

14-0143

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

SALLY MARSHALL,  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-160  
JUDGE LORENSEN

NANCY SOSTARIC and  
STJEPAN SOSTARIC,  
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER came before the Court this 14th day of January, 2014, upon Plaintiff's *Pro Se* Proposed Order of Judgment. During a hearing on the matter, the Court informed all parties that it would consider Plaintiff's Proposed Order as a Motion for Summary Judgment and gave the Defendants until December 2, 2013, to file a response. Upon full review of the record and all pertinent legal authority, the Court finds as follows.

RECEIVED  
KIMBERLY J. HARBACH, CLERK  
2014 JAN 16 AM 9:41

Motions for summary judgment are governed by Rule 56 of the West Virginia Rules of Civil Procedure, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.Va.R.C.P. Rule 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987). Therefore "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60. Otherwise, the movant is entitled to summary judgment.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

W. Va. R. Civ. P. 56

Here, the Plaintiff has met her burden, showing affirmative evidence of the existence and amount of Defendants' debt owed to the Plaintiff. On November 8, 2013, the Court advised the parties that it would consider the previously filed motion for default judgment as a motion for summary judgment. “[T]he court will require that the defendants and each of them file a response supported by admissible proof of a defense to the claim asserted by the Plaintiff in her complaint as supplemented by the motion filed August 26, 2013, and as supplemented by the proposed order of November 6, 2013, and affidavit of the same date.” Order November 12, 2013. The response of Defendant Nancy McCoy Sostaric addresses the allegations made by the Plaintiff but does not include any affidavit or other admissible proof of a defense.<sup>1</sup> Defendant Stjephen Sostaric failed to file a response.

---

<sup>1</sup> The response attempts to speak for both Defendants but is only signed by Nancy Sostaric.

Because Defendants have failed to rehabilitate the evidence, produce additional evidence showing the existence of a genuine issue for trial, or submit an affidavit explaining why further discovery is necessary, this Court FINDS that the Plaintiff is entitled to summary judgment as a matter of law.

The Plaintiff has set forth evidence, by way of a sworn affidavit, of an outstanding debt in the amount of \$175,407.45, the collection of which is supported by an exhibit to the Complaint, the Secured Balloon Promissory Note. Further, the Plaintiff has set forth evidence, by way of a sworn affidavit, of attorneys' fees in the amount of \$1,749.25, the collection of which is supported by an exhibit to the Complaint, the Secured Balloon Promissory Note. The Plaintiff also requests Pre-Judgment Interest, property taxes, water and sewer hookup expenses, HOA fees, and miscellaneous Fees and servicing charges, but has not supported the request with any evidence of her entitlement to the same. A review of the Secured Balloon Promissory Note ("the Note") does not reveal any basis for these damages. The Plaintiff has proposed that pre-judgment interest may be awarded under West Virginia Code §56-6-27 and §56-6-29, but misapplies the code.

West Virginia Code §56-6-27 applies only to jury verdicts, which is not applicable in summary judgment. West Virginia Code §56-6-29 clarifies that the Plaintiff is entitled to "principal and interest due at the date of the verdict." In the case *sub judice*, the interest rate was set at seven and one quarter percent (7 ¼ %) by the Note, which would be included in the "balance due and owing from the Defendants to the Plaintiff under the Note" as stated in the Complaint. "If an obligation is based upon a written agreement, the obligation shall bear a prejudgment interest at the rate set forth in the written agreement until the date the judgment or decree is entered and, thereafter, the judgment interest rate shall be the same rate as provided for

in this section." W. Va. Code § 56-6-31. Accordingly, the Plaintiff has failed to produce evidence that shows she is entitled to any pre-judgment interest beyond that already "due and owing" under the Note.

However, post-judgment interest at the constant rate of seven percent (7%) is appropriate here under §56-6-31. As such, the established rate of seven percent (7%) shall remain constant for this judgment until paid by the Defendants.

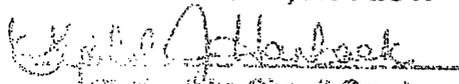
THEREFORE, this Court GRANTS the Plaintiff's Motion for Summary Judgment and ORDERS Summary Judgment in favor of Plaintiff against NANCY SOSTARIC and STJEPAN SOSTARIC in the amount of \$175,407.45 plus attorney's fees in the amount of \$1,749.25. The Court further GRANTS the post-judgment interest at the statutory rate from date of judgment plus court cost. This is a FINAL ORDER. Any aggrieved party may exercise his or her right to appeal to the West Virginia Supreme Court of Appeals as provided for by the West Virginia Code. It appearing that nothing further remains in the instant case, the Clerk shall retire this matter from the Court's active docket. The Court directs the Circuit Clerk to enter the foregoing Order and to distribute attested copies of this Order to the self-represented parties and counsel of record.

CC: 1-16-14  
J. Marshall  
P. Sostaric  
N. Sostaric

Enter this 14 day of January, 2014.

  
MICHAEL D. LORENSEN, JUDGE  
TWENTY-THIRD JUDICIAL CIRCUIT

A TRUE COPY, ATTEST:

  
Clerk of the Circuit Court  
of Logan County, West Virginia  
By Helen H. Mann

GUARDIAN  MARR   
DOM  MH   
CIVIL  JUVENILE   
CRIMINAL  ADM   
ORDER BOOK 43  
PAGE 23 INITIAL MS  
DATE 1-16-14