

11-0543

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

DELLA M. CRITCHLEY,  
Plaintiff,

v.

Civil Action No. 03-C-478-K

TUDOR'S BISCUIT WORLD  
OF AMERICA, INC.  
Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND ORDER FILED  
ON DECEMBER 4, 2009, DENYING DEFENDANT'S MOTION TO SET ASIDE  
DEFAULT JUDGMENT**

---

Presently before this court is the defendant Tudor's Biscuit World of America, Incorporated's Motion to Alter or Amend Order Filed on December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment. This motion was timely filed on December 18, 2009, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Counsel for both parties last appeared before this court at a settlement conference on September 8, 2010, after mediation attempts between the parties were unsuccessful. Attorney Ralph C. Young of the law firm Hamilton, Burgess, Young & Pollard, PLLC appeared for the plaintiff; attorney J. Nicholas Barth of the law firm Barth & Thompson appeared for the defendant. This settlement conference also proved to be fruitless and thus, the defendant's motion filed on December 18, 2009, remains mature for this court's determination. At the settlement conference, the defendant asserted that the recent decision of Beane v. Dailey, 226 W.Va. 445, 701 S.E.2d 848 (2010), which the West Virginia Supreme Court of Appeals decided on April 1, 2010, was applicable to this matter. After the unsuccessful settlement conference, the court afforded counsel time to submit memoranda of the defendant's original Motion to Alter or Amend Order Filed December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment, in

light of the newly issued Beane decision. The court has since received and reviewed submissions from both counsel.

Accordingly, the court has reconsidered the facts of this case and has consulted pertinent legal authorities, including the Beane decision and other decisions which the plaintiff has submitted to the court in support of her reply opposing the defendant's motion. Additionally, this court has revisited its previous Order Denying Defendant's Motion to Set Aside Default Judgment, entered on December 4, 2009. Based upon these deliberations, the court is constrained to **DENY** the defendant's Motion to Alter or Amend Order Filed on December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment. The reasons for this ruling are fully discussed hereinafter in this opinion order.

### ***Case Facts and Procedural History***

Due to this case's lengthy history and unique circumstances, the court shall carefully lay out the facts most pertinent to the pending motion.<sup>1</sup> The plaintiff initiated this case by filing suit against the defendant on June 10, 2003, by serving her complaint upon the West Virginia Secretary of State, pursuant to West Virginia Code §31D-5-504(c). Subsequently, the Secretary of State attempted to transmit the suit papers to John B. Tudor, president and registered agent for the defendant corporation, by certified mail. The Secretary of State attempted delivery of the plaintiff's complaint twice, once on June 18, 2003, the other on June 28, 2003. Both deliveries were returned to the Secretary of State's office as "unclaimed." Notwithstanding this result, along with the

---

<sup>1</sup> The court shall only summarize the facts pertinent to the delivery and service of the plaintiff's summons and complaint. It shall dispense with a discussion of the underlying facts that caused the plaintiff to initiate suit against the defendant.

plaintiff's Motion for Default Judgment, the plaintiff's attorney submitted an affidavit providing that the defendant was "duly served with process by a true copies [sic] of the Plaintiffs' [sic] Complaint and Summons being served upon the West Virginia Secretary of State on the 12<sup>th</sup> day of June, 2003." Upon this motion and accompanying affidavit, consequently, on August 8, 2003, the court granted the plaintiff's motion for a default judgment. No award of damages was ordered yet at this time.

The hearing on damages did not occur until years later. The record shows that the plaintiff, by her counsel, mailed a certified letter to John B. Tudor at his residence in Huntington, West Virginia, on September 29, 2004, informing him of the court's order granting the plaintiff default judgment. Included in this letter was the note that the order of default judgment was enclosed and that, "Before I set this matter for trial on damages, I would like to give you the opportunity to settle this claim. If you have any interest in that regard, kindly have your attorneys contact me immediately." This letter was signed by the plaintiff's attorney, Ralph C. Young. The receipt of this letter was signed for, and accepted by, Lydia Tudor, John B. Tudor's wife. A copy of this letter was also sent to the defendant's corporate address, in Huntington, West Virginia, which James Heighton, corporate accountant for the defendant, signed for and accepted. Both copies of these letters, with certified mail receipts signed by Ms. Tudor and Mr. Heighton, are included in the court file:

