

In the Circuit Court of Tucker County, West Virginia

Kapitus Servicing Inc.,
Plaintiff,

v.

Case No. CC-47-2022-C-4
Judge Michael Lorensen

**c/O Martin Sheehan, ESQ. Timberline
Four Seasons Utilites, Inc.,
Receiver of Timberline Utilities
Canaan Valley Public Sercice
District,
Defendants**

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS

This matter came before the Court this 20th day of December 2022 upon Defendants' Motion to Dismiss. A hearing was held on Defendants' Motion to Dismiss held via Microsoft Teams on October 11, 2022, commencing at 2:00 p.m., wherein the parties each presented oral argument. Colton C. Parsons, Esq. and Ben M. McFarland, Esq. appeared for Plaintiff, Kapitus Servicing, Inc., John W. Cooper, Esq. and Jeffrey S. Zurbuch, Esq. appeared for Defendant Canaan Valley Public Service District, and Martin P. Sheehan, Esq. appeared for Defendant Timberline Four Seasons Utilities, Inc.

FINDINGS OF FACT

1. In this civil action, Plaintiff Kapitus (hereinafter "Kapitus" or "Plaintiff") alleges that Defendant Timberline Utilities, among others, voluntarily entered a Revenue Based Factoring Agreement (hereinafter the "Agreement") with Kapitus on April 28, 2017, wherein Kapitus purchased Timberline Utilities's "future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies" and was granted a security interest in Timberline Utilities's personal property from Timberline Utilities's "customers and/or third-party payors" for the sum of One Hundred Thirty

Thousand and 0/100 Dollars (\$130,000.00). Plaintiff further alleges that prior management of Timberline acted fraudulently in its negotiation of the financial transactions which are the subject of this lawsuit. See Def's Mem., p. 3.

2. On or about April 11, 2022, the pending Motion to Dismiss was filed by Defendants Canaan Valley Public Service District, individually, and in its capacity as Receiver for Timberline Four Seasons Utilities, Inc. and Timberline Four Seasons Utilities, Inc.
3. A response to the instant motion was filed by Plaintiff on or about June 6, 2022. This civil action was then referred to the Business Court Division and assigned to the undersigned. After the undersigned ordered that Defendants shall file any Reply to the response of the pending Motion to Dismiss by September 7, 2022 at the status hearing held August 17, 2022 in this matter, Defendants did file a Supplemental Brief on September 7, 2022.
4. Oral argument was heard at the October 11, 2022 hearing.
5. Following this, the undersigned indicated he would take the matter under advisement. The undersigned directed counsel to submit proposed orders, with findings of fact and conclusions of law, by November 1, 2022.
6. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF DECISION

This matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). “Since the preference is to decide cases on their merits, courts presented with a motion to

dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true.” *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). “We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Marv. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

In this matter, Canaan Valley Public Service District (hereinafter “CVPSD”), individually, and in its capacity as Receiver for Timberline Four Seasons Utilities, Inc. and Timberline Four Seasons Utilities, Inc. (hereinafter “Timberline” or “Timberline Utilities”, together hereinafter “Defendants”) seek to dismiss the complaint against them because they allege the very transactions upon which this lawsuit is based are void, because West Virginia code requires that a utility cannot engage in certain types of conduct, specifically entering into any financial transaction with an affiliate of the utility, without prior Public Service Commission (hereinafter “PSC”) approval, and if the utility does not, the statute directs that such conduct and transaction shall be void to the extent that the interests of the public in this state are adversely affected. See Def’s Mem., p. 1, 9. Importantly, Defendants argue the PSC has entered a decision/order that declared each component of the underlying transactions void for this reason. *Id.* at 11. On the other hand, Plaintiff argued in its Response that the PSC’s order does not void the relevant agreement because the Bankruptcy Court for the Northern District of West Virginia had previously ruled in a prior order that the agreement is enforceable at Kapitius’s discretion. See Pl’s Resp., p. 1-2.

West Virginia Code §24-2-12 prohibits a contract for sale of anything other than

“unnecessary” property of a utility without the prior approval of the Public Service Commission. Defendant avers that among the prohibited types of conduct applicable to this case under the enumerated types contained in §24-2-12 are (1) the sale of property of the utility and (2) entering into any financial transaction with an affiliate of the utility. See Defs’ Mem., p. 9.

West Virginia Code §24-2-12 provides, in pertinent part:

Unless the consent and approval of the public service commission of West Virginia is first obtained.....(c) no public utility subject to the provisions of this chapter....may assign, transfer, lease, sell, or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof....;(f) no public utility subject to the provisions of this chapter...may, by any means, direct or indirect, enter into any contract or arrangement for management, construction, engineering, supply or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest...

