

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

UNITED BANK, INC.,
a West Virginia banking corporation,

Plaintiff,

vs.

Civil Action No.: 14-C-571

CLARENCE E. WHITE, an individual;
BLAIR WHITE, an individual;
GLENN RUNYAN, an individual;
KBW, INC., a West Virginia corporation;
CLEDENIN PLACE REALTY, LLC,
a West Virginia limited liability company,
successor by merger with Clendenin Place, Inc.;
WHITE DODGE, INC., a West Virginia corporation;
SHASTA AVIATION, INC., a Florida corporation;
AIR SUPPORT RESOURCES, LLC,
a Florida limited liability company; and
CYDNEY REALTY, INC., a West Virginia corporation,

Defendants.

CLARENCE E. WHITE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION
TO REFER CASE TO BUSINESS COURT DIVISION

Defendant Clarence E. White ("White"), by counsel, files this Memorandum In Opposition to Plaintiff's Motion to Refer Case to Business Court Division ("Motion"). In support, White respectfully states as follows:

INTRODUCTION

Plaintiff is attempting to transfer this collection action against individuals and certain entities to the Business Court Division. Defendant White files this Memorandum opposing such a transfer. The Business Court Division was authorized by legislative action in W. Va. Code § 51-2-15 solely to deal with "the complex nature of litigation involving highly technical

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CATHY C. CLEGG
KANAWHA COUNTY CIRCUIT COURT

commercial issues." The Legislation then authorized the Supreme Court of Appeals to enact rules, which are West Virginia Trial Court Rule 29 ("Rule 29"). These rules are designed to deal with only complex, specialized matters involving controversies solely between business entities. Every time a financial institution brings suit against an individual to collect on a guarantee or loan, it cannot avail itself of the Business Court Division. However, that is precisely what the Plaintiff seeks through its attempted transfer of a case that simply does not belong in the Business Court Division.

This case does not involve solely business-to-business disputes, which is the touchstone for referring a case to the Business Court Division. It instead involves only a collection suit by a bank against three individuals, as well as additional affiliated entities. Moreover, the individuals are not merely guarantors, but also makers of loans and at least two of these loans to the individuals are individual consumer loans, not business loans at all including a mortgage on a residence. Further, this case does not involve the types of complex issues that the West Virginia Legislature and the West Virginia Supreme Court envisioned and intended to be handled by the Business Court Division. This is a straightforward case that will not require any specialized knowledge or expertise.

Therefore, the Court should deny the Motion and allow the case to remain in the Circuit Court of Kanawha County. To hold otherwise would essentially open the floodgates to allow every case in which a financial institution has sued an individual — be it for a delinquent mortgage, a delinquent credit card account, or any other such delinquency — into the jurisdiction of the Business Court Division. Rule 29 was not enacted for that purpose or to permit that result.

LEGAL STANDARDS

Rule 29 establishes the purpose and procedure for hearing a case in the newly-created Business Court Division of the West Virginia judiciary. It is a limited process "for efficiently managing and resolving litigation involving commercial issues and disputes between businesses that include the establishment of a Business Court Division to handle a specialized court docket within the circuit courts." W. Va. Trial Ct. R., 29.01 (emphasis added).

"Business Litigation" is narrowly defined to be "one or more pending actions in circuit court in which;

- (1) The principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities;
- (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 government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va, Trial Ct. R. 29.04.

Business Litigation thus requires that all three predicates be met: (1) that the litigation is between businesses, (2) that the litigation involves highly complicated commercial or technological issues, and (3) that it does not involve consumer litigation. Plaintiff's claims do not satisfy any of these requirements, let alone all of them. Thus, the Court should deny Plaintiff's Motion.

ARGUMENT

A. This Case Does Not Involve a Business-to-Business Dispute.

As set forth in the Complaint, this is a simple collection matter on various loans made by the Bank to individuals and closely held entities owned by such individuals. Certain of the entities are merely real estate holding companies, or defunct business operations, whereas others are guarantors. The largest portion of the claimed debt relates to a personal consumer loan made to Defendant White for a residence, which has a total asserted delinquency in excess of \$7 million, out of the total claimed aggregate debt of approximately \$10,670,000¹. Moreover, two of the other Defendants are also individuals, Glenn Runyan and Blair White, who were sued both individuals and guarantors. Notability, the claim against Blair White related to "the Blair White Note #1", is an individual consumer loan and is in no way commercial. In fact, the Bank's extensive Complaint lists twenty-three counts. The first twelve are for breaches of various loans by various borrowers, while the remaining counts are claims to recover under various guaranties. Of the underlying claims on notes, only two of twelve counts are to business entities. These are Count VII, which is a loan to Shasta Aviation, Inc., for approximately \$2.2 million and Count

¹ Since Plaintiff filed the Complaint, two of the loans, which were NEVER DELINQUENT, have been paid in full, resulting in a recovery/payment to the Bank of in excess of One Million Dollars.

