

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

CARMEN SANCHEZ,

Plaintiff,

vs.

**LUIS HUGHES and LISTON DAVIS,
co-Administrators of the Estate of LUTHER
BENJAMIN, Deceased,**

Defendants.

CIVIL NO. ST-04-CV-393

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

Defendants Luis Hughes and Liston Davis¹ filed a Rule 41(b) Motion To Dismiss For Failure to Prosecute on January 5, 2011. After considering the circumstances of this case, the Court finds that dismissal is appropriate. Defendants' Motion will be granted.

PROCEDURAL HISTORY

This is an old case. Plaintiff Carmen Sanchez filed her Complaint on August 17, 2004. She alleges that on April 14, 2004, a dog ran across the street and bit her as she was walking on Kongens Tver Gade, St. Thomas. As a result of her injuries, she received stitches at the hospital. Sanchez alleges that the dog came from the direction of property owned by the Estate of Luther Benjamin, which estate is administered by the Defendants. More particularly, her strict liability claim alleges that the Defendants "were, and still are, the owners of certain dogs of a dangerous character," which caused her injuries. Her second claim, one for negligence, alleges that Defendants failed to keep the dog restrained and failed to post warnings about the dog.

On January 27, 2005, Defendants answered the Complaint. They generally deny that they own any dogs or kept any dogs at the time of the incident. They contend, as affirmative defenses, that Sanchez fails to state a claim, that she assumed the risk, and that her own negligence contributed to her injuries. They also state that they owed no duty to Sanchez, that she failed to join indispensable parties, that she provoked the dog, and that the injuries were caused by third parties.

On May 22, 2008, the Court noted that Sanchez had taken no action in the case in the more than three years since the Answer was filed. It issued an Order to Sanchez to move the case forward within fifteen days, failing which it would be dismissed for lack of prosecution. On June 5, 2008, Sanchez filed a "Preliminary Request to Charge." She did not, however, initiate discovery, file dispositive motions, or take any other action to move the matter forward.

¹ Kenth Rogers, Esq., represents Plaintiff Carmen Sanchez in this matter. Hughes and Davis are represented by Bernard VanSluytman, Esq.

On June 15, 2010, upon the recusal of the Honorable Brenda J. Hollar, the matter was reassigned to the undersigned. On November 8, 2010, the Court directed the parties to appear for a scheduling conference on December 15, 2010. However, although Defendants' counsel—Attorney VanSluytman—said he had discussed the conference with Plaintiff's counsel—Attorney Rogers—nonetheless Attorney Rogers did not appear at the scheduling conference. By Order dated December 16, 2010, the Court directed Attorney Rogers to appear on April 11, 2011, to show cause why he should not be held in contempt of Court.

On December 30, 2010, Attorney Rogers filed a "Motion to Withdraw as Counsel." In support thereof, he states that he "filed all papers necessary to move plaintiff's case forward." In addition, he states that "Judge Carroll is supposedly moving full speed ahead." Attorney Rogers "never checked mail from the court and did not realize that Judge Carroll had set up his usual scheduling order." In Attorney Rogers' view, "[t]o schedule this case and then to order the usual mediation is a waste of time."

In an Order dated January 25, 2011, the Court scheduled a conference for February 15, 2011 to discuss Attorney Rogers' pending Motion to Withdraw. It directed the parties, including Carmen Sanchez herself, to appear, and it directed Attorney Rogers to file proof that he served Sanchez with a copy of the Order.

Neither Attorney Rogers nor his client appeared for the February 15, 2011 conference. In addition, Attorney Rogers failed to file proof that he served his client with the January 25, 2011 Order. The Court determined that Attorney Rogers "failed to sufficiently support his Motion to Withdraw," and so, in an Order dated February 16, 2011, the Court denied Attorney Rogers' Motion to Withdraw.

The issue of representation now resolved, the Court considers Defendants' Motion to Dismiss.

I. DEFENDANTS' 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.² Rule 41(b) states:

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

² 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.

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*³:

- (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 analysis of *alternative sanctions*; and
- (6) the *meritoriousness* of the claim or defense.

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.⁴

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

In this case, there is no *direct* evidence that Sanchez herself is responsible for the delays in this matter.⁵ However, this case has been pending for more than six years. Although it would be reasonable for Sanchez to rely to some extent on her counsel's diligence and dedication to move the matter forward, at some point the responsibility becomes that of the client's to ensure that the case is progressing.

In the five and a half years before this matter was assigned to the undersigned, neither Sanchez nor her attorney took any action at all to move the matter forward, other than to file a "preliminary request to charge." Although the Court cannot peer behind the curtain to determine what communications occurred between Sanchez and her attorney, the Court is not ready to assume that Sanchez urged her attorney to pursue this action but that her counsel refused, and that she nonetheless continued to retain him to represent her. That seems an unlikely scenario. Therefore,

³ *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, which factors the Supreme Court now refers to as "*Halliday* factors").

⁴ *Halliday*, 2010 WL 1576436, at *3.

