

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHRISTOPHER TODD ZACH and
RAMONA C. GOEKE,

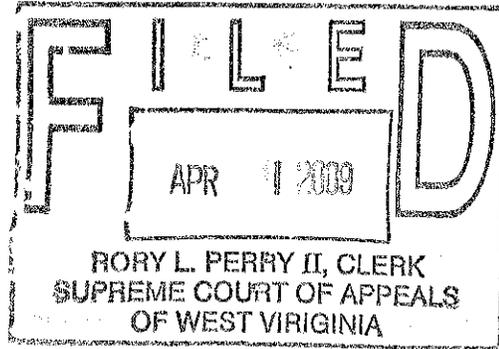
Appellants,

v.

Appeal No.34712

LESLIE EQUIPMENT COMPANY,
a West Virginia corporation,

Appellee.



BRIEF OF APPELLEE

DAVID H. WILMOTH
W.Va. State Bar No. 5942
Counsel for Appellee
Post Office Box 933
427 Kerens Ave., Suite 3
Elkins, WV 26241
(304) 636-9425

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STATEMENT OF THE CASE

Leslie Equipment Company, a West Virginia corporation, (LEC) extended credit to Wood Resources, LLC, a foreign limited liability company, and obtained the personal guaranty of the entity's debt from, *inter alia*, the appellants in this matter. Upon default, LEC filed suit in the Circuit Court of Wirt County; provided for service upon defendants at their residence addresses in New Mexico and Iowa; and obtained default judgment based upon the proof of service contained in the Court file as a result of their failure to Answer or submit other responsive pleading. Defendants below sought to have default judgment set aside asserting a lack of *in personam* jurisdiction as service of process was deemed insufficient. Defendants admitted receipt of service of process and their actual knowledge of the pendency of the suit, and argued that notwithstanding this knowledge the Circuit Court of Wirt County, West Virginia lacked personal jurisdiction and therefore authority to enter judgment in this matter. An Order denying this request was entered on May 22, 2008, from which this appeal is taken.

STATEMENT OF FACTS

Appellee Leslie Equipment Company, plaintiff below, filed suit in this matter in the Circuit Court of Wirt County, West Virginia, on or about October 18, 2007. Defendants were each served pursuant to Rule 4 (e) (2) W. Va. R. Civ. P. on October 22, 2007, and October 29, 2007, as shown by the return receipt cards provided by the United States Postal Service, and maintained in the lower Court's file. On or about January 25, 2008, having received no responsive pleading or contact on behalf of defendants, LEC moved for default judgment in its favor and against defendants, which motion was granted by Order entered on January 29, 2008.

Another co-defendant Wendell Koprek, served in the identical manner as petitioners, filed an Answer denying the allegations of the complaint. LEC moved for summary judgment as to the existence of the debt and Koprek obligation, which judgment was awarded in or about March, 2008.

Approximately two months later, defendants moved to have default judgment set aside, alleging that they were entitled to such relief as a result of; 1) lack of *in personam* jurisdiction of the Court due to the manner of service of process under Rule 4 (e) (2), *W. Va. R. Civ. P.*; and 2) pursuant to Rule 60 (b) *W. Va. R. Civ. P.*, for the litany of reasons cited therein. After hearing this matter, the trial Court denied defendants' Motions, finding that the record reflected receipt of service of process; that defendants acknowledged through counsel that they had in fact received service of process of the pending litigation; and because defendants admitted having actual notice of the pending suit. The Court further found that *W. Va. Code* §56-3-33 (f) permitted service in the manner utilized by LEC.

ISSUE ON APPEAL

1. Whether the Circuit Court of Wirt County erred in denying defendants' Motion as service pursuant to Rule 4 (e) (2) *W. Va. R. Civ. P.* was achieved; defendants acknowledged receipt of service of process; and admitted actual notice of the pendency of the litigation in this state

2. Whether the Circuit Court of Wirt County erred in denying defendants' Motion pursuant to Rule 60 (b)

ARGUMENT

1. The Circuit Court of Wirt County correctly denied defendants' Motion as the method of service of process was appropriate under the Rules and statutes of this state; achieved its purpose, i.e., providing actual knowledge of the pending action and obtaining personal jurisdiction over the defendants; and defendants failed to reply to the complaint filed in this matter.

