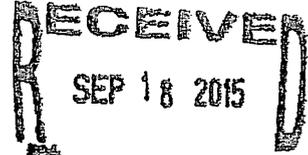


15-0993



IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

BRAXTON LUMBER CO., INC.,
a West Virginia corporation,

Plaintiff,

vs. //

Case No. 07-C-121

LLOYD'S, INC.,
a West Virginia corporation,

Defendant.

ORDER DENYING MOTION FOR LEAVE TO AMEND
OF
PLAINTIFF BRAXTON LUMBER CO., INC.

This matter came on for hearing pursuant to order on the 12th day of July, 2013, before the Honorable Richard A. Facemire, Chief Judge, there being present at said hearing defendant Lloyd's, Inc. (hereinafter "Lloyd's") by Greg Lloyd, its President, in person, and by counsel, Timothy B. Butcher, and plaintiff, Braxton Lumber Company, Inc. (hereinafter "BLC"), by counsel, Steven L. Thomas. This action was before the Court for, *inter alia*, a hearing on BLC's motion for leave to file amended complaint. Thereafter, counsel for plaintiff BLC argued in favor of the motion for leave to file amended complaint and counsel for defendant Lloyd's argued in opposition to the same.

Upon review of plaintiff BLC's motion for leave to file amended complaint, the response of Lloyd's to said motion for leave to file amended complaint which is contained in Lloyd's reply to BLC's response to first amendment to motion to dismiss and motion to stay

discovery, and argument of counsel, the Court is of the opinion that BLC's motion for leave to file amended complaint should be denied.

FINDINGS OF FACT

After carefully considering the motion for leave to file amended complaint, the proposed first amended complaint and other papers filed herein together with the argument of counsel, the Court finds as follows, *to-wit*:

1) On December 26, 2007, BLC sued Lloyd's in the case at bar for payment of a promissory note dated January 1, 1998, in the amount of \$564,000.00 together with accrued interest in the amount of \$280,918.36 as of December 17, 2007, and future interest accruing at the rate of \$77.26 *per diem* thereafter.

2) In the motion for leave to amend filed on June 27, 2013, BLC proposes to amend its complaint to sue Lloyd's for payment of the aforesaid \$564,000.00 note together with accrued interest in the amount of \$436,751.78 as of June 25, 2013, and future interest accruing at the rate of \$77.26 *per diem* thereafter and to add an equitable claim against William G. Lloyd (hereinafter "Greg Lloyd") for \$600,000.00 on a theory of unjust enrichment which is based on the same facts and circumstances that gave rise to BLC's claim against Lloyd's on the \$564,000.00 promissory note.

3) The promissory note at issue in the case at bar provides in pertinent part as follows, *viz.*:

"LLOYD'S INC, of Sutton, WV 26601, promises to pay to the order of BRAXTON LUMBER CO., INC., P. O. BOX 53, HEATERS, WV 26627, the sum of FIVE HUNDRED SIXTY FOUR THOUSAND DOLLARS, (\$564,000.00) on or before one year after date, bearing five percent (5%) interest per annum." (See Exhibit A to Lloyd's First Amendment).

4) BLC did not commence its action to enforce the obligation of Lloyd's to pay the aforesaid negotiable instrument until December 26, 2007, almost two (2) years after it was required by statute to file said action.

5) By assignment dated September 1, 1998, authorized by its Board of Directors on August 15, 1998, BLC assigned 68% of the aforesaid promissory note and a \$36,000.00 account hereinafter mentioned to Charles Lloyd, II (hereinafter "Chuck Lloyd") and 32% of said note and account to Greg Lloyd. (See Exhibit B to Lloyd's First Amendment).

6) In a case styled *Lloyd v. Braxton Lumber Co., Inc., et al*, Civil Action No. 04-C-39, before this Court (hereinafter "BLC case"), Chuck Lloyd, as third party plaintiff, sued Lloyd's, as third party defendant, for 68% of \$600,000.00 represented by a purported \$408,000.00 note.

7) At the jury trial in the BLC case, the Court permitted Chuck Lloyd to amend his third party complaint to sue Lloyd's for 68% of the aforesaid \$564,000.00 note and \$36,000.00 account, or \$408,000.00. (See Exhibit C to Lloyd's First Amendment, Trial Transcript pp. 507 and 563 -568).

8) The jury returned it's verdict in the BLC case on April 4, 2007, in open court, and with regard to Chuck Lloyd's third party claim against Lloyd's, Inc. for 68% of the aforesaid \$564,000.00 note and \$36,000.00 account, or \$408,000.00, it found against Chuck Lloyd. (See Exhibit G to Lloyd's First Amendment). BLC acknowledged that the jury returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's Response to First Amendment).

9) This Court previously rejected BLC's argument that Lloyd's defended the aforesaid debt claim exclusively by disputing the validity of Braxton Lumber's corporate action

in distributing the Lloyd's debt to Chuck Lloyd and Greg Lloyd. In an order entered February 22, 2008, denying Chuck Lloyd's post trial motions seeking to overturn the jury's verdict that he was not entitled to collect \$408,000.00 from Lloyd's, the following conclusions were made, *to-wit*, "The Court believes that there was sufficient evidence to support the jury's verdict on this issue. Given the informal nature of the parties' business dealings, the jury could have concluded that there was no real meeting of the minds on this issue, or as was argued at trial, as a matter of equity Chuck Lloyd was estopped from now trying to collect this debt which was distributed at the August 15, 1998 [board meeting], and Chuck Lloyd did not attempt to collect it, until he was sued by Greg Lloyd." (*Added missing language*). The West Virginia Supreme Court of Appeals rejected Chuck Lloyd's appeal of this Court's ruling.

10) BLC acknowledged that it could have asserted a claim to enforce the \$564,000.00 promissory note in the BLC case had it not had a reasonable belief that legal title to the note was held by Chuck Lloyd and Greg Lloyd. (*See p. 5 of BLC's response*). Although mistaken in its belief, BLC could have asserted its claim in the BLC case.

11) BLC, Chuck Lloyd, Greg Lloyd and Lloyd's were all parties to the BLC case.

12) Lloyd's (Ace) Hardware is owned by Lloyd's and Lloyd's is wholly owned by Greg Lloyd. (*See BLC case, Trial Transcript pp. 122-123*).

13) Charles Lloyd owns the real estate upon which the Lloyd's (Ace) Hardware building is situate. (*See BLC case, Trial Transcript pp. 202-203*).

14) BLC and Chuck Lloyd claim that the \$600,000.00 was loaned to Lloyd's for the purpose of building and equipping the Lloyd's (Ace) Hardware building. (*See BLC case, Trial Transcript pp. 625-627*).

15) BLC unilaterally reinstated the \$564,000.00 promissory note and \$36,000.00 account as an asset on its balance sheet. (See p. 4 and 9 of BLC's response to First Amendment).

CONCLUSIONS OF LAW

Based upon the findings as set forth hereinabove, the Court concludes as follows, *to-wit*:

1) *W. Va. Code §46-3-104* provides in pertinent part as follows, "(a) ... 'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest ..., if it: (1) Is payable ... to order at the time it is issued ...; (2) Is payable ... at a definite time; and (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain ... (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor."

2) *W. Va. Code §46-3-118(a)* requires that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note...".

3) Since BLC did not commence its original action to enforce the obligation of Lloyd's to pay the \$564,000.00 promissory note until December 26, 2007, the Court has concluded that BLC's original action is barred by the aforesaid statute of limitations which expired on January 1, 2005, and that the original action on the \$564,000.00 promissory note must be dismissed.

4) Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied: first, there must have been a final adjudication on the

merits in the prior action by a court having jurisdiction of the proceedings, second, the two actions must involve either the same parties or persons in privity with those same parties, and third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010).

5) The Court has concluded that it had jurisdiction over the proceedings in the BLC case. The Court has further concluded that a final adjudication on the merits was rendered in that case upon, *inter alia*, return of the jury's verdict against Chuck Lloyd on April 4, 2007. Additionally, this Court denied Chuck Lloyd's post trial motions seeking to overturn the jury's verdict that he was not entitled to collect \$408,000.00 from Lloyd's Inc., in an order entered on February 22, 2008. The West Virginia Supreme Court of Appeals rejected Chuck Lloyd's appeal in the BLC case on December 9, 2008.

6) *W. Va. Code* §55-8-9 provides in pertinent part the following, *to-wit*, "The assignee of any ... note, account, ..., not negotiable ..., may maintain thereupon any action in his own name, without the addition of 'assignee,' which the original ..., payee, ... might have brought; ..."

7) While legal title to a nonnegotiable instrument does not pass by assignment, the equitable owner thereof by assignment may sue in his own name at law. *Thomas v. Linn*, 40 W. Va. 122, 20 S.E. 878 (1894). *See also W. Va. Code* §55-8-9, *supra*.

8) Though, generally, an assignee of a note for collection or an unsettled account may sue on it, he acts, in so doing, as the assignor's agent. An assignee for the collection of a note stands as agent for the assignor and has no right of action which could not have been

exercised by the assignor. *Curl v. Ingram*, 121 W. Va. 763, 6 S.E.2d 483 (1939) and *State ex rel. Frieson v. Isner*, 168 W. Va. 758, 285 S.E.2d 641 (1981).

9) As assignor of the of the underlying \$564,000.00 promissory note and \$36,000.00 account, BLC held legal title to said debt and Chuck Lloyd, as assignee of the debt held equitable title thereto. Chuck Lloyd acted as agent for BLC in suing Lloyd's to collect 68% of the aforesaid debt although BLC is not named as a third party plaintiff. This clearly establishes privity between BLC and Chuck Lloyd. There is likewise privity between Lloyd's and Greg Lloyd in that Lloyd's is wholly owned by Greg Lloyd. Thus, the Court is of the opinion that the case at bar and the BLC case do involve either the same parties or persons in privity with those same parties in that BLC was in privity with Chuck Lloyd and Lloyd's was in privity with Greg Lloyd.

