

12-0991

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT L. BURNWORTH,

Plaintiff,

v.

CIVIL ACTION NO. 11-C-1851
The Honorable Robert Chafin, Judge

KENT GEORGE,
ROBINSON & McELWEE, PLLC, and
JOHN T. POFFENBARGER,

Defendants.

JUDGMENT ORDER
GRANTING SUMMARY JUDGMENT TO ALL DEFENDANTS

Came this 23rd day of May, 2012, Plaintiff Robert L. Burnworth ("Burnworth"), by his counsel, Kathy Brown, Defendants Robinson & McElwee, PLLC ("RAM") and Kent George ("George"), by their counsel, Michael J. Farrell, and Defendant John T. Poffenbarger ("Poffenbarger"), by his counsel, Guy Bucci, for hearing upon two (2) motions filed by RAM and George: 1) Motion for a Protective Order and Relief from Scheduling Order; and, 2) Motion for Summary Judgment. Burnworth filed Responses in Opposition to both Motions, which did not challenge the factual averments by RAM and Burnworth in their Motions. During the course of the Hearing, Poffenbarger joined in the Motion for Summary Judgment filed by RAM and George. Upon mature consideration of the briefs and oral arguments of counsel, this Court is of the opinion to GRANT the Motion for Summary Judgment and provides the following *Background*, reflecting the contentions of the parties in the Motions and Responses, to place into context this Court's *Findings of Fact* and *Conclusions of Law* that support the grant of Summary Judgment pursuant to Rule 56, W. Va. R. Civ. Proc.:

BACKGROUND

1. This action is a claim of legal malpractice arising from the sale by Burnworth of his controlling interest in a company, known as Access Documents Systems, Incorporated (“Access Documents Systems”).
2. In October 2000, Burnworth came to RAM and George for legal representation in a proposed stock purchase/redemption transaction.
3. Burnworth at the time was President and sole shareholder of Access Documents Systems and desired to transfer control of two-thirds of his company to Robert Jones (“Jones”), his friend and stock broker.
4. The engagement letter with RAM reflected that RAM would be representing both Burnworth and his company, Access Documents Systems.
5. In that representation, RAM was to prepare documents for (1) the proposed sale of stock to Jones; (2) the redemption by the company, Access Documents Systems, of the stock owned by Burnworth; and, (3) the implementation of the corporate strategy to effectuate the transfer of control of Access Documents Systems from Burnworth to Jones.
6. The preparation of the transaction documents took approximately ten (10) months, during which time attorneys working for RAM communicated with Burnworth, his accountant (Robert Dcnyer), Jones and Jones’s counsel, Poffenbarger.
7. Ultimately, the transaction was structured so that Burnworth transferred his interest in Access Documents Systems to a new corporation, ADSC Holding Company. Jones’s wife, Jane C. Jones, became the primary shareholder of ADSC Holding Company.
8. In consideration for transferring his shares in Access Documents Systems to ADSC Holding Company, Burnworth was to receive (1) a sum certain at Closing (to be financed

by the Joneses); (2) a contract for employment; (3) shares in ADSC Holding Company; and, (4) a Promissory Note from ADSC Holding Company to Burnworth for the remaining balance owed.

9. The ADSC Holding Company Promissory Note was to be secured by (a) two (2) second priority liens on real property owned by the Joneses and (b) personal guaranties from the Joneses. It was understood that the banking institutions that were financing the upfront cash payment to Burnworth would receive first priority liens against the Joneses' property.
10. Attorneys working for RAM, including George, drafted all of the transaction documents with the noted exception of the two (2) second priority Deeds of Trust that were part of the security for the Promissory Note.
11. Poffenbarger prepared the two (2) second priority Deeds of Trust.
12. No one at RAM, including George, was informed by Burnworth, the Joneses or Poffenbarger prior to Closing what property the Joneses would pledge in the Deeds of Trust and no one at RAM, including George, saw the Deeds of Trust prepared by Poffenbarger prior to Closing on August 1, 2001.
13. Both Deeds of Trust contained general warranties of title.
14. At Closing, the Joneses, through their counsel, announced that the Joneses would only encumber one piece of their personally held real estate with a second priority Deed of Trust.
15. The other second priority Deed of Trust would be pledged by Colby Corporation, a company wholly owned by Jane Jones.

16. The Colby Corporation Deed of Trust referenced a parcel of land with the purported physical address of 4104 MacCorkle Avenue, Kanawha City, West Virginia.
17. Because the transaction documents had to be revised to include references to Colby Corporation in the Promissory Note, Poffenbarger agreed to prepare a corporate resolution for Colby Corporation to explain and authorize the pledge of Colby Corporation assets in a transaction to which Colby Corporation was a stranger.
18. RAM and George contend that George recommended to Burnworth that the Closing be postponed, but Burnworth rejected this recommendation and the Closing proceeded with the execution of documents and the payment of monies to Burnworth.
19. Neither Poffenbarger nor any attorney at RAM conducted a title search on any of the property pledged in the second priority Deeds of Trust given as security by the Joneses and Colby Corporation to Burnworth.
20. The following day, August 2, 2001, RAM had the two (2) second priority Deeds of Trust recorded. Unbeknownst to RAM and George, both Deeds of Trust were defective.
21. Without notice to RAM or George, approximately eleven (11) months later, on July 2, 2002, Burnworth executed a Release of Deed of Trust, releasing the second priority Deed of Trust from the Joneses that was part of the security for the ADSC Holding Company Promissory Note.
22. As a consequence, only the personal guaranties of the Joneses and the second priority Deed of Trust from Colby Corporation remained as collateral for the ADSC Holding Corporation Promissory Note.
23. On or about August 22, 2006, more than five years after the Closing, Burnworth contacted George to advise that ADSC Holding Company and the Joneses had defaulted

under the Promissory Note. RAM and George contend that Burnworth asked RAM to send a default letter to ADSC Holding Company and the Joneses.

