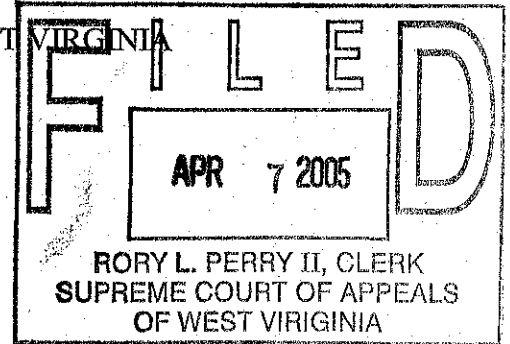


S. Ct. Docket No. : 32564

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



REALCO LIMITED LIABILITY CO.,)
 a successor and interest to, REALMARK)
 DEVELOPMENT, INC., a West Virginia)
 Corporation, Plaintiff Below, APPELLEE)

CIVIL ACTION NO. 99-C-1039

VERSUS)

APEX RESTAURANTS, INC.,)
 Defendant Below, APPELLANT)

and)

REALCO LIMITED LIABILITY CO.,)
 a successor and interest to, REALMARK)
 DEVELOPMENT, INC., a West Virginia)
 Corporation, Plaintiff Below, APPELLEE,)

CIVIL ACTION NO. 00-C-1337

VERSUS)

GEORGE STEVEN SHAWKEY,)
 Defendant Below, APPELLANT)

**BRIEF ON BEHALF OF APPELLANT,
 APEX RESTAURANTS, INC.**

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

A. STATEMENT OF THE CASE.

This matter is before the Court on a petition for appeal by the Appellant, Apex Restaurants, Inc., from a June 23rd, 2004, "Order" entered by the Circuit Court of Kanawha County, West Virginia, denying Appellant's June 5th, 2001, "Motion to Set Aside Judgment" which sought to set aside an April 16th, 2000, "Judgment Order" granting default judgment against Appellant.

B. STATEMENT OF THE FACTS OF THE CASE

On April 22nd, 1996, George Steven Shawkey (hereinafter "Shawkey") formed and incorporated Apex Restaurants Corporation under the laws of the State of California (hereinafter "Apex California"). All papers of incorporation were properly filed with the California Secretary of States Office. (See Exhibit A - California Articles of Incorporation.)

At that time, Shawkey was the President and Owner of 100% of all stock in Apex California. (See Exhibit B - Deposition of George Steven Shawkey, at pp. 18.)

In 1996 Shawkey formed a business relationship with Emre Sarihan (hereinafter "Sarihan"), a California bar owner and restaurateur, who expressed to Shawkey a desire to expand his bar and restaurant business. (See Exhibit B, at pp. 22.)

At some point prior to February 6th, 1997, Shawkey sold 100% of his title, right and interest in Apex California to Sarihan and properly transferred 100% of his stock to Sarihan. (See Exhibit B, at pp. 18; and Exhibit C - Documents Of Transfer.)

Shawkey was employed by Sarihan to continue to function as Director of Operations and Real Estate for Apex California. (See Exhibit B, at pp. 21.)

In his capacity as an agent of Apex California, Shawkey entered into negotiations with Phil Shaffer, a representative of Realmark Developments, Inc. (hereinafter "Realmark"), to lease property in Charleston, West Virginia. That property was to be the location of an Apex California restaurant/bar. Shawkey advised Shaffer that Sarihan was the President and Owner of Apex California, and that Shawkey was only acting as an agent on behalf of that corporation. The negotiations culminated in Shawkey executing a lease on behalf of Apex California and in his capacity as Director of Operations and Real Estate. (See Exhibit B, at pps. 23 to 25; and Exhibit D - Lease, at pgs. 1 and 26.)

Shawkey promptly informed Sarihan of the lease entered into with Realmark, but Sarihan informed Shawkey that Apex California was experiencing some financial problems and could not commit to the lease agreement. At this time Shawkey and Sarihan had a "falling out" and have not had any further contact. Shawkey terminated his employment with Apex California. (See Exhibit B, at pp. 22 to 23, and 25 to 26)

Shawkey informed Shaffer of Apex California's intent not to fulfill the lease agreement. However, Shawkey then advised Shaffer that he believed he could, on his own, as a business entrepreneur separate and apart from Apex California, successfully open a restaurant in that same property for which he had negotiated the lease on behalf of Apex California. (See Exhibit B, at pp. 25 to 27.) Shawkey made it clear that he intended to fulfill all the terms of the written lease with the exception of the ten (10) year primary term commitment. Shawkey was and still is a man with practically no net worth and could not possibly make such a commitment.