Having heard no response or finding any other appearance by the defendant in court, the case moved forward. On February 23, 2006, the court held the hearing on damages. Present at this hearing was the plaintiff with her counsel. The defendant did not appear in person or by counsel. At the conclusion of this hearing, the court awarded

the plaintiff damages for the default judgment in the sum of \$264,776.00, and an Abstract of Judgment was issued in said amount. Thereupon, another gap occurs in the history of this case. The defendant contends that it was not apprised of the judgment until September 30, 2009. The defendant subsequently filed its Motion to Set Aside Default Judgment on October 16, 2009. The court heard argument by the parties, took the matter under advisement, and issued a written ruling, *i.e.*, its Order Denying Defendant's Motion to Set Aside Default Judgment, entered on December 4, 2009.

In its Motion to Set Aside Default Judgment under Rule 55(c) of the West Virginia Rules of Civil Procedure, the defendant's primary argument was that because it did not receive proper service of the plaintiff's initial summons and complaint, the default judgment against it should be set aside. Pursuant to West Virginia Code §31D-5-504(c), as applied in Syllabus Point 2 in the case of Burkes v. FasChek Food Mart, Inc., 217 W.Va. 291, 617 S.E.2d 838 (2005), service of process upon a corporation through the Secretary of State is insufficient when the registered or certified mailing is neither accepted nor refused by an agent or employee of the corporation. As such, because further review of the instant case revealed that the initial suit papers were returned as "unclaimed," this court held that the plaintiff's service of process was indeed insufficient. As a result, it found that the default judgment it entered was void.

Notwithstanding this finding, however, the court continued its analysis by considering (1) whether a "reasonable time"<sup>2</sup> had passed before the defendant took action, and (2) the four factors set forth by the West Virginia Supreme Court of Appeals

---

<sup>2</sup> The statutory language of Rule 60(b) directs courts to consider whether a motion to set aside default judgment was made "within a reasonable time" when based on subsections (4), (5), or (6) of the Rule.

in the case of Parsons v. Consolidated Gas Supply Corp., 163 W.Va. 464, 256 S.E.2d 758 (1979), for reviewing motions to set aside default judgments. After this further consideration, the court found that although service was insufficiently obtained against the defendant, the defendant had knowledge of the suit and default judgment in 2004,<sup>3</sup> but failed to act until 2009. The court found that this five-year delay was not a reasonable length of time. It further engaged in an analysis of the Parsons factors, finding that considerations weighed against granting the defendant's motion to set aside the default judgment. Accordingly, the court upheld its Order granting default judgment to the plaintiff, and entered the December 4, 2009 Order Denying the Defendant's Motion to Set Aside Default Judgment.<sup>4</sup>

Now before this court, as previously introduced, the defendant appends the Beane opinion to its December 18, 2009 motion to alter or amend this prior judgment of the court, in accordance with Rule 59(e) of the West Virginia Rules of Civil Procedure. The court has reconsidered the pending motion, in light of the Beane case. Additionally, it has reviewed the plaintiff's response to the defendant's briefing of Beane and again

---

<sup>3</sup> The record contains a document in which someone in the defendant corporation made an informal note on October 4, 2004, denying that the plaintiff was an employee of the corporation. The court directly quoted this note in its Order addressing the defendant's Motion to Set Aside Default Judgment.

<sup>4</sup> The court briefly revisits here the issue of proper party defendants. In its prior ruling, the court addressed the possibility of prejudice to the plaintiff if she needed to bring this suit against a different party instead. However, upon further review, this court finds that this issue would not impair this case from moving forward. Under the general principles of agency theory, the court does not find that the plaintiff was unreasonable in bringing her suit against this defendant, rather than a franchisee operating under the name of KOR, Incorporated. As discussed in the Oregon case of Miller v. McDonald, 150 Or.App. 274, 945 P.2d 1107 (1997), it is reasonable for a party to bring suit against a franchisor, rather than a franchisee, when the relationship between the franchisor and the franchisee is such that the plaintiff places reliance on the public perception of the franchisor's name and operation.

scrutinized the supporting statutory and case law inclusive in its prior order. As a result, the court must again deny the defendant's Motion to Alter or Amend Order Filed on December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment, for the reasons discussed below.

