

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE HARDWOOD GROUP d/b/a
Plywood and Plastics of Roanoke,

Appellee

v.

CLAIRE V. LAROCCO,

Appellant.

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA
APPEAL NO. 03-278
(Appealed from Civil Action No. 03-C-214
Circuit Court, Greenbrier County)

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

By Counsel
James W. Lane, Jr.
West Va. Bar # 6483
205 Capitol Street, Suite 400
P.O. Box 11806
Charleston, West Virginia 25301
(304) 342-0081
(304)343-3365 (facsimile)

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I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is an Appeal from an Order of the Circuit Court of Greenbrier County, West Virginia ("Circuit Court"), entered December 9, 2004. The Plaintiff in the underlying Circuit Court action and the Appellee on Appeal, The Hardwood Group ("Hardwood") brought suit against Claire V. LaRocco, the Appellant ("LaRocco"). The lawsuit was based upon LaRocco's alleged personal guaranty of an indebtedness that a third party owed to Hardwood. Judgment by default was entered against LaRocco. LaRocco moved pursuant to Rule 60(b) to set aside the default judgment based upon excusable neglect. LaRocco also moved to quash a suggestion that had been filed against her employer to garnish her wages. The Circuit Court denied LaRocco's motion in its December 9, 2004 Order. LaRocco appeals the Order, arguing that the default judgment should have been set aside and that the Circuit Court abused its discretion.

II. STATEMENT OF FACTS

The following is a time line of events and filings in the Circuit Court:

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|--------------------|---|
| September 19, 2003 | Hardwood filed its complaint with the Circuit Court of Greenbrier County, West Virginia. The Complaint alleges that LaRocco Enterprises, Inc. executed a note to Hardwood, and that LaRocco guaranteed the note, that the note was in default, and sought judgment against LaRocco for \$15,435.98 plus accrued interest of |
|--------------------|---|

\$1,432.22.

September 19, 2003 The Circuit Court issued a summons to Claire LaRocco as follows:

Claire V. LaRocco
C/o LaRocco Enterprises, Inc.
D/b/a Greenbrier Architectural Woodwork
601 East Edgar Avenue
Ronceverte, WV 24970

October 1, 2003 Claire V. LaRocco's signature is affixed to the return receipt of a certified mailing of process indicating her receipt of process mailed to the corporate address of LaRocco Enterprises, Inc. (In her Motion to Set Aside Default Judgment LaRocco contested that her signature to the receipt is genuine because she was out of state on a business trip on October 1, 2004. She withdrew this particular argument at the hearing on the Motion because prior to the hearing she determined that she was in West Virginia for at least part of the day on October 1, 2004).

December 5, 2003 Hardwood filed a motion for default judgment.

December 9, 2003 The Circuit Court entered an "Order Granting Default Judgment Against Defendant, Claire V. LaRocco."

January 19, 2004 Hardwood filed a "Suggestee Execution" and other documents to garnish LaRocco's wages.

February 3, 2004 LaRocco mailed to the Circuit Court and served upon counsel for Hardwood her motion to set aside the default judgment and to quash the wage garnishment action.

At the time the summons and complaint were mailed to LaRocco at the corporate address for LaRocco Enterprises, Inc., LaRocco Enterprises, Inc. was and had been a debtor in a Chapter 11 reorganization case pending in the United States Bankruptcy Court for the Southern District of West Virginia. The law firm of Hoyer, Hoyer & Smith represented the corporation in the bankruptcy proceeding. The corporation received frequent legal pleadings in the mail associated with the bankruptcy case. LaRocco was the President of the corporation, and she had grown accustomed to receipt of legal pleadings and she had grown complacent because the corporate counsel had also received the legal pleadings and had handled the same. LaRocco did not pay adequate attention to the summons and complaint to determine that the documents were not connected to the corporate bankruptcy case.

On October 1, 2004, when the summons and complaint were signed for by LaRocco, LaRocco was in Lewisburg for a one day respite sandwiched by two out of state business trips. When LaRocco first filed her motion to set aside the judgment she believed that she was out of town on October 1, 2004 as well, and that she could not possibly have signed for the certified mailing. However, she later determined that she possibly did sign for the certified mail because she was in town that day.

III. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ABUSED ITS DISCRETION BY FINDING THAT THE DEFAULT JUDGMENT SHOULD NOT BE SET ASIDE UNDER RULE 60(b) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR EXCUSABLE NEGLIGENCE.

IV. DISCUSSION OF THE LAW.

A. Standard of Review

A motion to vacate a default judgment is addressed to the sound discretion of the circuit court, and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion. *Games-Neely ex rel. West Virginia State Police v. Real Property*, 211 W.Va. 236, 245, 565 S.E.2d 358, 366 (2002); *Intercity Realty Company v. Gibson*, 154 W.Va. 369, 175 S.E.2d 452 (1970).

B. Discussion of Merits of Appeal.

LaRocco suffered a default judgment in the Circuit Court, and she moved to set aside the default judgment for excusable neglect. The basis for her motion is Rule 55(c) and Rule 60(b) of the West Virginia Rules of Civil Procedure. Rule 55(c) provides that if judgment by default has been entered in a case, a court may set it aside in accordance with Rule 60(b). Rule 60(b) of the West Virginia Rules

of Civil Procedure provides that a court may relieve a party from a final order for “excusable neglect.”

Generally, courts look with disfavor on judgments obtained by default. *Bego v. Bego*, 177 W.Va. 74, 77, 350 S.E.2d 701, 704 (1986); *Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 376, 172 S.E. 2d 452, 456 (1970). Courts favor adjudication of cases on their merits. *Coury v. Tsapis*, 172 W.Va. 103, 110, 304 S.E.2d 7, 14 (1983). A liberal construction should be accorded a Rule 60(b) motion to vacate a default judgment. *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 471, 256 S.E.2d 758, 762 (1979); *Parsons v. McCoy*, Syl. pt. 2, 157 W.Va. 183, 190, 202 S.E.2d 632, 637 (1973).

The factors to be considered in determining whether a judgment by default should be vacated under Rule 60(b) are: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party. *Cales v. Wills*, 212 W.Va. 232, 241-42, 569 S.E.2d 479, 488-89 (2002), quoting *Parsons v. Consolidated Gas Supply Corp.*, Syl. pt. 3, 163 W.Va. 464, 256 S.E.2d 758 (1979). Further, there must be a showing of “some excusable or unavoidable cause to explain the delay in answering.” *Cales*, 212 W.Va. at 242, 569 S.E.2d at 489,

quoting *Parsons*, Syl. pt. 3. See also, Cleckley, Davis & Palmer, *Litigation Handbook On West Virginia Rules of Civil Procedure*, Juris Publishing, 2002.

LaRocco satisfied each of the factors that a court should consider to determine whether a default judgment should be set aside. Given this Court's determination that default judgments are looked on with disfavor and that Rule 60(b) motions to set aside default judgments should be given liberal consideration, LaRocco contends that the Circuit Court abused its discretion by declining to grant LaRocco's motion. Each of the applicable factors relevant to a Rule 60(b) motion to set aside a default judgment are discussed below.

1. The Degree of Prejudice.

The first inquiry is to determine the degree of prejudice to Hardwood if the default judgment is vacated. *Cales*, 212 W.Va. at 241-42, 569 S.E.2d at 488-89. In this case, Hardwood has not alleged any prejudice that it may suffer if the default judgment is vacated. A party may be prejudiced by vacating a default judgment if evidence or witness testimony may be lost due to the delay. *Id.*; *Cook v. Channel One, Inc.*, 209 W.Va. 432, 435, 549 S.E.2d 306, 309 (2000). In this case, LaRocco's motion to set aside the judgment was filed within two months of the entry of the default judgment, and about four months after service of process.

Therefore, there was no prejudice to Hardwood if the judgment were vacated, and Hardwood has not alleged any prejudice.

2. The Presence of Material Issues of Fact and Meritorious Defenses.

The second consideration is whether LaRocco has meritorious defenses to the Complaint. *Cales*, 212 W.Va. at 241-42, 569 S.E.2d at 488-89. This Court has explained that this factor weighs in favor of the defaulting party if there is no reason to conclude, at this juncture, that the defenses raised by the defaulting party are not meritorious. *State ex rel. United MineWorkers of Am., Local 1938 v. Waters*, 200 W.Va. 289, 299, 489 S.E.2d 266, 276 (1977).

