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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JUN 12 2020

KEITH ALLEN MONGOLD,

*Defendant Below/Petitioner,*

v.

CASE NO. 19-1106

KEVIN W. MONGOLD and  
MISTY LYNN MONGOLD,

*Plaintiffs Below/Respondents.*

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RESPONDENTS' BRIEF

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Appeal Arising from Order Entered on  
November 6, 2019, in Civil Action No. 18-C-16 in  
The Circuit Court of Grant County, West Virginia

Duke A. McDaniel (WVSB#2433)  
P. O. Box 417  
Petersburg, WV 26847  
Phone: 304-257-4377  
*Counsel for Respondents*

**TABLE OF CONTENTS**

ASSIGNMENTS OF ERROR..... 1

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....5

ARGUMENT.....5

    I.    THE CIRCUIT COURT PROPERLY GRANTED THE DEFAULT  
          JUDGMENT AGAINST PETITIONER. GRANTING THE JUDGMENT  
          WAS WITHIN THE DISCRETION OF THE JUDGE OF THE CIRCUIT  
          COURT.....5

        A.    The failure to serve the Motion for Default Judgment in the  
              case at bar was not prejudicial to the Petitioner.....5

CONCLUSION.....6

## TABLE OF AUTHORITIES

### Cases

Intercity Realty Company v. Agnes Gibson,  
175 S.E. 2d 452 (1970)

## **ASSIGNMENTS OF ERROR**

THE RESPONDENTS DO NOT ALLEGE ANY ASSIGNMENTS OF ERROR.

## **STATEMENT OF THE CASE**

Your Respondents Kevin W. Mongold, the father of Keith Allen Mongold, and Misty Lynn Mongold, stepmother of the Petitioner, did institute civil action for specific performance of a Contract of Sale enter into by Keith Allen Mongold and Kevin W. Mongold and Misty Lynn Mongold on September 6, 2018. The complaint alleges that Kevin W. Mongold and Misty Lynn Mongold had expended monies upon behalf of Keith Allen Mongold to satisfy judgments, bonds, and payment to Summit Community Bank for monies that were wrongfully received by Keith Allen Mongold.

When the suit was filed, there was an Affidavit for Order of Publication filed by the Respondents in that they were not aware of the mailing address or physical location of Keith Allen Mongold.

The matters between Keith Allen Mongold and his father, Kevin W. Mongold, and stepmother, Misty Lynn Mongold, occurred as a result of various liens and abstracts and executions of judgments which had been levied against Keith Allen Mongold by the State of West Virginia for various criminal actions which had been brought by the State of West Virginia against Keith Allen Mongold, which resulted in numerous fines and costs assessed against Keith Allen Mongold and reduced to judgments.

There were four judgments filed against Keith Allen Mongold in the year 2007 and two judgments filed during the year 2009. During the years of 2011, 2013, 2014, and 2015 there were executions filed against Keith Allen Mongold. Per agreement between Keith Allen Mongold and

his father, Kevin W. Mongold, the Petitioner agreed to sell the real estate in question to his father for the sum of Twenty-Five Thousand (\$25,000.00) Dollars, and as a part of the consideration, Kevin W. Mongold agreed to pay off and secure releases of the judgments against his son. Kevin W. Mongold also agreed to pay unto Summit Community Bank the sum of Two Thousand Nine Hundred Seventy-Five (\$2,975.00) Dollars for funds wrongfully received by Keith Allen Mongold regarding the endorsement and cashing of a check, and the Four Thousand Eight Hundred (\$4,800.00) Dollars owed by the Petitioner to Donald Mongold, Jr.

On or about January 5, 2016, Keith Allen Mongold entered into a Contract of Sale to sell the real estate in question to his father, Kevin W. Mongold, and his stepmother, Misty Lynn Mongold, for the original agreed price of Twenty-Five Thousand (\$25,000.00) Dollars. Under the terms of the Contract of Sale, Kevin W. Mongold and Misty Lynn Mongold paid unto Keith Allen Mongold the sum of One Thousand (\$1,000.00) Dollars, paid unto the Summit Community Bank the sum of Two Thousand Nine Hundred Seventy-Five (\$2,975.00) Dollars, paid unto Keith Allen Mongold's uncle, Donald Mongold, Jr., the sum of Four Thousand Eight Hundred (\$4,800.00) Dollars, and paid all judgments and court costs that were owed by the Petitioner Keith Allen Mongold, which originally occurred in the years 2007 and 2009.

The Petitioner, on October 9, 2018, *pro se* sought to obtain an extension on his deadline to answer the Respondents' Complaint [16].

On December 17, 2018, the Petitioner *pro se* sent a letter to the Court with the subject line, "Answer to the Complaint Filed on 09.06.2018." [19] Your Respondents would represent to this Court that they did not receive copies of any of the correspondences that the Petitioner filed with the Court. The Court extended the Petitioner's time to answer to November 21, 2018. The

Petitioner's December 17, 2018 letter was docketed as "Answer to Complaint filed by Keith Mongold." [1, at Lines 10-11]

The Court's docket indicates that on January 8, 2019, the Court advised Petitioner that 'he could set the case for hearing if he so desires but he would be responsible for doing the notice of hearing and certificate of service.' [1, at Lines 12-16]

On July 9, 2019, The Court entered an Order granting the Respondents' Motion for Default Judgment. The Petitioner, on October 9, 2019, sent a letter to the Court with the subject line, "Motion to modify Order filed July 09, 2019." [29-30] Again, your Respondents did not receive a copy of the letter.