10) The Court further believes that Lloyd's satisfies the third prong of the test for applying *res judicata*, *to-wit*: the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. As stated in the findings of fact, BLC, Chuck Lloyd, Greg Lloyd and Lloyd's were all parties to the BLC case. *Res judicata* applies if BLC's unjust enrichment claim could have been resolved, had it been presented, in the BLC case. BLC, as assignor was the holder of legal title to 100% of the underlying \$564,000.00 promissory note and \$36,000.00 account. Thus, the Court is of the opinion that BLC (a) could have joined in the third-party complaint as a third party plaintiff with Chuck Lloyd, as assignee of said debt and holder of equitable title to 68% thereof, (b) could have joined Greg Lloyd, as a voluntary or involuntary third party defendant and assignee of said debt and holder of equitable title to 32% thereof, and (c) could have litigated 100% of its unjust

enrichment claim against Greg Lloyd in the BLC case. Instead, BLC chose to split its cause of action, withhold its unjust enrichment claim against Greg Lloyd and allow Chuck Lloyd to sue only Lloyd's, for 68% of the \$564,000.00 promissory note and \$36,000.00 account. The jury found against Chuck Lloyd on that issue and BLC acknowledges that the jury returned a verdict finding that Chuck Lloyd could not recover on its claim against Lloyd's. (See p. 4 of BLC's response to First Amendment). Since Chuck Lloyd, as agent of BLC (holder of legal title), lost his bid to collect 68% of the underlying debt from Lloyd's by jury verdict, BLC cannot now sue Greg Lloyd for unjust enrichment on 100% of the same underlying debt in the case at bar. BLC and Chuck Lloyd must live with the consequences of their choice. Because BLC's cause of action for unjust enrichment based on the underlying debt could have been resolved, had it been presented, in the BLC case, the Court is of the opinion that it is also barred under the doctrine of *res judicata*.

11) The Court has previously rejected BLC's argument that Lloyd's defended the underlying debt claim exclusively by disputing the validity of Braxton Lumber's corporate action in distributing the Lloyd's debt to Chuck Lloyd and Greg Lloyd.

12) An assignment of a right is a manifestation of the assignor's intention to transfer such right, by virtue of which transfer the assignor's right to performance by the obligor is extinguished ... and the assignee acquires a right to such performance. *Restatement (Second) of Contracts* §317(1) (1979). The assignor of a judgment or decree by the assignment deprives himself of all interest in and control over it, and transfers to the assignee the ownership of the judgment and all remedies thereunder. *Boarman v. Boarman*, 210 W. Va. 155, 556 S.E.2d 800 (2001). When an obligee assigns its right to the assignee, it concurrently extinguishes its own

right to the obligor's performance. *See JDN Dev. Co., Inc. v. Terra Ventures, Inc.*, 265 F.Supp.2d 1239, 1249 (D. Kan. 2003).

13) As stated in the findings of fact, BLC now moves to amend its complaint in the case at bar to add an unjust enrichment claim against Greg Lloyd based upon the same facts and circumstances that gave rise to the underlying \$600,000.00 debt assigned by BLC to Chuck Lloyd and Greg Lloyd, 68% of which has already been litigated by Chuck Lloyd in the BLC case. This theory of the case is problematic. BLC assigned the underlying \$564,000.00 promissory note and \$36,000.00 account to Chuck Lloyd (68%) and to Greg Lloyd (32%) on September 1, 1998. (See Exhibit B to BLC's response to First Amendment). Together with the underlying debt, BLC assigned away all remedies related to it, including, but not limited to, its proposed cause of action for unjust enrichment. BLC now claims that as result of the jury's verdict in finding the assignment invalid, it unilaterally reinstated the underlying \$564,000.00 promissory note and \$36,000.00 account as an asset on its balance sheet and has the right to sue Greg Lloyd for unjust enrichment in the amount of \$600,000.00. The Court is of the opinion that BLC cannot say for a fact that the jury found the aforesaid assignment invalid. In an order entered February 22, 2008, the Court concluded that the jury could have found that there was no meeting of the minds on the debt in a contractual sense or it could have found that Chuck Lloyd was estopped from collecting the same or waived his right to do so. Without being able to say factually that the jury found the assignment invalid and in the absence of assignments from Chuck Lloyd and Greg Lloyd, BLC lacks full and complete title (ownership) necessary to prevail on its proposed cause of action for unjust enrichment against Greg Lloyd.

14) There is another obstacle militating against BLC's proposed cause of action for unjust enrichment. BLC alleges that it provided \$600,000.00 in labor and materials in

the establishment of Greg Lloyd's hardware business and that Greg Lloyd was thereby unjustly enriched. Specifically, BLC claims that it provided these funds for the purpose of building and equipping the Lloyd's (Ace) Hardware building. The hardware business known as "Lloyd's Ace Hardware" or "Lloyd's Hardware" is actually owned by Lloyd's not Greg Lloyd, individually. The Court is of the opinion that Greg Lloyd could not be unjustly enriched since Lloyd's, a separate and distinct entity, owns Lloyd's (Ace) Hardware, its building and equipment. Additionally, the building constructed for the hardware business was constructed on land owned by Charles Lloyd. Thus, the Court believes that Charles Lloyd may have been unjustly enriched to the extent of the money utilized to construct the building housing Lloyd's (Ace) Hardware, and not Greg Lloyd.

15) The purpose of the words "and leave [to amend] shall be freely given when justice so requires" in Rule 15 (a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (a) the amendment permits the presentation of the merits of the action; (b) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (c) the adverse party can be given ample opportunity to meet the issue. *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010).

16) Prejudice to the adverse party is the paramount consideration in motions to amend. *Board of Educ. v. Spillers*, 164 W. Va. 453, 259 S.E.2d 417 (1979).

17) The liberality allowed in amendment of pleadings pursuant to Rule 15 (a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect the case for a long period of time. Lack of diligence is justification for a

denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay. *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010).

18) If BLC has a claim for unjust enrichment against Greg Lloyd, the Court is of the opinion that it knew, or should have known, that it had such a claim on January 1, 1999, when Lloyd's failed to pay the \$564,000.00 note. The Court is further of the opinion that BLC certainly knew it had an unjust enrichment claim against Greg Lloyd when it filed its original complaint on December 26, 2007. The Court believes that it is unreasonable for BLC to delay assertion of the unjust enrichment claim for 8 to 14 years. BLC has failed to demonstrate any valid reason for its neglect of this cause of action and delay in bringing the same. Such a lack of diligence justifies a denial of a motion for leave to amend. Therefore, the Court denies BLC's motion for leave to amend.

19) An unjust enrichment claim is equitable in nature, and thus, the principles of laches apply in such cases rather than the statute of limitations. *Absure, Inc. v. Huffman*, 213 W. Va 651, 584 S.E.2d 507 (2003).

20) BLC was dilatory in bringing its action against Lloyd's on the \$564,000.00 promissory note two years after the statute of limitations had run. Likewise, the doctrine of laches probably bars BLC's unjust enrichment claim against Greg Lloyd in that it was delayed for 8 to 14 years for no valid reason.

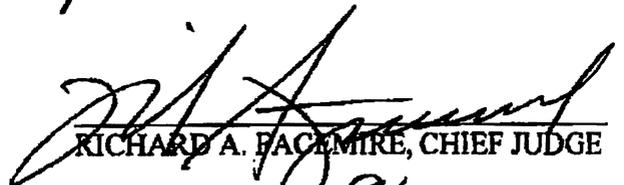
21) Additionally, BLC's motion for leave to amend should be denied for the following reasons. Since BLC's unjust enrichment claim against Greg Lloyd is barred by *res judicata*, the Court is of the opinion that an amendment of the complaint would not serve to permit the presentation of the merits of the action. The Court notes that the underlying debt for

the unjust enrichment claim against Greg Lloyd is the same \$600,000.00 in labor and materials represented by the \$564,000.00 promissory note and \$36,000.00 account assigned to Chuck Lloyd and Greg Lloyd, 68% of which was litigated in the BLC case wherein the jury found against Chuck Lloyd. Thus, the Court is of the opinion that Greg Lloyd would clearly be prejudiced by BLC's proposed action for unjust enrichment in that he owns by assignment 32% of the underlying obligation represented by the debt assigned to him.

After due consideration of all the foregoing, and believing it proper so to do, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. Plaintiff BLC's motion for leave to file amended complaint be, and the same is hereby, denied.
2. And the Clerk of this Court be, and is hereby, directed to mail a certified copy of this Order, which shall serve as notice to the parties of the judgment of the Court herein to counsel of record by first class mail.

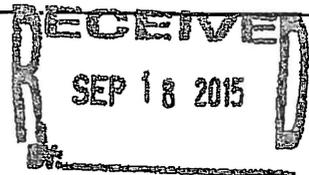
ENTERED this 9th day of September, 2015.


RICHARD A. FACEMIRE, CHIEF JUDGE

9/9/15

STATE OF WEST VIRGINIA
COUNTY OF BRAXTON, to-wit:
Susan Lemon, Circuit Clerk, do hereby certify that the foregoing is a
true and correct copy of an Order of record in my office in _____
Order Book No. _____ at page _____ as taken from the records.
Circuit Clerk by Hand this 15 day of Sept, 2015

CIRCUIT CLERK



IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

BRAXTON LUMBER CO., INC.,
a West Virginia corporation,

Plaintiff,

vs. //

Case No. 07-C-121

LLOYD'S, INC.,
a West Virginia corporation,

Defendant.

ORDER GRANTING MOTION TO DISMISS
OF
DEFENDANT LLOYD'S, INC.