LaRocco has meritorious defenses to the Complaint. The Complaint asserts that LaRocco personally guaranteed the corporate debt of LaRocco Enterprises, Inc., d/b/a Greenbrier Architectural Woodwork, of which LaRocco was the president. Hardwood was a trade creditor of the corporation, and the corporation owed Hardwood \$38,046. The indebtedness was memorialized in a promissory note, which promissory note serves as the basis for the Complaint.

(i) LaRocco shall contend at trial that she never intended to personally guaranty the note. She will contend that she did not believe Hardwood required

that she guaranty the note. To determine whether a contract of guaranty exists, the court must consider the parties' intentions along with the circumstances under which the alleged guaranty was made, particularly where the contract is amiguous. *Scyoc v. Holmes*, 192 W.Va. 87, 450 S.E.2d 784 (1994); *Midland Investment Co. v. Nelson*, 107 W.Va. 220, 148 S.E.9 (1929). If the trier of fact believes LaRocco that no contract of guaranty was intended, then she will prevail. Various objective aspects of the promissory note itself support LaRocco's contention that she and Hardwood did not intend for her to guaranty the promissory note. First, LaRocco signed the note in her capacity as "president" of Greenbrier Architectural Woodwork. LaRocco likewise signed the promissory note under a provision for "guaranty" in her capacity as "president." She did not sign it in her "individual" capacity, but on behalf of the corporation. Hardwood accepted the note as executed, indicating its intent that LaRocco was not a personal guarantor of the note. Second, the indebtedness was a trade debt that already existed at the time the note was executed. LaRocco had not guaranteed the trade debt to Hardwood as it accumulated, and there was no expectation that she should guaranty the note. Third, the guaranty provision is not an independent document that clearly indicates that the signor is personally guaranteeing a debt. Instead, the guaranty provision is a one-sentence add-on at the bottom of the note, and it states that the

signor guarantees “prompt and punctual payment of all moneys due under the aforesaid note and agree to be bound until fully paid.” LaRocco will contend that she interpreted this provision to entail her duty as a corporate officer to ensure the corporation paid the debt, not her own personal guaranty of the debt. Fourth, the promissory note contains a preprinted execution line for the corporation to sign the note, but no such pre-printed execution line exists for the guaranty sentence, which reinforces LaRocco’s argument that her guaranty was not required or intended. the document states that “the undersigned hereby execute this note as principals and not as sureties.” This language further validates LaRocco’s claim that the parties did not intend for LaRocco to be a surety or guarantor for the corporate debt. Instead, she was a corporate officer, acknowledging her duty to ensure that the corporation paid its payments in a “prompt and punctual” manner.

Finally, the document states that “[t]he undersigned and all other parties to this note, whether as endorsers, guarantors or sureties, agree to remain fully bound hereunder until this note shall be fully paid . . .” This language again indicates the parties’ intent that the those persons who sign the document are not guarantors of the note because the language contemplates that a guarantor of the note is not “the undersigned.” This language indicates that to guaranty the note a guarantor would not sign the promissory note, but would sign instead separate guaranty agreement.

(ii) LaRocco will assert that her guaranty is void for lack of consideration. The promise of one person to pay the debt of another must be founded on consideration to make it binding. *Scyoc v. Holmes*, 192 W.Va. 87, 89, 450 S.E.2d 784, 786 (1994). In this case, no consideration existed to support LaRocco's guaranty of the debt. Again, at the time of her alleged guaranty, the corporate debt already existed. This was not a new loan to the corporation. The consideration for the guaranty is not set forth in the writing. The consideration is not explained in the complaint. Nothing of value passed to LaRocco in exchange for her personal guaranty of the corporate debt.

(iii) LaRocco disputes the balance of the debt. The original debt evidenced by the note was \$38,446.86 in September, 2002. The Complaint sought judgment for \$17,118.30 in September 2003. Substantial payments were made on the note from the date of the note until the date of the Complaint. Hardwood submitted a statement indicating that the balance on the loan was only \$11,000 at one point. The two businesses engaged in new business after the note was executed, and LaRocco contends that Hardwood misapplied note payments against new balances and that Hardwood treated the note and guaranty as a line of credit that could increase based upon new invoices from Hardwood.

