

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

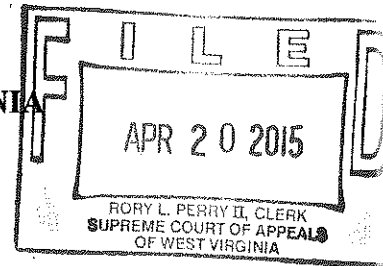
JERRY N. BLACK, M.D.,

Plaintiff,

vs.

Upshur County Circuit Court

Civil Action No. 15-C-15



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

Defendant.

TO: THE HONORABLE CHIEF JUSTICE

**MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Defendant St. Joseph's Hospital of Buckhannon, Inc., by counsel, Robert M. Sellards, Nathan I. Brown, Sarah B. Massey and the law firm of Nelson Mullins Riley & Scarborough LLP, respectfully requests the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

- ☒ There are no known related actions.
- ☐ The following related actions could be the subject of consolidation, and are
- ☐ now pending
  - or
  - ☐ may be filed in the future. (Please list case style, number, and Court if any)
- 
- 

This action involves: (Please check all that apply)

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Breach of Contract;  | <input type="checkbox"/> Terms of a Commercial Lease;              |
| <input type="checkbox"/> Sale or Purchase of Commercial Entity;  | <input type="checkbox"/> Commercial Non-consumer debts;            |
| <input checked="" type="checkbox"/> Sale or Purchase of Commercial Real Estate;                          | <input type="checkbox"/> Internal Affairs of a Commercial          |
| <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; | (continued on next)  |
|  | <input type="checkbox"/> Trade Secrets and Trademark Infringement; |
|  | <input type="checkbox"/> Non-compete Agreements;                   |

- |   |   |
|---|---|
| <input type="checkbox"/> Intellectual Property, Securities, Technology Disputes;<br><input type="checkbox"/> Commercial Torts;<br><input type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies;<br><input type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity;<br><input type="checkbox"/> Anti-trust Actions between Commercial Entities;<br><input type="checkbox"/> Injunctive and Declaratory Relief Between Commercial Entities; | <input type="checkbox"/> Liability of Shareholders, Directors, Officers, Partners, etc.;<br><input type="checkbox"/> Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest;<br><input type="checkbox"/> Shareholders Derivative Claims;<br><input type="checkbox"/> Commercial Bank Transactions;<br><input type="checkbox"/> Franchisees/Franchisors;<br><input type="checkbox"/> Internet, Electronic Commerce and Biotechnology<br><input type="checkbox"/> Disputes involving Commercial Entities; or<br><input type="checkbox"/> Other (Describe) _____<br>_____ |
|---|---|

In support of this motion, this matter contains issues significant to businesses and presents novel and/or complex commercial issues for which specialized treatment will be helpful, as more fully described here:

Please see the attached Memorandum in Support of Motion to Refer Case to the Business Court Division.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint(s) (**Exhibit E**), the operative answer(s) (**Exhibit F**), the docket sheet (**Attachment 1**), and the following other documents:

1. Memorandum Agreement (**Exhibit A**)
2. Deed (**Exhibit B**)
3. Option to Repurchase (**Exhibit C**)
4. February 1, 2011 Correspondence (**Exhibit D**)

In regard to expedited review, the Movant:

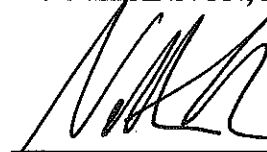
- ☒ DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.
- ☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following

constitutes good cause to do  
so: \_\_\_\_\_

\_\_\_\_\_

**WHEREFORE**, the undersigned hereby MOVES, 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.

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



Robert M. Sellards, Esquire (WVSB #9104)  
Nathan I. Brown, Esquire (WVSB #11900)  
Sarah B. Massey, Esquire (WVSB #12022)  
Nelson Mullins Riley & Scarborough LLP  
P.O. Box 1856  
Huntington, WV 25719-1856  
Main Office Phone: (304) 526-3500  
Direct Dial Phone: (304) 526-3506  
Fax: (304) 526-3556

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**JERRY N. BLACK, M.D.,**

Plaintiff,

Upshur County Circuit Court

Civil Action No. 15-C-15

vs.

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

Defendant.

**TO: THE HONORABLE CHIEF JUSTICE**

**MEMORANDUM IN SUPPORT OF  
MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Defendant, St. Joseph's Hospital of Buckhannon, Inc. ("STJ" or "Defendant"), by and through counsel, Robert M. Sellards, Nathan I. Brown, Sarah B. Massey and the law firm of Nelson Mullins Riley & Scarborough LLP, pursuant to Rule 29.06 of the West Virginia Trial Court Rules, respectfully submits this Memorandum in Support of its Motion to Refer Case to the Business Court Division. The claims asserted in this matter raise distinct, technical issues, including contractual, statutory, and common law issues of fact and law, with respect to the enforceability and interpretation of an option contract and the rights and obligations under the option contract. As such, this matter involves claims that raise precisely the sort of commercial issues that should be heard by the West Virginia's Business Court Division. In further support of its Motion, Defendant STJ states as follows.

