



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RECORD NO. 14-0215

LEXON INSURANCE COMPANY, Defendant Below,

Petitioner,

vs.

**COUNTY COUNCIL OF BERKELEY COUNTY, WEST VIRGINIA and
BERKELEY COUNTY PLANNING COMMISSION, Plaintiffs Below,**

Respondents.

ON APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
(CIVIL ACTION NO. 11-C-973)

BRIEF OF RESPONDENTS

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 2. Lexon declined the opportunity to have an evidentiary hearing before Judge Silver, made no effort to submit sworn affidavits or testimony in support of its factual assertions, and to this day has not offered to complete the infrastructure and improvements that its bonds guaranteed.7

 3. Judge Silver’s finding that Lexon’s Rule 60(b) motion was not filed “within a reasonable time” is not clearly wrong because Lexon knew of the default judgment for seven months but offered no reasonable explanation for why it waited to file its motion.8

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I. STATEMENT OF THE CASE

The County disagrees with the entirety of Lexon's "statement of the case," which is merely argument and inconsistent with Judge Silver's factual accounting in his Order denying Lexon's motion to set aside the default judgment, set forth in the Appendix at pages 571-79.

Petitioner Lexon Insurance Company ("Lexon") breached two subdivision performance bonds, totaling \$3,438,565.20, that it issued to DLM, LLC ("DLM") and in favor of Respondents, County Council of Berkeley County, West Virginia and Berkeley County Planning Commission (collectively, the "County") to guarantee completion of the required site improvements and infrastructure for Chandler's Glen, a subdivision project in Berkeley County, West Virginia. (App. at 7-14) After DLM stopped work on Chandler's Glen, the County was forced to sue Lexon for breach of contract because Lexon refused to honor its obligations under the bonds and continually delayed its responses to the County's inquiries. *Id.*

The County served Lexon by having the summons and complaint mailed to the address given by Lexon for Chris Parrish, the designated Lexon representative for the County's bond claims and who previously met with the County during pre-suit settlement negotiations. (App. at 1, 405, 418) The County's complaint was signed for by Mr. Parrish's secretary and forwarded to Lexon's counsel, who contacted the County two weeks later to request "an indefinite extension of time to respond to the complaint" and further requested that the County "give 15 days' notice if this consent is withdrawn." (App. at 421-22) This extension of time remained in place for over four months, when the County gave notice to Lexon's counsel that it intended to move forward with the litigation and requested Lexon's answer to the complaint. (App. at 423) Two months later, and after giving two additional warnings that Lexon needed to file an answer, the County moved for default judgment, which Judge Silver granted a month later. (App. at 1, 424-

26) Lexon's counsel received a copy of the default judgment five days after entry, yet Lexon did not move to vacate that judgment until seven months later. (App. at 1, 434)

Over the next year, Judge Silver held several hearings in this case while the parties briefed Lexon's motion to set aside the default judgment. (App. at 572) Lexon offered no testimony and agreed that the motion should be decided solely upon written memoranda, exhibits, and proposed orders. *Id*

On February 6, 2014, Judge Silver entered a 37-page memorandum decision denying Lexon's motion to set aside. (App. at 571-607) Judge Silver ruled that Lexon's motion was untimely because it had actual knowledge of the default judgment against it for seven months, yet failed to offer a reasonable explanation for why it did not immediately appear and file its motion. (App. at 579-80) Judge Silver also ruled that Lexon had not demonstrated good cause under Syllabus Point 3 of *Parsons v. Consolidated Gas Supply Corp.*, finding it significant that Lexon had no meritorious defenses to liability, and that Lexon had been severely intransigent in defending its interests. (App. at 581-89) Judge Silver also ruled that Lexon had not demonstrated entitlement to relief under Rule 60(b). (App. at 590-604) Judge Silver rejected Lexon's argument that the default judgment was void for lack of personal jurisdiction due to insufficient service of process, finding that the County properly served Lexon by mailing the complaint to the address given by Lexon, and that Lexon, by allowing the default judgment to be entered, had waived or was estopped from asserting any objection to the County's process. (App. at 590-604) This appeal followed.

II. SUMMARY OF ARGUMENT

Lexon failed to demonstrate below that its motion was timely under Rule 60(b), that it is entitled to relief under Rule 60(b), or that good cause exists to lift the default judgment. Lexon's appeal raises no new issues for this Court to consider, but instead simply asks this Court to

disagree with Judge Silver's findings and conclusions. Lexon does so even though it declined an evidentiary hearing on its motion, and chose not to submit sworn statements from its employees or its counsel.

Lexon's brief only raises two legal questions, and neither has merit. First, Judge Silver correctly entered default judgment for a "sum certain" under Rule 55(b)(1), which does not require notice to Lexon or a hearing on damages, because Lexon became obligated to pay the full penal sum of its bonds as liquidated damages when it refused the County's demand for performance. Second, the County's default judgment is not "void for lack of personal jurisdiction" due to insufficiency of process. The County properly served its complaint by mailing it to the address given by Lexon for correspondence with its agent for handling the County's bond claims. However, even if the County failed to properly serve its complaint, Lexon's objection is not to personal jurisdiction but to service of process, a defense which Lexon waived by permitting a default judgment to be entered when it had actual notice of the complaint and six months to respond.

Ultimately, Lexon has no defense to liability under its bonds. Lexon's appeal seeks only to further delay the County's efforts to collect the sums duly owed to it as a result of Lexon's refusal to cure DLM's default. Reversing Judge Silver's Order would serve only to reward Lexon's misconduct, and the County urges this Court to deny Lexon's appeal so that Chandler's Glen can finally be completed.

III. STATEMENT REGARDING ORAL ARGUMENT

The facts and legal arguments are adequately presented by the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Accordingly, the County urges this Court to act expeditiously and enter a memorandum decision affirming Judge Silver's Order so that the County may complete the infrastructure and

improvements for Chandler’s Glen without further delay. However, in the event that Lexon is granted oral argument, the County respectfully requests a similar opportunity for oral argument to respond to any facts or arguments raised by Lexon before the Court.

IV. ARGUMENT

A. JUDGE SILVER’S ORDER IS REVIEWED DEFERENTIALLY FOR ABUSE OF DISCRETION, WITH UNDERLYING FINDINGS OF FACT REVIEWED FOR CLEAR ERROR AND QUESTIONS OF LAW REVIEWED *DE NOVO*.

“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, in part, *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979). “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* . . . 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).

“A motion to vacate a default judgment [under Rule 60(b)] 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 of America v. Critchley*, 229 W. Va. 396, 729 S.E.2d 231 (2012) (per curiam).¹ “As a general rule, the party who seeks to have a default judgment . . . vacated has the burden of proving the facts

¹ “A per curiam opinion may be cited as support for a legal argument.” Syl. Pt. 4, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).

entitling him . . . to [that] relief. 49 C.J.S. *Judgments* § 601. Review for abuse of discretion is a *deferential*, three-prong review:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a [three]-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review."

Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).² See also *Hinerman v. Rodriguez*, No. 12-0617, 2013 WL 2157766, at *4 (W. Va. Supreme Ct. May 17, 2013) (memorandum decision) (applying Syl. Pt. 2 of *Walker* to review of circuit court order on motion for default judgment).³ "[A]n appellate court will look for reasons to sustain a trial court's discretionary decision; a discretionary act or ruling under review is *presumptively correct*, the burden being on the party seeking reversal to demonstrate an abuse of discretion." 5 Am. Jur. 2d *Appellate Review* § 623 (emphasis added).

B. LEXON'S APPEAL PRIMARILY CHALLENGES JUDGE SILVER'S FINDINGS OF FACT, BUT JUDGE SILVER'S FACTUAL FINDINGS ARE FULLY SUPPORTED BY THE RECORD AND LEXON HAS NOT DEMONSTRATED THAT THOSE FINDINGS ARE CLEARLY WRONG.

Although Lexon argues that its assignments of error are "legal issues" subject to *de novo* review, Lexon's appeal largely seeks to challenge Judge Silver's findings of fact as to the timeliness of its motion and the good cause factors under Syl. Pt. 3 of *Parsons*. (See Pet'r's Br. 1, 18-27) In fact, the other assignments of error raised by Lexon are irrelevant, and the default

² Although stated in *Walker* as a two-prong standard, abuse of discretion is identified by other cases as a three-prong standard. See Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006) (using identical abuse of discretion standard for habeas corpus actions but referring to standard as "a three-prong standard"); Syl. Pt. 1, *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995) (review of findings of family law master subject to three-pronged standard of review -- final equitable distribution order reviewed for abuse of discretion, underlying factual findings reviewed under clearly erroneous standard, and questions of law reviewed *de novo*).

³ A memorandum decision may be cited as support for a legal argument provided that the citation clearly denotes that a memorandum decision is being cited. See W. Va. R. App. P. 21(e).

judgment against Lexon must stand, unless Lexon can first demonstrate that Judge Silver committed clear error when he found that Lexon's Rule 60(b) motion was not filed within a reasonable time after learning of the default judgment. Lexon, however, makes no effort to demonstrate that any of Judge Silver's findings of fact are clearly wrong.