24. RAM undertook preliminary title research to determine whether the two (2) second priority Deeds of Trust securing the ADSC Holding Company Promissory Note had been released or whether the priority status of the Deeds of Trust had changed. It was through this research that RAM first discovered that Burnworth had released the Deed of Trust from the Joneses and that the other Deed of Trust (from Colby Corporation) was defective.
25. RAM and George contend, without challenge, in their Motion for Summary Judgment that on or about September 5, 2006, George notified Burnworth that there was a problem with the Colby Corporation Deed of Trust. Burnworth purportedly was upset that RAM had undertaken any title research and made clear to George that he only wanted a default letter sent to ADSC Holding Company and the Joneses.
26. RAM and George contend, without challenge, that Burnworth failed to pay for any of the work performed by RAM on his behalf in 2006. Burnworth's relationship with RAM and George ended.
27. Burnworth asserts that ADSC Holding Company defaulted again under the Promissory Note in 2009. Burnworth retained Attorney William Pepper ("Pepper") in or around March 2009 to commence collection efforts under the Promissory Note and against the security. Pepper in turn retained the services of another attorney, Glenn Turley, to conduct title research regarding the Deeds of Trust securing the ADSC Holding Company Promissory Note. Mr. Turley discovered defects in both of the second priority Deeds of Trust.

28. In December 2009, Pepper wrote a letter to RAM, alleging that RAM was liable to Burnworth for the defects in the Deeds of Trust. RAM denied liability to Burnworth.

FINDINGS OF FACT

1. On October 14, 2011, Burnworth filed this legal malpractice action against George, RAM and Poffenbarger. In this action, Burnworth is represented by new counsel, Attorneys James Lees and Kathy Brown.
2. In his Complaint, Burnworth alleges that RAM, George and/or Poffenbarger are liable to him for damages arising from failed collateral securing the ADSC Holding Company Promissory Note, specifically the defective second priority Deed of Trust pledged by Colby Corporation.
3. The theories of liability asserted against RAM and George are for negligence and breach of contract. The theories of liability asserted against Poffenbarger are negligence (under a third-party beneficiary theory) and fraud.
4. Burnworth specifically alleges that RAM and George breached their duty to protect his interests by failing to conduct a title search prior to Closing that would have disclosed the defect in the Colby Corporation Deed of Trust.
5. At Paragraph 33 of the Complaint, Burnworth expressly asserts that “as a direct and proximate result of” the alleged breaches by RAM and George, Burnworth allegedly “lost the ability to seek foreclosure on the valuable subject property to enforce payment of the note, which sale would have realized \$640,000 or more....”
6. It is undisputed that at the time that he filed this Complaint against RAM, George and Poffenbarger, Burnworth had not taken any formal action against ADSC Holding

Company for defaulting under the Promissory Note nor against the Joneses under their personal guaranties.

7. It is also undisputed that Burnworth had not taken any action against Colby Corporation based upon the general warranties of title contained within the second priority Deed of Trust.
8. On November 14, 2011, Burnworth, represented by Attorney William Pepper, filed a separate collection action in the Circuit Court of Kanawha County, Civil Action No. 11-C-2026, against ADSC Holding Company and the Joneses, seeking the remaining balance under the ADSC Holding Company Promissory Note.
9. Unaware of the collection action, RAM and George filed both an Answer and a Motion to Dismiss denying liability to Burnworth under any theory. Among their defenses, RAM and George asserted that Burnworth's claims against them are untimely and unsupported as a matter of law, in part, because Burnworth has not suffered any quantifiable damages as a direct and proximate result of any alleged act or omission by RAM and/or George.
10. Poffenbarger also filed a Motion to Dismiss, asserting that he did not owe a duty to Burnworth, as he never represented Burnworth.¹
11. On February 29, 2012, Burnworth filed a Response in Opposition to RAM and George's Motion to Dismiss. Burnworth's Response to the Motion to Dismiss did not make any reference to the collection action against ADSC Holding Company and the Joneses.
12. On March 3, 2012, this Court heard oral arguments on RAM and George's Motion to Dismiss, denied the same, and announced a schedule, pursuant to Rule 16, W.Va. Rules of Civil Procedure, for the disclosure of expert and fact witnesses, the completion of discovery and the commencement of trial.

¹ Poffenbarger did not notice his Motion to Dismiss for Hearing and Burnworth never filed a Response.

