

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MIREYA ROBLES,

PLAINTIFF,

v.

**OLIVIA JOSEPH; JOHN'S BAR AND
RESTAURANT; JOHN FREDERICK
INDIVIDUALLY AND OWNER OF JOHN'S BAR
AND RESTAURANT,**

DEFENDANTS.

SX-15-CV-348

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court for review *sua sponte*.

BACKGROUND

On August 21, 2015, Plaintiff Mireya Robles (hereinafter "Plaintiff") commenced a lawsuit against Defendant Olivia Joseph (hereinafter "Joseph"), Defendant John's Bar and Restaurant (hereinafter "John's"), and Defendant John Frederick (hereinafter "Frederick") for injuries she sustained on October 14, 2013. No proof of service was filed. On February 23, 2016, the Court entered a *sua sponte* order whereby the Court ordered Plaintiff to "provide the Court with proof of service within fifteen (15) days of the entry of this Order" and cautioned that failure to do will result in the action being dismissed without prejudice. On March 18, 2016, Plaintiff filed a notice of compliance with copies of proof of service for Defendants. On June 7, 2016, the Court entered a *sua sponte* order whereby the Court ordered Plaintiff to make appropriate filings to move this case forward. On February 21, 2017, the Court entered another *sua sponte* order whereby the Court ordered Plaintiff to make appropriate filings to move this case forward within thirty days and cautioned that failure to do will result in the action being dismissed for failure to prosecute. On March 22, 2017, Plaintiff filed a request for entry of default against all three Defendants. Upon review of Plaintiff's request, the Court

entered an order on May 23, 2017, whereby the Court pointed out that Plaintiff's request for entry of default was not in compliance with Virgin Islands Rule of Civil Procedure 55—to wit, Plaintiff failed to provide supporting affidavit affirming facts and circumstances pertinent to her request for entry of default, and ordered Plaintiff to file an affidavit to supplement her request. To date, Plaintiff has not complied with the Court's May 23, 2017 order.

STANDARD OF REVIEW

The Supreme Court of the Virgin Islands (hereinafter, "Supreme Court") clearly stated that "the Superior Court may not dismiss an action for failure to prosecute unless these six [*Poulis*]¹ factors strongly weigh in favor of dismissal as a sanction." *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511(V.I. 2010). The Supreme Court instructed that, in determining whether to dismiss an action for failure to prosecute, the Superior Court must examine the following six *Poulis* factors:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary cause by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the meritoriousness of the claim or defense; and (6) the effectiveness of sanctions that serve as an alternative to dismissing the case. *Molloy v. Independence Blue Cross*, 56 V.I. 155, *184-85 (V.I. 2012) (citing *Poulis*, 747 F.2d at 868)

The Supreme Court further instructed that, "[a]lthough a trial court is not required to find that all the factors weigh in favor of dismissal to warrant dismissal of the claim, the court must explicitly consider all six factors, balance them, and make express findings." *Molloy*, 56 V.I. at *186.

DISCUSSION

Here, Plaintiff filed her complaint on August 21, 2015, and Defendants were served on September 11, 2015 and September 12, 2015.² However, despite the Court's orders, Plaintiff has remained lethargic in moving this case forward. As such, the Court will consider and balance the six *Poulis* factors and determine whether this case should be dismissed for failure to prosecute.

¹ *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

² Defendant Fredrick and Defendant John's were served on September 11, 2015. Defendant Joseph was served on September 12, 2015.

1. The Extent of the Party's—Mireya Robles³—Personal Responsibility

This factor focuses on whether it was the client or his/her counsel who is responsible for the delay. *See Poulis*, 747 F.2d at 868 (observing that the plaintiff's counsel took responsibility for the delay, which is separate from the plaintiff's personal responsibility, and thus weighed against dismissal). Here, there is no direct evidence that Mireya Robles herself is personally responsible for the delay in this matter. However, this matter has been pending for approximately two years with minimal movement. Although Plaintiff's counsel, Ronald E. Russell, Esq., did indeed file a notice of compliance in response to the Court's February 23, 2016 order and a request for entry of default, albeit incomplete, neither Mireya Robles nor her counsel have been proactive in moving this matter forward since filing the complaint in August 2015. While it was reasonable for Mireya Robles to rely to some extent on her counsel to move the matter forward diligently, at some point the responsibility becomes that of the client's to ensure that the case is progressing. In this instance, had Mireya Robles urged her counsel to pursue this action at any point in the past two years, it is hard to imagine that her counsel would refuse such a request.⁴ Thus, while Mireya Robles' counsel bears the bulk of the blame, the Court believes that it is reasonable to assume that Mireya Robles also bears some blame for this long delay as well. *See Poulis*, 747 F.2d at 868 (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 cannot, however, fault Mireya Robles for failure to comply with the Court's May 23, 2017 order. First, it is unclear whether Mireya Robles herself was even aware of the May 23, 2017 order. Second, as a counseled party, Mireya Robles would rightly expect her counsel to comply with the Court's order.

