

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

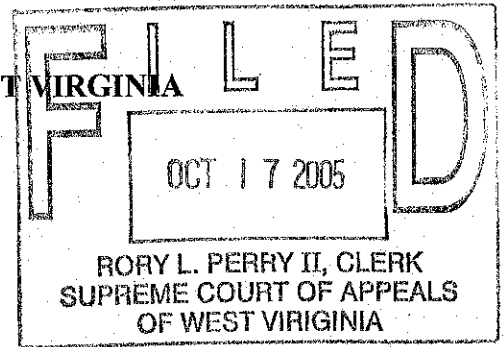
Appellee,

v.

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

Claire V. Larocco,

Appellant.



APPELLEE'S BRIEF IN OPPOSITION OF APPEAL

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

Appellant appeals an Order of the Circuit Court of Greenbrier County, West Virginia, entered on December 9, 2004. This Order denies Defendant's motion to set aside default judgment and quash suggestion filed on February 3, 2004.

II. STATEMENT OF FACTS

Appellee agrees with Appellant's Statement of Facts regarding the time line set forth in her brief. However, Appellee also notes that a hearing was held on May 17, 2004 in which the Defendant was present in person and the parties by counsel. Thereafter, the trial court requested briefs regarding meritorious defenses of the Defendant to the Complaint and the Appellant filed hers on May 26, 2004. On June 25, 2004, Appellee submitted its Reply to Defendant's Memorandum.

III. DISCUSSION OF LAW

Appellee believes that the trial court's ruling was proper in denying Appellant's motion to set aside default judgment. Plaintiff filed its Complaint against the Defendant on September 19, 2003. The same was served by certified mail, restricted delivery, and signed by the Defendant on October 1, 2003. Appellee then moved for default judgment on December 3, 2003 and, most importantly, a copy of the letter requesting default judgment written by Appellee's counsel along with a copy of the motion for default judgment and affidavit were also sent to the Defendant on this same date. The trial court entered an Order granting default judgment on December 9, 2003 with a copy of the Order granting default judgment forwarded to the Appellant at her business address. On January 21, 2004 Plaintiff sought execution of this judgment and it was not until

February 3, 2004 that Defendant finally responded and filed a motion to set aside a default judgment and quash suggestion.

Rule 55(c) of the West Virginia Rules of Civil Procedure states that for good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). Rule 60(b) of the West Virginia Rules of Civil Procedure provides, in pertinent part, “[o]n motion and upon such terms as our just, the court may relieve a party or a parties legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, excusable neglect, or unavoidable costs; . . . (6) any other reason justifying relief from the operation of the judgment.” A motion to vacate a judgment under subdivision (b) of this rule is addressed to the sound discretion of the court. Intercity Realty Company v. Gibson, 154 W. Va. 369, 175 S.E.2d 452 (1970). Before a motion to set aside a default judgment will be granted, the movant must show good cause as prescribed by Rule 60(b) for his failure to act in a timely manner. Intercity Realty Company v. Gibson, 154 W. Va. 369, 175 S.E.2d 452 (1970).

In determining whether a default judgment should be vacated upon a Rule 60(b) motion, the trial court should consider: (1) the degree of prejudice suffered by the plaintiff in delay of answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the intransigence on the part of the defaulting party. Parsons v. Consolidated Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979). These factors do not automatically relieve a Defendant from the consequences of a default judgment, as there still must be some showing of excusable neglect. Coury v. Tsapis, 172, W. Va. 103, 304 S.E.2d 7 (1983). Finally, the movant must also show good cause under Rule 60(b) for failure to

act in a timely matter in responding to the Complaint. Jackson General Hospital v. Davis, 195 W. Va. 74, 464 S.E.2d 593 (1995).

First, Ms. LaRocco declares that she did not intend to personally guarantee the indebtedness and the guarantee is vague. Plaintiff takes issue with this position.

Specifically, Plaintiff would proffer that the Note was not an item merely mailed to the Defendant for her signature and then returned to the Plaintiff. This Promissory Note is their result of negotiated, meaningful discussions between the parties. Robert Stolz, President of the Hardwood Group, would testify that the Note was the result of extensive negotiations with the Defendant and her company, Greenbrier Architectural Woodworks. He will also be ready to testify that it was the intention of the parties that in order to provide the corporation a continued line of credit, the Greenbrier Architectural Woodworks had to culminate its old past-due accounts into a single Promissory Note, which is the one guaranteed by Ms. LaRocco. He will also testify that it was made clear to Ms. LaRocco that she was personally guaranteeing this Note so that her company could continue their credit accounts with the Plaintiff. The mere fact she placed the title "President", behind her signature is not of consequence.

