IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KEITH ALLEN MONGOLD,

Defendant Below/Petitioner,

v.

KEVIN W. MONGOLD and
MISTY LYNN MONGOLD,

Plaintiffs Below/Respondents.

CASE NO. 19-1106

PETITIONER'S BRIEF

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

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ASSIGNMENTS OF ERROR

THE CIRCUIT COURT ERRED BY GRANTING DEFAULT JUDGMENT AGAINST PETITIONER WITHOUT NOTICE OR HEARING AND DENYING PETITIONER'S MOTION TO AMEND JUDGMENT WHERE THE *PRO SE* PETITIONER FILED AN ANSWER TO RESPONDENTS' COMPLAINT, PETITIONER ENDEAVORED TO PROVIDE A DEFENSE, AND THE PREJUDICE TO PETITIONER WAS APPARENT.

STATEMENT OF THE CASE

Respondents Kevin W. Mongold and Misty Lynn Mongold are Petitioner Keith Allen Mongold's father and step-mother, respectively. On March 3, 2003, Donald K. Mongold and Ollie M. Mongold conveyed 21 acres (the "property") to Keith Allen Mongold, as evidenced by deed of record in Deed Book 219, page 646, in the office of the Clerk of the County Commission of Grant County, West Virginia [9-11]. On September 6, 2018, Respondents filed a civil complaint against the Petitioner, alleging that Petitioner entered into a Contract of Sale regarding the property and that Petitioner refused to convey the property to Respondents [3-8]. Respondents sought the appointment of a special commissioner to execute and deliver a general warranty deed for the property owned by Petitioner.

Respondents sought and obtained an order of publication to effectuate service on Petitioner [14-15]. It appears that Respondents did not attempt service by any other means.

On October 9, 2018, Petitioner, *pro se*, sought and obtained an extension on his deadline to answer Respondents' Complaint [16]. Despite diligent efforts, Petitioner was unable to obtain an attorney to represent or counsel him until December 5, 2019.

On December 17, 2018, Petitioner sent a letter to the Court with the subject line, "Answer to the Complaint Filed on 09.06.2018." [19] Said letter, which listed Petitioner's address as PO Box 004, Stevenson, CT 06491, explained that Petitioner did not receive the Court's Order granting an extension of his answer deadline and did not learn of the Order until November 21, 2018, two

days before the extended answer deadline. *Id.* Petitioner requested "a court appearance to provide the evidence needed for [his] defense." *Id.* Petitioner also stated: "This case has no merit. My property was never offered for sale." *Id.* 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 June 13, 2019, Respondents filed a Motion for Default Judgment [20-22]. Said Motion did not include a certificate of service, and it was not served upon the Petitioner even though Respondents had his address.

It does not appear that the Court held a hearing on Respondents' Motion for Default Judgment. Nonetheless, on July 9, 2019, the Court entered an Order granting Respondents' Motion for Default Judgment, finding that "no pleading had been filed by the [Petitioner] [24-27]."

On October 9, 2019, Petitioner sent a letter to the Court with the subject line, "Motion to modify Order filed July 09, 2019." [29-30] Said letter listed Petitioner's address as "124 Bridgeport Avenue, APT 1, Shelton CT 06484." *Id.* Said letter explained that Petitioner never received notice of a hearing on Respondents' Motion for Default Judgment and Petitioner did not receive notice of the Order until October 7, 2019. *Id.* Petitioner also asserted therein that the Contract of Sale was forged, and his signature could not have been notarized in West Virginia as he was in Florida at the time. *Id.*

On November 6, 2019, the Court entered an Order Denying Motion to Modify, finding that Petitioner failed to file an answer to Respondents' Complaint and failed to take action to defend the action [33-35]. The Court described its November 6, 2019 Order as a "final order." *Id.*

Petitioner now appeals these Orders granting and affirming default judgment against the Petitioner.

SUMMARY OF ARGUMENT

On July 9, 2019, the Circuit Court granted Respondents' Motion for Default Judgment against Petitioner and ordered the sale of property deeded to Petitioner by his grandfather. On November 6, 2019, the Circuit Court denied Petitioner's Motion to Modify the July 9, 2019 Order. The Circuit Court denied Petitioner's Motion to Modify and ordered the sale of Petitioner's property despite the fact that (1) Petitioner lived in Connecticut and had no counsel; (2) Petitioner filed an Answer to Respondents' Complaint; (3) Petitioner notified the Circuit Court of his defense – that his signature was forged on the purported Contract of Sale; (4) Petitioner requested a hearing to present his defense; (5) Petitioner was not served with Respondents' Motion for Default Judgment; (6) Petitioner notified the Court that he did not received certain filings because he had moved; and (7) Petitioner provided the Circuit Court with his updated address.

The Supreme Court of Appeals of West Virginia has held that trial courts must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with legal procedures. The Circuit Court failed to give any weight to Petitioner's *pro se* status; granted default judgment against Petitioner despite Respondents' failure to comply with West Virginia Rule of Civil Procedure 55(b)(2); and abused its discretion by denying Petitioner's Motion to Amend.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: 1) all parties have not waived oral argument; 2) this appeal is not frivolous; and 3) the dispositive issues have not been authoritatively decided. W. Va. R. App. P. 18(a).