A. Appellee's chosen method of service of process is sufficient under the statutes and rules of this State.

The trial court was correct in its decision to deny defendants' Motion to Set Aside Default Judgment in regard to both jurisdiction and default judgment. The record below clearly reflects that defendants obtained service in a manner permitted by both statute and rule, and further reflects that defendants received service of process, admitted actual notice of the pendency of the suit, and merely declined to participate in this litigation, now objecting on the basis of an incorrectly perceived technical flaw.

The West Virginia Rules of Civil Procedure provide clear instruction on the proper method to achieve service of process for a non-resident defendant. Specifically, Rule 4 (e) (2) states in pertinent part as follows:

"(2) Service by mailing. ...when plaintiff knows the residence of a nonresident defendant... plaintiff shall obtain constructive service of the summons and complaint upon such defendants by the method set forth in Rule 4 (d) (1) (D). ...However, service pursuant to Rule 4 (d) (1) (D) shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing acceptance by the defendant...."

In this case, LEC obtained from appellants a personal guaranty of a debt owed by

a foreign limited liability company. Along with that guaranty, appellants provided their residence addresses in Iowa and New Mexico. It was these addresses which were used to achieve service of process pursuant to Rule 4 (e) (2), as reflected by the record in the lower Court.

The issue before this Court is not whether service was actually achieved, but whether the manner in which service was achieved passes muster. Appellants do not argue that they have not had “contact” with this State which would subject them to our Courts’ jurisdiction (Brief of Appellant at p. 17). Nor do they deny actual knowledge of the pending litigation. Appellants merely assert the technical argument that because service was not obtained pursuant to *W. Va. Code* §56-3-33 (c), they cannot be held liable for the obligations they created.

Appellants are incorrect in their assertion that the manner in which they were served is insufficient, and that the cited code section is the exclusive manner for effective service of process. Clearly *W. Va. R. Civ. P.* 4 (e) (2) permits service in the manner utilized by LEC in this matter. The record reflects that defendants received service, and they admit actual knowledge of the pending suit in Wirt County Circuit Court. The applicable Rule permits entry of default judgment when the record contains proof of service through mailing. This should be no less the case when service successfully results in actual knowledge of the suit and its issues.

Appellants rely upon *W. Va. Code* §56-3-33 for their argument that service of process in this manner does not convey *in personam* jurisdiction. This is misplaced in light of the entire provisions of that code section. It will be recalled that appellants do not assert that they have not had the contacts with this State that subject them to the jurisdiction of our Courts. Appellants rely solely on the language contained in paragraph (c), which is essentially identical to the language of Rule 4 (e) (2). Whichever method is chosen, default judgment is permitted

once it is clear that defendants received notice of the pending litigation.

Appellants also fail to consider the language of paragraph (f) of the cited code section. This reads as follows:

“(f) The provision for service of process herein is cumulative and nothing herein contained shall be construed as a bar to the plaintiff in any action or proceeding from having process in such action served in any other mode or manner provided by the law of this state...”

This provision of the applicable code section signals that the legislature recognizes that service of process in the manner promulgated by this Court through the Rules of Civil Procedure is equally sufficient to bind a party to the jurisdiction of the Courts of this State. Nevertheless, it is clear that when a statute enacted by the legislature conflicts with a Rule promulgated by the West Virginia Supreme Court of Appeals, the Rule clearly has authority over the statute. [See *State v. Davis*, 178 W.Va. 87; 357 S.E.2d 769, (W.Va. 1987)]. Appellants strict interpretation renders moot the method for service of an out of state, nonresident defendant prescribed by the Rules, as any judgment obtained by default (which is specifically recognized and permitted) under that Rule would fail for lack of personal jurisdiction under appellants’ theory.

Appellants remaining arguments concerning the method of service, restricted mailings, and constructive service were not raised in the trial court, and therefore cannot be considered on appeal. [See *Mayhew v. Mayhew* 250 W.Va. 490; 519 S.E.2d 188, (W.Va. 1999) and *State v. Bosley* 159 W.Va. 67, 218 S.E.2d 894, (W.Va. 1975).]

B. Personal jurisdiction was obtained through the method of service of process used by Appellee.

Appellants argue that because they were not served pursuant to *W. Va. Code* §56-3-33 they are not subject to *in personam* jurisdiction of the Courts of this state. That conclusion is contrary to decisions rendered by this Court, such as *Snider v. Snider* 209 W. Va. 771, 551 S.E. 2d 693 (W. Va. 2001), where the Court stated in syllabus point 2, citing with approval a prior decision in *Pries v. Watt* 186 W. Va. 49, 410 S.E. 2d 285 (W. Va. 1991),

“In order to obtain personal jurisdiction over a nonresident defendant, reasonable notice of the suit must be given the defendant. There also must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state”. (emphasis added).

