14-0058

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

RAY TONEY,

Plaintiff,

v.

Civil Action No. 12-C-527
Judge James C. Stucky

CITYNET LLC,
a West Virginia corporation,

Defendant.

ORDER GRANTING *PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT* AND ORDER DENYING *DEFENDANT'S MOTION TO DISMISS* AND ORDER DENYING *DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT*

Pending before the Court are the following motions: (1) *Citynet, LLC's Motion to Dismiss*; (2) *Plaintiff's Motion for Partial Summary Judgment*; and (3) *Citynet, LLC's Cross-Motion for Summary Judgment*. The parties have submitted memoranda of law both in support of, and in opposition to, the pending motions, respectively, and a hearing was conducted by the Court on all pending motions on August 22, 2012. At the hearing, the plaintiff, Ray Toney ("Mr. Toney"), appeared in person and by his counsel, J. Michael Ranson, Esquire, George B. Morrone III, Esquire, and Ranson Law Offices, PLLC, and the defendant, Citynet, LLC ("Citynet"), appeared by its President and Chief Executive Officer, James R. J. Martin II ("Mr. Martin"), and by its counsel, Steven K. Nord, Esquire, and Offutt Nord Burchett. The parties agree and the Court FINDS that this matter is properly before the Court and is ripe for disposition.

The Instant Proceeding

Mr. Toney seeks to cash out his entire accumulated and vested balance of Eighty Thousand Dollars and Forty-Eight Cents ($87,000.48) under an *Incentive Plan* adopted by Citynet on January 28, 2008, and he brings the instant proceeding to enforce his rights under the terms and provisions of the *Incentive Plan*. Mr. Toney also contends that his accumulated and vested balance under the *Incentive Plan* constitutes "wages" under the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1, et seq. ("WV-WPCA"), in that the monies are an "accrued fringe benefit[] capable of calculation and payable directly to [him]." Thus, Mr. Toney ultimately seeks payment of his wages, plus liquidated damages and attorneys' fees and costs.

On the other hand, Citynet seeks dismissal or summary judgment in its favor. Citynet denies it has any obligation to pay Mr. Toney his entire accumulated and vested balance under the *Incentive Plan*. Citynet further contends that payment of any amount is subject to the approval of Citynet's four-member Board.[1] Citynet advances three arguments in support of its position. First, Citynet contends that Mr. Toney misunderstands "how much" and "when" he can redeem his vested balance. Second, Citynet contends that its four-member Board has sole and exclusive discretion and authority to deny a valid redemption request, including relieving Citynet entirely of its obligation to honor the redemption request. Third, Citynet contends that Mr. Toney's claim is illogical, because any former employee who is entitled to "cash out" his entire vested balance upon voluntary termination of employment would receive a "windfall."

[1] Section 2.5 of the Incentive Plan defines the Board as follows: "Board" means the Board of Managers of the Plan. The Board shall consist of the CEO, General Counsel, CFO and COO.

The Court **FINDS** that this case is properly before the Court at this time and that it can reach a dispositive ruling as a matter of law by interpreting the terms and provisions of the *Incentive Plan* and applying relevant law thereto. The Court notes that the *Incentive Plan* and other pertinent documents have been submitted to the Court as exhibits to the various dispositive motions.

The Material Facts

The material facts of this case are undisputed. Accordingly, the Court hereby makes the following **FINDINGS OF FACT**:

1. Mr. Toney was employed by Citynet in West Virginia on or about January 1, 1999.
2. By letter dated January 22, 2008 ("Martin Letter"), Mr. Martin presented Mr. Toney [and other employees] with a summary of the new *Citynet, LLC Employee Incentive Plan* ("*Incentive Plan*").
3. The Martin letter states *inter alia* that Mr. Toney was already 100% vested and that his "Vested Employee Balance" [at that time] was Forty-Two Thousand, Nine Hundred Thirty-Three Thousand Dollars and Seventy-Three Cents ($42,933.73).
4. The Martin letter summarizes the "redemption" provisions of the *Incentive Plan*, which includes a statement that when "an employee leaves Citynet, the employee is then ***entitled to 'cash out' his or her entire vested balance*** subject to certain provisions contained in the plan document with respect to termination for cause." (emphasis added).

