

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RICHARD C. RASHID, M.D.,

Plaintiff,

v.

MUHIB S. TARAKJI, M.D.,

Defendant.

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CIVIL ACTION NO. 97-C-725
(Judge Louis H. Bloom)

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KIMBERLY S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER DENYING MOTION TO REINSTATE

On the 22nd day of March, 2006, came the plaintiff, Richard C. Rashid, M.D., and moved this Court to reinstate the current action, which was previously dismissed on July 5, 2001, pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure ["Rule 41(b)"]. The defendant, Muhib S. Tarakji, M.D., objected to Dr. Rashid's motion to reinstate by memorandum submitted on the April 19, 2006.

Upon consideration of the memoranda submitted by Dr. Rashid and Dr. Tarakji, the Court is of the opinion that Dr. Rashid's motion to reinstate should be denied based upon the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. On March 14, 1997, Dr. Rashid filed his Complaint against Dr. Tarakji in this Court. The Complaint was filed on Dr. Rashid's behalf by counsel Bradley Sorrells, Esq., and Scott Segal, Esq. The Court's electronic docket identifies Mr. Segal as counsel for Dr. Rashid. The cover of the paper file in the Kanawha County Circuit Court Clerk's office also identifies Mr. Segal as Dr. Rashid's counsel.

2 Dr. Rashid alleges in the Complaint that Dr. Tarakji, an ophthalmologist formerly working as an independent contractor in Dr. Rashid's ophthalmology practice, formed his own medical practice through the use of unauthorized trade secrets, which were misappropriated from Dr. Rashid through the use of fraud. Complaint at Introduction and Count II. Moreover, Dr. Rashid alleges that Dr. Tarakji's practice was formed and operated in direct violation of a non-competition agreement with Dr. Rashid. Id. at Introduction and Count I.

3 On December 8, 1997, Dr. Tarakji filed his answer to the Complaint and asserted a counterclaim against Dr. Rashid. Dr. Rashid filed his answer to Dr. Tarakji's counterclaim on February 2, 1998.

4 On November 30, 1998, and April 10, 2000, respectively, Dr. Rashid served nearly identical first and second request for production of documents to Dr. Tarakji. Dr. Rashid then provided Dr. Tarakji with an open-ended extension to answer the first request on December 1, 1998 and a six-month extension for the second request on April 11, 2000. No action was taken in the case thereafter.

5 According to the Court's docket, two letters were sent on March 30, 2001, informing the parties, through counsel, that the action would be dismissed unless twenty dollars was remitted to the Kanawha County Circuit Court Clerk by May 1, 2001, pursuant to W.Va. Code § 59-1-11(b) [the "notice letter"]. The notice letter stated further that failure to remit the twenty dollars by May 1, 2001, would result in the referral of the case to the Court for dismissal pursuant to Rule 41(b). The notice letter is dated March 30, 2001, and lists the current action's civil action number on the top right corner. Furthermore, the notice letter has "10 - 11" handwritten on the bottom right hand corner on both copies submitted to the Court from Dr. Rashid and Dr. Tarakji. Lines 10 - 11 of the

computer docket identify the following action as occurring on March 30, 2001: "3/30/01 #NOT OF THREE YEAR RULE."

6. The current action was subsequently dismissed by order of July 5, 2001, as a result of Dr. Rashid's failure to remit twenty dollars to the Circuit Court Clerk by May 1, 2001.

7. On January 28, 2003, Mr. Sorrells, on Dr. Rashid's behalf, requested Dr. Tarakji's tax returns for the years 1995, 1996 and 1997 in order to determine whether to reassert the dismissed claims. Dr. Tarakji's counsel, Jeffrey M. Wakefield, Esq., responded to Mr. Sorrells by letter dated January 31, 2003, and informed Mr. Sorrells that the action had been dismissed and any new lawsuit filed by Dr. Rashid would be barred under the doctrine of *res judicata*. Moreover, Mr. Wakefield included the text of Rule 41(b) and informed Mr. Sorrells that the three term limit in which to reinstate the action for "good cause" had lapsed.