Here again, appellants do not argue they did not have the second prong of “contacts” necessary to subject them to the jurisdiction of the courts of this state. The essential argument advanced is that somehow, certified mail from the Circuit Clerk of Wirt County is inferior to certified mail from the Secretary of State of West Virginia. In light of the admitted actual knowledge of defendants of the pending suit in the Circuit Court of Wirt County, West Virginia, the decisions in *Snider* and *Pries* clearly supplant the argument advanced by appellants in this matter.

With the *Snider* and *Pries* decisions, the issue is not whether service was accomplished according to the narrow dictates of a particular statute or rule, the issue is whether notice of the pending suit was reasonable. Therefore, once a party has actual knowledge of litigation pending in this state, the only question remaining is whether that nonresident party had sufficient contact with this state to subject them to the jurisdiction of the Courts of this state.

Since it is clear that the necessary contact exists, and equally clear that knowledge of the suit exists, the Circuit Court of Wirt County acquired personal jurisdiction over the appellants in this matter.

While neither the *Snider* or *Pries* decisions directly addressed the issue of the manner of service chosen, the *Pries* decision recognized that the defendant in that action was served by mail (the source and type of mail used is not clear). Ultimately, the Court found that Ms. Pries did not have the sufficient contacts with this state to subject her to the jurisdiction of our courts, but defined “personal jurisdiction” as being achieved when reasonable notice and sufficient contacts merged. The *Pries* court relied upon previous decisions rendered by it and other courts, and in particular cited with approval the decision of the United States Supreme Court of Appeals in *International Shoe Co., v. Washington* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), when it stated:

“The Court cited two prerequisites for personal jurisdiction: First, the defendant must be afforded reasonable and adequate notice of the suit, and second, the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit would not offend traditional concepts of fair play and substantial justice.” Pries at p. 289 citing *International Shoe Co.*, at p. 91.

It is clear from the decisions in *Snider* and *Pries*, decided upon authority of the United States Supreme Court, that there is no magic associated with a particular means of providing notice of a pending suit. The objective of both the statute enacted by the legislature and the Rule promulgated by this Court is to identify the manner most likely to provide reasonable notice to a defendant, in the most efficient manner, of a pending claim against them.

C. Actual notice combined with sufficient contacts creates personal jurisdiction.

Personal jurisdiction is not the product of a method of service of process. Instead, personal jurisdiction is obtained when a defendant is given reasonable notice of a pending action, and is presented with the opportunity to appear and be heard. It cannot be said that defendants in this matter lacked reasonable notice or the opportunity to be heard. This Court previously rejected a similar argument. In *Lemley v. Barr*, 176 W. Va. 378, 343 S.E. 2d 101, (W. Va. 1986), this court found personal jurisdiction, even without defendants in that case having ever been served with process in any manner, recognizing instead that they had actual knowledge of the proceedings to which they objected, and therefore they were prohibited from hiding behind the lack of service. In *Lemley*, not only were the defendants not served, service was never even attempted on them because they elected to assert their attorney-client privilege regarding their identity. Nevertheless, the Court found that defendants “knew about the lawsuit through the constant attention it received in the media” *Lemley* at p. 383, as well as through their attorney, and their discussions regarding the attorney-client privilege. Relying on this, the Court reasoned that the proceedings in question “...had the procedural due process requirements of notice and opportunity to be heard” *Lemley* at p.384. From these facts, the Court found that the defendants had “...the actual notice that the service of process is designed to provide...” *Lemley* at p. 383.

Appellants actions and argument are akin to the actions of defendants in the *Lemley* case. Although actual knowledge exists, appellants are attempting to “legally” avoid the jurisdiction of the courts of this state simply because they do not like the outcome of the court’s decision. The *Lemley* court recognized the issue of procedural due process and ruled that its

requirements had been met with the actual knowledge of the defendants. The actual knowledge of the appellants in this matter is the downfall of their argument in this case.

C. Appellee's Judgment rendered in the trial Court is not void, but is an enforceable judgment rendered consistent with applicable West Virginia law.

