

15-1056

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CRED-X, INC.
Plaintiff,

v.

COURT CASE NO: 06-C-1209

CABELL HUNTINGTON HOSPITAL, INC.
Defendant.

FILED
2012 MAR -9 PM 1:51
CATHY S. GARDNER, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER

Based on the mediator's report, and contacts to this office by counsel, the Court has been informed that this matter has been resolved, subject to approval by the Bankruptcy Court. This case is now hereby DISMISSED from the docket of the Circuit Court.

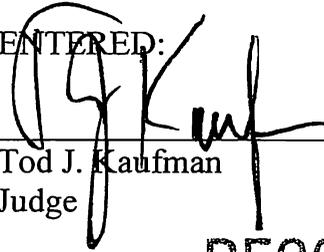
While this court understands that the settlement reached of all claims is subject to approval by the Bankruptcy Court, the Court is still dismissing the case from the Circuit Court docket. Should the Bankruptcy Court reject the settlement, the parties in this case may petition the court for reinstatement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

The Circuit Clerk shall send a certified copy of this Order to all parties of record below:

Harold S. Albertson, Esquire
P.O. Box 1989
Charleston, WV 25327

Arthur M. Standish, Esquire
Steptoe & Johnson
P.O. Box 1588
Charleston, WV 25326-1588

Todd A. Biddle, Esquire
Bailes Craig & Yon PLLC
P.O. Box 1926
Huntington, WV 25720

ENTERED:

Tod J. Kaufman
Judge

RECORDED

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3-12-12
Date
Entered:
by _____
method of receipt
_____ certified/1st class mail
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Clerk

ENTERED: March 9, 2012

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

FILED
Cathy S. GEORGE, Clerk
Kanawha Co. Circuit Court

JUN 30 2014
LHM

v.

CIVIL ACTION NO. 06-C-1209
Judge Tod Kaufman

CABELL-HUNTINGTON HOSPITAL, INC.,
a West Virginia corporation,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO REINSTATE

Before the Court is the Plaintiff's *Motion to Reinstate Case to Active Docket* filed on April 15, 2014. Defendant filed its response to the *Motion* on May 2, 2014.

FACTUAL AND PROCEDURAL HISTORY

1. Plaintiff was a West Virginia corporation which provided debt collection services to Defendant, Cabell Huntington Hospital (hereinafter sometimes referred to as "CHH").
2. In 2006, Debtor instituted this litigation alleging, among other things, that CHH breached its collection contract with the Cred-X, Inc.
3. Defendant denied liability to Plaintiff and, further, filed a Counter-Claim against Plaintiff for \$65,407.56 in damages arising from Plaintiff's breach of the collection contract.

4. On February 22, 2007, Plaintiff filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States District Court, Southern District of West Virginia. Attorney Arthur M. Standish was appointed as Chapter 7 Trustee (hereinafter the "Trustee").

5. On July 2, 2009, the Trustee filed a *Motion to Lift Stay on that Certain Civil Action Filed in the Circuit Court of Kanawha County, West Virginia* such that Plaintiff and Defendant could continue to litigate their respective breach of contract claims against each other in this action.

6. On July 23, 2009, the Bankruptcy Court entered an *Order Granting Trustee's Motion to Lift Stay* which allowed Plaintiff and Defendant to continue litigating this case in this Court.

7. Following years of discovery and two (2) mediation sessions in this matter, CHH and the Trustee for Cred-X, Inc. agreed to compromise and settle the underlying contractual dispute. The parties notified this Court of the settlement and, as a result, this Court entered an Order dismissing this matter from the docket.

8. The same Order also provided that if the settlement was not approved by the Bankruptcy Court, the parties may petition this Court for reinstatement. *See*, Order dated March 12, 1012.

9. In the Bankruptcy Court, the Trustee filed a *Motion to Settle Civil Action Filed in Kanawha County Known as Civil Action 06-C-1209; to Pay Fees and Expenses of Special County Nunc Pro Tunc and Mediation* (Doc. No. 35).

10. A hearing on the *Motion to Settle Civil Action Filed in Kanawha County Known as Civil Action 06-C-1209; to Pay Fees and Expenses of Special County Nunc Pro Tunc and Mediation* was held on November 28, 2012.

11. At the hearing, Trustee for Plaintiff and counsel for Defendant herein argued to the Bankruptcy Court that the settlement proposed in this action was reasonable and should be approved. However, Ron Davis, President of the then bankrupt corporation, objected to the settlement.