Lexon fails to demonstrate that Judge Silver's factual findings cannot reasonably be reached from the evidence. Lexon fails to point this Court to any evidence in the record that Judge Silver did not consider. Finally, Lexon cannot deny that it was given every opportunity to submit evidence and present argument prior to Judge Silver's ruling. Instead, Lexon simply argues that this Court should disagree with Judge Silver's view of the weight of the evidence.

1. Judge Silver's findings of fact are not reviewed *de novo*, and "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

"Findings of fact are not to be made *de novo* by an appellate court: '[u]nder this standard, appellate courts cannot presume to decide factual issues anew. Our precedent ordains that deference be paid to the trier's assessment of the evidence.'" *Stantec Consulting Servs., Inc. v. Thrasher Environmental, Inc.*, No. 12-1400, 2013 WL 5676826, at *3 (W. Va. Supreme Ct. October 18, 2013) (memorandum decision).

"A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, *and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.*" Syl. Pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996) (emphasis added). *See also State ex rel. Owners Ins. Co. v. McGraw*, No. 13-1153, --- S.E.2d ---, 2014 WL 2881218 (W. Va. Supreme Ct. June 18, 2014) (per curiam) (citing Syl. Pt. 1 of *Tiffany Marie S.*).

“Clearly erroneous is a ‘highly deferential’ standard of review.” *Stantec Consulting Servs., Inc.*, 2013 WL 5676826, at *3. “We will disturb only those factual findings that strike us wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’” *Id.* “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.* (emphasis added). See also 5 Am .Jur. 2d *Appellate Review* § 635.

2. **Lexon declined the opportunity to have an evidentiary hearing before Judge Silver, made no effort to submit sworn affidavits or testimony in support of its factual assertions, and to this day has not offered to complete the infrastructure and improvements that its bonds guaranteed.**

Lexon’s appeal is largely dependent upon this Court reversing Judge Silver’s findings on certain key facts. The County will separately address why Judge Silver’s findings are properly drawn from the record as a whole. However, this Court’s review of the record should take into account Lexon’s failure to make any genuine effort to support its arguments with fact.

First, Lexon explicitly declined Judge Silver’s offer to hold an evidentiary hearing on the factual findings that Lexon now seeks to challenge. Lexon could have supported its motion with sworn testimony from Chris Parrish, Linda Martinez, Bruce Maas, or a Lexon corporate representative. However, as noted in Judge Silver’s Order “[a]t th[e] July 29, 2013 hearing . . . [a]ll counsel were in agreement that Lexon’s Motion should be decided solely upon written memoranda, exhibits and proposed orders.” (App. at 572) Having helped “fashion the path forward” on how its own motion should be decided, Lexon cannot argue that it was deprived of a full and fair opportunity to submit evidence in support of its arguments. Furthermore, “[t]he clearly erroneous rule loses none of its rigor ‘when the [lower] court’s findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.’” *Stantec Consulting Services, Inc.*, 2013 WL 5676826, at *3. The fact that Judge Silver’s ruling is based upon the documentary evidence submitted by the parties

has no effect on the validity of his findings, particularly when Lexon affirmatively declined to present sworn testimony at an evidentiary hearing.

Second, Lexon also failed to submit evidence in support of its key factual assertions. Instead, Lexon simply expected Judge Silver to accept the conclusory statements of its counsel as true, despite the lack of any underlying factual support in the record. To establish good cause, Lexon should have presented “particular and specific demonstration[s] of fact, as distinguished from stereotyped and conclusory statements.” *See AT&T Communications of West Virginia, Inc. v. Public Service Com’n of West Virginia*, 188 W. Va. 250, 253, 423 S.E.2d 859 (1992) (discussing good cause requirement under Rule 26(c)). At no time did Lexon present testimony or offer affidavits from Chris Parrish, Linda Martinez, Bruce Maas, or any other Lexon corporate representative to provide a factual basis for the arguments in its motion or to demonstrate that the Chandler’s Glen improvements would cost less than the face value of its bonds. In fact, Lexon submitted no evidence at all on any of these issues. Indeed, as noted by Judge Silver, “the decision of Lexon’s counsel *not* to submit one or more affidavits from Lexon . . . has figured significantly in the Court’s analysis.” (App. at 593 n. 8)

Third, despite lamenting to this Court that it has been deprived of its “contractual right to exercise an option to perform rather than pay,” (Pet’r’s Br. 11) it bears stating that, to this day, Lexon has not once offered to perform its contractual obligations. Indeed, if Lexon had simply agreed to “complete the unfinished site improvements and infrastructure” for Chandler’s Glen or pay over the penal sum of its bonds, then the County would not have needed to file a lawsuit, Judge Silver would not have needed to enter a default judgment, and Lexon would not have needed to file this appeal.

- 3. Judge Silver’s finding that Lexon’s Rule 60(b) motion was not filed “within a reasonable time” is not clearly wrong because Lexon knew of the default**

judgment for seven months but offered no reasonable explanation for why it waited to file its motion.

Lexon argues that Judge Silver “clearly erred as a matter of law” by finding that its motion to set aside the default judgment was untimely under Rule 60(b). (Pet’r’s Br. 18) The timeliness of Lexon’s Rule 60(b) motion, however, is not a question of law, but instead a question of fact that Judge Silver thoroughly considered in his Order.

“There is no need to consider whether there is a basis for setting aside a default judgment if the motion was not made in a timely manner.” 49 C.J.S. *Judgments* § 584. *Cf. Tudor’s Biscuit World of America v. Critchley*, 229 W. Va. 396, 404, 729 S.E.2d 231, 239 (2012) (per curiam) (stating that the trial court’s analysis of the *Parsons* factors was “arguably unnecessary, given that it had already found the motion to be untimely”). Although West Virginia does not appear to have considered the issue,⁴ “[t]he question of what is a reasonable time under Rule 60(b) is a question of fact to be resolved by the trial court. We defer to the trial court’s findings on that issue unless they are clearly erroneous.” *Viafax Corp. v. Stuckenbrock*, 995 P.2d 835, 841 (Idaho Ct. App. 2000) (emphasis added).⁵ *See also Wooley v. Gould, Inc.*, 654 S.W.2d 669, 672 (Tenn.

⁴ The question of reasonableness is generally a question of fact to be resolved by the trier of fact. *See, e.g.*, Syl. Pt. 3, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004) (“Whether an insurer refused to pay a claim without conducting a reasonable investigation . . . and whether liability is reasonably clear . . . ordinarily are questions of fact for the jury.”); *Howell v. Appalachian Energy, Inc.*, 205 W. Va. 508, 517, 519 S.E.2d 423, 432 (1999) (“What constitutes a ‘reasonable period of time’ is normally a question of fact.”); Syl. Pt. 3, *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d 561 (1990) (“[T]he statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.”); Syl. Pt. 5, *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 334 S.E.2d 616 (1985) (“As a general rule, a fair test as to whether a particular use of real property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property . . . and ordinarily such a test to determine the existence of a nuisance raises a question of fact.”);

⁵ Rule 60(b) of the Idaho Rules of Civil Procedure is practically identical to Rule 60(b) of the West Virginia Rules of Civil Procedure, and both rules require that a motion to set aside a default judgment be made “within a reasonable time.” *Compare* Idaho R. Civ. P. 60(b) to W. Va. R. Civ. P. 60(b).

1983) (“It is a question of fact, and not one of law, as to whether a movant under [Rule 60(b)] has acted within a reasonable time.”), *overruled on other grounds by Betts v. Tom Wade Gin*, 810 S.W.2d 140 (Tenn. 1991); *Baxter v. Prescott*, 322 P.2d 1008, 1010 (Cal. Dist. Ct. App. 1958) (whether a motion to set aside was made within a reasonable time “presents a question of fact for determination of the trial court unless the circumstances are such as to demonstrate unreasonable delay as a matter of law.”).⁶ *Cf.* 49 C.J.S. *Judgments* § 584 (“The question of reasonableness, for purposes of a rule requiring that motion for relief from a judgment be filed within a ‘reasonable time,’ is ordinarily a question of fact to be resolved by the trier of fact after both parties have had an opportunity to try the issue.”).

The record clearly shows that a copy of the County’s Motion for Default Judgment was mailed to Lexon’s counsel on June 12, 2012 (App. at 1, 55); a copy of Judge Silver’s Order Granting Motion for Default Judgment was mailed to Lexon’s counsel on July 6, 2012 (App at 1, 77); and that Lexon’s counsel received the court’s Order by July 11, 2012 (App. at 434). Rather than immediately appear in the action and move to set aside the default judgment, Lexon instead sent the County an email asking it to agree to vacate it. (App. at 434) When the County denied Lexon’s request, Lexon took no further action until November 30, 2012, when it again asked the County to vacate the judgment but again made no effort to actually appear and move to set it aside. (App. at 436-39) On December 26, 2012 Lexon made a third request that the County voluntarily vacate the default judgment, and on January 9, 2013 the County again advised Lexon that it would not do so. (App. at 441-48) Lexon failed to actually appear and move to set aside

⁶ *Wooley* applied Rule 60.02 of the Tennessee Rules of Civil Procedure, and *Baxter* applied section 473 of the Code of Civil Procedure of California. These rules are analogous to Rule 60 of the West Virginia Rules of Civil Procedure, and likewise require that a motion to set aside a default judgment be made “within a reasonable time.” *Compare* Tenn. R. Civ. P. 60.02 *and* Cal. Civ. Proc. Code § 473 (1996) *to* W. Va. R. Civ. P. 60(b).

the default judgment until February 21, 2013 -- 7 months and 10 days (255 days) after Lexon's counsel learned of the Court's Order.

