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

**A. STATEMENT OF THE CASE**

The Appellee accepts the statement of the case by the Appellant in their brief and agrees that this appeal flows from a decision in Civil Action No. 99-C-1039 by the Circuit Court Judge to deny a Motion to Set Aside the Judgment of April 16, 2000.

**B. RESPONSE TO STATEMENT OF THE FACTS OF THE CASE**

Appellant spends a considerable amount of time in it's statement of facts presenting it's one sided view of what occurred in this lease arrangement between Realco, the Appellee and Apex. The Appellant spends a considerable amount of time identifying two different corporations being Apex West Virginia and Apex California. However, there was no such designation on the lease agreement. The Appellee and Plaintiff in the underlying action simply filed a lawsuit against the only Apex that had authority to operate in the State of West Virginia. Since there was only one Apex that had authority to operate in West Virginia it could have been the only entity that could have legally entered into a lease in the State of West Virginia and operated the restaurant in question. The Appellee dramatically disagrees with the statement of facts made by the Appellant as to representations made to one Phil Shaffer, who was a representative of Realmark Development, Inc.

However, this is not the crux of this case. Basically, the Appellant argues that it had a meritorious defense to this cause of action because George Shawkey, who negotiated on behalf of both corporations, Apex West Virginia and Apex California, modified the lease agreement orally

and allowed it to become applicable in some fashion to his corporation formed after the lease was entered into. Since a lease is an interest in real estate, no such oral modification could have been entered into pursuant to the West Virginia law. (See §36-1-3). More importantly, what this case really has to do with involves the procedural background of this case. On May 7, 1999, a complaint was filed against Apex Restaurants, Inc., d/b/a Shooters by Realco, the Appellee and was promptly served on the Secretary of State of West Virginia. Any claim that the affidavit alleging this was false is simply incorrect as proper service was made on the Secretary of State.

This case was assigned Civil Action No. 99-C-1039. The Defendant, despite their agent of service of process (being the Secretary of State of West Virginia), having received the complaint failed to answer the complaint and on April 5, 2000, the Plaintiff filed a Motion for Entry of Default with affidavit stating that proper service had been upon the Secretary of State. The Court subsequently entered a Default Order against Apex Restaurants Inc. This default was based upon the service upon the Secretary of State.

On May 5, 2000, a complaint was filed by Realco against George Steven Shawkey in an attempt to pierce the corporate veil as the Plaintiff had obtained a judgment against Apex Restaurants, Inc., which was and is undisputedly the wholly owned corporation of George Steven Shawkey. This was assigned Civil Action No. 00-C-1337. A subsequent Motion to Amend this Complaint was filed and this Civil Action 00-C-1337 was consolidated with Civil Action No. 99-C-1039 on June 17, 2002 pursuant to the Order of the Kanawha County Circuit Court.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

The decision of the Circuit Court of West Virginia to deny the Appellant's Motion to Set

Aside Judgment is clearly within the discretion of the trial court and should not be set aside or overturned on appeal.

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

**A. POINTS AND AUTHORITIES**

A ruling made on the Motion to Set Aside Default Judgment is in the sound discretion of the trial court and such ruling will not be disturbed unless it is shown that there is an abuse of such discretion. (*McDaniel vs. Romano*, 155 W.Va. 875, 190 S.E.2d 819 (1972); *County Comm'n vs. Hanson*, 187 W.Va. 61, 415 S.E.2d 607 (1992).

**B. ARGUMENT**

What this case is really about, is whether West Virginia Rules of Civil Procedure Rule 55 has any meaning whatsoever. It is important to note that the Appellant makes no argument as to any legitimate excuse as to why the complaint as served against Apex Restaurants, Inc. (West Virginia) was not answered. The one common individual in all of the corporations alleged by the Appellant (Apex Restaurants West Virginia and Apex Restaurants California) is George Shawkey. He was registered agent for service of process at the Secretary of State's office and was an agent of Apex Restaurant, Inc. and was an agent for Apex Restaurant Corporation (California). The Appellant goes to great lengths to argue that it may have had some defenses to the underlying claim but does not dispute nor argue that it had legitimate cause for not answering the complaint. It was not until a separate cause of action against George Shawkey was filed,

many many months after the default was entered, that Mr. Shawkey even attempted to respond to the complaint and default entered against Apex Restaurants, Inc.

There are many allegations made by the Appellant concerning the two different corporations and the allegation that the lease was entered into by a separate corporation. These allegations of facts can be interpreted to have more than one meaning. One could conclude that Mr. Shawkey was playing a corporate shell game in order to avoid liability for his lease obligation which he clearly executed on behalf of some entity. However, to allow the Appellant to come back after all of these years and attempt to set aside a default when the Appellant provides no excuse for not answering the complaint in the first place is to make a mockery of Rule 55 of the West Virginia Rules of Civil Procedure. It would create havoc on the legal system as there would never be any finalization to litigation. The Court was clearly within its sound discretion in upholding the default judgment especially given the fact that Mr. Shawkey individually has an opportunity to defend any liability against himself in Civil Action No. 00-C-1337, *Realco vs. George Steven Shawkey*.

The court was clearly within its discretion in upholding the Summary Judgment and therefore the decision of the Kanawha County Circuit Court should be upheld.

**C. PRAYER**

Based upon the foregoing the Appellee respectfully requests that this Honorable Court to uphold the lower court decision dated June 10, 2004.

Respectfully submitted,  
REALCO LIMITED LIABILITY CO., Appellee  
By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

REALCO LIMITED LIABILITY CO.,  
A successor and inter to REALMARK  
DEVELOPMENT, INC., a West Virginia  
corporation, Plaintiff below, APPELLEE,

vs.

APEX RESTAURANTS, INC.,  
Defendant below, APPELLANT,

and

REALCO LIMITED LIABILITY CO.,  
A successor and inter to REALMARK  
DEVELOPMENT, INC., a West Virginia  
corporation, Plaintiff below, APPELLEE,

vs.

GEORGE STEVEN SHAWKEY,  
Defendant below, APPELLANT.

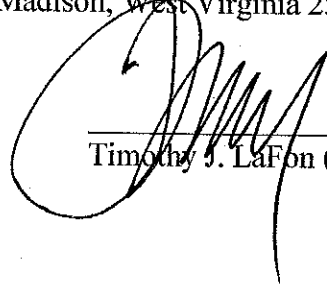
Civil Action No. 99-C-1039

Civil Action No. 00-C-1337

**CERTIFICATE OF SERVICE**

I, Timothy J. LaFon, counsel for Appellee, do hereby certify that I have this 9<sup>th</sup> day of May, 2005, served a copy of the foregoing "**BRIEF ON BEHALF OF APPELLEE REALCO LIMITED LIABILITY CO.**", by delivering the same to counsel for Appellant at his last known address by United States Mail, postage prepaid to his last known address as follows:

H. Jerome Sparks, Esquire  
Shaffer & Shaffer  
Post Office Box 38  
Madison, West Virginia 25130

A large, stylized handwritten signature in black ink, appearing to read 'TJ LaFon', is written over a horizontal line.

Timothy J. LaFon (#2123)