XII, a claim on a second note to Shasta Aviation, Inc., with an outstanding balance of approximately \$60,000. Thus, the total claims for direct loans to "business entities" is approximately \$2.3 million, which is only about 20% of the total debt of nearly \$11 million claimed by the Bank among the various Defendants. This means ten of the twelve primary counts are directed against individuals for loans made by the Bank to those individuals. Moreover, to the extent business entities are otherwise involved in the Complaint, it is solely as guarantors on loans made to the individuals named in the Complaint. Thus, Plaintiff fails miserably in its attempt to meet the first element of litigation solely between business entities.

Rule 29.04 is quite clear that Business Litigation involves claims "between business entities." W. Va. Trial Ct. R. 29.04; see also Judge Christopher C. Wilkes, West Virginia New Business Court Division; An Overview of the Development and Operation of Trial Court Rule 29, W. Va. Law., January-March 2013, at 40, 42 ("Litigation between business is at the center of the Business Court Division purpose.") Plaintiff's Motion incorrectly states that the case is one where the "principal claims" between the parties fall in the subject matter of the Business Court Division (See Pls. Mot. at Paragraph 4). That is simply not true. As noted above, the principal amount of the claims are for more than \$7 million on a residence owned by Mr. White in Florida, which is nearly 70% of the total debt involved. In fact, only 20% of the monetary claim relates to loans to business entities. Thus, it would be more accurate to state that the "principal claims" are between a bank and individuals on consumer loans.

B. There are No Complex Issues Requiring Special Expertise Present Here.

Plaintiff has brought claims against White for breach of contract. While the case involves contracts between and among various parties, nothing about these claims invokes 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. Trial Ct. 29.04; see also Wilkes, supra at 42 ("Cases which have a high level of complexity, novel issues, or other issues requiring specialized treatment are likely to land on the Business Court docket if requested."). Plaintiff has not based these claims on any complicated statutes, complex regulations or specialized areas of business law. The claims are instead quite straightforward contract claims, which are routine subjects for the Circuit Court of Kanawha County.

The mere presence of a commercial entity or a claim based on a simple breach of contract between an individual and a business entity cannot fulfill the definition of "Business Litigation." Otherwise, the number of cases eligible for transfer to the Business Court Division would be essentially unlimited.

The Legislature and Supreme Court did not intend this result as the stated goal of Rule 29 is to allow complex commercial litigation to proceed quickly and efficiently. The Court should not permit Plaintiff to expend resources reserved for true complex commercial litigation on a bank collection case against individuals, which action properly belongs in the Circuit Court.

C. The Case Falls Within The Exclusion Under The Rule for Consumer Litigation.

Contrary to the statement in Plaintiff's Motion, these claims largely involve collection actions by the Bank against individuals for what appear to be consumer loans or in any event loans made directly to an individual and not to a business entity. As noted, approximately 80% of the total indebtedness claimed arose solely from consumer loans. Nearly 70% of the total amount sought relates to attempts to collect on mortgages for a residence in Florida owned individually by Defendant White. Thus, the restrictions of Rule 29.04(a)(3) prevent the transfer

to the Business Court Division, as "consumer litigation" and "claims against individuals on residential property."

CONCLUSION

As clearly shown, Plaintiff's Motion must fail due to Plaintiff's inability to satisfy any of the three threshold requirements under Rule 29: (1) the case does not involve matters of significance between business entities; (2) the case does not involve specialized or complex areas involving issues of commerce or technology; and (3) the principal claims involve consumer litigation, thus precluding referral of this Civil Action to the Business Court Division. For the foregoing reasons, the Plaintiff's Motion to Refer Case to the Business Court Division should be denied.

Dated: July 9, 2014

Respectfully submitted,

Clarence E. White
Defendant,

By Counsel



Mark A. Ferguson
Sprouse & Ferguson, PLLC
230 Capitol Street, Suite 300
Charleston, WV 25301
(304) 342-9100
WV Bar No. 1182

Counsel for Defendant

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2014 JUL 10 PM 1:29

UNITED BANK, INC.,
a West Virginia banking corporation,

CATHY J. COLE, CLERK
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

vs.

