

14-0215

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA  
DIVISION III

COUNTY COUNCIL OF BERKELEY )  
COUNTY, WEST VIRGINIA and the )  
BERKELEY COUNTY PLANNING )  
COMMISSION, and NLP FINANCE, LLC, )

Plaintiffs, )

CIVIL ACTION NO. 11-C-973  
Judge Silver

v. )

DLM, LLC, and )  
LEXON INSURANCE COMPANY, )

Defendants, )

and )

NOEL MORRISON, )

Third-Party Plaintiff. )

**ORDER DENYING DEFENDANT  
LEXON INSURANCE COMPANY'S MOTION TO SET ASIDE DEFAULT JUDGMENT**

On a previous day came Defendant Lexon Insurance Company ("Lexon"), by counsel, upon a Motion to Set Aside Default Judgment (the "Motion") filed February 22, 2013; upon Plaintiffs' Response in Opposition filed July 29, 2013; upon Lexon's Reply in Support of Motion to Set Aside Default Judgment filed September 4, 2013; and upon the Court's Order Granting [Plaintiffs'] Motion for Leave to File Surreply entered September 4, 2013; and upon Plaintiffs' Surreply filed September 19, 2013.

The Court has carefully considered Lexon's Motion to Set Aside Default Judgment, the Responses, the Replies, the entire record of this case, and pertinent legal authority. As a result of these deliberations, the Court has concluded that Lexon's Motion to Set Aside Default Judgment

should be denied. In support of its decision, the Court makes the following findings of fact and conclusions of law.

#### **NOTE ON PROCEDURAL POSTURE OF THE CASE**

During 2013, the Court held several hearings in this case at which all parties, through their counsel, were heard on the procedural topic of the order in which matters should be briefed, argued and ruled upon. By Order entered August 5, 2013, reflecting discussion between the Court and all counsel at a hearing held July 29, 2013, the Court stated: “There was a consensus by the parties that the pending Motion filed by Lexon to Set Aside the Default Judgment previously entered by this Court should be the initial issue addressed.” At that July 29, 2013 hearing, the Court invited counsel themselves, should they be able to agree, to fashion the “path forward” and asked counsel whether counsel wished to have an evidentiary hearing or further oral argument. All counsel were in agreement that Lexon’s Motion should be decided solely upon written memoranda, exhibits and proposed orders.

#### **LEGAL STANDARD**

1. “A motion to vacate a default judgment is addressed to the sound discretion of the court and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion.” Syl. Pt. 2, *Tudor’s Biscuit World v. Critchley*, 229 W.Va. 396, 729 S.E.2d 231 (2012) (per curiam) (citations omitted).

2. “As a general rule, the party who seeks to have a default judgment opened or vacated has the burden of proving the facts entitling him or her to the relief asked.” 49 C.J.S. *Judgments* § 601 (2012); see *Hardwood Group. v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006) (requiring movant to demonstrate entitlement to relief); *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992) (same).

3. “A movant seeking relief under Rule 60(b)(4) 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 period of time.” Syl. Pt. 3, *Critchley, supra* (quoting Syl. Pt. 5, *Leslie Equipment Co. v. Wood Resources, Co., L.L.C.*, 224 W.Va. 530, 687 S.E.2d 109 (2009)).

4. “In addressing a motion to set aside a default judgment, ‘good cause’ requires not only considering 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), but also requires a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied.” Syl. Pt. 4, *Critchley, supra* (quoting Syl. Pt. 5, *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006)).

5. “In determining whether a default judgment should be entered in the face of a Rule 60(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: (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; and (4) the degree of intransigence on the part of the defaulting party.” Syl. Pt. 5, *Critchley, supra* (quoting Syl. Pt. 3, *Parsons, supra*).

6. “Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits.” Syl. Pt. 6, *Critchley, supra* (quoting Syl. Pt. 2, *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8 (1972)).

7. “To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” Syl. Pt. 7, *Critchley, supra* (citations omitted).

## FINDINGS OF FACT

8. This matter involves Lexon's liability to Plaintiffs County Council of Berkeley County, West Virginia and the Berkeley County Planning Commission (collectively, the "County") under two subdivision performance bonds, totaling \$3,438,565.20, issued to DLM, LLC ("DLM") as part of the approval process for Chandler's Glen, a 255-unit subdivision that was planned during the real estate upturn years of the mid-2000's to be developed by DLM in Berkeley County, West Virginia.

9. As a precondition to approval of the Chandler's Glen final plat, the County's subdivision ordinance required DLM to either (a) complete all of the required site improvements and infrastructure for the project or (b) post bonds guaranteeing future completion of the required site improvements and infrastructure.

10. On November 8, 2005, DLM obtained its first performance bond from Lexon, in the amount of \$1,050,000.00, guaranteeing completion of the site improvements for Chandler's Glen. Upon receipt and approval of the bond, DLM began grading the site and installing the site improvements.

11. On February 6, 2006, the County approved the final plat submitted by DLM for Chandler's Glen, with its approval contingent upon receiving a second performance bond from DLM in the amount of \$2,388,565.20.

12. On February 10, 2006, DLM obtained a second subdivision performance bond from Lexon, in the amount of \$2,388,565.20, guaranteeing completion of the infrastructure for Chandler's Glen.

13. The two subdivision performance bonds purchased by DLM were written, priced, and guaranteed by Lexon, and both bonds name the County as obligee.

14. On November 17, 2010, the County learned that DLM had filed for bankruptcy. The subdivision site improvements and infrastructure for Chandler's Glen had not been completed, constituting a default under both bonds.

15. On December 9, 2010, the County made a demand on Lexon for the \$2,388,565.20 guaranteed by the infrastructure bond. On January 25, 2011, the County made a demand on Lexon for the \$1,050,000.00 guaranteed by the site improvement bond.

16. By letter to the County dated February 24, 2011, Lexon acknowledged receipt of the County's demands on the bonds. Lexon's letter specifically stated that Chris Parrish, Lexon's Director of Construction, would be "handling this matter for response," and that Mr. Parrish's contact information was "Lexon Insurance Company, 900 South Frontage Road, Suite 250, Woodridge, IL 60517."

17. By letter dated June 15, 2011, the County inquired as to the progress of use of the bond proceeds, noting that there had been no communication with Lexon since the County's latest meeting with Mr. Parrish in April of 2011.

18. Later in the summer of 2011, staff for the County met with Mr. Parrish and Bruce Maas, Esquire, counsel for Lexon, to discuss a proposal by Lexon to complete only those portions of Chandler's Glen that contained purchased lots. Upon unanimous vote by the members of the planning commission, the County rejected Lexon's offer.

19. By letter dated October 6, 2011, the County again demanded that Lexon honor its obligations under the bonds either by remitting "the proceeds of the bonds, in full" or "[i]n the alternative" by arranging "with us to complete the project according to the required plans."<sup>1</sup>

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<sup>1</sup> The County's letter to Lexon also contains the following representation: "Certainly, if the proceeds of the bond [sic] are forthcoming, the County commits to utilize the funds exclusively for the purpose of completion of the project as specified by the plans. Any part of the proceeds not necessary to full completion of the project shall be returned to Lexon."

20. Lexon ignored the County's second demand, and thus on November 17, 2011, the County filed the instant lawsuit: a complaint against Lexon seeking specific performance of Lexon's obligations under the bonds.