It is also Plaintiff's position that the language of the Guaranty is sufficient to put Defendant on notice of what she was signing. "The parties intentions apply and the mere presence of technical terms such as "guarantee" or "guarantor" is not *sine qua non*." Scyoc v. Holmes, 192 W. Va. 87, 450 S.E.2d 784 (1994).

The second defense raised by the Defendant in her Brief, is that there was no consideration for Ms. LaRocco's guarantee. Again, Mr. Stolz is ready to give testimony that the execution of this Promissory Note was the only way for Greenbrier Architectural Woodworks to

continue receiving an open line of credit into the future with the Plaintiff. It must be made clear that the execution of this Promissory Note, and its guarantee by the Defendant, was a designed financial accommodation to the Defendant's corporation to help her corporation with a cash flow problem which she represented Greenbrier Architectural Woodworks was having at the time of the execution of the Note. . Therefore, the consideration for this Note and guaranty was Greenbrier Architectural Woodworks' ability to continue to do business with the Plaintiff into the future. The consideration for this Promissory Note was Plaintiff's detrimental reliance on this new promise by continuing to extend credit to Defendant's corporation into the future. See Generally, 4B, M.J., Contracts, §§ 30-36.

Further, this Note was a consolidation and payment of previously incurred invoices still outstanding with the Plaintiff. The consideration paid was Plaintiff's forbearance to sue on the old, past due accounts. Bank v. Lockwood, 13 W. Va. 392 (1878) (Forbearance to sue also binds a surety); Dolin v. Colonial Meadows, Ltd., 635 F. Supp. 786 (S.D.W.Va. 1986).

In any event, it is still the Appellee's position that the Appellant has not shown excusable neglect in failing to timely respond to the lawsuit. As can be seen from the Summons and Complaint, the Summons was clearly addressed to the Appellant and that her name appears as the only Defendant in the case style. The case style did not include her company name as a Defendant and therefore it is difficult to believe that the Appellant could confuse this process with that of her corporation, Greenbrier Architectural Woodwork, Inc. Also, it is again noted to this Honorable Court that when the Appellant did not file a timely answer to the Complaint served upon her and signed by her, the Appellee moved for default judgment, and provided copy of the motion, proposed order and affidavit to the Appellant at the same time the same was

forwarded to the court requesting entry of default judgment. The motion for default judgment was mailed on December 5, 2003, and entered on December 9, 2003. As the trial court noted, the Order granting default judgment was also sent to the Appellant personally. It was not until February 3, 2004 that the Appellant made any efforts to set aside this default judgment which is nearly sixty (60) days after entry of the same.

Finally, the real issue herein is whether Appellant has shown good cause allowing the trial court or this Honorable Court to set aside default judgment. As stated earlier, a hearing was conducted on May 17, 2004 where such inquiry was made and at the end, the trial court properly noted that no good cause was shown for failing to file an answer or otherwise respond to the Complaint by the Appellant in a timely manner. Such findings were incorporated into the trial court's Order of December 9, 2004.

It is well settled in West Virginia that findings of fact made by a trial court may not be set aside on appeal unless such findings are clearly wrong. Daugherty v. Ellis, 142 W. Va. 340, 97 S.E.2d 33 (1957).

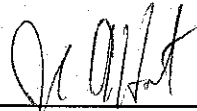
Also, "A motion to vacate a default judgment is addressed to the sound discretion of the court, and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion." Syl. pt. 3, Intercity Realty Company v. Gibson, 154 W. Va. 369, 175 S.E.2d 452 (1970). Finally, this Court has noted that "An appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." Syl. Pt. 2, Perdue v. Coiner, 156 W. Va. 467, 194 S.E.2d 657 (1973). It is the contention of the Appellee that there was no error by the trial court.

IV. CONCLUSION

Based upon the above, it is Appellees position that the trial court did not abuse its discretion and made proper findings of fact and conclusions of law. Therefore the trial court's Order denying Defendant's motion to set aside default judgment should be upheld.

Respectfully submitted.

The Hardwood Group d/b/a Plywood
and Plastics of Roanoke
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CERTIFICATE OF SERVICE

I, Josef A. Horter, counsel for Plaintiff, do hereby certify that I have served true and exact copies of the foregoing "**APPELLEE'S BRIEF IN OPPOSITION OF APPEAL**" upon counsel of record as listed below, by placing the same in the United States mail, postage prepaid, addressed as follows:

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Dated this 14th day of October, 2005.



Josef A. Horter (#1790)