

15-0151

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FILED

THE FIRST STATE BANK,

2014 OCT -7 A 9 46

Plaintiff,

v.

J.E. HOOD
CIRCUIT CLERK
CABELL CO. WV

Civil Action No. 13-C-415
(F. Jane Husted, Judge)

JEFFREY B. POWERS,

Defendant.

ORDER GRANTING MOTION FOR RELIEF JUDGMENT

Pending before this Court is Defendant's motion for relief from judgment. Having considered the written and oral submissions of the parties, the Court hereby GRANTS the motion.

The Court hereby finds and concludes as follows:

1. The civil complaint in this matter was filed on June 13, 2013. The complaint alleges that Defendant breached a contract with Plaintiff and seeks damages.
2. An "Agreed Order Confessing Judgment" was entered against Defendant on August 16, 2013, prior to any discovery or a decision on the merits.
3. By letter dated April 3, 2014, Defendant requested from Plaintiff copies of the contract at issue and other information related to the loan agreement and payments made. Plaintiff did not respond to this letter.
4. Defendant filed his motion for relief from judgment on May 5, 2014. At that time, Defendant noticed a hearing on the matter for July 11, 2014. Defendant also attached his proposed Answer, Affirmative Defenses, and Counterclaims.¹
5. Plaintiff filed its response to the motion on July 8, 2014.

¹ Defendant thereafter, and before the original Answer was filed, submitted his Amended Answer, Affirmative Defenses, and Counterclaims.

6. Defendant's motion was filed pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, which states:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to . . . set aside a judgment for fraud upon the court.

7. A motion made pursuant to Rule 60(b) is within the sound discretion of the circuit court. See Law v. Monongahela Power Co., 210 W. Va. 549, 555-56, 558 S.E.2d 349, 355 (2001). "A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W.Va.R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits." Id. at 555-56, 355-56 (quoting syl., pt. 6, Toler v. Shelton, 157 W. Va. 778, 204 S.E.2d 85, 86 (1974)).

8. Defendant's motion was filed less than one year after the date the contested order was filed. The motion was thus filed within a reasonable time.

9. Defendant first argues that the judgment should be set aside as void. Having considered the law at issue, the Court is of the opinion that the judgment is not void. As a result, relief from judgment is not granted pursuant to Rule 60(b)(4) of the West Virginia Rules of Civil Procedure.

10. Defendant also argues that relief from judgment is proper pursuant to Rule 60(b)(3) because the judgment was obtained as the result of Plaintiff's fraud, misrepresentation, and other misconduct. Namely, Defendant asserts that Plaintiff filed its complaint without attaching the alleged contract that the suit referred to, that if the contract exists it was obtained by fraud, and that the judgment itself was procured through false threats of criminal prosecution and imprisonment. Plaintiff disputes these allegations.

11. Defendant further argues that newly discovered evidence relating to the indictment and guilty plea of the loan officer at issue supports setting aside the judgment pursuant to Rule 60(b)(2). Plaintiff disputes these allegations.

12. At this time, the Court declines to rule conclusively on whether Plaintiff engaged in misconduct or fraud.

13. However, having considered the representations of the parties, the Court concludes that the circumstances surrounding the loan at issue at a minimum make the loan questionable. Because a decision on the merits is favored, the Court hereby concludes, within its sound discretion, that relief from judgment as justified pursuant to Rule 60(b)(6).

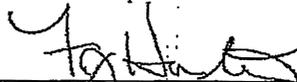
WHEREUPON, the Court hereby ORDERS as follows:

1. The Court hereby GRANTS the motion to set aside the judgment pursuant to Rule 60(b)(6) of the West Virginia Rules of Civil Procedure.
2. The Order dated August 16, 2013, is hereby set aside and declared null and void.
3. Defendant's Amended Answer, Affirmative Defenses, and Counterclaims shall be deemed filed and served concurrently with entry of this Order.
4. This matter will proceed in accordance with the scheduling order that will be entered by this Court.

The objections of Plaintiff are noted.

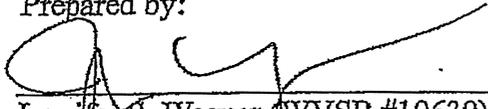
The Clerk is hereby directed to send a certified copy of this Order to all parties or their counsel of record.

