

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREEDA LARCH and
JIMMIE LARCH,

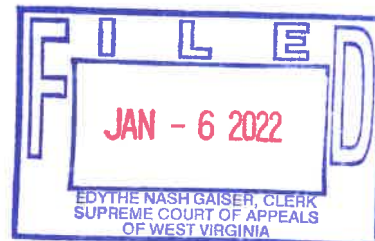
Plaintiffs,

v.

Civil Action No.: 17-C-1032
Kanawha County Circuit Court
Judge Tera L. Salango

BURDETTE REALTY IMPROVEMENT, INC.
and JON BURDETTE,

Defendants.



TO: THE HONORABLE CHIEF JUSTICE JOHN A. HUTCHISON

DEFENDANTS' JOINT MOTION TO REFER
TO THE WEST VIRGINIA BUSINESS COURT DIVISION

COME NOW, the Defendants Burdette Realty Improvement, Inc. ("BRI") and Jon Burdette (collectively, the "Defendants"), by counsel, and respectfully move this Court to refer this civil action to the West Virginia Business Court Division (the "Business Court Division")¹. In support of their motion, the Defendants state as follows:

¹ As required by West Virginia Trial Court Rule 29.06(a), a true and accurate copy of the following documents are attached hereto: Docket Sheet as Exhibit A; Amended Complaint as Exhibit B; Answer of Burdette Realty Improvement, Inc. to Plaintiffs' Amended Complaint as Exhibit C; Answer of Jon Burdette to Plaintiffs' Amended Complaint and Jon Burdette's Counterclaim Against Plaintiffs as Exhibit D; Motion for Partial Summary Judgment Filed on Behalf of Defendant Burdette Realty Improvement, Inc. and Memorandum in Support of Defendant Burdette Realty Improvement, Inc.'s Motion for Partial Summary Judgment as Exhibit E; Plaintiffs' Response to Defendant Burdette Realty Improvement, Inc.'s Motion for Partial Summary Judgment as Exhibit F; Defendant Burdette Realty Improvement, Inc.'s Reply Brief in Connection with the Motion for Partial Summary Judgment as Exhibit G; Order Denying Motion for Partial Summary Judgment as Exhibit H; Motion for Appointment of Commissioners for Partition of Real Property as Exhibit I; Defendant Burdette Realty Improvement, Inc.'s Response to Plaintiffs' Motion for Appointment of Commissioners for Partition of Real Property as Exhibit J; Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Appointment of Commissioners as Exhibit K; and Defendant Burdette Realty Improvement, Inc.'s Supplemental Response to Plaintiffs' Motion for Appointment of Commissioners for Partition of Real Property as Exhibit L.

STATEMENT OF CASE

BRI is a family-owned, closely held corporation established in 1967; BRI engages in the following business activities: (a) owning and managing commercial and residential real estate, (b) owning interests in business entities which themselves own and manage real estate, selling and erecting prefabricated metal buildings, and (c) providing remodeling, renovation, plumbing, electrical, heating, ventilation, and air conditioning services on properties owned by third-parties. Presently, Jon Burdette (“Jon”) and his immediate family own approximately 52% of the outstanding stock of BRI. Freeda Larch (“Freeda”), and her son, Jimmie Larch (“Jimmie”), the plaintiffs in this matter (sometimes hereinafter referred to collectively as the “Plaintiffs”), own the remaining minority interest of 48%: comprised of approximately 25.58% owned by Jimmie and 22.79% owned by Freeda.

In the years leading up to the commencement of this litigation, Jimmie Larch continually sought to be bought out of BRI through the distribution of certain BRI assets and/or cash to him with such a buyout also including Freeda. The Defendants negotiated in good faith to reach a buyout for Jimmie and Freeda; however, those negotiations have been unsuccessful because the Plaintiffs believe that they are entitled to more property than their interests in BRI is worth.

The Amended Complaint in this matter alleges three counts. See Am. Compl attached as Exhibit B. Count I is an attempt by the Plaintiffs to use the West Virginia partition statute seeking the court to order the division of BRI’s real estate between and among the shareholders. W. Va. Code § 37-4-1. This statute permits a stockholder of a closely held corporation, when there are no more than five stockholders, and the “only substantial asset of the corporation is real estate”, to compel partition of that sole asset. *Id.* Under this statute, it is essential that the only substantial asset of the corporation be real estate.