Based upon the oral agreement with Shaffer, Mr. Shawkey formed and incorporated Apex Restaurants, Inc. (hereinafter "Appellant" or "Apex West Virginia") under the laws of the State of West Virginia on February 7th, 1997. All papers of incorporation were properly filed with the West Virginia Secretary of States Office. (See Exhibit E -West Virginia Certificate of Incorporation) Apex West Virginia was formed in order to operate the restaurant Shawkey proposed to open under the oral agreement with Shaffer. (See Exhibit B, at pp. 27) Apex West Virginia is wholly separate from Apex California, the corporation that entered into the written lease.

Shawkey never signed another lease agreement with Realmark as either an individual or an agent of Apex West Virginia. Instead, Shawkey informed Shaffer that he would prefer to pay rent to Realmark and operate the business on a month to month basis. With this understanding Shawkey opened and operated Shooters Restaurant (hereinafter "Shooters"). (See Exhibit B, at pp. 27)

Due to a leak, the roof in the kitchen of Shooters collapsed and caused the restaurant to be closed for approximately two to three months. This was devastating to the new business and it never recovered, whereupon Shawkey was forced to permanently shut its doors and incurred substantial personal losses. (See Exhibit B, at pp. 28 to 30)

On June 21st, 2001, Realco Limited Liability Company (hereinafter "Realco" or "Appellee"), the successor to Realmark, filed a Complaint against Apex West Virginia in part for delinquent lease payments relating to that written ten year lease entered into on or about February 6th, 1997 between Realmark and Apex California, the corporation owned by Sarihan. The Complaint falsely claimed that the written lease was between Realmark and Apex West Virginia.

Apex West Virginia never answered the complaint and Realco, through its attorney of record, filed a Motion for Entry of Default. Realco's motion was based upon the attached affidavits

of attorney Timothy J. LaFon, attorney for the Appellee, and J. S. Stevens, III, the managing general partner of Shonk Land Company, a West Virginia limited partnership, which is manager for Realco, and the written lease signed by Apex California which was not even made a party to the litigation.

The Motion for Entry of Default is based upon a written lease that was never executed or otherwise agreed to by the Appellant. These facts are apparent upon the face of the complaint and default should never have been entered. However, relying upon the Appellee's motion and the factual inaccuracies upon which it was based, default judgment was entered in favor of the Appellee on April 6th, 2000. (*See Exhibit F - Judgment Order.*)

On June 5th, 2001, counsel for Apex West Virginia filed a Motion to Set Aside Judgment, asking that the Circuit Court of Kanawha County set aside the default judgment against Apex West Virginia. (*See Exhibit G - Motion to Set Aside Judgment.*) On June 23rd, 2004, the Circuit Court of Kanawha County, West Virginia, entered an "Order" denying the motion to set aside the default judgment. (*See Exhibit H - Order of June 23, 2004*)

II. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The decision of the Circuit Court of Kanawha County, West Virginia to deny the Appellant's Motion to Set Aside Judgment was a clear abuse of discretion and failed to consider certain factors required by law, as is set out more fully below.

III. POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF THE LAW AND THE RELIEF PRAYED FOR

A. POINTS AND AUTHORITIES

1. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

See Rule 60(b), W.Va. R.C.P.

2. An order denying a motion under Rule 60(b), W.Va. R.C.P., is final and appealable.

See Syl. Pt. 2, Toler v. Shelton, 157 W.Va. 778, 204 S.E.2d 85 (1974).

3. In reviewing an order denying a motion under Rule 60(b), W.Va. R.C.P., the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner. *See Syl. Pt. 4, Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

4. "In determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the Appellee 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.” See *Syl. Pt. 3, Parsons v. Consolidated Gas Supply Corporation*, 163 W.Va. 464, 256 S.E.2d 758 (1979).

5. “Rule 55 of the West Virginia Rules of Civil Procedure allows for the entry of a default judgment against a party who has “failed to plead or otherwise defend as provided by these rules.” Default is not, however, a favored means of disposition of a suit.” See *Hively v. Martin*, 185 W.Va. 225 at 227, 406 S.E.2d 451 at 453 (1991).

6. The rendering of judgment by default under the West Virginia Rules of Civil Procedure is “the harshest of sanctions” and ““should be used sparingly and only in extreme situations” because the policy of law favors disposition on the merits.” See *Foster v Good Shepherd Interfaith Volunteer Caregivers, Inc.*, 502 S.E.2d 178 at 181, 202 W.Va. 81 at 84 (1998).

7. “Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits.” See *Syl. Pt. 2, McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8 (1972).

B. ARGUMENT

The decision by the Circuit Court of Kanawha County, West Virginia, was a clear abuse of discretion, as it is obvious the documents attached to the Appellee’s “Motion for Entry of Default” contained inaccuracies and misrepresented the facts relied upon by the Circuit Court when it entered its “Judgment Order” on April 16th, 2000. The Appellee had entered into a lease agreement with Apex California, and filed suit against Apex West Virginia. (See Exhibit D; and Complaint.) When entering default judgment in favor of the Appellee and again when considering the Appellant’s

“Motion to Set Aside Judgment,” the Circuit Court failed to address the presence of “material issues of fact” and “the significance of interests at stake” as required by Syllabus Point 3 of *Parsons v. Consolidated Gas Supply Corporation*, 163 W.Va. 464, 256 S.E.2d 758 (1979).

