

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
[BUSINESS COURT DIVISION]

SOUTHERN AMUSEMENT CO., INC.,

Plaintiff,

v.

B.C.D. Action No. 14-BCD-20
[Logan County Circuit Court Civil
Action No. 14-C-231]

B&J BUSINESS ENTERPRISES, INC., doing
Business as GIOVANNIS PIZZA, a West Virginia
Corporation; DOTSON'S MANAGEMENT
CO., INC., a West Virginia Corporation;
JESSIE'S ITALIAN RESTAURANT LLC,
doing business as JOYCE'S and TOBACCO &
MORE EXPRESS, a West Virginia Limited
Liability Company; DAWN ENTERPRISES LLC,
a West Virginia Limited Liability Company; GREG
DOTSON, JEANNIE DOTSON and BRIDGET DOTSON
WHITE, individually,

Defendants.

**Motion to Refer on Behalf of Defendants
B&J Business Enterprises, Inc., Dotson's
Management Co., Inc., Jessie's Italian
Restaurant, LLC, Greg Dotson, Jeannie Dotson,
and Bridget Dotson White**

COME NOW Defendants B&J Business Enterprises, Inc. ("B&J"), Dotson's
Management Co., Inc. ("DMC"), Jessie's Italian Restaurant, LLC ("Jessie's"), Greg Dotson
("Mr. Dotson"), Jeannie Dotson ("Mrs. Dotson"), and Bridget Dotson White ("Mrs. White")
(collectively, "Defendants"), by counsel, and hereby move this Court to refer the above-
captioned civil action to the Business Court Division. In support of their Motion, Defendants
state as follows:

I. The Business Court Division Has Jurisdiction over This Civil Action.

1. West Virginia Code § 51-2-15 and Rule 29 of the West Virginia Trial Court Rules ("TCR") provide that civil actions which constitute "Business Litigation" are eligible for transfer to the West Virginia Business Court Division.

2. "Business Litigation" is defined by TCR 29 as a civil action 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].

TCR 29.04(a)(1)-(3).

3. Per recent amendments to TCR 29, any party or judge may seek a referral of "Business Litigation" to the Business Court Division by filing a Motion to Refer with the Clerk of this Court, after the time to answer the complaint has expired. TCR 29.06(a)(1). Such a motion must include a copy of the "complaint, answer, docket sheet and any other documents that support referral..." *Id.* Accordingly, a true and accurate copy of Plaintiff Southern Amusement Co., Inc.'s ("Plaintiff") Complaint is attached hereto as Exhibit A. A true and accurate copy of the docket sheet is attached hereto as Exhibit B. No answers have yet been filed, but four (4) motions to dismiss have been filed by various defendants in this matter, and are collectively attached hereto as Exhibit C.

4. Defendants are involved in a civil action filed by Plaintiff in the Circuit Court of Logan County, West Virginia, wherein the principal claims between the parties fall

within the subject matter jurisdiction of the Business Court Division. More specifically, Plaintiff's Complaint meets each of the three criteria provided in TCR 29.04(a)(1)-(3).

5. First, pursuant to TCR 29.04(a)(1), the "principal claims" stated in Plaintiff's Complaint involve "matters of significance" among Plaintiff, a corporation, and (3) other business entities - Defendants B&J, DMC, and Jessie's. The individual defendants - Mr. Dotson, Mrs. Dotson, and Mrs. White - are named parties solely due to their capacities as members or officers of Defendants B&J, DMC, and Jessie's. And as this Court, just observed, "The mere fact that the action involves an individual does not, of itself, exclude the case from eligibility." *United Bank, Inc. v. Clarence E. White et al.*, No. 14-C-571 (Kanawha County) ("Administrative Order of the Supreme Court of Appeals of West Virginia").¹

6. More specifically, Plaintiff's Complaint seeks relief from Defendants under a breach of contract theory and related tort theories. Each of Plaintiff's theories are tied to the expiration of a "West Virginia Lottery Retailer Agreement" (the "Agreement") entered into by and between Defendant B&J and Plaintiff on May 15, 2003. [See Compl. at p. 4, ¶ 17.] Accordingly, the "principal claims" in this matter relate directly to the parties' business operations in the lottery industry.

7. Second, pursuant to TCR 29.04(a)(2), "specialized treatment" of the parties' claims is likely to "improve the expectation" of a fair and reasonable resolution of their controversy. A judge that possesses "familiarity with" two complex legal principles related to business entities and contract law - (1) the doctrine of impracticability and (2) piercing the corporate veil - will likely improve the expectation of a fair and reasonable resolution of the parties' claims.

¹ A true and accurate copy of this Court's decision is attached hereto as Exhibit D.

8. To explain, Plaintiff bases its breach of contract action on a contract that expired by operation of law under the doctrine of impracticability. See Syl. pt. 2, *Waddy v. Riggleman*, 216 W. Va. 250, 252, 606 S.E.2d 222, 224 (2004). Mr. Dotson is the president of B&J - the entity which entered into the lottery Agreement with Plaintiff. Due to a plea agreement by and between Mr. Dotson and the United States, he can no longer possess any ownership interest in any license to conduct business in the lottery industry. Thus, with Mr. Dotson as a shareholder of B&J, B&J could no longer perform under the Agreement between itself and Plaintiff under the doctrine of impracticability. Accordingly, Plaintiff's breach of contract theory should be meritless with respect to a contract which expired by operation of this doctrine.