⁵ *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").

the Court believes it is reasonable to assume that at least some of the responsibility for this long delay lies with Sanchez herself.

The Court cannot fault Sanchez, however, for her attorney's failure to prepare a proposed scheduling plan or appear at a scheduling conference. As a counseled client, she would rightly expect that her attorney should appear in her place. Furthermore, because Attorney Rogers failed to file proof of service of the Court's order on Sanchez, the record is not clear if Sanchez was even aware of the February 15, 2011 conference.

Even though the delays resulting from the failure of the parties to agree on and set down a discovery plan lay with Sanchez's counsel, the responsibility for the more lengthy and general delay in the last six years may well be Sanchez's. Therefore, this factor weighs towards dismissal.

B. Prejudice to the Adversary.

Defendants argue that they are prejudiced by Sanchez's current failure to prosecute as well as her previous failures to move the case forward. They state that, should the motion not be granted, they would suffer because "it is certain that witnesses have relocated and memories faded since the inception of this lawsuit." The Court agrees that Defendants have been prejudiced by Sanchez's history of dilatoriness.⁶ Sanchez could have tried to move the case forward in the last six years but did not.⁷ Sanchez's counsel could have appeared at the scheduling conference and assisted in the preparation of a discovery plan, but did not. Therefore, this factor weighs strongly towards dismissal.

C. History of Dilatoriness.

As described above in the Procedural History section of this Opinion, Sanchez has not moved this case forward with the energy and effort that is required of plaintiffs in a civil action. For years, she allowed the case to sit idle. Her counsel is now stymieing efforts to establish a discovery plan by ignoring orders of the Court to appear for scheduling conferences. She has done absolutely nothing, other than file a request to charge, to move this matter forward since 2004.⁸ Therefore, this factor weighs strongly towards granting Defendants' Motion.

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

⁶ See, e.g., *Majestic Const., Inc. v. JCB Int'l, Inc.*, No. 2003-159, 2006 WL 2462639, at *3 (D.V.I. App. Div. Aug. 21, 2006) (observing that prejudice does not necessarily mean "irremediable harm," but rather the "burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy" (internal citations omitted)).

⁷ The Court recognizes that Sanchez filed a "Preliminary Request to Charge" in response to the Court's order to move the matter forward in 2008. However, the filing of jury instructions is not a reasonable way to move a matter forward, when there has not yet been an exchange of discovery, any pretrial conferences, or dispositive motions filed. In fact, it is not clear why Sanchez did not take any steps to serve the opposing parties with Rule 26 disclosures after they answered the Complaint. See *Watts v. Two Plus Two, Inc.*, S.Ct. Civ. No. 2007-0127, 2010 WL 4962902, at *3 (V.I. Aug. 24, 2010) (observing that the failure to serve the opposing party with Rule 26 disclosures "inherently impedes" the opposing party's ability to prepare its case).

⁸ Cf. *Watts*, 2010 WL 4962902, at *4 (finding, in the dismissal analysis, that a party's timely *compliance with court orders* should be balanced against a pattern of dilatoriness).

Unfortunately, because Sanchez failed to respond to Defendants' Motion, it is difficult to assess the reasonableness of Sanchez's excuse for her dilatoriness and failure to comply with the Court's orders. However, some degree of willfulness or bad faith is required if a case is to sit for five years with such little action taken on it, and without an excuse provided. The only excuse provided by counsel, which was provided in his Motion to Withdraw, is that he does not check mail from the court⁹ and that "to schedule this case and then to order the usual mediation is a waste of time."¹⁰ In addition, the Court can assume from counsel's failure to assist in the preparation of a scheduling order, or to respond to the Motion to Dismiss, that counsel's neglect is at least willful, if not in bad faith. Therefore, this factor weighs towards dismissal.

E. The Effectiveness of Alternative Sanctions.

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 appear at a scheduling conference or to prepare a proposed scheduling Order. The Court did direct Defendants to file an affidavit of costs that were incurred as a result of their appearance at the scheduling conference. Upon receipt of that filing, the Court might still award those costs. However, despite the fact that Rule 16(f) sanctions are looming, Sanchez has done nothing to move the matter forward. The Court's attempts to call Sanchez and her attorney before it to get the matter moving after many years of inaction were ineffectual, as neither one appeared at two scheduled conferences. The only response to the Court's orders was an attempt by Sanchez's counsel to withdraw because, he stated, it does not make sense for this case to move forward via the "usual scheduling order." The Court finds that there are no other effective alternative sanctions short of dismissal. Therefore, this factor weighs towards dismissal.

F. The Meritoriousness of the Claim or Defense.

It is too early, at this stage of the litigation, to say with much certainty whether Sanchez's claims are meritorious. However, taking as true the allegations in her Complaint, the Court finds that Sanchez might have a meritorious claim. Therefore, this factor weighs against dismissal.

