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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

HARRISON COUNTY DEVELOPMENT AUTHORITY

Plaintiff,

v.

CIVIL ACTION NO. 12-C-504-3

TETRICK & BARTLETT, PLLC,

Defendant.

Report and Recommendation to the Chief Justice

I Introduction

On, April 22, 2006, by administrative order, Chief Justice Brent Benjamin referred this matter to the Business Court Division for a hearing and recommendation on Defendant's Motion to Refer. On May 5, 2013, the parties appeared, by counsel, Jeffrey D. Van Volkenburg, Esq. and John F. McCuskey, Esq. at the Harrison County Courthouse for a hearing on this motion. The parties made argument, and relied upon their written briefs. No evidence was introduced. After carefully reviewing the parties' briefs, the arguments, and the court file, this Court submits this report to the Chief Justice which contains a review of the relevant information and a recommendation.

II Nature of This Action

This case was filed in Harrison County, West Virginia, on November 27, 2012, by Plaintiff, Harrison County Development Authority, a public corporation, organized and operating pursuant to W.Va. Code §7-12-1 *et. seq.* against, Defendant, Tetrick & Bartlett, PLLC, an accounting firm. The complaint alleges failure to discover or make the Plaintiff aware of

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financial irregularities existing due to a former employee's approximately \$300,000.00 embezzlement (for which the former employee has been convicted), and asserts three causes of action against Defendant: (1) professional negligence, (2) negligent misrepresentation, and (3) breach of fiduciary duty. Recently, Defendant's made a motion to refer this matter to the Business Court Division.

III. Applicable Law

This Court recognizes the lack of direct authority on this issue, due to recent creation of the Business Court Division. Yet, the relevant Rule is quite direct. West Virginia Trial Court Rule 29.04 provides, *inter alia*,

"Business Litigation" — one or more pending actions in circuit court in which:

the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

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

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 government organizations and regulatory agencies,

provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

With regard to the Plaintiff, a Development Authority, W.Va. Code § 7-12-2 provides,

The purposes for which the authority is created are to promote, develop and advance the business prosperity and economic welfare of the municipality or county for which it is created, its citizens and its industrial complex; to encourage and assist through loans, investments or other business transactions in the locating of new business and industry within the municipality or county and to rehabilitate and assist existing businesses and industries therein; to stimulate and promote the expansion of all kinds of business and industrial activity which will tend to advance business and industrial development and maintain the economic stability of the municipality or county, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of the county; to cooperate and act in conjunction with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural, and recreational developments within the municipality or county; and to furnish money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite to approved and deserving applicants for the promotion, development and conduct of all kinds of business activity within the municipality or county.

Also of note, is §6,

The authority and the members thereof shall constitute and be a public corporation under the name provided for in section one, and as such shall have perpetual succession, may contract and be contracted with, sue and be sued, plead and be pleaded, and have and use a common seal.

A review of the general and specific powers of a Development Authority, especially those outlined by § 7, 8, 9, 9a, and 13, appear to generally empower it to undertake a wide range of business-like or business-related transactions. Last, as thoroughly reviewed by the Plaintiff's Response Memorandum, this Court notes the manner in which other jurisdictions have handled

public agencies being subject to business courts (or the like), under admittedly a variety of different laws and procedures.

IV. Findings of Fact

This Court first notes thoroughness of the briefs filed in this matter including that of the Honorable Judge James A. Matish. At the hearing, the parties did not offer any evidence, and it appears that the facts material to this motion are not in dispute. The parties admitted at the hearing, that the claims here will likely involve somewhat complex accounting procedures, as well as review of some contractual terms between the parties. Plaintiff noted that its objection to referral was based, in part, upon a concern that it may cause the case to move out of Harrison County. After this Court noted the unlikelihood of that possibility, without agreement, Plaintiff noted that it no longer had a strong objection. However, Plaintiff was also concerned about the precedent that may be set by subjecting a Develop Authority to the Business Court. Further, the business-like manner in which Plaintiff operates and exists (including facts such as a general commercial liability policy, and the statutory abilities noted above) was noted at the hearing. The parties also relied upon the facts raised in their respective briefs. Otherwise, no relevant factual issues have been presented.