Entered this 2nd day of October, 2014.



Honorable Jane F. Husted

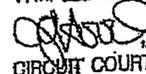
Prepared by:



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Clarksburg, WV 26301
(304)326-0188
(304)326-0189 (fax)
jennifer@msjlaw.org
Counsel for Defendant

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON: OCT 07 2014

GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS OCT 07 2014
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Reviewed as to form:

David Amsbary by JSW (10639) w/
David D. Amsbary, Esq. permission
Bailes, Craig & Yon PLLC
P.O. Box 1926
Huntington, WV 25720-1926
Counsel for Plaintiff

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15-0151

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THE FIRST STATE BANK,

2013 AUG 16 A 10:19

Plaintiff,

v.

J.E. HOOD CIVIL ACTION NO.: 13-C-415
CIRCUIT CLERK (Judge F. Jane Husted)
CABELL CO., WV

Jeffrey B. Powers,

Defendant.

AGREED ORDER CONFESSING JUDGMENT

On this 2nd day of July, 2013, came the Defendant, Jeffrey B. Powers, by counsel a David R. Pence and the law firm of Carter Zerbe Law Office, and the Plaintiff, The First State Bank, by counsel, Daniel T Yon, David D. Amsbary and the law firm of Bailes, Craig & Yon, PLLC, and announced to the Court that they have entered into an agreement, pursuant to West Virginia Code §56-4-48, and now do represent as follows:

1. On or about June 14, 2013, The First State Bank (hereinafter "Plaintiff"), alleged and filed herein a Complaint against Jeffrey B. Powers (hereinafter "Defendant") seeking to recover unpaid medical bills in the amount of Thirteen Thousand Ninety-eight Dollars Eighty-six Cents (\$13,098.86) plus interest, costs and attorney's fees.

2. The Defendant does desire and hereby wish to confess judgment upon said Complaint in the amount of Thirteen Thousand Ninety-eight Dollars Eighty-six Cents (\$13,098.86) in damages, plus One Hundred Seventy-five Dollars (\$175.00) in costs.

3. Plaintiff and Defendant have agreed that the judgment shall be paid by Defendant to Plaintiff's counsel. Defendant shall pay one payment of Eight Hundred Seventy-one Dollars Fifty-six Cents (\$871.56) within thirty (30) days of the date of this agreement. The remaining amount owed shall be made in monthly payments and shall occur on the second (2nd) day of each month, with the first payment due September 2, 2013 and shall be in the amount of Two Hundred Dollars (\$200.00) per month, by means of check, money order, debit card or credit



card until the total amount due, Thirteen Thousand Two Hundred Seventy-three Dollars Eighty-six Cents (\$13,273.86), plus interest is paid in full.

4. The parties agree that the validity of this Agreement is expressly conditioned upon the payment by the Defendant of the amounts set forth in Paragraph three (3) herein.

5. The Defendant specifically agree and understand that if payments are not made on time and the judgment is not satisfied in full, Plaintiff specifically reserves the right to file another complaint, execute a suggestion of personal property, and/or garnish wages, in its sole discretion.

Accordingly, Jeffrey B. Powers, having expressed to this Court a desire to confess judgment to the Complaint as brought by The First State Bank, it is ADJUDGED and ORDERED that judgment upon the Complaint brought herein by The First State Bank, against Jeffrey B. Powers is entered in favor of The First State Bank, and that this matter is DISMISSED from this Court's docket.

The Clerk of this Court is hereby directed to send a certified copy of this Order to the undersigned person and/or counsel.

Entered this 1st day of August, 2013.

