

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

JERRY N. BLACK, M.D.,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-15

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.,

Defendant.

CIVIL COMPLAINT

Comes now the Plaintiff, Dr. Jerry N. Black, seeking relief under West Virginia's "Uniform Declaratory Judgment Act", WV Code §55-13-1, et. seq., and this Court's general jurisdiction, WV Code §56-1-1, et. seq., seeking a declaration as to the enforceability and interpretation of the "option contract" referenced below.

1. The Plaintiff in this action is a citizen and resident of Upshur County, WV, and has been for many years.

2. Jerry N. Black, M.D. (Dr. Black herein) is a private citizen and a medical doctor, ophthalmologist, and surgeon, who has conducted his practice, and continues to conduct his practice, in Upshur County, West Virginia.

3. The Defendant, St. Joseph's Hospital of Buckhannon, Inc., (St. Joseph's herein) is a non-profit Corporation, affiliated with the Catholic Church, operating in the State of West Virginia, and doing business as a hospital in Buckhannon, West Virginia.

4. The real estate which is the subject of this matter is situate in Buckhannon, Upshur County, WV.

5. The transactions and option contract referenced herein were negotiated and executed in Upshur County, West Virginia.

6. Sister M. Diane Bushee, Provincial Superior, executed on behalf of St. Joseph's, and Dr. Black executed on his own behalf, the Memorandum Agreement dated June 3, 1982. The Memorandum Agreement is annexed to this Complaint as Exhibit "A".

7. A document titled "Option to Repurchase" dated June 3, 1982 is attached to this Complaint as Exhibit "B".

8. Sister M. Diane Bushee, SAC, President, on behalf of St. Joseph's also executed and delivered to Dr. Black a Deed dated June 3, 1982, conveying unto Dr. Black all of that certain tract, lot, or parcel of land situate in the City of Buckhannon, Buckhannon District, Upshur County, containing 13,069 square feet, more or less, as surveyed in October, 1982, by Burl J. Smith, RPCE #6988, Smith Engineering Company, Buckhannon, West Virginia. There was reserved from the conveyance a 40-foot right of way.

9. This deed is of record in the Office of the Clerk of the County Commission of Upshur County, West Virginia in Deed Book 306 at page 144. The Deed is attached to this Complaint as Exhibit "C".

10. Those three documents were drafted and prepared, following extensive exchanges and discussion, by St. Joseph's attorney, Terry D. Reed, Post Office Box 310, 23 West Main Street, Buckhannon, WV 26201. The Deed and Memorandum Agreement were notarized by Terry D. Reed.

11. St. Joseph's was a sophisticated party to the contract, acting under the auspices of the Catholic Church, and at all times was represented by competent counsel.

12. Dr. Black, an individual, was not represented by counsel throughout the negotiations and execution of documents. His vast learning and training are not in the law.

13. Dr. Black entered into the agreement in good faith believing at the time that he was agreeing to provide to St. Joseph's a "right of first refusal," and an option to repurchase during the last year of a 99 year term.

14. The negotiation of a contract which included a "right of first refusal", as a result of the "inartfulness" of the draftsmanship of counsel for St. Joseph's Hospital as a "first option to purchase" (Option to Repurchase, page 1, paragraph 1). The word "first" is superfluous since there is no other option, and is evidence that it should have said, "right of first refusal".

15. On or about April 20, 2012, the Defendant in this action filed a Complaint for Declaratory Judgment in the Circuit Court of Upshur County, WV, which was styled St. Joseph's Hospital of Buckhannon, Inc. v. Jerry N. Black, Upshur County Civil Action No.: 12-C-52.

16. In the preceding action, St. Joseph's alleged, in pertinent part, as follows:

...8. In exchange for the transfer of land, as more fully set forth in the attached documentation, Dr. Black granted to St. Joseph's Hospital an "Option to Repurchase." See "Option to Repurchase" attached hereto and incorporated herein as Exhibit 3.

9. Upon information and belief, Dr. Black refuses to recognize St. Joseph's Hospital's Option to Repurchase but instead considers the same to be a right of first refusal. Due to Dr. Black's incorrect legal position, a justiciable controversy now exists between the parties herein...

17. The quotation "option to repurchase" is incomplete. The actual quotation, on page 1, paragraph 1, of the "Option to Repurchase" is "...first option to purchase..."