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SHASTA AVIATION, INC., a Florida corporation;
AIR SUPPORT RESOURCES, LLC,
a Florida limited liability company; and
CYDNEY REALTY, INC., a West Virginia corporation,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Clarence E. White's Memorandum in Opposition to Plaintiffs' Motion to Refer Case to the Business Court Division was served, by first class United States mail, this 9th day of July, 2014, on the following counsel of record in this case:

Stuart McMillan, Esq.
James E. Scott, Esq.
Thompson R. Percy, Esq.
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P.O. Box 1386
Charleston, WV 25325-1386

Mark Ferguson
Mark A. Ferguson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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ORDER

UPON CONSIDERATION of Plaintiff's Motion to Refer Case to Business Court Division, and having considered the Motion, the Response in opposition, and a review of the entire record herein, it is hereby:

ORDERED that the Plaintiffs' Motion to Refer Case to Business Court Division is DENIED in its entirety, with prejudice.

SO ORDERED AND ADJUDGED, this the ____ day of _____, 2014.

Honorable Tod J. Kaufman

Prepared by:

Mark A. Ferguson
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230 Capitol Street, Suite 300
Charleston, WV 25301
(304) 342-9100
WV Bar No. 1182

FILED
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
(BUSINESS COURT DIVISION)

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CATHY S. GATSCHE, CLERK
KANAWHA COUNTY CIRCUIT COURT
LHM

UNITED BANK, INC.,
a West Virginia banking corporation,

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vs.

Case No: _____
(Kanawha Co. Civil Action
No. 14-C-571 Judge
Kaufman)

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CYDNEY REALTY, INC., a West Virginia corporation,

Defendants.

MOTION OF DEFENDANT CLARENCE E. WHITE IN OPPOSITION TO MOTION TO
REFER CASE TO BUSINESS COURT DIVISION

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(304) 342-9100
WV Bar No. 1182

Counsel for Defendant

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I. INTRODUCTION

As stated in greater detail in Defendant White's ("White's") Memorandum in Opposition, filed previously in this matter with the Circuit Court of Kanawha County, this case is not appropriate complex litigation for the Business Court Division. Because White has previously addressed this issue in greater detail in his prior Memorandum in Opposition, which is part of the record now before the Supreme Court of Appeals, he will not restate all of those arguments in their entirety. It is important to state, however, that this case is simply not the type of complex litigation between *business entities*, for which the Business Court Division was designed.

Notwithstanding the Bank's detailed listing of the various notes, this is and remains a collection matter by a bank principally against an individual, Mr. White. While the notes may be numerous, that does not make the case complex. Further, the presence of business entities is largely in the role of guarantors of loans made to individuals, does not change the essential nature of the case.

Instead, this is a fairly routine collection action, although with multiple notes, and one which is within the purview of any Circuit Court in the State and certainly within the purview of the State's largest Circuit Court. A referral of this matter to the Business Court Division would be inappropriate and would divert the Division from truly complex commercial litigation.

II. FACTUAL HISTORY

Given the recitation of facts in prior filings with the Circuit Court, Defendant will not restate the entire factual history in this Memorandum. Defendant certainly agrees that the Bank and White had a long and cooperative business relationship over many years, resulting in significant fees and earnings to the Bank. While some of the notes which are the subject of this case may have been used

by White for business purposes, others were for personal use, including principally the significant loans for the Florida real estate. The mere fact that loans may have been called "commercial" by the Bank in the loan documents it created does not make them commercial loans. Moreover, essentially all of the business entities involved are now defunct or have had all of their collateral foreclosed upon by Bank. Thus, it would appear that the only real focus of the Bank's collection action is Mr. White individually.

III. LEGAL STANDARD

Rule 29 establishes the purpose and procedure for hearing a case in the newly-created Business Court Division of the West Virginia judiciary. It is a limited process "for efficiently managing and resolving litigation involving commercial issues and disputes **between businesses** that include the establishment of a Business Court Division to handle a specialized court docket within the circuit courts." W. Va. Trial Ct. R., 29.01 (emphasis added).

"Business Litigation" is narrowly defined to be "one or more pending actions in circuit court in which:

- (1) The principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities;
- (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 government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va, Trial Ct. R. 29.04.

Business Litigation thus requires that all three predicates be met: (1) that the litigation is between businesses, (2) that the litigation involves highly complicated commercial or technological issues, and (3) that it does not involve consumer litigation. Plaintiff's claims do not satisfy any of these requirements, let alone all of them. Thus, the Court should deny Plaintiff's Motion.