Oral argument is appropriate under Rule 19(a) of the West Virginia Rules of Appellate Procedure because this case: 1) involves assignments of error in the application of settled law; 2) involves an unsustainable exercise of discretion where the law governing that discretion is settled; and 3) involves narrow issues of law. W. Va. R. App. P. 19(a).

A memorandum decision is appropriate in this fact-specific case.

ARGUMENT

This Court stated as follows in *Cottrill v. Cottrill*:

> [W]e have recognized that a *pro se* litigant's other rights under the law should not be abridged simply because he or she is unfamiliar with legal procedures. To that end, we have advised that the trial court must 'strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

219 W. Va. 51, 54, 631 S.E.2d 609, 612 (2006).

When Petitioner's actions in the underlying Civil Action are viewed through this lens, the Circuit Court abused its discretion by granting default judgment against Petitioner and denying Petitioner's Motion to Amend.

I. THE CIRCUIT COURT ERRED BY GRANTING DEFAULT JUDGMENT AGAINST PETITIONER WITHOUT NOTICE OR HEARING AND DENYING PETITIONER'S MOTION TO AMEND JUDGMENT WHERE THE *PRO SE* PETITIONER FILED AN ANSWER TO RESPONDENTS' COMPLAINT, PETITIONER ENDEAVORED TO PROVIDE A DEFENSE, AND THE PREJUDICE TO PETITIONER WAS APPARENT.

The Circuit Court erred in granting default judgment against Petitioner and denying Petitioner's Motion to Amend because (1) Petitioner lived in Connecticut and had no counsel; (2) Petitioner filed an Answer to Respondents' Complaint; (3) Petitioner notified the Circuit Court of his defense – that his signature was forged on the purported Contract of Sale; (4) Petitioner requested a hearing to present his defense; (5) Petitioner was not served with Respondents' Motion for Default Judgment; (6) Petitioner notified the Court that he did not received certain filings

because he had moved; (7) Petitioner provided the Circuit Court with his updated address; and (8) prejudice to the Petitioner was apparent.

A. The Circuit Court Erred by Granting Default Judgment Where the *Pro Se* Petitioner Filed an Answer to Respondents' Complaint or, at Least, Appeared in the Underlying Civil Action, and Respondents Did Not Serve their Motion upon Petitioner.

Default judgment is authorized when a party to litigation against whom judgment for affirmative relief is sought has failed to plead or otherwise defend. W. Va. R. Civ. Proc. 55(b). *See also Blair v. Ford Motor Credit Co.*, 193 W.Va. 250, 455 S.E.2d 809 (1995). "If the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." W. Va. R. Civ. Proc. 55(b)(2).

On December 17, 2018, Petitioner sent a letter to the Court with the subject line, "Answer to the Complaint Filed on 09.06.2018." [19] Therein, Petitioner requested "a court appearance to provide the evidence needed for [his] defense." *Id.* Petitioner also stated: "This case has no merit. My property was never offered for sale." *Id.* Petitioner's December 17, 2018 letter was docketed as "Answer to Complaint filed by Keith Mongold." [1, at Lines 10-11]

On June 13, 2019, Respondents filed a Motion for Default Judgment [20-22]. Said Motion did not include a certificate of service, and it was not served upon the Petitioner.

The term "appeared in the action" for purposes of a default judgment is quite different from an "appearance" for other purposes; an appearance for purposes of a default judgment may consist only of letters or conversations, and will "activate[] the special notice and judicial review protections provided in the [Rule 55(b)(2) of the West Virginia Rules of Civil Procedure]." *State ex rel. Harper-Adams v. Murray*, 224 W.Va. 86, 92, 680 S.E.2d 101, 107, and n.16 (2009) (internal citations omitted).

Under West Virginia law, Petitioner "appeared" in the underlying Civil Action so as to trigger the notice requirements of Rule 55(b)(2) of the West Virginia Rules of Civil Procedure. Respondents failed to serve their Motion for Default Judgment upon Petitioner and, therefore, the Circuit Court erred in granting default judgment.

B. The Circuit Court Erred by Denying Petitioner's Motion to Amend Judgment Where Petitioner Endeavored to Provide a Defense and Suffered Extreme Prejudice.

