

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES K. ABCOUWER,

Plaintiff,

v.

TRANS ENERGY, INC.,
a foreign corporation,
WILLIAM F. WOODBURN,
and LOREN E. BAGLEY,

Defendants.

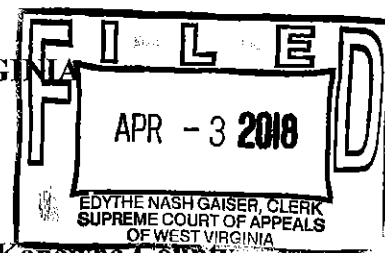
TO: The Honorable Chief Justice Margaret L. Workman

DEFENDANTS' MOTION TO REFER TO THE BUSINESS COURT DIVISION

In accordance with W. Va. T.C.R. 29.06, Defendants Trans Energy, Inc. ("Trans Energy"), William F. Woodburn ("Woodburn"), and Loren E. Bagley ("Bagley") (collectively, "Defendants") move to refer this case to the Business Court Division. In support of this Motion, Defendants state as follows:

I. FACTUAL BACKGROUND

1. This action involves a supposed agreement to sell Trans Energy. Trans Energy is an oil and gas company. (*See* Compl. ¶¶ 8 & 14, Ex. A.) Plaintiff James K. Abcouwer ("Abcouwer") alleges that Woodburn and Bagley agreed with Abcouwer to sell Trans Energy after Abcouwer, as its CEO, President, and Chief of the Board, successfully raised its value to a certain level or higher. (Compl. ¶¶ 6-9, Ex. A.) Abcouwer further alleges that Defendants refused to sell Trans Energy after he presented Defendants with commitments by one or more buyers that were willing to purchase the company for a value that met or exceeded the prior agreed upon value. (Compl. ¶¶ 17, 19-20, Ex. A.) Abcouwer alleges that he suffered damages because he



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“purchased thousands of shares of Defendants’ stock and further invested time and money on advancing the goals of the Defendants” and, after Trans Energy allegedly “refused to sell,” the “stock value and value of the company substantially decreased.” (Compl. ¶¶ 18-20, Ex. A.)

2. Defendants deny Abcouwer’s allegations. Defendants contend, among other things, that Abcouwer’s written employment agreement with Trans Energy, which Abcouwer drafted, did not include an agreement to sell Trans Energy if Abcouwer successfully raised its value to a certain level or higher. Defendants also point out that, any material agreement that could require a sale of a company would have to be disclosed by Trans Energy to the Securities Exchange Commission (“SEC”) on a Form 8-K or 10-K. *See SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 70 (D.C. Circ. 1980); 17 C.F.R. §§ 240.13a-1, 240.13a-11. Despite Abcouwer’s admission that the alleged agreement to sell Trans Energy would qualify as a material transaction, he never disclosed the agreement to the SEC on a Form 8-K, 10-K, or otherwise during his employment with Trans Energy.

II. STANDARD

3. The Business Court Division has jurisdiction to efficiently manage and resolve “litigation involving commercial issues” between parties engaged in business transactions. W. Va. T.C.R. 29.01. Specifically, the Business Court Division, upon proper referral and transfer by the Chief Justice of the Supreme Court of Appeals, may properly preside over and adjudicate “Business Litigation,” which is defined as “[o]ne or more pending actions in circuit court in which”:

1. the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
2. the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of

a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

3. the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va. T.C.R. 29.04(a)(1)-(3).

4. A party may file a motion to refer a case to the Business Court Division “after the time to answer the complaint has expired.” W. Va. T.C.R. 29.06(a)(2).

III. ARGUMENT

5. The Court should refer this action to the Business Court Division because it meets the requirements under W. Va. T.C.R. 29 for the following reasons: (A) Abcouwer’s claims and Defendants’ defenses “involve matters of significance to the transactions, operations, or governance between business entities”; (B) the parties’ dispute “presents commercial . . . issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution”; (C) Abcouwer’s claims are not within the meaning of “employee suits”; and (D) this Motion is timely. Additionally, pending before the Court is a motion to refer a related action to the Business Court Division.

A. Abcouwer's claims and Defendants' defenses "involve matters of significance to the transactions, operations, or governance between business entities."