When it finally filed its motion, Lexon did not submit affidavits stating that it did not have notice of the motion for default judgment, did not have time to act prior to the court's entry of default judgment, or did not receive the copy of the default judgment mailed to its counsel on July 6, 2012. Lexon never explained why it made no attempt to appear and move to set aside the default judgment for over seven months. As stated by Judge Silver, "[e]ven 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 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." (App. at 577)

The County explicitly warned Lexon's counsel that "I do not want you to be under the misapprehension that you should not do whatever you need to do to protect your client from a default judgment." (App. at 430) Lexon failed to do anything to protect itself from a default judgment, and failed to explain why it did nothing to set aside the default judgment for over seven months after its entry. Judge Silver's finding that Lexon did not act "within a reasonable time" for purposes of Rule 60(b) is therefore not only plausible, but entirely appropriate.

4. Judge Silver's finding that the County and residents of Chandler's Glen have been prejudiced is not clearly wrong because the improvements that were begun by DLM were never completed and have since deteriorated to the point where they will need to be redone.

Lexon asserts that "the County does not appear to have suffered any prejudice" and that Judge Silver's prejudice findings are not based upon "the relevant time period . . . as the cases require focus on 'the delay in answering.'" (Pet'r's Br. 21-22) However, "[t]he initial inquiry under *Parsons* requires a determination of the degree of prejudice to the non-defaulting party if

the default judgment is vacated.” *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W. Va. 309, 315, 664 S.E.2d 531, 537 (2008) (per curiam). See also *Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*, 218 W. Va. 247, 249, 624 S.E.2d 594, 596 (2005) (per curiam) (same); *Cales v. Wills*, 212 W. Va. 232, 242, 569 S.E.2d 479, 489 (2002) (same); *Cook v. Channel One, Inc.*, 209 W. Va. 432, 435, 549 S.E.2d 306, 309 (2001) (per curiam) (same). The cases did not “require [Judge Silver to] focus on the delay in answering,” but instead upon the prejudice suffered by the County if Lexon’s motion were to be granted.

Judge Silver’s findings as to prejudice suffered by the County are not clearly wrong. The bonded infrastructure and improvements for Chandler’s Glen were never installed and Lexon refuses to install them -- hence, the reason for this lawsuit. (App. at 7-14) The meager improvements that were begun by DLM before it went bankrupt were never completed, and have since deteriorated to the point that those improvements will need to be entirely redone. (App. at 450) The incomplete portions of Chandler’s Glen will also need to be cleaned up before new work can begin because those areas have been used as a dumping ground for appliances and a hangout for drug addicts. (App. at 450) Additionally, due to the neglect of the subdivision and the lack of progress in getting Lexon to honor its bonds, the County was sued by the homeowners of Chandler’s Glen, creating a separate financial burden upon the County. (App. at 252-70) At no time did Lexon present sworn testimony, affidavits, or any other evidence challenging these findings.

5. **Judge Silver’s finding that there are no material issues of fact to resolve is not clearly wrong because it is undisputed that Lexon issued the bonds posted by DLM, that DLM defaulted on the Chandler’s Glen project, and that Lexon subsequently refused to honor its obligations under the bonds.**

Lexon does not actually challenge Judge Silver’s finding that there are no material issues of fact to resolve on the County’s bond claims. However, it bears emphasizing that this matter is

a simple breach of contract claim against an insurance company that refuses to honor the two performance bonds that it issued.

This case is simple. In February 2006, the County approved the final subdivision plat for Chandler's Glen. (App. at 8) As a precondition to the County's approval of the Chandler's Glen final plat, DLM was required to either (a) complete all infrastructure and site improvements for the subdivision, or (b) obtain performance bonds guaranteeing completion of all work. *See* Subdivision Regulations, Berkeley County, West Virginia § 702.1 (2004). DLM chose the latter option, and posted bonds guaranteeing future completion of the platted infrastructure and improvements. (App. at 7-8) Lexon wrote, priced, and guaranteed the bonds posted by DLM, promising to hold itself "firmly bound" to the County "in the penal sum" of \$3,438,565,20, "for the payment of which sum well and truly to be made" if DLM should fail to complete the work. (App. at 11-12) DLM failed to complete the bonded work, and Lexon subsequently refused to perform when the County made its demand on the Chandler's Glen bonds. (App. at 9-10) As a result, Lexon is contractually liable to pay \$3,438,565,20, which amount was duly awarded to the County by Judge Silver under his July 5, 2012 Order.

- 6. Judge Silver's finding that the size of the default judgment is not, by itself, good cause is not clearly wrong because this Court has refused to set aside significant default judgments, other courts have enforced default judgments that are much more significant than the judgment against Lexon, and Lexon clearly has the ability to pay the judgment against it.**

Lexon believes Judge Silver "plainly erred in minimizing the significance of the interests at stake for Lexon" because "[i]t is difficult to think of a more 'significant' default judgment than one involving almost \$3.5 million." (Pet'r's Br. 23-24) Lexon's argument, however, is belied by its bonds, by admissions of its corporate parent, by its own admissions, and by its failure to put forward any evidence demonstrating financial hardship.

First, the size of the judgment is not by itself a sufficient justification for overturning Judge Silver's Order.⁷ Moreover, other courts have affirmed and enforced default judgments that are obviously more significant than the judgment against Lexon, including default judgments of \$873 million, \$136 million, \$33.1 million, and \$19 million.⁸ *See also Facebook, Inc. v. Guerbuez*, 2010 QCCS 4649, EYB 2010-179965 (Can. Que. Sup. Ct. Sept. 28, 2010) (enforcing an \$873 million judgment entered in the Northern District of California against a Quebec resident and his business for violations of the CAN-SPAM Act of 2003).⁹ Courts have even refused to vacate multi-million dollar default judgments against *pro se* defendants, who arguably deserve greater court protection from a default judgment than a sophisticated insurance

⁷ *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 -- “[o]bviously, the potential damages at stake in this case are significant”); *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); *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983) (affirming default judgment despite finding that amount of judgment was “a substantial sum”). *Cf. Hardwood Group v. Larocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006) (affirming default judgment and noting that Court could not affirmatively state that damages were insignificant); *Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*, 218 W. Va. 247, 624 S.E.2d 594 (2005) (per curiam) (affirming default judgment despite finding that amount at stake was “not insignificant”).

⁸ *See State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004) (affirming default judgment of \$136 million); *Casio Computer Co., Ltd. v. Noren*, No. 01-3250, 35 Fed. Appx. 247 (7th Cir. 2002) (unpublished) (affirming default judgment of \$33.1 million against *pro se* defendant “despite the staggering amount of money involved”); *Philips Med. Sys. Int’l. B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992) (affirming \$19 million default judgment “though the size of this default judgment is extraordinary”); *Cooper v. Faith Shipping*, No. 06-892, 2010 WL 2360668 (E.D. La. June 9, 2010) (denying motion to set aside default judgment of \$8.1 million -- “[a]lthough this judgment is considerable, its size is hardly extraordinary”); *Black v. Rimmer*, 700 N.W.2d 521 (Minn. Ct. App. 2005) (affirming default judgment of \$5.1 million against *pro se* defendant). The \$19 million default judgment in *Philips* was later affirmed for a second and final time in *Philips Med. Sys. Int’l B.V. v. Bruetman*, 8 F.3d 600 (7th Cir. 1993).

⁹ In *Facebook, Inc. v. Guerbuez*, No. 5:08-cv-03889-JF (N.D. Cal. Nov. 11, 2008), the U.S. District Court, Northern District of California, entered a \$873,277,200.00 default judgment against a Canadian man and his company, Atlantis Blue Capital, for sending spam messages through Facebook’s network in violation of the CAN-SPAM Act of 2003. Although they never appeared in the U.S. courts, the defendants did appear and defend against the judgment when Facebook attempted to enforce it in the defendants’ home province of Quebec. On September 28, 2010, the Superior Court of Quebec issued a ruling recognizing and enforcing the entire \$873 million default judgment. *See Facebook, Inc. v. Guerbuez* 2010 QCCS 4649, EYB 2010-179965 (Can. Que. Sup. Ct. Sept. 28, 2010). *See also* CBC News, *Quebec Spammer Must Pay Facebook \$873M*, CBCNews Montreal, October 5, 2010, available at <http://www.cbc.ca/news/canada/montreal/quebec-spammer-must-pay-facebook-873m-1.934797>.

company that was represented by counsel. *See Casio Computer Co., Ltd.*, 35 Fed.Appx. 247 (7th Cir. 2002) ; *Black*, 700 N.W.2d 521 (Minn. Ct. App. 2005).