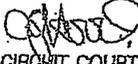

Honorable Judge F. Jane Hustead

ENTERED Circuit Court Civil Order Book
No. _____ Page _____ this

STATE OF WEST VIRGINIA
COUNTY OF CABELL

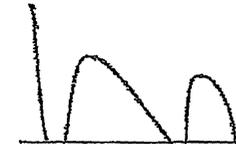
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON _____

GIVEN UNDER MY AND SEAL OF SAID COURT
THIS _____

 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

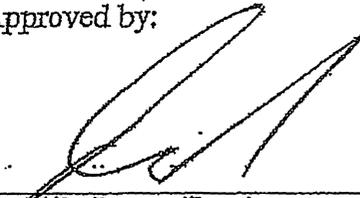
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Prepared by:

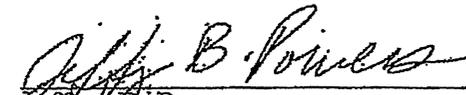


Daniel T. Yon, Esquire (WV 6139)
David D. Amstary, Esquire (WV 9968)
BAILES, CRAIG & YON, PLLC
Post Office Box 1926
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Counsel for Plaintiff

Approved by:



David R. Pence, Esquire
205 Capitol Street, Suite 500
Charleston, WV 25301
Counsel for Defendant



Jeffrey B. Powers
905 Wilson Street
Charleston, WV 25309
Defendant

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THE FIRST STATE BANK,

Plaintiff,

v.

CIVIL ACTION NO.: 13-C-415
(Judge F. Jane Hustead)

JEFFREY B. POWERS,

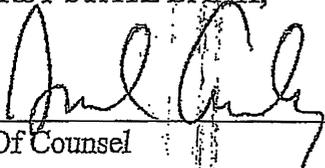
Defendant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he/she served the foregoing Response to Motion for Relief from Judgment on counsel named below via facsimile and by depositing a true copy thereof in the United States mail, postage prepaid at Huntington, West Virginia on the 8th day of July, 2014, addressed as follows:

Jennifer S. Wagner, Esq.
Bren J. Pomponio, Esq.
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, WV 25301
Facsimile - 304-344-3145

THE FIRST STATE BANK,

By: 

Of Counsel

Daniel T Yon, Esquire (WV 6139)
David D. Amsbary, Esquire (WV 9968)
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Facsimile - (304) 697-4714

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THE FIRST STATE BANK,

Plaintiff,

Civil Action No. 13-C-415

v.

JEFFREY B. POWERS,

Defendant.

MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Rule 60 of the West Virginia Rules of Civil Procedure, Defendant hereby moves to set aside the judgment entered in this matter on August 16, 2013. In support of said motion, Defendant states as follows:

Background

1. This suit was filed by The First State Bank on June 14, 2013. The Complaint asserts that Defendant owes Plaintiff an alleged debt. The Complaint states that documentation of the debt was attached thereto. In fact, unbeknownst to Defendant, Plaintiff did not file any such documentation or exhibit with the Complaint. (See Compl.; J. Powers Aff. ¶ 10, attached as Ex. A.) Further, despite multiple requests from Defendant, Plaintiff has repeatedly refused to provide Defendant with any documentation of the alleged debt. (J. Powers Aff. ¶¶ 2, 8, 10, 13, 15.)

2. On August 16, 2013, without any discovery or fact-finding, judgment was entered against Defendant for \$13,273.86—including \$175 in Plaintiff's "costs" that are prohibited under the West Virginia Consumer Credit and Protection Act (WVCCPA), W. Va. Code § 46A-2-127. (See Agreed Order Confessing Judgment.) Defendant authorized his counsel to consent to judgment as the result of conversations with Plaintiff in which Plaintiff threatened to take Defendant's property and falsely accused Defendant of committing bank fraud and threatened that he would be arrested

and criminally prosecuted. (J. Powers Aff. ¶¶ 5-11.) Defendant further authorized the consent judgment because he feared that he would not be able to pay the purported debt on the terms insisted upon by Plaintiff. (J. Powers Aff. ¶ 11.) At no point did Plaintiff provide any evidence supporting the allegations in its Complaint. (J. Powers Aff. ¶¶ 2, 8, 10, 13, 15.)

3. On February 18, 2014, Plaintiff's Vice President, Jackie Cantley, pleaded guilty in federal court as the result of an indictment on bank fraud and misallocation of bank funds. (See Indictment & Plea Agreement, Ex. B.) Mr. Cantley solicited and originated the purported loan at issue in the present matter.