W. Va. Code Ann. § 24-2-12 (West).

Further, the West Virginia Supreme Court of Appeals, in *Lockard v. City of Salem*, answered the question of whether a contract was legal and enforceable, or whether it was void because it was not initially submitted to the Public Service Commission of West Virginia for approval pursuant to West Virginia Code § 24-2-12. *Lockard v. City of Salem*, 127 W. Va. 237, 32 S.E.2d 568, 570 (1944).

In *Lockard*, the defendant city of Salem, West Virginia leased its municipal water system (a public utility within the meaning of West Virginia Code § 24-2-12) to plaintiff A. Page Lockard for a period of ten years, without having first obtained the consent of the Public Service Commission. *Id.* at 568-69, 571. The Court described the issue as follows:

Because the right to such future profits can be asserted successfully only if the alleged contract created a valid and subsisting lease of the water system during the ten-year

period purported to be covered thereby, the controlling question in this case is whether the contract was legal and enforceable, or whether it was void because it was not initially submitted to the Public Service Commission of West Virginia for approval, or, to state it another way, the proposed lease not having received the consent and approval of the Public Service Commission, was there at any time a legal and valid contract of lease?

Lockard v. City of Salem, 127 W. Va. 237, 32 S.E.2d 568, 570 (1944).

This Court considers the underlying policy for West Virginia Code § 24-2-12, as explained by the Supreme Court of Appeals in *Lockard*:

“In [*City of Mullens v. Union Power Co.*, 122 W. Va. 179, 7 S.E.2d 870 (1940)]this Court declared that ‘It is the policy of the law of this state that all public utilities, whether publicly or privately owned, shall be subject to the supervision of the Public Service Commission.’”

Lockard v. City of Salem, 127 W. Va. 237, 32 S.E.2d 568, 572 (1944); *citing City of Mullens v. Union Power Co.*, 122 W. Va. 179, 7 S.E.2d 870 (1940).

Further, this Court considers that *Lockard* is a 1944 case, and considers the fact that its research has revealed that the West Virginia Supreme Court of Appeals has stated and found it proper for the PSC to approve one of the factors of §24-2-12 in 2014. *See W. Virginia Action Grp. v. Pub. Serv. Comm'n of W. Virginia*, 233 W. Va. 327, 337, 758 S.E.2d 254, 264 (2014). In *W. Virginia Action Grp. v. Pub. Serv. Comm'n of W. Virginia*, the Supreme Court of Appeals declared as follows:

“Significantly, inter-affiliate transactions are not *per se* invalid under W. Va. Code § 24–2–12. Moreover, this Court has found it proper for the Commission to approve inter-affiliate transactions. *See United Fuel Gas Co. v. PSC*, 154 W.Va. 221, 174 S.E.2d 304 (1969) (reversing the PSC's denial of a realignment plan between public utilities all of which were subsidiaries of a parent holding corporation).”[1]

W. Virginia Action Grp. v. Pub. Serv. Comm'n of W. Virginia, 233 W. Va. 327, 337, 758 S.E.2d 254, 264 (2014).

Further, the West Virginia Supreme Court of Appeals has held that: “[a]n order

of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.’ *United Fuel Gas Company v. The Public Service Commission*, 143 W.Va. 33, [99 S.E.2d 1 (1957).]” Syl. Pt. 5, in part, *Boggs v. Public Service Comm’n*, 154 W.Va. 146, 174 S.E.2d 331 (1970); Syl. Pt. 1, *Broadmoor/Timberline Apartments v. Public Service Commission of West Virginia*, 180 W.Va. 387, 376 S.E.2d 593 (1988); cited by *Jefferson Utilities, Inc. v. Pub. Serv. Comm’n of W. Virginia*, 227 W. Va. 589, 592, 712 S.E.2d 498, 501 (2011).

Here, Plaintiff argues that the PSC Order should not be followed by this Court due to the competing prior order of the Bankruptcy Court of the Northern District of West Virginia. See Pl’s Resp., p. 1. The Bankruptcy Court considered West Virginia Code §24-2-12 and *Lockard v. Salem* and, distinguishing *Lockard*, decided specifically not to follow *Lockard*, finding that the Agreement was voidable and not void as West Virginia Code §24-2-12 directs. The Court notes the Bankruptcy Court’s Order was attached to the instant motion in Exhibit 3, and was also found in this Court’s research on the issue on Westlaw (See *In re Timberline Four Seasons Utilities, Inc.*, No. 2:21-BK-00125, 2021 WL 4952613 (Bankr. N.D.W. Va. Oct. 25, 2021)).

