No. 30109 – *Bobby Cales, National Union Fire Insurance Company of Pittsburgh, PA, v. Mark Steven Wills*

Albright, Justice, concurring,

I write separately to express certain concerns that the majority's opinion either fails to address or that are in need of further clarification. When possible, this Court clearly prefers that legal matters be determined on their merits. *See McDaniel v. Romano*, 155 W.Va. 875, 879, 190 S.E.2d 8, 11 (1972). At the same time, however, this Court fully recognizes the validity of and supports the enforceability of a default judgment that is properly obtained. In light of the finality of such judgments, barring successful Rule 60(b) motions, this Court has a duty to ensure that the requirements necessary for the issuance of default judgments are properly applied.

Lack of Defendant's "Appearance"

In discussing the distinction between default judgments that are obtained under the provisions of Rule 55(b)(1), as compared to those that result via the procedures of Rule 55(b)(2), the majority singularly focuses on the presence of a "sum certain" as the crucial requisite for proceeding under the former provision of the rule. While a sum certain is necessary to proceed under Rule 55(b)(1), the distinction that determines whether a clerk can enter the judgment or whether the court must enter the judgment is the issue of whether there

has been an appearance by the defendant for purposes of this rule. In tailoring its discussion to the narrow issue of a "sum certain," the majority overlooks the significance of the absence of an appearance by the defendant as a critical component of a default judgment that is entered pursuant to Rule 55(b)(1).

Thus, in establishing as a new point of law that "[g]enerally, under Rule 55(b)(1) of the West Virginia Rules of Civil Procedure, when the damages sought by a plaintiff involve a sum certain or a sum which can by computation be made certain, a judgment by default may be entered against a party who has defaulted as to liability without prior notice to that party," the majority appears to gloss over the essential distinction between default judgments obtained under Rule 55(b)(1) and (b)(2). Only where no appearance has been made by the defendant, can a default judgment be entered under Rule 55(b)(1).[1] *See* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2683 at 24-25 (3rd ed. 1998) (stating that Rule 55(b)(1) "applies only to parties who have never appeared in the action; it does not apply when a party appears and then merely fails to participate in some subsequent stage of the proceedings").

[1]While perhaps the majority intended to implicitly refer to the lack of an appearance in referencing the entry of a default as to liability, this is not accurate because the default as to liability may have been entered on a basis other than the lack of an appearance.

In attempting to distinguish those instances that properly fall under Rule 55(b)(1) from those required to proceed under Rule 55(b)(2), the majority should have followed the distinction used in the rule itself. Rule 55(b)(1) is labeled to apply only to those limited instances when a clerk is authorized to enter the default judgment, while Rule 55(b)(2) covers all the remaining instances, which require the active involvement of the circuit court judge in the process of entering judgment. *See generally*, Wright, *supra* at § 2684 (noting limited instances when default judgment can be entered under Rule 55(b)(1) and recognizing that in all other instances, including those in which "defendant is in default for a reason other than a failure to appear," application for judgment must proceed under Rule 55(b)(2)).

Oral Communication Constituting an "Appearance"

In establishing what constitutes an "appearance" for purposes of the notice requirement that attaches under the provisions of Rule 55(b)(2), the majority states that any communication, be it oral or written, suffices to constitute an "appearance," provided that such communication "demonstrates either an interest in the pending litigation, or actual notice of the litigation." In formulating this new law, the majority leaves unanswered several related concerns. I am concerned that when this law is applied, the practicing lawyers may find themselves without the necessary guidance to proceed. This is because, in elevating to a syllabus point the concept of oral communications being sufficient to constitute an

"appearance" under Rule 55,[2] the majority has failed to properly instruct the practitioner as to the parameters of oral communications that can properly be viewed as an "appearance" for purposes of the Rule 55.