8. On March 21, 2005, Dr. Rashid filed a new complaint in this Court, identical to the complaint filed in the current action, as civil action number 05-C-597. Mr. Sorrells and Mr. Segal were identified as Dr. Rashid's counsel. Dr. Tarakji filed a motion to dismiss on grounds of *res judicata* after which Mr. Segal, on Dr. Rashid's behalf, agreed to the dismissal of the action. An order reflecting the dismissal was entered on November 30, 2005.

9. On March 22, 2006, thirteen terms of court after the current action was dismissed, Dr. Rashid, through counsel, R. Edison Hill, Esq., filed a motion to reinstate the current action. Dr. Rashid argued that reinstatement was proper under the law of Arlan's Department Store v Conaty, 162 W. Va. 893, 253 S.E.2d 522 (1979) ["Arlan's"], based upon mistake and/or fraud of Mr. Sorrells. Moreover, Dr. Rashid claimed that the dismissal was invalid under Rule 41(b) since Mr. Sorrells and Mr. Segal were not provided with the notice letter assessing the twenty dollar fee in order to maintain

the current action on the Court's docket. Dr. Rashid attached affidavits as evidence of fraud and/or mistake as well as Mr. Segal's failure to receive the notice letter prior to entry of the dismissal order on July 5, 2001.

10. Dr. Rashid submitted the affidavit of Mr. Segal as evidence that Mr. Segal did not receive the notice letter prior to the entry of the dismissal order. Mr. Segal states that he received the Court's dismissal order on July 20, 2001, along with the notice letter. Mr. Segal requested another member of his firm, Mark R. Staun, to contact Mr. Sorrells regarding the dismissal. Mr. Staun later informed Mr. Segal that Mr. Sorrells was going to take care of the matter. Mr. Segal states further that he again became reacquainted with the case in April 2005 after receiving Dr. Tarakji's motion to dismiss civil action number 05-C-597. In other words, Mr. Segal made no effort to reinstate the current action for lack of notice or otherwise following his receipt of the dismissal order on July 20, 2001.

11. Dr. Rashid also submitted the affidavit of Earlena G. Titta as evidence that Mr. Segal did not receive the notice letter prior to the entry of the dismissal order. Ms. Titta's affidavit consists of Ms. Titta's personal account of a telephone conversation between herself and an unnamed employee of the Circuit Court Clerk's office regarding the sending of the notice letter. Dr. Tarakji has moved to strike the affidavit as impermissible hearsay testimony under Rule 802 of the West Virginia Rules of Evidence.

12. Dr. Rashid submitted his own affidavit stating that he was advised by Mr. Sorrells prior to 2005 that the current action had been dismissed, but that Mr. Sorrells would re-file the current action before March 23, 2005 -- the date the ten-year statute of limitations applicable to contracts expired.

13. Dr. Rashid submitted the affidavit of his son and office manager, Charles Rashid, in which Charles Rashid stated that he recalled conversations with Mr. Sorrells following the dismissal of the current action. Mr. Sorrells informed Charles Rashid that the current action was going to be re-filed within the applicable ten-year statute of limitations. Charles Rashid also recalled Mr. Sorrells informing him that there was no difference between "re-filing" and "reinstatement."

14. Dr. Rashid submitted the affidavit of Mr. Staun in which Mr. Staun stated that he had called Mr. Sorrells on Mr. Segal's behalf following the dismissal at which time Mr. Sorrells stated that he would be taking care of the matter. Mr. Staun stated that he had several conversations with Mr. Sorrells between 2001 and 2005 where Mr. Sorrells informed Mr. Staun that the Rashid matter was being taken care of.