***Standard of Review***

The court is mindful of the standard of review upon which it must evaluate this case. Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, the defendant has filed a motion to alter or amend the court's previous order denying to set aside default judgment against it. Upon such a motion to alter or amend a judgment, the standard of review applicable is that which was applied to the underlying judgment from which the motion is based. Wickland v. American Travellers Life Ins. Co., 204 W.Va. 430, 513 S.E.2d 657 (1998). Because the underlying judgment from which the defendant makes this pending motion was based on a motion to set aside default judgment under Rule 55(c) of the West Virginia Rules of Civil Procedure, the court shall once again utilize this same process in reviewing the present motion.

Upon a motion to set aside a default judgment, pursuant to Rule 55(c) of the West Virginia Rules of Civil Procedure, "for good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." In further dissecting this standard, the court remains cognizant of the following as pertains to "good cause":

In addressing a motion to set aside a default judgment, "good cause" requires not only considering the Parsons factors, but also requires a showing that a ground set out under W.Va. R. Civ. P. 60(b) has been satisfied; under the West Virginia Rules of Civil Procedure, there is a necessity to show some excusable or unavoidable cause.

Hardwood Group v. Larocco, 219 W.Va. 56, 631 S.E.2d 614 (2006). Accordingly, in consulting Rule 60(b), a court may “relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons. . .” after which the Rule lists six acceptable reasons under this motion. Of the six, the fourth item provides that a judgment may be set aside if the judgment is void. Following the six reasons under such a motion, the language of Rule 60(b) continues with the guidance, “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.”

The court recites here the Parsons factors for consideration under Rule 55(c): (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; (4) the degree of intransigence on the part of the defaulting party; and (5) the reason for the defaulting party’s failure to timely file an answer. Hardwood, supra. In essence, the movant requesting the court to set aside a default judgment must show good cause for his or her failure to act in a timely manner. Intercity Realty Co. v. Gibson, 154 W.Va. 369, 175 S.E.2d 452 (1995). Whether such good cause is addressed is ruled by the sound discretion of the court. Watch Co. v. Atlas Container, Inc., 156 W.Va. 52, 190 S.E.2d 779 (1972).

### **Beane Case**

The defendant argues that the Beane decision compels this court to set aside the default judgment. In Beane, the plaintiff brought suit for personal injuries from an automobile accident that occurred in 2000. Beane v. Dailey, 226 W.Va. 445, 701 S.E.2d 848 (2010). The summons for this suit was served at the defendant’s mother’s

home on April 10, 2003, in Dunbar, West Virginia. Id. The defendant's mother, Cheryl Dailey, accepted the summons for the action against her son. Id. However, no answer was filed. Id. Consequently, the plaintiff filed a motion for default judgment, asserting that proper service of both the summons and complaint had been made upon the defendant. Id. The circuit court granted the order of default to the plaintiff on June 22, 2003, and subsequently, on January 8, 2008, it awarded the plaintiff damages in the amounts of \$449.86 and \$1,600.00. Id. On April 25, 2008, the defendant filed an appeal with the West Virginia Supreme Court of Appeals, contending that he had no knowledge of any of the proceedings against him in this action and moved for the judgment to be set aside.<sup>5</sup> Id. at 447, 701 S.E.2d at 850.