V. Discussion and Recommendation

This Court initially takes note that there is no longer a strong objection to referral. The main area of contention is that Plaintiff is a public corporation, which Plaintiff argues should not be subject to the jurisdiction of the Business Court pursuant to W.Va. T.C.R. 29.04(a)(1), mostly for reasons of setting precedent.

On this issue, this Court sees a few distinct differences with this situation from possible future situations involving government agencies. First, a Development Authority is quite a unique government entity. As argued by Defendant, this type of public corporation appears to walk and talk like a business entity. As such, subjecting these type of entities to Business Court jurisdiction is likely appropriate, because of the nature of the legal disputes Development Authorities will inevitably be involved in. Plaintiff is even referred to in the Code as a “public corporation.” W.Va. Code § 7-12-6 (emphasis added).

Also, a review of the purpose and abilities of a Development Authority shows that it is quite similar to that of a business. Last, this Court notes that nowhere does Trial Court Rule 29 exclude or make any distinction between public, private, or non-profit corporations. Therefore, in so far as the language of W.Va. T.C.R. 29.04(a)(1) requires the claims to be those “involving matters of significance to the transactions, operations, or governance between business entities,” this Court is of the opinion that this matter meets this requirement because Plaintiff should be considered a “business entity.” *Id.*

Plaintiff also argues that the requirements of W.Va. T.C.R. 29.04(a)(2) cannot be met, arguing that the claims mostly amount to a typical malpractice case, similar to any legal or medical malpractice case. This Court does note that claims of professional malpractice may not typically present “commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution...” W.Va. T.C.R. 29.04(a)(2). However, this matter appears as though it will involve somewhat complex accounting practices, compounded by the alleged fact that the loss took place over a long period of time. Also, it has been noted that Defendant may attempt to file a third party complaint adding to the complexity of these business issues. Further, because of the nature of this dispute, it appears that speedy

resolution would be helpful and may be considerably aided by judicial mediation. Therefore, this Court opines that this case meets the requirement of § (a)(2).

Last, this Court states that there appears to be no dispute regarding § (a)(3), as its exclusions are not applicable to this matter. According, this Court is of the opinion that each element of W.Va. T.C.R. 29.04(a) can be met, and believes it to be an appropriate matter to be referred to the Business Court Division.

Therefore, based upon this reasoning, **this Court RECOMMENDS that the Chief Justice REFER this matter to the Business Court Division.**

The Court directs the Harrison County Circuit Clerk to distribute attested copies of this order to the following courts and counsel:

Counsel for Plaintiff:

Jeffrey D. Van Volkenburg, Esq.
James A. Varner, Esq.
P.O. Drawer 2040
Clarksburg, WV 26301

Harrison County Circuit Court

Hon. Judge James A. Matish
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

Business Court Administrative Office

Berkeley County Judicial Center
Suite 2100
380 W. South Street
Martinsburg, WV 25401

Counsel for Defendant:

John F. McCuskey, Esq.
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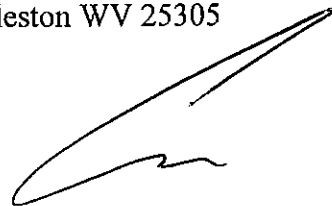
Supreme Court of Appeals of W.Va.

Hon. Chief Justice Brent Benjamin
Capitol Complex
Building One, Room E-302
Charleston, West Virginia 25305

Clerk of the Supreme Court of Appeals

Rory L. Perry, II
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

Enter May 20, 2013



CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION CHAIR

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STATE OF WEST VIRGINIA
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY, JEFFERSON AND MORGAN COUNTIES
BERKELEY COUNTY JUDICIAL CENTER
300 WEST SOUTH STREET, SUITE 4400
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CHRISTOPHER C. WALKER, JUDGE

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FAX COVER SHEET

To: Donald L. Kopp II, Clerk Fax: 624-8710

From: Carol A. Miller, Executive Director
WV Business Court Division

Date: May 20, 2013

Re: Harrison County Development Authority vs. Tetrick & Bartlett, PLLC
Civil Action No. 12-C-504-3
Harrison County, West Virginia

No. of Pages including cover sheet: 7

Please process and file the attached Report and Recommendation to the Chief
Justice regarding Referral to the Business Court Division