21. On November 18, 2011, the County had the Clerk of the Berkeley County Circuit Court mail the summons and complaint to Lexon's office in Woodridge, Illinois where Chris Parrish, its primary Lexon contact, worked at the same mailing address provided to the County by Lexon in its February 24, 2011 letter. The documents were mailed "return receipt requested"<sup>2</sup> and the green return receipt card returned to the Court file show that the documents were accepted and signed for on behalf of Lexon by one "L. Mart." The green return receipt card returned to the court file bears the date November 28, 2011.

22. In their briefs the parties have acknowledged that the signature "L. Mart." is an abbreviation for Linda Martinez, a receptionist employed at Lexon's Woodridge, Illinois offices (the same office where Mr. Parrish, the previously-provided contact for negotiations between Lexon and the County, is also located).

23. On December 15, 2011, Lexon emailed the County's counsel to confirm that Lexon had an "indefinite extension of time to respond to the complaint and that [the County] will give [it] 15 days' notice if this consent is withdrawn." This extension remained in place until April 20, 2012, when the County sent Lexon's counsel, Bruce Maas, an email informing him that "[w]e have decided to go forward and press the litigation which was earlier filed against your client, Lexon" and stating that it would "appreciate [Lexon's] answer at your earliest convenience."

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<sup>2</sup> The green return receipt card returned to the Court file is addressed to "Lexon" at the Woodridge Illinois office. Lexon has acknowledged in the course of briefing the instant Motion that by mailing the summons and complaint to the Woodridge Illinois office at the address given to the County by Lexon, that the County was mailing the summons and complaint to "defendant's representative with whom it had engaged in extensive settlement negotiations" (that is, Mr. Parrish).

24. Lexon did not respond to the County's April 20, 2012 warning email, so after nineteen days, the County sent Mr. Maas, counsel for Lexon a further follow-up email and a formal letter by U.S. mail on May 9, 2012 restating the County's decision to "move forward and prosecute the civil action against your client."

25. On May 30, 2012, NLP Finance, LLC filed its Motion to Intervene, which was granted by Order entered August 1, 2012 with the Court's notation thereon: "Note to Counsel: The Court has received no pleadings in opposition to this Motion during the time period contemplated by Trial Court Rule 22 Scheduling Order."

26. After the clear warning letter of May 9, 2012 that was received in Mr. Maas' office on approximately May 14, 2012 and the passage of another month with no response by Lexon, the County filed its motion for default judgment on June 14, 2012. The Motion was filed under a certificate of service showing service of the Motion upon all counsel of record, including "Bruce L. Maas, Esq., Harris Beach PLLC, 99 Garnsey Road, Pittsford, New York 14534, Counsel for Lexon Insurance Company." This address for Mr. Maas was correct. Lexon has not argued that Mr. Maas did not receive his copy of this Motion in the mail.

27. Despite the clear warning letter of May 9, 2012, and despite service of the Motion itself by mail upon Mr. Maas, Lexon did not enter its appearance in this case or make any response to the Motion for Default Judgment.

28. This Court entered default judgment against Lexon on July 5, 2012 for the sum certain claimed by the County of \$3,438,565.20, the total face amount of the two bonds combined, plus post judgment interest, and ordered the Circuit Clerk's office to mail an attested copy of the Order to all counsel of record. The Court file reflects that these mailings were sent out the next day, on July 6, 2012.

29. The parties, in briefing the instant Motion to Set Aside Default Judgment, have included numerous exhibits consisting of email exchanges between counsel for the County and counsel for Lexon. The conclusions to be reached by review of these email exchanges that the parties are urging upon the Court are, unsurprisingly, polar extremes. The County asserts that the email exchanges show that the County was courteous and direct with Lexon's counsel, Mr. Maas, and gave him notice of both the decision to proceed with the lawsuit, and also the decision to "press the litigation." On the other hand, Lexon's counsel contends that the email exchanges demonstrate that the County "took default in the midst of on-going settlement negotiations."

30. On July 6, 2012, Lexon belatedly<sup>3</sup> emailed the County a settlement offer and attempted to "confirm that Lexon's time to respond to the lawsuit continues to be extended while we discuss the terms of a settlement of this matter." The County in a responsive email reminded Lexon that its settlement offer was too late. The County sent a second response email on August 9, 2012 clarifying that the default judgment had already been entered when Lexon sent the offer of July 6, 2012.

31. Rather than immediately appear in the action and move to set aside the default judgment, Lexon instead sent the County an email on July 19, 2012 asking it to agree to vacate it. When the County denied Lexon's request, Lexon took no further action until November 30, 2012, when its newly-appearing local counsel sought the County's agreement to vacate the default judgment.

32. On December 19, 2012, Lexon's new counsel sent the County's counsel a letter requesting that he not begin proceedings to enforce the default until seven days after responding

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<sup>3</sup> Belatedly in two respects: first, of course, because by July 6, 2012, the Court had already entered its Order Granting Default Judgment; and also because Mr. Maas had in his email of June 21, 2012 to the County promised an offer within a matter of several days, but did not email it to the County's counsel until July 6, 2012.

to the agreed order. One week later, Lexon's counsel sent the County's counsel another letter suggesting that he advise the County to sign the agreed order.

33. The County's counsel responded on January 9, 2013 that the County would not sign the agreed order, but Lexon did not file its Motion to Set Aside Default Judgment until six weeks later, on February 22, 2013.

34. Lexon failed to appear in this action or file its Motion to Set Aside Default Judgment until February 22, 2013, nearly seven months after the Court's default judgment order was entered and over a year after this lawsuit was filed.

### CONCLUSIONS OF LAW

#### I. LEXON'S MOTION TO SET ASIDE DEFAULT JUDGMENT IS UNTIMELY.

35. Lexon filed its Motion to Set Aside Default Judgment on February 22, 2013. Considering that Lexon had actual knowledge of the default judgment for seven months, and under all the circumstances of this case, the Court finds that Lexon's Motion was not made within a reasonable time.

36. "The motion for relief [under Rule 60(b)] must be made within a reasonable time [] after the judgment order was entered." Syl. Pt. 1, in part, *Savas v. Savas*, 181 W.Va. 316, 382 S.E.2d 510 (1989).

37. Generally, our Supreme Court has found that periods of one month or shorter are reasonable for purposes of filing a motion under Rule 60(b). See *Leslie Equip. Co. v. Wood Res. Co., L.L.C.*, 224 W.Va. 530, 537, 687 S.E.2d 109, 116 (2009) (ten day period was reasonable); *Delapp v. Delapp*, 213 W.Va. 757, 764, 584 S.E.2d 899, 906 (2003) (per curiam) (two day period to file motion and twenty days to file memorandum in support was reasonable); *Tudor's Biscuit World of Am. v. Critchley*, 229 W.Va. 396, 404, 729 S.E.2d 231, 239 (2012) (period of less than two weeks was reasonable); *State ex rel. Bess v. Berger*, 203 W.Va. 662, 666, 510

S.E.2d 496, 500 (1998) (per curiam) (period of fourteen days after party learned of order was reasonable).

38. Although the West Virginia Supreme Court has found that a Rule 60(b) motion filed fourteen months after default was timely, the defaulting party in that case first learned of the default thirteen months after it was filed and therefore only took one month to file a motion to set it aside. *See Evans v. Holt*, 193 W.Va. 578, 586, 457 S.E.2d 515, 523 (1995).