Other courts that have considered this issue have made clear that not just any oral communication will suffice to constitute an appearance for purposes of invoking the notice requirement of Rule 55(b)(2). As the court made clear in *Alliance Group, Inc. v. Rosenfield*, 685 N.E.2d 570 (Ohio App. 1996), "[a] telephone call between parties would not constitute an appearance unless circumstances give the call some legal effect." *Id.* at 577. Generally, an affirmative act is required that manifests an intention to defend the action. *See id.*; *accord Miamisburg Motel v. Huntington Nat'l Bank*, 623 N.E.2d 163, 170 (Ohio App. 1993) (recognizing that telephone call that indicates to moving party clear purpose to defend the suit is sufficient to constitute appearance and trigger notice requirements under Rule 55); *see generally* Scott K. Zesch, *What Constitutes "Appearance" under Rule 55(b)(2) of Federal Rules of Civil Procedure, Providing that if Party Against Whom Default Judgment is Sought has "Appeared" in Action, that Party must be Served with Notice of Application for Judgment*, 139 A.L.R. Fed. 603, § 9[a], [b] (1997). Not all conversations, however, will be sufficient to amount to an appearance under the rule. *See, e.g., Ryan v. Collins*, 481 S.W.2d

[2]This position had previously only been recognized by this Court in notes accompanying two of our decisions. *See Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 75, n. 9, 501 S.E.2d 786, 792 n. 9 (1998); *accord Colonial Ins. Co. v. Barrett*, 208 W.Va. 706, 709, n. 2, 542 S.E.2d 869, 872 n. 2 (2000).

85, 88 (Ky. 1972) (holding that defendant had not "voluntarily taken a step in the main action that showed or from which it might be inferred that he had the intention of making some defense" where defendant had conversation with plaintiff's attorney regarding pending action and plaintiff's counsel merely instructed defendant to take summonses to insurance company).

While the issue of whether an "appearance" results from an oral communication will necessarily be a factual determination based on the nature of the conversation, as a general rule an "appearance" will result from a communication that conveys a clear intent to defend against the lawsuit at issue and may also be implied by language that indicates the defendant has taken or intends to take some steps related to the pending action that are either beneficial to the defendant or detrimental to the plaintiff's interests. *See Heleasco Seventeen, Inc. v. Drake*, 102 F.R.D. 909, 912 (D. Del. 1984). Missing from the majority's adoption of this new point of law permitting an oral communication to constitute an "appearance" is the clarification that the communication must involve an indication on the defendant's part to take some action relative to the lawsuit. Absent such an affirmative indication, an oral communication is unlikely to rise to the level of the "appearance" necessary to trigger the notice requirements of Rule 55(b)(2).

Practitioner Pointers

Despite the fact that Rule 55(b)(1) clearly allows default judgments to be taken in instances where no appearance has been made by the defendant and there is a "sum certain," I respectfully suggest to practitioners that it is by far the better practice to send notice of a default judgment application whenever counsel has sufficient information from which to serve such notice upon the defendant or defendant's counsel. Notice should be given to all parties who, despite the non-filing of formal pleadings, have nonetheless indicated a clear purpose to defend the suit by means of communication with the moving party.[3] Thus, if notice can be sent to an opposing party, it would appear prudent to dispatch such notice and hopefully foreclose unnecessary litigation that may result from the failure to advise a party of a default judgment application.

Based on the foregoing, I respectfully concur with the majority's decision.

---

[3]*See Miamisburg*, 623 N.E.2d at 170. By applying Rule 55 in this fashion, the court in *Miamisburg* observed that "informal, honest communication between the parties to a lawsuit [will be fostered] . . . [and] may lead to the resolution of disputes without resort to the legal process." *Id.*; *see also Zesch*, *supra*, at § 2[b] (recognizing that "most federal courts appear to be primarily concerned with the good faith of the moving party and fairness to the defaulting party" and that "[c]onsequently, courts may take into account whether the moving party attempted to obtain a default judgment by stealth").