5. *The Incentive Plan* was formally adopted by Citynet on January 28, 2008, but was effective on January 1, 2008.[2]

6. On October 12, 2011, Mr. Toney voluntarily terminated his employment with Citynet without cause, at which time his accumulated and vested balance under the *Incentive Plan* was **Eighty-Seven Thousand Dollars and Forty-Eight Cents ($87,000.48).**

7. Immediately upon giving notice to Citynet of his termination decision, Mr. Toney submitted a written request to Citynet for payment of his entire vested balance accumulated under the *Incentive Plan.*

8. Citynet refused Mr. Toney's request for payment of his accumulated and vested balance under the *Incentive Plan*, and instructed Mr. Toney that he must submit annual redemption requests--of up to 20% of his vested balance—during a specified four-month period only.

9. Citynet denies any obligation to make any payment under the *Incentive Plan* unless approved by the Citynet Board.

10. Citynet denies that Mr. Toney's accumulated and vested balance under the *Incentive Plan* constitutes wages under the WV-WPCA.

11. Redemption of performance units[3] is governed by Section 5.7 of the *Incentive Plan.*

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[2] The stated purpose of the *Incentive Plan* is set forth in Section 1.1 as follows:

> to create incentives which are designed to motivate Participants . . . to put forth maximum effort toward the success and growth of the Company and to enable the Company to attract and retain experienced individuals who by their positions, ability and diligence are able to make important contributions to the Company's success.

[3] "Performance Units" are the unit of measure by which the vested benefits are calculated.

Discussion & Analsysis

It is clear to the Court that the parties agree to the material facts, and that their disagreement lies with the meaning and application of various provisions of the *Incentive Plan*. The Court notes that " '[i]t is the province of the court, and not of the jury, to interpret a written contract.' Syl. Pt. 1, Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937)." Syl. Pt. 1, Orteza v. Monongalia County General Hospital, 173 W.Va. 461, 318 S.E.2d 40 (1984). See also, Winn v. Aleda Construction Co., 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984).

The Court further notes that the parties' disagreement over the meaning and application of the various provisions of the *Incentive Plan* does not necessarily mean that the terms and provisions are ambiguous. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, Berkeley Co. Pub. Serv. Dist. v. Vitro Corp. of Am., 152 W.Va. 252, 162 S.E.2d 189 (1968).

Finally, the Court notes that, "[w]here the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 3, Watts v. West Virginia Dept. of Health and Human Resources/Division of Human Services, 465 S.E.2d 887, 195 W.Va. 430 (W.Va., 1995) (citing, Syl. Pt. 2, Bethlehem Mines Corp. v. Haden, 153 W.Va. 721, 172 S.E.2d 126 (1969); Syl. Pt. 2, Orteza v. Monongalia County General Hospital, 173 W.Va. 461, 318 S.E.2d 40 (1984); Syl. Pt. 4, Tri-State Asphalt Products, Inc. v. Dravo Corp., 186 W.Va. 227, 412 S.E.2d 225 (1991)).

The central conflict between the parties is the applicable method of redemption by an employee who voluntarily terminates his employment with Citynet. Mr. Toney contends that he is entitled to cash out his entire vested balance of Eighty Thousand Dollars and Forty-Eight Cents ($87,000.48), which was accumulated as of the effective date his voluntary termination from employment. Mr. Toney submits that the *Incentive Plan* requires full payment of this entire balance within ninety (90) days of his voluntary termination.

