

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS,**

**SCA EFiled: Sep 23 2022
01:10PM EDT
Transaction ID 68153212**

Plaintiff,

v.

**Tucker County Circuit Court
Civil Action No.: 22-C-11
Judge James W. Courier, Jr.**

**KOKOSING CONSTRUCTION
COMPANY, INC.**

Defendant.

JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

TO: The Honorable Chief Justice

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the parties to this action, the West Virginia Department of Transportation, Division of Highways, (“DOH”) and Kokosing Construction Company, Inc. (“KCC”), jointly, by their undersigned counsel, respectfully request this case be referred to the Business Court Division. In support thereof, the parties present the following:

Background

1. On July 5, 2022, DOH filed a complaint (the “Complaint”) in Tucker County, West Virginia, seeking declaratory judgement regarding the parties’ rights and responsibilities under the operative contract for the construction of a portion of highway and a bridge located in Tucker County, West Virginia. DOH also asserts claims against KCC for breach of that contract.
2. On August 17, 2022, KCC filed an answer to the Complaint. KCC disputes any breach of contract and states that DOH is not entitled to declaratory judgment.

3. The issues in the case relate to the complex bidding and contracting process for Division of Highways Design/Build projects, the assessment of technical design and construction methods for the construction of a highway bridge, the impact of and responsibility for actual geological conditions encountered at the site and the potential interpretation of a significant contract clause in the construction agreement between the parties.

4. Because this case presents contract clause interpretations and a high level of technical complexity, and issues in which the specialized treatment of the Business Court Division is likely to improve the likelihood of a fair and reasonable resolution, referral is proper.

Legal Standard

5. The Business Court Division was established under Rule 29.04 of the West Virginia Trial Court Rules to provide specialized treatment for cases in which the dominant claims are related to commerce, are complex, and would benefit from particular expertise. TCR 29.04.

6. “Business Litigation” is defined by TCR 29 as a civil action 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].

TCR 29.04(a).

7. The claims and relief sought in this case quite clearly fit within the criteria for transfer to the Business Court Division. First, the case involves matters of significance to the interpretation

of a commercial agreement between business entities, DOH and KCC, and is therefore properly defined as a “business litigation” under the rule.

8. Additionally, the dispute centers on the bidding and contracting process of the Division of Highways, a process that is both complex and consequential given the scope of DOH’s work across the state.

9. The case also involves highly technical issues related to geological conditions and investigations as well as bridge design and construction methods for which referral to the Business Court Division is likely to improve the expectations of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise. Further, the principal claims in this case do not involve any of the categories of claims excluded for the definition of Business Litigation under TCR 29.04(a).

10. Therefore, in light of the commercial nature of this dispute and need for specialized treatment due to complex legal and technological issues, the principal claims in this case fall within the jurisdiction of the Business Court Division.

11. As required by TRC 29.06(a)(1), the Petitioners state that, on September 2, 2022, KCC filed an affirmative claim for relief seeking an estimated \$70 million dollars in extra costs associated with an alleged differing site condition against DOH before the Legislative Claims Commission. On September 19, 2022, DOH filed an Answer and a Motion to Stay the Legislative Claims Commission claim proceeding pending the resolution of this case.

12. In further support of this Motion, please find attached hereto the following documents: Complaint (**EXHIBIT A**); Answer (**EXHIBIT B**); Notice of Issuance of Duces Tecum (**EXHIBIT C**); Plaintiff’s Notice of Inspection to Defendants (**EXHIBIT D**), and the Tucker County Circuitry Clerk Docket (**EXHIBIT E**).

WHEREFORE, the undersigned hereby move, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted,

**WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION,
DIVISION OF HIGHWAYS**

By Counsel
BAILEY & GLASSER LLP

/s/ Benjamin L. Bailey
Benjamin L. Bailey (WVSB #200)
Bailey & Glasser LLP
209 Capitol Street
Charleston, West Virginia 25301
(304) 345-6555
(304) 342-1110 *facsimile*
bbailey@baileyglasser.com
Counsel for Plaintiff

**KOKOSING CONSTRUCTION COMPANY,
INC.**

By Counsel
BOWLES RICE LLP

/s/ Kenneth E. Webb, Jr.
Kenneth E. Webb, Jr. (WVSB #5560)
J. Mark Adkins (WVSB #7414)
Bowles Rice LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
kwebb@bowlesrice.com
madkins@bowlesrice.com
Counsel for Defendant

**IN THE SUPREME COURT OF WEST VIRGINIA
BUSINESS COURT DIVISION**

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS,**

Plaintiff,

v.

**Tucker County Circuit Court
Civil Action No.: 22-C-11
Judge James W. Courier, Jr.**

**KOKOSING CONSTRUCTION
COMPANY, INC.**

Defendant.

CERTIFICATE OF SERVICE

I, Benjamin L. Bailey, hereby certify that I caused a true and correct copy of the **Joint Motion to Refer Case to the Business Court Division** on this 23rd day of September, 2022, to be electronically filed with the Court using the File & ServeXpress system, which will provide copies to counsel of record and that a copy was served via electronic mail and/or U.S. Mail upon the following:

Kenneth E. Webb, Jr. (WVSB #5560)
J. Mark Adkins (WVSB #7414)
Bowles Rice LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
kwebb@bowlesrice.com
madkins@bowlesrice.com
Counsel for Defendant

Sharon Moats, Clerk
Tucker County Circuit Court
Tucker County Courthouse
211 First Street, Suite 407
Parsons, West Virginia 26287

Business Court Division Central Office
Berkley County Judicial Center
380 West South Street, Suite 2100
Martinsburg, WV 25401

/s/ *Benjamin L. Bailey*
Benjamin L. Bailey (WVSB #200)