18. Dr. Black was served with a "Complaint for Declaratory Judgment" on June 1, 2012.

19. Dr. Black filed a Rule 12(b)(6) Motion to Dismiss on June 27, 2012.

20. The Order Denying Defendant Jerry N. Black's Motion to Dismiss Plaintiff's Complaint, drafted by St. Joseph's Counsel, entered on October 9, 2012, stated, in pertinent part:

...2. The language of Paragraph 3 of the Option Contract allows St. Joseph's to exercise the Option at any time prior to June 3, 2080. Therefore, Paragraph 5 of the Option contract is ambiguous as a matter of law and fact...

21. During the argument of Defendant's Rule 12(b)(6) Motion on October 1, 2012, the issue of whether the agreement was "an option contract" was never disputed, but the interpretation of the contract was disputed, with the result that the Honorable Judge Thomas Keadle ruled the contract was ambiguous.

22. He did not find paragraph five (5) to be ambiguous, but that is how Plaintiff's counsel drafted the "Order Denying Defendant, Jerry N. Black's Motion to Dismiss Plaintiff's Complaint"

entered on October 9, 2012, by stating, "...Therefore, Paragraph 5 of the Option Contract is ambiguous as a matter of law and fact...".

23. Later, upon retaining expert John W. Fisher, II, Dr. Black received Dean Fisher's written opinion that the contract is not ambiguous, and that under its terms the option can only be exercised during the last year of the 99 year term. A true copy of Dean Fisher's letter is annexed hereto as Exhibit "D".

24. Dean Fisher also determined that the option contract is wholly unenforceable under West Virginia's "Rule Against Perpetuities" and the former common law rule.

25. The Honorable John L. Henning Jr. presided over this case following the retirement of the Honorable Judge Thomas H. Keadle.

26. There was a hearing on June 21, 2013, before Judge Henning, upon the Plaintiff's Motion for Summary Judgment.

27. In accordance with the stipulation of the parties, Judge Henning ruled that the contract in question is an "option contract".

28. In the order entered August 8, 2013, St. Joseph's counsel included the word "valid", which was never stated by the Court.

29. Dr. Black objected to the order on July 2, 2013, prior to its entry, and moved that the word "valid" be removed.

30. The proposed order was improper, inexplicable, and entered over the timely objection of Dr. Black's counsel.

31. Without acknowledging Dr. Black's written objection to St. Joseph's counsel's tendered final order, without granting oral argument thereon as requested by Dr. Black's counsel, and without making any findings of fact or rendering any conclusions of law, the Court entered St. Joseph's order with the "dispositive" modifier "valid" immediately before the term "option contract".

32. The order entered on August 8, 2013 was appealed by Plaintiff herein.

33. During oral argument, before the WV Supreme Court of Appeals, St. Joseph's counsel assured the court the St. Joseph's was not taking the position that the trial court had ruled on the issue of enforceability. The West Virginia Supreme Court disagreed, and the word "valid" was excised, and a new final order entered.

34. The Supreme Court, on page 19, stated:

We reverse the following ruling contained in the circuit court's August 8, 2013, summary judgment order: "The June 3, 1982 Option Contract is a valid Option Contract under West Virginia law." We remand this matter to the circuit court for entry of an order granting summary judgment to the hospital on the sole issue raised in its complaint for declaratory judgment-that the "Option to Repurchase" agreement is an option contract rather than a "right of first refusal."

35. Plaintiff herein filed a "Motion" on November 21, 2014, which stated, in pertinent part:

Comes now the Defendant, Appellant above, Jerry N. Black, M.D., by his counsel, who respectfully moves this honorable Court to establish a litigation schedule including a trial date upon the remaining controverted issues in this case, being:

a. The enforceability of the alleged "Option to Repurchase" including the applicability of West Virginia's Rule Against Perpetuities, WV Code§36-1A-1, et. seq.; and

b. If the "Option to Repurchase" is determined to be enforceable, a declaration as to the meaning and applicability of paragraph 3, page 1 and paragraph 5, page 2 of the "Option to Repurchase".

In the alternative, in accordance with Rule 15 of the West Virginia Rules of Civil Procedure as amended, Defendant respectfully moves for leave to amend his answer heretofore filed in order to include a counter-petition seeking declaratory relief on the issues referenced herein.