Citynet, on the other hand, denies that Mr. Toney can cash out or redeem his entire accumulated and vested balance of Eighty Thousand Dollars and Forty-Eight Cents ($87,000.48) within ninety (90) days of his termination. It is Citynet's contention that Mr. Toney's entire vested balance is *available* for redemption, but that he is limited to submitting redemption requests of not more than 20% of his vested benefit balance during a pre-defined four-month period. Citynet also contends that payments are subject to the sole and exclusive discretion of the Board, and that the Board has the discretion to deny any redemption request.

In advancing their respective positions, both parties rely primarily on four documents: (1) the January 22, 2008 correspondence from Mr. Martin summarizing the new *Incentive Plan*; (2) the *Incentive Plan* adopted on January 28, 2008 (effective January 1, 2008); (3) Mr. Toney's redemption request on or about the date of his termination--October 12, 2011; and (4) Citynet's response to Mr. Toney's redemption request on or about October 14, 2011. All four of these documents were before the Court for review and inspection during the hearing on August 22, 2012.

In reviewing the *Incentive Plan*, it is clear that **Section 5.7** ("Redemption of

Performance Units") is controlling on the central issue of redemption of the accumulated and vested benefits. Section 5.7 outlines four distinct circumstances whereby "Participants may redeem or request redemption of their Performance Unit Awards." The parties do agree that Section 5.7 applies to redemption requests, but they disagree as to which subsection of Section 5.7 applies to Mr. Toney's redemption request.[4]

Mr. Toney seeks application of **Section 5.7(a)** ("Termination of Employment") to his redemption request. Mr. Toney submits that subsection 5.7(a) applies to terminations from employment without cause and that there is no distinction between such terminations initiated by the employer and the employee. Subsection 5.7(a) provides: "In the event the Participant's employment is terminated without cause, the Participant **shall be eligible to redeem** the vested portion of their Performance Units as of the effective date of the Participant's termination. Any amounts due will be paid in accordance with the Payout Schedule of the Plan." (emphasis added). Mr. Toney also contends that the use of mandatory term "shall" in this particular subsection removes any doubt that he is entitled to cash out his entire vested balance upon termination.

Citynet denies that subsection 5.7(a) applies to Mr. Toney, arguing that the application of subsection 5.7(a) is limited to terminations without cause <u>by the employer</u>. The Court notes no limiting or distinguishing language with respect to terminations by the employer and the employee. Instead of subsection 5.7(a), Citynet seeks application of **subsection 5.7(b)** ("Annual Voluntary Redemption") to Mr. Toney's redemption request.

[4] The parties also agree that two of the four redemption provisions do not apply to Mr. Toney's redemption request. Section 5.7(c) applies to redemption requests prompted by **financial hardship**. Under subsection 5.7(c), Citynet reserves complete discretion on payment. Section 5.7(d) addresses redemption requests prompted by **retirement**. Like subsection 5.7(a), subsection 5.7(d) uses the following mandatory language regarding vesting and payment: "the Participant **shall** become vested in 100% of all of the Participant's Performance Units. The amount due under this option **shall** be paid in accordance with the Payout Schedule of the Plan."

Subsection 5.7(b) provides: "Participants **may redeem** up to a maximum of 20% of their vested Performance Units during each calendar year." (emphasis added).[5] Thus, Citynet believes Mr. Toney must submit his redemption requests during a specified four-month time period and that his request cannot exceed 20% of this vested balance. Mr. Toney denies subsection 5.7(b) applies to him as a former employee, arguing that it applies to active employees of Citynet.

It is necessary for the Court to determine, as a matter of law, whether subsection 5.7(a) or 5.7(b) applies to Mr. Toney's redemption request. It is clear that this determination will yield dramatically different results for Mr. Toney and Citynet. Application of subsection 5.7(a) will entitle Mr. Toney to mandatory redemption of his entire vested balance as of the effective date of termination, or Eighty Thousand Dollars and Forty-Eight Cents ($87,000.48). Whereas, subsection 5.7(b) will afford Mr. Toney a limited temporal opportunity during which he may request redemption of up to 20% of the vested balance, yet any payment is subject to the discretion of the Board. In other words, the application of subsection (b) could result in no payment to Mr. Toney.

