

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JERRY N. BLACK, M.D.,

Plaintiff,

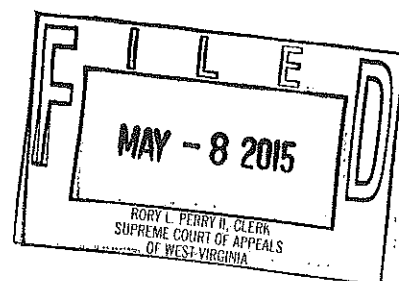
v.

UPSHUR COUNTY CIRCUIT COURT
CIVIL ACTION NO. 15-C-15

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

Defendant.

TO: THE HONORABLE CHIEF JUSTICE



RESPONSE TO MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Comes now the Plaintiff, Jerry N. Black, M.D., by and through his counsel, J. Burton Hunter, III, who responds to the Defendant's Motion to Refer Case to the Business Court Division as follows:

1. This is not an action between two (2) businesses.
2. It is an action between a large business and an individual holding this real estate in his own name.
3. Jerry N. Black, the individual, is a medical doctor.
4. This is a case that has already been litigated for over two (2) years in the Circuit Court of Upshur County, and it should not be moved.
5. This is not a matter that will require extensive discovery, especially "e-discovery".
6. This is yet another tactic of a large Charleston law firm and sophisticated client designed to impair Dr. Black's ability to defend himself because his counsel has no experience in West Virginia Business Court and is not specialized in business litigation.

7. This case does not need a "rocket docket", so much as it needs a judge who will listen to the evidence, set sufficient time for his hearings, make appropriate findings of fact and conclusions of law, and give the case his full attention, contrary to recent prior rulings where in the court declined to grant hearings, set but never conducted oral argument, failed to make findings of fact and conclusions of law to support its actions, and entered two final orders over objection of counsel, one of which has already been set aside by an opinion of the West Virginia Supreme Court of appeals submitted on September 3, 2014, and filed on September 30, 2014 (case number 13-0926).

8. It is also a case in which Dr. Black has requested a jury trial.

9. The issues in this case are very straightforward:

a. That the option contract is unenforceable as being violative of the common law Rule Against Perpetuities and the Uniform Statutory Rule Against Perpetuities ("USRAP") in 1992, which was adopted by West Virginia;

b. If enforceable, that it may be exercised only during the last year of the 99 year term, and;

c. If the Court cannot do either of those, that Dr. Black finally have his day in court, before a jury of his peers, on the true issues in controversy and no longer have to deal with a sham in which the opposing party claims Dr. Black is taking a position which he never took.

10. These issues are simple matters of law. Dean John Fisher, who has been described by our West Virginia Supreme Court of Appeals as "the foremost authority in this field in the State" in the case of McClung Investments, Inc., v. Green Valley Community Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997), has stated:

a. ...The drafters of the "option to repurchase" by labeling paragraph 3 as "Notice of Exercise" and paragraph 5 as "Time During Which Option May be Exercised" clearly tells the reader the purpose of each section and makes it possible for the instrument to be read as a whole, not ignoring or disregarding any of its provision. To read it otherwise would create an internal inconsistency that is not necessary and is inconsistent with the

directions of the Court quoted above and the subheadings of the various paragraphs provided by the draftee...

b. ...In conclusion, I note that I am in agreement with the interpretation of the documents involved in this case as articulated in your "Motion to Dismiss" and the substance of your Response to the Plaintiffs notion for summary judgment.

c. ...As we have discussed, the agreement as drafted violates the common law rule against perpetuities. The facts of this case are very similar to a case decided by Judge Keeley in 2007. Like Judge Keeley's case, the agreement was entered into before West Virginia adopted the Uniform Statutory Rule Against Perpetuities ("USRAP") in 1992 and decided following its adoption. For the purpose of discussion, if one were to assume the Plaintiff's interpretation is correct, it leaves the Plaintiff with what I believe is an insurmountable Rule Against Perpetuity problem. If one accepts the Plaintiff's reading of the documents, I believe the agreement becomes patently inequitable and a court would hold exactly as Judge Keeley did and the court would refuse to exercise its equitable power to reform the document... (Dean Fisher's Undated Letter)

...In answer to your question as to the sixteenth and seventeenth defenses which rely upon W.Va. Code §§36-1A-4-5 and 36-1A-3, I believe the Uniform Act and the comments clearly establish that they are not applicable. To the extent the Defendant seeks reformation, it must be pursuant to W.Va. Code 36-1A-5(b), and Judge Kelley's decision provides excellent guidance as to how a Court should proceed and makes it clear that the Court is exercising its equitable authority under that provision. Reformation is not a matter of right, and as you consistently noted, and in which I agree, the requested reformation would be grossly inequitable to Dr. Black... (letter dated April 7, 2015)

11. For reasons more particularly set out in Dr. Black's "Motion for Summary Judgment", this case can be disposed of expeditiously by hearing upon that motion before the Circuit Court of Upshur County, West Virginia.

NOW, THEREFORE, Plaintiff prays that this matter remain before the Circuit Court of Upshur County, WV; that the Plaintiff be awarded his attorney fees associated with the costs of defending this motion; and for any other such relief as this Court deems appropriate.

Respectfully submitted,

JERRY N. BLACK, M.D., Plaintiff,

By Counsel

Prepared By:



J. Burton Hunter, III
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Buckhannon, WV 26201
(304) 472-7477
WV State Bar ID: 1827

STATE OF WEST VIRGINIA,

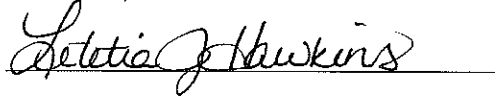
COUNTY OF UPSHUR, TO-WIT:

I, Jerry N. Black, M.D., being first duly sworn, says that the facts and allegations set forth in said **Response o Motion to Refer Case to the Business Court Division** are true and correct, except insofar as they are therein stated to be upon information and belief, he believes them to be true and correct.

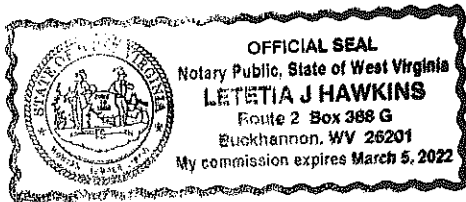

Jerry N. Black, M.D.

Taken, sworn to and subscribed before me this 6th day of May, 2015 by Jerry N. Black,
M.D.

My commission expires: March 5, 2022



Notary Public



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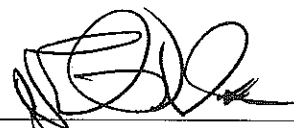
TO: THE HONORABLE CHIEF JUSTICE

CERTIFICATE OF SERVICE

I, J. Burton Hunter, III, attorney for Jerry N. Black, M.D., do hereby certify that I served the foregoing **Response to Motion to Refer Case to the Business Court Division** upon the following counsel, via facsimile and by delivering a true copy thereof in the US Mail, in an envelope addressed as follows:

Robert M. Sellards, Esq.
Nathan I. Brown, Esq.
Sarah B. Massey, Esq.
Nelson Mullins Riley & Scarborough LLP
Post Office Box 1856
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Huntington, WV 25701

Dated this 7th day of May, 2015.



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