4. After learning of said guilty plea, Defendant became suspicious regarding the facts and circumstances underlying the instant suit. (J. Powers Aff. ¶¶ 12-14.) As a result, Defendant mailed a letter to Plaintiff and Plaintiff's counsel on April 3, 2014, requesting documentation supporting the allegations in the Complaint, including a copy of the exhibit that the Complaint represents was attached thereto. Despite Plaintiff's and its counsel's receipt of said letter, Plaintiff has failed to provide any of the requested documentation evidencing the purported loan. (See Letter & Certified Mail Receipt, Ex. C; Powers Aff. ¶ 13.)

5. Defendant attaches here his Answer, Affirmative Defenses, and Counterclaims setting forth the facts and circumstances surrounding the alleged debt and raising several meritorious defenses to the suit, including that collection is barred by the WVCCPA, the purported debt is void because it was secured by fraud, that Plaintiff breached the contract, and that the instant suit is an instance of abuse of process. (See Ex. D.)

6. Defendant further asserts several meritorious Counterclaims, including that Plaintiff committed numerous violations of the West Virginia Consumer Credit Protection Act, as well as fraud, breach of contract, abuse of process, and malicious prosecution. (See Ex. D.)

7. Defendant requests that the judgment in this case be set aside to permit him to pursue his affirmative defenses and counterclaims, and to allow discovery and a decision on the merits in this matter. Relief from judgment is appropriate because the judgment is void; was secured by fraud, misrepresentation, and misconduct; and newly discovered evidence exists. See W. Va. R. Civ. P. 60(b).

8. Continued enforcement of the existing judgment, which requires Defendant to make thousands of dollars of payments to Plaintiff, is unjust, because the judgment is not supported by the evidence or the law. (See Powers Aff. ¶ 15.) Rather, it is in the interests of justice to allow full decision on the merits in this matter.

Standard of Review

9. Rule 60(b) of the West Virginia Rules of Civil Procedure sets forth numerous grounds pursuant to which a court may vacate a prior judgment, including discovery of new evidence, fraud or misconduct of the adverse party, and that the judgment is void.

10. A motion made pursuant to Rule 60(b) is within the sound discretion of the circuit court. See Law v. Monongahela Power Co., 210 W. Va. 549, 555-56, 558 S.E.2d 349, 355 (2001). "A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W.Va.R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits." Id. at 555-56, 355-56 (quoting syl. pt. 6, Toler v. Shelton, 157 W. Va. 778, 204 S.E.2d 85, 86 (1974)).

Grounds for Relief from Judgment

11. For the reasons that follow, relief from judgment to permit a decision on the merits in the instant matter is in the interests of justice.

12. First, relief from judgment is appropriate because the judgment is void. See W. Va. R. Civ. P. 60(b)(4). The WVCCPA prohibits confession of judgment "on a claim arising out of a . . . consumer loan." W. Va. Code § 46A-2-117. Pursuant to the provision, any authorization to confess judgment is deemed "void." Id. This provision protects consumers in exactly the circumstances in the instant matter, wherein Plaintiff never substantiated the purported debt and secured the confession of judgment by illegally threatening Defendant with criminal prosecution. Pursuant to the WVCCPA, Defendant could not have authorized David Pence to confess judgment on his behalf, and as a result the judgment is void. Relief from judgment is thus appropriate pursuant to Rule 60(b)(4).

13. Alternatively, the judgment should be set aside because of fraud, misrepresentation, or other misconduct of Plaintiff in this matter. See W. Va. R. Civ. P. 60(b)(3). As set forth in Defendant's Answer and Counterclaims, attached hereto, Plaintiff filed suit in this Court alleging that it had attached a writing that obligated Defendant on the terms set forth by Plaintiff. In contrast to Plaintiff's representations in the Complaint, no exhibit was attached thereto. Upon information and belief, Plaintiff has no such writing in its possession and the Complaint is based on misrepresentations to Defendant and this Court. If such writing does exist, it was obtained by fraud, given that Defendant has not signed or seen any documents related to the alleged debt. (See Powers Aff. ¶ 16.) Further, prior to filing the suit, Plaintiff threatened Defendant by falsely accusing him of bank fraud and imprisonment, and then refused to provide him with any evidence of the purported obligation. (See Powers Aff. ¶¶ 5-11.) Because of Plaintiff's misconduct, the judgment should be set aside and the claims should be decided on the merits after full investigation.

