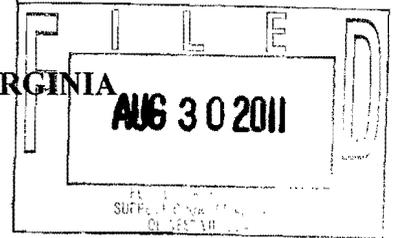


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0543



Tudor's Biscuit World of America, Inc.,)
Defendant Below, Petitioner,)
vs.)
Della M. Critchley,)
Plaintiff Below, Respondent.)
_____)

PETITIONER'S REPLY BRIEF

TUDOR'S BISCUIT WORLD OF
AMERICA, INC.

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I.

VOID JUDGMENTS VIOLATE DUE PROCESS PROTECTIONS

The Respondent suggests that even if a judgment is void, where there is an “untimely” challenge the trial court may ignore the voidness and affirm the judgment. Yet as *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010) makes clear, and as due process clearly requires,

“A void judgment, being a nullity, may be attacked, collaterally or directly, **at any time and in any court whenever any claim or right is asserted** under such judgment.” [Emphasis added.]

In the instant case, the Petitioner upon receiving notice of a writ of execution, with the purpose of executing on the Respondent’s judgment, sought to have the judgment vacated on the basis that it was void. The lower court clearly agreed that its judgment was void for insufficiency of service of process (Am. App. p. 70). However, the judgment that was indeed void for lack of personal jurisdiction was nevertheless upheld by the lower court. Rather than follow the direction in *Beane*, the lower court employed a timeliness standard which flies in the face of this Court’s ruling in *Beane*, and refused to set it aside.

A void judgment is not synonymous with an erroneous judgment. Even gross errors do not render a judgment void. *Matter of Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985). A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with due process of law. 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2862 (1995); see: *Combs v. Nick Garin Trucking*, 825 F.2d 437 (D.C. Cir. 1987); *Pacurar v. Hernly*, 611 F.2d 179 (7th Cir. 1979). A judgment is void if the rendering court was

without power to enter it; that is, if the court entered a decree “not within the powers granted to it by the law.” *United States ex rel. Wilson v. Walker*, 109 U.S. 258, 3 S.Ct. 277, 27 L.Ed. 927 (1883).

In *New York Life Ins. Co. v. Brown*, 84 F.3d 137 (C.A. 5 1996), the Fifth Circuit held that there is no discretion for the trial court where a motion to set aside a default judgment is based upon a void judgment. Further that a judgment is either void or it is not. If the judgment is void, there is no time limit on attacking the judgment. A judgment entered by a court without subject matter or personal jurisdiction is a “legal nullity” and may be vacated by the court, which rendered it at any time. *Pacurar v. Hernly*, 611 F.2d 179, 181 (7th Cir. 1979), citing 7 Moors Federal ¶ 60.25 [4] at 315 (2d ed. 1979). A judgment is void “if the court which rendered it lacked jurisdiction of the subject matter or of the parties...” *O’Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948 951 (7th Cir. 2000). A default judgment entered when there has been no proper service of a complaint is, a fortiori, void and should be set aside.

In *Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14 (C.A. 3d. 1985), the Third Circuit held that “A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect. In the interest of finality, the concept of void judgments is narrowly construed.” In *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (C.A. 1st, 1972), the First Circuit held that because the district court did not have personal jurisdiction over defendant, a Costa Rican entity, and the default judgment entered against defendant was therefore void, the district court had a nondiscretionary duty to grant relief from the judgment. See: *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa*

Rica, 614 F.2d 1247. (C.A. 9th, 1980). *Nature's First Inc. v. Nature's First Law, Inc.*, 436 F.Supp2d 368 (D.C. Conn. 2006). The result of a void judgment without relief is a denial of due process. *Rodrigues v. Genlyte Thomas Group LLC*, 392 F.Supp.2d 102 (D. Mass. 2005).

Due process requirements apply to all judgments in civil proceedings, and a judgment is void if the proceedings on which it was based were inconsistent with due process. The due process requirements of the federal and state constitutions apply to all judgments in civil proceedings. Due process of law is essential to a valid judgment. *See: In re Stephanie B.*, 826 A.2d 985 (R.I. 2003). Moreover, the validity of a judgment or order, for due process purposes, depends on whether the interested party has received notice and has been afforded an opportunity to defend against its entry. A judgment is void for want of due process where a court exceeded its jurisdiction, or acted without any judicial determination of the facts that can support the judgment. A default judgment rendered in violation of the defaulting party's due process rights is a legal nullity, and therefore, the proper disposition of the judgment is to vacate it. *First Nat. Bank of Telluride v. Fleisher*, 2 P.3d 706 (Colo. 2000).