Second, Lexon contractually obligated itself to pay the entire \$3.5 million face value of the bonds as a “penal sum” upon default -- if the bonded amount were significant to Lexon, it clearly shouldn’t have agreed to pay it. As stated by Judge Silver, the penal sum of the bonds is “an amount that [Lexon] should have fully accounted for prior to issuing the Chandler’s Glen bonds in the first place.” (App. at 586)

Third, Lexon’s corporate parent admits that Lexon is not “in any financial distress whatsoever” and has access to “nearly \$200,000,000 in liquidity” to pay the default judgment. (App. at 452-53)¹⁰ Lexon did not object to the County’s submission of the Lexon Surety Group press release, and thus Lexon waived any argument that Judge Silver should not have considered it. *See State v. Asbury*, 187 W. Va. 87, 91, 415 S.E.2d 891, 895 (1992) (“Generally the failure to object constitutes a waiver of the right to raise the matter on appeal.”) This public admission by Lexon’s corporate parent demonstrates not only that Lexon would suffer no financial distress whatsoever if forced to pay the default judgment, but also that the default judgment impacts less than 2% of the \$200 million in liquid reserves that Lexon may access.

Fourth, Lexon’s own admissions demonstrate that, even without access to the “nearly \$200,000,000 in liquidity” of its corporate parent, Lexon is still more than capable of paying the County’s default judgment. Lexon’s website states that it has “a current listing of \$4,397,000 capacity for federal bonds,” and with its reinsurance agreement has the capacity “to write bonds up to and in excess of \$10,000,000.” *See Lexon Surety Group, Financial Ratings for Lexon & Bond Safeguard Insurance Companies*, available at <http://www.lexonsurety.com/about->

¹⁰ Lexon Surety Group’s press release also shows that it treats its subsidiaries as a single business unit that “cumulatively [] are the 12th largest writer of surety bonds.” (App. at 452)

us/financial-ratings/. The underwriting limitation for surety companies for federal bonds is 10% of the paid-up capital and surplus of the company. *See* 31 C.F.R. § 223.10 (current through June 26, 2014). Thus, Lexon itself admits to assets of at nearly \$44 million from which it can pay the County's judgment, and also admits to having reinsurance that will offset any losses.

Finally, at no time did Lexon present testimony or affidavits demonstrating that its financial strength was at issue. Judge Silver, therefore, did not clearly err in refusing to set aside the default judgment based upon the size of the judgment award.

7. Judge Silver's finding that Lexon was significantly intransigent is not clearly wrong because Lexon repeatedly ignored its obligations under the bonds, delayed in responding to the County's inquiries, and gave no reasonable explanation for why it waited seven months to file its Rule 60(b) motion.

Lexon argues that Judge Silver "erred in ruling Lexon's intransigence militated against setting aside the default judgment." (Pet'r's Br. 27) Lexon, of course, offers nothing for this Court to consider other than Lexon's interpretation of the record, which Judge Silver previously considered and rejected.

"[A]ny 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, 310 S.E.2d 843 (1983). Lexon simply cannot contest (1) that it had over six months to answer the County's complaint; (2) that it received not one, but three, communications stating that the County intended to move forward with this lawsuit and expected Lexon to file its answer; (3) that Lexon had nearly two months to file an answer after the first warning from the County, as well as an additional month while the County's motion for default judgment was pending, yet Lexon failed to do so; (4) that Lexon had actual and timely notice of the County's motion for default judgment and Judge Silver's order granting it; or (5) that Lexon did nothing to either

appear before the Court or move for relief from the default judgment until seven months after the judgment was entered.

The argument that Lexon put forward below and reiterates here -- that it failed to take reasonable steps to protect its interests because it believed it was in the midst of “ongoing settlement negotiations” -- is directly contradicted by the facts. The record clearly shows that the County was done negotiating on April 20, 2012: “[w]e have decided to go forward and press the litigation which was earlier filed against your client, Lexon. . . . Will appreciate your answer at your earliest convenience.” (App. at 423) The County did not actually file its motion for default judgment until June 14, 2012, and in the interim the County sent two additional warnings to Lexon that it needed to appear before the court and file its answer. (*See* App. at 1, 424-25) Lexon does not deny that it received the County’s April 20, 2012 email and May 9, 2012 follow-up communications, yet it literally did nothing between the County’s first warning on April 20, 2012 and the County’s motion for default on June 14, 2012.

Lexon nonetheless argues that it reasonably believed settlement discussions “were still ongoing” because on July 6, 2012 (the day after the Court entered default judgment), Lexon extended 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.” (Pet’r’s Br. 24-26) This is obvious bootstrapping -- at the time, Lexon had actual knowledge of the County’s revocation of the extension of time to answer and of the County’s motion for default judgment. (App. at 90, 428) Moreover, in the very email exchange that Lexon relies on, the County explicitly warned Lexon that it needed to protect itself in court: “I do not want you to be under the impression that you should not do whatever you need to do to protect your client from a default judgment.” (App. at 430) The fact that the County’s lawyer did not act to enforce the

default judgment prior to relaying Lexon's offer to his client, which he had an affirmative ethical duty to do, *see* W. Va. Rules of Prof'l Conduct R. 1.4 cmt. (1990), does not mean that the parties were "negotiating," nor does it affect Lexon's obligation to seek relief from the default judgment.

To the extent that the County's prior communications were somehow unclear (which they were not), on August 9, 2012 the County's counsel unequivocally stated "[y]ou will recall that my earlier e-mails made clear that the initial extension of time for answering was ended and that an answer was expected. That, certainly was confirmed both by our correspondence and by the motion for default and subsequent order granting default." (App. at 432) Lexon should have known to appear and move to set aside the default judgment at that time, yet failed to even hire local counsel until November 2012 and failed to actually file its motion until February 2013.

It should also be noted that Lexon's repeated attempts to characterize the parties' communications as "negotiations" falsely imply that there was an actual bargaining process that occurred. *See* Black's Law Dictionary 874 (abr. 8th ed. 2005) (defining negotiation). At no time did Lexon "negotiate" with the County. Lexon simply offered to complete only the improvements adjacent to finished lots, leaving the other portions of Chandler's Glen unfinished. (App. at 428) Lexon's attempt to "negotiate" was to initially convince the County's lawyer to accept this offer (*see* App. at 422), and when that failed Lexon attempted to make the same offer while agreeing to temporarily keep its bonds in place (a meaningless gesture considering that Lexon was asking the County to "agree to make no further claim against the bonds") and pay the County \$50,000 (which obviously would not be enough to complete the Chandler's Glen improvements). (App. at 428)

“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.” (App. at 588) The record contains overwhelming support for Judge Silver’s finding.

C. THE COUNTY PROPERLY MOVED FOR DEFAULT JUDGMENT UNDER RULE 55(B)(1), AND THUS NO NOTICE TO LEXON OR HEARING ON DAMAGES WERE REQUIRED, BECAUSE LEXON REFUSED THE COUNTY’S DEMAND FOR PERFORMANCE, OBLIGATING LEXON TO PAY THE FULL PENAL SUM OF ITS BONDS AS LIQUIDATED DAMAGES.

Lexon asserts that Judge Silver committed reversible error by entering default judgment without first giving notice to Lexon and without holding a damages hearing. (Pet’r’s Br. 30) In support, Lexon argues that the County’s damages were unliquidated and therefore a default judgment could only be entered under Rule 55(b)(2). This argument is based upon Lexon’s mistaken belief that it somehow still possesses a “right to elect a method of curing the default of its principal” despite breaching the terms of its bonds and despite having never offered to cure the default of its principal. The County, however, properly moved for default under Rule 55(b)(1) because its damages are a “sum certain,” determined during the approval process for Chandler’s Glen, and as a result no notice or hearing was required before default judgment could be entered against Lexon. Moreover, “[t]he fact that the court did not hold a hearing prior to entering the default judgment does not constitute a failure of due process making the judgment void.” 10A Charles Alan Wright *et al.*, Federal Practice & Procedure § 2695 (3d ed. 1998).

- 1. Where damages sought are a “sum certain,” such as where the amount due was “ascertained and agreed upon by the parties, or fixed by operation of law,” default judgment may be sought and entered under Rule 55(b)(1), which does not require that notice be given to the defaulting party or that a damages hearing be held.**

“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 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) (emphasis added). “[P]ursuant to Rule 55(b)(1), notice to a party who has defaulted as to liability is not required when default damages are sought that involve a sum certain. *Cales v. Wills*, 212 W. Va. 232, 240, 569 S.E.2d 479, 487 (2002).