14. A third ground for relief from judgment exists because of newly discovered evidence that directly impacts this matter. See W. Va. R. Civ. P. 60(b)(2). Judgment was entered in the

instant matter on August 16, 2013. Thereafter, on September 25, 2013, the loan officer at issue in the present matter (and Plaintiff's Vice President), Jackie Cantley, was federally indicted on several counts of bank fraud and misallocation of bank funds. (See Indictment & Plea Agreement, Ex. B.) Thereafter, in February 2014, Mr. Cantley pleaded guilty to certain of the charges. (*Id.*) In regard to the present matter, Mr. Cantley solicited Mr. Powers and provided the funds to him without any documentation. (Powers Aff. ¶¶ 1-3.) Mr. Powers now believes that, as an agent of Plaintiff, Mr. Cantley likely misappropriated funds in relation to the funds provided to Mr. Powers and received from Mr. Powers, consistent with Mr. Cantley's criminal indictment and conviction. (Powers Aff. ¶ 14.) This evidence is clearly relevant to the validity and amount of the alleged debt in this matter. As the result of this newly discovered evidence, Defendant believes that there is a likelihood of success in defending the claims brought against him and is entitled to the judgment being set aside.

15. Finally, this Court is empowered to set aside a judgment for fraud on the court. W. Va. R. Civ. P. 60(b). Upon information and belief, Plaintiff committed fraud on the court by alleging that a loan was made to Mr. Powers and memorialized in writing, and by representing that it was attaching said evidence to its Complaint. In fact, it appears that no such writing exists and that Plaintiff's representations to this Court were false. If such writing does exist, it was obtained by fraud, given that Defendant has not signed or seen any documents related to the alleged debt. (Powers Aff. ¶ 16.) In order to protect the integrity of the judicial process, relief from judgment and investigation into Plaintiff's claims is appropriate.

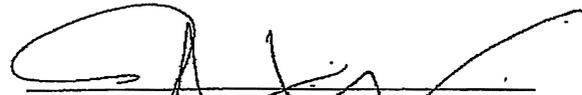
Conclusion

16. Relief from the judgment entered in this case is appropriate because, alternatively, the judgment is void, was obtained by fraud, misconduct, and fraud on the court, and/or new evidence has been discovered. Further, for the reasons alleged herein, it is in the interests of justice

to allow a decision to be reached on the merits.

WHEREFORE, Defendant respectfully requests that this Court grant his motion for relief from judgment and permit the attached Answer, Affirmative Defenses, and Counterclaims to be filed in this Court and Plaintiff's suit to be decided on its merits.

**Defendant,
JEFFREY B. POWERS,
By Counsel,**



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Bren J. Pomponio (WVSB #7774)
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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THE FIRST STATE BANK,

Plaintiff,

v.

CIVIL ACTION NO.: 13-C-415
(Judge F. Jane Husted)

JEFFREY B. POWERS,

Defendant.

RESPONSE TO MOTION FOR RELIEF FROM JUDGMENT

NOW COMES the Plaintiff, The First State Bank, by counsel David D. Amsbary, Daniel T Yon and the law firm of Bailes, Craig and Yon, PLLC and for its Response to Defendant's Motion for Relief of Judgment, respectfully requests that Defendant's Motion be denied because Defendant has failed to produce evidence of extraordinary circumstances sufficient to set aside the parties' Agreed Order Confessing Judgment, a final order entered by this Court on August 16, 2013. Specifically, Defendant has failed to meet his burden under Rule 60(b) of the West Virginia Rules of Civil Procedure which requires a demonstration of specific enumerated circumstances which justify the extraordinary remedy he has sought. Defendant has failed to demonstrate any such extraordinary circumstances and as such, his Motion for Relief of Judgment should be denied.

