

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

KRP MARCELLUS I, LLC,
RIVERCREST ROYALTIES II, LLC,
DIVERSIFIED ROX MINERALS, LLC,
BRD ROYALTY HOLDINGS, LLC and
AMON G. CARTER FOUNDATION,
collectively known as KIMBELL GROUP,

Plaintiffs,

vs.

CIVIL ACTION NO.: 18-C-215

Presiding: Judge Michael D. Lorensen

Resolution: Judge Christopher C. Wilkes

CHEVRON U.S.A. INC.,
a Pennsylvania corporation,
TH EXPLORATION, LLC,
a Texas limited liability company, and
DOE CORPORATION 1-20,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT

This matter came before the Court this 9th day of July, 2019, pursuant to Plaintiffs' Motion for Default Judgment¹. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

Procedural Background and Findings of Fact

1. This matter surrounds the causes of action alleged in the Amended Complaint filed March 4, 2019, alleging causes of action for breach of contract, tort, and declaratory

¹ The Court notes Plaintiffs also contemporaneously filed a pleading entitled "Petition to Marshall County Circuit Clerk to Enter Default".

judgment related to certain oil and gas conveyances covering approximately 53,000 acres in Marshall County, West Virginia. *See* Compl.

2. On March 21, 2019, Defendant Chevron U.S.A. Inc. filed its Motion to Dismiss Plaintiffs' Amended Complaint. On March 26, 2019, Defendant TH Exploration, LLC (hereinafter "Defendant" or "TH Exploration") filed its Motion to Dismiss Amended Complaint. The Court issued briefing orders setting forth response and reply times regarding each of these motions to dismiss.
3. On May 16, 2019, the Court entered its Order Denying Chevron U.S.A. Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint. Also on May 16, 2019, the Court entered its Order Denying Defendant TH Exploration, LLC's Motion to Dismiss Plaintiff's Amended Complaint. The Court's Orders contained the following direction: "The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office...". *See* Ord., 5/16/19, p. 10.
4. On June 4, 2019, the Circuit Clerk of Marshall County, West Virginia re-docketed both the Order Denying Chevron U.S.A. Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint filed May 16, 2019 and the Order Denying Defendant TH Exploration, LLC's Motion to Dismiss Plaintiff's Amended Complaint filed May 16, 2019. The Clerk's docket entry stated that it was "put on as docket work" and that the Clerk "issued all copies out today [June 4, 2019]". *See* Dkt. Sheet. This docket entry was initialed by a deputy clerk. Additionally, the Circuit Clerk's Office called the office of the undersigned on or about June 5, 2019 and explained that the orders were mis-docketed, and entered in

the court file but not mailed to counsels on May 16, 2019. Furthermore, it was explained that the orders were mailed out on June 5, 2019.

5. On June 6, 2019, Plaintiffs KRP Marcellus I, LLC, Rivercrest Royalties Holdings II, LLC, Diversified Rox Minerals, LLC, BRD Royalty Holdings, LLC, Amon G. Carter Foundation, and the Kimbell Art Foundation (hereinafter "Plaintiffs") filed the instant Motion for Default Judgment, seeking the Court to issue default judgment against the Defendants, arguing this relief is appropriate because Defendants did not file an Answer to Plaintiff's Complaint within ten days after the court's denial of Defendants' motions to dismiss, in contravention of Rule 12. *See* Pl's Mot., p. 2.
6. On June 10, 2019, Defendant TH Exploration, LLC filed its Response in Opposition to Plaintiffs' Motion for Default Judgment, arguing it is not in contravention of Rule 12 as it did not receive notice of the denial of the motions to dismiss because the Circuit Clerk did not transmit an Order to it. *See* Def's Resp., p. 1-2.
7. Also on June 10, 2019, Defendant Chevron U.S.A. Inc. filed its Response in Opposition to Plaintiffs' Motion for Default Judgment and Petition to Marshall County Clerk to Enter Default, likewise arguing they were not in violation of any deadline to answer the Amended Complaint in this civil action because they were not served with, and were unaware of, the Court's order denying Defendants' respective motions to dismiss. *See* Def's Resp., p. 2.
8. On June 12, 2019, Plaintiffs filed their Reply to Defendants' Response to Plaintiff's Motion for Default, countering the argument that did not receive notice of the orders by

stating that the orders were posted to Circuit Express², and counsels should have monitored that medium for the entry of any orders.

9. The Court finds the issue is now ripe for adjudication.

Conclusions of Law

This matter is before the Court on Plaintiffs' Motion for Default Judgment. Motions for default judgment are governed by Rule 55 of the West Virginia Rules of Civil Procedure. Rule 55(a) provides that:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

W. Va. R. Civ. P. 55(a).

Further, the West Virginia Supreme Court of Appeals has held that courts look with disfavor on judgments obtained by default, since the law strongly favors an opportunity to a defendant to make defense to an action against him. *Intercity Realty Co. v. Gibson*, 154 W. Va. 369 (1970). Similarly, the Supreme Court of Appeals has directed "it is the policy of the law to favor the trial of all cases on their merits". *McDaniel v. Romano*, 155 W. Va. 875 (1972).