- 2. The County did not seek default judgment under Rule 55(b)(2), but instead moved for and obtained default judgment under Rule 55(b)(1).**

Lexon incorrectly states in its brief that “default judgment was obtained under R. Civ. P. 55(b)(2).” (Pet’r’s Br. 28) The County has repeatedly explained to Lexon that the motion for default judgment was not filed under Rule 55(b)(2), but was instead filed under Rule 55(b)(1), because the amount sought by the County was “a sum certain or a sum which can by computation be made certain.” *See* W. Va. R. Civ. P. 55(b)(1). This fact should be clear from the record. (App. at 52, 75, 396, 563, 601)

3. **The County correctly sought default judgment under Rule 55(b)(1) because the penal sum of Lexon's bonds are liquidated damages "ascertained and agreed upon by the parties" in exchange for approval of Chandler's Glen and "fixed by operation of law" in an amount to cover the cost of the Chandler's Glen infrastructure and improvements.**

The County properly moved for default judgment under Rule 55(b)(1) because the "penal sum" set forth in Lexon's bonds defines the measure of the County's damages. "The general rule is that where a bond is given to a public body . . . the full penalty of such bond may be recovered as in the nature of liquidated damages for its breach . . ." 12 Am. Jur. 2d *Bonds* § 37. Lexon's bonds were given to the County as a condition precedent to approval of the final plat for Chandler's Glen, and the penal sum of the bonds were set in 2006 at "the amount of the estimated construction cost of the ultimate installation of the improvement at prevailing rates." *See* Subdivision Regulations, Berkeley County, West Virginia, § 702.1 (2004). By statute, Lexon's bonds were required to "[b]e in an amount to cover the infrastructure construction." *See* W. Va. Code § 8A-6-1 (2004). The County's damages under the bonds are therefore a "sum certain" within the meaning of Rule 55(b)(1) because the penal sum of the bonds was "ascertained and agreed upon by the parties" when the Chandler's Glen final plat was approved and was "fixed by operation of law" under both the County's subdivision ordinance and W. Va. Code § 8A-6-1. The County simply did not need to "resort to extrinsic proof" at a Rule 55(b)(2) damages hearing because DLM's failure to complete the Chandler's Glen improvements and Lexon's refusal to cure DLM's default obligate Lexon to pay the full penal sum of the bonds as liquidated damages.

4. **Lexon raised its "unliquidated damages" argument with another appellate court and lost.**

In *Synovus Bank v. County of Henderson*, Lexon issued a performance bond stating that it was "held and firmly bound unto [Henderson County] in the penal sum of [Six Million & no/100

Dollars (\$6,000,000.00)] the payment of which sums, well and truly to be made, we . . . bind ourselves . . . firmly by these presents.” No. COA11-1601, 729 S.E.2d 731, 2012 WL 3192688, at *6 (N.C. Ct. App. Aug. 7, 2012) (unpublished table decision), *review withdrawn by Synovus Bank v. County of Henderson*, 735 S.E.2d 176 (N.C. 2012) (granting motion by Lexon to withdraw petition for discretionary review). Lexon argued that the trial court erred in ruling that Lexon was liable for the entire face value of its performance bond because of the possibility that “the actual cost to complete the required improvements would be less than \$6,000,000.” *Id.* The court rejected Lexon’s argument, noting that Lexon specifically described the amount of the performance bond as a “penal sum,” which in bond parlance required Lexon “to pay a specified sum as a penalty if the underlying obligation is not performed.” *Id.* “Lexon chose to include the word ‘penal’ to modify the word ‘sum.’ We assume that Lexon included the word ‘penal’ in the bond for a purpose. The plain meaning of ‘penal sum’ is an amount awarded to a beneficiary as a penalty if some obligation is not performed.” *Id.* at *7. The court further noted that, even assuming that the meaning of “penal sum” is not clear from the face of Lexon’s bond, the court “must then interpret ‘penal sum’ in favor of the policyholder, or the beneficiary, and against the company.” *Id.* The court thus found that “Lexon’s argument is without merit” and that the trial court properly required Lexon to pay the full amount of the performance bond.

The result in *Synovus Bank* is entirely consistent with West Virginia law and the facts of this case. Like its bond in *Synovus Bank*, Lexon’s bonds here obligate it to pay to the County the total “penal sum” of \$3,438,565.20 upon default. *Compare Synovus Bank*, 2012 WL 3192688 at *6 (quoting “penal sum” language of bond) *to* App. at 415-16 (bonds using identical language). The “penal sum” of Lexon’s bonds was sought in a breach of contract claim by the County, and duly awarded by Judge Silver, when Lexon refused to honor its obligations and refused to

answer the County's complaint. Like the *Synovus Bank* court, any ambiguity in the term "penal sum" must be construed against Lexon, and in favor of the County, because "when the surety is a corporation and supplies bonds for a consideration, the courts will construe the obligations of the bond most strongly against the surety." *Cecil I. Walker Machinery Co. v. Steuben*, 159 W. Va. 563, 567-68, 230 S.E.2d 818, 820 (1976).¹¹ Accordingly, Lexon's bonds, which constitutes the "estimate[d] and adjust[ed]" cost of completing the Chandler's Glen infrastructure and improvements, require payment of the face value of the bonds in the event that Lexon failed or refused to remedy its principal's default.

5. Lexon breached the terms of its bonds, and forfeited its contractual "right to elect a method of curing the default of its principal," when it chose to neither perform in place of its principal nor pay the County to perform in its stead.

Lexon's belief that it may still offer to perform under its bonds is false. It is basic contract law that "[w]here there has been an actual, as opposed to an anticipatory, breach of contract, the plaintiff's right of action accrues and cannot be defeated by a subsequent offer to perform." 23 Williston on Contracts § 63:20 (4th ed.) *See also, e.g., Syl., Kendall v. Dunn*, 71 W. Va. 262, 76 S.E. 454 (1912); 17A Am. Jur. 2d *Contracts* § 711; 17B C.J.S. *Contracts* § 718. When DLM defaulted on its obligations and the County notified Lexon of the default, Lexon at that time had the option of either performing at its own expense or paying to the County the cost of performance. When Lexon did neither, it breached its bonds and became liable to pay the

¹¹ Moreover, "[t]here are two rules for inferring that the parties naming in a contract a sum to be paid for its breach intended it to be as liquidated damages . . . (2) where from the nature of the case and the tenor of the agreement it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties." Syl., *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S.E. 815 (1908). There is no question that the "penal sum" of Lexon's bonds was reached through "actual and fair estimate and adjustment between the parties" because the face value of Lexon's bonds, which by statute must "[b]e in an amount to cover the infrastructure construction," was set by the County and Lexon's principal, DLM, in exchange for approval of the Chandler's Glen final plat.

County the total penal sum of \$3,438,565.20. Lexon, therefore, forfeited its option to “elect a method of curing the default of its principal” when it chose to do nothing.

6. The County’s offer to return any unused bond proceeds is not an admission that its claims are unliquidated but instead an acknowledgment of the County’s statutory obligation to act in good faith in using the bond proceeds.

Lexon’s argument that the County converted its liquidated damages into unliquidated damages by offering to return any unused proceeds is also false. The County’s subdivision ordinance states that “[t]he bond shall be subject to forfeiture to the County Commission for the sole purpose of installation or completion of required improvements.” Subdivision Regulations, at § 702.1. By statute “[t]he money from the bond shall only be used by the governing body to which the bond is payable, for the completion of the infrastructure construction” W. Va. Code § 8A-6-1 (2004). Lexon’s bonds were thus “subject to forfeiture to the County” when DLM defaulted and Lexon refused to perform; however, the proceeds from the forfeiture can only be used by the County to complete the bonded improvements. “There is a presumption that public officials will perform their duties in accordance with the law. It is reasonable to presume, therefore, that the County will properly use the bond proceeds.” *Bd. of Sup’rs of Stafford County v. Safeco Ins. Co. of America*, 310 S.E.2d 445, 450 (Va. 1983). The County’s offer to return any unused funds is nothing more than an acknowledgment of its statutory duty to act in good faith -- not an admission that the County will ultimately spend less than the face value of the bonds, nor an admission that default judgment could not be entered under Rule 55(b)(1).

D. THE COUNTY’S DEFAULT JUDGMENT IS NOT “VOID FOR LACK OF PERSONAL JURISDICTION” DUE TO INSUFFICIENCY OF PROCESS.

Lexon next argues that the County’s default judgment is void for lack of personal jurisdiction, and therefore must be set aside as void under Rule 60(b)(4), because the County did not serve its summons and complaint in a manner authorized by statute. Lexon’s argument is

without merit because the County properly served Lexon by mailing its complaint to the address given by Lexon for Chris Parrish, whom Lexon held out to the County as its agent for handling the County's bond claims, and who acted with actual authority on Lexon's behalf prior to the County's lawsuit. However, even assuming *arguendo* that the County improperly served Lexon, the County's default judgment is not "void for lack of personal jurisdiction" because lack of personal jurisdiction and insufficiency of process are separate defenses and Lexon waived its objection to service by allowing a default judgment to be entered against it.