12. The Bankruptcy Court at no time found the settlement agreement reached between the Trustee and Defendant to be unreasonable.

13. Rather, the Bankruptcy Court found that, given Mr. Davis' personal objection to the settlement, the fairest resolution was to allow Mr. Davis to personally buy the claim out of bankruptcy if he so desired. To wit:

. . .the fairest resolution, . . ., is to say to Mr. Davis, we'll give you 21 days, . . ., to provide security to the trustee to the extent of - - that would allow the satisfaction by the trustee of all non-Cabell Huntington claims and the costs of administration. And if you do that, then we'll let you keep the cause of action, we'll close the bankruptcy case, we'll sell the cause of action, and Cabell Huntington and Mr. Davis can then duke it out in court.

See, Transcript of Proceedings Before the Honorable Ronald K. Pearson United States Bankruptcy Judge, Case No. 2:07-BK-20164, at p. 27; see also, Order dated December 13, 2012.

14. On December 18, 2012, Mr. Davis exercised the option granted to him by the Bankruptcy Court and paid to the Trustee the amount necessary to satisfy all of the filed claims (with interest and administration fees), save the Counterclaim of CHH in this litigation.

15. As a result, the Bankruptcy Court entered an Order on January 3, 2013 that provided that “the Trustee is authorized to assign all rights and interest . . . in that Civil Action No. 06-C-1209 filed in the Circuit Court of Kanawha County . . . to Ronald K. Davis. . .”

16. Plaintiff filed the *Motion to Reinstate Case to Active Docket* on April 14, 2014, approximately fifteen (15) months after purchasing the case.

17. Between January 3, 2013 when Mr. Davis was permitted the right to proceed in this action and the April 14, 2014 filing of the instant Motion, neither Cred-X, Inc., nor Mr. Davis came before this Court seeking reinstatement of the case. Thus, more than fifteen (15) months passed before Plaintiff or Mr. Davis took any action to pursue this matter after he “purchased this case” from the Bankruptcy Court.

18. Defendant filed the *Response to Plaintiff’s Motion to Reinstate Case to Active Docket* on May 7, 2014.

DISCUSSION

The Plaintiff essentially seeks to take advantage of the bankruptcy proceeding twice to enhance himself, first in reorganizing his debt, which he owes, to start anew or pay less, which he clearly has a right to do; and secondly by choosing to remove the asset of the law suit, used to satisfy existing debt, to make his original settlement worth more out of bankruptcy than he agreed it was worth in a state circuit court before bankruptcy.

When this case was originally brought, Plaintiff received due process that resulted in a most reasonable settlement for Plaintiff, or at least one that he and his lawyer found to be satisfactory and to his best interest and one that Plaintiff agreed to. It is inequitable in both fact and

law that Plaintiff is now trying to revive this asset position. Plaintiff entered into the settlement agreement by his own decision making and only months later attempted to renege this agreement in a disingenuous attempt to receive a better offer.

After years of litigation, (the case was a 2006 case and included two mediation sessions) the parties came to a settlement that benefited both parties, but during the course of the bankruptcy proceedings he decided that this settlement was not enough, and of his own volition, took a gamble in buying this claim out of bankruptcy in an attempt to gain a more financially advantageous position.

The West Virginia Supreme Court of Appeals has previously found that cases may be barred pursuant to the doctrine of laches. To wit: "Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." Syllabus Point 2, *Bank of Marlinton v. McLaughlin*, 123 W. Va. 608, 17 S.E.2d 213 (1941); *See also*, Syllabus Point 3, *Carter v. Price*, 85 W. Va. 744, 102 S.E. 685 (1920) ("Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. This disadvantage may come from death of parties, loss of evidence, change of title or condition of the subject-matter, intervention of equities, or other causes. When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.").

In the case *sub judice*, Defendant has been prejudiced by Plaintiff's fifteen (15) month delay in seeking reinstatement. More specifically, Plaintiff in this case alleges that he is

entitled to pre-judgment interest. If Plaintiff is correct, his dilatory action in bringing the instant motion turns into a reward for Plaintiff to the detriment of Defendant. In other words, Defendant should not be forced to face additional damages in the form of pre-judgment interest because Plaintiff, of its own volition, sat on his hands for over a year. This prejudice to Defendant should not be overlooked and the doctrine of laches should apply thereby barring reinstatement as a matter of law.