39. The Court finds that Lexon had actual knowledge of the default judgment against it for nearly seven months. In the Court's July 5, 2012, Order Granting Motion for Default Judgment, the Court directed that the Clerk mail an attested copy of the Order to Bruce L. Maas, Esquire, who had communicated with the County as Lexon's counsel. The Court's docket sheet confirms that a copy of the Order was mailed to Mr. Maas on that date. Additionally, the County's counsel informed Mr. Maas in an email exchange on August 9, 2012 that the default judgment had been entered against Lexon.

40. The Court finds that Lexon has not provided any reasonable explanation for why it failed immediately to move to set aside the default judgment. Although Lexon made efforts to obtain an agreement from the County to have the default judgment set aside voluntarily, these efforts do not relieve Lexon's failure to appear and file its Motion. Even if the approximately three month time period which Lexon's newly-appearing local counsel spent attempting to get the County to agree to set aside the default judgment is forgiven, the four months of inactivity after the default judgment order was entered, and the failure of Lexon to make any appearance in this case in opposition to the Motion while it was pending, remain unexplained.

41. Accordingly, the Court concludes that Lexon's Motion is untimely under Rule 60(b).

**II. LEXON HAS NOT DEMONSTRATED GOOD CAUSE ENTITLING IT TO RELIEF FROM THE COURT'S DEFAULT JUDGMENT.**

42. Even if Lexon's Motion to Set Aside Default Judgment was timely, the Court finds that Lexon has not made the required showing of "good cause" under Rule 60(b) to justify setting aside the default judgment entered by the Court. Instead, the factors that this Court must consider weigh in favor of affirming the Court's judgment and against granting Lexon's motion.

43. "In determining whether a default judgment . . . should be vacated upon a Rule 60(b) motion, the trial court should consider (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; and (4) the degree of intransigence on the part of the defaulting party." Syl. Pt. 3, *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006).

44. "[A]ny evidence of intransigence on the part of a defaulting party *should be weighed heavily against him* in determining the propriety of a default judgment." *Hinerman v. Levin*, 172 W.Va. 777, 782, 310 S.E.2d 843, 849 (1983) (emphasis added).

**A. The County has been significantly prejudiced by Lexon's delay in answering and will be further prejudiced if the default judgment is set aside.**

45. The Court finds that not only have the necessary infrastructure and improvements for Chandler's Glen not been installed, the improvements that were begun by DLM were themselves never completed and have severely degraded and deteriorated to the point that the County may need to redo portions of this work entirely. The incomplete portions of Chandler's Glen will also need to be cleaned up before new infrastructure and improvements can be installed because those areas have been used as a dumping ground.

46. The Court finds that the property values in the area of an unfinished large-scale subdivision such as Chandler's Glen are deleteriously affected by the failure of the developer,

the work stoppage, the visually blemished appearance of such an unfinished large-scale subdivision, and the uncertainties attendant to its completion.

47. The Court finds that the County has to rely upon these Lexon bonds, written in 2005 and 2006, for the funding to complete infrastructure and improvements. At this stage, it is possible that the County will not be able to complete all of the planned site improvements and infrastructure within the amount allotted under the 2005 and 2006 bonds because of increases in costs for labor and materials, changes in market conditions over these years, and the necessity to re-do some portion of work that, due to incomplete construction and delays, has deteriorated.

48. The Court finds that, due to the neglect of the subdivision and the lack of progress with Lexon on getting the site improvements and infrastructure completed or paid for by Lexon, the County has been sued by the homeowners of Chandler's Glen, creating a separate financial burden upon the County and further complicating the County's efforts to complete the Chandler's Glen infrastructure and improvements.

49. The Court finds that forcing the County to endure lengthy litigation in order to obtain the relief that it is entitled to and has already obtained, particularly when a full trial will simply result in the same outcome, serves no purpose other than to exacerbate the burdens that the County now faces.

50. Accordingly, the Court finds that setting aside the default judgment will significantly further prejudice the County and this factor weighs in favor of upholding the default judgment.

**B. There are no material issues of fact to resolve in this case and Lexon has not demonstrated that it has any meritorious defenses to liability.**

51. Although Lexon's motion sets forth multiple defenses to the entry of default judgment, the Court finds that Lexon has identified no *meritorious* defenses demonstrating that it

will not be liable to the County for specific performance of its obligations under the bonds.<sup>4</sup> Ultimately, this case is one for breach of a contract of suretyship and there are no material issues of fact that could relieve Lexon of its liability under the bonds.

52. This factor focuses on whether “there is . . . reason to believe that a result different from the one obtained would have followed from a full trial.” *Hardwood Group v. Larocco*, 219 W.Va. 56, 63, 631 S.E.2d 614, 621 (2006).

53. “In a contract of suretyship the obligation of the principal and his surety is original, primary, and direct, and the surety is liable for the debt, default, or miscarriage of his principal.” Syl. Pt. 1, *Gateway Commc’ns, Inc. v. John R. Hess, Inc.*, 208 W.Va. 505, 541 S.E.2d 595 (2000).

54. “As a general rule, the liability of the surety is coextensive with that of the principal.” Syl. Pt. 2, *Gateway Commc’ns, Inc. v. John R. Hess, Inc.*, 208 W.Va. 505, 541 S.E.2d 595 (2000).

55. “The liability of a surety is a legal as distinguished from a moral one. The surety’s obligation arises out of positive contract, and the contract generally measures the extent of the surety’s liability.” Syl. Pt. 3, *Gateway Commc’ns, Inc. v. John R. Hess, Inc.*, 208 W.Va. 505, 541 S.E.2d 595 (2000).

56. The Court finds that there are no issues of material fact to be resolved in a full trial. In exchange for approving the Chandler’s Glen final plat, the County’s subdivision ordinance required DLM to either (1) complete all infrastructure and site improvements prior to

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<sup>4</sup> Lexon’s motion appears to argue that its objection to the County’s service of process constitutes a meritorious defense to liability under the bonds. Even if Lexon’s objection to service had merit, it would not result in dismissal of this action. Where a defendant seeks dismissal for lack of personal jurisdiction based upon defective service of process, the appropriate remedy is to *quash service*, not dismiss the action. See *Bailey v. Boilermakers Local 667 of Int’l Bhd. of Boilermakers*, 480 F.Supp. 274, 278 (N.D.W.Va. 1979) (if defect in service of process is curable, motion to dismiss should not be granted but instead the Court should treat the motion as one to quash service of process and retain the case on the docket pending effective service).

approval or (2) obtain performance bonds guaranteeing future completion of all work. DLM chose to obtain performance bonds, and Lexon chose to write, price, and guarantee the bonds issued to DLM. DLM failed to perform its obligations to the County, and Lexon is now obligated to either complete the site improvements and infrastructure itself, or pay the County the full face amount of the bonds.

57. The Court finds that Lexon has not articulated any substantive defense to its liability under the bonds. If this matter were to proceed to a full trial, Lexon will be liable to specifically perform its obligation as surety under the bonds which guaranteed construction of the infrastructure and improvements for Chandler's Glen.<sup>5</sup>

58. To the extent that Lexon argues that defective service of process is a substantive defense to liability, the Court finds that Lexon's argument is without merit. Where a defendant seeks dismissal for lack of personal jurisdiction based upon defective service of process, the appropriate remedy is to quash service, not dismiss the action. *See Bailey v. Boilermakers Local 667 of Int'l Bhd. of Boilermakers*, 480 F. Supp. 274, 278 (N.D.W.Va. 1979) (if defect in service of process is curable, motion to dismiss should not be granted but instead the Court should treat the motion as one to quash service of process and retain the case on the docket pending effective service).