13. During the March 3rd Hearing on RAM and George's Motion to Dismiss, Burnworth's counsel disclosed for the first time that Burnworth, through different counsel, was pursuing a collection action against ADSC Holding Company and the Joneses.
14. Counsel for Burnworth did not disclose that ADSC Holding Company and the Joneses had retained Nicholas Barth, Esquire as their counsel, but had not filed an Answer or other responsive pleading to the Complaint in the collection action.
15. On April 16, 2011, pursuant to Rule 42, W.Va. Rules of Civil Procedure, RAM and George filed a Motion to Consolidate the pending action with the collection action against ADSC Holding Company and the Joneses, based upon the fact that both actions arose from the same transaction. Poffenbarger, by letter from his counsel, joined in the Motion to Consolidate.
16. On April 18, 2012, Burnworth filed a Response in Opposition to the Motion to Consolidate, representing to this Court that the collection action had been (or was in the process of being) dismissed.
17. On April 19, 2012, the Honorable Carrie Webster, Judge of the Circuit Court of Kanawha County, entered a Stipulation of Settlement and Order of Dismissal in the collection action that provided terms and conditions beyond the mere entry of a default judgment.
18. In the Stipulation of Settlement and Order of Dismissal, Burnworth obtained a judgment award against ADSC Holding Company and the Joneses, individually and jointly, for the remaining balance of Seven Hundred Twenty Five Thousand Seven Hundred and Fifteen Dollars and Twenty Eight Cents(\$ 725,715.28) on the Promissory Note, plus interest. *Id.* at ¶ 2.
19. The Stipulation of Settlement and Order of Dismissal also expressly provided that:

“[t]he entry of judgment in favor of the plaintiff [Burnworth] ... *shall operate to extinguish* all obligations of all the defendants under the [Promissory] Note, *and any security instrument given to secure the same*, and the subject Note is *cancelled* and merged into the judgment.”

(*Id.* at ¶ 3.)[Emphasis added.]

20. The Court confirmed with Attorney Kathy Brown that Burnworth had been represented by counsel in the collection action and that Burnworth knowingly approved the Stipulation of Settlement and Order of Dismissal upon the advice of his counsel.
21. On April 27, 2012, RAM and George filed their Motion for Summary Judgment and Memorandum in Support, arguing that the Stipulation of Settlement and Order of Dismissal, having expressly “extinguished” and “cancelled” the ADSC Holding Company Promissory Note and all security pledged under the same, effectively rendered moot any claim asserted against RAM and/or George that Burnworth is unable to collect under the Promissory Note based upon any defect in pledged security, including, without limitation the second priority Deed of Trust from Colby Corporation. Concurrently with the filing of the Motion for Summary Judgment, RAM and George filed their Motion for Protective Order for relief from pending discovery deadlines.
22. On May 21, 2012, Burnworth filed his Opposition to Summary Judgment. Burnworth’s Response in Opposition to Summary Judgment did not challenge any of the factual averments in RAM and George’s Motion for Summary Judgment and Memorandum in Support. Instead, Burnworth argued that his counsel in the collection action, William Pepper, had advised him that the Stipulation of Settlement and Order of Dismissal was not collectable as against the Joneses and ADSC Holding Company. As a consequence,

Burnworth argued, RAM and George should be held liable for the defective second priority Deed of Trust from Colby Corporation. Burnworth contended that the purpose of the Colby Corporation Deed of Trust was to protect him in the event that ADSC Holding Company and/or the Joneses were judgment proof.

23. Attached as an exhibit to his Response in Opposition is Burnworth's Affidavit containing the averments related to what his counsel, Pepper, opined regarding Burnworth's ability to collect monies from ADSC Holding Company and the Joneses. There is no averment or testimony regarding what efforts had been undertaken to execute the Stipulation of Settlement and Order of Dismissal.
24. At the Hearing on May 23, 2012, RAM and George filed their Reply to Burnworth's Response in Opposition. In their Reply, RAM and George challenged the sufficiency of Burnworth's Affidavit, noted that Burnworth did not challenge any of the factual averments in their Motion for Summary Judgment, and reasserted their argument that Burnworth cannot demonstrate that he suffered any damages as a direct and proximate result of any alleged act or omission by RAM and/or George.
25. This Court agrees with RAM and George.
26. This Court finds that Burnworth's Affidavit does not meet the requirements of Rule 56(e), W.Va. Rules of Civil Procedure. It is not based upon his personal knowledge and it does not affirmatively state that Burnworth is competent to testify to any of the matters contained within the Affidavit. Further, the Affidavit does not address the critical issue of whether Burnworth can demonstrate that he has suffered damages as a direct and proximate result of any alleged act or omission of the Defendants. The Affidavit merely

states that William Pepper, his attorney, has opined that Burnworth will be unable to collect monies from ADSC Holding Company and/or the Joneses.