3. The Significance of the Interests At Stake.

The third factor is the interests at stake in the litigation. This Court has previously held that money damages of \$35,000 is not insignificant with respect to a judgment against a corporation. *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 473, 256 S.E.2d 758, 763 (1979). In *Hinerman v. Levin*, 172 W.Va. 777, 784, 310 S.E.2d 843,850 (1983), this Court found that a default judgment for \$12,088.54 was a "substantial sum." The judgment in this case is against an individual for \$15,435.98, plus accrued interest of \$1,682.32, plus post-judgment interest. This is a significant amount of money, and therefore this factor is satisfied in favor of LaRocco.

4. The Degree of Intransigence of the Defaulting Party.

The fourth factor is the degree of intransigence by the defaulting party in failing to respond to the Complaint. *Cales*, 212 W.Va. at 241-42, 569 S.E.2d at 488-89. This Court has found that a party's intransigence exists when a party fails to answer notwithstanding the party's conscious knowledge of the lawsuit. For instance, in *Cales*, where an insurance carrier sought to overturn a default judgment based on the fact that it was not a named party although it did know of the pending lawsuit and it had the right to answer and assert defenses, the Court

found that allowing six (6) months to pass without defending constituted intransigence. *Cales*, 212 W.Va. at 241-42, 569 S.E.2d at 488-89. In *Hinerman v. Levin*, 172 W.Va. 777, 784, 310 S.E.2d 843,850 (1983), a *pro se* defendant appeared in the case but refused the trial court's admonition to file a written statement of defenses and displayed a lack of respect for the proceedings. This Court found that the defendant displayed intransigence. *Id.*

In this case LaRocco has not been intransigent, which implies knowing disregard for a lawsuit. The word intransigent is defined as "refusing to compromise or to abandon an extreme position or attitude." *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster, Inc., 1987. LaRocco simply developed a routine of relying upon her corporate counsel to ferret through legal pleadings and determine when action was required. This routine evidences neglect, but not intransigence.

In *Lee v. The Gentlemen's Club, Inc.*, 208 W.Va. 564, 542 S.E.2d 78 (2000) a corporation was served by certified mail with process and the mailing was returned unclaimed. Earlier, the plaintiff had mailed a certified letter to the corporation notifying it of his claims against the corporation and that letter to was returned unclaimed. The corporation did not take action to defend the lawsuit until it received the default judgment in the mail. *Lee*, 208 W.Va. at 566, 542

S.E.2d at 80. This Court held that the evidence overwhelmingly showed that the defendant “intentionally avoided” the two previous communications.

This case is different from the facts in *Lee*. LaRocco is not accused of, and the Circuit Court did not find that LaRocco, intentionally failed to respond to the Complaint. LaRocco has explained why she was simply unaware of the Complaint and the motion for default judgment even though they were mailed to her at the corporate address. Only when her wages were garnished did LaRocco become aware of the fact that the Greenbrier County lawsuit was against her personally and that the corporate lawyer was not receiving the pleadings. She took prompt action to defend herself upon her realization.

5. The Existence of Excusable Cause.

The final consideration is the existence of “some” excusable or unavoidable cause to explain the delay in answering the complaint. *Cales*, 212 W.Va. at 242, 569 S.E.2d at 489. In its Order from which this appeal is taken the Circuit Court accurately set forth the basis for LaRocco’s contention that an “excusable” cause exists to explain her delay in answering the Complaint:

Defendant states that she was serving as the president of a corporation which had recently filed for Chapter 11 bankruptcy protection and that legal pleadings were delivered to her office address frequently and she did

not review each pleading, secure in the knowledge that the corporation was well represented by the law firm of Hoyer, Hoyer, Smith, & Miesner.

From this explanation it is clear that LaRocco developed a habit or routine of not reviewing legal pleadings when they were delivered to her at the corporate office because the corporation's lawyers handled the pleadings and would raise with her any issues that needed to be addressed. What she did is simply human nature - if the corporate attorneys adequately and responsibly dealt with the first ten (10) pleadings that LaRocco received, then they can handle the eleventh as well. LaRocco's explanation demonstrates a bad habit and even neglect, but it is excusable neglect because nothing indicates that she acted dishonestly, disrespectfully, stubbornly, or deceptively.