A. Procedural History

On or about February 3, 2012, Defendant issued a loan to Plaintiff in the amount of Fifteen Thousand Dollars (\$15,000.00). A copy of the Loan Application,

Promissory Note, Security Agreement, Notice of Final Agreement and Truth in Lending Extension Agreements, all executed by Defendant, are attached hereto as Exhibit A. On the same day, Mr. Powers was issued a check in the amount of Fifteen Thousand Dollars (\$15,000.00) which he endorsed and negotiated at another bank. See, Exhibit B. Having failed to make payments as required by the Note, and extensions thereto, Plaintiff initiated the above-styled action on or about June 14, 2013 to collect the outstanding balance of Thirteen Thousand Ninety-eight Dollars Eighty-six Cents (\$13,098.86) plus interest, costs, and attorney fees as provided for in the Note. A copy of correspondence providing Defendant the payoff information is attached as Exhibit C. Soon after service of the Complaint upon Defendant, Plaintiff was advised by Mr. David Pence and the Carter Zerbe Law Office that they had been retained as counsel by Mr. Powers. Rather than file an Answer and counterclaims or serve discovery, Mr. Powers and his counsel chose to deal directly with Plaintiff's counsel to resolve the rather routine collection matter in an expeditious fashion. An agreed payment plan, among other terms were reached and memorialized in an Agreed Order Confessing Judgment, executed by Mr. Powers himself, his counsel Mr. Pence and counsel for Plaintiff. The parties' Agreed Order Confessing Judgment was entered by this Court on August 13, 2013. See, Exhibit D attached hereto. From that date forward, the Defendant has forwarded payments toward satisfaction of this judgment to Plaintiff's counsel.

On or about April 3, 2014, Defendant forwarded correspondence to Plaintiff and Plaintiff's counsel requesting his loan documents, but also advised that he was represented by new counsel. Mr. Powers directed that all further communication be directed

to Jennifer S. Wagner of Mountain State Justice. On or about May 5, 2013, the instant Motion For Relief of Judgment was filed by Attorney Wagner wherein Mr. Powers has requested that the Agreed Order Confessing Judgment (hereinafter sometimes "Agreed Order") which he and his previous counsel negotiated, executed and caused to be entered with this Court in August of 2013, be set aside and that he be permitted a second opportunity to litigate this matter pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure.

B. Legal Authority

The subject Agreed Order Confessing Judgment is a final order that was not timely appealed by Mr. Powers or his counsel. Given that this Order was negotiated by the parties and entered by agreement, it is not surprising that neither party timely appealed the substance of the Order. Nevertheless, it is well established that collateral attacks on final orders by means other than timely appeals are disfavored. The West Virginia Supreme Court of Appeals has long held that the legal doctrine of *res judicata* is "properly asserted where a judgment on the merits, fairly rendered, by a court of competent jurisdiction, having cognizance of both the parties and subject matter, however erroneous it may be, is conclusive on the parties and their privies until reversed or set aside in a direct proceeding for that purpose and is not amendable to collateral attack. Hustead v. Ashland, 197 W.Va. 55, 66 (internal citations omitted) (1996).

The West Virginia Rules of Civil Procedure, Rule 60(b) provides the exclusive exception by which a final judgment may be set aside: upon a showing of extraordinary circumstances. Rule 60(b) provides, in pertinent part, as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . .

When any of the "extraordinary circumstances are absent, a collateral attack is an inappropriate means for attempting to defeat a final judgment in a civil action."

Syllabus Point 2. Hustead v. Ashland Oil, Inc., 197 W.Va. 55, 475 S.E.2d 55 (1996).

Whether relief is to be granted upon such motion is within the Court's discretion. The remedial purpose of this rule is to accomplish justice and to "facilitate the desirable legal objective that cases are to be decided on the merits." Toler v. Shelton, 157 W.Va. 778, 204 S.E.2d 85 (1974). While this rule is to be liberally construed, it is an extraordinary form of relief that is not to be liberally granted. As pointed out by Justice Cleckly:

"there is a significant disadvantage and tradeoff in proceeding under Rule 60(b). Rarely is relief granted under this rule because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted." Cox v. State, (footnote 5 of Justice Cleckly's concurring opinion.) 197 W.Va. 210, 460 SE2d 25 (1990).