27. Neither the Response nor Burnworth's Affidavit addresses the impact on the pending litigation of the Stipulation of Settlement and Order of Dismissal entered in the collection action.
28. According to Burnworth's Response in Opposition to Summary Judgment, ADSC Holding Company and the Joneses failed to file an Answer the Complaint in the collection action. Burnworth could have sought and obtained a simple default judgment against those defendants under the Promissory Note and the personal guaranties. Such a default judgment would not have "extinguished" and "cancelled" the Promissory Note and security, but would have served as a vehicle for enforcing the same.
29. Instead, as clearly reflected by the Stipulation of Settlement and Order of Dismissal, Burnworth negotiated a settlement of his dispute with ADSC Holding Company and the Joneses.
30. The terms of Burnworth's settlement with ADSC Holding Company and the Joneses include the critical language found in Paragraph 3 of the Order, wherein Burnworth agreed that the Promissory Note and all security obligations and instruments under the Promissory Note were extinguished and cancelled.²

² The Stipulation of Settlement and Order of Dismissal is unique in this Court's considerable experience. It is clearly not a simple default judgment, as Burnworth suggests in his Response in Opposition to Summary Judgment. The defendants in the collection action expressly concede liability, but then Burnworth inexplicably and voluntarily gives up rights that he has. In light of the fact that Burnworth was represented in the collection action by experienced counsel of his choosing who reviewed and signed the Stipulation of Settlement and Order of Dismissal prior to conducting any discovery, this Court will not second guess the wisdom of his choice in giving up his rights.

31. The Court notes that the Stipulation of Settlement and Order of Dismissal was signed on Burnworth's behalf by his counsel, Pepper, and also signed by the Joneses individually and on behalf of ADSC Holding Company, as well as by their counsel, Nicholas Barth.
32. This Court further notes that in his Response in Opposition to Summary Judgment in this action, Burnworth does not challenge the wording, enforceability or legitimacy of the Stipulation of Settlement and Order of Dismissal.
33. In fact, Burnworth relied upon the Stipulation of Settlement and Order of Dismissal to oppose consolidation and further relies upon the Stipulation of Settlement and Order of Dismissal as evidence of his efforts to mitigate his damages.
34. This Court cannot ignore or modify the clear language of the Stipulation of Settlement and Order of Dismissal voluntarily agreed to by Burnworth and entered by the Circuit Court in the collection action.
35. The Court finds that the Promissory Note which is the essence of the legal malpractice action against these defendants has been "extinguished" and "cancelled" by Burnworth's voluntary act.

CONCLUSIONS OF LAW

1. Summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, W.Va. R. Civ. P.; *Mueller v. Am. Electr. Power Energy Serv.*, 214 W.Va. 390, 392-93, 589 S.E.2d 532, 534-35 (2003). Moreover, summary judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Syl. Pt. 3, Aetna Casualty & Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d

770 (1963). Further, summary judgment should be granted “where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” *Syl. Pt. 2, Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

2. Burnworth has the burden of presenting by a preponderance of the evidence three (3) essential elements of his legal malpractice claim: (a) that he retained the services of the attorneys; (b) that the attorneys in representing him neglected a “reasonable duty”; and, (c) that he suffered damages as a direct and proximate result of such breach of duty. *Syl. Pt. 1, Calvert v. Scharf*, 217 W.Va. 684, 685, 619 S.E.2d 197, 198 (2005).
3. Damages in a legal malpractice action are never presumed. The burden is upon the plaintiff to present evidence of an actual loss sustained and evidence that such loss was “the direct and proximate result” of the attorney’s negligence. *Id. at Syl. Pts. 3 and 4* (citing *Syl. Pts. 2 and 3, Keister v. Talbott*, 182 W.Va. 745, 391 S.E.2d 895 (1990).)
4. Here, with regard to the first element of his claim, it is undisputed that Burnworth retained the legal services of RAM and George.
5. Whether Burnworth had third-party beneficiary rights as against Poffenbarger has not been briefed and is not necessary for this Court’s ruling.
6. This Court also does not need to address the second element of Burnworth’s claims against RAM, George and Poffenbarger—namely, whether any of these defendants breached a duty owed. Burnworth’s claims fail because he cannot prove the third element, damages.
7. Burnworth’s claims for damages against RAM, George and Poffenbarger are predicated upon whether he can collect monies owed under the ADSC Holding Company Promissory

Note and its security. In other words, Burnworth must prove that, but for the defects in the security pledged under the Promissory Note, he would be able to collect the monies owed to him based on the Promissory Note.

8. Whether he could have met that burden prior to entry of the Stipulation of Settlement and Order of Dismissal is unknown at this point and irrelevant.
9. The entry of the Stipulation of Settlement and Order of Dismissal breaks any chain between Burnworth's ability to collect on the ADSC Holding Company debt and the alleged prior acts or omissions of the Defendants.
10. Simply, Burnworth agreed in settlement, and had the Circuit Court of Kanawha County declare in the Stipulation of Settlement and Order of Dismissal that the ADSC Holding Company Promissory Note and all security pledged under the Promissory Note were "extinguished" and "cancelled."
11. Burnworth released all rights under the Note and security.
12. Thus, regardless of any defect, Burnworth gave up the right to collect against the Promissory Note and any security pledged.
13. Said differently, if Burnworth is now unable to collect against ADSC Holding Company and/or the Joneses through execution of the Stipulation of Settlement and Order of Dismissal, such inability to collect is not based upon any defect in previously pledged Colby Corporation Deed of Trust security that supported the now non-existent Promissory Note.
14. In entering into the Stipulation of Settlement and Order of Dismissal, Burnworth effectively dismissed his own legal malpractice and related claims against RAM, George and Poffenbarger.