Upon appellate review of Beane, the West Virginia Supreme Court of Appeals initially reviewed the standards of review necessary for determining whether a motion for default judgment should be set aside, pursuant to Rule 55(c) of the West Virginia Rules of Civil Procedure. Id. at 447, 701 S.E.2d at 850. Under these standards, the Court reiterated that a reviewing court must consider the factors set out in Syllabus Point 3 of Parsons v. Consolidated Gas Supply Corp., 163 W.Va. 464, 256 S.E.2d 758 (1979), and any ground for relief under Rule 60(b) of the West Virginia Rules of Civil Procedure. Id. However, once the Court determined that the plaintiff's service of process for this suit was insufficient, it found it unnecessary to consider the factors it

---

<sup>5</sup> In its opinion, the Court notes that rather than directly appealing this matter, a litigant's better practice would have been to file an initial motion to the circuit court to set aside the default judgment, pursuant to Rules 55(c) and 60(b) of the West Virginia Rules of Civil Procedure. Because the defendant was acting *pro se*, however, the Court proceeded to hear this matter on appeal under the standards it would have employed had the defendant filed such a motion with the circuit court and the circuit court had denied it. Id. at 447, 701 S.E.2d at 850.

outlined in the Parsons decision. Id. It held that the plaintiff improperly followed the requirements of notice and service of suit under Rule 4(d)(1)(A) and (B) of the West Virginia Rules of Civil Procedure, which sets forth service for defendants named individually. Id. Under Rule 4(d)(1)(A) and (B), personal or substitute service of a suit must be made by delivering a copy of the summons and complaint to the individual personally or at the individual's dwelling to a member of that individual's family over the age of sixteen years old. Id. at 448, 701 S.E.2d at 851. Here, the Court reviewed that only the summons was delivered to the defendant's mother. Id. The Court also found that the defendant was not residing with his mother at her home. Id.

In making these findings, the Court also highlighted that "[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." Syllabus Point 2, Beane, supra (quoting Syllabus Point 3, State ex rel. Vance v. Arthur, 142 W.Va. 737, 98 S.E.2d 418 (1957), Syllabus Point 3, State ex rel. Lemley v. Roberts, 164 W.Va. 457, 260 S.E.2d 850 (1979), *overruled on other grounds by* Stalnaker v. Roberts, 168 W.Va. 593, 287 S.E.2d 166 (1981), Syllabus Point 5, State ex rel. Farber v. Mazzone, 213 W.Va. 661, 584 S.E.2d 517 (2003)). Explaining further that void judgments include those made on a defective service, the Court also held, "[a] default decree upon a defective substituted service of process is void for want of jurisdiction." Syllabus Point 3, Beane, supra, (quoting Syllabus Point 4, Jones v. Crim & Peck, 66 W.Va. 301, 66 S.E. 367 (1909)). Because the plaintiff improperly served suit upon the defendant, the Court found the circuit court did not have proper jurisdiction over the defendant and therefore, its order granting default judgment to the plaintiff was void. Id. at 452, 701 S.E.2d at 855. The

Court did not provide further analysis beyond the initial finding that would shed light on the timeliness factor pertaining to the present defense motion.

***Plaintiff's Counterarguments to Beane***

In response to the defendant's application of the Beane decision to this case, the plaintiff highlights a distinction between her case and the Beane case. In Beane, there was no evidence that the court could rely upon to find that the defendant ever had either constructive or actual knowledge of a suit against him. In the instant case, however, the plaintiff reminds the court of substantial evidence which charges the defendant with the knowledge of a pending suit against it. Additionally, the plaintiff asserts that although Beane held that void judgments may be attacked at any time, the court must further consider whether the defendant's motion was made within a reasonable time, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. She argues that timeliness was not argued or discussed in the Beane decision, but even if timeliness were considered, it would not have been an issue; in Beane, the defendant's delay in action had been a matter of mere months,<sup>6</sup> whereas in the instant case, the defendant's delay was over a span of five years. She further supports this assertion with the Court's decision in Evans v. Holt, 193 W.Va. 578, 457 S.E.2d 515 (1995), which this court cited in its previous Order. The plaintiff additionally argues that timeliness is a concern of the Court by citing other cases, including Dierkes v. Dierkes, 165 W.Va. 425, 268 S.E.2d 142 (1980). Finally, the plaintiff couples her timeliness argument with the West Virginia Supreme Court of Appeals's guidance in Walker v. Doe, 210 W.Va. 490, 558 S.E.2d

---

<sup>6</sup> The circuit court entered its default judgment order award on January 8, 2008, and as a result of this order, the defendant filed his appeal to the West Virginia Supreme Court of Appeals on April 25, 2008.