- 1. The County properly served its complaint upon Lexon by mailing the summons and complaint to the address given by Lexon for Chris Parrish, Lexon's Director of Construction, (1) who Lexon specifically held out as its agent "handling this matter for response," (2) who repeatedly traveled to West Virginia to meet with the County prior to suit, and (3) who directly negotiated with the County on Lexon's behalf.**

Lexon argues that the County failed to properly serve its summons and complaint because it "did not serve the[] summons and complaint on Petitioner through the Secretary of State; through its registered agent; or through an officer, director, trustee, or authorized agent of petitioner." (Pet'r's Br. 30) The County, however, did in fact serve an "authorized agent of petitioner" by mailing the summons and complaint to the exact address given to the County by Lexon for Chris Parrish, Lexon's Director of Construction, whom Lexon held out as its agent for handling the County's bond claims.

A plaintiff may serve a foreign corporation by serving "any person appointed by [such corporation] to accept service of process in its behalf , or on its president or other chief officer, or its vice president, cashier, assistant cashier, treasurer, assistant treasurer, secretary, or any member of its board of directors, or, if no such officer or director be found, on any agent of such

corporation” W. Va. Code § 56-3-13.¹² “The only test of agency within the meaning of [W. Va. Code § 56-3-13] is whether the nature of the agent’s employment is such that it may reasonably be supposed that notice will reach the corporation through him.” *Brash v. Appalachian Elec. Power Co.*, 144 W. Va. 620, 624, 110 S.E.2d 386, 389 (1959). “The test is whether the agent served sustains such relation to the corporation or to the business out of which the alleged cause of action arose as to justify a fair and reasonable inference of a duty on his part to communicate the fact of service to the corporation.” 19 C.J.S. *Corporations* § 1031.

The undisputed facts of this case demonstrate that Lexon held Chris Parrish out as its agent for the County’s bond claims. When it came to the County’s attention that DLM had stopped work on Chandler’s Glen, the County notified Lexon through a letter dated December 9, 2010. (See App. at 9, 11-12) By letter dated February 28, 2011, Lexon responded to the County’s letter by acknowledging receipt of the County’s claims and “inform[ing] you we have forwarded your correspondence to our Director of Construction, Chris Parrish, who is handling this matter for response. His contact information is: Lexon Insurance Company 900 South Frontage Road, Suite 250 Woodbridge, IL 60517.” (App. at 405) Chris Parrish subsequently traveled to West Virginia in April 2011 to discuss completion of the Chandler’s Glen project, and again traveled to West Virginia that summer to present a settlement offer from Lexon. (App. at 9, 13, 406) Lexon specifically directed the County to communicate with Chris Parrish about its claims, and all of Lexon’s pre-suit communications and negotiations were conducted through him. Having held Chris Parrish out as its agent, and having provided the County a specific address to send mail to him, it should come as no surprise that the County “reasonably []

¹² A foreign corporation may be served in accordance with W. Va. Code § 56-3-14, which states that “[p]rocess against, or notice to, a foreign corporation which . . . is doing business in this State . . . and which has qualified to do such business under the laws of this State, may be served in accordance with the provisions of subdivision (d) of [W. Va. Code § 56-3-13].” W. Va. Code § 56-3-14.

supposed that notice w[ould] reach [Lexon] through him.” *Brash v. Appalachian Elec. Power Co.*, 144 W. Va. 620, 624, 110 S.E.2d 386, 389 (1959).

The fact that Lexon now argues that Chris Parrish and Linda Martinez, his secretary, were not authorized to accept service does not mean that the County failed to properly serve Lexon. “The fact that the parties, as between themselves especially, disclaim their relation to be that of principal and agent is not decisive as against an inference of law from the facts surrounding the relationship.” 19 C.J.S. *Corporations* § 1031. It is undisputed that the County mailed the complaint to the address Lexon provided for its agent and that Lexon actually received it. Significantly, at no time did Lexon present testimony or offer affidavits from Chris Parrish or Linda Martinez stating that they were not authorized to accept service of the County’s complaint. Since Lexon bore the burden “of proving the facts entitling [it] to relief,” yet failed to present any actual evidence that Chris Parrish or Linda Martinez could not accept service, Judge Silver correctly found that the County properly served its complaint.

2. Even if the County improperly served its complaint, the default judgment against Lexon is nonetheless valid because Lexon waived its objection to service of process by permitting a default judgment to be entered.

Lexon has sufficient minimum contacts with this State, actually received the County’s complaint within the time to answer, and had nearly six months thereafter to file an answer or object to service of process. Lexon, therefore, does not actually argue lack of personal jurisdiction, but instead insufficiency of the County’s service of process -- a separate (and waivable) defense under Rule 12(b). Lexon, however, failed to file an answer or pre-answer motion raising sufficiency of process as a defense, and therefore waived its objection to process by allowing the default judgment to be entered..

Contrary to Lexon’s assertions, the trial court clearly has personal jurisdiction over Lexon because Lexon specifically entered into insurance contracts for projects in this State. “A

court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va. Code, 31-1-15 [1996] and W. Va. Code, 56-3-33 [1996]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process." Syl. Pt. 1, *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000). "The standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of the action in the forum does not offend traditional notions of fair play and substantial justice." Syl. Pt. 1, *Hodge v. Sands Mfg. Co.*, 151 W. Va. 133, 150 S.E.2d 793 (1966). Lexon specifically wrote, priced, and guaranteed two performance bonds in favor of a West Virginia County guaranteeing improvements for a West Virginia construction project. Lexon, therefore, cannot seriously contest that it "transact[ed] any business in this state" or "contract[ed] to insure any person, property or risk located within this state" for purposes of W. Va. Code § 56-3-33. Lexon also cannot deny that it has sufficient minimum contacts with this State; having written, and accepted payment for, two performance bonds for a West Virginia subdivision project, Lexon "should reasonably anticipate being haled into court there." *See Hill by Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 657, 425 S.E.2d 609, 612 (1992).

Given its contacts with West Virginia, Lexon's true argument is not lack of personal jurisdiction under Rule 12(b)(2) but insufficiency of process under Rule 12(b)(5).¹³

¹³ "Rule 12(b) distinguishes between the defenses of lack of personal jurisdiction [] and insufficient service of process If the true objection is insufficient service of process, we do not think it is too much to require a litigant to plainly say so. [A party] should not couch its true objection to the sufficiency of service in the garb of formalistic incantations of lack of personal jurisdiction[.]" *Leslie Equipment Co. v. Wood Resources Co., LLC*, 224 W. Va. 530, 541, 687 S.E.2d 109, 120 (2009) (Davis, J., concurring in part and dissenting in part).

Insufficiency of process, however, does not render a default judgment void for lack of jurisdiction absent a violation of due process. Where there is actual notice and an opportunity to be heard, there is no violation of due process. Accordingly, even if the County failed to properly serve its complaint, the fact that Lexon received actual notice of the lawsuit and had more than six months to answer or file a Rule 12(b) motion (and even sought extensions of time to answer), yet failed to interpose an objection to service prior to default judgment, constitutes waiver.

“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). “As a general rule, federal courts will consider a Rule 12(b) motion by a party in default as untimely and therefore as having been waived.” 5C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1391 (3d ed. 1998). “[A] defect in service of process may not render the proceedings void, which means that the court has personal jurisdiction over defendant and an objection to the service may be waived by allowing a default and default judgment to be entered.” 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2695 (3d ed. 1998).¹⁴ Although lack of personal jurisdiction and sufficiency of process defenses are interrelated, the difference between the two is whether constitutional due process (the right to notice and an opportunity to be heard) has been violated:

A distinction should be drawn, however, between service of process objections and personal jurisdiction objections. An objection to personal jurisdiction may raise constitutional issues, and the non-appearance of the defendant should not constitute a waiver of that defense. . . . If the defendant is merely arguing that there is no jurisdiction because service of process or the content of

¹⁴ “Under our law, the failure of a defendant to file an answer or pre-answer motion asserting the defense of insufficiency of service of process constitutes a waiver of that issue. Moreover, I have been unable to find any case by this Court or from other jurisdictions that permits a defendant to belatedly raise the issue of insufficiency of process, but permitted a default judgment to be entered.” *Leslie Equipment Co.*, 224 W. Va. at 542 (Davis, J., concurring in part and dissenting in part).

the papers was defective or improper and thus did not effectuate jurisdiction over his person, then the objection is not of a constitutional dimension and Rule 12(h)(1) waiver principles clearly should apply.

5C Charles Alan Wright *et al.*, Federal Practice & Procedure § 1391 (3d ed. 1998).