15. During oral argument, Burnworth's counsel requested the opportunity to conduct discovery. This request was not made in the written Response in Opposition to the Motion for Summary Judgment. Rather, it was made after the Court had announced its ruling to grant the Motion for Summary Judgment.
16. Because of the unique circumstances presented by this case, the Court finds no basis for permitting discovery under Rule 56(f), W.Va. Rules of Civil Procedure or otherwise delaying resolution of this claim.
17. The Stipulation of Settlement and Order of Dismissal is clear and unambiguous, and was voluntarily entered into by Burnworth. There is no discovery that can be had which will modify the adverse impact of that Order and resuscitate Burnworth's claims in this action, because the Promissory Note has been "extinguished" and "cancelled."
18. Accordingly, this Court finds and concludes that there are no genuine issues of material fact that exist in regard to Burnworth's claims against RAM, George and Poffenbarger.
19. The Court further concludes that RAM, George and Poffenbarger are entitled to judgment as a matter of law.
20. Having concluded that summary judgment for RAM, George and Poffenbarger is proper, Defendants' Motion for Protective Order is moot.

IT IS ORDERED, THEREFORE, that Defendants RAM, George and Poffenbarger are GRANTED summary judgment on all claims against them in this action.

IT IS ORDERED FURTHER that all claims against Defendants RAM, George and Poffenbarger are DISMISSED, WITH PREJUDICE, and this action shall be removed from this Court's docket.

IT IS ORDERED FURTHER that the Clerk of the Court shall provide *teste* copies of this

Order to the following counsel of record:

James B. Lees, Jr., Esquire
Hunt & Lees, L.C.
2306 Kanawha Blvd., East
P.O. Box 2506
Charleston, WV 25329-2506
Counsel for Plaintiff

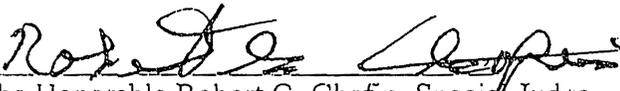
Kathy A. Brown, Esquire
Kathy Brown Law, PLLC
P.O. Box 631
Charleston, WV 25322-0631
Counsel for Plaintiff

Guy Bucci, Esquire
Bucci, Bailey & Javins, L.C.
213 Hale Street
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Counsel for Defendant John Poffenbarger, Esq.

Michael J. Farrell, Esquire
Charlotte A. Hoffman Norris, Esquire
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Counsel for Defendants Robinson & McElwee PLLC and Kent George

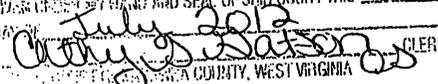
The objections and exceptions of the parties are noted and preserved.

ENTERED THIS 23rd DAY OF July 2012.


The Honorable Robert G. Chafin, Special Judge

Prepared for Entry By:


Michael J. Farrell, Esquire (WV State Bar No. 1168)
Charlotte A. Hoffman Norris, Esquire (WV State Bar No. 5473)

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, GUY S. WATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
WITNESSED BY MY HAND AND SEAL OF SAID COURT THIS 24
DAY OF July 2012

GUY S. WATSON, CLERK

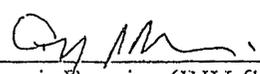
Farrell, White & Legg PLLC
Counsel for Defendants Robinson & McElwee PLLC and Kent George

Reviewed Prior to Entry By:

James B. Lees, Jr., Esquire (WV State Bar No. 2176)
Hunt & Lees, L.C.
Counsel for Plaintiff

Declined to endorse Order by 

Kathy A. Brown, Esquire (WV State Bar No. 8878)
Kathy Brown Law, PLLC
Counsel for Plaintiff



Guy Bucci, Esquire (WV State Bar No. 521)
Bucci, Bailey & Javins, L.C.
Counsel for Defendant John Poffenbarger

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT L. BURNWORTH,

Plaintiff,

v.

KENT GEORGE,
ROBINSON & McELWEE, PLLC, and
JOHN T. POFFENBARGER,

Defendants.

2012 AUG 15 AM 10:52
CATHY S. GATES, CLERK
KANAWHA COUNTY CIRCUIT COURT

CIVIL ACTION NO. 11-C-1851
The Honorable Robert Chafin, Judge

**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM
SUMMARY JUDGMENT PREVIOUSLY GRANTED TO ALL DEFENDANTS**

Came this 23rd day of July, 2012, Plaintiff Robert L. Burnworth ("Burnworth"), by his counsel, Kathy Brown, Defendants Robinson & McElwee, PLLC ("RAM") and Kent George ("George"), by their counsel, Michael J. Farrell, and Defendant John T. Poffenbarger ("Poffenbarger"), by his counsel, Guy Bucci, for hearing upon *Plaintiff's Motion for Relief* from this Court's rulings from the May 23, 2012 Hearing granting summary judgment to all defendants in this action. RAM and George filed *Defendants Kent George and Robinson & McElwee PLLC's Response in Opposition to Plaintiff's Motion for Relief and Defendant Kent George and Robinson & McElwee PLLC's Motion for Relief from Order, Pursuant to Rule 60(b)*. Poffenbarger did not file a Response. At the Hearing, Plaintiff tendered his *Reply* to RAM and George's *Response*. Upon mature consideration of the briefs and oral arguments of counsel, this Court makes the following Findings of Fact and Conclusions of Law relative to *Plaintiff's Motion for Relief*.