MORE DISCUSSION

This matter should not be reinstated because the more than fifteen (15) month delay by Plaintiff is sufficient to warrant the presumption that Cred-X, Inc. waived its rights. See, Syl. Pt. 2, *Bank of Marlinton*, supra. Stated another way, the presumption of Plaintiff waiving its rights is supported because Plaintiff waited over fifteen (15) months to file the instant Motion despite having the right and every opportunity to do so earlier. The presumption that Plaintiff waived its rights is further supported by other aspects of West Virginia law. For instance, pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, an action may be dismissed for failure to prosecute if there is no order or proceeding within one (1) year. Over one (1) year lapsed before Plaintiff took any action to reinstate and, therefore, Rule 41(b) supports the continued dismissal of this action.

Likewise, the application of the presumption that Cred-X, Inc. waived its rights is further bolstered by West Virginia Code §56-8-12 which requires a Motion to Reinstate to be filed within three (3) terms after the entry of the Order of Dismissal. W.Va. Code §56-8-12. In Kanawha County, the term of court shall commence and be held on the second Monday in January,

May, and September. W.Va. T.C.R. 2.13. Since Plaintiff had from January 3, 2013 to file for reinstatement, more than three (3) terms of Court expired prior to Plaintiff's attempt to reinstate the case. Thus, Plaintiff's Motion to Reinstate the same should be denied. Moreover, reinstatement should not be permitted as Plaintiff has failed to rebut the aforementioned presumption of a waiver of rights or otherwise state any "good cause" for the delay in moving this Court to reinstate the case. *See generally, Higgs v. Cunningham*, 77 S.E. 273 (W.Va. 1913)(W.Va. Code 56-8-12 does not dispense with the showing of good cause for the neglect that has disturbed orderly legal procedure. One cannot refuse to prosecute and then ask to do so without showing why he thus acts so inconsistently).

Given the *Motion to Reinstate's* reference to Hal Albertson, plaintiff's former counsel, being "disbarred and discharged", 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. Mr. Albertson was disbarred for reasons other than his dealings with Plaintiff or this litigation. Moreover, it does not appear that Mr. Albertson was disbarred until January 15, 2014; more than a year after the instant motion could have been filed.

Plaintiff 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.

CONCLUSION AND RULING

When a party fails to make a reinstatement motion within the time period prescribed following dismissal, that 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. *Tolliver v. Maxey*, 2005, 624 S.E.2d 856, 218 W.Va. 419. The Court finds that Plaintiff's alleged reasons for delay do not meet the requirements of good cause.

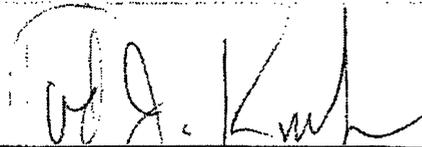
It is unfair not to make this Plaintiff adhere to the same time frames as are accorded others, especially when he agreed on the result once. Bankruptcy may give people a new start by avoiding circumstances, but it should not and does not give another chance at litigation under the facts of this case. Accordingly, the Court has reviewed the record and motion and finds that good cause has not been shown to reinstate the case to the active docket. Plaintiff's *Motion to Reinstate Case to Active Docket* is hereby **DENIED**.

The Circuit Clerk shall send a certified copy of this Order to all parties of record:

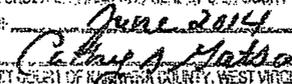
Todd A. Biddle, Esq.
Bailes Craig & Yon PLLC
P.O. Box 1926
Huntington, WV 25720

J. Timothy DiPiero, Esq.
Sean P. McGinley, Esq.
DiTrapano, Barrett, Dipiero,
McGinley & Simmons, PLLC.
P.O. Box 1631
Charleston, WV 25326

Entered this 30th day of June, 2014.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA
I, CATHY B. WATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY,
AND IN SAID COUNTY, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS 30th
DAY OF June 2014
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
WJH

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2015 SEP 25 PM 2: 54

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

Clerk of the Circuit Court
KANAWHA COUNTY, WEST VIRGINIA
UHM

Plaintiff,

v.

