

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEVEN D. FOSTER,)	
)	
Defendant Below, Petitioner,)	
)	No. 12-0165
v.)	(Jefferson County Circuit
)	Court Civil Action
GLEN POE,)	No. 08-C-223)
)	
Plaintiff Below, Respondent.)	

PETITIONER’S REPLY TO RESPONDENT’S SUMMARY RESPONSE

COMES NOW, Petitioner Steven D. Foster, *pro se*, (“Foster”) and files the following Reply to Respondent, Glen R. Poe’s (“Poe”) ¹ Summary Response (the “Response”) to Foster’s Brief.²

Poe’s Response to Foster’s Brief is one under Rule 10(e) of the Rules of Appellate Procedure. Rule 10(e) provides that such response “must contain an argument responsive to the assignments of error with appropriate citations to the record on appeal, exhibiting clearly the points of fact and law being presented and the authorities relied on; a conclusion . . .” Poe has failed to adequately respond to any of Foster’s Assignments of Error. Therefore, this Court must conclude that Poe agrees with Foster’s views on the facts and the law as stated in his Brief.

Further, Poe makes numerous bold assertions of “fact” with no support to the record in this matter. Such behavior should not be tolerated.

¹ Capitalized terms used but not defined herein shall have the same meanings ascribed to them in the Petitioner’s Brief.

² Foster adopts any of Campbell’s arguments in *Campbell v. Foster*, Case No. 12-0130, to the extent the same are not contradictory to Foster’s positions in this matter.

A. Poe's False Argument Regarding a "Meeting of the Minds"

Poe repeatedly states in his Response that the parties had a "meeting of the minds" as to the Promissory Note and any obligations arising thereunder. What Poe fails to point out, and is clearly detailed in Foster's Brief, is that Poe did not prove his burden of establishing a valid written guarantee of the Promissory Note in order to recover based upon the promise to pay. *See* Foster's Assignment of Error No. 1, pp. 9-13 of Foster's Brief. It is and was Poe's burden to prove that a written instrument exists and the terms thereof. When the written instrument is the very basis of the cause of action, as the guarantee to the Promissory Note in this case is, then the failure to introduce and prove the validity of the document is fatal to the cause.

Poe tries to explain away his own testimony – on multiple occasions – concerning the authenticity of the Promissory Note itself. At his deposition on December 22, 2010, Poe testified under oath that the personal guarantees attached to the Promissory Note were originally attached to a different document than originally intended for and the photocopy of the Promissory Note attached to the Amended Complaint was not a true and accurate copy of the original note or reflected the terms of that note. *See* App. at 0039, 0053, 0072-77.

Poe states to this Court that Foster and Campbell have argued that because Athey never signed the Promissory Note, they should not be required to repay the same. This is an argument that has never been put forth by either Campbell or Foster. *See* Section D below regarding further untrue statements proffered by Poe.

Further, Poe completely ignores the testimony of Briel – his own witness at trial and Briel's testimony *that the Promissory Note is not the Note*. Briel's testimony

rendered the Promissory Note and any purported guarantee thereof unenforceable or, at least, a disputed issue of material fact. Because Poe failed to address any issues related to Briel and his testimony, the Circuit Court's denial of Foster's motion for summary judgment was inappropriate.

B. Bankruptcy of 210 West Liberty Holdings, LLC

Poe's argument on page 2 and again on 6 that, because 210 West Liberty Holdings, LLC identified the Promissory Note on its bankruptcy filing, the same is then determined to be an obligation of Foster and Campbell is truly insane.³ The bankruptcy was filed by 210 West Liberty Holdings, LLC and not a **personal** bankruptcy filing on behalf of either Foster or Campbell. Listing the Promissory Note on the corporate schedules – and, for the record, identifying it as “disputed” – does not, in any way, make it a personal obligation of Foster or Campbell. To even suggest to this Court otherwise is outlandish.

C. Amended Answer

Looking at the issue of inconsistency first, Foster consistently denied the validity of the instrument that was introduced at trial. The validity of the Promissory Note was first raised in Poe's December 2010 deposition, in which he admitted that the Promissory Note in his possession was not the one signed by all of the parties to the agreement (App. 038-39; 53; 72-76). The issue arose again at trial, when both the Poe and his witness, Briel, testified that Promissory Note introduced into evidence to establish the terms of the note between the parties was not the actual Promissory Note signed by the parties. At this time, Foster amended his Answer to the Amended Complaint to include the

³ Poe incorrectly alleges that the \$100,000 loan that is at issue in this matter was made directly to Campbell and Foster for the very first time in Poe's Response. This allegation has never been made before.

instrument's lack of authenticity as a defense (App. 0146-48). The amended answer stated:

The Promissory Note attached to the Amended Complaint was not properly executed. Specifically, Michael E. Briel, the representative of 210 W. Liberty Holding, LLC who signed the asserted Promissory Note testified as part of the Plaintiff's case that the signatures attached to Exhibit 10 related to a different Note, and that the first page of Exhibit 10 and the guarantee pages of Exhibit 10 were part of a different document and not Exhibit 10.