³ When the Court refers to "Mireya Robles," the Court is referring solely to Mireya Robles.

⁴ In the unlikely scenario that Mireya Robles' counsel refused Mireya Robles' request to move this case forward, it is also hard to imagine that Mireya Robles would continue to retain said counsel to represent her in this matter.

Therefore, while the delay resulting from Plaintiff's failure to comply with the Court's May 23, 2017 order lay with Mireya Robles' counsel, the responsibility of the general, lengthy delay in the past 24 months may partially be attributed to Mireya Robles herself. Accordingly, this factor weighs in favor of dismissal.

2. The Prejudice to the Adversary

In *Molloy*, the Supreme Court stated that "[p]rejudice to the opposing party is generally demonstrated by either increased expense to the opposing party arising from the extra costs associated with filings responding to dilatory behavior or increased difficulty in the opposing parties' ability to present or defend their claim(s) due to the improper behavior." 55 V.I. at *189 (citing *Poulis*, 747 F.2d at 868). Here, Plaintiff commenced this lawsuit against Defendants on August 21, 2015 for injuries she sustained on October 14, 2013. Plaintiff had the past two years to move her case forward but she did not. It has now been close to four years since the date she sustained her injuries. It is certain that this lengthy delay has made it more difficult for Defendants to defend against Plaintiff's claims. With the passage of time, witnesses may disperse and become unavailable, memories may fade, and evidence may be lost. Accordingly, this factor weighs strongly in favor of dismissal.

3. A History of Dilatoriness

A history of dilatoriness is characterized by a consistent delay by the plaintiff's counsel. See *Poulis*, 747 F.2d at 868 (observing that a history by the plaintiff's counsel of ignoring the time limits is intolerable). As described above, this matter has been pending since August 21, 2015 and Plaintiff simply allowed the case to sit idly before the Court. Even after the Court entered the June 7, 2016 order directing Plaintiff to make appropriate filings to move this case forward, Plaintiff continued to remain dilatory and lethargic in pursuing her claims against Defendants. In fact, on February 21, 2017, the Court entered another order directing Plaintiff to make appropriate filings to move this case forward, and even then, Plaintiff waited another month before filing her incomplete request for entry

of default. Thereafter, the Court entered its May 23, 2017 order directing Plaintiff to file an affidavit to supplement her request for entry of default within four weeks, and to date, Plaintiff has not complied with the Court's order. Essentially, Plaintiff has done the very bare minimal to move this matter forward since filing her complaint. Accordingly, this factor weighs strongly in favor of dismissal.

4. Offending Party/Attorney's Conduct Willful or in Bad Faith

In *Molloy*, the Supreme Court stated that "the trial court must point to specific evidence to justify its determination of willfulness or bad faith." 56 V.I. at *192. Thus, if there is no evidence of willfulness or bad faith on the record, the Court must presume the party/attorney's conduct was not willful or in bad faith. *Id.* Here, there are no specific direct evidence to justify a determination that Mireya Robles or her counsel acted willfully or in bad faith. However, for the matter to remain more or less dormant for the past two years and for the continued delay and/or incompliance with the Court's orders, the Court finds that some degree of willfulness or bad faith is involved. According, this factor weighs in favor of dismissal.

5. The Meritoriousness of the Claim or Defense

"In considering whether a claim or defense appears to be meritorious for this inquiry, we do not purport to use summary judgment standards. A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." *Poulis*, 747 F.2d at 869-70. In her complaint, Plaintiff claimed that she sustained injuries when she was assaulted by Defendant Joseph at Defendant John's as the result of Defendant John's and Defendant Frederik's negligence on October 14, 2013. More specifically, Plaintiff alleged that:

7. On Monday, October 14, 2013 at about 12:25 AM Robles called the police because she was assaulted.
8. Prior to this incident Ms. Robles was involved with an attack by three females including Ms. Joseph and Fredrick knows about this attack.
9. Robles regularly visit [John's] for recreation and entertainment and has spoken to Fredrick about Joseph before the incident of this action.