CIVIL ACTION NO.: 06-C-1209
(Honorable Tod J. Kaufman)

CABELL HUNTINGTON HOSPITAL, INC.,
a West Virginia corporation,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER OR, IN THE
ALTERNATIVE, TO REFER THIS CASE TO THE BUSINESS COURT

The Court has carefully considered the motions. (K)

On the 14th day of July, 2014, Plaintiff filed a *Motion to Reconsider or, in the alternative, to Refer This Case to the Business Court*. In it, Plaintiff seeks reconsideration and reversal of this Court's Order dated June 30, 2014 which denied Plaintiff's *Motion to Reinstate Case to Active Docket*. Alternatively, Plaintiff seeks a referral of this case to the West Virginia Business Court. Defendant filed a response to Plaintiff's *Motion to Reconsider or, in the alternative, to Refer This Case to the Business Court*. Plaintiff, thereafter, submitted a reply brief. The written submissions of the party adequately address the issues to be decided and, therefore, no hearing or oral argument is necessary prior to ruling on Plaintiff's *Motion to Reconsider or, in the alternative, to Refer This Case to the Business Court*.

In denying Plaintiff's *Motion to Reconsider or, in the alternative, to Refer This Case to the Business Court*, the Court hereby makes the following findings of fact and conclusions of law:

1. In the pending Motion, Plaintiff seeks relief from this Court's Order dated June 30, 2014 which denied Plaintiff's *Motion to Reinstate Case to Active Docket*.

2. In the pending *Motion to Reconsider or, in the alternative, to Refer This Case to the Business Court*, Plaintiff fails to indicate under which Rule of the West Virginia Rules of Civil Procedure it seeks relief.

3. The West Virginia Supreme Court of Appeals has stated, "[w]hen a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, as in the case *sub judice*, we have considered the motion to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. *See, Savage v. Booth*, 196 W.Va. 65, 67-68, 468 S.E.2d 318, 320-21 (1996); *In re Burley*, 988 F.2d 1, 2 (4th Cir. 1992). In note 5 of *Savage*, we adopted a bright-line rule that if the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e)." *Powderidge Unit Owners Ass'n v. Highland Prop., Ltd.*, 196 W.Va. 692, 704, 474 S.E.2d 872, 884 (1996).

4. Pursuant to Rule 59(e), "any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment."

5. Plaintiff's *Motion to Reconsider* was filed within ten (10) days of the Order it seeks to reconsider and, therefore, Rule 59(e) applies to the issues now before the Court.

6. Significantly, Rule 59(e) provides no specific guidance for relief thereunder; however, the West Virginia Supreme Court of Appeals has noted that Circuit Courts are given considerable discretion in reconsidering an issue. *Id.*; *see also* (See generally, *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3rd 350, 355 (5th Cir. 1993). Moreover, the Supreme Court of

Appeals has stated that, to merit relief under Rule 59(e), a movant must demonstrate (1) an intervening change in controlling law; (2) new evidence not available at trial; or (3) that there has been a clear error of law or a manifest injustice. Syl. Pt. 2, *Mey v. The Pep Boys*, 717 S.E.2d 235 (W.Va. 2011); *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).¹

7. This Court finds that Plaintiff failed to establish a change in the controlling law, new evidence, a clear error of law, manifest injustice, good cause or any other ground which warrants reconsideration or reversal of the Order entered June 30, 2014.

8. Plaintiff's first argues the June 30, 2014 Order should be reconsidered because "the Court appears to have misapprehended what transpired in bankruptcy court amongst these parties, and accepted a number of erroneous, unsupported assertions of defense counsel. First, to the extent the Court accepted the representation that Plaintiff is somehow 'double-dipping' by continuing this case, the exact opposite is true." See, Motion to Reconsider at p. 1, filed herein.

9. The Court's June 30, 2014 *Order Denying Plaintiff's Motion to Reinstate* does not make a finding that Plaintiff is attempting to engage in "double-dipping" of damages. There is simply no reference to the phrase "double-dipping" within the four (4) corners of the Court's Order. Thus, reconsideration is not warranted on this ground.

¹ Rule 59(e) of the West Virginia Rules of Civil Procedure differs from Rule 59(e) of the Federal Rules of Civil Procedure in only one respect: the Federal Rule requires a motion to alter to be filed no later than 28 days after judgment is entered whereas the West Virginia Rule requires the motion to be filed within 10 days. See, *Mey v. The Pep Boys*, 717 S.E.2d at fn. 10 (W.Va. 2011).

10. Plaintiff next argues that “the Court seems to have accepted the assertion that Plaintiff agreed to the proposed settlement. That is not correct.”

