

No. 32564 – *Realco Limited Liability Co., a successor and interest to Realmark Development, Inc., a West Virginia corporation v. Apex Restaurants, Inc., and Realco Limited Liability Co., a successor and interest to Realmark Development, Inc., a West Virginia corporation v. George Steven Shawkey*

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OF WEST VIRGINIA

Albright, Chief Justice, dissenting:

I must dissent from this Court’s refusal to set aside a default judgment where the facts readily reveal that the majority ignored time-honored legal principles which prefer a judgment on the merits to resolution of a dispute by default judgment. *See* Syl. Pt. 2, *Hamilton Watch Co. v. Atlas Container, Inc.*, 156 W.Va. 52, 190 S.E.2d 779 (1972); Syl. Pt. 2, *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8 (1972).

The lower court’s refusal to set aside the default judgment was a clear abuse of discretion. Syllabus point three of *Parsons v. Consolidated Gas Supply Corporation*, 163 W.Va. 464, 256 S.E.2d 758 (1979), our leading case on the consideration of default judgments, sets forth the test for sustaining or setting aside such judgments. Of particular relevance is the part of the *Parsons* test which requires a court to examine “the presence of material issues of fact and meritorious defenses” which would weigh against allowing the default judgment to stand. *Id.*

The record before us clearly demonstrates that Realco obtained judgment on a complaint filed against and served upon Apex Restaurants, Inc., a West Virginia corporation (hereinafter referred to as “Apex West Virginia”), to obtain delinquent lease payments arising under a written ten-year lease. The lease in question was attached to the motion for default judgment. Apex West Virginia argued below, as it did before this Court, that it was not a party to the lease and asserts that it was not incorporated until after the date the lease was signed. It is hard to imagine more material issues of fact and law than whether the claim stated against a defendant sought relief against the wrong party with respect to a transaction for which that party was not legally obligated. The lower court jumped over outstanding, material questions of fact – upon which the defendant was entitled to a jury trial – to draw conclusions of law unfavorable to the defendant not necessarily justified by the facts. It was not properly within this Court’s province or that of the trial court to decide the factual questions raised. Rather, it was this Court’s responsibility to recognize that material issues of facts presented potentially meritorious defenses warranting that the default judgment be set aside.

This Court has long held that “courts should not set aside default judgments . . . without good cause.” Syl. Pt. 2, in part, *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8 (1972). However, it *should* go without saying that whether a default judgment was

entered against the wrong party with respect to a transaction for which that party may not have been obligated constitutes good cause to set aside the judgment.

Accordingly, I dissent from the conclusion reached by the majority.