It is worth noting, though not dispositive, that the vast majority of reported cases interpreting W.Va. R. Civ. P. Rule 60(b) address entry of judgments by default or summary judgment—not, as in this case, an Agreed Order Confessing Judgment executed by the Defendant.

Nevertheless, Defendant asserts that distinct extraordinary circumstances identified in Rule 60(b)(2), (3) and (4) exist which should compel this Court to set aside the

Agreed Order. First, he alleges that the Agreed Order is void as a matter of law and therefore unenforceable. Second, he alleges that the Order should be set aside because Plaintiff has committed fraud or misrepresentation in the procurement of the Agreed Order. Third, Defendant generally alleges that he should be given another opportunity to litigate this matter because he believes that newly discovered evidence may be inferred from statements culled from certain documents from the pending criminal prosecution of a former employee who originated his loan, but which make no reference to Defendant whatsoever. As set forth below, Defendant's Motion for Relief of Judgment fails to establish any grounds upon which the relief he seeks may be granted under Rule 60(b).

C. Argument

1. The Agreed Order Confessing Judgment should not be set aside because it is not void nor is it prohibited by the West Virginia Consumer Credit and Protection Act.

At Paragraph 12 of the Motion for Relief from Judgment, Defendant states the following:

First, relief from judgment is appropriate because the judgment is void. See W. Va. R. Civ. P. 60(b)(4). The WVCCPA [West Virginia Consumer Credit and Protection Act] prohibits confession of judgment "on a claim arising out of a ... consumer loan" W. Va. Code 46A-2-117. [Emphasis added.]

The relevant portion of the statute, cited in its entirety, states as follows:

A consumer may not authorize any person to confess judgment on a claim arising out of a consumer credit sale, consumer lease or a consumer loan. An authorization in violation of this section is void. The provisions of this section shall not be construed as in any way impliedly authorizing a confession of judgment in any other type of transaction. Id. [Emphasis added.]

Based upon the unambiguous language of this statute, it is clear that West Virginia Consumer Credit and Protection Act (hereinafter the "Act") does not provide for a blanket prohibition of confessions of judgment as Defendant has asserted. The Act prohibits consumers from authorizing others to enter into such agreements on the consumer's behalf. In the instant matter, Mr. Powers executed the Agreed Order on his own behalf. See, Exhibit D. Neither his attorney nor any other party executed this document on his behalf. Defendant's argument that the Agreed Order Confessing Judgment is void is unsupported by the law and completely without merit. Therefore, to the extent Mr. Powers asserts the Agreed Order should be set aside based upon an extraordinary circumstance of Rule 60(b)(4) by which a judgment may be set aside if void, the same should be denied.

2. The Agreed Order Confessing Judgment should not be set aside because Defendant has failed to produce any factual allegations of fraud or misrepresentation which he discovered after the entry of the same.

With respect W.Va. R. Civ. P. Rule 60(b)(3), the Supreme Court of Appeals of West Virginia has held "a judgment may be set aside for fraud or misrepresentation discovered after entry of judgment; fraud is defined as anything falsely said or done to the injury of property rights of another and consists of an intentional deception or misrepresentation to induce another to part with property or surrender some legal right and which accomplishes the end designed." Gerver v. Benavides, 207 W.Va. 228, 530 S.E.2d 701 (2000). [Emphasis added.]

In Paragraph 13 of Defendant's Motion for Relief from Judgment, Powers provides the basis for his fraud/misrepresentation argument. He alleges no loan document related to his debt was attached to the Complaint and therefore, it is possible no such loan

document exists. Secondly, he alleges that prior to the filing of the underlying suit "Plaintiff threatened Defendant by falsely accusing him of bank fraud and imprisonment, and then refused to provide him with any evidence of the purported obligation." *See*, Motion for Relief of Judgment, at Paragraph 13. While Plaintiff vigorously denies each of these slanderous assertions, the truth of any of such allegation is immaterial to the instant motion because none of the same are alleged to have been discovered after entry of judgment as required by Rule 60(b). Powers's own pleadings clarify that each instance of alleged misconduct he cites as instances of fraud or misrepresentation were known to him prior to his execution of the Agreed Order Confessing Judgment.

