

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

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|                                        |   |                               |
|----------------------------------------|---|-------------------------------|
| <b>ANDREA LEE,</b>                     | ) | <b>CIVIL NO. ST-02-CV-521</b> |
|                                        | ) |                               |
|                                        | ) |                               |
| Plaintiff,                             | ) |                               |
|                                        | ) |                               |
| vs.                                    | ) | <b>ACTION FOR DAMAGES</b>     |
|                                        | ) |                               |
| <b>JAMES SMITH, DERRICK FREDERICK,</b> | ) | <b>JURY TRIAL DEMANDED</b>    |
| <b>and MARY WILLIAMS,</b>              | ) |                               |
|                                        | ) |                               |
|                                        | ) |                               |
| Defendants.                            | ) |                               |
|                                        | ) |                               |

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**MEMORANDUM OPINION**

Defendant James Smith<sup>1</sup> filed a Rule 41(b) Motion To Dismiss For Failure to Prosecute on December 17, 2010. After considering the circumstances of this case, the Court finds that dismissal is not appropriate at this time. Smith's Motion will, therefore, be denied.

**PROCEDURAL HISTORY**

This is an old case. Plaintiff Andrea Lee filed her Complaint on October 22, 2002. She was in a car accident on March 5, 2002, which she alleges was the result of the negligence of Defendants Derrick Frederick and James Smith. She also sues Mary Williams for allegedly letting Frederick drive Williams's car. As a result of the accident, she alleges, she has suffered physical and economic injuries.

Lee did not serve Smith until April 2, 2003. On September 24, 2003, the Clerk of the Court entered the defaults of Williams, Smith and Frederick. Lee moved for Default Judgment on October 14, 2003. On May 27, 2004, Williams moved for relief from the entry of default, and Lee filed her Opposition on July 9, 2004. Thereafter, Lee did nothing for two and a half years while the Motion for Relief was pending. Then, on January 24, 2007, Smith moved to vacate the entry of his default, and Lee filed an Opposition on February 14, 2007. In the intervening four years, Lee has done nothing to move her case forward.

After this matter was reassigned to the undersigned, the Court scheduled a Rule 16 conference and directed the parties to meet to prepare a scheduling plan. Apparently, Lee's attorney did not meet and confer with Defendants, nor did he appear at the time scheduled for the Rule 16 conference. He was sanctioned as a result of his noncompliance with the Court's orders.

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<sup>1</sup> Kenth Rogers, Esq., represents Plaintiff Andera Lee in this matter. Smith is represented by Kyle Waldner, Esq., of Smock & Moorehead. Defendant Mary Williams is represented by Denise Francois, Esq., of Hodge & Francois.

**I. SMITH'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.<sup>2</sup> 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 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*<sup>3</sup>:

- (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.<sup>4</sup>

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

In this case, there is no evidence that Lee herself is responsible for the delays in this matter.<sup>5</sup>

<sup>2</sup> 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.

<sup>3</sup> *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).

<sup>4</sup> *Halliday*, 2010 WL 1576436, at \*3.

<sup>5</sup> *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").

First, the Court delayed its decision on Defendants' Motions to Vacate Default. During this time, it would not have been wholly unreasonable for Lee to believe that it was best to wait for a ruling from the Court on the Motions. It is true that the better practice for counsel, faced with an inordinately long delay in a ruling on a motion, is to make a motion for a hearing, for a ruling or for some other relief, rather than to let the case sit idle for nearly half a decade. However, the Court cannot fault Lee herself for being unaware of effective litigation strategy; that responsibility lies with her attorney. In any case, the Court cannot shirk its own responsibility for delaying a ruling on the case.

Neither can the Court fault Lee 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. Attorney Rogers' failure to do so should not cause Lee to suffer dismissal, at least not at this stage.

**B. Prejudice to the Adversary.**

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Smith argues that he is prejudiced by Lee's current failure to prosecute as well as her previous failures to serve Smith in a timely fashion. He states that, should the motion not be granted, he would "be hampered in presenting a defense on the merits, through, for example, the loss of witnesses and other important evidence." The Court agrees that Smith has been prejudiced by Lee's history of dilatoriness. Lee could have tried to move the case forward in the last five years but did not. Lee's counsel could have appeared at the scheduling conference and assisted in the preparation of a discovery plan, but did not. Although some of the fault for the delay, as discussed above, lies with the Court, this factor weighs towards dismissal.

**C. History of Dilatoriness.**

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As described above in the Procedural History section of this Opinion, Lee 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. She is now stymying efforts to establish a discovery plan by ignoring orders of the Court. Again, however, some fault for the delay rests with the Court. Therefore, this factor weighs slightly towards granting Smith's Motion.

