

**IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA**

**THE BRUCE McDONALD HOLDING  
COMPANY, et al,**

**Plaintiffs,**

v.

**ADDINGTON, INC., et al,**

**Defendants.**

**Civil Action No.: 16-C-070-LGN**

**Judge: James H. Young, Jr.**

**ORDER**

On the 30<sup>th</sup> day of January 2017, this matter came before the Court upon the Plaintiff, the Bruce McDonald Holding Company's Motion to Dismiss Counterclaims Filed by Defendants Addington, Inc., and the Brinks Company. Plaintiff appeared by counsel Nicholas Johnson, Esq., and Sharon Iskra, Esq. Defendants Addington Inc. and the Brinks Company appeared by counsel Wade Massie, Esq.

Thereupon, the Court proceeded to hear the arguments of the parties; and at the conclusion of the same the Court held the motion in abeyance. Therefore, the Court upon reviewing the parties' pleadings, briefs, and legal authority finds as follows:

**STANDARD OF REVIEW**

The Supreme Court of Appeals of West Virginia (West Virginia Supreme Court) has instructed the courts on numerous occasions regarding the proper standard to evaluate a Motion to Dismiss filed under Rules of Civil Procedure 12(b)(6). One of the best explanations of this standard occurred in *Sedlock v. Moyle*, 222 W.Va. 547 (2008), where the West Virginia Supreme Court stated, "[a]s set forth in syllabus point three of *Chapman v. Kane Transfer Company, Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977), '[t]he trial court, in appraising the sufficiency of a

complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (citation omitted).’ *See also Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 491 n. 4, 655 S.E.2d 509, 513 n. 4 (2007) . . . Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 604–05, 245 S.E.2d 157, 158–59 (1978).” *Sedlock* at 550. With these standards in mind the Court will now take up Plaintiff, the Bruce McDonald Holding Company’s Motion to Dismiss Counterclaims filed by Defendants Addington, Inc., and the Brinks Company.

## ANALYSIS

### **The “Silent” Consent Provision and the Implied Covenant of Good Faith and Fair Dealing**

The Plaintiff avers that the Court should grant its Motion to Dismiss Counterclaims on the basis that the status of the law in 1978, the year the lease was drafted and signed, allowed for the arbitrary refusal of assignments and subleases when the lease contained a “silent” consent provision (i.e., “Party A will not assign the lease without prior written consent of Party B.”). West Virginia has never addressed the issue of “silent” consent provisions. The Plaintiff is correct in that the majority of jurisdictions that addressed the issue prior to 1978 followed the “traditional” approach, which permitted arbitrary refusal; however, the Plaintiff has failed to convince the Court that the status of the law should remain stagnant, stuck in 1978. Over the near four decades of this lease, the law has continued to develop and all parties to the lease have had continuing rights and obligations as parties to this lease.



In 2008, when the alleged breach occurred, it is clear that West Virginia recognized that “in every contract there exists an implied covenant of good faith and fair dealing. *Knapp v. Am. Gen. Fin. Inc.*, 111 F. Supp. 2d 758, 767 (S.D.W. Va. 2000). After surveying case law, it is apparent by 2008 the former “traditional,” majority approach had eroded into the minority and the “modern,” majority approach and the *Restatement (Second) of Property* agreed that an implied covenant of good faith and fair dealing was required unless a lease contained an express provision allowing an arbitrary and unconditional right to refuse. See *Dick Broad. Co. of Tennessee v. Oak Ridge FM, Inc.*, 395 S.W.3d 653 (Tenn. 2013), and *The Restatement (Second) of Property: Landlord and Tenant* § 15.2.

The “silent” consent provision in the lease in question cannot be interpreted as *expressly* reserving the right to refuse consent arbitrarily or unconditionally. Had the assignment provision expressly provided this right to the Plaintiff, the Court, undoubtedly, would be unable to find an implied covenant of good faith and fair dealing in the assignment provision. However, this is simply not what the lease provides.

By entering into the long-term lease, the parties are subject to continuing rights and obligations throughout the lifetime of lease. Because the lease is “silent” on the standard required for denying consent to assign or sublease, it is subject to changes in the status of law. When the breach occurred, it is clear that West Virginia required an implied covenant of good faith and fair dealing into every contract that did not expressly provide otherwise. *Knapp*, 111 F. Supp. 2d at 767. This is not the Court modifying terms of an unambiguous lease or rewriting provisions that the parties had negotiated themselves; rather, the Court is simply applying the law at the time of the breach to a provision the lease did not address.

Therefore, the Court **DENIES** the Plaintiff's Motion to Dismiss as the law in West Virginia required an implied covenant of good faith and fair dealing, unless otherwise explicitly provided, at the time of the alleged breach.