This matter came on for hearing pursuant to order on the 12th day of July, 2013, before the Honorable Richard A. Facemire, Chief Judge, there being present at said hearing defendant Lloyd's, Inc. (hereinafter "Lloyd's") by Greg Lloyd, its President, in person, and by counsel, Timothy B. Butcher, and plaintiff, Braxton Lumber Company, Inc. (hereinafter "BLC"), by counsel, Steven L. Thomas. This action was before the Court for, *inter alia*, a hearing on Lloyd's first amendment to motion to dismiss. Thereafter, counsel for defendant Lloyd's argued in favor of the first amendment to motion to dismiss and counsel for plaintiff BLC argued in opposition to the same.

This cause was previously before the Court on the 19th day of June, 2009, for a hearing on, *inter alia*, Lloyd's motion to dismiss, there being present at said hearing defendant Lloyd's by its former counsel Kenneth E. Webb, Jr. and plaintiff BLC by its counsel Steven L.

Thomas. Counsel for the parties argued their respective positions and the matter was taken under advisement by the Court. A transcript of the argument was filed by Janette M. Campbell, Official Court Reporter for the Fourteenth Judicial Circuit, on November 17, 2009, which said transcript is before the Court.

Upon review of defendant Lloyd's motion to dismiss and the memorandum of law in support thereof, the response of BLC to said motion to dismiss, Lloyd's first amendment to motion to dismiss, the response of BLC thereto, the reply of Lloyd's to said response, the transcript of the prior proceedings and argument of counsel, the Court is of the opinion that Lloyd's motion to dismiss should be granted.

FINDINGS OF FACT

After carefully considering the pleadings, motion to dismiss and other papers filed herein together with the argument of counsel, the Court finds as follows, *to-wit*:

1) On December 26, 2007, BLC sued Lloyd's in the case at bar for payment of a promissory note dated January 1, 1998, in the amount of \$564,000.00 together with accrued interest in the amount of \$280,918.36 as of December 17, 2007, and future interest accruing at the rate of \$77.26 *per diem* thereafter.

2) The promissory note at issue in the case at bar provides in pertinent part as follows, *viz.*:

"LLOYD'S INC, of Sutton, WV 26601, promises to pay to the order of BRAXTON LUMBER CO., INC., P. O. BOX 53, HEATERS, WV 26627, the sum of FIVE HUNDRED SIXTY FOUR THOUSAND DOLLARS, (\$564,000.00) on or before one year after date, bearing five percent (5%) interest per annum." (See Exhibit A to Lloyd's First Amendment).

3) The aforesaid promissory note is a "negotiable instrument" as that term is defined in *W. Va. Code* §46-3-104.

4) According to the terms of said promissory note dated January 1, 1998, it was due and payable "on or before one year after date", being a definite time, on January 1, 1999, subject to the right of prepayment.

5) In the case at bar, the due date stated in the aforesaid promissory note is January 1, 1999, and the action by BLC to enforce the obligation of Lloyd's to pay said note was required by statute to be commenced on or before January 1, 2005.

6) BLC did not commence its action to enforce the obligation of Lloyd's to pay the aforesaid promissory note until December 26, 2007, almost two (2) years after it was required by statute to file said action.

7) By assignment dated September 1, 1998, authorized by its Board of Directors on August 15, 1998, BLC assigned 68% of the aforesaid promissory note to Charles Lloyd, II (hereinafter "Chuck Lloyd") and 32% of said note to William G. Lloyd (hereinafter "Greg Lloyd"). (See Exhibit B to Lloyd's First Amendment).

8) Chuck Lloyd took possession of the original of the aforesaid promissory note as well as the original of the assignment mentioned immediately hereinabove.

9) BLC clearly assigned less than the entire instrument by splitting its cause of action and assigning 68% of the aforesaid promissory note to Chuck Lloyd and 32% of the same to Greg Lloyd.

10) In a case styled *Lloyd v. Braxton Lumber Co., Inc., et al*, Civil Action No. 04-C-39, before this Court (hereinafter "BLC case"), Chuck Lloyd, as third party plaintiff, sued

Lloyd's, as third party defendant, for 68% of \$600,000.00 represented by a purported \$408,000.00 note.

11) Specifically, in Count Four of his Amended Third-Party Complaint, Chuck Lloyd alleged in paragraphs 37-39 that BLC loaned Lloyd's \$600,000.00 which the books of both companies reflected and that BLC distributed its note receivable from Lloyd's in a \$408,000.00 note to Chuck Lloyd and a \$192,000.00 note to Greg Lloyd.

12) In its Answer to the Amended Third-Party Complaint (¶37-39), Lloyd's stated that it was without knowledge or information sufficient to form a belief as to the truth of the foregoing allegations.

13) In paragraph 41 of said Amended Third-Party Complaint, Chuck Lloyd demanded judgment against Lloyd's in the amount of \$408,000.00 plus interest.

14) In its Answer to the Amended Third-Party Complaint (¶41), Lloyd's denied the forgoing demand.

15) At the jury trial in the BLC case, the Court permitted Chuck Lloyd to amend his third party complaint to sue Lloyd's for 68% of the aforesaid \$564,000.00 note and a \$36,000.00 account, or \$408,000.00. (See Exhibit C to Lloyd's First Amendment, Trial Transcript pp. 507 and 563 -568).

16) Both the original \$564,000.00 note and the original assignment of it were introduced into evidence for the jury's consideration at the jury trial in the BLC case.

17) BLC had the burden to prove to the jury by a preponderance of the evidence that the underlying debt was valid and that the \$564,000.00 note represented a valid and enforceable contract. Lloyd's had no burden of proof in this regard.

18) Greg Lloyd's testimony at trial in the BLC case was clearly equivocal as to the underlying debt and as to the execution of the \$564,000.00 promissory note. (See Exhibit 1 to Lloyd's Reply, Trial Transcript p. 277-279 and Exhibit D to Lloyd's First Amendment, Trial Transcript p. 995).

19) The Court gave the jury a standard contract instruction in the BLC case. (See Exhibit E to Lloyd's First Amendment, Trial Transcript p. 1120, lines 6-11).

20) In defense of Chuck Lloyd's claim in the BLC case, Lloyd's then counsel made a number of general arguments to the jury concerning the validity or invalidity and enforceability or unenforceability of contracts which would apply to the underlying debt and the \$564,000.00 promissory note. (See Exhibit F to Lloyd's First Amendment, Trial Transcript pp. 1126, 1128, and 1140 - 1141).

21) In the prosecution of Chuck Lloyd's claim in the BLC case, Chuck Lloyd's counsel even informed the jury that the evidence revealed that Greg Lloyd did not want to pay any amount on Chuck Lloyd's claim. (See Exhibit F to Lloyd's First Amendment, Trial Transcript p. 1151).

22) The Court likewise gave the jury standard estoppel and waiver instructions in the BLC case. (See Exhibit E to Lloyd's First Amendment, Trial Transcript p. 1121, lines 3-8 and p. 1124, lines 4-10).

23) In defense of Chuck Lloyd's claim in the BLC case, Lloyd's then counsel made general arguments to the jury concerning estoppel and waiver which would also apply to the underlying debt and the \$564,000.00 promissory note. (See Exhibit F to Lloyd's First Amendment, Trial Transcript p. 1143).

24) The jury returned its verdict in the BLC case on April 4, 2007, in open court, and with regard to Chuck Lloyd's third party claim against Lloyd's, Inc. for 68% of the aforesaid \$564,000.00 note and \$36,000.00 account, or \$408,000.00, it found against Chuck Lloyd. (See Exhibit G to Lloyd's First Amendment). BLC acknowledged that the jury returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's Response).

25) This Court previously rejected BLC's argument that Lloyd's defended the note claim exclusively by disputing the validity of Braxton Lumber's corporate action in distributing the Lloyd's Inc. debt to Chuck Lloyd and Greg Lloyd. In an order entered February 22, 2008, denying Chuck Lloyd's post trial motions seeking to overturn the jury's verdict that he was not entitled to collect \$408,000.00 from Lloyd's Inc., the following conclusions were made, *to-wit*, "The Court believes that there was sufficient evidence to support the jury's verdict on this issue. Given the informal nature of the parties' business dealings, the jury could have concluded that there was no real meeting of the minds on this issue, or as was argued at trial, as a matter of equity Chuck Lloyd was estopped from now trying to collect this debt which was distributed at the August 15, 1998 [board meeting], and Chuck Lloyd did not attempt to collect it, until he was sued by Greg Lloyd." (*Added missing language*). The West Virginia Supreme Court of Appeals rejected Chuck Lloyd's appeal of this Court's ruling.

26) In the case at bar, BLC is plaintiff, and Lloyd's is defendant. In the BLC case, Chuck Lloyd was third party plaintiff and Lloyd's was third party defendant. However, as explained in the conclusions of law, there is privity between BLC and Chuck Lloyd.

27) BLC acknowledged that it could have asserted a claim to enforce the \$564,000.00 promissory note in the BLC case had it not had a reasonable belief that legal title to

the note was held by Chuck Lloyd and Greg Lloyd. (See p. 5 of BLC's response). Although mistaken in its belief, BLC could have asserted its claim in the BLC case.

28) BLC, Chuck Lloyd, Greg Lloyd and Lloyd's were all parties to the BLC case.

29) In the case at bar, BLC is suing Lloyd's to collect 100% of the aforesaid \$564,000.00 promissory note. In the BLC case, Chuck Lloyd sued Lloyd's to collect 68% of the same \$564,000.00 note.

30) BLC unilaterally reinstated the \$564,000.00 promissory note and \$36,000.00 account as an asset on its balance sheet and is now suing Lloyd's to collect 100% of said note in the case at bar. (See p. 4 and 9 of BLC's response).

CONCLUSIONS OF LAW

Based upon the findings as set forth hereinabove, the Court concludes as follows, to-wit:

1) *W. Va. Code* §46-3-104 provides in pertinent part as follows, "(a) ... 'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest ..., if it: (1) Is payable ... to order at the time it is issued ...; (2) Is payable ... at a definite time; and (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain ... (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor."