15. Dr. Rashid did not submit an affidavit or any other evidence from Mr. Sorrells.

16. On April 19, 2006, Dr. Tarakji filed his response in opposition to Dr. Rashid's motion to reinstate. In his response, Dr. Tarakji noted that Dr. Rashid failed to move for reinstatement within three terms of court following the dismissal of the current action as required by Rule 41(b). In so doing, Dr. Tarakji presented conflicting evidence that the notice letter was sent prior to the entry of the dismissal order. Dr. Tarakji also pointed out that Mr. Segal became aware of the dismissal and his alleged failure to receive the notice letter on July 20, 2001, when he received the dismissal order, but failed to move for reinstatement within three terms of court thereafter.

Moreover, Dr. Tarakji disputes Dr. Rashid's assertion that Mr. Sorrells' conduct rises to the level of fraud and/or mistake sufficient to overcome Mr. Sorrells or Mr. Segal's failure to move for reinstatement within three terms of court as articulated in Arlan's

17. Dr. Rashid did not file a memorandum replying to Dr. Tarakji's response in opposition to the motion to reinstate.

CONCLUSIONS OF LAW

1. Pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure:

Any court in which is pending an action wherein for more than one year there has been no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket, and it shall thereby be discontinued. . . . *The court may, on motion, reinstate on its trial docket any action dismissed under this rule, and set aside any nonsuit that may [be] entered by reason of the nonappearance of the plaintiff, within three terms after entry of the order of dismissal or nonsuit*; but an order of reinstatement shall not be entered until the accrued costs are paid.

Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.

(*emphasis added*) W.Va.R.Civ.P. 41(b) 2006.

2. Rule 41(b) permits West Virginia courts to strike actions from their dockets where there has been no order or proceeding in the action for more than one year. West Virginia courts may reinstate an action within three terms of court after dismissal if the plaintiff proves "good cause" for failure to prosecute, which is defined as "[that] which adequately excuses [the plaintiff's] neglect in prosecution of the case." Syl. Pt. 1, Covington v. Smith, 213 W.Va. 309, 582 S.E.2d 756 (2003) (quoting Syl. Pt. 1, Brent v. Bd. of Trustees of Davis & Elkins College, 173 W.Va. 96, 311 S.E.2d 153 (1983)). A court is without jurisdiction to act after three terms of court have lapsed since the entry of the dismissal order. Arlan's, 162 W.Va. at 898, 253 S.E.2d at 526. However, the West Virginia Supreme Court of Appeals recognizes a limited exception to the three term limit for

reinstatement if the parties consent to reinstatement, or if the plaintiff proves a heightened standard of "good cause" for failure to prosecute, which is defined as fraud, accident, or mistake. Id. at Svl. Pt. 1.

3. The "good cause" exception articulated in Arlan's was not intended to reinstate cases where counsel was ignorant as to the rules of civil procedure, but rather extreme circumstances. See e.g. Taylor v. Smith, 171 W.Va. 665, 667, 301 S.E.2d 621, 624 (1983). In fact, the Supreme Court of Appeals has yet to find "good cause" sufficient to allow the reinstatement of a dismissed action more than three terms of court after a case was dismissed under Rule 41(b). For example, the Supreme Court of Appeals recently affirmed a denial of a motion for reinstatement under a similar factual scenario in Tolliver v. Maxey, 218 W.Va. 419, 624 S.E.2d 856 (2005). In Tolliver, the Supreme Court of Appeals held that counsel's ignorance of the law, specifically the "good cause" exception articulated in Arlan's, did not constitute "good cause" sufficient to reinstate the case twelve terms of court after entry of the dismissal order. Id. at 862. In so holding, the Supreme Court of Appeals concluded that "it would expand the exception to the three term limit under Arlan's too far" to apply it in the circumstances presented by Tolliver since new counsel's actions did not arise to the level of fraud, accident, or mistake. Id. at 861.

4. The Court concludes that Mr. Sorrells' apparent ignorance of the law does not constitute "good cause" sufficient to reinstate the current action thirteen terms of court after entry of the dismissal order pursuant to Rule 41(b). See e.g. Tolliver, 218 W.Va. 419, 624 S.E.2d at 862. It is clear from the record that Mr. Sorrells believed that the dismissal could be cured by re-filing the current action before the expiration of the ten-year statute of limitations applicable to contract actions. As Charles Rashid stated in his affidavit,

At some point prior to 2005, I recall Mr. Sorrells advising [Dr. Rashid] and me that the pending case (97-C-725) had been dismissed by the Court. Mr. Sorrells advised me that the case would be refiled before March 23, 2005, since the ten year statute of limitation would not run until then. Mr. Sorrells explained that there was no real difference between a "refiling" and a "reinstatement", that there was no problem and that he would be taking care of the matter[.]