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

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Unfortunately, because Lee failed to respond to Smith's Motion, it is difficult to assess the reasonableness of Lee's excuse for her dilatoriness and failure to comply with the Court's orders. 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 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.

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**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 sanction Attorney Rogers by Order entered on January 27, 2011. The Court finds that, for now, that is an effective alternative sanction. Keeping in mind that a Rule 41(b) dismissal is an adjudication on the merits,<sup>6</sup> which is a harsh sanction reserved for a small number of cases, the Court finds that the existence of an effective alternative sanction weighs against dismissal.

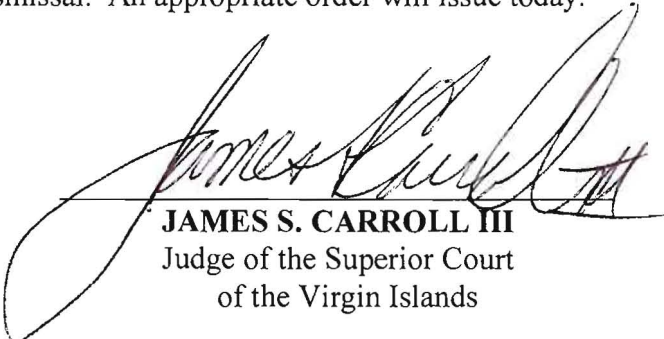
**F. The Meritoriousness of the Claim or Defense.**

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

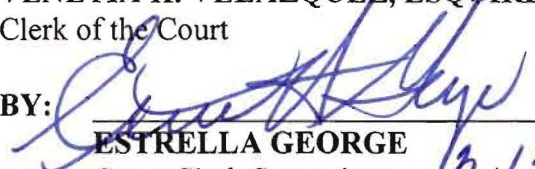
**CONCLUSION**

Lee has been a dilatory and unenergetic plaintiff, which has certainly caused some prejudice to the Defendants. Her failure to move her case along brings it to the brink of dismissal. However, as dismissal is an extreme sanction, and as some of the responsibility for the delays in this case rests with the Court, the Court will deny Smith's Motion to Dismiss for Failure to Prosecute. However, Lee is strongly cautioned that repeated failures to comply with the Court's orders and to diligently prosecute this matter will result in its dismissal. An appropriate order will issue today.

DATED: March 17, 2011

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

**ATTEST:**  
**VENETIA H. VELAZQUEZ, ESQUIRE**  
Clerk of the Court

  
**BY: ESTRELLA GEORGE**  
Court Clerk Supervisor

**CERTIFIED A TRUE COPY**

Date: 3-21-2011  
Venetia H. Velazquez, Esq.  
Clerk of the Court  
By:   
Court Clerk

<sup>6</sup> FED. R. CIV. P. 41(b).



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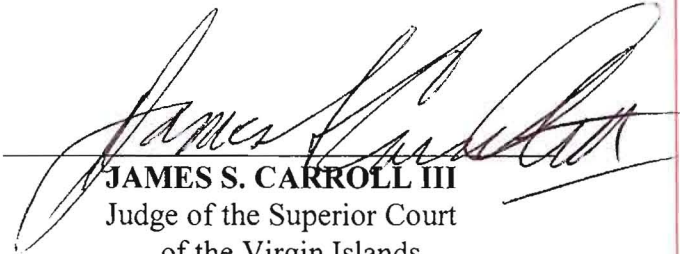
**ORDER**

AND NOW, pursuant to the Memorandum Opinion issued today, it is hereby

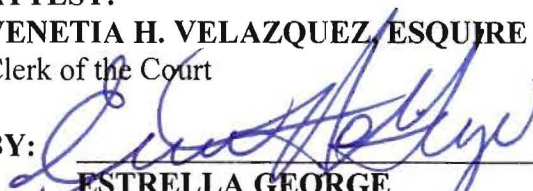
**ORDERED** that James Smith's December 17, 2010 Motion to Dismiss for Failure to Prosecute is **DENIED**; and it is further

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

DATED: March 17, 2011

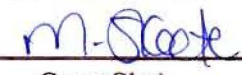
  
**JAMES S. CARROLL III**  
Judge of the Superior Court  
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**ATTEST:**  
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**BY:**   
**ESTRELLA GEORGE**  
Court Clerk Supervisor

**CERTIFIED A TRUE COPY**

Date: 3-21-2011  
Venetia H. Velazquez, Esq.  
Clerk of the Court

By:   
Court Clerk

3 / 18 / 2011