FINDINGS OF FACT

1. On October 14, 2011, Burnworth filed this legal malpractice action against George, RAM and Poffenbarger.
2. In his Complaint, Burnworth alleged that RAM, George and/or Poffenbarger are liable to him for damages arising from failed collateral securing a Promissory Note from ADSC Holding Company, specifically a defective second priority Deed of Trust pledged by Colby Corporation. The Promissory Note also was secured by personal guaranties executed by Robert R. Jones and Jane C. Jones.
3. The theories of liability asserted against RAM and George were for negligence and breach of contract. The theories of liability asserted against Poffenbarger were negligence (under a third-party beneficiary theory) and fraud.
4. Burnworth specifically alleged that RAM and George breached their duty to protect his interests by failing to conduct a title search prior to Closing that would have disclosed the defect in the Colby Corporation Deed of Trust.
5. At Paragraph 33 of the Complaint, Burnworth expressly alleged that “as a direct and proximate result of” the alleged breaches by RAM and George, Burnworth allegedly “lost the ability to seek foreclosure on the valuable subject property to enforce payment of the note, which sale would have realized \$640,000 or more....”
6. On November 14, 2011, Burnworth, represented by Attorney William Pepper¹, filed a separate collection action in the Circuit Court of Kanawha County, Civil Action No. 11-C-2026, against ADSC Holding Company and the Joneses, seeking the remaining balance under the ADSC Holding Company Promissory Note.

¹ The Court’s Record reflects that Mr. Pepper represented Burnworth beginning in 2009 and purportedly discovered the alleged legal malpractice by RAM, George and/or Poffenbarger described in Burnworth’s Complaint in this action.

7. On April 16, 2011, pursuant to Rule 42, W.Va. R. Civ. P., RAM and George filed a *Motion to Consolidate* the pending action with the collection action against ADSC Holding Company and the Joneses, based upon the fact that both actions arose from the same transaction. Poffenbarger, by letter from his counsel, joined in the *Motion to Consolidate*.
8. On April 18, 2012, Burnworth filed a *Response in Opposition to the Motion to Consolidate*, representing to this Court that the collection action had been (or was in the process of being) dismissed.
9. On April 19, 2012, the Honorable Carrie Webster, Judge of the Circuit Court of Kanawha County, entered a *Stipulation of Settlement and Order of Dismissal* in the collection action.
10. In the *Stipulation of Settlement and Order of Dismissal*, Burnworth obtained a judgment award against ADSC Holding Company and the Joneses, individually and jointly, for the remaining balance of Seven Hundred Twenty Five Thousand Seven Hundred and Fifteen Dollars and Twenty Eight Cents(\$ 725,715.28) on the Promissory Note, plus interest. *Id.* at ¶ 2.
11. The *Stipulation of Settlement and Order of Dismissal* contained the following language at Paragraph 3:

“[t]he entry of judgment in favor of the plaintiff [Burnworth] ... *shall operate to extinguish* all obligations of all the defendants under the [Promissory] Note, *and any security instrument given to secure the same*, and the subject Note is *cancelled* and merged into the judgment.”

(*Id.*)[Emphasis added.]

12. *The Stipulation of Settlement and Order of Dismissal* provided for the signatures of the parties, as well as their counsel. It was both a settlement agreement and an Order.
13. On April 27, 2012, RAM and George filed their *Motion for Summary Judgment and Memorandum in Support* and supported it by the *Stipulation of Settlement and Order of Dismissal*. RAM and George argued that Burnworth could not present evidence that he was unable to collect under the Promissory Note and security where he voluntarily and expressly agreed that the Promissory Note and all security pledged were “extinguished” and “cancelled.” The *Stipulation of Settlement and Order of Dismissal* served to replace the Promissory Note and collateral.
14. On May 21, 2012, Burnworth filed his *Response in Opposition to Summary Judgment*. Burnworth’s *Response in Opposition to Summary Judgment* did not challenge any of the factual averments in RAM and George’s *Motion for Summary Judgment and Memorandum in Support*. Instead, Burnworth argued that his counsel in the collection action, William Pepper, had advised him that the *Stipulation of Settlement and Order of Dismissal* was not collectable as against the Joneses and ADSC Holding Company. As a consequence, Burnworth argued, RAM and George should be held liable for any defects in the pledged collateral, because the purpose of the collateral was to protect Burnworth in the event that ADSC Holding Company and/or the Joneses were judgment proof.
15. On May 23, 2012, this Court heard oral arguments on RAM and George’s *Motion for Summary Judgment*. During oral argument, this Court asked Burnworth’s counsel to address the uniqueness of the *Stipulation of Settlement and Order of Dismissal* in light of the fact that Burnworth could have obtained a default judgment from the Joneses and ADSC Holding Company for the total amount owed. In response to this Court’s

questioning, Burnworth's counsel confirmed that the terms of the *Stipulation of Settlement and Order of Dismissal* had been negotiated by the parties and that Burnworth had been represented by counsel.