Affidavit of Charles Rashid at ¶ 8. As the Supreme Court of Appeals held in Tolliver, such ignorance of the law is not "good cause." See e.g. Tolliver, 218 W.Va. 419, 624 S.E.2d at 862. Moreover, Mr. Sorrells failed to move for reinstatement of the current action even after the correct law was brought to his attention by Dr. Tarakji's counsel, Mr. Wakefield, by letter of January 31, 2003 – four terms of court after entry of the dismissal order. Therefore, the Court concludes that Mr. Sorrells' ignorance of the law, coupled with his inaction for an additional five terms of court after learning the proper state of the law from Mr. Wakefield, even then erroneously re-filing the action, does not constitute "good cause" sufficient to reinstate the current action thirteen terms of court after entry of the dismissal order.

5. Dr. Rashid's reliance on Covington v. Smith, 213 W.Va. 309, 582 S.E.2d 756 (2003), Justice Starcher's concurring opinion in Covington, and Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. (S.C.) 1988) is misplaced. First, Dr. Rashid's reliance on Covington is misplaced as Covington addresses a situation involving reinstatement *within three terms of court following entry of the dismissal order* as a result of counsel's misconduct and neglect of the case. Covington, 213 W.Va. at 321, 582 S.E.2d at 768. The current action, on the other hand, involves reinstatement thirteen terms of court after entry of the dismissal order – well over the three term limit. Second, Dr. Rashid's reliance on Justice Starcher's opinion that "positive misconduct" of counsel should not be permitted to harm a client's cause of action is similarly misplaced as Justice

Starcher's opinion is a *concurring opinion* in Covington that has not been adopted by the Supreme Court of Appeals. Id. at 325, 772. And third, Dr. Rashid's reliance on Augusta, classifying attorney neglect as mistake or excusable neglect under Rule 60 of the Federal Rules of Civil Procedure, is also misplaced as West Virginia law directly holds that attorney negligence does not constitute "good cause" to reinstate an action over three terms of court after a Rule 41(b) dismissal. See e.g. Tolliver, Id.; Taylor, 171 W.Va. 665, 301 S.E.2d 621. Moreover, the Supreme Court of Appeals has not considered attorney negligence or improper advice good cause to overturn other types of final orders such as default judgments. See e.g. White v. Berryman, 187 W.Va. 323, 332, 418 S.E.2d 917, 926 (1992) (attorney's improper advice to defendant to disregard suit papers did not constitute excusable neglect or good cause for overcoming default judgment).

Adopting Dr. Rashid's interpretation of "good cause" under Arjan's would mean that Rule 41(b), or any rule or court-imposed order setting a deadline for that matter, would be virtually unenforceable as long as the dismissal was the result of any action or inaction of counsel. There would never be an adverse effect of missing a deadline as long as the deadline was missed as the result of some action or inaction of counsel. The Supreme Court of Appeals has not held, and this Court will not hold, that a client is automatically absolved of the sins of the lawyer and thereby relinquished of an obligation to abide by court rules and orders.

6. The Supreme Court of Appeals has held that "[a]ctual fraud is intentional, and consists of an intentional deception or misrepresentation to 'induce another to part with property or to surrender some legal right, and which accomplishes the end designed.'" Dailey v Bd. of Review, W. Va. Bureau of Employment Programs, 214 W.Va. 419, 429, 589 S.E.2d 797, 807 (2003) (quoting Gerver v. Benavides, 207 W.Va. 228, 232, 530 S.E.2d 701, 705 (1999)). Based upon a review of

the facts as presented in the record, this Court concludes that Dr. Rashid has failed to prove that Mr. Sorrells engaged in fraud constituting "good cause" to reinstate the current action more than three terms of court after entry of the dismissal order.