IV. ARGUMENT

The Bank's Motion refers to White's "attempt to cast the case as a collection matter between a bank and three individuals." This is not an attempt by the Defendant, but in fact the essence of the case. Any collection matter by a bank, or any other breach of contract claim, will necessarily concern "commercial issues." That cannot render every such case a matter of complex, specialized litigation appropriate for the Business Court Division.

United first makes much of the large amount of the aggregate claim. However, the dollar amount in controversy standing alone certainly cannot be basis for establishing a case as complex. The underlying legal issues and disputes would be the same whether the claim were for \$10,000 or \$10 million. Similarly, the amount in dispute cannot alone justify the matter as "matter of significance." A fixed dollar threshold was apparently never the intention in the creation of the Business Court Division.

Ironically, after the Bank tries to argue that the \$10 million amount makes the case "significant", it then turns around and contends that the dollar amounts of the loans on the Florida residence are irrelevant with regard to its assertion of "principal claims" under Rule 29.

As White argued in his prior Memorandum, the significant bulk of the loan amounts in dispute, in excess of 70%, relate to loans on the Florida residence. Therefore, as noted in the prior Memorandum in Opposition, White asserted that the principal amounts of the claims in this litigation in essence relate to excluded residential loans related to the Florida mortgage, and thus explicitly fall outside the scope of Rule 29.

Further, it appears unlikely that this case would involve substantially complex matters requiring specialized treatment, as envisioned by Rule 29. The Bank asserts that the valuation of corporate assets alone creates a complex matter suitable for the jurisdiction of the Division. There is no basis in Rule 29 or any other authorities to support such a position. The valuation of any corporate assets, would simply be a matter of determining the appropriate values of foreclosed real estate in terms of affording proper credit to the customer following the Bank's foreclosures.

This is hardly similar to a matter where someone has to value a going concern of a significant business with active operations and assets. The referenced case of *Holliday v. Toney*, (a ruling from the Business Court Division (dated June 18, 2013, as cited in and attached to Plaintiff's Reply in Support of its Motion to Refer Case to the Business Court Division) is thus inappropriate to the present matter. Based upon the Court's Findings of Fact, that case involved a shareholder derivative action arising under the State Corporation Code, requiring potential dissolution of a company in a dispute between co-owners as well as valuation of the companies operating assets and goodwill. There is no such similar valuation issue that would be likely to arise in the present litigation.

Further, counterclaims raised by White again deal with fairly routine lending matters concerning loan documents and notes. Hardly complex, specialized litigation beyond the scope of any of the Circuit Courts of Kanawha County.

Finally, White again asserts that the fact of consumer and residential nature of the loans precludes the Business Court's jurisdiction under Rule 29.04(a)(3). Again, this relates to issue of what constitutes the "principal claim." Its undeniable that the principal bulk of the claim relates to the over \$7 million in loans related to the residential property in Florida, notwithstanding the fact that the claims may be made against various business entities as guarantors. The Bank tries to suggest that this is a "significant" amount, but that significant amount is irrelevant to the "principal claims" in the case. If a bank sued on nine outstanding loans for \$1,000 and one loan for \$100,000, one could hardly say that the principal claims involved the \$9,000 in small notes. Notwithstanding the number of counts in the Plaintiff's Complaint, it is clear that the principal focus of this case is the \$7 million owed with regard to the Florida residence.

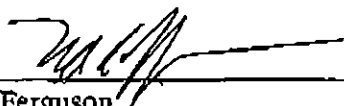
V. CONCLUSION

Plaintiff's Motion must fail due to its inability to satisfy any of the three threshold requirements under Rule 29: (1) The case does not involve matters of significance between *business entities*; (2) The case does not involve specialized or complex areas involving issues of commerce or technology; and (3) The principal claims involve consumer litigation. This precludes referral of this Civil Action to the Business Court Division. For the foregoing reasons, the Plaintiff's Motion to Refer Case to the Business Court Division should be denied.

Dated: August 8, 2014

Respectfully submitted,

Clarence E. White
Defendant,
By Counsel



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(BUSINESS COURT DIVISION)

FILED

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CATHY S. GAINES, CLERK
KANAWHA COUNTY CIRCUIT COURT
WJH

Case No: _____
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a Florida limited liability company; and
CYDNEY REALTY, INC., a West Virginia corporation,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion of Defendant Clarence E. White in Opposition to Motion to Refer Case to Business Court Division was served, by first class United States mail, this 8th day of August, 2014, on the following counsel of record in this case:

Stuart McMillan, Esq.
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Charleston, WV 25325-1386


Mark A. Ferguson

FILED

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KANAWHA COUNTY CIRCUIT COURT
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