6. The alleged agreement to sell Trans Energy involves transactions between business entities. In the Complaint, Abcouwer alleges:

8. Defendant, Trans Energy, by its officers and agents, Defendants Woodburn and Bagley represented to [Abcouwer] that Trans Energy, Inc. was in financial difficulties, its stock was valued at only \$.40 to \$.50 per share; that it had no employees and was on the verge of bankruptcy. Consequently, Defendants offer [Abcouwer] the position [CEO, President, and Chair of the Board] with the understanding that his duties would include resurrecting the company, beginning a drilling program and managing the company, to increase its value, viability, future and stability.

9. [Abcouwer] agreed to accept the position . . . on the condition that he would receive the stock options . . . and, further, once the goal was accomplished of optimizing the value of the company and its stock, that the company would be sold at the enhanced value and issue the profits to its stockholders

...

15. Defendants, on their own behalf and acting by its board of directors, in 2010, agreed that [Abcouwer] had accomplished the goals they had set for him to optimize the value of the company and agreed and directed [Abcouwer] to then sell the company for the reasonably best price.

16. [Abcouwer] then further agreed to continue his efforts and the parties affirmed that [Abcouwer] would obtain contracts to sell the company pursuant to the aforesaid contracts and agreements.

17. [Abcouwer], pursuant to the above, worked constantly for the next eight to nine months until he obtained a commitment and/or commitments from buyers who agreed to purchase the company for the reasonably optimum value of the company.

18. In further reliance upon Defendants' agreement, [Abcouwer] purchased thousands of shares of Defendants' stock and further invested time and money on advancing the goals of the Defendants.

19. When [Abcouwer] presented Defendants with the commitments by one or more buyers, Defendants negligently, carelessly and wrongfully and in violation of its contract refused to sell the company.

20. As a proximate result of Defendants' breach of the contract, the company was not sold, the stock value and value of the company substantially decreased, and [Abcouwer] was significantly damaged.

(Comp. ¶¶ 8-9, 15-20, Ex. A.)

7. Abcouwer's claims and Defendants' defenses "involve matters of significance to the transactions, operations, or governance between business entities," because at the heart of this action is an alleged agreement to sell Trans Energy.

B. The parties' dispute "presents commercial . . . issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution."

8. The nature of Trans Energy's business—oil and gas—adds to the "specialized" nature of this action beyond the ordinary complexities related to corporate transactions. Oil and gas transactions are especially complex because, in addition to the intricacies attendant to any corporate transaction, they also involve difficult mineral rights and real property issues. *See Teague v. Sawyer Drilling Co.*, 485 So. 2d 204, 210 n.3 (La. Ct. App. 1986) (describing the oil and gas industry as "complex"), *vacated on other grounds*, 491 So. 2d 14 (La. 1986); *see also Schulein v. Petroleum Dev. Corp.*, No. SACV111891AGANX, 2015 WL 12698312, at *5 (C.D. Cal. Mar. 16, 2015) (describing "technical issues in the oil and gas industries, and complicated financial valuations"); *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 113 (Tex. Ct. App. 1997) (explaining that the "business of drilling and producing oil and gas" is "complex and risky").

9. Indeed, Abcouwer and Defendants have designated experts to opine about issues in this action using their "specialized knowledge" concerning oil and gas transactions. To enable the Court and jury to understand the specialized nature of oil and gas transactions, which are central to the parties' dispute, Defendants designated an expert, Ryan Purpua, to opine about:

industry custom, general practices, documentation, binding and non-bindings, persons with authority, and pricing relating to a stock sale or asset sale by an oil and gas company, without limitation, letters of intent (binding and nonbinding),

stock purchase agreements, asset purchase agreements, and additions and reductions in price based on acreage included in a sale, *all of which are central to the instant dispute* between [Abcouwer] . . . and Defendants.

(Defs.' Expert Witness Disclosure 1-2, Ex. D (emphasis added).)

10. Defendants explained that Mr. Purpua's opinions would be based on, among other things, "his 10-year plus experience in the field of mergers, acquisitions, and joint ventures involving publicly traded and privately held energy companies, particularly oil and gas companies." (Defs.' Expert Witness Disclosure 3, Ex. D.).

11. Abcouwer designated an expert, John Tittle, Jr. CPA/CFF/CGMA, CTP, CIRA, CDBV, to rebut Mr. Purpua's opinions. (Pl.'s Disclosure of Rebuttal Expert Witness 1, Ex. E.) Abcouwer explained that Mr. Tittle had the following relevant experience:

Mr. Tittle has been involved in the oil and gas industry since 1979, during which time he acted in the capacities of accountant and advisor. . . . Mr. Tittle has taken a company public and served for three years as its Chief Financial Officer, Treasurer, and Board Member. In this role, he closed nine acquisitions, handling all due diligence and negotiations from expressions of interest, execution of the letters of intent, and consummation of the transactions through definitive agreements. He also took 17 other potential transactions to the letter of intent stage.

