

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**CRED-X, INC., a West Virginia corporation d/b/a
The Credit Corp. of America,
Plaintiff below, Petitioner**

v. No. 15-1056 (Kanawha County 06-C-1209)

**CABELL HUNTINGTON HOSPITAL, INC.,
Defendant below, Respondent**

**FILED
November 10, 2016**

released at 3:00 p.m.
RORY L. PERRY, II CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner, Cred-X, Inc. “(Cred-X)”, by counsel J. Timothy DiPiero and Sean P. McGinley, appeals the June 30, 2014, order of the Circuit Court of Kanawha County, refusing to reinstate its complaint for declaratory and injunctive relief that was dismissed by ruling of March 9, 2012, on the basis of a tentative settlement agreement.¹ The respondent Cabell Huntington Hospital, Inc. (the “Hospital”), by counsel Todd A. Biddle, has filed a response in support of the circuit court’s order. The petitioner argues that the circuit court erred both in refusing to reinstate this case to the active docket and in relying on laches as a basis for its ruling.

Upon consideration of the parties’ briefs, oral argument, and the submitted record, we determine that this case fails to present a new or significant question of law. Based on our additional conclusion that the circuit court committed no error, a memorandum decision affirming the circuit court’s order is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

At issue in this appeal is whether the circuit court erred in denying the petitioner’s motion to reinstate its civil action. Cred-X instituted the underlying action in 2006, asserting that the Hospital had breached a contractual agreement pursuant to which Cred-X was

¹The petitioner further appeals from the September 25, 2015, order of the circuit court denying reconsideration of its June 30, 2014, order or, alternatively, referral of this matter to Business Court.

assigned collection rights regarding specific Hospital accounts. Through the complaint,² Cred-X sought both a declaration of its contractual rights and to enjoin the Hospital from placing its collection accounts with another collection agency. In response to the complaint, the Hospital filed a counterclaim against Cred-X, seeking \$65,407.56 in damages arising from an alleged breach of the subject collection contract by Cred-X.

When Cred-X sought Chapter 7 protection in federal bankruptcy court (“Bankruptcy Court”) in 2007, its claims pending before the circuit court were automatically stayed. After his appointment as trustee to act on behalf of Cred-X by the Bankruptcy Court, Arthur M. Standish obtained court approval to lift the stay on the circuit court proceedings to allow Cred-X to pursue its claims against the Hospital. After almost two years of litigation and several mediations, the circuit court was apprised that a tentative settlement agreement had been reached between Cred-X and the Hospital. On March 9, 2012, the circuit court dismissed the underlying action, stating in its order:

While this court understands that the settlement reached of all claims is subject to approval by the Bankruptcy Court, the Court is still dismissing the case from the Circuit Court docket. *Should the Bankruptcy Court reject the settlement, the parties in this case may petition the court for reinstatement of this action.* (emphasis supplied).

At the hearing to obtain approval of the settlement agreement,³ both the trustee and Cred-X informed the Bankruptcy Court that the settlement amount was reasonable. The sole shareholder and president of Cred-X, Ron Davis, objected to the settlement amount as insufficient. Given Mr. Davis’ position, the Bankruptcy Court withheld its approval of the settlement but authorized Mr. Davis to personally buy the claim out of bankruptcy by providing security to the trustee in the amount necessary to satisfy all of the filed claims.⁴ Mr. Davis proceeded to buy out his claim as authorized by the Bankruptcy Court and on January 3, 2013, the Bankruptcy Court entered an order authorizing the trustee to assign all rights and interest in the circuit court proceeding to Mr. Davis.⁵

²Cred-X was represented by different counsel at this time—Harold S. Albertson.

³The hearing was held on November 28, 2012.

⁴The “buy out” exceeded the amount of the Hospital’s counterclaim.

⁵Through an order entered on February 21, 2013, the Bankruptcy Court addressed with specificity the Hospital’s right to pursue its counterclaim, making Mr. Davis personally

On June 26, 2013, the petitioner filed a motion with the circuit court seeking to have its claim referred to the newly-created Business Court. No further action was taken with regard to this motion,⁷ which the Hospital asserts it never received. Concurrent with his motion for a referral, the petitioner did not request that the civil action be reinstated to the circuit court's active docket.