This Court has found in other cases that where a party's default is due to sloppy paper handling, it can be an "excusable" cause. In *Coury v. Tsapis*, 172 W.Va. 103, 304 S.E.2d 7 (1983), a corporation was served with a complaint and knew about the pending lawsuit, but failed to timely answer because the corporation relied on its insurance carrier to defend the suit. This Court held that this explanation can be an "excusable" cause to warrant setting aside a default judgment. *Coury v. Tsapis*, 172 W.Va. at 110-11, 304 S.E.2d at 14-15. In *Parsons v. McCoy*, 157 W.Va. 183, 190, 202 S.E.2d 632, 636 (1973), the Court

held that where default occurred because an insurance company clerk misfiled the complaint, the neglect was “excusable.” In *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 256 S.E.2d 758 (1979), the Court held that where a lawyer mistakenly believed he had an agreement with the plaintiff for an extension of the deadline to answer, the failure to file the answer was “excusable.”

It seems the determination whether neglect is “excusable” depends largely on whether the neglect was an honest mistake, or the result of more culpable conduct. LaRocco’s actions were no more neglectful nor less excusable than the actions of the defendants in the cases cited immediately above.

6. Weighing the Factors.

LaRocco has satisfied each of the factors that a court should consider in determining that the default judgment against LaRocco should be overturned. Hardwood will suffer no prejudice; LaRocco has meritorious defenses; significant interests are at stake; LaRocco has not been intransigent; and an excusable cause for LaRocco’s default exists. Given this Court’s liberal construction accorded Rule 60(b) motions to set aside default judgments, LaRocco should prevail.

The Circuit Court’s order accurately sets forth the legal standard applicable to a Rule 60(b) motion to set aside a default judgment, but the Order contains no discussion of the Court’s application to the facts. The Circuit Court simply

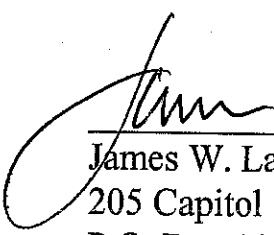
concluded that LaRocco has not shown "good cause" for her failure to act upon the Complaint. The standard that LaRocco must satisfy, however, is not a showing of "good cause" for her failure; she only needs to show "excusable neglect." Because there is no discussion, it is not clear whether the Court applied the wrong legal standard, or whether the Court applied the correct legal standard and concluded simply that LaRocco had not met it. LaRocco respectfully asserts that the Circuit Court did not properly weigh all of the relevant considerations and that it abused its discretion when it denied the motion to set aside the default judgment.

C. RELIEF REQUESTED.

LaRocco respectfully requests that the Court overturn the Circuit Court's Order denying LaRocco's motion to set aside the default judgment, that the Court set aside the default judgment, and that the Court instruct the Circuit Court to convene a trial of the case on the merits.

Respectfully submitted,

Claire V. LaRocco



James W. Lane, Jr. (WVSB 6483)
205 Capitol Street, Suite 400
P.O. Box 11806
Charleston, WV 25339
(304) 342-0081

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE HARDWOOD GROUP d/b/a
Plywood and Plastics of Roanoke,

Appellee,

APPEAL NO. 32781
(Appealed from Civil Action 03-C-214
Circuit Court, Greenbrier County)

v.

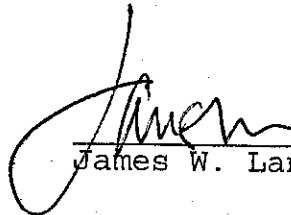
CLAIRE V. LAROCCO,

Appellant.

CERTIFICATE OF SERVICE

I, James W. Lane, Jr., counsel for Claire V. LaRocco, do hereby certify that I have this 14 day of September 2005, served the foregoing "Appellant's Brief in Support of Appeal" by mailing U. S. mail, first class, postage prepaid, true and complete copies thereof to the following:

Josef A. Horter
Hendrickson & Long, PLLC
P.O. Box 11070
Charleston, WV 25339



James W. Lane, Jr. (#6483)