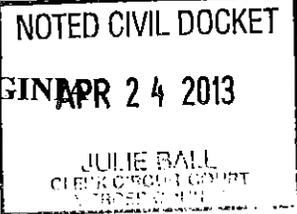


IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION



**ERIE INSURANCE PROPERTY
AND CASUALTY COMPANY**
Plaintiff,

v.

CIVIL ACTION NO 12-C-687

**ALEX LAMBERT, LAMBERTS
CONSTRUCTION COMPANY,
And CROWN POINT PROPERTIES, LLC,**
Defendants.

FINDINGS OF FACT AND RECOMMENDATION

Plaintiff in the above-styled matter has filed a motion with the Circuit Court of Mercer County to refer the case to the Business Court Division. Defendant Crown Point Properties ("Crown Point") objects to referral on the grounds that an individual is a named defendant in the dispute. By Administrative Order of April 3, 2013, Chief Justice Brent D. Benjamin of the West Virginia Supreme Court of Appeals directed that a hearing be held on the matter of whether the case should be referred to the Business Court Division. The Business Court Division or a designated member thereof was directed to conduct a hearing, in order to receive evidence and entertain arguments by the parties or any judge, and to submit findings of fact and a recommendation to the Chief Justice.

By Order entered April 10, 2013, the undersigned was designated by the Business Court Division to conduct a hearing on Plaintiff's motion and to submit findings of fact and a recommendation to the Chief Justice.

On the 17th day of April, 2013, the following parties appeared before the Court for hearing on this matter: Erie Insurance Property and Casualty Company ("Plaintiff") by counsel, Lauren M. Palmer of Steptoe & Johnson PLLC; and Crown Point Properties ("Crown Point") by

counsel, Harold B. Wolfe, III. Lamberts Construction Company and Alex Lambert have not filed any response to Plaintiff's Complaint and failed to appear at the hearing.

Plaintiff's complaint seeks a declaratory judgment to determine whether it is required to defend or indemnify policyholder Lamberts Construction Company of Bluefield (sometimes, "Lamberts Construction") in a civil action for damages brought by Crown Point, *Crown Point Inc. v. Alex Lambert and Lambert Construction*, Mercer County Docket No. 11-C-491. The initial complaint filed by Crown Point alleges negligence, breach of contract, and promissory fraud in conjunction with a contract for excavation and paving of an apartment complex parking lot. Plaintiff is defending its insured in this separate action under a reservation of rights. Plaintiff asserts that the commercial general liability insurance policy held by Lamberts Construction does not provide coverage for the property damage alleged by Crown Point, and that it thus has no duty to defend Lamberts Construction in the *Crown Point* litigation.

In support of its motion to refer the case to the Business Court Division, Plaintiff states that the claim falls within the subject-matter jurisdiction of the Business Court Division, to-wit: the claim involves a matter of significance to and between business entities, and presents commercial issues in which specialized treatment by the Business Court Division is likely to improve the expectation of a fair and reasonable resolution of the controversy.

Crown Point filed its response to Plaintiff's Motion outside the 20 days provided for under W.Va. T.C.R. 29.06. Therein it asserts that because Alex Lambert is an individually-named defendant in the *Crown Point* Complaint, W.Va. T.C.R. 29.04 bars referral to the Business Court Division. In relevant part, the Rule reads as follows.

Rule 29.04 Definitions

For purposes of this Rule, the following definitions apply:

- (a) "Business Litigation" — one or more pending actions in circuit court in which...
 - (3) the principal claim or claims **do not** involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions,

actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance coverage disputes relating to bad faith, or **disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity**; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W.Va. T.C.R. 29.04 (emphasis added).

Crown Point urges the Court to find that this dispute is one in which an individual, Alex Lambert, may be covered under the commercial policy issued to Lamberts Construction, but is involved in the dispute in an individual capacity. It argues that Alex Lambert is named in the initial complaint as an individual tortfeasor, just as a complaint alleging a battery by a business owner might name both the business entity and the business owner in his individual capacity.

Plaintiff argues that the exclusion delineated in Rule 29.04 is intended to preclude transfer of cases where one party is an individual but may be covered under a commercial policy. For example, an employee operating his personal vehicle for business purposes might be entitled to coverage under his employer's commercial insurance policy in the event of an accident. The employer's commercial insurance carrier could not file a complaint for declaratory relief and seek transfer to the Business Court Division, because the individual might be prejudiced by transfer to a specialty court intended to manage complex business litigation.

The situation here is not one where an individual may be covered under a commercial policy but is involved in the dispute in an individual capacity. In the initial complaint filed by Crown Point, Lamberts Construction Company is a named defendant. Crown Point concedes that it entered into a contract whereby Lamberts Construction Company would excavate and pave an apartment complex parking lot. A portion of the agreement between the parties is memorialized in a document signed "Lesley Lambert, VP."

Crown Point argues that Lamberts Construction is a sole proprietorship operated by Alex Lambert and family members. However, the evidence clearly shows that Lamberts Construction is a duly formed West Virginia Corporation. Records maintained by the West Virginia Secretary of State identify Alex Lambert as the president of the company and Lesley Lambert as its vice president. Together, these brothers own and operate the business.

Crown Point contends that Alex Lambert did not hold himself out as acting on behalf of an incorporated entity and seeks to hold him individually liable for the alleged malfeasance of Lamberts Construction. However, this does not render the matter at hand unsuitable for resolution in before the Business Court Division. Even if Alex Lambert is individually liable to Crown Point, he is not involved in the dispute in his individual capacity. Alex Lambert is named in Plaintiff's Complaint for Declaratory Relief, and in Crown Point's initial complaint, in his capacity as business owner and contractor.

This scenario can be distinguished from the example stated above, where an individual is involved in an auto accident while operating his personal vehicle for business purposes. The employee might seek indemnification for claims brought by others involved in the accident, or be named in an action such as this where the commercial insurance carrier seeks a declaratory judgment as to whether or not coverage should be afforded under the employer's policy. Neither case would be appropriate for transfer to the Business Court Division.

The recommendation of the undersigned is that Plaintiff's Complaint for Declaratory Relief is appropriate for referral to the Business Court Division under Trial Court Rule 29.

Submitted this 19th day of April, 2013.

THE FOREGOING IS A TRUE COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 20th DAY
OF April
DATED THIS 20th DAY OF April
20 13

JULIE BALL, CLERK OF THE
CIRCUIT COURT OF MERCER COUNTY WV
BY Angie's Tex
HER DEPUTY

James J. Rowe
James J. Rowe, Judge
Business Court Division