16. Nowhere in his *Response in Opposition to Summary Judgment* or during oral argument on May 23rd did Burnworth challenge the wording, enforceability or legitimacy of the *Stipulation of Settlement and Order of Dismissal*. Indeed, Burnworth had relied upon the *Stipulation of Settlement and Order of Dismissal* when he tendered it to this Court in opposition to RAM and George's *Motion to Consolidate* and implicitly relied upon its validity when he argued in his *Response to Motion for Summary Judgment* that the only reason he would not be made whole by the judgment obtained in the *Stipulation of Settlement and Order of Dismissal* was that the Joneses purportedly were judgment proof.
17. During the May 23, 2012, this Court found that the terms of the *Stipulation of Settlement and Order of Dismissal* were plain. Burnworth voluntarily "extinguished" and "cancelled" the Promissory Note and pledged security. The Promissory Note and pledged security were the predicates for Burnworth's legal malpractice action against RAM, George and Poffenbarger. The Promissory Note and pledged security were critical to Burnworth's ability to prove his claim of damages.
18. This Court could not and did not ignore that Burnworth, while represented by counsel, expressly agreed to extinguish and cancel the Promissory Note and pledged security after he had asserted his legal malpractice claims here.
19. It was not the province of this Court to question the wisdom of Burnworth's decision to enter into the settlement with the Joneses and ADSC Holding Company as memorialized by the *Stipulation of Settlement and Order of Dismissal*.

20. This Court, therefore, found that there was no genuine issue of fact to be tried and granted summary judgment to RAM, George and Poffenbarger. In accordance with Rule 24, West Virginia Trial Court Rules, this Court directed counsel for RAM and George to prepare the Order reflecting this Court's findings and conclusions.
21. On May 24, 2012, the day after this Court granted summary judgment to RAM, George and Poffenbarger, the Honorable Carrie Webster, the presiding judge in the collection action, entered a *Corrected Stipulation of Settlement and Order of Dismissal*, signed by the Joneses, ADSC Holding Company and their counsel, as well as by Burnworth and his counsel. The *Corrected Order* did not contain the language found in Paragraph 3 of the original *Stipulation of Settlement and Order of Dismissal*. It did contain the Latin phrase *nunc pro tunc*, reflecting that the *Corrected Order* would serve to replace the original Order of Dismissal effective as of April 19, 2012.
22. On June 6, 2012, counsel for RAM and George tendered to this Court the proposed *Judgment Order Granting Summary Judgment to All Defendants*.
23. The following day, June 7, 2012, Burnworth filed his *Motion to Stay Consideration and Entry of Judgment Order Granting Summary Judgment to All Defendants Pending Ruling on Plaintiff's Motion for Relief*² and *Plaintiff's Motion for Relief*.
24. Burnworth's *Motion for Relief*, filed pursuant to Rule 60(b)(5), W.Va. R. Civ. P., is predicated entirely upon the entry of the *Corrected Stipulation of Settlement and Order of Dismissal* and the absence of any language in the *Corrected Stipulation of Settlement and Order of Dismissal* extinguishing and cancelling the Promissory Note and pledged security.

² This Court granted Plaintiff's Motion to Stay as reflected by a separate Order.

25. RAM and George filed their Response to the Motion for Relief and asserted that the requested relief was not proper or warranted, specifically asserting fraud on the Court and judicial estoppel. This Court need not consider whether a fraud on the Court has occurred, because the entry of *the Corrected Stipulation of Settlement and Order of Dismissal* does not implicate the factual findings and legal conclusions by this Court underlying its grant of summary judgment to RAM, George and Poffenbarger.

CONCLUSIONS OF LAW

1. Rule 60(b)(5), W.Va. R. Civ. P., provides that

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: ... 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.

2. Burnworth argues that he is entitled to relief from summary judgment here based upon the entry by Judge Webster of the *Corrected Stipulation of Settlement and Order of Dismissal*.

3. Burnworth's reliance on the *Corrected Stipulation of Settlement and Order of Dismissal*, however, is misplaced and reflects a misunderstanding of this Court's ruling during the May 23rd Hearing. This Court did not grant summary judgment based upon any rulings by the Honorable Carrie Webster in the collection action. Rather, this Court granted summary judgment in favor of RAM, George and Poffenbarger based upon the voluntary and negotiated settlement by and between Burnworth, ADSC Holding Company and the Joneses contained with the *Stipulation of Settlement and Order of Dismissal*.

4. Burnworth has not presented any evidence that the voluntary and negotiated settlement he entered into with ADSC Holding Company and the Joneses contained within the

Stipulation of Settlement and Order of Dismissal was not a binding agreement. The *Corrected Stipulation of Settlement and Order of Dismissal* contains no findings to suggest that the substantive agreement reached by Burnworth, ADSC Holding Company and the Joneses reflected in the *Stipulation of Settlement and Order of Dismissal* is not binding. Moreover, Burnworth's request that this Court interpret the *Corrected Stipulation of Settlement and Order of Dismissal* as changing the substantive rights of the parties, rather than merely correcting a clerical error, is inconsistent with West Virginia law. See *Barber v. Barber*, 195 W.Va. 38, 464 S.E.2d 358 (1995).

