

IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

DAN RYAN BUILDERS WEST VIRGINIA, LLC,)
)
Plaintiff,)
v.)
)
OVERLAY I, LLC,)
)
Defendant.)

Civil Action No.: 20-C-110
(Berkeley Co.)
No. 21-BCD-7

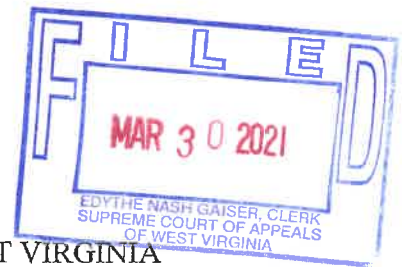
**PLAINTIFF'S BRIEF IN SUPPORT OF JUDICIAL
MOTION TO REFER CASE TO BUSINESS COURT DIVISION**

Plaintiff Dan Ryan Builders West Virginia, LLC ("DRB," or "Plaintiff"), by and through its undersigned counsel and pursuant to the Order entered by this Honorable Court on 3/17/21, respectfully submits the following in support of the Judicial Motion (submitted by the Circuit Court for Berkeley County, West Virginia) to refer the above-captioned matter to the Business Court Division (the "Motion to Refer"). For the reasons herein stated, and such others as this Court finds persuasive, the Motion to Refer should be granted and this case transferred to the Business Court Division for all purposes and proceedings going forward, including scheduling and trial.

I. Argument

As the Court knows from the Complaint and Amended Complaint,¹ this dispute between two business entities involves alleged breach and requested redress and enforcement of certain contract rights and obligations involving a commercial (non-consumer) real estate transaction, in

¹ To the extent the Court is not already aware, after the Motion to Refer was filed but prior to the filing of this brief DRB filed an Amended Complaint in the pending action. That Amended Complaint, which was filed both in an effort to moot all or at least some of the Defendant's then-pending Motion to Dismiss and to further clarify the factual underpinnings of DRB's claims, does not fundamentally alter the substance of the claims and/or the reasons why the Motion to Refer should be granted.



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which DRB agreed to purchase, and Defendant Overlay I, LLC (“Defendant”) agreed to sell, certain real property (as entitled and developed residential building lots) located in Berkeley County, West Virginia (the “**Property**”).

It is DRB’s position that the terms of the parties’ binding contract documents (*e.g.*, DRB’s notice of partial termination of the so-called “Second Amendment”) unambiguously dictate the entry of judgment in DRB’s favor. However, the complexity of the contractual relationships (at first blush, at least) and of the land entitlement and development process, invite specialized knowledge and expertise in such complex real estate transactions, and of agreements governing such transactions, which would aid in assuring a fair and complete resolution to the controversy.

So too, and perhaps even more compelling, is the fact that this matter will (in the expected event DRB prevails on the liability aspect of its specific performance claim) necessarily involve an understanding and evaluation of the costs that will be required in order for DRB to develop the subject property into the “finished” state in which they were promised in the parties’ agreement.² That analysis will involve testimony by both fact and expert witnesses regarding complex land development principles/requirements and financial particulars (including but not

² In short, given the Defendant’s alleged breach, in order to transform the subject property from its current state to the state it was promised to be in under the parties’ agreement (once conveyed to DRB per DRB’s specific performance count), DRB will be required to undertake the development work that the Defendant was supposed to perform but did not, and the costs that DRB will incur in connection with that work must be taken into account and deducted from any sum that DRB would be required to pay in exchange for that property (in its now-current state). Thus, rather than the total remaining amount that DRB would have been required to pay under the parties’ agreement for the subject property had it been in the state as promised by the Seller Defendant, the amount now to be paid to the Defendant must necessarily be (i) the remaining purchase price, less (ii) the amounts that will be required for DRB to perform the work that the Defendant failed to. Of course, if the amount of that work to be performed by DRB exceeds the remaining sales price under the parties’ agreement, then DRB should be entitled to a deficiency judgment against the Defendant to account for those excess costs.

limited to costs), which will ultimately determine the sum that DRB will be required to pay Defendant for the property in question or, in the alternative, the additional amount that DRB should be entitled to receive from the Defendant in order for DRB to realize DRB's (as-planned) benefit of its bargain – *albeit* activities that DRB will now be required to finance itself – to substitute for the Defendant's as-promised (but failed) performance. For this additional reason, the Business Court's more specialized knowledge and experience in such matters should help further assure a fair and reasonable resolution of this controversy.

Finally (and relatedly), the subject Property is part of a larger tract of land still owned by the Defendant (and/or by others to whom/which the Defendant conveyed during the pendency of this lawsuit). As explained in the Complaint/ Amended Complaint, at least some of the specific property which DRB is entitled to purchase has not yet been legally separated from that larger tract (*e.g.*, via record plat). Further, in order to perform the development activities DRB will be required to undertake in order to change the subject Property from its current state to the as-promised "finished lots," DRB – as necessarily implied easement grantee – will be required to enter onto portions of Defendant's larger tract of land (*e.g.*, in order to access the specific property to which DRB is entitled to purchase). In both instances, the Court will be required to undertake an analysis (after presentation of proof by the parties) of property boundaries in order to determine (i) the specific Property which is to be conveyed to DRB under its specific performance claim, and (ii) the additional specific property use rights (*e.g.*, as necessarily implied easement grantee) over which DRB should have rights (*e.g.*, in the nature of a necessarily implied temporary easement) in order to perform its development work to substitute for the Seller Defendant's failed performance. Here again, the more particularized experience of

the Business Court in such matters should further assure that this lawsuit would be correctly adjudicated and/or more quickly otherwise resolved between the parties.

II. Conclusion

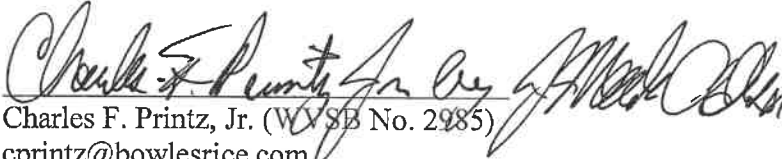
For all of the foregoing reasons, DRB supports the Judicial Motion and joins in asking that it be granted.

Respectfully submitted,

DAN RYAN WEST VIRGINIA
BUILDERS, LLC, a Maryland LLC

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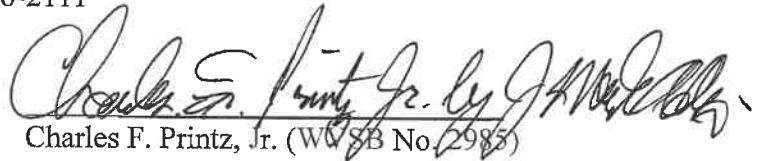
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 2021, a true and correct copy of the foregoing was served upon the below-named counsel by U.S. mail, postage prepaid, and by facsimile:

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