**I. FACTS AND PROCEDURAL HISTORY**

Defendant STJ and Plaintiff, Jerry N. Black M.D., ("Plaintiff" or "Dr. Black") entered into a "Memorandum Agreement" dated June 3, 1982. See "Memorandum Agreement" attached hereto as **Exhibit A**. Pursuant to the Memorandum Agreement, STJ transferred certain real

property<sup>1</sup> to Dr. Black by Deed dated June 3, 1982 and recorded at Book 306 Page 144. *See* "Deed" attached hereto as **Exhibit B**. In exchange for the transfer of land, as more fully set forth in the attached documentation, Dr. Black granted to STJ an "Option to Repurchase." *See* "Option to Repurchase" attached hereto as **Exhibit C**.

Subsequently, on February 1, 2011, Dr. Black formally took the position that STJ did not possess an option contract but rather a right of first refusal. Specifically, Dr. Black issued STJ a "formal offer to sell" the property at issue for a sum certain. *See* February 1, 2011 Correspondence from Dr. Black attached in pertinent part hereto as **Exhibit D**. Dr. Black informed STJ that a buyer had made an offer to purchase the property and offered STJ the right of first refusal. *Id.* However, despite requesting information about the purported offer, STJ never received verification that an offer to purchase was actually made.

Well established West Virginia law provides that a right of first refusal is significantly different from an option contract. Specifically, a right of first refusal does not ripen into an executed contract until the condition precedent, the existence of an offer by a *bona fide* purchaser, is met. Alternatively, an option contract can be exercised by the optionee within the agreed-upon time frame, and regardless of the existence of an offer by a *bona fide* purchaser. Dr. Black attempted to modify the rights of STJ under its option contract by inferring a condition precedent which does not exist and for which there was no bargain. Moreover, such an arrangement was never contemplated by the parties.

As such, based on Dr. Black's position that the "Option to Repurchase" created a "right of first refusal," STJ brought a previous action pursuant to the West Virginia Uniform Declaratory Judgment Act, W. Va. Code § 55-13-1, *et seq.* and W. Va. R. Civ. P. 57 against Dr.

---

<sup>1</sup> The deeded property is located in Upshur County, West Virginia.

Black in the Circuit Court of Upshur County, West Virginia, Civil Action No. 12-C-52. In the previous action, STJ sought the declaration that STJ possessed an option to repurchase rather than a right of first refusal. By Order dated, August 8, 2013, the Court granted STJ summary judgment and declared that STJ did possess an option contract rather than a right of first refusal.<sup>2</sup>

However, Dr. Black objected to the August 8, 2013 Order granting summary judgment because it stated that the "Option to Repurchase" was valid. Upon entry of this order, Dr. Black appealed to the Supreme Court of Appeals of West Virginia. The Supreme Court of Appeals of West Virginia ultimately affirmed the trial court's decision that the Option to Repurchase created an option contract, as opposed to a right of first refusal, but agreed that the word "valid" should be removed from the order. On January 13, 2015, after a remand hearing, the Circuit Court entered an order granting STJ summary judgment and finding the "Option to Repurchase" to be an option contract.

On February 5, 2015, Plaintiff filed a second appeal in this matter. In his second appeal, Dr. Black challenges the Circuit Court's January 13, 2015 Order. The second appeal remains pending. On February 10, 2015, Plaintiff initiated this present lawsuit against STJ by filing the present Complaint. In his Complaint, Dr. Black asks the Circuit Court to make a declaration as to the enforceability and interpretation of the "Option to Repurchase."<sup>3</sup> *See generally*, Complaint attached hereto as **Exhibit E**. Specifically, Dr. Black claims that the "Option to Repurchase" violates West Virginia's Rule Against Perpetuities, W. Va. Code § 36-1A-1, *et seq.* and the former common law rule. *Id.* at unnumbered paragraph beginning "Now, Therefore." In the alternative, if the Circuit Court finds that the option contract is valid, then Dr. Black asks the

---

<sup>2</sup> At this point, Dr. Black and his counsel no longer disputed that the "Option to Repurchase" created an option contract.

<sup>3</sup> Significantly, both parties have continuously been operating under the terms of the "Memorandum Agreement," "Deed," and "Option to Repurchase" since their execution in 1982.