In January 2014, the law license of the petitioner's former attorney was annulled.⁸ On April 10, 2014, the petitioner's current counsel filed a notice of appearance with the circuit court and simultaneously filed a motion to reinstate the underlying suit filed by Cred-X. In response, the Hospital expressly opposed reinstatement of the suit.

By order entered on June 30, 2014, the circuit court denied the petitioner's request to reinstate the subject lawsuit. As grounds for its ruling, the lower court stated that the petitioner had delayed taking any action to reinstate the circuit court matter for more than fifteen months after the January 3, 2013, order entered by the Bankruptcy Court authorized him to further litigate his claim. Looking also to the equitable doctrine of laches, the circuit court reasoned that the fifteen-month delay in prosecution prejudiced the Hospital given that the delay had potentially enhanced any award of prejudgment interest.⁹ As additional support for its ruling, the circuit court ruled that the petitioner had failed to move to reinstate his civil action as required within three terms of court under West Virginia Code § 56-8-12 (2012). In concluding its decision, the circuit court found that the petitioner had failed to demonstrate good cause for failing to timely seek reinstatement of the underlying action.

liable for any liability assessed against Cred-X for such claim. This ruling resulted when the Hospital sought clarification that its counterclaim "has not been impeded or otherwise infringed upon by the Court's January 3 Order or any other Order of this Court."

⁷The petitioner faults the circuit court for not holding a hearing on this motion. As the Hospital correctly observes, the circuit court was not the proper entity to decide the transfer issue. *See* T.C.R. 29.06.

⁸*See supra* note 2.

⁹The circuit court rejected the petitioner's attempt to rely on the disbarment of his first attorney given that there was a year of inaction prior to Mr. Albert's annulment when reinstatement could have been sought. As further authority for its ruling, the circuit court cited Rule 41(b) of the West Virginia Rules of Civil Procedure which permits dismissal of an action that has not been prosecuted for three terms of court. Because the case was not on the court's active docket, Rule 41(b) is not controlling.

On July 14, 2014, the petitioner filed a motion to reconsider the June 30, 2014, ruling that denied his motion for reinstatement or, alternatively, he sought a referral of the matter to Business Court. Given the filing of this motion within ten days of the prior ruling, the circuit court treated the motion as having been filed under Rule 59(e) of the Rules of Civil Procedure.¹⁰ Finding no grounds sufficient to set aside its ruling, the circuit court, by order entered on September 25, 2015, denied the motion and further determined that a referral to Business Court was not proper given the inactive status of this case and the petitioner's failure to meet the requirements for such a transfer.¹¹

At the root of this matter is the trial court's determination that as of January 3, 2013, the petitioner was free to pursue his claim against the Hospital in circuit court but then sat on his rights. In light of the circuit court's dismissal of the action from its active docket by order of March 9, 2012, the petitioner had to first seek the reinstatement of the Cred-X action in circuit court as a prerequisite to further litigation of his claim.¹² Yet the first time that the petitioner actually sought to reinstate the civil action was on April 10, 2014.

The petitioner maintains that the trial court erred in refusing to reinstate the Cred-X case through its ruling of June 30, 2014. Essentially, the petitioner disputes the trial court's finding that as of January 3, 2013, there were no legal impediments to prevent him from prosecuting his claim against the Hospital. Seeking to construct a plausible explanation for the fifteen-month delay between when he could have sought reinstatement and when he finally did seek reinstatement, the petitioner relies on what are typically viewed as equitable arguments: He cites the disbarment of his former counsel,¹³ tries to shorten the period of

¹⁰The petitioner did not cite a specific procedural rule through which he sought relief.

¹¹See W.Va. T.C.R. 29.06(a)(2)(3).

¹²To argue, as does the petitioner, that the circuit court should have merely stayed the circuit court action is of no moment; once the order was entered there was no way to place the action back on the active docket of the circuit court other than by formally seeking a reinstatement. Significantly, the *only* basis upon which reinstatement was sought in the April 10, 2014, motion was the language of the March 9, 2012, order—which provided for the *possibility* but not a guaranty of reinstatement.

