No. 30358 - *Matthew Aaron Kerner v. Affordable Living, Inc., formerly known as Buckhannon Home Show, Inc., now known as The Home Show-Buckhannon*

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OF WEST VIRGINIA

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OF WEST VIRGINIA

Albright, Justice, dissenting:

I have no choice but to dissent from a majority opinion which allows the constitutionally protected right to due process to be flagrantly disregarded.

In reliance on our previous decisions regarding review of lower court rulings on Rule 60(b) motions, the majority concluded that the lower court in the present case did not abuse its discretion because the issues raised by the appellant, The Home Show-Buckhannon, Inc. (hereinafter "HS-B"), had been "thoroughly considered" by the court below and HS-B's appeal was merely an attempt to relitigate the legal issues heard at the underlying proceeding. However, HS-B was not requesting that any issue be litigated *again*. Rather, HS-B was asking to have its concerns heard meaningfully for the first time by the lower court, which a careful and objective examination of the record reveals did not occur in this case.

In its Rule 60(b) motion, HS-B claimed that it is and has been a different and separate legal entity from the judgment debtors and defendants in the underlying case, Buckhannon Home Show, Inc. (hereinafter "BHS") and Affordable Living, Inc. As such, HS-B

argues that it could not be named as a judgment debtor in the Kerner wage claim suit because HS-B was not named as a party, was not served with a summons and complaint, did not have the opportunity to defend and offer evidence, did not participate in the stipulation of Affordable Living – in sum, it was not given the opportunity to be fairly heard as to the merits of its arguments *before* judgment was entered in the case. The majority's finding that the record showed that HS-B fully participated in the September 5, 2000, hearing and did not object when asked by the court if it had a problem with the notice of the September 5 hearing completely misses HS-B's due process argument. It is not the notice of or participation in the post judgment hearing that is at issue.

HS-B argues further that even if it had been named a party to the Kerner suit, HS-B could prove that it was not a successor corporation to BHS and had no liability for the debts of BHS when HS-B purchased the assets from and assumed the floor plan financing for BHS (subsequently renamed Affordable Living, Inc.). The record shows that this issue was not addressed at the September 5, 2000, hearing, nor could it have been addressed at that time because the issue was not even brought before the lower court until HS-B filed its Rule 60(b) motion on May 10, 2001.[1]

[1]The record contains a "Motion to Reconsider" raising similar issues filed on December 15, 2000, by HS-B; however, the record does not show that this motion was taken up at any hearing nor does the record indicate that the court otherwise considered or ruled on the motion. Nevertheless, evidence was not taken by the lower court on either motion to reform the judgment.

HS-B's Rule 60(b) motion which is the basis for this appeal was first considered by the court below on May 11, 2001, during a hearing which had been called, according to the transcript and the subsequent order entered, for the particular purpose of determining whether execution should issue on the surety bond posted by HS-B when it appealed the September 19, 2000, amended judgment order. The transcript of the May 11 hearing further shows that despite HS-B's attempts to have the court below consider the substance of its Rule 60(b) motion and set a hearing to take evidence on the issues raised therein, the lower court refused to do so, and stated instead that:

> [T]his case has been litigated enough, and it's finalized, as far as I'm concerned. The Supreme Court denied the appeal. . . . [t]here's no sense setting a date to hear your motion, [be]cause I'm going to deny it, and I'm going to deny it at this time, your 60B motion. We've been through this on several occasions. We've litigated it, we've had hearings, we've done everything, and it seems like every time we move, there's some kind of a jump around among these corporations to show that something else belongs here and something else belongs there, it's done. The execution is issued.

This statement demonstrates that the lower court questioned the legitimacy of HS-B's assertion that it was not liable as a successor corporation for the debts of BHS. Faced with such a situation, the lower court should have followed the direction provided in the syllabus of *Meadows v. Daniels*, 169 W.Va. 237, 286 S.E.2d 423 (1982):

> Where a Rule 60(b) motion is made to set aside a judgment and there is a conflict as to the facts on whether there is a ground to set aside the judgment, the trial court should hold a hearing to resolve the disputed facts and make some findings relative thereto.

Id. HS-B's Rule 60(b) motion was based on the assertion that it being named a judgment debtor was due to a mistake and/or misrepresentation regarding the circumstances by which it became a successor corporation. HS-B offered to present evidence in support of the assertion. Since factual issues were in dispute regarding the liability of HS-B and no documentary or testimonial evidence had been taken on this issue by the lower court, a hearing concerning the relevant factors which would prove or disprove HS-B's liability[2] certainly was warranted.

Consequently, HS-B was forced to assume liability for satisfaction of a judgment entered in a case to which it was never made a party. In other words, HS-B was "deprived of . . . property [] without due process of law . . . ." W.Va. Const. art. III, § 10. Sadly, appeal to this Court of the denial of the 60(b) motion did not correct the injustice but instead contributed to it.

This Court was not being asked in this appeal, as the majority appears to believe, to set aside or ignore our holding in *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974) and to examine substantive issues related to the underlying judgment. HS-B was simply asking

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[2]*See* Syl. Pt. 3, *Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E.2d 557 (1992) (delineation of instances when a successor corporation is liable for the debts and obligations of a predecessor corporation); *Jordan v. Ravenswood Aluminum Corp.*, 193 W.Va. 192, 455 S.E.2d 561 (1995) (examination of whether successor corporation simply a reincarnation of its predecessor).

to be given its day in court for a full and fair hearing on the issue of whether it could be held liable as a successor corporation for the judgment in the Kerner case. More instructive to this appeal is the premise set forth in syllabus point six of *Toler*, which states that

> [a] court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W.Va.R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits.

Id. at 778, 204 S.E.2d at 86.

I do not condone the forming of new corporations for the sole purpose of avoiding payment of debts; however, justice can not be accomplished when bald assertions rather than credible evidence form the basis for determining liability for debts. In the case before us, it appears likely that the "new" corporation paid the "old" corporation substantial consideration for its assets, including substantial cash and the assumption of obligations for payment of a portion of the stock-in-trade of the "old" corporation, that is to say, the assumption of obligations for "floor-plan" inventory. If this be shown in fact, I do not believe there would be any grounds to saddle the "new" corporation with other debts of the "old" corporation. Fair is fair to all; appellants have *not* been fairly heard, I believe.

I am authorized to state that Justice Starcher joins in this dissent.