The decision in *Parsons* makes it clear that there are four factors which the Circuit Court must consider in determining whether to vacate a default judgment upon a Rule 60(b) motion, one of which is “. . . the presence of material issues of fact and meritorious defenses . . .” *Id.* at Syl. Pt. 3. The Order entered on June 10th, 2004 did not address this factor or “. . . the significance of the interests at stake . . .,” as is made evident by the language of the order. *Id.* at Syl. Pt. 3.

It was Apex California and not Apex West Virginia which entered into the lease with Realmark. (See Exhibit D.) The Complaint filed by the Appellee and the affidavits attached to their “Motion for Entry of Default” misidentified the corporation which entered into the lease as being Apex West Virginia. In fact, when Shawkey signed the lease agreement on February 6th, 1997, Apex West Virginia was not in existence. It was not incorporated until February 7th, 1997. (See Exhibit E.) Therefore, it is evident that the Circuit Court entered default judgment on behalf of the Appellee based upon a purported contract which never existed. These material issues of fact should have been addressed or resolved by the Circuit Court of Kanawha County when it entered an order denying the “Motion to Set Aside Judgment.”

Furthermore, the Circuit Court failed to address the significance of the interests at stake. The Appellee’s Complaint asks for approximately ten (10) years of damages in rental payments, which includes:

. . . [D]amages in the amount of Forty-Six Thousand Three Hundred Eighty-One Dollars and Forty-Eight Cents (\$46,381.48) for delinquent lease payments resulting from Defendants’ default on the lease executed February 12, 1997 and a judgment

for all future lease payments due until the premises are re-leased, and the cost of attorney's fees in accordance with Paragraph 20 of said Lease, plus interest thereon.

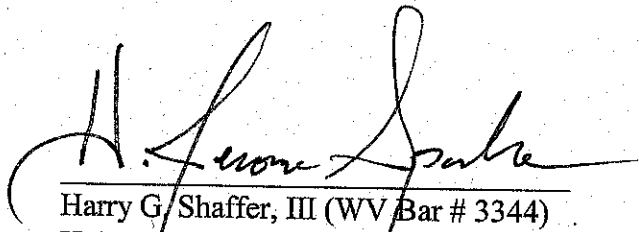
(See Complaint, at pg. 2.) By granting default judgment to the Appellee and refusing to vacate that judgment upon the Appellant's Motion pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, the Circuit Court was imposing a severe and misplaced penalty against Apex West Virginia due to misrepresentations in the Appellee's Complaint and affidavits.

This Honorable Court's disfavor of default judgments is a matter of record. *Hively v. Martin*, 185 W.Va. 225 at 227, 406 S.E.2d 451 at 453 (1991). Similarly, this Honorable Court has instructed that, due to the harsh nature of a default judgment, such a sanction should be used sparingly. *Foster v Good Shepherd Interfaith Volunteer Caregivers, Inc.*, 502 S.E.2d 178 at 181, 202 W.Va. 81 at 84 (1998). Here it is obvious that the imposition of a default judgment against Apex West Virginia is a miscarriage of justice and the order imposing that sanction should be vacated. It is patently unfair and absurd to ask a corporation which never entered into a written lease agreement with the Appellee to pay the Appellee damages for a breach of that written agreement.

C. PRAYER

Based on the foregoing, the Appellant respectfully requests that this Honorable Court reverse the Order of the Circuit Court of Kanawha County, West Virginia, dated June 10th, 2004 and remand the case back to the Circuit Court of Kanawha County with instructions that the default judgment be vacated.

Respectfully submitted,
APEX RESTAURANTS, INC.,
Appellant,
By Counsel



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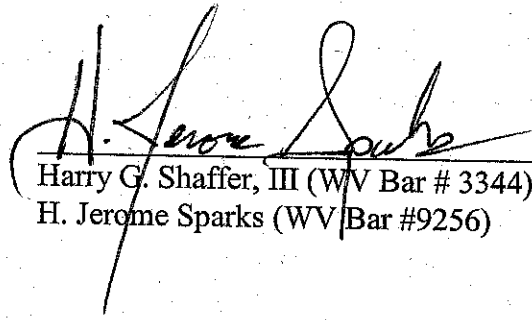
CIVIL ACTION NO. 99-C-1039

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CERTIFICATE OF SERVICE

I, H. Jerome Sparks, counsel for the Appellant, do hereby certify that I have this 7
day of April, 2005, served a copy of the foregoing "**BRIEF ON BEHALF OF APPELLANT,
APEX RESTAURANTS, INC.**" by hand delivery and addressed as follows:

Timothy J. LaFon
1219 Virginia Street, East
Suite 100
Charleston, WV 25301



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H. Jerome Sparks (WV Bar #9256)