

12-0130

J. Campbell

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

GLEN POE,

Plaintiff,

v.

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JEFFERSON COUNTY
CIRCUIT CLERK

Civil Action No. 08-C-223

JAMES P. CAMPBELL, ESQ.,
CAMPBELL MILLER ZIMMERMAN, PC,
ANDREW N. RICHARDSON, STEVEN FOSTER,
FOSTER-HERZ, INC.,
WOODSTAR HOLDINGS, LLC,
210 WEST LIBERTY HOLDINGS, LLC

Defendants.

ORDER DENYING CAMPBELL'S AND FOSTER'S MOTION TO ALTER OR
AMEND THE COURT'S JUDGMENT ORDER

Defendant Campbell and Defendant Foster moved this Court for an Order to alter or amend its Judgment Order finding these Defendants liable on a Promissory Note which they admittedly executed as guarantors. It appears to the Court that once again these Defendants shift positions, claiming lack of due process among other perceived "error", and now argue that this Court should set aside its Judgment Order enforcing a note drafted by James Campbell, executed by Campbell and Foster, acted upon by the Plaintiff and for which Campbell and Foster had begun making payments in 2008. In support of its Order, the Court finds as follows:

- Since the beginning, these two Defendants **ADMITTED**, in their answers as follows: "Defendants James Campbell and Foster personally guaranteed performance under the Note. See Exhibit 'A' at 1."
- Mr. Foster, a long standing 'business' partner of Campbell, when it suited his purpose told the Bankruptcy Court as follows:
Q: Did you guarantee the note?
A. **I certainly did.**

- Foster and Campbell assured a Bankruptcy Judge that they were guarantors on the Note at a time when Foster and Campbell were seeking to re-organize 210 West Liberty as their guarantee would assure that outcome. That Court found that Campbell had engaged in “gross mismanagement” of the assets of 210 West Liberty.
- These Defendants in pleadings stated unequivocally that they “personally guaranteed performance under a Note.”
- Then these Defendants insisted on a jury trial regarding the issue of whether Mr. Campbell’s efforts at excluding a signature line for Lou Athey rendered Campbell’s and Foster’s admissions to this Court and assurances to the Bankruptcy Court null and void.
- The Note, as drafted by attorney Campbell, actually provides for Campbell’s and Foster’s continuing legal obligations to pay on the Note regardless and independent of whether Athey or anyone else executed or failed to execute on the Note:

Maker and all endorsers, guarantors, and other parties primarily and secondarily liable on this Note, if any, each hereby waive an and all lack of diligence or delays in collection or enforcement hereof and consent that the maturity hereof may be extended without notice, and **each expressly agrees to remain and continue to be bound for the payment of the principal, interest (if any), and other charges provided for by the terms of this Note** notwithstanding any extension(s) of the time of payment of said principal, interest, or other charges or any changes in the amounts agreed to be paid under, and by virtue of the obligation to pay provided for in this Note, and each hereby waives all and every kind of notice of such extension(s), or changes, and **agrees that the same may be made without the joinder of any of the parties executing this Note and without the joinder of the endorsers or guarantors of, or other parties primarily or secondarily liable upon this Note.**
- During trial, Campbell’s position du jour was that the Note was subject to a legal finding and did not present itself as a jury issue. During trial, Campbell’s position du jour was that the Note presented “fact issues” to be submitted to the jury. But, it is Campbell’s sworn testimony which secures the just outcome found in this Court’s judgment order:
 - Q. So it is your testimony you don’t know what it is that you signed?
 - A. I know what I signed. I believe that I know what I signed.
 - Q. What did you sign?
 - A. I signed a promissory note guarantee but Mr. Briel—
 - Q. Before you on, tell me how much that was?
 - A. \$100,000.
 - Q. Who was it payable to?
 - A. Mr. Poe.