The burden was at all times on Poe to establish the correct written instrument because a personal guarantee must be in writing pursuant to the Statute of Frauds to be enforceable. Foster at no time agreed that the Promissory Note introduced by Poe at trial was the properly executed and enforceable Promissory Note that all parties had signed. Just the opposite, Foster consistently raised Briel's testimony and Poe's testimony at his deposition as evidence that Exhibit 10 was not the valid and enforceable Promissory Note.

Poe's statements that Campbell and Foster "mischaracterize" Poe's testimony regarding the Promissory Note is inaccurate. Poe attempts to put a positive, and completely inaccurate spin, on both his deposition and trial testimony regarding the authenticity of the Promissory Note. On multiple occasions, Poe unequivocally disavows the Promissory Note. He cannot back away from this testimony and this fact alone requires that this Court vacate the Judgment Order and enter judgment in Foster's favor.

Any argument raised by Poe in the Response concerning judicial estoppel is inappropriate because the issue regarding execution of the guarantee and the Note was first raised by Poe and his evidence – not by Foster or Campbell. Therefore, Poe does not meet the test for judicial estoppel as provided for in *West Virginia Dept. of Transp., Div.*

of Highways v. Robertson, 217 W.Va. 497, 618 S.E.2d 506 (2005) and further detailed in Foster's Brief.

Foster directs this Court to the arguments detailed in this Brief regarding personal guarantees.

D. Poe's Untrue Statements with No Support in the Record

The following statements by Poe in the Response have no support in the record and should not even be considered by this Court:

1. "There, Foster and Campbell identified the Note has a liability, which is far different than the current argument du jour that there was no meeting of the minds." *See* p. 2, ¶ 2.

2. "The Petitioners were attempting to hide relevant facts behind a misplaced assertion of attorney client privilege." *See* p. 3, footnote 2.

3. "[T]hese two Petitioners took that money to pay off their own bills rather than using the money first and foremost to advance the restaurant project." *See* p. 3, ¶ 2.

4. "In essence, Campbell and Foster have argued that their successful fraud on Mr. Poe as an investor in the LLC should be rewarded for the sole reason that Athey did not sign a personal guarantee of the Note which was signed by Campbell and Foster." *See* p. 3, ¶ 2.

5. "After Mr. Poe wired the \$100,000.00, Campbell "revised" the Promissory Note to remove Athey's name as a guarantor." *See* p. 6, ¶ 2.

Foster has complained numerous times about the conduct of Poe and his attorneys during the pendency of this matter. Poe's attorneys have repeatedly put forward what

they deem to be the “facts,” which amount to nothing more than what they wish the testimony actually was. Prime examples of this conduct are listed above. In addition, the Circuit Court has sanctioned this conduct as evidenced by Judge Sanders’ bias in favor of Poe.

CONCLUSION

Poe’s Response is woefully inept and he tries to dodge his own testimony and fails to address any of Foster’s arguments that require, in fairness, for this Court to reverse the Judgment Order and grant judgment in favor of Foster. Because he has no rebuttal to Foster’s artful arguments, Poe then makes absurd statements with no back up to the record. Statements that are nothing but conjecture. Sanctioning the conduct of a party and his counsel is disrespectful and completely unfair.



Steven D. Foster, Pro Se
P.O. Box 6058
Leesburg, Virginia 20178
(703) 771-0107/Telephone
(703) 771-0104/Facsimile

CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the foregoing has been made as follows:

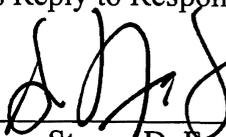
Type of Service: First-Class, U.S. Mail

Date of Service: July 10, 2012

Persons Served and Address: James P. Campbell
1602 Village Market Boulevard, Suite 20
Leesburg, Virginia 20175

David M. Hammer
Robert J. Schiavoni
Hammer, Ferretti & Schiavoni
408 West King Street
Martinsburg, West Virginia 25401

Item Served: Petitioner's Reply to Respondent's Summary
Response



Steven D. Foster