Looking closer at subsection 5.7(a), the Court notes that subsection 5.7(a) does not contain any limiting language to distinguish a termination for cause by the employer from that by the employee, and also that this subsection uses the mandatory term "shall." Looking closer at subsection 5.7(b), the Court notes that subsection 5.7(b) does limit participants to redemption requests to 20% of the vested balance, and such redemption

[5] The Court notes that Section 2.24 defines "Participant" as "an Eligible Employee of the Company to whom an Award has been granted by the Company under the Plan." Also, Section 2.13 defines "Eligible Employee" as "any full time employee of the Company as determined to be eligible to participate in the Plan, in the sole discretion of the Company. To be an Eligible Employee, the Employee must first complete one (1) year of full time employment with the Company."

requests must be made during a specified four-month period each calendar year. Also, subsection 5.7(b) uses the discretionary term "may" and payment thereunder is subject to the discretion of the Citynet Board.

Reading subsections (a) and (b) *in pari materia*, it is clear that Citynet recognized the need to draft two separate provisions—one that applies to employees whose relationship has been terminated and another that applies to active employees seeking annual voluntary redemption at specified periods each calendar year. It is undisputed in this case that Mr. Toney initiated his own termination without cause. As pointed out by Mr. Toney, it would be illogical to expect a former employee to seek redemption of up to 20% each year, subject to the discretion of the Citynet Board, as such a procedure would literally preclude the former employee from ever receiving the full ration of his vested benefits.[6]

The Court finds several additional reasons to reject Citynet's argument that an employee who voluntarily terminates his position of employment cannot redeem all of his accumulated and vested benefits is found in Section 5.6 of the *Incentive Plan*. Section 5.6 defines four different types of "termination events." Section 5.6(b) addresses "Voluntary Termination of Employment by Participant," and specifically states that "**[a]**ll Performance Units granted to the Participant which have vested prior to the effective date of such

[6] The Court notes that Citynet used similar competing redemption policies with respect to hardship requests and retirement requests. Under subsection 5.7 (c), Citynet employees are permitted to submit hardship requests to cash in or redeem vested benefits. There is no pre-determined period of time for submission of hardship requests. However, the payment of hardship requests is within the discretion of the Citynet Board. Yet, under subsection 5.7(d), retirees are deemed 100% vested and they are permitted to cash out their entire vested balance. Thus, it is clear that Citynet both recognized and employed the need to distinguish between discretionary payment and mandatory payment. It appears to the Court that discretionary payment was reserved to redemption requests by current employees who seek redemption on an annual basis or for hardship reasons. Whereas, mandatory payment is reserved for employees whose relationship is terminated without cause or who retire. In order to accomplish this result, Citynet used the discretionary terminology in subsections (b) and (c) and used mandatory terminology in subsections (a) and (d).

termination **shall be available for redemption.**" (emphasis added). Again, it is noted that Citynet drafted yet another provision in the *Incentive Plan* in such a manner to state that a Participant who voluntarily terminates his position of employment is eligible to redeem all of his vested benefits as of the date of termination. Indeed, both subsection 5.6(b) and subsection 5.7(a), *supra*, employ the mandatory term "shall" with regards to the Participant's redemption of his vested benefits.

Yet another reason to reject Citynet's argument is found in **Section 5.12** of the *Incentive Plan*. Section 5.12 was specifically drafted by Citynet to serve as an "Example of How the Plan Works." In Citynet's example, the fictitious employee, John, voluntarily terminates his position of employment with Citynet. At the time of termination, John is 100% vested and John had accumulated 1,000 performance units valued at $96.00 each. In this example, Citynet states that "John would be due a total amount of $96,000 (less applicable withholding) from the Company payable under the Payout provisions of the Plan." The example goes on to state that all of John's performance units are retired in the example. Thus, the very example included by Citynet in the *Incentive Plan* uses an employee who voluntarily terminated his position of employment without cause and who was then entitled to redeem all of his accumulated and vested benefits. Simply stated, Mr. Toney seeks to have his redemption handled like John's redemption in the example.