(Pl.'s Disclosure of Rebuttal Expert Witness 1, Ex. E.)

12. The dispute presents commercial issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy due to the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable.

C. Abcouwer's claims are not within the meaning of "employee suits."

13. The claims in this case do not involve any of the types of claims excluded from the Business Court Division by W. Va. T.C.R. 29.04(a)(1)-(3), including "employee suits."

14. While the Court has not had the opportunity to define the meaning of “employee suits” under W. Va. T.C.R. 29.04, the Court’s opinions about the meaning of “employee” persuasively suggests that “employee suits” do not include claims by a “partner, owner, or part-owner.” See *Hanlon v. Chambers*, 195 W. Va. 99, 107, 464 S.E.2d 741, 749 (1995); see also *Woodall v. Int’l Bhd. of Elec. Workers, Local 596*, 192 W. Va. 673, 677, 453 S.E.2d 656, 660 (1994).

15. In *Hanlon*, the Court held that “[a] supervisor is an employee under the West Virginia Human Rights Act . . . at least where the individual is not a partner, owner, or part-owner.” Syl. pt. 6, *Hanlon*, 195 W. Va. 99, 464 S.E.2d 741 (emphasis added).

16. In the Complaint, Abcouwer alleges that he was the “former Chairman, Chief Executive Officer, and President” of Trans Energy. (Compl. ¶ 4, Ex. A.) More importantly, however, he alleges that he suffered damages because (1) he “purchased thousands of shares of Defendants’ stock and further invested time and money on advancing the goals of the Defendants” and, (2) after Trans Energy allegedly “refused to sell,” the “stock value and value of the company substantially decreased.” (Compl. ¶¶ 18-20, Ex. A.) In other words, Abcouwer’s damages resulted from his ownership interest in Trans Energy, not simply because he had an employment agreement with Trans Energy. The phrase “employee suits” could not have been intended to include claims, like those in this action, involving a part-owner seeking to recover amounts he or she lost as a result of the decrease in the value of an ownership share. See Syl. pt. 6, *Hanlon*, 195 W. Va. 99, 464 S.E.2d 741. Because Abcouwer’s alleged damages resulted from his status as a “part-owner” of Trans Energy, this action does not meet the definition of “employee suits.”

D. This Motion is timely.

17. This Motion is timely because, as required by W. Va. T.C.R. 29.06(a)(2), it is properly filed after the time to answer the Complaint has expired. The Complaint was filed on January 14, 2013.

E. Pending before the Court is a motion to refer a related action to the Business Court Division.

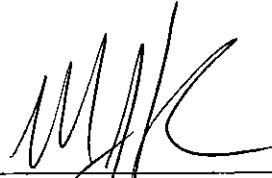
18. On February 14, 2018, the parties filed a joint motion to refer a related action, *James K. Abcouwer v. Trans Energy, Inc.*, Civil Action No. 12-C-416, to the Business Court Division. That action involves a dispute over the interpretation of a corporate stock option awarded as part of Trans Energy's compensation and incentive package to Abcouwer.

19. As required by W. Va. T.C.R. 29.06(a)(1), Defendants have attached the following Exhibits to this Motion:

Document	Exhibit
Complaint	A
Answer	B
Docket Sheet (Civil Action No. 13-C-56)	C
Defendants' Expert Witness Disclosure	D
Plaintiff's Disclosure of Rebuttal Expert Witness	E

WHEREAS, Defendants respectfully request that, in accordance with W. Va. T.C.R. 29.06, the Chief Justice of the Supreme Court of Appeals refer this case to the Business Court Division together with such other relief as the Court may deem proper.

Respectfully submitted this 3rd day of April, 2018.



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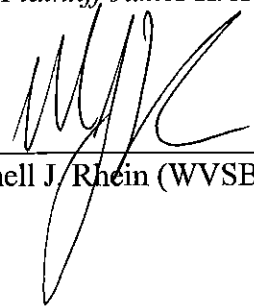
Defendants.

CERTIFICATE OF SERVICE

I, Mitchell J. Rhein, certify that I served the **Defendants' Motion to Refer to the Business Court Division** on Plaintiff on this 3rd day of April, 2018, by depositing the same in the United States mail, postage prepaid, addressed to counsel as follows:

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Mitchell J. Rhein (WVSB # 12804)