Count II is an allegation that Jon Burdette as majority shareholder has “oppressed” the Plaintiffs to such an extent that the court should fashion a remedy to overcome this oppression. However, the Plaintiffs have been unable to articulate any legally cognizable oppression they have suffered or any actions that could remedy the alleged oppression or to provide the Larches “commensurate value” for their stock.

Count III deals with a letter sent to Freeda ten years ago which promised that BRI would take certain actions to buy out her interest in BRI. Freeda has admitted that BRI tendered deeds to the properties referenced in the letter and that she refused to accept delivery of the same (i.e. BRI performed its promise to her but she refused to accept such performances); this count was dismissed on May 16, 2019. Stip. of Dismissal of Count III of Pl’s Am. Compl.

In its Answer of Burdette Realty Improvement to Plaintiff’s Amended Complaint, BRI makes three counterclaims against the Plaintiffs. See Exhibit C. The first count alleges that Jimmie improperly used and damaged BRI assets and resources without permission and without paying BRI for the value of those services, equipment, and damages. In that same count, BRI alleges that Freeda improperly used private confidential company information to her own personal benefit. This allegation relates primarily to Freeda taking out life insurance policies on at least five BRI employees without the insureds’ knowledge, naming herself as the beneficiary, paying the premiums out of various BRI-affiliated company checking accounts, making claims on each insured person’s policy upon their death, and personally receiving the insurance proceeds.

BRI also seeks damages against the Plaintiffs for the losses which will result if the request by the Plaintiffs that the real estate of BRI be divided among the shareholders is granted. Specifically, a sizable loan is secured by many of BRI’s most profitable properties. This loan has a standard due on sale clause, which would be triggered if BRI’s assets are sold through partition

sale, as W. Va. Code § 37-4-1 requires. This in turn will cause the breach of various leases and contractual obligations of BRI (including sixty-eight (68) contracts totaling \$3,022,500 that BRI is obligated to under non real-estate divisions of BRI) and will, in essence, cause the destruction of BRI as a going concern. BRI will then be forced to terminate the employment of BRI's thirty employees. Further, the loan was entered into for the benefit of BRI, which all of its stockholders, including the Plaintiffs, benefit from. As a result, the Plaintiffs should be estopped from the relief sought because they benefitted and continue to benefit, from the loan.

Finally, BRI alleges that the actions of the Plaintiffs in essence constitute an attempt by the Plaintiffs to transfer or surrender their stock in BRI in return for consideration which, if true, gives rise to BRI's right to exercise an option to purchase the Plaintiffs stock at book value. This purchase right is contained in BRI's bylaws.

Jon Burdette, in his Answer of Jon Burdette to Plaintiff's Amended Complaint and Jon Burdette's Counterclaim also counterclaimed against the Plaintiffs. See Exhibit D. Jon has alleged that he will personally incur significant damages if Plaintiffs are allowed to divest the company of a significant amount of its real estate assets. Of particular importance, Jon has personally guaranteed the company debt, the acceleration of that debt by virtue of the due on sale clauses in the deeds of trust will expose him to significant personal liability to the company creditors—a liability that no other BRI stockholder would be subject to.

Also, Jon Burdette claims damages against Freeda as a result of her clandestine actions in obtaining insurance policies on his father, Foster Burdette, without his knowledge, consent or approval. Upon Foster's death, Freeda made claims on at least two life insurance policies on his life and received the insurance proceeds from both. As the natural heir of his father, Jon Burdette seeks disgorgement of the insurance proceeds from Freeda Larch to himself.

LEGAL STANDARD

West Virginia Code § 51-2-15 and West Virginia Trial Court Rule 29 provide that civil actions which constitute “business litigation” are eligible for transfer to the Business Court Division. The term “business litigation” is defined, in pertinent part, within the West Virginia Trial Court Rules as: one or more pending actions in circuit court in which (1) the principal claim involves matters of significance to the transactions, operations, or governance between business entities; (2) the dispute presents commercial issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy . . . ; and (3) the principal claim does not involve consumer litigation, non-commercial insurance disputes, employee suits, consumer environmental actions, consumer malpractice actions, consumer and residential real estate, domestic relations, criminal cases, eminent domain or condemnation, and administrative disputes with government organizations. W. Va. Tr. Ct. R. 29.04(a).