11. The Court’s *Order Denying Plaintiff’s Motion to Reinstate* speaks for itself in regard to the settlement reached between Plaintiff, Cred-X, Inc. – through its Trustee – and Defendant and no reconsideration is needed. The Court’s Order notes that the Plaintiff through the bankruptcy trustee entered into a settlement agreement with Defendant, “but during the course of the bankruptcy proceedings [Mr. Davis individually] decided that the settlement was not enough, and of his own volition, took a gamble in buying this claim out of bankruptcy in an attempt to gain a more financially advantageous position.” All of those things are true. No facts are of record contradict the same. Thus, there is no misunderstanding by the Court as contended by Plaintiff.

12. Plaintiff’s third argument is that reconsideration and reinstatement is warranted because “laches simply doesn’t apply.”

13. The law of West Virginia provides that cases may be barred pursuant to the doctrine of laches. “Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.” Syl. Pt. 2, *Bank of Marlinton v. McLaughlin*, 17 S.E.2d 213 (W.Va. 1941); *see also*, Syl. Pt. 3, *Carter v. Price*, 102 S.E. 685 (W. Va. 1920).²

² Plaintiff’s Reply brief states, “[i]t is hornbook law that, “a defense of laches may not be invoked in a law action.” He cites to the portion of *Hoffman v. Wheeling Sav. & Loan Ass’n*, 133 W.Va. 64, 57 S.E.2d 725 (1950) wherein a historical analysis of the doctrine of laches is discussed. While accurately quoting *Hoffman*, Plaintiff omits the very next sentence of *Hoffman* and said omission is substantial. The very next sentence of *Hoffman* provides that “[m]odern decisions have somewhat changed the original theory of laches, . . .” This Court finds that there are instances of laches applying to actions based solely in law. *See generally*, *State ex rel. Webb v. West Va. Bd. of Medicine*, 506 S.E.2d 830 (W.Va. 1998)(“the doctrine of laches may be applicable in proceedings by and before the West Virginia Board of Medicine pursuant to W.Va. Code 30-3-1”). Thus, the doctrine of laches is not exclusively limited to actions in equity.

14. Plaintiff has not provided evidence that the *Motion to Reinstate* was filed within fifteen (15) months of when it could have filed such a Motion. Accordingly, this Court finds no error in applying the doctrine of laches.

15. Plaintiff's position that fifteen (15) months did not lapse before reinstatement was sought is not persuasive. It is true that Plaintiff's counsel at the time filed a *Motion to Transfer* this case to the Business Court approximately four (4) months after Mr. Davis purchased the right to pursue this litigation.³ This case, however, was not on the active docket and no action taken by Plaintiff to put it on the active docket was undertaken at that time. Rather, another eleven (11) months lapsed before Plaintiff filed what should have been filed – a *Motion to Reinstate*. Thus, it is an accurate factual finding that fifteen (15) months lapsed between when Plaintiff could have filed a Motion to Reinstate and when the *Motion to Reinstate* was actually filed by Plaintiff.

16. This Court further finds that Plaintiff has not provided any evidence to refute the fact that Defendant has been prejudiced by Plaintiff's fifteen (15) month delay in seeking reinstatement. The prejudice comes in the form of additional pre-judgment interest as well as the fading of witnesses' memories about the events giving rise to the parties' over such a length of time.

17. Plaintiff's argument that reinstatement is warranted because the prejudice suffered by Defendant is of its own volition is also not persuasive. Plaintiff, in making this

³ The signature of Defendant's counsel in its Response is certification under Rule 11 that he never received a copy of the Motion to Transfer this case to the Business Court in June of 2013 when it was submitted to the Court and that the first Defendant heard of the attempt to file a Motion to Transfer to Business Court was when the Court's law clerk called for the undersigned counsel in December of 2013 and inquired of him whether he knew of any reason Mr. Albertson would file said Motion in a case which was dismissed in 2012.

argument, seeks to have this Court ignore that the fact that it is Plaintiff, not Defendant, who has the burden to seek reinstatement of this case if Plaintiff wanted to proceed further in this litigation. Stated another way, Plaintiff cannot rely upon Defendant's inaction to explain its own inaction when Plaintiff, not Defendant, seeks reinstatement.

18. Plaintiff also argues that "reinstatement of this case comes as no surprise" to Defendant.

19. There is no evidentiary support for Plaintiff's position that Defendant knew Plaintiff would seek reinstatement, particularly after fifteen (15) months passed.