In *Sanderford v. Prudential Ins. Co. of America* defendant Prudential served a third-party summons and complaint for indemnification upon Daniel Kikly, a Prudential insurance agent. 902 F.2d 897, 898-99 (11th Cir. 1990). It was not disputed that Kikly had notice of the action against him or that he was served with numerous motions relating to a default judgment sought by Prudential. *Id.* at 899. “It was only after he studiously ignored the various motions and final default judgment had been entered that Kikly decided to act,” notifying the court of his intent to move to set aside the default and filing his motion two weeks later. *Id.* The trial court denied Kikly’s motion to set aside and the Eleventh Circuit affirmed: “we conclude that the court is not deprived of personal jurisdiction because there is a minor defect in the process” and “[w]e specifically decide here that appellant’s failure to assert the defense of insufficiency of process prior to the entry of final default judgment, at a time when he had actual notice of the action and of the court’s entry of final default judgment constitutes waiver of the defense of insufficiency of process.” *Id.*

In *Myers v. Brown* “[t]he issue presented [wa]s whether a party who has actual knowledge of a lawsuit against him, but who has been improperly served with process, may take no action in defense of the lawsuit, allow a default judgment to be entered against him, and then seek to have that judgment set aside by bringing a motion for relief under [Rule 60].” 465 A.2d 254, 254-55 (Vt. 1983). The defendant in *Myers* had actual knowledge of the lawsuit against it and that service was mistakenly made upon the wrong agent for the defendant, yet within a few days of accepting service the defendant called counsel for the plaintiff to acknowledge receipt of

the complaint. *Id.* at 255-56. The trial court denied the defendant's motion to set aside and the Supreme Court of Vermont affirmed: "where defective service implicates constitutional rights, waiver cannot be found without running afoul of due process; however, in those cases in which a party has actual knowledge of the pending action, there are no constitutional issues at stake, and waiver is not only possible but advisable." *Id.* at 258.

"The Federal Rules do not contemplate that a party may simply ignore pleadings it receives," *Sanderson*, 902 F.2d at 900, nor do the West Virginia Rules.¹⁵ Like the defendants in *Sanderford* and *Myers*, Lexon had actual, and timely, notice the County's lawsuit; knew or should have known of any defects in process; and had ample time to appear and object to the sufficiency of the County's service; yet utterly failed to appear and protect itself after being informed by the County that it needed to file an answer. Moreover, unlike the defendants in *Sanderford* and *Myers*, who immediately appeared and sought to vacate the default judgments, Lexon continued to sit on its objection to process, and continued to avoid coming into court, for an additional seven months. Accordingly, even if the County improperly served Lexon (which it did not), the default judgment is nonetheless valid because Lexon has waived its objection to the sufficiency of process.

E. LEXON'S RULE 60(B) MOTION WAS NOT PRESUMPTIVELY TIMELY JUST BECAUSE IT WAS FILED WITHIN THE ONE-YEAR OUTER LIMIT FOR FILING RULE 60(B)(1) - 60(B)(3) MOTIONS.

Lexon failed to present any evidence contradicting Judge Silver's factual finding that Lexon failed to file its Rule 60(b) motion within a reasonable time. Instead, Lexon argues that its motion was timely as a matter of law because "Lexon's motion to set aside the default

¹⁵ "Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of our rules." *Painter v. Peavy*, 192 W. Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994).

judgment was filed well within the one-year period provided in Rule 60(b)(1).” (Pet’r’s Br. 20) Lexon’s argument is based upon a clear misreading of Rule 60(b) that has been unequivocally rejected by numerous courts.

“A motion filed under Civil Procedure Rule 60(b) is not considered timely just because it is filed within the one-year time limit.” *In re USN Communications, Inc.*, 288 B.R. 391, 396 (Bankr. D. Del. 2003). “The one-year period represents an extreme limit, and the motion may be rejected as untimely if not made within a ‘reasonable time’ even though the one-year period has not expired.” 11 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2866 (3d ed. 1998). *See also Sorbo v. United Parcel Service*, 432 F.3d 1169, 1178 (10th Cir. 2005); *Viafax Corp. v. Stuckenbrock*, 995 P.2d 835 (Idaho 2000).

Several courts have denied Rule 60(b) relief sought by parties whose delay in filing was significantly shorter than Lexon’s seven month delay. *See Limon v. Double Eagle Marine, LLC*, 771 F. Supp. 2d 672 (S.D. Tex 2011) (four month delay); *Maine Nat. Bank v. F/V Explorer*, 663 F. Supp. 462, 466 (D. Me. 1987) (six weeks after knowledge of judgment); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 541-42 (S.D.N.Y. 1985) (one month after knowledge of judgment). Lexon cannot dispute that it had actual knowledge of the default judgment for seven months, had every opportunity to appear and file its motion, and was even advised by the County that it needed to protect itself from the default judgment, yet willfully chose not to appear and file its Rule 60(b) motion. “Having chosen this manner of proceeding, [Lexon] also chooses the consequences.” *Brand v. NCC Corp., Through its Div. Nat. Toll Free Marketing*, 540 F. Supp. 562, 564 (E.D. Pa. 1982) (intentional decision to ignore lawsuit while attempting to negotiate a settlement did not entitle defendant to relief from default judgment).

F. THE COUNTY’S COMPLAINT DOES NOT BAR RECOVERY OF THE PENAL SUM OF LEXON’S BONDS BECAUSE THE FACTS SET FORTH IN THE

COMPLAINT DEMONSTRATE THAT LEXON WAS BOUND TO PAY THAT AMOUNT WHEN IT REFUSED TO REMEDY DLM'S DEFAULT.

Lexon next argues that Judge Silver erred by entering default judgment for the penal sum of the bonds because “[t]he County’s complaint was not a suit for damages, but for specific performance.” (Pet’r’s Br. 23) Lexon’s argument is a throwback to archaic, hypertechnical pleading requirements that West Virginia (and almost every other jurisdiction) abandoned by adopting notice pleading under the West Virginia Rules of Civil Procedure. Moreover, the default judgment is entirely consistent with the County’s complaint, which alleged Lexon’s liability for the proceeds of its bonds and the County’s entitlement to recover those amounts.

“Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). “[A] party is no longer slavishly bound to stating particular theories in its pleadings Under the practice of notice pleading . . . [a] party should be given whatever relief the facts entitle him or her to, even if he or she has misconceived their legal effect.” 61A Am. Jur. 2d *Pleading* § 130.

“The prayer of the complaint is no part of the complaint.” *State v. Bonham*, 119 W. Va. 280, 193 S.E. 340, 341 (1937). “The prayer is not part of the petition and may be disregarded in determining what relief, if any, is authorized by the petition. Thus, where the facts alleged state a cause of action, and are supported by the evidence, the court will grant proper relief, although the relief granted may not conform to the relief requested.” 61A Am. Jur. 2d *Pleading* § 144.

“If the specific relief prayed for cannot be granted, the court may, if there is a prayer for general relief, grant any appropriate relief warranted by the averments in the bill and the proof.” Syl., *Taylor v. Taylor*, 76 W. Va. 469, 85 S.E. 652 (1915). “Under the prayer for general relief, the court should grant such relief as the plaintiff’s cause entitles him to, not inconsistent with the

prayer for specific relief.” Syl. Pt. 4, *Cable v. Cable*, 132 W. Va. 620, 53 S.E.2d 637 (1949). *See also Bonham*, 119 W. Va. at 341. “A prayer for general relief enables a court to grant whatever relief the facts pleaded and proved require, even to the granting of other and additional relief from that specially prayed for if supported by the allegations of the complaint or bill, and established by competent evidence.” 61A Am. Jur. 2d *Pleading* § 150.

The County’s complaint clearly alleged the terms of Lexon’s bonds (and even attached copies of the bonds as exhibits), that Lexon’s obligation to perform had been triggered by DLM’s default, that the County had demanded Lexon’s performance under the bonds, and that Lexon subsequently refused to honor its contractual obligations under the bonds. (App. at 7-14) The County’s complaint thus clearly alleged a breach of contract claim against Lexon, and accordingly requested that the Court either grant “specific performance of the Surety’s obligations according to the terms of the subject bonds . . . [or] such other relief as the Court deems appropriate and proper.” (App. at 10) When Lexon refused to appear, the County subsequently moved for default judgment for the penal sum of the bonds. It is immaterial whether the Court granted a monetary judgment under the prayer for specific performance (which the terms of the bonds clearly authorize by binding Lexon for payment of that amount) or under the prayer for general relief: the facts clearly support the County’s claim for the proceeds of Lexon’s bonds, so Judge Silver properly granted the relief decreed in the default judgment.

G. LEXON HAS NO MERITORIOUS DEFENSES TO THE COUNTY’S CLAIMS, SO REVERSING THE DEFAULT JUDGMENT WILL ONLY REWARD LEXON’S PAST MISCONDUCT AND FURTHER DELAY THE COUNTY’S EFFORTS TO COMPLETE CHANDLER’S GLEN.

Perhaps the most important thing for this Court to understand is that upholding the County’s default judgment will render the same result as a full trial on the merits: Lexon’s bonds guaranteed that all infrastructure and improvements for Chandler’s Glen would be completed up

to the penal sum of the bonds, and Lexon is liable to honor that guarantee. Indeed, although Lexon makes a cursory reference to “multiple legal authorities . . . supporting Lexon’s position that it was not obligated to complete or pay for improvements,” (Pet’r’s Br. 25) Lexon did not even bother to present these “multiple legal authorities” to this Court because they consist entirely of misrepresentations of various cases and frivolous boilerplate defenses that would never be presented at trial. (See App. at 551-59) The only end that reversal would serve is to reward Lexon for ignoring its obligations under the bonds, delaying its responses to the County’s inquiries, and obstructing the judicial process.