2) *W. Va. Code* §46-3-108 provides in pertinent part as follows, "(b) A promise or order is 'payable at a definite time' if it is payable ... at a time or times readily ascertainable at the time the promise or order is issued, subject to the rights of (i) prepayment,"

3) *W. Va. Code* §§46-3-113 provides in pertinent part as follows. “(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date.”

4) *W. Va. Code* §46-3-118(a) requires that “an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note...”.

5) Since BLC did not commence its action to enforce the obligation of Lloyd’s to pay said note until December 26, 2007, the Court is of the opinion that BLC’s action is barred by the aforesaid statute of limitations which expired on January 1, 2005, and that said action must be dismissed.

6) The delivery of an instrument to one of the joint payees is delivery to all of them. 11 Am. Jur. 2d Bills and Notes §179 (2013).

7) *W. Va. Code* §46-3-203 provides in pertinent part as follows, *to-wit*, “(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee.” Since BLC assigned less than the entire instrument to Chuck Lloyd and Greg Lloyd, negotiation of the promissory note at issue herein did not occur. Thus, Chuck Lloyd and Greg Lloyd obtained no rights under Article 3, Chapter 46 of the Code as a result of the assignment and held their respective interests in the aforesaid promissory note as partial assignees. As partial assignees, the Court is of the opinion that Chuck Lloyd and Greg Lloyd only had rights to the extent that applicable law gave rights to a partial assignee. (See Official Comment 5).

8) *W. Va. Code* §55-8-9 provides in pertinent part the following, *to-wit*, “The assignee of any ... note, ..., not negotiable ..., may maintain thereupon any action in his own name, without the addition of ‘assignee,’ which the original ..., payee, ... might have brought; ...”

9) Rule 8(b) of the West Virginia Rules of Civil Procedure provides in pertinent part as follows, *to-wit*, “If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial.” Lloyd’s clearly denied paragraphs 37, 38, 39 and 41 contained in Count Four of Chuck Lloyd’s Amended Third-Party Complaint. Therefore, the Court is of the opinion that BLC’s argument that Lloyd’s failed to challenge the underlying debt or the aforesaid promissory note is unfounded. It was BLC’s burden to prove to the jury by a preponderance of the evidence the validity of the underlying debt and the validity of said note, not Lloyd’s.

10) The Court is of the opinion that Greg Lloyd’s testimony at trial in the BLC case raised issues for the jury as to the contractual validity of the underlying debt as well as the contractual validity of the note.

11) Based upon the testimony, exhibits, instructions, and final arguments of counsel in the BLC case, not to mention the jury’s inherent duty to determine the facts and apply the law notwithstanding argument of counsel, the Court is of the opinion that the jury in the BLC case could have found, *inter alia*, that there was no meeting of the minds of the parties concerning the underlying debt, or that the underlying \$564,000.00 note was not a valid and enforceable contract, or that Chuck Lloyd waived his right to enforce the \$564,000.00 note by not attempting to enforce the same for a long period of time and was thereby estopped from collecting on it.

12) The Court again rejects BLC's argument that Lloyd's defended the note claim exclusively by disputing the validity of Braxton Lumber's corporate action in distributing the Lloyd's debt to Chuck Lloyd and Greg Lloyd.

13) Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied: first, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings, second, the two actions must involve either the same parties or persons in privity with those same parties, and third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010).

14) The Court believes that it had jurisdiction over the proceedings in the BLC case. The Court is further of the opinion that a final adjudication on the merits was rendered in that case upon, *inter alia*, return of the jury's verdict against Chuck Lloyd on April 4, 2007. Additionally, this Court denied Chuck Lloyd's post trial motions seeking to overturn the jury's verdict that he was not entitled to collect \$408,000.00 from Lloyd's Inc., in an order entered on February 22, 2008. The West Virginia Supreme Court of Appeals rejected Chuck Lloyd's appeal in the BLC case on December 9, 2008.

15) While legal title to a nonnegotiable instrument does not pass by assignment, the equitable owner thereof by assignment may sue in his own name at law. *Thomas v. Linn*, 40 W. Va. 122, 20 S.E. 878 (1894). See also *W. Va. Code* §55-8-9, *supra*.

16) Though, generally, an assignee of a note for collection may sue on it, he acts, in so doing, as the assignor's agent. *Curl v. Ingram*, 121 W. Va. 763, 6 S.E.2d 483 (1939).

17) BLC, as assignor of the of the \$564,000.00 promissory note, held legal title to said note and Chuck Lloyd, as assignee of the note held equitable title thereto. Chuck Lloyd acted as agent for BLC in suing Lloyd's to collect 68% of the aforesaid \$564,000.00 note although BLC is not named as a third party plaintiff. This clearly establishes privity between BLC and Chuck Lloyd. Thus, the Court is of the opinion that the case at bar and the BLC case do involve either the same parties or persons in privity with those same parties in that BLC was in privity with Chuck Lloyd.

18) The Court further believes that Lloyd's has satisfied the third prong of the test for applying *res judicata*, to-wit: the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. As stated in the findings of fact, BLC, Chuck Lloyd, Greg Lloyd and Lloyd's were all parties to the BLC case. *Res judicata* applies if BLC's current cause of action could have been resolved, had it been presented, in the BLC case. BLC, as assignor was the holder of legal title to 100% of the \$564,000.00 promissory note. Thus, the Court is of the opinion that BLC (a) could have joined in the third-party complaint as a third party plaintiff with Chuck Lloyd, as assignee of said note and holder of equitable title to 68% thereof, (b) could have joined Greg Lloyd, as a voluntary or involuntary third party plaintiff or third party defendant and assignee of said note and holder of equitable title to 32% thereof, and (c) could have litigated 100% of the \$564,000.00 promissory note in the BLC case. Instead, BLC chose to split its cause of action and allow Chuck Lloyd to sue Lloyd's, for 68% of the \$564,000.00 promissory note. The jury found against Chuck Lloyd on that issue and BLC acknowledges that the jury returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's response). Since Chuck Lloyd,

as agent of BLC (holder of legal title), lost his bid to collect 68% of the \$564,000.00 note from Lloyd's by jury verdict, BLC cannot now sue Lloyd's for 100% of the same \$564,000.00 note in the case at bar. BLC and Chuck Lloyd must live with the consequences of their choice. Because BLC's cause of action for 100% of the \$564,000.00 note could have been resolved, had it been presented, in the BLC case, the Court is of the opinion that it is now barred under the doctrine of *res judicata*.

19) A demand arising from an entire contract cannot be divided and made the subject of several suits, and if several suits are brought for a breach of such a contract, a judgment on the merits of either will bar recovery in the others notwithstanding the second form of action is not identical with the first or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule exists mainly for the protection of the defendant, is intended to suppress serious grievances, and is applied to prevent vexatious litigation and to avoid the costs and expenses incident to numerous suits on the same cause of action. It is based on the maxims, *Interest reipublicae ut sit finis litium* (It concerns the commonwealth that there be a limit to litigation), and *Nemo debet bis vexari pro una et eadem causa* (No one ought to be twice vexed for one and the same cause). 1A *M.J. Actions* §16 (2012). *See also Snyder v. Exum*, 227 Va. 373, 315 S.E.2d 216 (1984).

20) BLC chose to split its cause of action on the \$564,000.00 promissory note by assigning 68% thereof to Chuck Lloyd and 32% thereof to Greg Lloyd. In the BLC case, Chuck Lloyd, as agent of BLC (holder of legal title), sued Lloyd's for 68% of the \$564,000.00 promissory note due to Lloyd's breach in not paying the same. The jury found against Chuck Lloyd on that issue and, as stated elsewhere hereinabove, BLC acknowledges that the jury

returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's response). In the case at bar, BLC is suing Lloyd's for 100% of the same \$564,000.00 promissory note due to Lloyd's breach in not paying the same. (See p. 1 of BLC's response). The Court believes that the \$564,000.00 promissory note was an entire contract that could not be divided and made the subject of several suits. The Court further notes that two suits have been brought for breach of contract against Lloyd's for not paying the \$564,000.00 promissory note. Thus, the Court is of the opinion that the judgment on the merits in the BLC case bars recovery in this case, notwithstanding that the form of action in this case may not be identical with that pursued in the BLC case or that different grounds for relief may be set forth in this case. In other words, since Chuck Lloyd, as agent of BLC (holder of legal title), lost his bid to collect 68% of the \$564,000.00 note from Lloyd's by jury verdict, BLC is barred from collecting 100% of the same \$564,000.00 note from Lloyd's in the case at bar.

21) The doctrine of *res judicata* prevents relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. Applying the doctrine of *res judicata* enforces the rule against claim-splitting by barring further litigation of claims which could have been litigated between the parties in an earlier proceeding. *Bill Greever Corp. v. Tazewell Nat. Bank*, 256 Va. 250, 504 S.E.2d 854 (1998).

22) BLC chose to split its cause of action and allow Chuck Lloyd, as agent of BLC (holder of legal title), to sue Lloyd's for 68% of the \$564,000.00 promissory note. Since BLC's cause of action for 100% of the \$564,000.00 note could have been resolved, had it been presented, in the BLC case, the Court has concluded that it is now barred under the doctrine of *res judicata*. The Court believes that applying this doctrine in the case at bar enforces the rule

against claim-splitting by barring further litigation of a claim which could have been litigated between the parties in the BLC case.

23) The Court believes that BLC has another problem in pursuing its claim against Lloyd's to collect 100% of the \$564,000.00 promissory note in the case at bar. BLC assigned the \$564,000.00 promissory note and a \$36,000.00 account to Chuck Lloyd (68%) and to Greg Lloyd (32%) on September 1, 1998. (See Exhibit B to BLC's response to First Amendment). BLC now claims that as result of the jury's verdict in finding the assignment invalid, it unilaterally reinstated the \$564,000.00 promissory note and \$36,000.00 account as an asset on its balance sheet and has the right to sue Lloyd's for 100% of the \$564,000.00 promissory note. The Court is of the opinion that BLC cannot say for a fact that the jury found the aforesaid assignment invalid. In an order entered February 22, 2008, the Court concluded that the jury could have found that there was no meeting of the minds on the debt in a contractual sense or it could have found that Chuck Lloyd was estopped from collecting the same or waived his right to do so. Without being able to say factually that the jury found the assignment invalid and in the absence of assignments from Chuck Lloyd and Greg Lloyd, BLC lacks full and complete title (ownership) necessary to prevail in its action seeking 100% of the \$564,000.00 promissory note from Lloyd's.