Appellants citation of authority on the issue of effective service of process is not on point in this discussion and involves factually dissimilar situations. To begin, the decision rendered in *Fabian v. Kennedy* 333 F. Supp. 1001 (N.D. W.Va. 1971) was reached because neither party involved in the litigation were residents of this state; the contract at issue was not entered into in this state; and the Court determined that it lacked both *in personam* and *in rem* jurisdiction over the parties or the subject matter, a "contacts" decision. The decision in *Teachout v. Larry Sherman's Bakery, Inc.*, 158 W. Va. 1020, 216 S.E. 2d 889 (W. Va. 1975), addresses whether a nonresident co-defendant could be served by publication, in order to obtain personal jurisdiction over him. And the issue in *McClay v. Mid Atlantic Country Magazine* 190 W. Va. 42, 435 S. E. 2d 180 (W. Va. 1993), centered around the manner utilized to attempt service on a defendant foreign corporation not authorized to conduct business in this state.

Appellants rest their theory on the issue of constructive service under the Rules. While that is a beginning point in this argument, appellants fail to complete their analysis in light of the authority previously cited. Subsequent decisions of this Court have held that once a party has actual knowledge of pending litigation, constructive service becomes personal service through actual knowledge. Appellants argument seeks to put form over function, assigning great significance to a merely technical aspect, and ignoring the true purpose of providing service of process to a party to litigation.

2. The lower Court was correct in denying defendants' Motion to set aside default judgment in this matter, as defendants failed to meet the required standard.

The decision to set aside a previously awarded default judgment is left to the sound discretion of the trial court. This decision will not be disturbed on appeal absent a showing of an abuse of such discretion. *Toler v. Shelton*, 157 W. Va. 778, 204 S. E. 2d 85 (W. Va. 1974). A request is not automatic, and appellants must show "good cause" as a "necessary predicate" to support their motion. *Hinerman v. Levin* 172 W. Va. 777, 310 S. E. 2d 843 (W. Va. 1983).

Review of a motion under Rule 60 is made under a two prong analysis. First, the Court must determine whether excusable neglect is present. Absent a showing of excusable neglect, the second prong is not applicable. However, if the Court determines the existence of excusable neglect, the factors set forth in *Parsons v. Consolidated Gas Supply Corp.* 163 W. Va. 464, 256 S. E. 2d 758 (W. Va. 1979) are applied to the particular facts of the matter.

Appellants failed to establish excusable neglect in this matter at the trial Court level, therefore, the *Parsons* analysis has no application. [See *Cook v. Channell One Inc.*, 209 W. Va. 432, 549 S. E. 2d 306(W. Va. 2001)].

Defendants were served with and received a copy of the summons and complaint in this matter, as is clearly shown by the contents of the Court file. As argued previously, service of the summons and complaint in this matter was achieved according to provisions of West Virginia law. Appellants do not contend that their failure to provide an Answer or other responsive pleading is based upon any reason other than impudence and disregard for the legal process. In fact they argued previously to this Court that they were involved in other litigation in

this state, and simply couldn't be bothered with another suit. Having actual knowledge of the existence of this litigation, they chose to ignore this matter rather than provide an Answer or response. This does not rise to the level of excusable neglect. It is simply a cavalier disregard of the issues.

This suit was filed in October, 2007. Appellants received notice of the pendency of this suit in October 2007. Default Judgment was neither sought nor entered until early 2008. Notwithstanding this, appellants took no action in this matter until nearly two months following the entry of default judgment against them.

Furthermore, this Court has ruled that failing to act, based on the advice of counsel, is not a basis for setting aside default judgment. (See *White v. Berryman* 187 W. Va. 323, 418 S. E. 2d 917, (W. Va. 1992). Moreover "...the omission of a defendant's attorney does not constitute grounds for setting aside default judgment" *White*, p. 33 citing *Badalow v. Evenson* 62 Mich. App. 750, 233 N.W. 2d 708 (1975). While counsel is unaware of the arrangements between appellants and counsel as to whether it was appellants' decision to ignore this matter and not seek advice; or their reliance upon the advise of counsel regarding a perceived technical flaw that made them reject the idea of filing a response of some sort, neither would constitute a basis for setting aside the judgment.

PARSONS ANALYSIS

Assuming, however, for the sake of argument, that this first prong has been met and the Court finds excusable neglect, that finding alone is insufficient to justify the requested relief. Once a showing of excusable neglect is made, the Court must apply the factors of *Parsons* to determine whether to set aside the default judgment. In the present situation, that analysis

would mitigate in favor of appellee, and render appellants' motion without merit.