Yet another reason to reject Citynet's argument is found in the Martin Letter dated January 22, 2008. The Martin Letter states that "an employee will be permitted to 'cash out' 20% of his or her vested balance on an annual basis. When an employee leaves Citynet, the employee is then **entitled to 'cash out' his or her entire vested balance . . . . .**" (emphasis added). Again, the Court notes that Citynet appears to be mindful of using

permissive language in discussing certain redemption provisions ("***permitted*** to 'cash out' ***20%***") and mandatory language in others ("***entitled*** to 'cash out' his or her ***entire*** vested balance."). (emphasis added). In any event, it appears to the Court that Citynet did intend for employees who leave Citynet, other than for cause, to be entitled to cash out his or her entire vested balance.

Upon mature consideration of the undisputed material facts of this case and the applicable legal principles, the Court makes the following CONCLUSIONS OF LAW herein:

1. The parties are bound by the terms and provisions of the *Incentive Plan* with respect to Mr. Toney's request to redeem his accumulated performance units as vested benefits in the amount of Eighty-Seven Thousand Dollars and Forty-Eight Cents ($87,000.48).
2. The *Incentive Plan* was drafted by Citynet and is an intricate and involved contract designed to control *inter alia* the redemption of monetary benefits accumulated by and vested in an employee.
3. Any "[u]ncertainties in an intricate and involved contract should be resolved against the party who prepared it." Syl. Pt. 1, Charlton v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (1934).
4. Section 5.7 of the *Incentive Plan* was drafted by Citynet to dictate the redemption of performance units by employees.
5. The plain and unambiguous language of subsection 5.7(a) of the *Incentive Plan* states that it applies to employment terminations without cause, and

the provision contains no language whatsoever stating that its application is limited to terminations by the employer only.

6. The plain and unambiguous language of subsection 5.7(a) of the *Incentive Plan* applies equally to terminations without cause by the employee and the employer, and neither the parties nor this Court can now interject additional restrictive language into subsection 5.7(a).
7. Applying subsection 5.7(a) to Mr. Toney's redemption request, he is entitled to cash out his entire accumulated and vested balance of Eighty-Seven Thousand Dollars and Forty-Eight Cents ($87,000.48), and the same is payable within ninety (90) days of his request.
8. Mr. Toney submitted his redemption request to Citynet on or about October 12, 2011 and Citynet was obligated under the *Incentive Plan* to pay him the entire vested balance of Eighty-Seven Thousand Dollars and Forty-Eight Cents ($87,000.48) within ninety (90) days.
9. Section 21-5-4(c) of the WV-WPCA requires payment of wages whenever an employee quits or resigns no later than the next regular payday.
10. Section 21-5-1(c) of the WV-WPCA provides, in pertinent part, that "the term 'wages' shall also include then accrued fringe benefits capable of calculation and payable directly to an employee."
11. Section 21-5-1(l) of the WV-WPCA provides: "The term 'fringe benefits' means <u>any benefit</u> provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave,

production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage." (emphasis added).

12. The monetary value of Mr. Toney's performance units accumulated, calculated and vested under the *Incentive Plan* at the time of his termination constitute both fringe benefits and wages under the WV-WPCA.

13. Section 21-5-4(e) of the WV-WPCA imposes liability on employers who fail to pay an employee wages as required under the WV-WPCA for three times that unpaid amount as liquidated damages.

14. Citynet failed to pay Mr. Toney his wages as required by the WV-WPCA and Citynet is therefore liable to Mr. Toney for liquidated damages as defined by Section 21-5-4(e) of the WV-WPCA.

15. Section 21-5-12 of the WV-WPCA affords additional remedies for employees whose wages have not been paid in accordance with the WV-WPCA, including assessing the costs of the action, including reasonable attorneys' fees against the defendant.