This Court has established a basic policy that cases should be decided on their merits and that, therefore, default judgments are disfavored. *See* Syl. Pt. 2 of *Parsons v. McCoy,* 157 W.Va. 183, 202 S.E.2d 632 (1973). Petitioner appeared in the underlying Civil Action and attempted to answer Respondent's Complaint [*see* 19; 1 (docketing Petitioner's "Answer")]. Moreover, Petitioner requested a hearing to present his defense [19]. *See also* 1, at Lines 12-16 (The Circuit 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."). Nonetheless, on July 9, 2019, without notice to Petitioner or hearing, the Court entered an Order granting Respondents' Motion for Default Judgment, finding that "no pleading had been filed by the [Petitioner]." [24-27]

Said Order was apparently sent to the Petitioner, but returned to sender because Petitioner's P.O. Box was closed. Petitioner avers, and the record reflects, that his P.O. Box was closed because he moved to a new address – 124 Bridgeport Avenue, Apt. 1, Shelton, CT 06484. On October 9, 2019, Petitioner sent a letter to the Court with the subject line, "Motion to modify Order filed July 09, 2019 [29-30]." Said letter listed Petitioner's address as "124 Bridgeport Avenue, APT 1, Shelton CT 06484." *Id.* Said letter explained that Petitioner never received notice of a hearing on Respondents' Motion for Default Judgment and Petitioner did not receive notice of the

Order until October 7, 2019. *Id.* Petitioner also asserted therein that the Contract of Sale was forged, and his signature could not have been notarized in West Virginia as he was in Florida at the time. *Id.*

On November 6, 2019, the Court entered an Order Denying Motion to Modify, finding that Petitioner failed to file an answer to Respondents' Complaint and failed to take action to defend the action [33-35].

"In determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party." Syl. Pt. 3, *Parsons v. Consolidated Gas Supply Corporation,* 163 W.Va. 464, 256 S.E.2d 758 (1979). "A motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. Pt. 3, *Intercity Realty Co. v. Gibson,* 154 W.Va. 369, 175 S.E.2d 452 (1970).

The Circuit Court abused its discretion with consideration of the standard set by this Court in *Parsons*:

(1) The degree of prejudice suffered by the plaintiff from the delay in answering.

The Circuit Court's Order Denying Motion to Modify [33-35] does not address whether Respondents suffered prejudice as a result of Petitioner's delay in filing a formal answer to Respondents' Complaint. Nonetheless, this Court can infer that Respondents suffered no such prejudice. As discussed throughout, Petitioner attempted to engage in this case. On the other hand, Respondents took no action in the underlying Civil Action after they filed the Complaint on

September 6, 2018, until they filed their Motion for Default Judgment on June 13, 2019, over nine months later. Respondents' efforts do not illustrate any rush to get the matter resolved.

(2) The presence of material issues of fact and meritorious defenses.

Respondents' Complaint alleges that Petitioner entered into a Contract of Sale regarding 21 acres of property, and that Petitioner refused to convey said property to the Respondents." On December 17, 2018, Petitioner asserted to the Circuit Court by letter, "This case has no merit. My property was never offered for sale." [19] On October 9, 2019, after the Circuit Court granted default judgment against Petitioner, Petitioner wrote a letter to the Circuit Court asserting that the Contract of Sale was forged, and that his signature could not have been notarized in West Virginia because he was in Florida at the time." [29-30]

Clearly, material issues of fact existed that should have been addressed by the Circuit Court before granting default judgment and ordering the sale of Petitioner's property.

(3) The significance of the interests at stake.

Before the Circuit Court granted default judgment against Petitioner, Petitioner owned 21 acres of property in Grant County, West Virginia, that was deeded to Petitioner by his grandparents. The significance of the interests at stake should have been abundantly clear to the Circuit Court.

(4) The degree of intransigence on the part of the defaulting party.

The Circuit Court abused its discretion in finding that Petitioner "failed to take action to defend." Petitioner sought an extension on his deadline to respond to Respondents' Complaint after he was served by publication [16]. Petitioner, *pro se*, filed an Answer to Respondents' Complaint in letter form [19]. Petitioner requested a court appearance to present a defense (though the Circuit Court placed the burden on the *pro se* litigant to notice the hearing rather than notice

the hearing itself) [19; 1, at Lines 12-16]. Finally, after Petitioner admittedly failed to notify the Circuit Court of a change in his address, he filed a Motion to Amend the Order granting default [29-30].

Based upon established policy that default judgments are disfavored, and established policy that a *pro se* litigant's defense should not be defeated solely by reason of his or her unfamiliarity with procedural or evidentiary rules, the Circuit Court abused its discretion in finding that Petitioner failed to defend his interests. *See Cottrill v. Cottrill,* 219 W. Va. 51, 54, 631 S.E.2d 609, 612 (2006) (*pro se* litigant protection); Syl. Pt. 2 of *Parsons v. McCoy,* 157 W.Va. 183, 202 S.E.2d 632 (1973) (default judgments disfavored).

CONCLUSION

For the foregoing reasons, the Circuit Court abused its discretion by denying Petitioner's Motion to Amend.

WHEREFORE Petitioner respectfully requests that this Honorable Court vacate that Order entered November 6, 2019, by the Circuit Court of Grant County, West Virginia, for further proceedings below.

DATED the 2nd day of March 2020.

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CERTIFICATE OF SERVICE

I certify that I served a true and accurate copy of this PETITIONER'S BRIEF upon the counsel listed below by United States Mail, First Class, postage prepaid, on the 2nd day of March 2020.

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