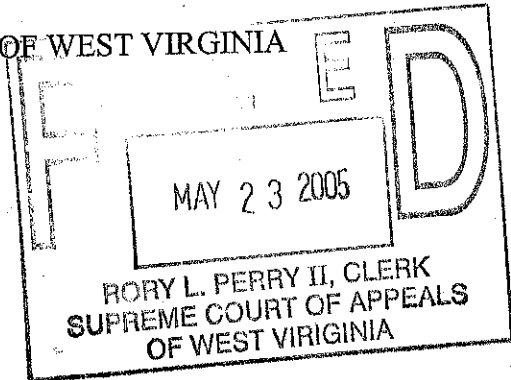


Supreme Court Docket No. 32564

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.

Civil Action No. 99-C-1039

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.

Civil Action No. 00-C-1337

GEORGE STEVEN SHAWKEY,
Defendant below, APPELLANT.

**REPLY BRIEF ON BEHALF OF APPELLANT,
GEORGE STEVEN SHAWKEY**

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I. REPLY TO APPELLANT'S ARGUMENTS REGARDING
THE FACTS OF THE CASE

In their attack upon the Appellant's statement of the facts, the Appellee asserts that the lease agreement at issue does not designate the name of the party entering into the lease with Realmark Development, Inc. This assertion is wholly inaccurate. As a simple review of the lease agreement demonstrates, it was entered into by and between Realmark Development, Inc., and Apex Restaurants Corporation. (See Lease, attached hereto as Exhibit A.) Apex Restaurants Corporation is a California corporation. Apex Restaurants, Inc., is a West Virginia corporation. The crux of this case is the misidentification by the Appellee of the parties to the aforementioned lease agreement and the Kanawha County Circuit Clerk's reliance upon these misrepresentations when entering its Order for Default Judgment. As was the case below, the Appellee has again misstated the facts. The lease agreement clearly specifies that it is Apex Restaurants Corporation, a California corporation, which entered into the lease agreement at issue. (See Exhibit A.)

Furthermore, the Appellee is correct that, pursuant to *West Virginia Code* § 36-1-3, no lease of land "*for more than one year*" is enforced under the laws of West Virginia unless it is in writing. However, as the Appellant has previously specified, Mr. Shawkey, as an agent of Apex Restaurants, Inc., the West Virginia corporation, agreed orally to a month-to-month lease of the property at issue. (See Deposition of George Steven Shawkey, attached hereto as Exhibit B, at pp. 27.) This month-to-month lease is not prohibited by *West Virginia Code* § 36-1-3. The agreement Mr. Shawkey entered

into on behalf of Apex Restaurants, Inc. was not a modification or assumption of that lease entered into by Apex Restaurants Corporation. (See Exhibit B at pp. 26.)

II. APPELLANT'S REPLY TO APPELLEE'S AGRUMENT

Default judgment in the case of Realco Limited Liability Co. v. Apex Restaurants, Inc., Civil Action No. 99-C-1039, was based upon a factual inaccuracy recited by the Appellee. That inaccuracy being the assertion that it was Apex Restaurants, Inc., rather than Apex Restaurants Corporation, which entered into the lease at issue with the Appellee. Due to this key procedural flaw, this Honorable Court should reverse and remand the lower court's denial of the Appellant's Motion to Set Aside Default Judgment. This flaw should have, but was not, addressed by the Kanawha County Circuit Court when considering the Motion to Set Aside Default Judgment, pursuant to Syl. Pt. 3, *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 256 S.E.2d 758 (1979). By failing to address this key factual inaccuracy, the lower court committed an abuse of discretion and reversible error.

When the Appellee filed its first lawsuit against Apex Restaurants, Inc., Mr. Shawkey did not consult with an attorney, believing such consultation was unnecessary as Apex Restaurants, Inc., had never entered into the written lease with Realmark as was alleged. Mr. Shawkey assumed that judgment could not be obtained against a party for the breach of a contract which that party had never entered into. The principles of equity would seem to support Mr. Shawkey's assumption, despite the fact that the court below does not.

III. CONCLUSION

The Appellant requests that, in light of the aforementioned inaccuracies and the lower court's refusal to address those inaccuracies, this Honorable Court reverse and remand the lower court's denying the Appellant's Motion to Set Aside Default Judgment.

Respectfully submitted,

GEORGE STEVEN SHAWKEY,

By Counsel



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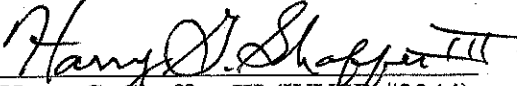
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Counsel for Appellant

CERTIFICATE OF SERVICE

I, Harry G. Shaffer, III, counsel for the Appellant herein, do hereby certify that, on this 3rd day of May, 2005, I have placed a true and exact copy of the foregoing "REPLY BRIEF ON BEHALF OF APPELLANT, GEORGE STEVEN SHAWKEY" in the United States Mail, postage properly paid, in envelopes addressed as follows:

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