59. To the extent that Lexon argued that insufficient service of process rendered the default judgment void, the Court finds that while this would state a meritorious defense under the Parsons factors that, if viable, would have weighed in favor of vacating the default judgment, *see*

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<sup>5</sup> Lexon argues that because of the "low" valuation made of the Chandler's Glen development interests in the bankruptcy of the prior developer DLM, and because it is currently unclear whether the real estate market will support full build-out of Chandler's Glen to the 255 homes originally planned (i.e., Lexon maintains, "permission to build" is not a "mandate" to build), Lexon's liability to the County under the bonds is some undetermined amount less than the full face amount of the bonds. The Court believes that if it were to accept this argument it would be placing Lexon in the driver's seat as to a decision that is not Lexon's to make: it is the County's, in conjunction with a new developer.

*Critchley*, supra at 241, 406 (defect in service held meritorious defense under Parsons test), because the Court in this Order considers this argument and rules against Lexon on the issue of sufficiency of service of process, the Rule 60(b)(4) “void judgment” defense is not meritorious.

60. To the extent that Lexon is correct in arguing that it held the option of performance (installing the site improvements and infrastructure itself) as opposed to payment, under the bonds, the Court finds that it would be futile and inequitable to treat that “option” as a meritorious defense to liability sufficient to favor Lexon in weighing the Parsons factors. Prior to the County’s bringing of this lawsuit, it appears that Lexon had the option of performance versus payment, and the Court finds that the County worked in good faith with Lexon toward achieving that option for at least ten months during 2011 and was met only with delays, unresponsiveness and lack of cooperation from Lexon. In addition, the Court does not consider the “performance as opposed to payment” option as raising a meritorious defense under these circumstances because even if Lexon’s costs of performance, had it taken this route, would have been less than the full face amount of the bonds equaling the amount of the default judgment, because the County has represented that it is only seeking to retain proceeds from Lexon under the bonds in the amount that the County actually expends installing the site improvements and infrastructure for Chandler’s Glen, and that any amount of the default judgment not so expended will be returned to Lexon.<sup>6</sup>

61. Accordingly, the Court finds that there are no issues of material fact to resolve and no meritorious defenses to liability if this action were to proceed to a full trial, and thus this factor weighs in favor of upholding the default judgment.

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<sup>6</sup> Even if the County ultimately were to decide to install some portion of, but not the entirety of, the planned and bonded site improvements and infrastructure for Chandler’s Glen (and the Court is not ruling upon the propriety of such a decision, were it to be made), the County’s position that it is only entitled to retain bond proceeds from Lexon in the amount the County expends for site improvements and infrastructure at Chandler’s Glen, means that the County will not be the beneficiary of any unjust “windfall” from Lexon.

**C. The interests at stake are significant but that alone does not justify setting aside the default judgment.**

62. The Court finds that the amount of the Court's default judgment award is significant to both the County and Lexon, but significance alone does not justify setting aside a default judgment.

63. The West Virginia Supreme Court has refused to set aside default judgments where the defaulting party's interests were significant. *See Cales v. Wills*, 212 W.Va. 232, 569 S.E.2d 479 (2002) (upholding default as to liability despite damages in the amount of \$113,734.19); *Lee v. Gentlemen's Club, Inc.*, 208 W.Va. 564, 542 S.E.2d 78 (2000) (per curiam) (upholding default judgment despite \$322,415.76 damages award). *See also Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*, 218 W.Va. 247 (2005) (per curiam); *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006); *Hinerman v. Levin*, 172 W.Va. 777, 310 S.E.2d 843 (1983).

64. The Court finds that the significance of the judgment is tempered by the fact that Lexon is a large business entity with, as reported in financial industry publications, nearly \$200,000,000 in liquidity. The Court's default judgment award of \$3,438,565.20 constitutes less than 2% of Lexon's admitted reserves – a fraction of the company's surplus and, indeed, an amount that it should have fully accounted for prior to issuing the Chandler's Glen bonds in the first place.

65. Accordingly, while the Court finds that the interests at stake are significant and this factor somewhat weighs in favor of setting aside the default judgment, the Court concludes that the default judgment should not be set aside based solely upon this factor.

**D. Lexon has been significantly intransigent in defending its interests.**

66. The Court finds that Lexon has been significantly intransigent in defending itself in this case and has also been intransigent in its level of cooperation with the County.

67. “[A]ny evidence of intransigence on the part of a defaulting party should be weighed heavily against him in determining the propriety of a default judgment.” *Hinerman v. Levin*, 172 W.Va. 777, 782, 310 S.E.2d 843, 849 (1983).

68. The Court finds that Lexon had over six months to answer the County’s complaint under its agreement with the County, yet Lexon failed to appear or file anything with the Court. Moreover, after being warned that the County planned to move forward with litigation, Lexon had almost two months to answer the complaint before the County actually moved for default judgment. During this time, the County warned Lexon not once, but three times, that it required Lexon to answer the complaint. Lexon then had nearly a month between the County’s filing of its motion, which was served upon Lexon’s counsel in the normal course of litigation, and the Court’s order granting default judgment. Finally, even after the Court entered default judgment, Lexon failed to appear or file its motion for an additional period of nearly seven months.

69. The Court finds that Lexon cannot claim ignorance of this lawsuit, the County’s decision to move forward, or the default judgment. Lexon admits in its motion that, on December 15, 2011, it sent an email to counsel for the County requesting an extension of time to file its answer. Lexon further admits in its motion that on May 14, 2012, it received the May 9, 2012 warning letter from the County advising that the extension had been revoked and that the County expected Lexon to file its answer. Further, the Court’s Order was mailed on July 5, 2012 to counsel for Lexon, and Lexon requested on July 19, 2012 that the County voluntarily agree to vacate the judgment (all the while choosing to make no appearance before this Court).

70. The Court finds that, even after default, Lexon chose to wait an additional seven months instead of immediately filing its motion to set aside the default. Considering that Lexon had actual notice of the default judgment and the County's refusal to vacate it, the Court finds that Lexon's decision not to make an appearance in the case to seek relief from the Court is not excused.

71. The Court finds that the exchange of emailed correspondence between Lexon's prior counsel, Mr. Maas, and the County's counsel, demonstrates that Lexon was given appropriate, even courteous, notice and warnings of the County's impending actions in the litigation. The Court rejects Lexon's characterization that the County "took default in the midst of on-going settlement negotiations." What the Court sees from this entire record is that over and over again, Lexon has ignored its obligation under the bonds, delayed in responding to the County's inquiries, and further, Lexon chose not to make an appearance in the litigation until seven months after its default. The Court finds that this amounts to intransigent conduct by Lexon.

72. Accordingly, the Court finds that Lexon has been significantly intransigent in defending its interests in this lawsuit and in moving to set aside the default judgment to the material detriment of the County, and this factor weighs heavily in favor of upholding the default judgment.