¹³The trial court found that Mr. Albertson was disbarred for reasons other than his dealings with the petitioner or this litigation and that the annulment did not occur until more than a year after the petitioner had the right to seek reinstatement.

dilatoriness;¹⁴ or argues that justice is necessarily denied absent a trial on the merits. We are not persuaded by these attempts to skirt the facts upon which this case was decided.

By statute, a dismissed case may be reinstated subject to the discretion of the trial court. *See* W.Va. Code § 56-8-12. A motion to reinstate must be made “within three terms after the order of dismissal shall have been made.” *Id.* Under the facts of this case, which include the intervening bankruptcy proceedings, we cannot treat the March 9, 2012, dismissal order as the tolling date for purposes of applying the three-term reinstatement rule. To do so, would be overly harsh and improper. However, the January 3, 2013, order, which first allowed Mr. Davis to stand in the shoes of Cred-X, is the date from which to examine whether the petitioner timely sought to reinstate the Cred-X claim. Under Trial Court Rule 2.13, which provides the respective terms of court for our circuit courts,¹⁵ three terms of court had completely passed before the petitioner sought to reinstate his claim in April 2014.

When this Court is asked to review a decision by a lower court not to reinstate a civil action, our review is governed by an abuse of discretion standard. *See* Syl. Pt. 1, *Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756 (2003); Syl. Pt. 4, *White Sulphur Springs, Inc. v. Jarrett*, 124 W.Va. 486, 20 S.E.2d 794 (1942). Further controlling our decision in this case is our holding in syllabus point one of *Arlan’s Department Store of Huntington, Inc. v. Conaty*, 162 W.Va. 893, 253 S.E.2d 522 (1979):

When a party fails to make a reinstatement motion within the time period prescribed by R.C.P. 41(b) and W.Va. Code, 56-8-12,¹⁶ such party is not entitled to reinstatement of a case to the docket and the court is without power to grant such relief, except where the parties consent, or where good cause is shown such as fraud, accident, or mistake.

¹⁴We reject the petitioner’s suggestion that the operative date of January 3, 2013, should be advanced to February 21, 2013, based on the issuance of a supplemental order by the Bankruptcy Court on that date. Critically, the clarifying language in that order solely addressed the Hospital’s rights with regard to prosecuting its counterclaim; it did not alter the rights of the petitioner or prevent him from prosecuting his claim.

¹⁵“For the county of Kanawha, on the second Monday in January, May, and September.” T.C.R. 2.13.

¹⁶The time period provided for moving for reinstatement under Rule 41(b) of the Civil Rules of Procedure is three terms of court—the same as that provided by West Virginia Code § 56-8-12. *See supra* note 9 (finding Rule 41(b) inapplicable to this case).

162 W.Va. at 893, 253 S.E.2d at 523 (footnote added).

In reviewing the lower court's ruling, we first examine whether the disbarment of Mr. Albertson should have any impact on the decision to deny reinstatement. The circuit court specifically found that "any attempt by Cred-X, Inc. or Mr. Davis to lay blame on Mr. Albertson for the case languishing before trying to litigate it the second time in Circuit Court is disingenuous." As the circuit court reasoned:

Plaintiff [petitioner] was represented by counsel from the initiation of this litigation until Mr. Albertson was disbarred on January 15, 2014. Accordingly, the movant and/or Mr. Davis was/were represented for a minimum of one (1) year and twelve (12) days following the Bankruptcy Court's Order allowing it to come back before this Court, but absolutely nothing to reinstate the case was done. This inaction – even if a result of their attorney – is imputed to Plaintiff and it is responsible. *See generally, Murray v. Roberts*, 183 S.E. 688 (W.Va. 1936) (Supreme Court stating that it is regrettable that the plaintiff should suffer from the effect of a misunderstanding between her and an attorney she consulted, but ultimately concluding that the court did not abuse its discretion in refusing to reinstate the case because the showing made by the plaintiff was insufficient); *Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W.Va. 1985). Accordingly, simply pointing the finger at Mr. Albertson is insufficient to justify how dilatory Plaintiff and/or Mr. Davis has/have been.