16. Citynet is liable for the costs of this action and the reasonable attorneys' fees incurred by Mr. Toney.

Based upon the foregoing findings of fact and conclusions of law, the Court is of the opinion to, and does hereby, **ORDER** the following:

1. *Citynet, LLC's Motion to Dismiss* is **DENIED** and **OVERRULED**;
2. *Citynet, LLC's Cross-Motion for Summary Judgment* is **DENIED** and **OVERRULED**;
3. *Plaintiff's Motion for Partial Summary Judgment* is **GRANTED**;

4. Citynet shall pay wages in the amount of **Eighty-Seven Thousand Dollars and Forty-Eight Cents ($87,000.48)**;
5. Citynet shall pay Mr. Toney liquidated damages in the amount of **Two Hundred Sixty-One Thousand, One Dollars and Forty-Four Cents ($261,001.44)**;
6. Citynet shall pay Mr. Toney's **reasonable attorney's fees and costs** incurred in this proceeding, and the Court retains jurisdiction over this matter should the parties be unable to reach an agreement on said amount;
7. Citynet shall be liable to Mr. Toney for statutory **interest on the wages** beginning ninety (90) days after his written redemption request on October 12, 2011;
8. Citynet shall be liable to Mr. Toney for statutory **interest on the liquidated damages** upon entry of this order; and,
9. Court costs shall be assessed against Citynet.

It is so **ORDERED**. The objections and exceptions of the parties to any adverse ruling herein shall be reserved and preserved. The Clerk of the Court shall forward certified copies of this order to counsel of record.

ENTER this 18 day of Sept, 2012.

James C. Stucky

James C. Stucky, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19th DAY OF September 2012
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
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CATHY S. GAMBLE
KANAWHA COUNTY CIRCUIT COURT

RAY TONEY,

Plaintiff,

v.

Civil Action No. 12-C-527
(Judge James C. Stucky)

CITYNET, LLC,

Defendant.

ORDER DENYING *DEFENDANT'S MOTION FOR RECONSIDERATION AND MOTION UNDER RULES 59(E) AND 60(B) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE*

The Court has reviewed the *Defendant's Motion for Reconsideration and Motion under Rules 59(e) and 60(b) of the West Virginia Rules of Civil Procedure* heretofore filed herein on or about October 8, 2012, whereby the defendant, Citynet, LLC ("Citynet"), seeks relief from the judgment of this Court heretofore entered herein on September 18, 2012. Citynet makes three arguments: (1) that the Court is wrong to have concluded that Citynet breached the contract; (2) that the *West Virginia Wage Payment and Collection Act* does not apply; and (3) that the plaintiff misrepresented the amount due under the contract.

Initially, the Court points out that the *West Virginia Rules of Civil Procedure* do not explicitly recognize a "motion for reconsideration." See, Builders' Service and Supply Co. v. Dempsey, 680 S.E.2d 95, 224 W.Va. 80 (W.Va., 2009); Richardson v. Kennedy, 197 W.Va. 326, 329, 475 S.E.2d 418, 421 (1996) ("[d]espite our repeated direction to the bench and bar of this State that a `motion to reconsider' is not a properly titled pleading in West Virginia, it

continues to be used."); Savage v. Booth, 196 W.Va. 65, 68, 468 S.E.2d 318, 321 (1996) ("the West Virginia Rules of Civil Procedure do not recognize a 'motion for reconsideration.'"); see also Moten v. Stump, 220 W.Va. 652, 656, 648 S.E.2d 639, 643 (2007)).

Citynet does cite Rule 59(e) and Rule 60(b) of the *West Virginia Rules of Civil Procedure* in its motion and in the introduction to its memorandum of law. However, Citynet does not cite or discuss the substance or application of Rule 59(e) or Rule 60(b) in its memorandum of law.