**E. The balance of factors weighs in favor of denying Lexon's Motion and upholding the default judgment.**

73. The Court finds that only one of the above factors somewhat weighs in favor of Lexon: the interests at stake are significant. The interests at stake, however, are not so significant as to threaten Lexon's financial stability, and the amount of the award is entirely

within the scope of risk that Lexon voluntarily accepted by issuing the performance bonds for Chandler's Glen.

74. The Court finds that the remaining factors weigh heavily in favor of upholding the default judgment: (1) the County has been significantly prejudiced by Lexon's delay; (2) there are no material issues of fact and Lexon has not articulated meritorious defenses to liability; and (3) Lexon has been significantly intransigent both in defending itself prior to the default judgment, in filing its Motion, and in its dealings with the County.

75. The Court finds that denying Lexon's Motion is consistent with West Virginia case law. In *Cales*, the West Virginia Supreme Court found that although three factors weighed in the defendant's favor (the plaintiff would not be prejudiced if the default was set aside, the defendant had two meritorious defenses, and the interests at stake were significant), those factors were outweighed by the defendant's "significant" intransigence and its "utter failure to present any excusable or unavoidable cause for not filing a timely answer." *Cales*, 212 W.Va. at 242, 569 S.E.2d at 489. Similarly, in *Larocco*, the Court found that "the proper balance requires us to affirm the trial court's denial of [the defendant's] motion to set aside the default judgment" because of the defendant's "inability to present any excusable neglect for not filing a timely answer," and the fact that the defendant's defenses "[did] not rise to the level of meritorious defenses." *Larocco*, 219 W.Va. at 65, 631 S.E.2d at 623.

76. Accordingly, having weighed the "good cause" factors set forth in Syl. Pt. 3, *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006), the Court concludes that the balance of factors weighs in favor of upholding the Court's default judgment and weighs against granting Lexon's motion.

**III. LEXON HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO RELIEF UNDER THE GROUNDS SET FORTH UNDER RULE 60(B)(4) OR 60(B)(1).**

77. Lexon invokes Rule 60(b)(4) and alternatively Rule 60(b)(1) in arguing that the default judgment should be set aside because (1) the default judgment is void for insufficient service of process, (2) County did not honor its agreement to grant Lexon an ongoing extension to answer, (3) the parties were engaged in ongoing settlement negotiations, (4) public policy favors setting aside the default judgment, and (5) the County was equitably estopped from seeking default judgment. Other than the Rule 60(b)(4) “void judgment” defense, Lexon in its Motion and its Reply did not tie the defenses set forth as numbers 2, 3, 4 and 5, above, to the “excusable neglect” ground set forth in Rule 60(b)(1), which Lexon *must* establish, given that Lexon’s Rule 60(b)(4) ground fails herein, in order to obtain relief from the default judgment. However, to the extent that any of these arguments can be construed as invoking any other ground for relief under Rule 60(b) other than Rule (60)(b)(4), the Court finds that Lexon’s arguments do not demonstrate that it is entitled to relief under Rule 60(b).

78. “In addressing a motion to set aside a default judgment, ‘good cause’ requires not only considering the factors set out in Syllabus point 3 of [*Larocco*] but also requires a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied.” Syl. Pt. 5, *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006).

79. “Unless and until he shows that his default and the resultant judgment are attributable to [a ground for relief under Rule 60(b)], the rule invoked *confers no authority upon the court to vacate the judgment* . . . . In the absence of such a showing, *the judgment must stand* . . . .” *Ledwith v. Storkin*, 2 F.R.D. 539, 544-45 (D.Neb. 1942) (emphasis added).

**A. The Court's default judgment is not void for insufficiency of service of process.**

**i. Lexon has failed to carry its burden of proof that service of process was signed for by an unauthorized agent of Lexon.**

80. Lexon primarily asserts that it is entitled to relief because the default judgment is void due to insufficient service of process. Lexon argues that the County's service of process was improper for three reasons: (1) the County did not serve Lexon through the Secretary of State; (2) the County did not serve the summons and complaint on Lexon's registered agent or send it to its principal place of business; and (3) the summons and complaint were not sent to an officer, director, or trustee or authorized agent of Lexon. This list identifies three options by which the County could have served Lexon. The Court finds that the County followed the third option.

81. The Court finds that, on February 24, 2011, Lexon gave the County the contact information for Chris Parrish, Lexon's Director of Construction, and told it that Mr. Parrish would be "handling this matter for response." In so doing, Lexon held Mr. Parrish out as its agent for service and, consequently, the County mailed the summons and complaint to him pursuant to Rule 4(d)(7). Lexon cannot argue that service on Mr. Parrish was unfair after specifically appointing him as its agent for handling this matter. Moreover, the County's belief that it should send the summons and complaint directly to Mr. Parrish, who was handling the matter on behalf of Lexon and with whom the County's counsel had been in contact for a period of eight or more months, was entirely reasonable.

82. The Court finds that the fact that the County's summons and complaint were signed for by one "L. Mart.," the signature of Linda Martinez, a Lexon receptionist at the Woodridge, Illinois office, does not create a defect in service. Although the County did not specifically write Mr. Parrish's name in the address window of the envelope or on the green

return receipt card, the County used the exact mailing address provided in Lexon's February 24, 2011 letter for communications to Mr. Parrish, Lexon's designated representative for this matter. Further, Lexon cannot deny that "L. Mart." promptly delivered the County's complaint to the proper Lexon authorities, as approximately two weeks later, counsel for Lexon emailed the County confirming its "indefinite extension of time to respond to the complaint." Thus, Lexon clearly received the summons and complaint and had actual, and timely, knowledge of the action against it. Further, Lexon formed a plan to defend the action well within the 30 days it was given to answer under Rule 12.

83. The Court finds that although the County did not write Mr. Parrish's name on the envelope and on the green return receipt card, Lexon has in its arguments bypassed an additional method by which service in this case would be held proper. This is where service is had upon a duly authorized agent of the company. Lexon's argument does not persuade the Court that Linda Martinez, receptionist for Lexon at the same Lexon office where Mr. Parrish worked, whom the parties acknowledge signed for the green return receipt card on behalf of Lexon with the abbreviation "L. Mart." was *not* authorized as an agent to receive such process for Lexon. Lexon relies upon *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992) ("service of process upon a secretary in a public corporation or agency is insufficient to constitute service on the public corporation or agency absent a clear showing that such individual was delegated by the corporation or agency to accept process"), but this Court notes that in that opinion by Justice Brotherton at footnote 16, our Supreme Court recognized that there is a split of authority among state courts as to whether the same rule announced in *Berryman* for public corporations should apply to private corporations, and that issue was not before the Supreme Court in the *Berryman* case. *Id.* at 331 n. 16, 925 n. 16.

84. The Court finds that Lexon has failed to persuade the Court that Lexon's receptionist, in signing the green return receipt card for Lexon, was not authorized to do so.<sup>7</sup> Lexon does not directly assert that Linda Martinez was not authorized to receive the process. In this regard, with respect to another case relied upon by Lexon, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517, 522-23 and footnote 7, service upon an attorney's temporary secretary was held insufficient where an affidavit was submitted to the Court to the effect that the attorney's temporary secretary was not authorized to receive service of process. No such affidavit was submitted by Lexon in support of its argument. Lexon's brief states: "[t]he signature on the certified mail card 'L. Mart.' is not of an officer, director, or trustee of Lexon." Surely, a receptionist is not an officer, director, or trustee of a corporation. Lexon argued that its registered agent for service of process when service is had through the Secretary of State's office is a different individual. But that does not end the analysis.