290 (2001), which discusses the precedential value and weight of syllabus points of a signed opinion, as compared to the guidance of syllabus points in a per curiam opinion. She argues that because the Beane decision was issued per curiam, rather than as a signed opinion, the Syllabus Point asserting that void judgments “may be attacked at any time” did not extend to the Court’s prior ruling that circuit courts have the duty to analyze timeliness under Rule 60(b).

The court cited Evans v. Holt, 193 W.Va. 578, 457 S.E.2d 515 (1995) in its previous order, but did not discuss its facts. In Evans, the plaintiff sued two defendant parties, an individual in his own capacity and a business entity. Absent an answer from the defendant business entity, the trial court granted the plaintiff’s motion for default judgment. Id. at 582, 457 S.E.2d at 519. This same day, the court held a hearing on the issue of damages, and entered a judgment for an award of \$1,058,240.00, plus pre-judgment and post-judgment interest. Id. The defendant did not receive proper notice of either the motion for default judgment or the writ of inquiry. Id. The defendant did not become aware of the default judgment against it until its insurance company received a certified letter informing the insurer of the judgment. Id. at 587, 457 S.E.2d at 524. Within a month after receiving notice of the default judgment through communication with its insurer, the defendant filed its motion to dismiss or set aside the default judgment. Id. The circuit court denied this motion. Id.

Upon appellate review of Evans, the West Virginia Supreme Court of Appeals held that the defendant had not been properly served with process because the plaintiff did not comply with any of the methods of service of process proscribed by West Virginia Code §56-3-31. Id. at 587, 457 S.E.2d at 524. As such, the Court held that the

default judgment that the circuit court had rendered against the defendant was void for lack of jurisdiction. Id. Upon this finding, the Court held that the defendant met the specific requirement of Rule 60(b)(4) of the West Virginia Rules of Civil Procedure, and thus, the only other requirement it needed to meet for the default judgment to be properly set aside was that the motion for relief had to be filed “within a reasonable time,” as proscribed by Rule 60(b) of the West Virginia Rules of Civil Procedure. Id. The Court found that the one-month time frame in between the defendant receiving notice of the default judgment damage award and when it filed to set aside the default judgment was certainly within a “reasonable time.” Id. Accordingly, the Court reversed and remanded the circuit court’s decision. Id.

The plaintiff additionally uses the Dierkes case simply to illustrate that the West Virginia Supreme Court of Appeals has held that a party’s failure to take prompt action bars the party from a right to pursue setting aside a judgment. This case was a domestic action. The plaintiff husband had improperly served the defendant wife with divorce papers. Dierkes v. Dierkes, 165 W.Va. 425, 268 S.E.2d 142 (1980). As a result, the circuit court ruled that the judgment of the divorce decree was void. Id. at 426, 268 S.E.2d at 141. On appellate review of Dierkes, the West Virginia Supreme Court of Appeals remanded the decision to the circuit court for further inquiry as to whether the wife had had actual knowledge that her former husband had obtained a divorce from her. Id. at 430, 268 S.E.2d at 146. The Court held that if “facts constituting laches are proven, a complaining party may be denied the right to proceed against a [divorce] decree because of the failure to take prompt action.” Id.

Lastly in her response, the plaintiff directs the court's attention to the fact that Beane was issued as a per curiam decision, rather than as a signed opinion. In doing so, she cites the case of Walker v. Doe as guidance on how circuit courts and attorneys should consult the weight of authority given in each kind of opinions. The court is familiar with this case and recaps its pertinent points here. According to Walker,

Per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases.

Syllabus Point 3, Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001). Additionally, the court notes Syllabus Point 2 of this opinion, "This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." Walker, supra.