10. On Monday October 14, 2013 Robles was exiting the restroom at [John's] when she was assaulted and severely injured by Olivia Joseph.

11. Joseph struck Robles in the head with a glass bottle causing Robles to have to visit the emergency room of the hospital.

12. Robles and Joseph, along with others have had prior altercations and confrontations at [John's] and [John's] and Fredrick knew that Joseph and others were a problem before the October 14, [2013] assault.

...

15. Robles determined that Joseph may be employed part-time at [John's] and that [John's] facilitated the incident by omission, complacency and lack of discipline and control.

...

26. [John's] and Fredrick negligently failed to keep the establishment safe and free from Joseph attacking Robles thus causing injuries to Robles.

Plaintiff pled four separate counts in her complaint, including strict liability (against all Defendants) and negligence (against Defendant John's and Defendant Frederik),⁵ and requested punitive damages, damages, costs and fees, pre and post judgment interest and such other relief as this court deems fair and just. Taking the allegations in her complaint at face value, the Court finds at least one of Plaintiff's claims to be meritorious. Accordingly, this factor weighs against dismissal.

6. The Effectiveness of Alternative Sanctions

Courts must look to other appropriate methods of sanctioning before dismissal for failure to prosecute because "[d]ismissal must be a sanction of last, not first, resort." *Poulis*, 747 F.2d at 869. Alternative sanctions include excluding evidence, precluding witnesses, striking portions of pleadings, or imposing monetary sanctions to compensate the harmed party for reasonable expenses, including attorney's fees, caused by the noncompliance. *See Carty v. Mason*, ST-06-CV-433, 2010 V.I. LEXIS 88, 8 (Super. Ct. Dec. 7, 2010) (unpublished). Although it is clear to the Court that, to

⁵ The Court cannot discern the causes of action alleged in following counts, which stated:

Count II

20. Robles repeats and re-alleges the allegations contained in ¶¶ 1-19 as though more fully set forth herein.

21. The actions of Joseph were willful and reckless and as a result Robles suffered damages.

22. [John's] and Fredrick contributed, aided and abetted and facilitated the willful and reckless actions of Joseph.

Count III

23. Robles repeats and re-alleges the allegations contained in ¶¶ 1-23 [sic] as though more fully set forth herein.

24. The actions of Joseph and in-actions of [John's] and Fredrick constitute a willful and deliberate tortuous act in violation of common law and caused the injuries and damages to Robles.

date, Plaintiff has not shown any interest in moving this case forward, there are a number of less drastic alternative sanctions at the Court's disposal. Accordingly, this factor weighs against dismissal.

CONCLUSION

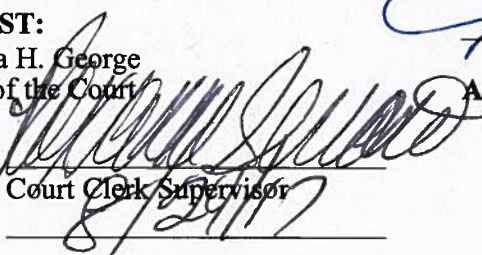
Having examined the six *Poulis* factors regarding the dismissal of this matter for failure to prosecute, the Court finds that two factors weigh against dismissal and four factors weigh in favor of dismissal (with two factors—the prejudice to the adversary and a history of dilatoriness—weighing strongly in favor of dismissal). In this instance, the Court finds the *Poulis* factors weigh in favor of dismissal of this matter, and thus, the extreme sanction of dismissal is warranted. *See Molloy*, 56 V.I. at *186 (“a trial court is not required to find that all the factors weigh in favor of dismissal to warrant dismissal of the claim”). Based on the foregoing, this matter will be dismissed for failure to prosecute. An Order consistent with this Memorandum Opinion will follow.

DONE and so ORDERED this 23rd day of August, 2017.

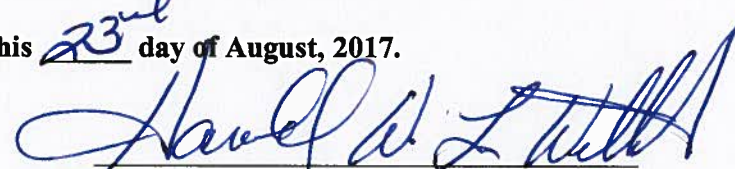
ATTEST:

Estrella H. George
Clerk of the Court

By:


Court Clerk Supervisor

Dated: 8/24/17


HAROLD W.L. WILLOCKS

Administrative Judge of the Superior Court