5. This Court noted repeatedly during the May 23, 2012 Hearing that the *Stipulation of Settlement and Order of Dismissal* was unique in this Court's extensive experience. For reasons not apparent to this Court, the parties in the collection action—Burnworth, the Joneses and ADSC Holding Company-- chose to memorialize the terms of their settlement in the body of a Dismissal Order that they tendered to the Court. This Court confirmed through Burnworth's counsel (a) that Burnworth was represented by counsel of his choosing in the collection action; and, (b) that the terms of the settlement, as reflected by the *Stipulation of Settlement and Order of Dismissal*, had been negotiated. This Court sought this confirmation, because it was plain on the face of the *Stipulation of Settlement and Order of Dismissal* that Burnworth had effectively given up his legal malpractice claims against RAM, George and Poffenbarger, which would not have occurred if he simply had sought a default judgment against the Joneses and ADSC Holding Company.
6. Although Burnworth did not personally sign the *Stipulation of Settlement and Order of Dismissal*, Burnworth's counsel, William Pepper, did. As a matter of law, Burnworth is

bound by the acts of his agent reflected by the Stipulation of Settlement. *See Messer v. Huntington Anesthesia Group, Inc.*, 222 W. Va. 410; 664 S.E.2d 751 (2008).

7. During the May 23rd Hearing, this Court did not find any ambiguity in the *Stipulation of Settlement and Order of Dismissal*, nor did Burnworth claim one existed. This Court, therefore, in granting summary judgment to RAM, George and Poffenbarger applied the plain meaning of the settlement terms. *See Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 493, 128 S.E.2d 626, 633 (1962). No triable issue remained in the legal malpractice action, because Burnworth had agreed in the *Stipulation of Settlement and Order of Dismissal* to extinguish, cancel and render null and void the Promissory Note and all pledged collateral that were the evidentiary predicate for his damages claims.
8. This Court further finds that Burnworth is judicially estopped from repudiating the *Stipulation of Settlement and Order of Dismissal*. *See Syl. Pt. 2, W.Va. Dept. of Transportation v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005). Burnworth tendered the *Stipulation of Settlement and Order of Dismissal* to this Court and relied upon it in this action to oppose RAM and George's *Motion to Consolidate*. In his *Response in Opposition to Summary Judgment*, Burnworth implicitly relied upon the *Stipulation of Settlement and Order of Dismissal* and its validity when he argued that he could not collect under the *Stipulation of Settlement and Order of Dismissal* because the Joneses were judgment proof. Any effort by Burnworth now to disavow the record of his settlement agreement in the collection action comes only after this Court granted summary judgment.

9. This Court concludes that there is no basis in the facts, law or equity to modify its earlier decision granting RAM, George and Poffenbarger summary judgment. Accordingly, this Court is of the opinion to DENY *Plaintiff's Motion for Relief*.

**CONSIDERATION OF PROPOSED JUDGMENT ORDER GRANTING
SUMMARY JUDGMENT**

1. This Court has reviewed the proposed *Judgment Order Granting Summary Judgment to All Defendants* tendered by counsel for RAM and George.
2. The Judgment Order correctly reflects this Court's findings and conclusions from the May 23, 2012 Hearing, including, without exception this Court's findings regarding the settlement agreement that Burnworth negotiated and entered into with the Joneses on or before April 19, 2012, as reflected by the *Stipulation of Settlement and Order of Dismissal*.
3. The record reflects that the only timely challenge made by Burnworth to the proposed *Judgment Order* was contained within *Plaintiff's Motion for Relief*, which this Court has denied.
4. This Court is of the opinion to enter the *Judgment Order* as tendered.

IT IS ORDERED, THEREFORE, that *Plaintiff's Motion for Relief* from the summary judgment previously granted Defendants RAM, George and Poffenbarger is DENIED. The *Judgment Order Granting Summary Judgment to All Defendants* shall be entered forthwith.

IT IS ORDERED FURTHER that the Clerk of the Court shall provide *teste* copies of this Order to the following counsel of record:

James B. Lees, Jr., Esquire
Hunt & Lees, L.C.
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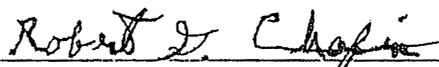
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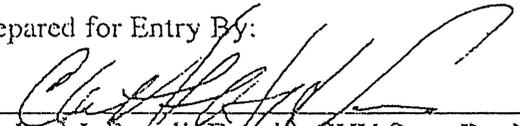
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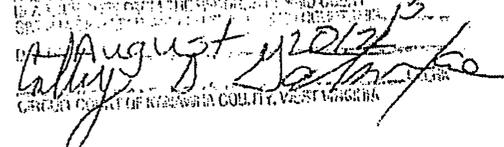
The objections and exceptions of the parties are noted and preserved
PLAINTIFF'S WRITEN OBJECTIONS TO THIS ORDER ARE OVERRULED. (PSC)

ENTERED this 10th day of August, 2012.


The Honorable Robert G. Clafin, Special Judge

Prepared for Entry By:


Michael J. Farrell, Esquire (WV State Bar No. 1168)
Charlotte A. Hoffman Norris, Esquire (WV State Bar No. 5473)
Farrell, White & Legg PLLC
Counsel for Defendants Robinson & McElwee PLLC and Kent George

STATE OF WEST VIRGINIA
CLERK OF COURT
CLERK OF COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN SAID COURT
ON AUGUST 15, 2012.

CLERK OF COURT OF KANAWHA COUNTY, WEST VIRGINIA

Reviewed Prior to Entry By:

James B. Lees, Jr., Esquire (WV State Bar No. 2176)
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Kathy Brown Law, PLLC
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