Q. What was the interest rate?

A. I think it was 12 percent.

Q. And have you paid that personal guarantee?

A. I have not.

- Campbell, who was witness, party and lawyer, told the jury the following in his effort to avoid an award of punitive damages:
 - This is about money. Glen Poe has a note for \$100,00 with 12 percent interest... as I understand Mr. Poe's claim, he unequivocally loaned \$100,000. Mr. Hammer read to you my answer where I admitted signing the guarantee.
 - Why did I admit in papers to this Court because I signed the guarantee because I did. I never lied about that. I never shied away from that. I never said I didn't.
 - Because Steve Foster from day one, the first day that we were asked to respond to the complaint, said that we signed the note.
 - As Mr. Snyder said I hope you didn't hold it against me that the process allowed other issues to come to the forefront because I didn't act with fraud or malice or oppression I don't think in responding to the note because I admitted that I guaranteed it.
 - But the point is your verdict already will compensate Mr. Poe for the full amount of the note plus attorney fees, because you can look at the note, it has the award for attorney fees, and the Court has an obligation to award those attorney fees...."
- Campbell, by memorandum to this Court on May 17, 2011 in an effort to set aside a jury finding that Campbell and Foster were liable for fraud, stated: "Although the issue of the execution of the Note and the guarantee should not have been a jury question in the first instance, in making a determination that enforcement of the guarantees was appropriate, the jury necessarily concluded that the Note was properly executed."
- Foster and Campbell cite caselaw which supports the Court's entry of judgment. Foster and Campbell cite cases for a proposition that there was no meeting of the minds between themselves and Mr. Poe, or that a signature page was substituted, or that a contract must be signed. Yet, Fisher took Mr. Poe's \$100,000.00, and as is clear in the trial record, paid his company and himself for "work" performed. Moreover, as Foster and Campbell acknowledge to another Court and to a jury and at other various times when convenient, there was a meeting of the minds as to their own personal guarantees which is all that is relevant for their liability; they both at various times acknowledged that they signed the Note; Foster under oath told the Bankruptcy Court that he did in fact guarantee the Note (as opposed

to simply signing it); and that Campbell, as he told the jury to minimize any finding of punitive damages, was responsible for paying on the Note. The only issue these Defendants presented then was that Mr. Athey's guarantee was not included on the Note---an issue with no bearing as to their own liability according to the very terms of the Note which these two Defendants guaranteed--- **“[Foster and Campbell] agree that the same may be made without the joinder of any of the parties executing this Note and without the joinder of the endorsers or guarantors of, or other parties primarily or secondarily liable upon this Note.** By its plain reading, regardless of the primary or secondary liability of anyone else, Campbell and Foster signed a document assuring their own liability for taking Mr. Poe's money. No caselaw supports Campbell or Foster's conduct.

Defendants' argument aside, Due Process is not the right of these defendants to change positions with different courts, or at different times. Due Process is not license for arguing against one's own sworn testimony. Due Process is not telling a jury one thing, but arguing to a Judge something factually at odds in order to avoid a judgment. Due Process is not the allowance, without ethical constraint, for these Defendants to repeatedly move for recusal of a judge when dissatisfied with a ruling. And, Due Process does not empower Campbell to divine what the jury was thinking when it posed a question about damages, when in fact the jury did tell Mr. Campbell what it thought of Campbell's and Foster's various and mutating defenses when it found them liable for fraud. Indeed, principles of judicial estoppel are intended to deny giving weight or merit to such conduct. *See W.Va. DOT v. Robertson*, 217 W.Va. 497 (2005); *Riggs v. W.Va. Univ Hosps., Inc.*, 221 W.Va. 646 (2007); *Hager v. Graham*, 267 F.R.D. 486 (N.D.W.V., 2010).

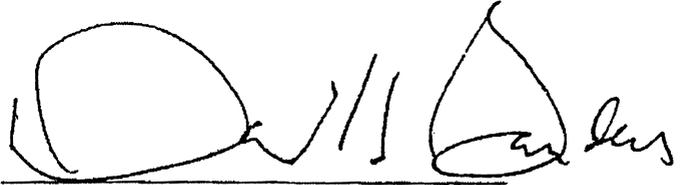
Wherefore, the Court hereby ORDERS that Defendants', Foster and Campbell, motions be denied.

The Clerk shall deliver an attested copy of this Order to all counsel of record and *pro se* parties.

5 cc's Entered: 1/5/12

D. Hammer
J. Campbell
C. Bailey
S. Foster / Foster Harty
Woodstar Holdings

1-6-12 BC



The Honorable David H. Sanders,
Judge of the Circuit Court of
Jefferson County, West Virginia

... TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY B. Clark
DEPUTY CLERK