20. Additionally, there is guidance throughout our jurisprudence which would allow a presumption under the law that Plaintiff did not intend further prosecute this matter. *See generally*, Syl. Pt. 2, *Bank of Marlinton v. McLaughlin*, 17 S.E.2d 213 (W.Va. 1941); *see also*, Syl. Pt. 3, *Carter v. Price*, 102 S.E. 685 (W. Va. 1920); W.Va. R. Civ. P. 41(b) (allowing for dismissal of an action if there is no order or proceeding within one (1) year); W.Va. Code §56-8-12 (requiring a Motion to Reinstate to be filed within three (3) terms after the entry of the Order of Dismissal); W.Va. T.C.R. 2.13.

21. Plaintiff also argues that, "[b]y refusing to reinstate Plaintiff's case, the Court is essentially giving defendant a tremendous windfall". This, too, is not persuasive. The Court has not given a windfall to either party. The Court has simply applied the facts to the law to reach its decisions. To the extent anybody is responsible for giving Defendant a purported windfall, it is Mr. Davis' failure to timely pursue reinstatement of this case which caused the same.

22. The final reason set forth by Plaintiff in the pending Motion is to put blame upon Cred-X, Inc.'s former counsel. However, there is no evidence to support Plaintiff's position that Mr. Albertson "apparently believed the motion to transfer [to business court] was tantamount to a motion to reinstate."⁴

23. Even if one were to assume the former counsel was dilatory, the law of West Virginia supports this Court's finding in this regard as Plaintiff is imputed with the acts or omissions of its counsel. *See, 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).

24. This Court has been presented with no other valid reason to reconsider and reverse its prior ruling.

25. This Court finds that reconsideration and, ultimately, reinstatement should not be permitted. Plaintiff's Motion essentially re-argues the points and facts that were already presented. Plaintiff has failed to present any persuasive and new factual, legal or equitable grounds for reconsidering this Court's prior decision to refuse reinstatement due to the unnecessary and lengthy delay of Plaintiff in seeking reinstatement. *See generally, Higgs v.*

⁴ Mr. Davis did submit an Affidavit which provides, "Mr. Albertson told me this motion would both to [sic] reopen the case and refer it to a better suited business court ..." Mr. Davis' comments about what Mr. Albertson advised, however, are hearsay and, under the law, are not to be considered. *See generally, Blankenship v. Mendelson*, 2012 W.Va. LEXIS 474 (W.Va. 2012); *Peterson v. Ankrom*, 25 W.Va. 56 (W.Va. 1884); *see also, Major League Baseball Props. v. Salvino, Inc.*, 542 F.3d 290 (2nd Cir. 2008)("[H]earsay testimony . . . that would not be admissible if testified to at the trial may not properly be set forth in [an] affidavit."(internal citations omitted)); *United States v. \$92,203.00 in U.S. Currency*, 537 F.3d 504 (5th Cir. 2008)(district court erred by not striking the affidavit which "clearly contained hearsay [and] was not based on personal knowledge...").

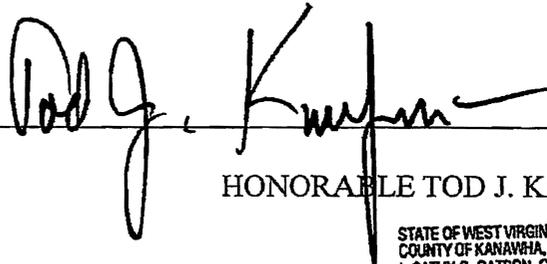
Cunningham, 77 S.E. 273 (W.Va. 1913) (One cannot refuse to prosecute and then ask to do so without showing why he thus acts so inconsistently).

26. The alternative request for a transfer of this case to Business Court is also denied because (1) this case has not been re-instated and, therefore, there is no active case to transfer and (2) even if it had been reinstated, the procedural requirements for referring a case to Business Court have not been satisfied. W. Va. T.C.R. 29.06(a)(2)(3).

WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff's *Motion to Reconsider or, in the alternative, to Refer This Case to the Business Court* is DENIED. This civil action is to be DISMISSED from the Court's docket.

The Clerk of this Court is hereby directed to provide a copy of this Order to the following counsel of record: Todd A. Biddle, BAILES, CRAIG & YON, PLLC, Post Office Box 1926, Huntington, West Virginia 25720-1926 and Sean P. McGinley, Esquire, DiTrapano, Barrett & DiPiero, McGinley & Simmons, PLLC, Post Office Box 1631, Charleston, West Virginia 25326.

ENTERED this 25th day of September, 2015.


HONORABLE TOD J. KAUFMAN

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 25th
DAY OF September, 2015
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
