

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAULA PAUL, as executrix of the  
estate of Helen F. Walker,

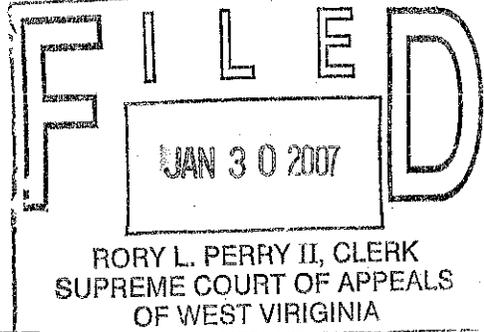
Plaintiff/Appellee,

v.

OPTION ONE MORTGAGE  
CORPORATION, a corporation, and  
H & R BLOCK MORTGAGE CORP.,  
a corporation

Defendants/Appellants.

Appeal No. 33225  
(Appealed from Civil Action No. 03-C-1937)



APPELLEE'S BRIEF

**I. KIND OF PROCEEDINGS AND NATURE  
OF RULING BELOW/STATEMENT OF FACTS**

This case was filed on August 7, 2003. Pursuant to the circuit court's first Scheduling Order the deadline for filing Third Party Complaints was May 15, 2004. The trial was set for January 15, 2005. On October 29, 2004, the Defendants/Appellants deposed the Plaintiff, Helen Walker, and began the deposition of the Plaintiff's daughter, Paula Walker Paul. The deposition of Ms. Paul was continued until mid-November.

Meanwhile, the Defendants had subpoenaed the bank records for the Plaintiff and Ms. Paul's joint checking account. After the conclusion of Ms. Paul's deposition, counsel for the Defendants contacted the undersigned and informed that the Defendants had received certain bank records and believed that these records raised questions about Ms. Paul's relationship with her former employer. At the very latest, by mid-November, 2004, the Defendants had information that they believed entitled them to file their proposed Counterclaim and Motion to Add Third Party.

By Order entered January 20, 2005, the Court continued the trial to September 12, 2005. On April 4, 2005, nearly six months after having the information upon which they based the motion, the Defendants filed their Motion to File Counterclaim and Third Party Complaint. The Motion was not noticed for hearing until July 6, 2005, six weeks before the trial date.

The Counterclaim and Motion to File Third Party Complaint sought to introduce extraneous issues into this case that arise out of the former employment of the Plaintiff's daughter, who is not a signatory to the loan or owner of the property. Additionally, the conduct at issue concerns the subject of a grand jury investigation of Ms. Paul's former employer. Ms. Paul has received immunity for her testimony in this investigation.

The Defendants failed to provide good cause why they waited six months after they had evidence on which they base their motion such that leave should be granted to allow the motion well beyond the deadline. Accordingly, the circuit court's denied the Defendants' motion. (See Order (July 7, 2005).)

This case alleges predatory lending and unlawful debt collection arising out of the financing of the purchase of a home in Dunbar, West Virginia. (See Am. Compl. *in passim*.) Helen Walker instituted this action against the Defendants alleging that her loan was unconscionable, contained points and fees that exceed the 5% cap in violation of *West Virginia Code* section 31-17-8(m)(4), and that the Defendant, Option One Mortgage Corp. breached its duty of good faith in servicing the loan and engaged in debt collection violations.

Ms. Walker died during the litigation, and the suit is being maintained by the executrix of her estate, her daughter Paula Paul. (See Order (Aug. 1, 2005).) After the Petition was filed, the circuit court entered judgment in favor of the Plaintiff. (See Order September 26, 2005.) On March 6, 2006,

the circuit court entered judgment awarding the Plaintiff attorney's fees and costs. (See Order March 6, 2006.) The time to appeal both of these judgments has expired.

In the Summer of last year (2006), these judgment were satisfied when the Plaintiff's property was sold and the Defendants agreed to accept a short payoff, which reflected the subtraction of the judgment amount. A satisfaction of judgment in connection with the agreement was entered on July 25, 2006.

## II. TABLE OF AUTHORITIES

### Cases

<u>Jame M.B. v. Carolyn M.</u> , 193 W. Va. 289, 292-93, 456 S.E.2d 16, 19-20 (1995) .....	3
<u>State ex rel. Leung v. Sanders</u> , 213 W. Va. 569, 575, 584 S.E.2d 203, 209 (2003) .....	3
<u>State ex rel. Peacher v. Sencindiver</u> , 160 W. Va. 314, 316, 233 S.E.2d 425, 426 (1977) .....	3

## III. DISCUSSION

The circuit court's decision to deny leave to file a Counterclaim and Third Party Complaint after the deadline had expired is subject to an abuse of discretion standard. See generally State ex rel. Leung v. Sanders, 213 W. Va. 569, 575, 584 S.E.2d 203, 209 (2003).<sup>1</sup> The circuit court concluded that by the time the motion was noticed for hearing, nearly fourteen months had passed since the deadline for such motions. Additionally, the Defendants had waited, without explanation, over six months from learning of the basis for the motion to seek leave from the circuit court. Given these circumstances, the circuit court did not abuse its discretion to grant leave to file the Counterclaim and Third Party Complaint six weeks prior to trial.

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<sup>1</sup> Because this appeal was not made of a final order, it is more akin to a writ of prohibition, which typically is not granted to prevent an abuse of discretion by a circuit court. See State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 316, 233 S.E.2d 425, 426 (1977).

Additionally, this Court has jurisdiction to hear appeals (1) of final judgments; (2) pursuant to a specific statute of rule of procedure providing for the appeal; or (3) of an interlocutory order if the appeal (a) conclusively determines the disputed controversy, (b) resolves an important issue separate from the merits of the underlying action, and (b) is unreviewable on appeal from a final order. See Jame M.B. v. Carolyn M., 193 W. Va. 289, 292-93, 456 S.E.2d 16, 19-20 (1995). The Appellants' appeal does not fall in any of these three categories. The Order appealed clearly is not a final judgment, and the Appellants do not rely on any specific statute or rule of procedure for their appeal. Finally, the appeal of the order would not conclusively determine the disputed controversy and is not unreviewable from a final order.

Finally, given the circumstances, it is unclear what relief the Defendants seek in their petition. Even if their appeal was granted, the Defendants would then be permitted to file a counterclaim against the deceased Helen Walker and a Third Party Complaint against Paula Paul concerning an action that has already resulted in a judgment, which has been satisfied. The counterclaim would be futile, and the undersigned does not represent Paula Paul in her individual capacity. Accordingly, the order of the Circuit Court should be affirmed.

**PAULA PAUL, as executrix of the  
estate of Helen F. Walker,  
By counsel.**

  
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CERTIFICATE OF SERVICE

I, Bren J. Pomponio, counsel for the Plaintiff, do hereby certify that I have served a true and exact copy of the foregoing **Appellee's Brief** upon counsel of record as listed below, via United States mail with postage prepaid on this the 29<sup>th</sup> day of January, 2007, addressed as follows:

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