24) In order that the period of time during which a former action while still pending may subsequently be available to repel the statute of limitations, between the parties the cause of action in the two cases must be substantially identical. *City National Bank of Fairmont v. Fidelity Mut. Life Ins. Co.*, 110 F. Supp. 510 (1953). On the law side, in order to apply the provisions of Code, 55-2-18 [extending the statute of limitations], it is necessary that the cause of action and the parties be the same. *Town of Clendenin ex rel. Fields v. Ledsoe*, 129 W. Va. 388.

40 S.E.2d 849 (1946). The institution of an action against one person does not arrest the running of the statute of limitations with respect to an action against another person if the parties are different; and no amendment of the declaration and summons will be allowed after the statute has run if objected to by the defendant who is not the same party named in the institution of the initial action. *Sage v. Boyd*, 145 W. Va. 197, 113 S.E.2d 836 (1960).

25) The Court is therefore of the opinion that *W. Va. Code* §55-2-21 and *W. Va. Code* § 55-2-8 tolling the statute of limitations do not apply in the case at bar unless the parties and the cause of action in the BLC case are the same as those in the case at bar. In the BLC case, Chuck Lloyd was the third party plaintiff and Lloyd's was the third party defendant with regard to Chuck Lloyd's claim that Lloyd's owed him 68% of a \$564,000.00 promissory note. In the instant case, BLC is the plaintiff and Lloyd's is the defendant with regard to BLC's claim that Lloyd's owes it 100 % of the same \$564,000.00 note. The parties in the two cases are clearly different. The Court is of the opinion that the third-party complaint of Chuck Lloyd in the BLC case could not have tolled the statute of limitations running against BLC in that BLC and Chuck Lloyd are distinctly different parties. In the BLC case, Chuck Lloyd attempted to collect only 68% of the \$564,000.00 promissory note from Lloyd's, while in the case at bar BLC is attempting to collect 100% of the same \$564,000.00 note from Lloyd's. The causes of action in the two cases are likewise different. Due to the fact that both the parties and/or causes of action are different in the two cases, the Court concludes that the statute of limitations was not tolled as to BLC and continued to run during the pendency of the BLC case.

26) If prior legal actions in a given case invoke the principle of *res judicata*, barring subsequent action, the principle of *res judicata* nullifies the application of the tolling statute. *Litten v. Peer*, 156 W. Va. 791, 197 S.E.2d 322 (1973).

27) The Court having already concluded that *res judicata* bars BLC's cause of action in the instant case, the principle of *res judicata* would nullify the application of the tolling statutes if they did apply.

28) Collateral estoppel bars a party from instituting a collateral action to attack or circumvent an adverse verdict on the same issue against the same adversary. The doctrine of collateral estoppel applies when four elements are satisfied, *viz.*, (a) the issue previously decided is identical to the one presented in the action in question; (b) there is a final adjudication on the merits of the prior action; (c) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (d) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *State of West Virginia v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

29) The Court is of the opinion that BLC's cause of action for Lloyd's breach in not paying the \$564,000.00 note and its effort to collect 100% of the same is barred by the doctrine of collateral estoppel. Collateral estoppel serves to estop the relitigation by the parties and their privies of any right, fact or legal matter which is put in issue and has been once determined by a valid and final judgment of a court of competent jurisdiction. BLC acknowledges that the jury in the BLC case returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (*See* p. 9 of BLC's Response to First Amendment). In the case at bar, BLC is attempting to sue Lloyd's for breach of the same \$564,000.00 note and to collect 100% of the same. Thus, the issue previously decided in the BLC case is identical to the one presented in the case at bar. It has heretofore been concluded that there was a final adjudication on the merits in the BLC case (*See* ¶ 14, *supra*); that BLC, the party against whom the doctrine is invoked, was in privity with Chuck Lloyd, who was a party to the BLC case (*See* ¶

17, *supra*); and that BLC had a full and fair opportunity to litigate the breach of the \$564,000.00 promissory note had it joined in the third-party complaint with Chuck Lloyd (*See* ¶ 18, *supra*). Therefore, the Court believes that Lloyd's has satisfied the elements necessary to invoke the doctrine of collateral estoppel.

30) Judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation. If a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position simply because his interests have changed. A party will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts. *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 66 S.E.2d 91 (2007). The doctrine of judicial estoppel bars a party from relitigating an issue when four elements are established, *viz.*, (a) the party assumed a position on the issue that is clearly inconsistent with a position taken in the previous case; (b) the positions were taken in proceedings involving the same adverse party; (c) the party taking the inconsistent positions received some benefit from his/her original position; and (d) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. *West Virginia Dept. of Transp. v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).

31) The Court is not convinced that BLC received any benefit from the position taken by Chuck Lloyd in his third-party complaint against Lloyd's in the BLC case. First, BLC was not a party to the third-party claim in that case. Second, Chuck Lloyd was unsuccessful in his bid to collect 68% of the \$564,000.00 promissory note under any theory. Neither is the Court convinced that Lloyd's prevailed in the BLC case by successfully arguing

that BLC's assignment of 68% of the \$564,000.00 promissory note was invalid. As concluded earlier, Lloyd's could have just as easily prevailed because there was no meeting of the minds on this issue or because Chuck Lloyd was estopped from collecting on the note or because he waived his right to do so. Furthermore, the Court believes that the positions taken in the BLC case by Lloyd's were taken against Chuck Lloyd as the adverse party and that positions taken by Lloyd's in the instant case are taken against BLC, a different adverse party. Finally, not being a party to Chuck Lloyd's third-party action, the Court is of the opinion that BLC could not have been misled by Lloyd's positions in the BLC case. Thus, the Court concludes that the doctrine of judicial estoppel is not applicable in the case at bar.

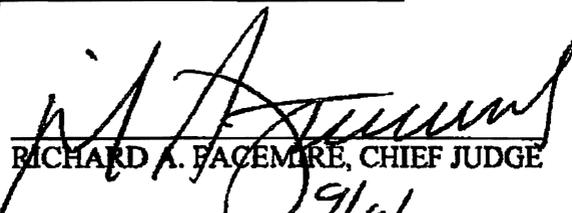
32) An assignment of a right is a manifestation of the assignor's intention to transfer such right, by virtue of which transfer the assignor's right to performance by the obligor is extinguished ... and the assignee acquires a right to such performance. *Restatement (Second) of Contracts* §317(1) (1979). The assignor of a judgment or decree by the assignment deprives himself of all interest in and control over it, and transfers to the assignee the ownership of the judgment and all remedies thereunder. *Boarman v. Boarman*, 210 W. Va. 155, 556 S.E.2d 800 (2001). When an obligee assigns its right to the assignee, it concurrently extinguishes its own right to the obligor's performance. *See JDN Dev. Co., Inc. v. Terra Ventures, Inc.*, 265 F.Supp.2d 1239, 1249 (D. Kan. 2003).

33) As stated in the findings of fact, BLC assigned the \$564,000.00 promissory note to Chuck Lloyd and Greg Lloyd. Once this assignment took place, the Court believes that BLC's right to performance by Lloyd's under the \$564,000.00 note was extinguished. Simply stated, BLC lacks full and complete title (ownership) necessary to prevail in its action seeking 100% of the \$564,000.00 promissory note from Lloyd's and the same must be dismissed.

After due consideration of all the foregoing, and believing it proper so to do, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. Defendant Lloyd's motion to dismiss be, and the same is hereby, granted.
2. And the Clerk of this Court be, and is hereby, directed to mail a certified copy of this Order, which shall serve as notice to the parties of the judgment of the Court herein to counsel of record by first class mail.

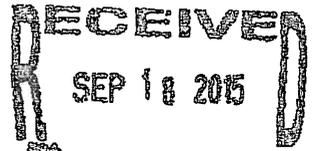
ENTERED this 9th day of September.


RICHARD A. FACEMIRE, CHIEF JUDGE
9/9/15

SOUTH WEST VIRGINIA
COUNTY OF HERTFORD, to-wit:

Sharon Lemmon, County Clerk, do hereby certify that the foregoing is a
true and correct copy of an Order of record in my office in _____
Book _____ at page _____ as taken from the records.
My office is held this 15 day of Sept., 2015.

Sharon Lemmon
COUNTY CLERK



IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

BRAXTON LUMBER CO., INC.,
a West Virginia corporation,

Plaintiff,

vs. //

Case No. 07-C-121

LLOYD'S, INC.,
a West Virginia corporation,

Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT
OF
PLAINTIFF BRAXTON LUMBER CO., INC.
AND
GRANTING CROSS-MOTION FOR SUMMARY JUDGMENT
OF
DEFENDANT LLOYD'S, INC.

This matter came on for hearing pursuant to order on the 12th day of July, 2013, before the Honorable Richard A. Facemire, Chief Judge, there being present at said hearing defendant Lloyd's, Inc. (hereinafter "Lloyd's") by Greg Lloyd, its President, in person, and by counsel, Timothy B. Butcher, and plaintiff, Braxton Lumber Company, Inc. (hereinafter "BLC"), by counsel, Steven L. Thomas. This action was before the Court for various motions argued that day.

This cause was previously before the Court on the 19th day of June, 2009, for a hearing on, *inter alia*, BLC's motion for summary judgment and Lloyd's cross-motion for summary judgment, there being present at said hearing defendant Lloyd's by its former counsel

Kenneth E. Webb, Jr. and plaintiff BLC by its counsel Steven L. Thomas. Counsel for the parties argued their respective positions and the motions were taken under advisement by the Court. A transcript of the argument was filed by Janette M. Campbell, Official Court Reporter for the Fourteenth Judicial Circuit, on November 17, 2009, which said transcript is before the Court.