Rule 59(e) does not itself provide a standard under which a circuit court may grant a motion to alter or amend. However, the Court notes that the *Litigation Handbook on West Virginia Rules of Civil Procedure* states that a Rule 59(e) motion should be granted where: "(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 59(e) at 1178–1179 (3d. Ed.2008). (See also Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir.1993)).

Considering the four possible "grounds" upon which to grant a Rule 59(e) motion, Citynet has not asserted any of the four grounds per se. Citynet does not suggest the first possible grounds, i.e., an intervening change in the law. However, Citynet does appear to suggest the Court committed an "error of law," insofar as it insists that the *West Virginia Wage Payment and Collection Act* does not apply. However, for the reasons set forth in the Court's order granting

judgment in favor of Mr. Toney, the Court does hereby DENY and OVERRULE a Rule 59(e) motion on said grounds.

Citynet also claims--for the first time post-judgment--that Mr. Toney "misrepresented the amount due" under the contract. It is unclear whether Citynet is offering this contention as a "new evidence" argument or "to prevent obvious injustice." In either event, the Court notes that Citynet proffered the same amount owed under the contract ($87,000.48) throughout this entire proceeding, at the hearing and also in its proposed findings of fact and conclusions of law. In other words, Citynet's attempt to cast the onus on Mr. Toney is without merit. Moreover, the amount due under the contract would be reflected in Citynet's own business records, to which Citynet has full access and control. Based upon the undisputed evidence, it was Citynet who provided Mr. Toney with the statement of his vested benefits, and both Citynet and Mr. Toney proffered the same figure to the Court ($87,000.48). It was not until after judgment was entered against Citynet that Citynet first raised the issue regarding the amount owed to Mr. Toney.

Under Rule 59(e), a party who relies on newly discovered evidence "must produce a legitimate justification for not presenting the evidence during the earlier proceeding." Small v. Hunt, 98 F.3d 789, 798 (4th Cir.1996). Citynet has failed to offer any legitimate justification for not presenting evidence during the earlier proceeding to contradict Mr. Toney's claim of the amount owed. To the contrary, Citynet admittedly agreed with the amount claimed by Mr. Toney and even proffered the same figure in its own pleadings and proposed final order.

Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. See Palmer v. Champion Mortgage, 465 F.3d 24, 29 (1st Cir.2006); Templet v. HydroChem Inc., 367 F.3d 473, 479 (5th Cir.2004); Pacific Ins. Co. v. Amer. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir.1998). See also 11 Wright et. al., Federal Practice and Procedure § 2810.1 (3d ed.2010). Citynet's arguments do not meet the criteria necessary to prevail on a Rule 59(e) motion. To the extent City asserts a clear error of law by the Court, the Court is of the opinion that its prior ruling is sound and well-reasoned and should not be disturbed or set aside.

Citynet has also filed a motion under Rule 60(b) of the *West Virginia Rules of Civil Procedure* which provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

It is well established that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available, but not offered at the original proceeding. See Jividen v. Jividen, 212 W.Va. 478, 575 S.E.2d 88 (2002). The rule is designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law. Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 60(b), p. 1189 (3d ed. 2008). Where the motion is nothing more than a request that the court change its mind, it is not authorized by Rule 60(b). Id. A trial court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it. Id. In other words, a Rule 60(b) motion is simply not an opportunity to reargue facts and theories upon which a court has already ruled. Kerner v. Affordable Living, Inc., 212 W.Va. 312, 315, 570 S.E.2d 571, 574 (2002); Powderidge Unit Owners Ass'n v. Highland Props., 196 W.Va. 692, 706, 474 S.E.2d 872, 886 (1996). Stated another way, the basis for setting aside a judgment under the rule must be something that could not have been used to obtain a reversal by means of a direct appeal. *Litigation Handbook*, § 60(b), p. 1189 (citing Bell v. Eastman Kodak Co., 214 F.3d 798 (7th Cir.2000)). Citynet has not asserted or met any of the criteria set forth in Rule 60(b). There is no "new evidence," but only existing evidence which Citynet chose not to present to the Court. Citynet's remaining arguments are simply efforts to reargue facts and theories upon which the court has already ruled.