85. Lexon does not squarely address the propriety of service of process upon a duly authorized agent of the corporation, which is another method of service permitted under Rule 4. Neither did Lexon offer to establish by affidavit<sup>8</sup> that the Lexon receptionist, Linda Martinez, who signed the green return receipt card by abbreviating her name "L. Mart." is not an authorized agent for Lexon to receive such process.<sup>9</sup> Under the unique factual circumstances

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<sup>7</sup> The Court rules that the burden of proof in asserting insufficiency of process in the context of a Rule 60(b)(4) motion is on the moving party, Lexon. *See generally* "Who Has the Burden of Proof in proceeding under rule 60(b)(4) [of Federal Rules of Civil Procedure] to have default judgment set aside on ground that it is void for lack of jurisdiction?" 102 A.L.R. Fed. 811 (1991) (collecting cases).

<sup>8</sup> Because all counsel agreed that Lexon's Motion to Set Aside Default Judgment should proceed to the Court's decision on briefs with no evidentiary hearing, *see* discussion at procedural note, *supra* page 2, the decision of Lexon's counsel *not* to submit one or more affidavits from Lexon offering proof regarding the service of process issue with respect to Linda Martinez has figured significantly in the Court's analysis.

<sup>9</sup> The Court reaches its decision upon the facts submitted. While Rule 4 requires "exact compliance" the Court, in the absence of an affidavit or proof to the contrary, is of the view that when Lexon's receptionist Linda Martinez signed for the document in the ordinary course of Lexon's business, she was authorized to do so by Lexon

presented by this case, and in light of Lexon's arguments, the Court does not find that Lexon carried its burden of proof and persuasion that Linda Martinez was not authorized to receive the process on behalf of Lexon.

**ii. Lexon has waived its objection to any deficiency in the County's method of serving process.**

86. In the alternative to the above holding, the Court rules that to the extent Lexon has any claim that the County failed to properly serve the summons and complaint, the Court finds Lexon failed to preserve that defense prior to entry of default judgment.

87. "Proper service is necessary to confer jurisdiction upon a circuit court, *unless the jurisdictional error is in some manner waived by the party . . .*" *State ex rel. Farber v. Mazzone*, 213 W.Va. 661, 666, 584 S.E.2d 517, 522 (2003) (emphasis added).

88. "Of course, if he waived such objection than any judgment returned against him would not be rendered void by reason of the failure to obtain personal service." *Teachout v. Larry Sherman's Bakery, Inc.*, 158 W.Va. 1020, 1024, 216 S.E.2d 889, 892 (1975).

89. "That defense, like the other privileged defenses referred to in Rule 12(h)(1), may be waived by formal submission in a cause, or by submission through conduct." *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991).

90. "A party need not actually file an answer or motion before waiver is found." *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991). "Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed, for example, courts have not hesitated to conclude that the defense is waived." *Id.*

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and did so on behalf of Lexon. Merely questioning why the County did not serve process via the Secretary of State, or upon an officer, director, or trustee, is not proof that the method the County *did* choose was improper.

91. Other courts have held that a defendant waives its right to contest service of process by failing to assert its objection prior to entry of a default judgment. *See Drill South, Inc. v. International Fidelity Ins. Co.*, 234 F.3d 1323, 1238 (11th Cir. 2000) (defendant that receives actual notice of a lawsuit despite receiving improper service waives its sufficiency of process defense if it is not asserted prior to entry of default judgment). *Cf. United States to use of Combustion Systems Sales, Inc. v. Eastern Metal Products and Fabricators, Inc.*, 112 F.R.D. 685, 686, 688 (M.D.N.C. 1986) (where plaintiff makes a good faith effort to serve and defendant has actual notice of the lawsuit, an objection to service may be waived by allowing a default judgment to be entered).

92. Lexon was served with the complaint on November 28, 2011, and default judgment was entered on July 5, 2012. Even assuming that Lexon did not have actual notice of the lawsuit prior to its counsel emailing the County on December 15, 2011, Lexon still had time to raise its objection to service of process under the time limits provided in Rule 12. Further, the County gave Lexon a nearly six-month extension to file an answer or Rule 12 motion, and thus Lexon had ample time to both contest service and avoid having default judgment entered against it. Even if Lexon was operating on the County's extension of time to answer the complaint, once the County's motion for default judgment was filed and served upon Lexon's counsel, it was imperative that Lexon make an appearance in the case and contest the motion. By failing to do either, the Court finds that Lexon waived its objection to service of process.

93. Finally, the Supreme Court of South Carolina ruled that when a defendant consents to a particular manner of service, that service is deemed proper and cannot be attacked. *Financial Federal Credit, Inc. v. Brown*, 384 S.C. 555, 565, 683 S.E.2d 486, 491 (2009). Lexon told the County that Chris Parrish would be "handling this matter" for it, holding Mr. Parrish out

as its agent to receive correspondence from the County. The Court finds that Lexon cannot now argue that service was improper when it was sent to the very person to whom it requested all communications be sent.

94. The Court finds that Lexon's delay in contesting the service until seven months after default judgment had been entered and its holding out of Mr. Parrish as the person to receive all correspondence both act as waivers of the defense of improper service.

**iii. Lexon is estopped from arguing that it was not properly served with the summons and complaint.**

95. The Court also finds that Lexon's conduct estops it from objecting to the County's method of serving the summons and complaint. Lexon cannot deny that it had actual knowledge of this lawsuit and the method in which it was served, yet Lexon chose to sit on its objection until well after the Court entered default judgment against it.

96. "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais [1] there must exist a false representation or a concealment of material facts; [2] it must have been made with knowledge, actual or constructive of the facts; [3] the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; [4] it must have been made with the intention that it should be acted on; and [5] the party to whom it was made must have relied on or acted on it to his prejudice." Syl. Pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

97. Here, the Court finds that all five factors for invoking equitable estoppel are present, preventing Lexon from now arguing that service was improper.

98. First, the Court finds that Lexon both made a false representation and concealed material facts. Lexon held Chris Parrish out as its contact for this matter and specifically

provided his mailing address for the County's communications. After the County served its summons and complaint at Mr. Parrish's address, counsel for Lexon emailed the County requesting an extension of its time to answer the complaint, leading the County to believe not only that it had properly served the complaint but that Lexon did, indeed, intend to answer the complaint. During the time of this extension and as recently as the day after the Court entered default judgment, Lexon continued to represent to the County that it planned to answer the complaint. In making these representations, Lexon either knew that service was faulty and was concealing that fact, or it believed that service was proper and had accepted it. The sufficiency of the County's service is material because Lexon now seeks to argue that this Court's judgment is void for lack of service.<sup>10</sup>

99. Second, the Court finds that Lexon had actual knowledge of the facts it misrepresented or concealed. Lexon was aware that "L. Mart." had signed for the documents, but it never revealed to the County that she was not authorized to do so. Thus, Lexon knew of the complaint, knew how it was served, knew that "L. Mart." had signed for it, and therefore knew if it had a colorable objection to the County's method of service. However, Lexon not only never told the County of a "problem" with service, but it took actions consistent with having received valid service of process, including requesting an extension of time to answer the complaint.

