

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC, INC.,  
a West Virginia corporation,

2014 SEP 17 PM 3:03

CATHY L. GIBSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

PLAINTIFF,

VS.

CIVIL CASE NO. 12-C-2134

SUMMIT COMMUNITY BANK, INC.,  
a West Virginia corporation,

DEFENDANT.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO**  
**DEFENDANT'S MOTION TO DISMISS**

Now comes the Plaintiff, Viking Video & Music, Inc., by counsel, and objects to the Motion of the Defendant to dismiss this matter under Rule 41(b) of the West Virginia Rules of Civil Procedure.

**I. STATEMENT OF FACTS**

Plaintiff is in the business of owning and leasing limited video lottery terminals. In 2011, the West Virginia Lottery Commission required persons or entities desiring licenses to operate limited video lottery terminals to rebid for those licenses.

Since the Plaintiff had been in the business for ten years prior with ownership of approximately 150 licenses, it intended to rebid. Furthermore, since the Plaintiff had a special relationship with the Defendant, in that they have had several loans over the years, the Plaintiff approached the Defendant about providing a letter of credit to produce with the bid to the West Virginia Lottery Commission.

There was an agreement that Defendant would provide the letter of credit; however, before doing so, they required the Plaintiff to post substantial collateral to protect the letter of credit. The Plaintiff did all necessary requests made of it by the Defendant.

Dennis Kerns, the Plaintiff's owner, went to the bank in February, 2011 with the information necessary to prepare the bid and the letter of credit. Mr. Kerns provided the information to the bank that he was intending to bid for 70 terminals at a price of \$9,160.00 per terminal. The Defendant's employees, in preparing the documents to be submitted to the West Virginia Lottery Commission on behalf of the Plaintiff, placed the incorrect amount on the bid at \$9,106.00. Because of this error, the Plaintiff did not receive its award of the terminals.

## **II. PROCEDURAL HISTORY**

As a result of the breach of contract and negligence by the Defendant, the Plaintiff employed counsel to pursue a civil action against the Defendant and a lawsuit was filed on or about October 22, 2012. From that date until May, 2013, the parties engaged in written discovery, both to and from; however, no Scheduling Orders were entered and the matter has proceeded without any additional filing since May, 2013.

## **III. ARGUMENT**

The Plaintiff acknowledges there has been no activity in this case for over one year; however, dismissal is not automatic, but rather discretionary with the

Court. Diamon v. Mansy, 479 S.E.2d 339, 198 W.Va. 40 (1996). Dismissal based upon procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit. McCoy v. CAMC, Inc., 557 S.E.2d 378, 210 W.Va. 324 (2001). Motions to Dismiss are viewed with disfavor and the Court's should rarely grant such Motions. Ewing v. Board of Educ. of County of Summers, 503 S.E.2d 541, 202 W.Va. 228 (1998). In that a dismissal under Rule 41(b) is a harsh sanction, dismissal with prejudice is appropriate only in flagrant cases. Howerton v. Tri-State Salvage, Inc., 210 W.Va. 233, 557 S.E.2d 287 (2001). Furthermore, Rule 41(b) provides for reinstatement of a case even after it is dismissed on these procedural grounds.

The Court may consider whether or not it is the act of the Plaintiff or counsel when considering a dismissal. The Courts favor that a Plaintiff is given his day in Court. Here, the delay was not the result of the Plaintiff, but excusable neglect on behalf of the Plaintiff's counsel for not obtaining a Scheduling Order.

Counsel for the Plaintiff, as soon as he became aware of the situation and received the Motion for dismissal, contacted the Court's office and obtained a Scheduling Conference. A Notice of Scheduling Conference has been sent out and the Scheduling Conference is presently scheduled for September 29, 2014 at 11:00 a.m.

More importantly, while the burden of proof is on the Plaintiff to show good cause for any delay, once that has been shown, the burden then shifts to the

Defendant to show any prejudice which has occurred. The Plaintiff has set forth that the excusable neglect of counsel was the good cause and nothing on the fault of the Plaintiff itself was the cause of the delay.

The Defendant has shown in its Motion no prejudice which has occurred to it for the delay. Caruso v. Pearce, 678 S.E.2d 50, 223 W.Va. 544 (2009).

Even if the Defendant were to show some type of prejudice, the Court would then have to weigh the prejudice versus the reason for the delay to determine what is fair to the parties. In this case, it is manifestly unfair to the Plaintiff to dismiss the case on procedural error caused by counsel rather than allowing the case to be pursued on the merits.

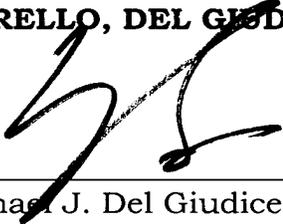
**CONCLUSION**

**WHEREFORE**, the Plaintiff requests the Court deny the Defendant's Motion to Dismiss. The Plaintiff requests the Court award such other relief as the Court deems just.

**VIKING VIDEO & MUSIC, INC.**

**By Counsel,**

**CICCARELLO, DEL GIUDICE & LAFON**

By: 

Michael J. Del Giudice (WV#982)  
1219 Virginia Street, East, Suite 100  
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Phone: (304) 343-4440  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

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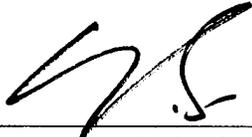
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I, Michael J. Del Giudice, do hereby certify that the foregoing **Plaintiff's Response in Opposition to Defendant's Motion to Dismiss** has been served upon counsel of record by placing a true copy thereof in the U.S. Mail, postage pre-paid and properly addressed as follows, on the 15<sup>th</sup> day of September, 2014:

CATHY S. DATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Edward D. McDevitt, Esq.  
P.O. Box 1386  
Charleston, West Virginia 25325-1386  
Attorney for Defendant

**CICCARELLO, DEL GIUDICE & LAFON**

By:   
Michael J. Del Giudice (WV#982)  
Attorney for Plaintiff