On November 6, 2019, the Court entered an Order Denying Motion to Modify, and entered a final Order on November 6, 2019 as a "final order." Your Respondents would say that they did not receive a copy of the Order dated November 6, 2019.

Your Respondents would say that after filing the Complaint in this matter until they filed their Motion for Default Judgment they had absolutely no idea of the Petitioner's whereabouts as the Petitioner had been concealing himself from his father and stepmother since the date of signing the Contract of Sale and the Respondents were not privy to any of the correspondence between the Petitioner, Judge, or Clerk of the Circuit Court.

## **SUMMARY OF ARGUMENT**

Your Respondents would set forth that the Order denying the Petitioner's Motion to Modify the Court Order summarizes your Respondents' Argument.

The record reflects that the Respondents filed suit on September 6, 2018, and not knowing the Petitioner's whereabouts, obtained service of process by Order of Publication.

The Petitioner had notice of the suit as by his correspondence dated October 9, 2018, your Petitioner requested thirty (30) or sixty (60) days in which to answer the Complaint. No Answer was filed.

The Court granted the Petitioner's extension to file his answer until November 23, 2018. The Petitioner indicated in his correspondence to the Court that he knew of the extension on November 27, 2018. Despite having notice since early October, the Petitioner did not file an Answer even though the Court had extended the Petitioner's time.

The Petitioner, on December 17, 2018, sent the Court a letter defining the issues in the case with some brief language towards the end, "This case has no merit. My property was never offered for sale."

The Court, in its Order, did rule that the letter of the Petitioner was late and was insufficient to answer the Complaint. The Court noted that approximately 2-1/2 months had passed since the Petitioner had received notice of the suit.

On June 13, 2019, approximately six months later, the Respondents filed their Motion for Default Judgment, and the Court granted the Respondents' Motion and entered a Default Judgment Order.

The Respondents do admit that they did not afford the Petitioner three days' notice before the hearing as your Respondents from the onset did not know the Petitioner's whereabouts as he for years had purposefully concealed his address and whereabouts from his father.

Your Respondents would say that in their opinion, the Court went overboard to protect the rights of the Petitioner, who from his prior dealings was no stranger to court proceedings.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Your Respondents have no objection to oral argument if the Court deems it appropriate.

### **ARGUMENT**

The Court, in discussing judgments by default, has set forth the following in 175 S.E. 2d 452, *Intercity Realty Company, a West Virginia Corporation v. Agnes Gibson, a/k/a Mrs. William Gibson and Mrs. W. Gibson*:

“Before motion to set aside default judgment will be granted, movant must show good cause for his failure to act in timely manner. Rules of Civil Procedure, rules 55, 60(b).”

“Findings of fact made by trial court may not be set aside on appeal unless such findings are clearly wrong.”

“Evidence did not plainly preponderate against trial court’s finding that defendant against whom default judgment had been entered did not establish excusable neglect for failing to timely file answer. Rules of Civil Procedure, rules 55, 60(b).”

“Exercise of judicial discretion will not be disturbed so as to reverse judgment unless such discretion appears to have been abused.”

“Motion to vacate judgment is addressed to sound discretion of court and abuse of such discretion must be shown before denial of motion will be overturned on appeal. Rules of Civil Procedure, rule 60(b).”

The Court looks with disfavor on Respondent’s judgments, however, our Court has clearly ruled that if the lower court uses its discretion in awarding a Default Judgment, this Court should not overturn the judgment granted in default unless there is a clear showing of abuse by the lower court.



The Petitioner in this case was given every opportunity to secure counsel and to file an appropriate Answer and he has now come to this court claiming foul due to his failure to act appropriately when the lower court gave the Petitioner every opportunity to file an appropriate Answer.

### **CONCLUSION**

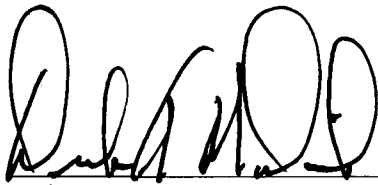
For the foregoing reasons, the Petitioner's relief should be denied.

**WHEREFORE**, Respondents respectfully request that this Honorable Court deny the relief requested by the Petitioner.

DATED the 9<sup>th</sup> day of June, 2020.

**KEVIN W. MONGOLD AND MISTY  
LYNN MONGOLD  
RESPONDENTS**

**By Counsel.**



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Duke A. McDaniel (WVSB#2433)  
P. O. Box 417  
Petersburg, WV 26847  
Phone: 304-257-4377  
E-mail: [dukeesq@frontiernet.net](mailto:dukeesq@frontiernet.net)  
*Counsel for Respondents*

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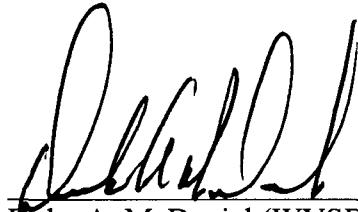
KEVIN W. MONGOLD and  
MISTY LYNN MONGOLD,

Plaintiffs Below/Respondents.

**CERTIFICATE OF SERVICE**

I certify that I served a true and accurate copy of this Respondents' Brief upon the counsel listed below by United States Mail, First Class, postage prepaid, on the 9<sup>th</sup> day of June, 2020.

Michael C. Cardi, Esquire  
Bowles Rice LLP  
125 Granville Square, Suite 400  
Morgantown, WV 26501  
*Counsel for Petitioner*



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Duke A. McDaniel (WVSB#2433)  
P. O. Box 417  
Petersburg, WV 26847  
*Counsel for Respondents*