The record shows that Mr. Sorrells informed Dr. Rashid and Charles Rashid that he intended to re-file the action within the ten-year statute of limitations applicable to contract actions. According to Charles Rashid, Mr. Sorrells also stated that there was no difference between re-filing and reinstatement. Mr. Sorrells did re-file the action within the ten-year statute of limitations although Mr. Segal later agreed to its dismissal after Dr. Tarakji filed a motion to dismiss. Moreover, Mr. Sorrells informed Mr. Staun that the Rashid matter was being taken care of. Mr. Sorrells did take care of the Rashid matter by re-filing the action within the ten-year statute of limitations. Although Mr. Sorrells took the wrong action in response to the dismissal, this does not prove intentional deception or misrepresentation by Mr. Sorrells. In fact, Mr. Sorrells did precisely what he said he would do and Dr. Rashid was fully aware of the dismissal. Accordingly, the Court concludes that Dr. Rashid has failed to show that Mr. Sorrells' actions and inactions arise to the level of fraud.

Furthermore, the Court notes that Dr. Rashid inconsistently argues that Mr. Sorrells was both negligent and committing fraud by informing Dr. Rashid that the action would be re-filed and ultimately re-filing the action in March 2005. Dr. Rashid's inconsistency, coupled with the evidence presented and the absence of an affidavit from Mr. Sorrells, leads the Court to conclude that fraud is not present in the current action.

7. The Court further concludes that any alleged failure of Mr. Segal to receive the notice letter prior to dismissal does not constitute "good cause" sufficient to reinstate the action over three terms of court after the entry of the dismissal order. According to the evidence submitted by Dr

Rashid, including the unsubstantiated hearsay affidavit of Ms. Titta, Mr. Segal and Mr. Sorrells did not receive the notice letter prior to the entry of the dismissal order. Mr. Segal stated that he became aware on July 20, 2001, that he allegedly had not received the notice letter prior to the entry of the dismissal order. Dr. Rashid states that Mr. Sorrells allegedly never received the notice letter. While there appears to be a conflict over whether the docket accurately reflects the course of events, this Court need not resolve this conflict. Even assuming that this notice letter was not received by either Mr. Segal or Mr. Sorrells, no action was taken by either counsel to cure the dismissal for failure to receive notice within three terms of court of the entry of the dismissal order. That course would have been the proper remedy. Rather, Mr. Segal and Mr. Sorrells allowed three terms of court to lapse either through ignorance of the law or sheer neglect of the case and, in fact, allowed thirteen terms of court to lapse before any remedy was sought for the alleged lack of notice.

8. The Court also concludes that Dr. Tarakji will suffer prejudice if the current action is reinstated. The current action was instituted on March 14, 1997 and dismissed on July 5, 2001. Until the re-filing of the action on March 21, 2005, Dr. Tarakji had every reason to believe that this matter was behind him and that the litigation had concluded. For Dr. Rashid's claims to be resurrected at this late date would run afoul of the important public policy that there be finality to litigation.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED and DECREED that the motion to reinstate of the plaintiff, Richard C. Rashid, M.D., be and the same is hereby DENIED.

The objections and exceptions of the plaintiff are expressly reserved unto him.

The Circuit Clerk is directed to send a certified copy of this order to all counsel of record.

ENTERED this 27 day of Sept, 2006.

[Signature]
Judge Louis H. Bloom

PRESENTED BY:

[Signature]
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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, JUDITH A. BRYK, CLERK OF CIRCUIT COURT OF SAID COUNTY,
AND HILARY STRAIN, DEPUTY CLERK OF SAID COURT, DO HEREBY
CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE
ORIGINAL FILED IN THE OFFICE OF SAID COURT THIS
DAY OF September, 2006.
[Signature]
CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

9/28/06
Clerk's Office
By: *[Signature]* Wakefield
Hilary Strain
Deputy Clerk

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