#### **Tort Claims for the Breach of Duty of Good Faith and Fair Dealing**

The Plaintiff correctly states that West Virginia does not recognize an independent tort for violating the duty of good faith and fair dealing. However, Defendants are simply asserting a claim for breach of contract based upon the Plaintiff's alleged breach of the lease by arbitrarily denying their right to assign or sublease the property.

Therefore, the Court **DENIES** Plaintiff's Motion to Dismiss Defendants Counterclaim because the Defendants are not alleging an independent tort, but are alleging a breach of contract.

#### **Damages**

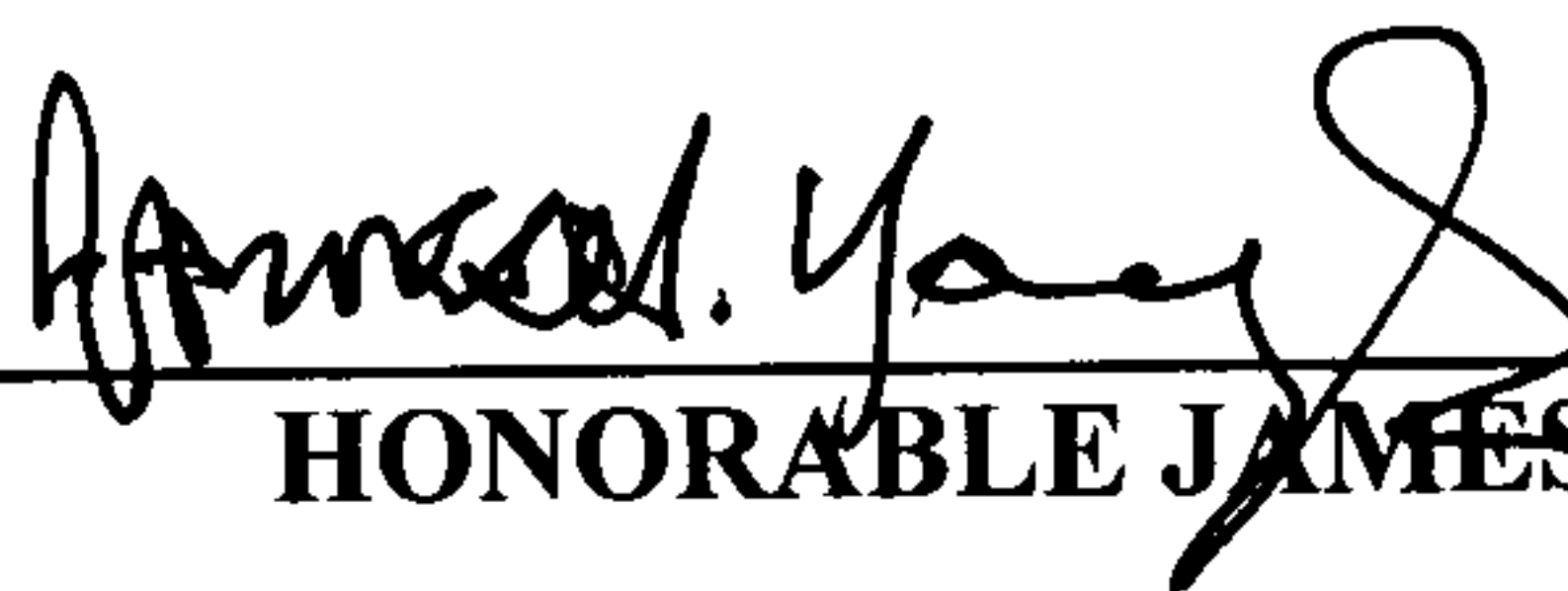
The Plaintiff alleges in its Motion to Dismiss Defendants Counterclaims that Count II must be dismissed because Addington Inc., and the Brinks Co. are not entitled to damages as a matter of law. Addington Inc. and the Brinks Co. allege damages in paragraph 16 of the Counterclaim and for the purposes of a motion to dismiss these allegations must be accepted as true. Thus, this argument is inappropriate in a motion to dismiss under Rule 12(b)(6). The Plaintiff's contention is appropriate to consider after the completion of discovery in a Motion for Summary Judgement or at trial.

**WHEREFORE**, it is **ORDERED** and **ADJUDGED** that the Plaintiff, the Bruce McDonald Holding Company's Motion to Dismiss is **DENIED**.

All accordingly which is **ORDERED** and **DECREED**.

Enter this 10th day of February 2017.

ORDER  
ENTER:

A handwritten signature in black ink, appearing to read "James H. Young, Jr.", is written over a horizontal line.

HONORABLE JAMES H. YOUNG, JR.