36. This matter came on for further hearing, a remand hearing, on December 1, 2014 by Judge Henning.

37. More particularly, at the remand hearing, on December 1, 2014, Dr. Black's counsel offered to waive oral argument on his pending motion.

38. Counsel for St. Joseph's refused to waive oral argument, and the trial court declared that it did not have time at that hearing to hear oral argument.

39. Therefore, St. Joseph's objection to the court's ruling without oral argument on Dr. Black's motion was granted.

40. Plaintiff herein filed an "Objection to Proposed Order and Renewed Motion", on December 9, 2014.

41. On or about December 15, 2014, Defendant's counsel's assistant followed up with the Court's law clerk for a date for oral argument on Defendant's objection.

42. Dr. Black's objection was that the order should not be entered, with its language that the order was a "final order dismissing the action, with prejudice", and could not be entered until the Court ruled on Defendant's pending motion.

43. On January 12, 2015, counsel's assistant again spoke with the Court's law clerk who advised that he was "not sure" that the Court would permit oral argument and if the Court decided to permit the oral argument, the Court's secretary would call counsel to schedule a hearing.

44. Thereafter, on January 13, 2015, the trial court, as it had with the order that the Supreme Court had just overturned, entered Plaintiff's proposed order without the oral argument it had ruled had to be made, and, in effect, denied Defendant's pending motion.

45. The Court failed to make any findings of fact or render any conclusions of law in support thereof.

46. The purpose of Dr. Black's motion was to make certain that the issue which St. Joseph's counsel had attempted to dispose of in its erroneous final order be clearly left open for further adjudication, either in the instant proceeding (by moving forward on the issues of enforceability and interpretation), or by amending Dr. Black's answer, or in a subsequent action to be filed by Dr. Black.

47. Thus, Dr. Black's counsel felt no need to present oral argument, since it was relatively unimportant whether the action be heard within the pending case.

48. Unfortunately, by denying the oral argument that the court required at the December 1, 2014 hearing, by failing to acknowledge Dr. Black's pending motion even existed, and by failing to make any findings or render any conclusions whatsoever, the court has now left Dr. Black vulnerable to the very argument that St. Joseph's counsel made during the previous oral argument to the WV Supreme Court that the final order was not dispositive on the issue of enforceability.

NOW, THEREFORE, Plaintiff prays for declaratory judgment that the subject "option contract" is unenforceable as violative of West Virginia's "Rule Against Perpetuities, WV Code §36-1A-1, et. seq.

Dr. Black prays, in the alternative, should the "option contract" be deemed enforceable, for a declaration by this Court that the "first option to purchase" can be exercised only during the last year of the 99 term; that is, between June 3, 2080 and June 3, 2081.

Also, in light of reprehensible conduct of St. Joseph's Hospital and its counsel both in trial tactics and draftsmanship of orders, Plaintiff seeks compensable damages, punitive and exemplary damages, reimbursement of attorney's fees, and such other sanctions as this court may deem appropriate.

Respectfully Submitted,

JERRY N. BLACK, M.D.

Plaintiff,

By Counsel.

Prepared By:



J. Burton Hunter, III
J. Burton Hunter, III and Associates, PLLC
One West Main Street
Buckhannon, WV 26201
304-472-7477
WV State Bar ID: 1827

Exhibit B

BOOK 306 PAGE 134

MEMORANDUM AGREEMENT BY AND BETWEEN
JERRY N. BLACK AND ST. JOSEPH'S HOSPITAL

This Agreement made and entered into this 3rd day of June, 1982, by and between Jerry N. Black (physician), hereinafter referred to as Physician and Sisters of the Pallottine Missionary society, a corporation, dba St. Joseph's Hospital, hereinafter referred to as Hospital.

Whereas, Hospital owns and operates a hospital located at Amalia Drive, Buckhannon, Upshur County, West Virginia, and

Whereas, Physician will construct a one story medical office building, on 13,069 square feet of land west of and adjacent to St. Joseph's as more fully appears from the Deed between Physician as Owner and Hospital, a copy of which is attached hereto and made a part hereof, and,

Whereas, Hospital has agreed to provide parking adjacent to the aforesaid Physician Office Building at no cost to Physician and to increase the parking capacity for patients, visitors, employees, and staff of St. Joseph's Hospital and for the use of the physicians, patients, visitors and employees of the Physician Office Building, and,

Whereas, Physician has agreed to maintain the exterior and common areas of the interior of the Physician Office Building in first class condition and repair and to otherwise carry out the agreements.