The Supreme Court has held that it is error to grant default judgment where the delay in answering is short and there existed no prejudice of plaintiff's rights in any way. *Hively v. Martin*, 185 W. Va. 225 (1991).

Moreover, Rule 77 of the West Virginia Rules of Civil Procedure governs courts and clerks. Rule 77(d) provides, in pertinent part: "Immediately upon the entry of an order...the

² The Court notes Circuit Express is a subscription service that provides online access to thirty-five circuit courts in the state of West Virginia. It provides a variety of subscriber's online access to West Virginia court records. See Pl's Reply, p. 4; citing <https://www.wvcircuitexpress.com/Circuit-Express-Information.html>.

clerk...shall serve by mail a notice of the entry in the manner provided for in Rule 5 upon every party affected thereby". *See* W. Va. R. Civ. P. 77(d).

Additionally, Rule 12 of the West Virginia Rules of Civil Procedure governs defenses and objections. Rule 12 provides, in pertinent part: "[i]f the court denies the motion...the responsive pleading shall be served within 10 days after notice of the court's action". *See* W. Va. R. Civ. P. 12(a)(3)(A).

In the present case, the Court considers the fact that no actual notice was given of the orders denying the defendants' respective motions to dismiss, due to an undisputed clerical error on the part of the Marshall County Circuit Clerk's Office. The Court notes it has been averred that the problem related to the mis-docketing on the part of the Circuit Clerk has now been discovered and corrected for the future. The Court finds it incredulous that Plaintiffs did not withdraw their motion given this reason for Defendants' lack of answer.

Further, the Court finds there is no great degree of prejudice suffered by the plaintiffs from any slight delay in answering. Defendant TH Exploration avers it inadvertently learned of the entry of the Order on June 4, 2019, less than three weeks after the order was entered on May 16, 2019. *See* TH's Resp., p. 1-2. Specifically, TH Exploration avers it learned of the email when it "received an email from counsel for [Plaintiffs], referencing various orders entered in this case". *Id.* at 2. Defendant TH Exploration provided a verified affidavit affirming that prior to this, it had been unaware that the orders regarding the motions to dismiss had been entered. *Id.* at 2-3. Likewise, Defendant Chevron averred it was not served with, and was unaware of, the orders denying the motions to dismiss. *See* Chevron's Resp., p. 2.

The Court's own research shows that cases in which the entry of default judgment are upheld are generally cases in which the party had notice. *See Amoruso v. Commerce & Indus.*

Ins. Co., 241 W. Va. 517, 826 S.E.2d 642, 643 (2019)(Plaintiff received proper notice of the hearing conducted by the circuit court on the motion, but he did not appear to contest); *Chamblee v. State*, No. 18-0310, 2019 WL 2246091, at *1 (W. Va. May 24, 2019)(Petitioner was served with the via certified mail, signed for the petition, and filed no answer or claim); *Arbuckle v. Smith*, No. 17-0239, 2018 WL 1444288, at *4 (W. Va. Mar. 23, 2018)(finding counsel never asserted that he did not have notice of the hearings at which he failed to appear and affirming the circuit court's order denying motion to set aside default judgment); *Realco Liab. Co. v. Apex Restaurants, Inc.*, 218 W. Va. 247, 250, 624 S.E.2d 594, 597 (2005)(upholding the entry of default judgment entered eleven months after the filing of the Complaint when "there is nothing in the record to suggest that [the party] did not have actual notice of the filing of the original suit); and *Lee v. Gentlemen's Club, Inc.*, 208 W. Va. 564, 568, 542 S.E.2d 78, 82 (2000)(finding intransigence warranted dismissal of motion to vacate default judgment where the secretary of state accepted service on behalf of the corporate defendant and it received and responded to regularly mailed notice of default judgment).

Defendants have indicated that they are prepared to file a timely answer in this case. The Court also considers counsel for Defendants' quick actions upon learning of the entered orders. TH Exploration provided a verified affidavit which averred that it learned of the entry of the orders after the close of business on June 4, 2019, and called the Circuit Clerk's Office the very next morning to figure out why it did not receive a copy of the Order. *See* TH's Resp., p. 3. The Court also notes Plaintiffs' assertion that this contact was some sort of inappropriate *ex parte* communication between counsel for Defendant and the Circuit Clerk's Office, and finds such an argument unpersuasive. The Circuit Clerk's Office is not a tribunal. Attorneys are in contact with Circuit Clerks' Offices in person and otherwise routinely for filing and other matters related

to the keeping of the records of a court action. The Court does not find any assertion that counsel for Defendants acted improperly by contacting the Circuit Clerk to determine the problem regarding the recording and transmittal of orders persuasive at all. Instead, the Court finds counsel acted quickly and responsibly.

