

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

FILED

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
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UNITED BANK, INC.,
a West Virginia banking corporation,

Plaintiff,

vs.

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

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.

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

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Counsel for Defendant

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KANAWHA COUNTY CIRCUIT COURT

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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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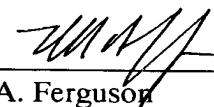
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CERTIFICATE OF SERVICE

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:

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