***Application of Beane, Evans, and Other Case Law to the Instant Facts***

In revisiting this case, the court cannot ignore the following facts: (1) The plaintiff's service of summons and complaint to the defendant was insufficient, therefore the default judgment entered was void; (2) Documents indicate that the defendant had actual knowledge of the default judgment rendered against it; and (3) The defendant did not act upon this knowledge until five years later. The court recognizes that the plaintiff's insufficient service of process upon the defendant voided the judgment at the outset of this action. However, applying the syllabus points solely from Beane would overlook the fact that although the defendant had actual knowledge of the default judgment, it did not act upon such knowledge until much later. Applying Beane without taking this into consideration would also neglect the statutory language of the Rule

60(b) timeliness requirement. Indeed, this court clearly perceives that the West Virginia Supreme Court of Appeals has engaged in analysis of timeliness before when deciding whether a default judgment should be set aside, as illustrated in the Evans decision.<sup>7</sup>

The court must reconcile the statutory and case law with the facts before it in this case. Notwithstanding the Beane opinion, the court must further analyze the timeliness requirement under Rule 60(b) in making this decision, in accordance with the Evans case.<sup>8</sup> Although it notes the Court's findings in Dierkes, the court's focused concentration in its analysis here shall center on Evans. Like Evans, the plaintiff here also improperly served the defendant with the suit papers. Furthermore, in Evans, the plaintiff obtained a default judgment from the circuit court, and following that judgment, obtained a monetary award from the court. The similarities between Evans and the instant case continue to persist beyond those analogous facts. As in Evans, the defendant here proceeded by way of a motion to set aside the default judgment against it. And, as discussed, on appellate review, the West Virginia Supreme Court of Appeals found that the plaintiff's improper service upon the defendant rendered the default judgment void. Similarly, this court found that its prior default judgment order against

---

<sup>7</sup> And, as this court discusses in a later footnote, the decision in Leslie Equipment Co. v. Wood Resources Co., 224 W.Va. 530, 687 S.E.2d 109 (2009)

<sup>8</sup> The court notes here that in its prior Order Denying Defendant's Motion to Set Aside Default Judgment, it discussed the decision of Leslie Equipment Co., v. Wood Resources Co., 224 W.Va. 530, 687 S.E.2d 109 (2009) (formerly cited as -- S.E.2d --, 2009 WL 3517682) as applicable case law. The Court in Leslie Equipment, by way of a signed opinion of Justice McHugh, cited its prior finding in Evans that, "a movant seeking relief under Rule 60(b) of the West Virginia Rules of Civil Procedure must show that the judgment sought to be vacated is void and that the motion to vacate the judgment was filed within a reasonable time period." Leslie Equipment at 534, 687 S.E.2d at 114 (quoting Evans at 587, 457 S.E.2d at 524). Although this quote from Evans was not a syllabus point, the Court made this Syllabus Point 5 in Leslie Equipment.

the defendant here was also void. Nevertheless, it followed the principles set down by the West Virginia Supreme Court of Appeals in its Evans decision.<sup>9</sup> After finding that the default judgment was void in Evans, the Court continued its analysis and engaged in determining whether the defendant made its motion within a reasonable time, pursuant to the language of Rule 60(b) of the West Virginia Rules of Civil Procedure. This court also engaged in analyzing timeliness, as discussed in its prior order.

As it analyzed in its previous order, because it charged the defendant with knowledge of the lawsuit in 2004, it found that the five-year delay in its filing to set aside the default judgment was outside the “reasonable time” requirement of Rule 60(b). Even if the defendant showed no indication of knowledge of this suit until after 2004, but before 2009, this court would have still been compelled to engage in analysis of the “timeliness requirement” under Rule 60(b). As it is, however, the court cannot ignore the facts in the record that indicate that the defendant had knowledgeable opportunities to act upon the default judgment against it before 2009, but failed to do so.<sup>10</sup> This knowledge is a clear distinction from Evans, where neither party could show the defendant’s knowledge of the suit until notification was sent to the defendant’s insurance company.

The court also revisits the case of Crowley v. Krylon Diversified Brands, 216 W.Va. 408, 607 S.E.2d 514 (2004) cited in its previous opinion. In this case, the court cited a holding made by the West Virginia Supreme Court of Appeals to support its

---

<sup>9</sup> Proceeding to analyze in this fashion also followed suit of the Court’s Leslie Equipment decision.