1. This case is a simple breach of contract matter in which Lexon’s liability cannot be disputed.

In order to establish a meritorious defense, Lexon was required to show that “there is . . . reason to believe that a result different from the one obtained would have followed from a full trial.” *Cales v. Wills*, 212 W. Va. 232, 242, 569 S.E.2d 479, 489 (2002). The results of a full trial, however, will not be any different from the default judgment. Lexon chose to write, price, and guarantee the performance bonds that DLM posted for Chandler’s Glen, DLM defaulted on the Chandler’s Glen project, and Lexon refused to remedy DLM’s default. Lexon has no justifiable or meritorious defense for its failure to honor the clear terms of its bonds, so any trial on the merits will simply result in the same judgment against Lexon.

2. The *Westchester* case that Lexon attempted to rely on below is inapplicable to this case because Lexon’s bonds cover the entire Chandler’s Glen project - not a specific phase in which no development has occurred.

The first of the “multiple legal authorities” that Lexon attempted to use to create a meritorious defense is *Westchester Fire Ins. Co. v. City of Brooksville*, No. 10-14075, 465 Fed. Appx. 851 (11th Cir. Mar. 8, 2012) (unpublished per curiam opinion), which held that a bond surety did not have to complete improvements in an undeveloped subdivision phase that was to

be platted, bonded, and approved as a separate project. The *Westchester* case is entirely inapplicable here because the approved final plat for Chandler's Glen covered the entire 255-lot project, and Lexon's bonds guaranteed infrastructure and improvements for the project as a whole. There is no question that DLM began development of Chandler's Glen, and thus Lexon has no credible argument that the holding in *Westchester* cuts off its liability.

3. The New York cases that Lexon attempted to rely on below are inapplicable because they apply a statutory limitation on liability that does not exist in West Virginia.

In an effort to lend support to its mischaracterization of the *Westchester* case, Lexon pointed Judge Silver to two New York cases for the proposition that Lexon's liability cannot "exceed an amount commensurate with the extent of building development completed." (App. at 475, n.3) These cases, however, simply applied New York General City Law § 33, which statutorily limits the liability of a performance bond surety to "the extent of building development that has taken place in the subdivision" See *City of Peekskill v. Continental Ins. Co.*, 999 F. Supp. 584, 586 (S.D.N.Y. 1998) (limiting liability under § 33); *Town of Shawangunk v. Goldwil Properties Corp.*, 61 A.D.2d 693 (N.Y.3d Dept. 1978) (same). Unlike New York, West Virginia places no such statutory limitation upon Lexon's liability. In fact, reading such a limitation into Lexon's bonds would violate West Virginia public policy, which requires courts to construe the terms of Lexon's bonds strictly against it. See *Cecil I. Walker Machinery Co. v. Steuben*, 159 W. Va. 563, 230 S.E.2d 818, 820 (1976) ("[W]hen the surety is a corporation and supplies bonds for a consideration, the courts will construe the obligations of the bond most strongly against the surety.").

4. Lexon misrepresented a California case it quoted to Judge Silver by taking a small piece of a larger quote out of context.

Lexon attempted to support its “meritorious defense” by quoting *Berman v. Aetna Cas. and Sur. Co.*, 115 Cal. Rptr. 566, 568 (Cal. Ct. App. 1974), for the proposition that the County “is not entitled to treat as a windfall the proceeds of a faithful performance bond realized as a consequence of work not performed.” (App. at 475, n.3) The “windfall” discussed in *Berman*, however, was the obligee’s attempt to prevent a third party from receiving a share of the bond proceeds for improvements that the third party completed. *See Berman*, 115 Cal.Rptr. at 568. Lexon took the language it quoted to Judge Silver out of context and then attempted to present it in a manner that the *Berman* court never intended.

5. The *River Vale* case that Lexon attempted to rely on below is inapplicable because DLM did begin work on Chandler’s Glen.

Lexon also referred Judge Silver to *River Vale Planning Bd. v. E & R Office Interiors, Inc.* as support for its argument that it has no liability to complete improvements for unfinished portions of Chandler’s Glen. 575 A.2d 55 (N.J. Super. Ct. App. Div. 1990). Lexon, however, ignored the fact that the development in *River Vale* was entirely abandoned before any work began. *See River Vale Planning Bd.*, 575 A.2d at 57-58 (stating that approved plan to develop warehouse property into a multi-tenant occupancy was abandoned by original owner and subsequent transferee of property). In fact, the developer in *River Vale* did not even post a performance bond for the required improvements before it abandoned the project. *River Vale Planning Bd.*, 575 A.2d at 57. Again, there is no question that DLM began development of Chandler’s Glen, so there is no question that Lexon is liable under the bonds it issued.

6. Lexon's assertions that it is only liable to install the improvements for completed lots has been rejected by other courts.

The “meritorious defense” that Lexon sought to assert below (and did not even bother to raise here) has been rejected by several courts, which have simply held that a surety is liable to complete all contemplated improvements. Absent a statutory limitation like that in New York (and which West Virginia does not have), a surety’s liability is commensurate with the terms of its bond and not the extent of building development completed. *See Lake Sarasota, Inc. v. Pan. Am. Sur. Co.*, 140 So.2d 139 (Fla. Dist. Ct. App. 1962) (reversing trial court order that surety only furnish improvements for property owners that had purchased lots because “[t]he condition of the bond is to construct all of the contemplated improvements and is not limited to construction of the improvements which abut on a lot sold to the public”). Similarly, other courts have determined that the terms of the bond control the surety’s liability and thus a surety is obligated to complete all contemplated improvements when its principal fails to perform. *See City of Merced v. American Motorists Ins. Co.*, 24 Cal. Rptr. 3d 788 (Cal. Ct. App. 2005); *City of Sacramento v. Trans Pacific Industries, Inc.*, 159 Cal. Rptr. 514 (Cal. Ct. App. 1979). A surety’s duty to complete all bonded improvements for a subdivision has even been imposed in situations where no lots in the subdivision were conveyed, where only *de minimis* construction in the subdivision was begun, and where construction of improvements would be a waste of money. *See Town of Southington v. Commercial Union Ins. Co.*, 805 A.2d 76 (Conn. App. 2002) (no lots conveyed); *City of Los Angeles v. Amwest Sur. Ins. Co.*, 73 Cal. Rptr. 2d 729 (Cal. Ct. App. 1998) (only *de minimis* construction begun); *Bd. of Sup’rs of Stafford County*, 310 S.E.2d 445 (Va. 1983) (construction of improvements would be a waste of money).

7. **Even if this Court were to reverse due to improper service, Lexon would nonetheless be liable under its bonds because the County could simply re-serve its complaint.**

Lexon attempted to argue below that its objection to service of process was somehow a meritorious defense as to liability. However, even if Lexon's objection to service had merit (which it does not), it would not result in dismissal of this case. *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 and retain the case pending effective service). Lexon itself admits to being amenable to service of process through the Secretary of State, so any defect in service would be curable and thus dismissal would be improper.

8. **The other boilerplate pleading defenses that Lexon presented to Judge Silver are frivolous on their face and would never be presented at trial.**

Lexon also attempted to convince Judge Silver that it could assert any of the following as meritorious defenses: "failure to state a claim, lack of standing, laches, statute of limitations, collateral estoppel, waiver, failure to mitigate damages, release, acquiescence, ratification, and failure to satisfy conditions precedent." (App. at 476-77) Lexon would not actually rely upon any of these "defenses" if the default judgment were to be lifted; as discussed in the County's surreply, Lexon's interposition of these claimed defenses at trial would clearly be frivolous and could therefore expose its attorneys to sanctions. (App. at 557-59)

V. CONCLUSION

Judge Silver correctly and appropriately exercised his discretion in denying Lexon's motion to set aside default judgment. Lexon failed to act within a reasonable time, failed to provide any factual support for its positions, and ultimately has no defense to liability. Reversal would only prolong the considerable wait that the residents of Chandler's Glen have already

endured. The Respondents, County Council of Berkeley County, West Virginia and Berkeley County Planning Commission, respectfully request that this Honorable Court affirm Judge Silver's Order denying Lexon's motion, and affirm the default judgment entered in favor of the County, so that Chandler's Glen can be completed without further delay.

RESPECTFULLY SUBMITTED,

**COUNTY COUNCIL OF
BERKELEY COUNTY, WEST VIRGINIA
~and~
BERKELEY COUNTY
PLANNING COMMISSION**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RECORD NO. 14-0215

LEXON INSURANCE COMPANY, Defendant Below,

Petitioner,

vs.

**COUNTY COUNCIL OF BERKELEY COUNTY, WEST VIRGINIA and
BERKELEY COUNTY PLANNING COMMISSION, Plaintiffs Below,**

Respondents.

**ON APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
(CIVIL ACTION NO. 11-C-973)**

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Brief of Respondents* was sent this 24th day of July, 2014, postage prepaid, first class mail to:

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