Upon review of plaintiff BLC's motion for summary judgment and the memorandum of law in support thereof, defendant Lloyd's response in opposition thereto, defendant Lloyd's cross-motion for summary judgment and the memorandum of law in support thereof, BLC's reply in support of its motion for summary judgment, response in opposition to Lloyd's cross-motion for summary judgment, the transcript of the prior proceedings and argument of counsel, the Court is of the opinion that BLC's motion for summary judgment should be denied and Lloyd's cross-motion for summary judgment should be granted.

FINDINGS OF FACT

After carefully considering the pleadings, BLC's motion for summary judgment and Lloyd's cross-motion for summary judgment and other papers filed herein together with the argument of counsel, the Court finds as follows, *to-wit*:

1) On December 26, 2007, BLC sued Lloyd's in the case at bar for payment of a promissory note dated January 1, 1998, in the amount of \$564,000.00 together with accrued interest in the amount of \$280,918.36 as of December 17, 2007, and future interest accruing at the rate of \$77.26 *per diem* thereafter.

2) The promissory note at issue in the case at bar provides in pertinent part as follows, *viz.*:

"LLOYD'S INC, of Sutton, WV 26601, promises to pay to the order of BRAXTON LUMBER CO., INC., P. O. BOX 53, HEATERS, WV 26627, the sum of FIVE HUNDRED SIXTY

FOUR THOUSAND DOLLARS, (\$564,000.00) on or before one year after date, bearing five percent (5%) interest per annum." (See Exhibit A to Lloyd's First Amendment).

3) The aforesaid promissory note is a "negotiable instrument" as that term is defined in *W. Va. Code* §46-3-104.

4) According to the terms of said promissory note dated January 1, 1998, it was due and payable "on or before one year after date", being a definite time, on January 1, 1999, subject to the right of prepayment.

5) In the case at bar, the due date stated in the aforesaid promissory note is January 1, 1999, and the action by BLC to enforce the obligation of Lloyd's to pay said note was required by statute to be commenced on or before January 1, 2005.

6) BLC did not commence its action to enforce the obligation of Lloyd's to pay the aforesaid promissory note until December 26, 2007, almost two (2) years after it was required by statute to file said action.

7) By assignment dated September 1, 1998, authorized by its Board of Directors on August 15, 1998, BLC assigned 68% of the aforesaid promissory note to Charles Lloyd, II (hereinafter "Chuck Lloyd") and 32% of said note to William G. Lloyd (hereinafter "Greg Lloyd"). (See Exhibit B to Lloyd's First Amendment).

8) Chuck Lloyd took possession of the original of the aforesaid promissory note as well as the original of the assignment mentioned immediately hereinabove.

9) BLC clearly assigned less than the entire instrument by splitting its cause of action and assigning 68% of the aforesaid promissory note to Chuck Lloyd and 32% of the same to Greg Lloyd.

10) In a case styled *Lloyd v. Braxton Lumber Co., Inc., et al*, Civil Action No. 04-C-39, before this Court (hereinafter "BLC case"), Chuck Lloyd, as third party plaintiff, sued Lloyd's, as third party defendant, for 68% of \$600,000.00 represented by a purported \$408,000.00 note.

11) Specifically, in Count Four of his Amended Third-Party Complaint, Chuck Lloyd alleged in paragraphs 37-39 that BLC loaned Lloyd's \$600,000.00 which the books of both companies reflected and that BLC distributed its note receivable from Lloyd's in a \$408,000.00 note to Chuck Lloyd and a \$192,000.00 note to Greg Lloyd.

12) In its Answer to the Amended Third-Party Complaint (¶37-39), Lloyd's stated that it was without knowledge or information sufficient to form a belief as to the truth of the foregoing allegations.

13) In paragraph 41 of said Amended Third-Party Complaint, Chuck Lloyd demanded judgment against Lloyd's in the amount of \$408,000.00 plus interest.

14) In its Answer to the Amended Third-Party Complaint (¶41), Lloyd's denied the forgoing demand.

15) At the jury trial in the BLC case, the Court permitted Chuck Lloyd to amend his third party complaint to sue Lloyd's for 68% of the aforesaid \$564,000.00 note and a \$36,000.00 account, or \$408,000.00. (See Exhibit C to Lloyd's First Amendment, Trial Transcript pp. 507 and 563 -568).

16) Both the original \$564,000.00 note and the original assignment of it were introduced into evidence for the jury's consideration at the jury trial in the BLC case.

17) BLC had the burden to prove to the jury by a preponderance of the evidence that the underlying debt was valid and that the \$564,000.00 note represented a valid and enforceable contract. Lloyd's had no burden of proof in this regard.

18) Greg Lloyd's testimony at trial in the BLC case was clearly equivocal as to the underlying debt and as to the execution of the \$564,000.00 promissory note. (See Exhibit 1 to Lloyd's Reply, Trial Transcript p. 277-279 and Exhibit D to Lloyd's First Amendment, Trial Transcript p. 995).

19) The Court gave the jury a standard contract instruction in the BLC case. (See Exhibit E to Lloyd's First Amendment, Trial Transcript p. 1120, lines 6-11).

20) In defense of Chuck Lloyd's claim in the BLC case, Lloyd's then counsel made a number of general arguments to the jury concerning the validity or invalidity and enforceability or unenforceability of contracts which would apply to the underlying debt and the \$564,000.00 promissory note. (See Exhibit F to Lloyd's First Amendment, Trial Transcript pp. 1126, 1128, and 1140 - 1141).

21) In the prosecution of Chuck Lloyd's claim in the BLC case, Chuck Lloyd's counsel even informed the jury that the evidence revealed that Greg Lloyd did not want to pay any amount on Chuck Lloyd's claim. (See Exhibit F to Lloyd's First Amendment, Trial Transcript p. 1151).

22) The Court likewise gave the jury standard estoppel and waiver instructions in the BLC case. (See Exhibit E to Lloyd's First Amendment, Trial Transcript p. 1121, lines 3-8 and p. 1124, lines 4-10).

23) In defense of Chuck Lloyd's claim in the BLC case, Lloyd's then counsel made general arguments to the jury concerning estoppel and waiver which would also apply to

the underlying debt and the \$564,000.00 promissory note. (See Exhibit F to Lloyd's First Amendment, Trial Transcript p. 1143).

24) The jury returned its verdict in the BLC case on April 4, 2007, in open court, and with regard to Chuck Lloyd's third party claim against Lloyd's, Inc. for 68% of the aforesaid \$564,000.00 note and \$36,000.00 account, or \$408,000.00, it found against Chuck Lloyd. (See Exhibit G to Lloyd's First Amendment). BLC acknowledged that the jury returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's Response).

25) This Court previously rejected BLC's argument that Lloyd's defended the note claim exclusively by disputing the validity of Braxton Lumber's corporate action in distributing the Lloyd's Inc. debt to Chuck Lloyd and Greg Lloyd. In an order entered February 22, 2008, denying Chuck Lloyd's post trial motions seeking to overturn the jury's verdict that he was not entitled to collect \$408,000.00 from Lloyd's Inc., the following conclusions were made, *to-wit*, "The Court believes that there was sufficient evidence to support the jury's verdict on this issue. Given the informal nature of the parties' business dealings, the jury could have concluded that there was no real meeting of the minds on this issue, or as was argued at trial, as a matter of equity Chuck Lloyd was estopped from now trying to collect this debt which was distributed at the August 15, 1998 [board meeting], and Chuck Lloyd did not attempt to collect it, until he was sued by Greg Lloyd." (*Added missing language*). The West Virginia Supreme Court of Appeals rejected Chuck Lloyd's appeal of this Court's ruling.

26) In the case at bar, BLC is plaintiff, and Lloyd's is defendant. In the BLC case, Chuck Lloyd was third party plaintiff and Lloyd's was third party defendant. However, as explained in the conclusions of law, there is privity between BLC and Chuck Lloyd.

27) BLC acknowledged that it could have asserted a claim to enforce the \$564,000.00 promissory note in the BLC case had it not had a reasonable belief that legal title to the note was held by Chuck Lloyd and Greg Lloyd. (See p. 5 of BLC's response). Although mistaken in its belief, BLC could have asserted its claim in the BLC case.

28) BLC, Chuck Lloyd, Greg Lloyd and Lloyd's were all parties to the BLC case.

29) In the case at bar, BLC is suing Lloyd's to collect 100% of the aforesaid \$564,000.00 promissory note. In the BLC case, Chuck Lloyd sued Lloyd's to collect 68% of the same \$564,000.00 note.

30) BLC unilaterally reinstated the \$564,000.00 promissory note and \$36,000.00 account as an asset on its balance sheet and is now suing Lloyd's to collect 100% of said note in the case at bar. (See p. 4 and 9 of BLC's response).

CONCLUSIONS OF LAW

Based upon the findings as set forth hereinabove, the Court concludes as follows, *to-wit:*

1) *W. Va. Code* §46-3-104 provides in pertinent part as follows, "(a) ... 'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest ..., if it: (1) Is payable ... to order at the time it is issued ...; (2) Is payable ... at a definite time; and (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain ... (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor."

2) *W. Va. Code* §46-3-108 provides in pertinent part as follows. "(b) A promise or order is 'payable at a definite time' if it is payable ... at a time or times readily ascertainable at the time the promisc or order is issued, subject to the rights of (i) prepayment,"

3) *W. Va. Code* §§46-3-113 provides in pertinent part as follows, "(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date."

4) *W. Va. Code* §46-3-118(a) requires that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note...".

5) Since BLC did not commence its action to enforce the obligation of Lloyd's to pay said note until December 26, 2007, the Court is of the opinion that BLC's action is barred by the aforesaid statute of limitations which expired on January 1, 2005, and that said action must be dismissed.