Now, therefore, witnesseth: That for and in consideration of the foregoing which are not to be construed as mere recitals



but as an integral part hereof, and other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged and the mutual covenants hereinafter contained, the parties do agree as follows:

1. Physician will construct at his own cost a Physicians Office Building in accordance with the construction contract aforesaid of said Physicians Office Building which shall be commenced on or before September 1, 1982, and completed no later than May 31, 1983.
2. Hospital will promptly commence and diligently prosecute the construction at its own cost of extending the water and sewer lines to Physician's property line and extend the parking lot in order that it will, in total, accommodate approximately 160 automobiles on said lot and shall be made available to the physicians, patients, visitors and employees in the Physicians Office Building as they are made available to the physicians, patients, visitors, employees and staff of St. Joseph's Hospital.
3. Physician agrees that Hospital will be furnished with copies of all plans, specifications and contract documents pertaining to any remodeling or other changes to the exterior of the Physician's Office Building for its advance approval which shall not be unreasonably withheld.
4. Physician agrees that the Unit within the building will be used and occupied only by members of the medical, surgical and oral surgical staff at St. Joseph's Hospital hereinafter

referred to as Physician. In addition, only those activities reasonably related to the practice of the Physician shall be permitted in the Unit provided and further, only if such activities are performed in conjunction with or are supportive of the practice of the Doctors. If a supported Doctor is unable to continue his practice, his related supportive personnel may continue to practice in the building for two years. Every effort will be made to recruit a new supported doctor for the building by mutual agreement with the hospital. In the event any of the Doctors shall lose their staff privileges for any reason at said Hospital and make an honest and sincere effort to regain said staff privilege, such Physician shall be permitted to retain his usage of the Unit. Any failure to comply with this provision shall be enforceable in a court of law by Physician, any Unit Owner or Hospital.

5. Physician agrees to maintain the common areas and all other properties belonging to Physician, including the exterior of the building, in first class shape and repair and to abide by all covenants and agreements which are incorporated by reference and made a part hereof. In the event the Physician fails to maintain the common areas and all other properties, including the exterior of the building, in the manner deemed proper by the Hospital, then and in that event the Hospital shall have the right to maintain the common areas and such other properties belonging to the Physician and to charge the expense related thereto to the Physician, his successors and assigns. The Physician, his successors and assigns shall pay such expense within thirty (30) days after presentment of a bill for the

total amount thereof. Nothing herein, however, shall impose an obligation upon the Hospital to maintain such common areas and office building.

6. It is agreed that the parties hereto are not engaged in a joint venture or in any other type of partnership activity, and that each of the parties hereto are acting independently of the other. The Physician does hereby agree to save and hold harmless the Hospital from any loss or liability arising out of any act or omission which occurs within the property owned by the Physician.

7. Hospital or its successors is hereby granted the first option to purchase the land for the sum of \$1.00 and the Physicians Office Building pursuant to the terms and conditions shown on the option agreement attached hereto as Exhibit A and made a part hereof. In the event the Physician, his successors and assigns, is in default of any provision of this agreement, the Hospital shall have the right to declare a breach of this agreement and give notice thereof, in writing, to the Physician, his successor or assign. In the event such breach is not cured within thirty (30) days after the date such notice was given, then and in that event, the Hospital may, at its option, seek such injunctive relief or other remedies it deems appropriate in any Court of competent jurisdiction or it may terminate this agreement and exercise immediately the option to repurchase which is set forth as Exhibit A, attached hereto and made a part hereof.

BOOK 306 PAGE 138

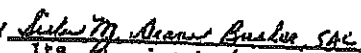
8. Physician agrees that the covenants contained herein shall be binding upon his heirs, successors, and assigns, including but not limited to Physicians Office Building.

9. Purchasers and/or unit owners need not be restricted to members of the medical, surgical and oral surgical staff at St. Joseph's Hospital. Although ownership need not be restricted to members of the medical, surgical or oral surgical staff at St. Joseph's Hospital, the use of such facilities shall be controlled by Section 4 of this Agreement.

In witness whereof, the parties have hereunto caused their corporate names to be signed the day and year first hereinafter written.


Jerry M. Black (Physician)

Sisters of the Pallottine Missionary
Society, a corporation, dba St.
Joseph's Hospital

By 
its Provincial Superior