100. Third, the Court finds that the County did not know, and could not have known, that service was potentially faulty when it served the complaint upon the contact address provided by Lexon. Although the County received a delivery confirmation that showed that someone other than Chris Parrish had signed for the summons and complaint, it did not know,

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<sup>10</sup> The sufficiency of service is also material because Rule 4(k) of the West Virginia Rules of Civil Procedure required the County to serve its lawsuit on Lexon within 120 days.

and could not have known, that the signer was not authorized to accept service. Moreover, it was reasonable for the County to believe that “L. Mart.” was authorized to accept service, and that service was therefore proper, because Lexon represented that it would answer the complaint and never contested service or alleged that it was improper until seven months after the default judgment was entered.

101. Fourth, the Court finds that Lexon intended for the County to rely on its representation that it would answer the complaint, its representation that service was proper, and its concealment of any defect in service. As consideration for obtaining an extension of time, Lexon represented to the County that it would file an answer, and this representation’s existence as part of a contractual agreement shows that Lexon intended for the County to rely on it. Further, because only Lexon knew of the unauthorized acceptance of the summons and complaint, it intended for the County to rely on its representation that service was proper and its concealment of any defect in service, as the County had no other option but to believe Lexon. Again, either Lexon accepted service as being good or its representations were an attempt to mislead the County.

102. Fifth, and finally, the Court finds that the County relied on Lexon’s promise to respond to the complaint to its prejudice. Because the County did not know, and could not have known, that “L. Mart.” was not authorized to accept service, it relied on Lexon’s promise to answer the complaint as proof that service was proper. In doing so, the County failed to take any corrective measure prior to the Court entering default judgment, thereby permitting Lexon to stage this collateral attack on the judgment after it became clear that the County would not accept Lexon’s settlement offer. Had Lexon objected to service rather than falsely giving the appearance of accepting it, the County could have corrected service prior to entry of the default

judgment. Because Lexon's actions deprived it of the ability to do so, the County is now prejudiced by increased legal fees and a needless delay in litigation. Further, the cost to the County of completing the bonded improvements has likely increased due to inflation and deterioration of the partially-completed improvements on-site. The County has also been sued by Chandler's Glen homeowners over the incomplete subdivision improvements, requiring the County to further expend resources in its defense while seeking to obtain compliance from Lexon.

103. The County followed Lexon's instructions to send its communications to Chris Parrish at the Woodridge, Illinois office of Lexon, and Lexon had actual and timely notice of the suit against it. The Court finds that each of the five factors of equitable estoppel is present, and justice requires that Lexon be barred from arguing that the County failed to properly serve its summons and complaint.

**B. The County honored the parties' agreement to grant Lexon an extension of time to file an answer.**

104. Lexon next argues that it has a defense to the default judgment because the County did not honor its agreement to grant Lexon an ongoing extension to file an answer. Specifically, Lexon states that the County filed for default judgment "without expressly revoking the extension and without any additional notice or warning to Lexon." The Court finds that Lexon's own motion contradicts this argument.

105. In a December 15, 2011 email, Lexon confirmed the County's extension and noted that the County had the right to revoke the extension with 15 days' notice. The Court finds that the County expressly revoked this extension on April 20, 2012, and on May 9, 2012 it again confirmed the revocation by both email and letter. Lexon even admits in its motion that it

received the County's May 9, 2012 "letter announcing that the 15-day notice period would begin to run and asking when an answer might be expected."

106. The County finally filed for default judgment on June 14, 2012, giving Lexon one full month's notice from the date of Lexon's receipt of the May 9, 2012 warning letter, instead of merely the fifteen days to which the parties had agreed. Thus, the Court finds that the County not only honored its agreement to grant Lexon an ongoing extension to file an answer, but it prolonged the agreed-upon extension to ensure that Lexon had time to respond. Further, the County was under no obligation to warn Lexon again specifically before it filed for default judgment; Lexon had already been warned that the County would pursue the litigation.

**C. The parties were not engaging in "ongoing settlement discussions" when the County moved for default judgment.**

107. Lexon argues that its failure to appear in the action or file an answer is excusable because the parties were engaged in "ongoing settlement negotiations." The Court finds, however, that the County sent Lexon warning notices, including the May 9, 2012 letter unequivocally informing it that negotiations had ended. While Lexon argues that "Plaintiffs' counsel did not grant the basic professional courtesy of a phone call, email, or fax [on the date it filed its motion for default judgment] demanding that the Answer be filed or the Motion for Default would be filed the next day," no such notice was required, and it is clear from the record before the Court that Lexon was adequately warned. Settlement negotiations ended on April 20, 2012, or at the latest when Lexon's counsel received the May 9, 2012 letter, and the County required Lexon to appear and respond to the complaint at that time, which Lexon failed to do. While it is a commonly accepted and oftentimes successful norm for litigants to pursue simultaneous dual tracks of litigating while engaging in settlement discussions with the opposing

party, a litigant who nonetheless chooses to ignore the Court's deadlines, rules and requirements does so at his peril. This choice was Lexon's to make.

108. Further, the West Virginia Supreme Court has held that "certain forms of informal communication between litigants will require that a defaulting party be given notice before unliquidated damages can be assessed under Rule 55(b)(2). However, *we have specifically noted that this type of communication will not prevent entry of a default as to liability*" under Rule 55(b)(1). *State ex rel. Harper-Adams v. Murray*, 224 W.Va. 86, 92, 680 S.E.2d 101, 107 (2009) (per curiam) (emphasis added). *See also Cales v. Wills*, 212 W.Va. 232, 241, 569 S.E.2d 479, 488 (2002) (informal communication between litigants will not prevent entry of default as to liability but does require that notice be given before unliquidated damages may be assessed). The Court directed the Clerk to enter default judgment in this matter under Rule 55(b)(1) because this is an action on two performance bonds in which the County's claimed damages are a "sum certain."<sup>11</sup> The Court finds, therefore, that Lexon's informal settlement communications with the County are insufficient grounds for setting aside the default judgment.

109. While Lexon cites opinions to support its contention that default judgment entered during settlement negotiations should be vacated, the Court finds that none of those opinions is close to this situation factually. In each case cited by Lexon, the moving party "surprised" the

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<sup>11</sup> "Rule 55(b)(1) of the West Virginia Rules of Civil Procedure relates to cases where the amount sued for is a sum certain or which can be rendered certain by computation. Upon a default in this category of cases, the court can enter a judgment not only as to liability but also to the amount due." Syl. Pt. 2, *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 501 S.E.2d 786 (1998). "The term 'sum certain' under West Virginia Rules of Civil Procedure Rule 55(b)(1) [1959] contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, ascertained and agreed upon by the parties, or fixed by operation of law." Syl. Pt. 3, in part, *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 501 S.E.2d 786 (1998). "Typical 'sum certain' situations covered by Rule 55(b)(1) [1959] include actions on money judgments, negotiable instruments, or similar actions where the damages can be determined without resort to extrinsic proof." *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 75, 501 S.E.2d 786, 792 (1998). The County's damages are a "sum certain" because its claimed damages are for the amount of the performance bonds, which themselves set the County's damages. Further, to the extent that the exact cost of completing the Chandler's Glen infrastructure and improvements has yet to be calculated, those amounts are entirely susceptible to calculation by the County's planning department and any excess amount will be returned to Lexon by the County, per the terms of the bonds, once construction is complete.

defaulting party by either shortening the time it had given it to respond or by not giving it notice of its intent to move forward with the lawsuit. The County did neither. Similarly, while Lexon cites other cases to support its argument that even a settlement agreement without an agreed extension justifies setting aside default judgment, none changes the fact that settlement negotiations here ended on April 20, 2012 – weeks before the County filed for default judgment, or, at the latest, with Mr. Maas’ receipt of the County’s May 9, 2012 warning letter on approximately May 14, 2012, one month prior to the filing of the motion for default judgment.