With respect to the failure of the undersigned counsel to attach the loan document to the Complaint, is difficult to understand how a mistake such as neglecting to attach an exhibit constitutes fraud or misrepresentation, particularly when the subject loan document was described in detail in the Complaint and specifically referred to as an exhibit. Notwithstanding this error, the loan documents do exist and are attached hereto as Exhibit A. Moreover, his signature is prominently displayed on each such document, as it is also present on the Agreed Order Confessing Judgment. Nevertheless, even if failing to attach the loan document to the Complaint, or any of the other above cited allegations did constitute fraud or misrepresentation, Defendant was well aware of each such fact or allegation well before he executed the Agreed Order and therefore the same does not and can not constitute grounds to set aside the Agreed Order under Rule 60(b)(3).

3. The Agreed Order Confessing Judgment should not be set aside because the conviction of Plaintiff's former employee for conduct not related to Defendant's failure to make timely payments pursuant to his loan agreement

is not newly discovered evidence which would constitute an extraordinary circumstance.

The last of three (3) alleged extraordinary circumstances upon which Defendant relies in his attempt to collaterally attack the Agreed Order Confessing Judgment is the purported existence of newly discovered evidence. Specifically, Defendant cites to the criminal matter pending against Plaintiff's former employee, Mr. Jackie Cantley. The matter is presently pending before The United States District Court, Southern District of West Virginia, Huntington and is styled United States of America v. Jackie Cantley, Criminal No. 3:13-cr-00245. See, Defendant's Motion for Relief of Judgment, Exhibit B.

Put simply, it is Mr. Powers's position that the mere existence of this criminal action against Mr. Cantley, who was the originating loan officer on his loan, without any more connection whatsoever, constitutes newly discovered evidence which he believes should be sufficient to relieve him from judgment in the underlying action and provide him the opportunity to re-litigate the underlying matter.

Upon review of the documents proffered by Mr. Powers in support of his Motion for Relief of Judgment, it is evident that neither he nor his loan is mentioned one time. See, Defendant's Motion for Relief of Judgment, Exhibit B. In fact, Mr. Powers fails to cite any new evidence to connect Mr. Cantley's criminal matter to his Agreed Order Confessing Judgment whatsoever. In Paragraph 14 of the Motion for Relief, Defendant states his case for relief under Rule 60(b)(4) as follows:

Based upon the attached Indictment and Plea Agreement, he] Mr. Powers believes that, as an agent of Plaintiff, Mr. Cantley likely misappropriated funds in relation to the funds he provided to Mr.

Powers and received from Mr. Powers, consistent with Mr. Cantley's criminal indictment and conviction.

This is not newly discovered evidence. This is speculation and innuendo which constitutes nothing more than a theory. This statement is certainly not an extraordinary circumstance with which to permit an extraordinary collateral attack on a final order entered by this Court.

It is clear that Defendant is seeking to take advantage of criminal conduct of another in which he is not a victim. Such a position is regrettable. To the extent these pleadings are the sole basis upon which Defendant asserts newly discovered evidence exists under Rule 60(b)(4), which appears to be the case, his Motion for Relief of Judgment should be denied as it is clear there is no newly discovered evidence which bears any relationship to Mr. Powers failure to honor the terms of a loan he procured from Plaintiff.

D. Conclusion

As set forth above, Defendant has failed to produce any sufficient facts, or even allegations to support his Motion for Relief of Judgment. Put simply, Mr. Powers executed a note and took certain loan proceeds. He failed to honor the terms of the note and was sued. Thereafter, with assistance of counsel he agreed to a payment plan, confessed judgment, and memorialized the same in an Agreed Order entered with this Court. The instant Motion is an attempt to relitigate a case which reached finality nearly a year ago. Though Mr. Power may now wish to avoid the obligation to which he agreed and allege a whole host of counterclaims against Plaintiff, that opportunity has long since passed. Therefore, for all of the reasons set forth herein, Plaintiff respectfully requests that

Defendant's Motion for Relief of Judgment be denied and that Plaintiff be awarded all costs and attorney fees associated with responding to the same.

THE FIRST STATE BANK,

By: _____

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