6) The delivery of an instrument to one of the joint payees is delivery to all of them. 11 Am. Jur. 2d Bills and Notes §179 (2013).

7) *W. Va. Code* §46-3-203 provides in pertinent part as follows, *to-wit*, "(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee." Since BLC assigned less than the entire instrument to Chuck Lloyd and Greg Lloyd, negotiation of the promissory note at issue herein did not occur. Thus, Chuck Lloyd and Greg Lloyd obtained no rights under Article 3, Chapter 46 of the Code as a result of the assignment and held their respective interests in the aforesaid promissory note as partial assignees. As partial

assignees, the Court is of the opinion that Chuck Lloyd and Greg Lloyd only had rights to the extent that applicable law gave rights to a partial assignee. (See Official Comment 5).

8) *W. Va. Code* §55-8-9 provides in pertinent part the following, *to-wit*, "The assignee of any ... note, ..., not negotiable ..., may maintain thereupon any action in his own name, without the addition of 'assignee,' which the original ..., payee, ... might have brought; ..."

9) Rule 8(b) of the West Virginia Rules of Civil Procedure provides in pertinent part as follows, *to-wit*, "If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial." Lloyd's clearly denied paragraphs 37, 38, 39 and 41 contained in Count Four of Chuck Lloyd's Amended Third-Party Complaint. Therefore, the Court is of the opinion that BLC's argument that Lloyd's failed to challenge the underlying debt or the aforesaid promissory note is unfounded. It was BLC's burden to prove to the jury by a preponderance of the evidence the validity of the underlying debt and the validity of said note, not Lloyd's.

10) The Court is of the opinion that Greg Lloyd's testimony at trial in the BLC case raised issues for the jury as to the contractual validity of the underlying debt as well as the contractual validity of the note and contract instructions were given to the jury.

11) The Court is further of the opinion that the evidence adduced at trial in the BLC case raised issues for the jury on estoppel and waiver and those instructions were likewise given to the jury..

12) Based upon the testimony, exhibits, instructions, and final arguments of counsel in the BLC case, not to mention the jury's inherent duty to determine the facts and apply the law notwithstanding argument of counsel, the Court is of the opinion that the jury in the BLC case could have found, *inter alia*, that there was no meeting of the minds of the parties concerning

the underlying debt, or that the underlying \$564,000.00 note was not a valid and enforceable contract, or that Chuck Lloyd waived his right to enforce the \$564,000.00 note by not attempting to enforce the same for a long period of time and was thereby estopped from collecting on it.

13) The Court again rejects BLC's argument that Lloyd's defended the note claim exclusively by disputing the validity of Braxton Lumber's corporate action in distributing the Lloyd's debt to Chuck Lloyd and Greg Lloyd.

14) Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied: first, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings, second, the two actions must involve either the same parties or persons in privity with those same parties, and third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010).

15) The Court believes that it had jurisdiction over the proceedings in the BLC case. The Court is further of the opinion that a final adjudication on the merits was rendered in that case upon, *inter alia*, return of the jury's verdict against Chuck Lloyd on April 4, 2007. Additionally, this Court denied Chuck Lloyd's post trial motions seeking to overturn the jury's verdict that he was not entitled to collect \$408,000.00 from Lloyd's Inc., in an order entered on February 22, 2008. The West Virginia Supreme Court of Appeals rejected Chuck Lloyd's appeal in the BLC case on December 9, 2008.

16) While legal title to a nonnegotiable instrument does not pass by assignment, the equitable owner thereof by assignment may sue in his own name at law. *Thomas v. Linn*, 40 W. Va. 122, 20 S.E. 878 (1894). See also *W. Va. Code* §55-8-9, *supra*.

17) Though, generally, an assignee of a note for collection may sue on it, he acts, in so doing, as the assignor's agent. *Curl v. Ingram*, 121 W. Va. 763, 6 S.E.2d 483 (1939).

18) BLC, as assignor of the of the \$564,000.00 promissory note, held legal title to said note and Chuck Lloyd, as assignee of the note held equitable title thereto. Chuck Lloyd acted as agent for BLC in suing Lloyd's to collect 68% of the aforesaid \$564,000.00 note although BLC is not named as a third party plaintiff. This clearly establishes privity between BLC and Chuck Lloyd. Thus, the Court is of the opinion that the case at bar and the BLC case do involve either the same parties or persons in privity with those same parties in that BLC was in privity with Chuck Lloyd.

19) The Court further believes that Lloyd's has satisfied the third prong of the test for applying *res judicata*, to-wit: the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. As stated in the findings of fact, BLC, Chuck Lloyd, Greg Lloyd and Lloyd's were all parties to the BLC case. *Res judicata* applies if BLC's current cause of action could have been resolved, had it been presented, in the BLC case. BLC, as assignor was the holder of legal title to 100% of the \$564,000.00 promissory note. Thus, the Court is of the opinion that BLC (a) could have joined in the third-party complaint as a third party plaintiff with Chuck Lloyd, as assignee of said note and holder of equitable title to 68% thereof, (b) could have joined Greg Lloyd, as a voluntary or involuntary third party plaintiff or third party defendant and assignee of said note and holder of

equitable title to 32% thereof, and (c) could have litigated 100% of the \$564,000.00 promissory note in the BLC case. Instead, BLC chose to split its cause of action and allow Chuck Lloyd to sue Lloyd's, for 68% of the \$564,000.00 promissory note. The jury found against Chuck Lloyd on that issue and BLC acknowledges that the jury returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's response). Since Chuck Lloyd, as agent of BLC (holder of legal title), lost his bid to collect 68% of the \$564,000.00 note from Lloyd's by jury verdict, BLC cannot now sue Lloyd's for 100% of the same \$564,000.00 note in the case at bar. BLC and Chuck Lloyd must live with the consequences of their choice. Because BLC's cause of action for 100% of the \$564,000.00 note could have been resolved, had it been presented, in the BLC case, the Court is of the opinion that it is now barred under the doctrine of *res judicata*.

20) A demand arising from an entire contract cannot be divided and made the subject of several suits, and if several suits are brought for a breach of such a contract, a judgment on the merits of either will bar recovery in the others notwithstanding the second form of action is not identical with the first or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule exists mainly for the protection of the defendant, is intended to suppress serious grievances, and is applied to prevent vexatious litigation and to avoid the costs and expenses incident to numerous suits on the same cause of action. It is based on the maxims, *Interest reipublicae ut sit finis litium* (It concerns the commonwealth that there be a limit to litigation), and *Nemo debet bis vexari pro una et eadem causa* (No one ought to be twice vexed for one and the same cause). 1A *M.J. Actions* §16 (2012). See also *Snyder v. Exum*, 227 Va. 373, 315 S.E.2d 216 (1984).

21) BLC chose to split its cause of action on the \$564,000.00 promissory note by assigning 68% thereof to Chuck Lloyd and 32% thereof to Greg Lloyd. In the BLC case, Chuck Lloyd, as agent of BLC (holder of legal title), sued Lloyd's for 68% of the \$564,000.00 promissory note due to Lloyd's breach in not paying the same. The jury found against Chuck Lloyd on that issue and, as stated elsewhere hereinabove, BLC acknowledges that the jury returned a verdict finding that Chuck Lloyd could not recover on the "Lloyd's Inc. note." (See p. 9 of BLC's response). In the case at bar, BLC is suing Lloyd's for 100% of the same \$564,000.00 promissory note due to Lloyd's breach in not paying the same. (See p. 1 of BLC's response). The Court believes that the \$564,000.00 promissory note was an entire contract that could not be divided and made the subject of several suits. The Court further notes that two suits have been brought for breach of contract against Lloyd's for not paying the \$564,000.00 promissory note. Thus, the Court is of the opinion that the judgment on the merits in the BLC case bars recovery in this case, notwithstanding that the form of action in this case may not be identical with that pursued in the BLC case or that different grounds for relief may be set forth in this case. In other words, since Chuck Lloyd, as agent of BLC (holder of legal title), lost his bid to collect 68% of the \$564,000.00 note from Lloyd's by jury verdict, BLC is barred from collecting 100% of the same \$564,000.00 note from Lloyd's in the case at bar.

22) The doctrine of *res judicata* prevents relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. Applying the doctrine of *res judicata* enforces the rule against claim-splitting by barring further litigation of claims which could have been litigated between the parties in an earlier proceeding. *Bill Greever Corp. v. Tazewell Nat. Bank*, 256 Va. 250, 504 S.E.2d 854 (1998).

23) BLC chose to split its cause of action and allow Chuck Lloyd, as agent of BLC (holder of legal title), to sue Lloyd's for 68% of the \$564,000.00 promissory note. Since BLC's cause of action for 100% of the \$564,000.00 note could have been resolved, had it been presented, in the BLC case, the Court has concluded that it is now barred under the doctrine of *res judicata*. The Court believes that applying this doctrine in the case at bar enforces the rule against claim-splitting by barring further litigation of a claim which could have been litigated between the parties in the BLC case.

24) The Court believes that BLC has another problem in pursuing its claim against Lloyd's to collect 100% of the \$564,000.00 promissory note in the case at bar. BLC assigned the \$564,000.00 promissory note and a \$36,000.00 account to Chuck Lloyd (68%) and to Greg Lloyd (32%) on September 1, 1998. (See Exhibit B to BLC's response to First Amendment). BLC now claims that as result of the jury's verdict in finding the assignment invalid, it unilaterally reinstated the \$564,000.00 promissory note and \$36,000.00 account as an asset on its balance sheet and has the right to sue Lloyd's for 100% of the \$564,000.00 promissory note. The Court is of the opinion that BLC cannot say for a fact that the jury found the aforesaid assignment invalid. In an order entered February 22, 2008, the Court concluded that the jury could have found that there was no meeting of the minds on the debt in a contractual sense or it could have found that Chuck Lloyd was estopped from collecting the same or waived his right to do so. Without being able to say factually that the jury found the assignment invalid and in the absence of assignments from Chuck Lloyd and Greg Lloyd, BLC lacks full and complete title (ownership) necessary to prevail in its action seeking 100% of the \$564,000.00 promissory note from Lloyd's.