110. In a scenario similar to this one, the plaintiff in *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) agreed to not pursue litigation “while negotiations were continuing in good faith.” The plaintiff later “explicitly warned [the defendant] that negotiations had broken down and that it was proceeding with litigation.” The defendant failed to answer “until after [the plaintiff] began collecting on the default judgment.” The court found that the defendant had “received actual or constructive notice of the filing of the action and failed to answer” and that its culpable conduct showed that the default judgment should stand. *Id.* (citations omitted). The Court finds the reasoning of *Franchise Holding II, LLC* persuasive. Here, after the County allowed time for negotiations, it repeatedly warned Lexon that it was proceeding with litigation. Lexon failed to answer, choosing only to negotiate and not to appear in this Court, and its attempt to create a defense of “ongoing settlement negotiations” is meritless because the County gave Lexon notice of its intentions to proceed both initially in filing suit, and in the County’s decision to “press the litigation” with the May 9, 2012 warning letter. Lexon’s failure to appear and defend was its own decision.

**D. Public Policy does not require setting aside the default judgment.**

111. Lexon next argues that public policy requires setting aside the default judgment because default judgments are generally disfavored under the law and because “a defendant should not be punished for engaging in settlement discussions.” While Lexon is correct that trials on their merits are preferred, this preference does not absolve a defendant from having to prove good cause for setting aside the default judgment, nor can it save Lexon from failing to answer. *See McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8, 9 (1972) (“Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits.”).

112. Furthermore, the Court finds that Lexon has failed to show that a trial on the merits would result in a different outcome in this case because Lexon is contractually obligated to honor its suretyship bonds, which are for a sum certain. The Court is persuaded by the County’s argument that the costs to make all of the site improvements and install all of the infrastructure contemplated by these two subdivision performance bonds will, after the passage of several years, now equal or exceed the amount secured by the bonds.<sup>12</sup>

113. Additionally, this Court will not be punishing Lexon for “engaging in settlement discussions” if it enforces the default judgment because the Court finds that settlement discussions ended with written notice at least one full month before the County filed its motion for default judgment. Rather, Lexon is simply facing the legal consequence flowing from its repeated failure to answer the complaint or defend its interests in the litigation.

114. The Court, therefore, finds that public policy does not provide a ground for relief from the default judgment.

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<sup>12</sup> This ruling is predicated upon the County’s representation that the proceeds of Lexon’s two subdivision performance bonds will only be used to construct the bonded improvements and infrastructure at Chandler’s Glen, and that any unused portion(s) of those proceeds will be returned to Lexon.

**E. The County was not estopped from seeking default judgment.**

115. Lexon's final attempt to raise a defense is its argument that because the County violated its agreement to grant Lexon an ongoing extension to file an answer, equitable estoppel requires that the default judgment be set aside. In order for equitable estoppel to apply, however, "there must exist a false representation or a concealment of material facts." *Hunter*, 191 W.Va. at 391, 446 S.E.2d at 178. Because the Court finds that the County fully honored its agreement, and even gave Lexon extra time to answer, the Court finds that there is no false representation or concealment of material facts by the County and Lexon therefore may not take advantage of an estoppel.

**CONCLUSION**

The Court has given consideration to the unique factual posture of this case and the equities involved. This matter consists wholly of bargained-for insurance which is designed to protect the citizens of the county by providing assurance that site improvements and infrastructure would not fail to be installed in just such an instance as occurred here: a developer's bankruptcy in a serious economic downturn. The record shows that the County's attorney worked in good faith with Lexon for an extended period of time in an attempt to resolve this matter; received virtually nothing from Lexon; and finally the County was forced to file this lawsuit. The facts demonstrate that Lexon could not and cannot be relied upon to cooperate with the County to resolve this matter. Indeed, the economic incentives are that Lexon has had the benefit of its bargain, having been paid for these two subdivision performance bonds years ago, in 2005 and 2006, and has further benefited by retaining the entire proceeds despite unequivocal demands by the County for the proceeds dating from, at the latest, October 6, 2011. Defendant Lexon is a large insurance company, and although the amount of the default judgment is significant, it becomes less so when measured against the scale of Lexon's financial profile. The

County, and especially those residents of the failed subdivision, have been living with an unfinished mess for several years and have been waiting for the relief to which they are entitled from Lexon for at least three years. The unfinished subdivision has a depressing effect on Chandler's Glen residents' property values and the surrounding area. The Court acknowledges the diligent work and arguments made by Lexon's newly appearing local counsel, but cannot permit Lexon's prior intransigence and failure to appear and litigate the case properly to be erased or excused on this factual record, especially in light of Lexon's clear liability under the bonds. In seeking relief from this Court because Lexon's own previous tactical decision to risk ignoring the litigation turned out to be a poor one, Lexon is asking not just to be held harmless, but to be *rewarded* for refusing to meet its obligations all while there has been prejudice, costly delay and harm to the County, the citizens and the Chandler's Glen residents. The Court will not endorse such a result.

Finally, regarding Lexon's argument that the bonds gave Lexon the choice of performance (installing the site improvements and infrastructure itself) versus payment, the Court rules that because the Court will deny Lexon's Motion to Set Aside Default Judgment entered in this case on July 5, 2012, Lexon has lost the opportunity it once had to avail itself of performance as opposed to payment under the two subdivision performance bonds. The Court notes that in this regard, given the factual posture of this case and in particular the Court's finding that the County worked in good faith with Lexon for many months before bringing this lawsuit to attempt to work out an agreement which would have provided Lexon with that performance option, the Court now views Lexon's argument as to a choice of performance versus payment as specious.

## RULING

A motion to set aside default judgment may only be granted if the movant establishes a ground under Rule 60(b) for relief from judgment. In this case, relief was sought either under Rule 60(b)(4) that the judgment was void; or under Rule 60(b)(1) which also requires a showing of good cause under the factors set forth in *Larocco*. For the reasons set forth above, the Court hereby **ADJUDGES** and **ORDERS** that Lexon has failed to establish its entitlement to relief under either ground, and its Motion to Set Aside Default Judgment is **DENIED**.

As to the amount of the July 5, 2012 default judgment, \$3,438,565.20, which is the total combined amount of the two subdivision performance bonds, the Court's ruling herein is predicated upon the County's representation that the proceeds of Lexon's two subdivision performance bonds will only be used to construct site improvements and infrastructure at Chandler's Glen covered by those bonds, and that any unused portion of those proceeds will be returned to Lexon.

The Court notes the objections of the parties to all adverse rulings herein.

The Clerk shall provide an attested copy of this Order to the following counsel of record:

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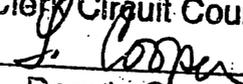
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ENTER: 2/6/14

  
\_\_\_\_\_  
GRAY SILVER, III  
CIRCUIT JUDGE

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court  
By:   
\_\_\_\_\_  
Deputy Clerk