<sup>10</sup> Rather than reciting its prior analysis here on this issue, the court directs the parties to refer to the court’s prior order.

finding that service upon the defendant corporation was insufficient in the instant case.<sup>11</sup> Now, in addition, the court couples its ruling with dicta in the Crowley opinion, provided in Footnote 3: Although service on a defendant may be found insufficient, a plaintiff who has acted in good faith to provide proper service on a defendant has standing to assert that the defendant corporation that has failed to follow statutory requirements should be estopped from asserting insufficiency of process, the statute of limitations, or other defense arising from insufficient process.

In the same vein, the court finds that this sentiment is applicable to the circumstances of the instant case. In Crowley, although the Court found that service against the defendant was insufficient, by this footnote, it observed that it would be affected by the position of a plaintiff who asserts that a defendant is estopped from asserting particular defenses if the defendant did not adhere to certain statutory requirements. The Court also advises in this footnote that such a matter should be considered in balancing the equities of circumstances. Here, the plaintiff asserts that the defendant should be held responsible for failing to act upon the knowledge of the suit and judgment against it until several years later. Similarly, this court must give weight to these actions by the defendant in evaluating the circumstances of this case as a whole.

Lastly, as explained, the court cannot ignore the three aforementioned pertinent facts. In doing so and in reviewing Beane, it agrees with the plaintiff that the Court did not eliminate the timeliness requirement under Rule 60(b). Although Beane provides an explanation as to why analysis of the Parsons factors is unnecessary, it does not

---

<sup>11</sup> The court notes that the appeal of this case was based on the circuit court's refusal to set aside default judgment.

provide an explanation for any stance on analyzing timeliness. Inasmuch, it also does not expressly overrule Evans or Leslie Equipment. As explained in Walker, the syllabus points in a per curiam decision illustrate the use of prior syllabus points for a different set of facts. The court believes the syllabus points in Beane do just that for the defendant in that case, but do not provide new law that would affect the instant case.<sup>12</sup> The court understands that given the lengthy history of this case, accompanied by its multiple layers of facts, the parties have performed in the manners most appropriate in their positions at this juncture. Nevertheless, the court must bring closure to this case, and under the circumstances presented, finds that this is the most judicious resolution in accordance with the law.

**WHEREFORE**, it is hereby **ORDERED, ADJUDGED, and DECREED** that:

1. The defendant's Motion to Alter or Amend Order Filed on December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, is **DENIED** and

---

<sup>12</sup> The court notes that Beane attributes great weight to the fact that the default judgment is void because of lack of personal jurisdiction. In finding lack of personal jurisdiction, it subsequently finds it unnecessary to engage in analyzing the Parsons factors or the rest of Rule 60(b) as it pertains to timeliness. However, the default judgments in Evans and Leslie Equipment were also set aside as void for lack of personal jurisdiction, and both due to insufficient service of process. Yet, the Court in both of those cases continued to analyze the issue of timeliness. The court would better understand the absence of analyzing timeliness and the Parsons factors, perhaps, if the default judgment was set aside on the basis of one of the other five reasons under Rule 60(b). In such a case, there would at least be a clearer distinction as to why timeliness was not included in its analysis.

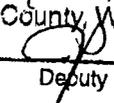
2. The court's Order, entered on December 4, 2009, Denying the Defendant's Motion to Set Aside Default Judgment shall remain undisturbed.

This is a Final Order. The defendant's exceptions and objections to this order are preserved for the possibility of review by the West Virginia Supreme Court of Appeals.

The Circuit Clerk shall direct attested copies of this order to counsel of record: (1) attorney Ralph C. Young and (2) attorney J. Nicholas Barth.

ENTER this Order this the 1<sup>st</sup> day of March, 2011.

  
JUDGE

The foregoing is a true copy of an order entered in this office on the 1 day of Tues March, 2011.  
PAUL H. FLANAGAN, Circuit Clerk of Raleigh County, West Virginia  
By:   
Deputy