9. However, whether the doctrine of impracticability discharged B&J's duty to perform under the Agreement will be dictated by this issue; to what extent B&J can be imputed with any "fault" in creating the very condition which made its performance impracticable. Imputing B&J with "fault" for this condition will require a specific type of "veil-piercing" on which the Supreme Court of Appeals of West Virginia has yet to opine - "reverse veil-piercing." In the normal veil piercing scenario, courts may impute liability of a corporation to that of its shareholders. But in the present scenario, the reverse would be true - imputing the "fault" of a shareholder to the corporation so as to avoid application of the doctrine of impracticability.

10. Reverse veil-piercing is a complex, novel legal principle. In fact, the United States Court of Appeals for the Fourth Circuit even certified questions to the Supreme Court of Virginia on "what standards must be met before Virginia would allow reverse veil-piercing of [a business entity]." *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 141

(4th Cir. 2002) *certified question answered sub nom. C.F. Trust, Inc. v. First Flight L.P.*, 266 Va. 3, 580 S.E.2d 806 (2003). To the extent that this case presents such novel legal issues, referral to the Business Court Division is further merited. See Hon. Christopher C. Wilkes, Judge, *West Virginia's New Business Court Division: An Overview of the Development and Operation of Trial Court Rule 29*, W. Va. Lawyer, Jan.-March 2013, 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.”) (emphasis added).

11. Finally, pursuant to TCR 29.04(a)(3), none of Plaintiff’s or Defendants’ claims fall within consumer litigation exceptions.

12. Therefore, in light of the commercial nature of this dispute, as well as the need for specialized treatment due to complex and novel legal issues, the principal claims in this matter fall within the jurisdiction of the Business Court Division.

II. Defendants’ Motion Is Timely before This Court.

13. Where a civil action falls within the jurisdiction of the West Virginia Business Court Division, any party may file a Motion to Refer “after the time to answer the complaint has expired.” TCR 29.06(a)(2). Defendants responded to Plaintiff’s Complaint on October 2, 2014. Accordingly, this matter is timely before this Court.

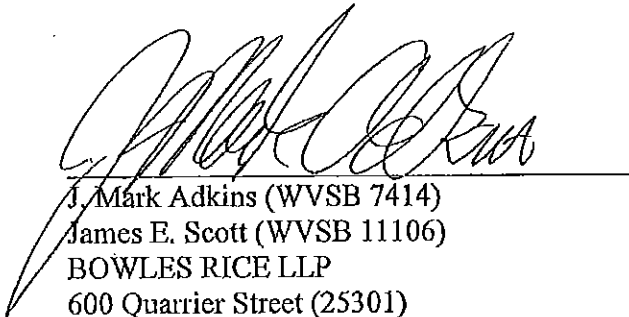
III. Transfer of This Civil Action to the Business Court Division Will Not Affect the Litigation of Any Related Pending or Future Actions.

14. As required by TCR 29.06(a)(1), Defendants state that they are unaware of any pending or future actions related to the parties’ controversy.

WHEREFORE, Defendants B&J Business Enterprises, Inc., Dotson's Management Co., Inc., Jessie's Italian Restaurant, LLC, Greg Dotson, Jeannie Dotson, and Bridget Dotson White respectfully request that this Court refer this civil action to the Business Court Division.

B&J BUSINESS ENTERPRISES, INC.,
DOTSON'S MANAGEMENT
CO., INC., JESSIE'S ITALIAN
RESTAURANT LLC, GREG DOTSON,
JEANNIE DOTSON, AND BRIDGET
DOTSON WHITE

By Counsel



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Certificate of Service

I, J. Mark Adkins, do hereby certify that I have caused copies of the hereto attached *Motion to Refer on Behalf of Defendants B&J Business Enterprises, Inc., Dotson's Management Co., Inc., Jessie's Italian Restaurant, LLC, Greg Dotson, Jeannie Dotson, and Bridget Dotson White* to be served upon:

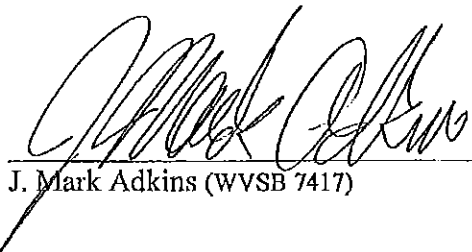
The Honorable Roger L. Perry
Vickie Kolota
Logan County Courthouse
300 Stratton Street
Logan, West Virginia 25601

Berkeley County Judicial Center
Business Court Division
Suite 2100
380 W. South Street
Martinsburg, West Virginia
Attn: Carol A. Miller, Business Court Executive Director

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Counsel for Defendant Dawn Enterprises, LLC

by placing the same in the regular United States Mail, postage prepaid on this 2nd day of October, 2014.



J. Mark Adkins (WVSB 7417)