25) In order that the period of time during which a former action while still pending may subsequently be available to repel the statute of limitations, between the parties the cause of action in the two cases must be substantially identical. *City National Bank of Fairmont v. Fidelity Mut. Life Ins. Co.*, 110 F. Supp. 510 (1953). On the law side, in order to apply the provisions of Code, 55-2-18 [extending the statute of limitations], it is necessary that the cause of action and the parties be the same. *Town of Clendenin ex rel. Fields v. Ledsome*, 129 W. Va. 388, 40 S.E.2d 849 (1946). The institution of an action against one person does not arrest the running of the statute of limitations with respect to an action against another person if the parties are different; and no amendment of the declaration and summons will be allowed after the statute has run if objected to by the defendant who is not the same party named in the institution of the initial action. *Sage v. Boyd*, 145 W. Va. 197, 113 S.E.2d 836 (1960).

26) The Court is therefore of the opinion that *W. Va. Code §55-2-21* and *W. Va. Code § 55-2-8* tolling the statute of limitations do not apply in the case at bar unless the parties and the cause of action in the BLC case are the same as those in the case at bar. In the BLC case, Chuck Lloyd was the third party plaintiff and Lloyd's was the third party defendant with regard to Chuck Lloyd's claim that Lloyd's owed him 68% of a \$564,000.00 promissory note. In the instant case, BLC is the plaintiff and Lloyd's is the defendant with regard to BLC's claim that Lloyd's owes it 100 % of the same \$564,000.00 note. The parties in the two cases are clearly different. The Court is of the opinion that the third-party complaint of Chuck Lloyd in the BLC case could not have tolled the statute of limitations running against BLC in that BLC and Chuck Lloyd are distinctly different parties. In the BLC case, Chuck Lloyd attempted to collect only 68% of the \$564,000.00 promissory note from Lloyd's, while in the case at bar BLC is attempting to collect 100% of the same \$564,000.00 note from Lloyd's. The causes of action in

the two cases are likewise different. Due to the fact that both the parties and/or causes of action are different in the two cases, the Court concludes that the statute of limitations was not tolled as to BLC and continued to run during the pendency of the BLC case.

27) If prior legal actions in a given case invoke the principle of *res judicata*, barring subsequent action, the principle of *res judicata* nullifies the application of the tolling statute. *Litten v. Peer*, 156 W. Va. 791, 197 S.E.2d 322 (1973).

28) The Court having already concluded that *res judicata* bars BLC's cause of action in the instant case, the principle of *res judicata* would nullify the application of the tolling statutes if they did apply.

29) Collateral estoppel bars a party from instituting a collateral action to attack or circumvent an adverse verdict on the same issue against the same adversary. The doctrine of collateral estoppel applies when four elements are satisfied, *viz.*, (a) the issue previously decided is identical to the one presented in the action in question; (b) there is a final adjudication on the merits of the prior action; (c) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (d) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *State of West Virginia v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

30) The Court is of the opinion that BLC's cause of action for Lloyd's breach in not paying the \$564,000.00 note and its effort to collect 100% of the same is barred by the doctrine of collateral estoppel. Collateral estoppel serves to estop the relitigation by the parties and their privies of any right, fact or legal matter which is put in issue and has been once determined by a valid and final judgment of a court of competent jurisdiction. BLC acknowledges that the jury in the BLC case returned a verdict finding that Chuck Lloyd could not

recover on the "Lloyd's Inc. note." (See p. 9 of BLC's Response to First Amendment). In the case at bar, BLC is attempting to sue Lloyd's for breach of the same \$564,000.00 note and to collect 100% of the same. Thus, the issue previously decided in the BLC case is identical to the one presented in the case at bar. It has heretofore been concluded that there was a final adjudication on the merits in the BLC case (See ¶ 14, *supra*); that BLC, the party against whom the doctrine is invoked, was in privity with Chuck Lloyd, who was a party to the BLC case (See ¶ 17, *supra*); and that BLC had a full and fair opportunity to litigate the breach of the \$564,000.00 promissory note had it joined in the third-party complaint with Chuck Lloyd (See ¶ 18, *supra*). Therefore, the Court believes that Lloyd's has satisfied the elements necessary to invoke the doctrine of collateral estoppel.

31) Judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation. If a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position simply because his interests have changed. A party will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts. *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 66 S.E.2d 91 (2007). The doctrine of judicial estoppel bars a party from relitigating an issue when four elements are established, viz., (a) the party assumed a position on the issue that is clearly inconsistent with a position taken in the previous case; (b) the positions were taken in proceedings involving the same adverse party; (c) the party taking the inconsistent positions received some benefit from his/her original position; and (d) the original position misled the adverse party so that allowing the estopped party to

change his/her position would injuriously affect the adverse party and the integrity of the judicial process. *West Virginia Dept. of Transp. v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).

32) The Court is not convinced that BLC received any benefit from the position taken by Chuck Lloyd in his third-party complaint against Lloyd's in the BLC case. First, BLC was not a party to the third-party claim in that case. Second, Chuck Lloyd was unsuccessful in his bid to collect 68% of the \$564,000.00 promissory note under any theory. Neither is the Court convinced that Lloyd's prevailed in the BLC case by successfully arguing that BLC's assignment of 68% of the \$564,000.00 promissory note was invalid. As concluded earlier, Lloyd's could have just as easily prevailed because there was no meeting of the minds on this issue or because Chuck Lloyd was estopped from collecting on the note or because he waived his right to do so. Furthermore, the Court believes that the positions taken in the BLC case by Lloyd's were taken against Chuck Lloyd as the adverse party and that positions taken by Lloyd's in the instant case are taken against BLC, a different adverse party. Finally, not being a party to Chuck Lloyd's third-party action, the Court is of the opinion that BLC could not have been misled by Lloyd's positions in the BLC case. Thus, the Court concludes that the doctrine of judicial estoppel is not applicable in the case at bar.

33) An assignment of a right is a manifestation of the assignor's intention to transfer such right, by virtue of which transfer the assignor's right to performance by the obligor is extinguished ... and the assignee acquires a right to such performance. *Restatement (Second) of Contracts* §317(1) (1979). The assignor of a judgment or decree by the assignment deprives himself of all interest in and control over it, and transfers to the assignee the ownership of the judgment and all remedies thereunder. *Boarman v. Boarman*, 210 W. Va. 155, 556 S.E.2d 800 (2001). When an obligee assigns its right to the assignee, it concurrently extinguishes its own

right to the obligor's performance. *See JDN Dev. Co., Inc. v. Terra Ventures, Inc.*, 265 F.Supp.2d 1239, 1249 (D. Kan. 2003).

34) As stated in the findings of fact, BLC assigned the \$564,000.00 promissory note to Chuck Lloyd and Greg Lloyd. Once this assignment took place, the Court believes that BLC's right to performance by Lloyd's under the \$564,000.00 note was extinguished. Simply stated, BLC lacks full and complete title (ownership) necessary to prevail in its action seeking 100% of the \$564,000.00 promissory note from Lloyd's and the same must be dismissed.

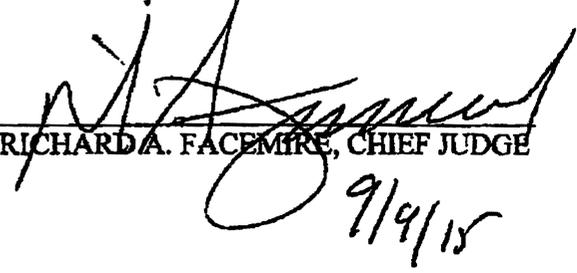
35) Rule 56(c) of the West Virginia Rules of Civil Procedure states in pertinent part that a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A trial court should only grant summary judgment "... when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. *Aetna Cas. & Surety Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963) and *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). When considering a motion for summary judgment, the trial court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. *Williams, Id.*

36) The Court concludes that there is no genuine issue as to any material fact and that Lloyd's is entitled to judgment as a matter of law pursuant to the statute of limitations, the doctrine of *res judicata*, assignment of the cause of action, and the doctrine of collateral estoppel.

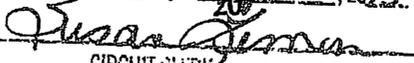
After due consideration of all the foregoing, and believing it proper so to do, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. Defendant Lloyd's cross-motion for summary judgment be, and the same is hereby, granted.
2. Plaintiff BLC's motion for summary judgment be, and the same is, hereby denied.
3. And the Clerk of this Court be, and is hereby, directed to mail a certified copy of this Order, which shall serve as notice to the parties of the judgment of the Court herein to counsel of record by first class mail.

ENTERED this 9th day of September 2015.


RICHARD A. FACEMIRE, CHIEF JUDGE

9/9/15

STATE OF WEST VIRGINIA
COUNTY OF BRAXTON, to-wit:
I, Susan Lemon, Circuit Clerk, do hereby certify that the foregoing is a true and accurate copy of an Order of record in my office in _____
Order Book No. _____ at page _____, as taken from the records.
Given Under My Hand this 15 day of Sept, 2015.

CIRCUIT CLERK

CERTIFICATE OF SERVICE

I, Steven L. Thomas, counsel for the Plaintiff, Braxton Lumber Co., Inc., do hereby certify that on the 9th day of October, 2015, I served the foregoing **NOTICE OF APPEAL** upon counsel for the Lloyd's, Inc., via First Class U.S. Mail, postage prepaid, as follows:

Timothy R. Butcher, Esq.
Butcher & Butcher
P.O. Box 100
Glenville, WV 26351



Steven L. Thomas (WVSB #3738)
Charles W. Pace, Jr. (WVSB#8076)
Kay Casto & Chaney PLLC
P.O. Box 2031
Charleston, WV 25327