CONCLUSION

Sanchez has been a dilatory and unenergetic plaintiff, which has certainly caused prejudice to the Defendants. While acknowledging that dismissal is an extreme sanction, the Court recognizes that it is sometimes "justly merited."¹¹ In this case, taking the factors together, the Court finds that

⁹ See *Watts*, 2010 WL 4962902, at *4 n.2 (observing that counsel for the parties have a responsibility to check the docket of a case and to follow up on the case's status); LRCi. 5.3 (requiring parties to check their court mailboxes "sufficiently often to ensure that they receive timely notice of such orders and other notices").

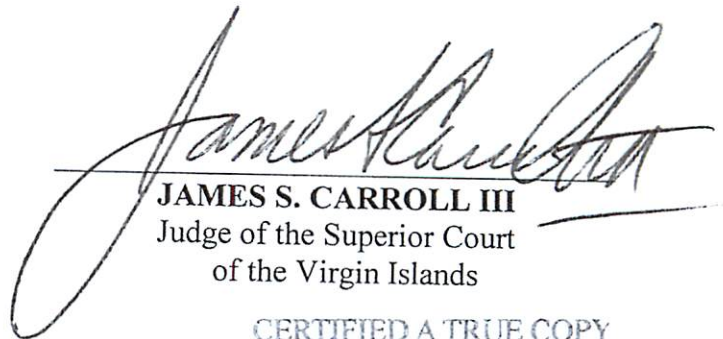
¹⁰ Counsel also states that Sanchez does not have funds for mediation but this is no excuse for a failure to exchange discovery, to appear at conferences, or to respond to motions. In fact, there is no mediation order yet in place and, were the Court to issue one, Sanchez could object at that time.

¹¹ *Watts*, 2010 WL 4962902, at *2 (quoting *Halliday*, 2010 WL 1576436, at *3).

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the *Poulis* factors weigh strongly towards dismissal.¹² Therefore, the Court will grant Defendants' Motion to Dismiss for Failure to Prosecute. An appropriate order will issue today.

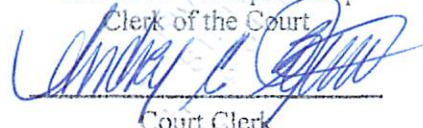
DATED: March 21, 2011


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

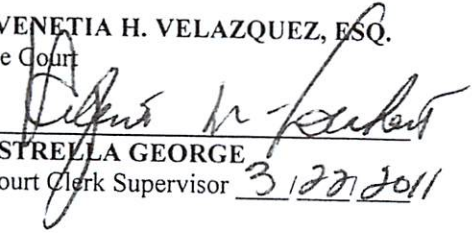
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Date: 3/22/11

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk

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

BY: 
ESTRELLA GEORGE
Court Clerk Supervisor 3/22/2011

¹² *Poulis*, 747 F.2d at 870 (concluding that some of the factors weighed towards dismissal and some against, and although the Court of Appeals may not have come to the same conclusion as the trial court, it could not say the trial court abused its discretion in ordering the dismissal).

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	)	
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vs.	)	ACTION FOR DAMAGES
	)	
LUIS HUGHES and LISTON DAVIS,	)	JURY TRIAL DEMANDED
co-Administrators of the Estate of LUTHER	)	
BENJAMIN, Deceased,	)	
	)	
Defendants.	)	
	)	

ORDER

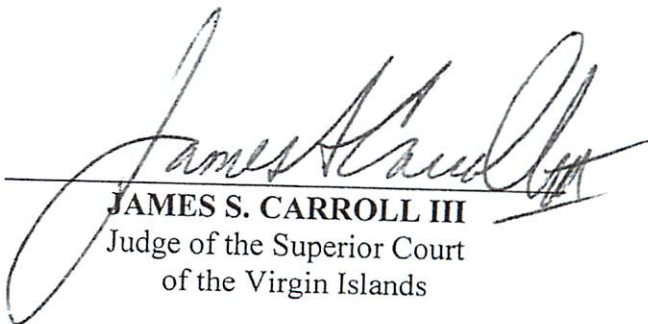
AND NOW, for the reasons stated in the Memorandum Opinion issued today in this case, it is hereby

ORDERED that Defendants' January 5, 2011 Motion to Dismiss Action is **GRANTED**; and it is further

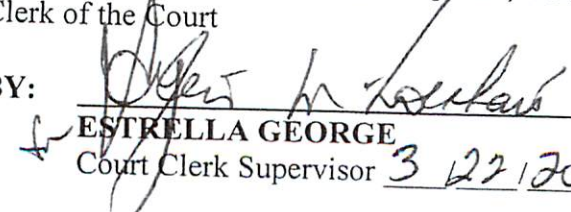
ORDERED that this matter is **DISMISSED** for failure to prosecute; and it is further

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

DATED: March 21, 2011


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

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

BY: 
ESTRELLA GEORGE
Court Clerk Supervisor 3 22/2011

CERTIFIED A TRUE COPY
Date: 3/22/11
Venetia H. Velazquez, Esq.
Clerk of the Court
By: 
Court Clerk