Any party or judge may seek a referral of “business litigation” to the Business Court Division by filing a Motion to Refer to the Business Court Division with the Clerk of this Court after the time to answer the complaint has expired. See W. Va. Tr. Ct. R. 29.06(a)(1)-(2). “A copy of the complaint, answer, docket sheet and any other documents that support referral under West Virginia Trial Court Rule 29.04(a) shall be attached to the motion.” W. Va. Tr. Ct. R. 29.06(a)(1). There is no time limit as to when, after an action has commenced, a party may move to refer the subject business litigation to the Business Court Division.

ARGUMENT

The present case should be referred to the West Virginia Business Court Division because it fits squarely within the definition of “business litigation” as set forth in West Virginia Trial

Court Rule 29.04(a). First, civil actions eligible for transfer to the Business Court Division include matters in which “the principal claim . . . involve[s] matters of significance to the transactions, operations, or governance between business entities.” W. Va. Tr. Ct. R. 29.04(a)(1).

BRI is a corporation incorporated under the laws of the state of West Virginia. Thus, BRI is a “business entity” for the purpose of West Virginia Trial Court Rule 29.04(a)(1). Currently, the Plaintiffs seek a partition of the real estate owned by BRI under W. Va. Code § 37-4-1. If the Plaintiffs are successful in their efforts to have a commissioner appointed to partition BRI’s real property, the Plaintiffs would, in essence, be forcing a dissolution of BRI. The income derived from the real property constitutes a sizable portion of BRI’s income. Forcing the sale of this real property would be severing one of BRI’s sizable income streams and in turn forcing the dissolution of BRI.

Also, this matter involves an issue of corporate governance regarding the buyout requirements contained within BRI’s bylaws. The Court must make a determination as to whether BRI is correct in its position that any buyout of the Plaintiffs’ shares must be in accordance with the BRI bylaws, and that any judicial partition of BRI’s assets would effectively circumvent the corporate bylaws buyout provisions by which all parties to this case are bound. Thus, this action falls within the requirements of West Virginia Trial Court Rule 29.04(a)(1).

Furthermore, the disputes within the Business Court Division must present commercial 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. The principal issue of this case is what constitutes “only substantial asset” under W. Va. Code § 37-4-1 presents an issue of first impression for West Virginia courts. There is no definition of

“substantial” or “only substantial asset” under West Virginia law with which a court may work from to decide this issue. As such, the judge presiding over this case will eventually be forced to make a finding of this question of law as to what constitutes “only substantial asset” of a business. A judge who is familiar and interested in business law concepts will greatly impact the disposition of this case due to the depth of analysis and fact investigation that is necessary to reach a well-reasoned decision as to the definition of “only substantial asset.” As such, the subject matter of this case falls within the subject matter contemplated as “business litigation” under West Virginia Trial Court Rule 29.

Third, the principal claims asserted in this litigation do not involve any of the categories of claims expressly excluded from the definition of “business litigation” provided by West Virginia Trial Court Rule 29.04(a)(3). The jurisdiction conferred to the Business Court Division does not extend to cases where the principal claim or claims involve the following:

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. Tr. Ct. R. 29.04(a)(3). The claims asserted by the parties do not relate to any matter excluded from the Business Court Division’s jurisdiction by West Virginia Trial Court Rule 29.04(a)(3). Therefore, the present case fully satisfies the requirements of West Virginia Trial Court Rule 29 to be eligible for referral to the Business Court Division.

CONCLUSION


For the foregoing reasons, the Defendants Burdette Realty Improvement, Inc. and Jon Burdette respectfully request that this Court grant the Defendants' Joint Motion to Refer to Business Court Division.

Dated this 6th day of January, 2022.

BURDETTE REALTY IMPROVEMENT, INC.
and
JON BURDETTE
By Counsel,



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CERTIFICATE OF SERVICE

I, Christopher L. Hamb, counsel for Defendant Burdette Realty Improvement, Inc., do hereby certify that on the 6th day of January 2022, I served the foregoing DEFENDANTS' JOINT MOTION TO REFER TO THE WEST VIRGINIA BUSINESS COURT DIVISION by mailing true copies upon all required persons at the following addresses:

Judge Tera L. Salango
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Charleston, WV 25301

Cathy S. Gatson, Clerk
Kanawha County Judicial Building
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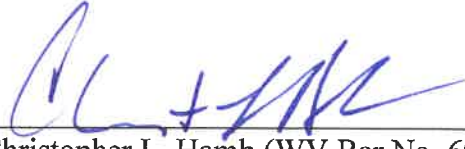
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A handwritten signature in blue ink, appearing to read 'CL + JMB', is written over a horizontal line.

Christopher L. Hamb (WV Bar No. 6902)