Accordingly, for the reasons set forth hereinabove and those previously outlined by the Court in the Order Granting Plaintiff's Motion for Summary

Judgment and Order Denying Defendant's Motion to Dismiss and Order Denying Defendant's Cross-Motion for Summary Judgment, the Court is of the opinion to, and does hereby, **DENY** and **OVERRULE** the *Defendant's Motion for Reconsideration and Motion under Rules 59(e) and 60(b) of the West Virginia Rules of Civil Procedure.* It is so **ORDERED.**

The Court notes an objection and exception for any party aggrieved by this order, and **ORDERS** that the Clerk of this Court send a certified copy of this order to all counsel of record.

James C. Stucky

James C. Stucky, Judge

11-20-2012

DATE ENTERED

Prepared and presented by:

J. Michael Ranson, Esquire (WVSB #3017)
Cynthia M. Ranson, Esquire (WVSB #4983)
George B. Morrone III, Esquire (WVSB #4980)
RANSON LAW OFFICES, PLLC
1562 Kanawha Blvd., East
Post Office Box 3589
Charleston, West Virginia 25336-3589
(304) 345-1990
Counsel for Plaintiff

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS:
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21st DAY OF November 2012
CATHY S. GATSON CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

2013 DEC 30 PM 2:25
KANAWHA COUNTY CIRCUIT COURT

RAY TONEY,

Plaintiff,

v.

Civil Action No.: 12-C-527
(James C. Stucky)

CITYNET, LLC,

Defendant.

ORDER

This day came the plaintiff, Ray Toney, by his counsel, and informed this Court that he was voluntarily dismissing Count II of his complaint which should end all matters in controversy between the parties as the other matters have been ruled upon by the Court in which Summary Judgment and Damages have been awarded to the plaintiff.

Therefore the plaintiff moves this Court to dismiss Count II.

Additionally the plaintiff moves this Court to reconsider its past order denying the plaintiff's motion to have the defendant post a bond in regard to Judgment Order that was entered on Count's I and III.

The Court grants the plaintiff's motion to dismiss and denies the motion to reconsider.

It is accordingly, **ADJUDGED** and **ORDERED** that the Court accepts the plaintiff's voluntary dismissal and the same is hereby dismissed. Additionally the Court **DENIES** the plaintiff's motion to reconsider.

The Clerk is directed to mail a certified copy of this order to all counsel of record.

James C. Stucky
Honorable James C. Stucky

12-30-2013
DATE ENTERED

Presented by;

J. Michael Ranson State Bar # 3017
Cynthia M. Ranson State Bar # 4983
RANSON LAW OFFICES
1562 Kanawha Blvd., East
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(304) 345-1990
Counsel for plaintiff

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.
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GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 31st DAY OF December 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Reviewed by:

Bryan R. Cokeley, State Bar #774
Russell D. Jessee, State Bar #10020
STEPTOE & JOHNSON
Post Office Box 1588
Charleston WV 25326
(304) 353-8000
Counsel for defendant

IN THE CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

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RAY TONEY,

Plaintiff,

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Civil Action No.: 12-C-527
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ORDER

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It is accordingly, **ADJUDGED** and **ORDERED** that the Court accepts the plaintiff's voluntary dismissal and the same is hereby dismissed. Additionally the Court **DENIES** the plaintiff's motion to reconsider.

The Clerk is directed to mail a certified copy of this order to all counsel of record.

James C. Stucky
Honorable James C. Stucky

12-30-2013
DATE ENTERED

Presented by;

J. Michael Ranson State Bar # 3017
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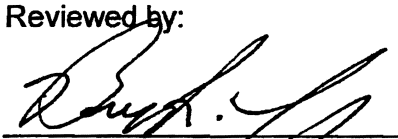
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Reviewed by:



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