that his behavior is willful or in bad faith. Therefore, this factor weighs against dismissal.

e. *THE EFFECTIVENESS OF ALTERNATIVE SANCTIONS*

Rule 16(f) of the Federal Rules of Civil Procedure empowers the Court to “[i]nstead of or in addition to any other sanction, . . . order the party, its attorney, or both to pay the reasonable expenses -- including attorney’s fees – incurred because of any noncompliance with this rule . . .”⁴ On December 16, 2011 the Court issued an Order which specifically ordered Carty to return the medical authorizations to Defendants and respond to demands for production. Carty appears to have violated that Order. The Court has now ordered Carty to produce the documents for the second time. If Carty violates this direct order of the Court for the second time, more severe sanctions could be warranted. For the time being however, this factor weighs against dismissal because a sanction in the form of a monetary penalty is preferable to dismissing an action in which Carty allegedly suffered significant injuries. This is particularly true where Carty argues that these injuries are the reason for his delay in responding to the Defendant’s request. Thus, the Court finds that this factor does not weigh in favor of a dismissal.

f. *THE MERITORIOUSNESS OF CARTY’S CLAIM*

At this stage of the litigation, with discovery nearly at a close but with some discovery outstanding, it is too early to determine with certainty the meritoriousness of Carty’s claim.

In conclusion, in considering all of the *Poulis* factors, the Court finds that this action does not merit dismissal.

II. MOTION FOR PROTECTIVE ORDER

With respect to the Motion for Protective Order, the Court will deny the Motion for failure to comply with the Local Rules of Civil Procedure. Under LCRi 37.1, “Prior to filing any motion relating to discovery pursuant to Federal Rules of Civil Procedure 26-37, other than a motion relating to depositions under Federal Rule of Civil Procedure 30, counsel for the Plaintiffs shall confer in a good faith effort to eliminate the necessity for the motion or to eliminate as many of the disputes as possible.”⁵ The Rule calls for the moving party to arrange the conference at a mutually convenient location but also gives the parties the option of having the conference electronically or telephonically. Once this meeting takes place, the parties may seek the Court’s assistance in resolving the dispute. Specifically, LCRi 37.2 states that “if counsel are unable to resolve all of their differences, they shall formulate and sign a written stipulation to that effect, expressly certifying their compliance with 37.1. The stipulation shall

⁴ FED. R. CIV. P. 16(f)(2).

⁵ Local Rule of Civil Procedure 37.1.

include the moving party's letter requesting a pre-filing conference of counsel and shall be filed and served with the motion."⁶ Finally, pursuant to LCRi 37.3, the Court may impose sanctions on counsel for failure to comply with LCRi 37.1 and 37.2. Here, in the Defendant's Motion For Protective Order, the Defendant seeks to quash the Plaintiff's Discovery Requests. The Motion however, does not comply with LCRi 37.1 and 37.2 as the Defendant has not included a stipulation signed by the parties, or a copy of their letter requesting the conference. Accordingly, the Court will not impose sanctions at this time but will deny the motion for protective order for failure to comply with LCRi 37. 1 and 37.2

III. MOTION FOR SANCTIONS: DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE FOR VIOLATION OF COURT ORDERS

In its Motion for Sanctions, the Defendant seeks sanctions in the form of a dismissal for Carty's failure to comply with the Court's December 16, 2011 Order, which specifically ordered Carty to return the medical authorizations to Defendants and respond to demands for production. In addition, counsel for Mason affirmed that counsel for Carty refused to schedule mediation in this matter to meet the mediation deadline set out by the Court since he was planning to withdraw from his representation of Carty.

To the extent that the Defendant's motion seeks to dismiss this case for failure to prosecute, the Court will deny that motion under *Poulis*, as previously discussed. To the extent however, that the Defendant seeks to dismiss this case as a sanction for the Defendant failing to follow a Court Order, the Court will not dismiss on that ground either, but for different reasons. The Court is satisfied that the mediation deadline will be complied with since the Court has extended the mediation deadline and denied The Law Office of Pedro k. Williams' Motion to Withdraw, thus forcing the firm to plan mediation. In addition, upon learning that the delay in producing the requisite documents was due to the medical problems experienced by Carty, the Court has given Carty until May 17, 2012 to submit the requested documents and medical authorizations. As such, the Court will deny the Motion for Sanctions without prejudice at this time and the Defendant may renew the Motion at a later date if the Plaintiff does not comply with the Court's Order.

Accordingly, it is hereby

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

ORDERED that the Defendant Tracy Mason's Motion for Protective Order Quashing Plaintiff's Discovery Requests is **DENIED**; and it is further

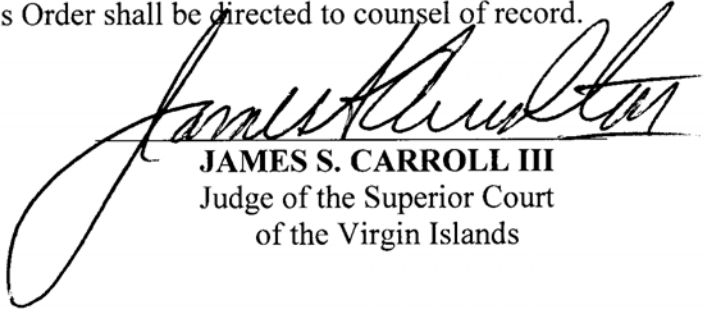
⁶ Local Rule of Civil Procedure 37.2.

ORDERED that Defendant Tracy Mason's Motion for Sanctions and Dismissal is **DENIED**; and it is further;

ORDERED that Plaintiff Maxwell Carty shall respond to demands for production, and return medical authorization forms to Defendants **on or before May 17, 2012**; and it is further

ORDERED that a copy of this Order shall be directed to counsel of record.

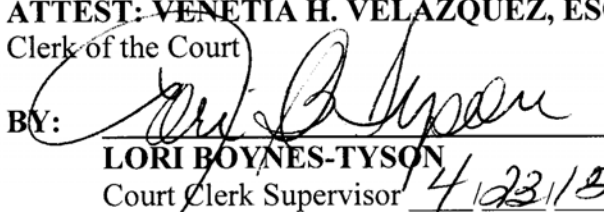
DATED: April 25, 2012



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

ATTEST: VENETIA H. VELAZQUEZ, ESQ.

Clerk of the Court

BY: 

LORI BOYNES-TYSON

Court Clerk Supervisor 4/23/12