In fact, the Bankruptcy Court’s Order stated that the analysis of the voidability language contained in the dissent of the *Lockard* decision was more in line with West Virginia state law in its view. *In re Timberline Four Seasons Utilities, Inc.*, No. 2:21-BK-00125, 2021 WL 4952613, at *7 (Bankr. N.D.W. Va. Oct. 25, 2021). Judge Lovins, in his dissent in *Lockard*, stated “I am not in agreement with the conclusion expressed in the majority opinion which is premised on the theory that the contract between the plaintiff and defendant is wholly void.” *Lockard v. City of Salem*, 127 W. Va. 237, 32 S.E.2d 568, 573 (1944) (Lovins, J., dissenting).

But it is this Court's duty to follow the law and directives of the West Virginia Supreme Court of Appeals, which outlined above, as clearly and in plain language stated that pursuant to West Virginia Code § 24–2–12, prior approval must be given before the sale of property of the utility and/or entering into any financial transaction with an affiliate of the utility, PSC orders are to be given deference in West Virginia Courts and not disturbed unless "such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles" (see *Jefferson Utilities, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 227 W. Va. 589, 592, 712 S.E.2d 498, 501 (2011)), and that the underlying rationale and black letter West Virginia law is that all public utilities shall be subject to the supervision of the PSC (see *City of Mullens v. Union Power Co.*, 122 W. Va. 179, 7 S.E.2d 870 (1940)).

This Court notes that Plaintiff argues the Court should follow the Bankruptcy's Court order, because it was a prior order. See Pl's Resp., p. 1. On the other hand, Defendant argues the PSC order should be given deference because it was the later order, citing a Third Circuit case in support of this averment. See Defs' Suppl. Br., p. 6. The Court, in considering the competing holdings from the PSC Order and the federal Bankruptcy Court order, concludes it must follow the West Virginia Supreme Court of Appeals, which gives deference to PSC orders. The PSC Order in this case is also consistent with West Virginia Code and West Virginia case law, as described above, while the Bankruptcy Court's order considered the relevant case law, and decided to issue a conclusion consistent with the dissent in *Lockard*.

For all of these reasons, the Court concludes it must give deference to the PSC order, which concluded that the subject contract was void because prior approval was not sought, pursuant to West Virginia Code § 24–2–12. As such, the Court finds that Count I of the Complaint, Breach of Contract, must be dismissed.

However, the Court considers the other Counts in the Complaint deal with issues outside of the contract, and finds that it would be inappropriate to dismiss those counts at this stage in the litigation. For these reasons, the Court concludes the instant motion is GRANTED IN PART.

Further, W.Va.R.Civ.P. 54(b) permits the Court to “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” The Court FINDS that there is no just reason for delay of entry of judgment with regard to this Order’s dismissal of Count I. This Court concludes this Order is a final, appealable order pursuant to W.Va.R.Civ.P. 54(b).

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants’ Motion to Dismiss is hereby GRANTED IN PART. It is further hereby ADJUDGED and ORDERED that Count I of the Complaint, Breach of Contract, is hereby DISMISSED WITH PREJUDICE. It is further hereby ADJUDGED and ORDERED that there is no just reason for delay of entry of judgment with regard to this Order’s dismissal of Count I, pursuant to W.Va.R.Civ.P. 54(b).

The motion to dismiss as to all other counts is denied.

The Court hereby notes the objections and exceptions of any party to any adverse rulings. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTER: December 20, 2022

[1]The Court notes that in *W. Virginia Action Grp.*, the Supreme Court confirmed it was proper for the PSC to approve inter-affiliate transactions, and in that case, “[t]he Commission specifically found that the transaction at issue does not give one party an undue advantage over another party, and the petitioner has failed to convince [the Court] that this finding is in error.” *W. Virginia Action Grp. v. Pub. Serv. Comm’n of W. Virginia*, 233 W. Va. 327, 337, 758 S.E.2d 254, 264 (2014). This Court recognizes that in *W. Virginia Action Grp.* the Court found the inter-affiliate transactions at issue were not invalid under W.Va. Code §24-2-12 because the PSC can and did approve such a transaction. However, here, it is undisputed that approval was not sought prior to Kapitrus entering into the Agreement with Defendant Utilities. Moreover, this fact was recognized by the Bankruptcy Court. See *In re Timberline Four Seasons Utilities, Inc.*, No. 2:21-BK-00125, 2021 WL 4952613, at *1 (Bankr. N.D.W. Va. Oct. 25, 2021).

/s/ Michael Lorensen
Circuit Court Judge
21st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswwv.gov/e-file/ for more details.