1. **Degree of Prejudice to Plaintiff** Appellants' decision to ignore the reality of this suit has greatly adversely effected appellee. First, LEC has incurred additional attorney's fees related to the judgment rendered in its favor and the steps to enforce this judgment. Second, setting aside that judgment will cause additional expenses to appellee. Third, appellee will suffer a setback in its effort to enforce this judgment and possibly be placed in an inferior position to other creditors of the appellants due wholly to appellants' own recalcitrance. They should not be rewarded for their behavior in this matter.

2. **Material Issues and/or Meritorious Claims** LEC has previously been awarded summary judgment against a co-debtor for this obligation, based not only upon the existence of the debt, but also upon the affidavit of a representative of LEC. There is no material issue to be litigated. Appellants executed personal guarantys to pay the debt owed. Factually, there is no pragmatic defense that they could raise to avoid liability for this debt. Appellants in their motion at the trial court level only asserted that there is an "unassailable defense" yet declined to advise the Court of that defense. Appellee is unaware of any defense, particularly in light of the award of summary judgment against a co-debtor under the same factual scenario. Merely asserting a defense existing without providing a basis for such assertion is insufficient to satisfy the *Parsons* analysis.

3. **Significance of Interests** The significance of interests is identical in this matter. The amount in controversy is the same for both parties. Appellants claim no basis for counter-claims against appellee, and appellants are jointly and severally liable for this debt with their co-

defendant who filed an Answer (and who incidentally was served in the identical fashion without raising the issues these defendants raise). Allowing this judgment to remain in place does not hinder their own separate ability to pursue a claim for contribution against that co-defendant, or bring another action to seek reimbursement for amounts paid on his behalf.

4. **Degree of Intransigence on Defendants' Part** Appellants in this action have exhibited a great deal of disrespect for the trial court, plaintiff, their legal obligation as personal guarantors, and the legal process. Having received the complaint in this matter, they declined their opportunity to appear and defend or otherwise respond to the litigation. Having had judgment entered against them as a result of their own decision, they seek to delay, deny and defend on the spurious basis of an issue of service. Appellants argument and position would have much more significance if they had not each received a copy of the complaint which contained a clearly worded explanation that failure to defend could result in default judgment against them. Obviously they are aware of the wisdom of hiring an attorney to represent them in matters pending before a Court of law. Had such discretion been exercised rather than simply ignoring a lawsuit, they would not now be in the position of attempting to undue what has already been done, and which would not have been done had they simply appeared and defended.

CONCLUSION

Appellants request for relief in this matter should be denied. Service of process upon them was achieved in a manner prescribed by the Rules of Civil Procedure, and permitted by statute. Further, at the hearing on this matter in the lower Court, they acknowledged their personal knowledge of the pendency of the suit and their receipt of the complaint and summons

in this matter. In their brief it is conceded that they were aware of the suit because they intended to file a motion to dismiss it due only to the perceived insufficient service of process. A tactical decision on how to proceed does not give rise to set aside a previously entered default judgment. Under the *Parsons* analysis, appellants have failed to present evidence that they are entitled to have the judgment set aside, and they have not presented controlling authority in support of their position that service is insufficient.

WHEREFORE appellee requests that the relief requested on appeal be denied, that the previously entered judgment remain in full force and effect, and that it be awarded its costs including reasonable attorneys fees and for such other and further relief as to this Court seems fair and just.

Respectfully submitted,

LESLIE EQUIPMENT COMPANY,
Respondent, by counsel

DAVID H. WILMOTH
W.Va. State Bar No. 5942
Counsel for Respondent
Post Office Box 933
427 Kerens Ave., Suite 3
Elkins, WV 26241
(304) 636-9425

CERTIFICATE OF SERVICE

I, David H. Wilmoth, counsel for appellee, do hereby certify that on this date I served a true copy of the foregoing ***BRIEF OF APPELLEE*** upon P. Todd Phillips, Esq., counsel for Appellant, by depositing a true copy of same in the United States mail, with sufficient postage attached thereto, addressed to said counsel as follows:

P. Todd Phillips, Esquire
235 High Street, Suite 322
Morgantown, WV 26505

Dated this ____ day of March, 2009

DAVID H. WILMOTH
W.Va. State Bar No. 5942
Counsel for Respondent
Post Office Box 933
Elkins, WV 26241
(304)636-9425