The same authority, which imputes legal error to a client, further prevents the petitioner from relying on his representation that Mr. Albertson wrongly assumed that the filing of a motion to refer this matter to the Business Court would, in coterminous fashion, operate to reinstate the matter.

With regard to the petitioner's attempts to shorten the period of his inaction, we are wholly unpersuaded that any date other than January 3, 2013, can serve as the date from which his actions must be scrutinized for purposes of dilatoriness. The motion filed by Mr. Albertson to transfer this case to the Business Court on June 26, 2013, was not the

functional equivalent of a motion to reinstate the case.¹⁷ Critically, the misapprehension or lack of awareness by an attorney with regard to reinstatement does not serve as an excuse to permit a case to languish beyond the three-term limit. *See Tolliver v. Maxey*, 218 W.Va. 419, 425, 624 S.E.2d 856, 862 (2005) (affirming trial court’s denial to reinstate where attorney lacked awareness for over a year after being retained concerning exception allowing reinstatement for good cause), *Bell*, 175 W.Va. at 173-74, 332 S.E.2d at 135 (“A litigant chooses counsel at his peril and here, as in countless other contexts, counsel’s disregard of his professional responsibilities can lead to extinction of his client’s claim.”) (quoting *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) and internal citation omitted).

As a final basis for seeking a reversal, the petitioner argued that he must be allowed to proceed to a trial on the merits. He contends that imputation of his attorney’s failure to get this case reinstated on the docket is a harsh sanction to be used sparingly. *See Foster v. Good Shepherd Interfaith Volunteer Caregivers, Inc.*, 202 W.Va. 81, 83, 502 S.E.2d 178, 180 (1998). Overlooked by the petitioner, however, is this Court’s recognition in *Foster* that “a clear record of delay” is one of the bases upon which courts may rely in upholding dismissals based on imputed attorney conduct. *See id.* (citing *Davis v. Sheppe*, 187 W.Va. 194, 197, 417 S.E.2d 113, 116 (1992)).¹⁸

The trial court examined the reasons offered by the petitioner for disregarding the time table that is both statutorily and judicially prescribed for taking action to reinstate an action that has been dismissed. *See* W.Va. Code § 56-8-12; W.Va. R. Civ. P. 41(b). Citing to the standard this Court adopted in *Conaty*, the trial court concluded that the petitioner’s “alleged reasons for delay do not meet the requirements of good cause.”¹⁹ *See Conaty*, 162 W.Va. at 893, 253 S.E.2d at 523, syl. pt. 1. Expositing further on its ruling, the circuit court opined: “It is unfair not to make this Plaintiff adhere to the same time frames as are

¹⁷Neither is it simply a procedural “mistake,” as petitioner’s counsel suggests, that would permit application of the “good cause” exceptions we identified in *Conaty*. *See* 162 W.Va. at 893, 253 S.E.2d at 523, syl. pt. 1.

¹⁸In positing that the circuit court’s ruling “violates the holdings of *Foster* . . . and *Davis* . . .”, the petitioner fails to acknowledge that in *Foster* this Court cited our decision in *Bell*—a case in which this Court upheld the entry of a default judgment based on attorney conduct/lack of action. *See Bell*, 175 W.Va. at 175, 332 S.E.2d at 137.

¹⁹Given that the trial court based its ruling on the “find[ing] that good cause has not been shown to reinstate the case to the active docket,” we do not find it necessary to address the circuit court’s discussion of the application of laches to this case.

accorded others, especially when he agreed on the result once. Bankruptcy may give people a new start by avoiding circumstances, but it should not and does not give another chance at litigation under the facts of this case.”

Upon our careful and thorough review of this case, we do not find that the circuit court abused its discretion in denying the petitioner’s motion to reinstate the underlying case to the active docket. Accordingly, the June 30, 2014, and September 25, 2015, decisions of the Circuit Court of Kanawha County are affirmed.

Affirmed.

ISSUED: November 10, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II
Judge James H. Young, Jr., sitting by temporary assignment

DISQUALIFIED:

Justice Brent D. Benjamin