Ordinarily, the decision whether to grant relief under Rule 60(b) is entrusted to the sound discretion of the trial court. *See: Front Range Partners v. Hyland Hills Metro.*, 706 P.2d 1279, 1281 (Colo. 1985); *Ehrlinger v. Parker*, 137 Colo. 514, 517, 327 P.2d 267, 269 (1958) (stating that the decision to grant relief under Rules 55(c) and 60(b) is subject to the discretion of the trial court and will not be disturbed absent an abuse of that discretion). If the surrounding circumstances indicate that the defaulting party's due process right was unfairly compromised by lack of notice of the default proceeding, then relief under 60(b) is mandatory. *See: Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998) (holding that under Fed. R. Civ. Pro. 60(b)(4) it is a

per se abuse of discretion for a lower court to uphold a void judgment); *V.T.A., Inc.*, 597 F.2d at 224 & n. 8 (“If voidness is found, relief is not a discretionary matter; it is mandatory.”); *Smalls v. Batista*, 22 F.Supp.2d 230, 231 (S.D. N.Y. 1998) (“[U]nlike other motions made pursuant to the other subsections of Rule 60(b), the court lacks discretion with respect to a motion made under Rule 60(b)(4). If void, the court must vacate the judgment.”); *United Nat’l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 907 F.Supp. 663, 668 (S.D. N.Y. 1995).

Relief under 60(b) is mandatory because a void judgment “is one which, from its inception, was a complete nullity and without legal effect.” *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972); *see, also, Weaver Constr.*, 545 P.2d at 1045 (“It is an elementary principle of due process that where [a default judgment is obtained without service of process] ... the underlying judgment must be vacated in the first instance, as a void judgment cannot be allowed to remain in effect...”) Consequently, in this proceeding there is no judgment the propriety of which a court can review and it has no choice as *Beane* dictates but to grant the motion to vacate the judgment. Accord: *Zikos v. Clark*, 214 W Va. 235, 588 S.E.2d 400 (2003).

II.

UNLIKE THE CASES CITED BY RESPONDENT, HERE, THE WRONG PARTY WAS SUED IN THE FIRST INSTANCE

What obviously makes this case unique and distinguishable from every case cited by Respondent is that in each of those cases the proper party defendant was named and attempted to be served. Here, as discussed in the Petitioner’s initial brief, Respondent sued the wrong party even after having successfully obtained a workers’ compensation claim against the proper party

defendant. This was a mistake by the Respondent, and any attempt to justify this glaring and obvious lack of elementary fact discovery before filing the action is difficult to ignore.

Curiously, not only was the wrong party named as a defendant, but the case was filed in the wrong court. The Raleigh County Circuit Court was not the proper venue for the action. West Virginia Code Section 56-1-1(a)(1) requires an action to be brought in the circuit court where any of the defendants may reside or the cause of action arose. The underlying cause of action arose in Fayette County and the Petitioner's principal office and chief officer's residence was in Cabell County. Inexplicably, the case was filed in Raleigh County, and since the Petitioner never received service of process, the Petitioner never had an opportunity to challenge venue.

Respondent argued to the lower court that the certified letters with copies of the default judgment rendered without jurisdiction sent by Respondent's counsel were sufficient to place Petitioner on notice of the judgment on September 30, 2004. Respondent argues that the Petitioner was then required to timely file a motion to set aside the void judgment or else the void judgment would become a valid judgment. The *Beane* case makes clear that parties against whom a void default judgment is entered may challenge it at any time. Here once the Respondent sought to enforce the judgment by issuing a summons in aid of execution, under *Beane*, and other cases cited above, the Petitioner still had the right to challenge the underlying judgment. Logic suggests that even if the Respondent had executed on the invalid judgment, Petitioner still could have challenged -- directly or collaterally -- the judgment.

Petitioner had no notice of the default or the default judgment and thus no opportunity to defend. Of course, in the instant action, the Petitioner had an absolute defense to

the Respondent's claims since she was never employed by the Petitioner nor injured on the Petitioner's premises (Am. App. p. 24). The lower court in refusing to set aside the default judgment effectively stripped the Petitioner of its most basic due process rights. This pivotal fact clearly distinguished the instant action from all cases cited by the Respondent in support of her argument that the Petitioner's action in seeking to set aside the default judgment were untimely and therefore must fall. As explained in the preceding section, the Petitioner could attack the judgment at any time, especially in view of the facts of the case.

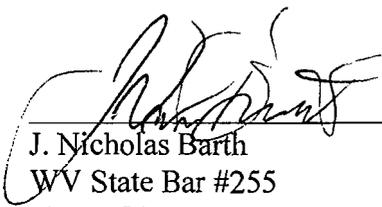
III

CONCLUSION

For the foregoing reasons, together with the reasons stated in Petitioner's Brief, the Petitioner, Tudor's Biscuit World of America, Inc., prays that this Court enter an order that reverses the Raleigh County Circuit Court Order Denying Defendant its Motion to Set Aside Default Judgment and the Raleigh County Circuit Court Order Denying Defendant's Motion to Alter or Amend Order entered on December 4, 2009, denying Defendant's Motion to Set Aside Default Judgment.

Respectfully submitted,

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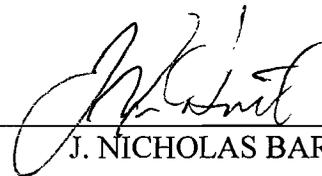
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CERTIFICATE OF SERVICE

I, J. Nicholas Barth, one of counsel for Petitioner, do hereby certify that the foregoing Reply Brief was served this 30th day of August, 2011, upon counsel for Respondent by mailing, postage prepaid, a true copy of the same, addressed as follows:

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J. NICHOLAS BARTH