Circuit Court to declare that the option can only be exercised during the last year of the 99-year term. *Id.* On March 13, 2015, STJ timely filed its Answer and Affirmative Defenses. *See generally*, Answer and Affirmative Defenses of Defendant St. Joseph's Hospital of Buckhannon, Inc. to Plaintiff's Complaint and Counterclaims Against Jerry N. Black, M.D., attached hereto as **Exhibit F**. STJ further filed counterclaims against Dr. Black asserting Breach of Contract, Unjust Enrichment, and Trespass. *Id.*

## II. APPLICABLE LAW

Defendant STJ is requesting referral to the West Virginia Business Court Division ("Business Court") by and through W. Va. T.C.R. 29.01. The purpose of the Business Court is to "efficiently manag[e] and resolv[e] litigation involving commercial issues and disputes between businesses." W. Va. T.C.R. 29.01. Specifically, the Business Court, upon proper referral and transfer by the Chief Justice of the Supreme Court of Appeals of West Virginia, may properly preside over and adjudicate "Business Litigation," which is defined as one or more pending actions in a circuit court 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, 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 governmental organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va. T.C.R. 29.04(a)(1)-(3).

Moreover, a Motion to Refer “shall be filed after the time to answer the complaint has expired.” W. Va. T.C.R. 29.06(a)(2). “A copy of the complaint, answer, docket sheet and any other documents that support referral under Trial Court Rule 29.04(a) shall be attached to the motion.” W. Va. T.C.R. 29.06(a)(1). In the present matter, referral of Dr. Black’s claims and STJ’s counterclaims is appropriate because of the technical, commercial nature of these claims and because the principal claim of enforceability and interpretation of an option contract and the rights and obligations under the option contract, is not one of the enumerated claims barred from referral.

### III. ARGUMENT

First, the claims at issue in this matter pertain to “transactions . . . between business entities.” W. Va. T.C.R. 29.04(a)(1). With respect to motions to refer to the Business Court, the Supreme Court of Appeals of West Virginia has held that “[t]he mere fact the action involves individuals does not, of itself, exclude the case from eligibility.” In fact, there have been numerous matters that the Supreme Court of Appeals of West Virginia has referred to the Business Court that involve individuals. See *Betty Parmer v. United Bank, Inc. et al.*, No. 14-C-374, Administrative Order Granting Referral to Business Court Division (Monongalia County, W. Va., October 31, 2014); *DAR, LLC, v. Triad Engineering, Inc., et al.*, No. 13-C-394, Administrative Order Granting Referral to Business Court Division (Berkeley County, W. Va., November 14, 2014).



Here, all parties involved represent business entities and their transactions with one another. Specifically, it is undisputed that Defendant STJ is a non-profit corporation. *See Exhibit E ¶ 3.* Moreover, while Plaintiff Dr. Black is an individual physician, he entered into the subject Memorandum Agreement, Deed, and Option to Repurchase to transact business and operate a physician's office. As such, both parties are undisputedly businesses engaged in conducting business matters and transactions.

Second, "the dispute presents 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." W. Va. T.C.R. 29.04(a). Specifically, as discussed above, the claims and issues that are the subject of this matter involve complex contractual issues and the complicated Rule Against Perpetuities. A "scholar who spent a substantial part of an academic lifetime attempting to bring order and add sense to the rule against perpetuities, W. Barton Leach, described the rule as a 'technicality-ridden legal nightmare' and a dangerous instrumentality in the hands of most members of the bar." Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 178 (2d ed. 1984) (quoting Leach, *Perpetuities Legislation, Massachusetts Style*, 67 Harv. L. Rev. 1349 (1954)). As such, these claims are precisely the types of issues that require the specialized knowledge of the Business Court.

Third, none of the claims at issue in this matter involve categories of litigation that are barred from referral under the Trial Court Rules. *See* W. Va. T.C.R. 29.04(a)(3). The claims pertain exclusively to matters of contractual interpretation and the duties and rights of the parties under the contracts at issue. As discussed above, these claims are purely commercial in nature.

*See generally*, Complaint attached hereto as **Exhibit E**; *see also generally*, Answer and Affirmative Defenses of Defendant St. Joseph's Hospital of Buckhannon, Inc. to Plaintiff's Complaint and Counterclaims Against Jerry N. Black, M.D. attached hereto as **Exhibit F**. Therefore, this action meets the definition of "Business Litigation" as defined in Rule 29.04 of the West Virginia Trial Court Rules. As such, these claims are properly referable to the Business Court pursuant to the requirements of Rules 29.04 and 29.06 of the West Virginia Trial Court Rules.

#### IV. CONCLUSION

WHEREFORE, because this lawsuit meets the definition of "Business Litigation" within the meaning of Rule 29.04(a) of the West Virginia Trial Court Rules, Defendant St. Joseph's Hospital of Buckhannon, Inc, moves this Court to refer this matter to the West Virginia Business Court Division.

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

By: 

Of Counsel

Robert M. Sellards, Esquire (WVSB #9104)  
Nathan I. Brown, Esquire (WVSB #11900)  
Sarah B. Massey, Esquire (WVSB #12022)  
Nelson Mullins Riley & Scarborough LLP  
P.O. Box 1856  
Huntington, WV 25719-1856  
Main Office Phone: (304) 526-3500  
Direct Dial Phone: (304) 526-3506  
Fax: (304) 526-3556