Because of the only slight delay in time for answering, the fact that the clerical error on the part of the Circuit Clerk was of no fault to any party, the fact that Defendants verified they had no actual notice, and counsel's quick action once the error was discovered, the Court does not find any significant degree of prejudice was suffered by the Plaintiffs from the delay in the filing of an Answer. The positions of both sides regarding the oil and gas overriding royalty interests can still be fully argued regardless of the slight delay in obtaining a copy of the orders denying the motions to dismiss and filing an Answer, and as such, no significant degree of prejudice is present in this case.

The Court also notes Defendants' participation in this case. Although no Answer was filed, as Defendants were waiting on an Order regarding the pending motions to dismiss, Defendants had counsel of record listed in this case, had briefed the motions to dismiss, appeared in this court's scheduling conference, and were apparently otherwise in communication with all counsels. The Court certainly finds no dilatoriness or intransigence on the part of Defendants in this civil action with regard to appearing and participating fully in this litigation.

Further, the Court considers the relevant rules of civil procedure. As set forth above, Rule 77 dictates that the Circuit Clerk was to have transmitted a copy of the orders denying the motions to dismiss. It is undisputed that the Circuit Clerk did not do this, due to a clerical error in how it processed business court orders. Because of this, counsels were not provided notice of the orders denying the motions to dismiss as required by Rule 12's deadline for answering.

Plaintiffs have proffered no evidence that Defendants failed to answer within the time period prescribed by rule after receiving notice of the orders; instead, it avers that somehow Defendants should have monitored Circuit Express for the entry of any orders. This is not official notice from the Circuit Clerk. The Court finds this position untenable. In fact, the website for Circuit Express, which Plaintiffs cited to in their reply, specifically contains the following disclaimer: “These materials have been prepared by the Office of the Clerk for the various Circuit Courts from original sources and data believed to be reliable. The information contained herein, however, has not been independently verified by the Office of the Clerk or Software Computer Group, Incorporated. The Office of the Clerk of the Circuit Courts and Software Computer Group, Inc. assume no liability for the accuracy, completeness, or timeliness of the information contained herein”. See <https://www.wvcircuitexpress.com/UserInterface/Main.aspx>. In short, the Court does not find the fact that the orders were posted to the third-party website Circuit Express constitutes valid official notice to all counsel, fulfilling the Circuit Clerk’s duty under our Rules.

Finally, the Court considers the West Virginia Rules of Professional Conduct Standards. Standard (b)(9) of the West Virginia Lawyers’ Duties to Other Counsel and the Courts states: “A lawyer should not cause any default or dismissal to be entered without first notifying opposing counsel, when the identity of such counsel is known”. W. Va. R. Prof. Cond. Stds., Standard I.

The Court finds and considers the expectation that counsel in this case was to have called opposing counsel before filing the instant motion for default judgment, as there was obviously some miscommunication. The Court notes the Circuit Clerk avers the Orders regarding the motions to dismiss were not transmitted to *any* counsel in this civil action, so counsel for

Plaintiffs knew, or reasonably should have known, by virtue of its own non-receipt of the orders by mail, that a miscommunication or mistake within the Circuit Clerk's Office had occurred.

Finally, the Court considers Rule 3.4 of the West Virginia Rules of Professional Conduct, which governs fairness to opposing party and counsel. Rule 3.4(c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." *See* W. Va. R. Prof. Conduct 3.4(c). In *Lawyer Disciplinary Bd. V. Scott*, the West Virginia Supreme Court of Appeals held that an attorney violated Rule 3.4(c) requiring a lawyer not to knowingly disobey an obligation under the rules of a tribunal when he obtained a default judgment by misrepresenting to a magistrate that service of process on an opposing party had been made. 213 W. Va. 209, 579 S.E.2d 550 (2003). In this case, counsel for Plaintiffs did not state in its motion that transmittal of the orders regarding the motions to dismiss had been made; however, it certainly omitted the information regarding the Circuit Clerks' failure to transmit the orders to all counsel, thus informing them of the denial of the then-pending motions to dismiss and triggering their answering time.

In the light of all the foregoing, the undersigned finds the instant Motion for Default Judgment must be denied.

Accordingly, the Court DENIES Plaintiff's Motion for Default Judgment. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 9th day of July 2019.

From:

07/09/2019 14:37

#055 P.011/011



Michael D. Lorensen
Business Court Division

A Copy Teste:

Joseph M. Rucki, Clerk

By Donna Gerner Deputy