

IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA

LANNA KLEIN,

FILED

Plaintiff,

SEP 17 2019

v.

Candy L. Warner
Tyler Co. Circuit ClerkCivil Action No. 18-C-38-H
(Judge David W. Hummel, Jr.)ERIC COCHRAN, BRIAN COCHRAN,
DARLENE MCCULLOUGH, and
GREENBRIER ROYALTY FUND, LLC,*Defendants.***ORDER GRANTING MOTION TO DISMISS OF
DEFENDANT DARLENE MCCULLOUGH**

On a former day defendant Darlene McCullough filed a motion to dismiss plaintiff Lanna Klein's Complaint against her for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Court conducted a hearing on defendant McCullough's motion on September 12, 2019 and, having considered the arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

Findings Fact

Taking for the purposes of this motion the allegations in the Complaint as true, the Court finds:

1. By deed dated June 24, 1995 and recorded in Book 320 at Page 424, (the "Deed") Julia McCullough conveyed property in Tyler County to Benjamin McCullough.
2. The Deed contained a provision: "This conveyance is made subject to the provision that upon the subsequent ,, devise of the said property, the said Benjamin F. McCullough, his heirs or assigns, shall offer a first right of refusal ... to Lanna L. Klein"
3. Benjamin McCullough passed away on April 13, 2010.

4. Benjamin McCullough's will left the entirety of his estate, including the property conveyed in the Deed, to his wife, defendant Darlene McCullough.
5. Plaintiff Lanna Klein is a stranger to the Deed and admitted as such in her response to the motion.
6. The Complaint does not allege that a right of first refusal in favor of Lanna Klein exists in another writing, instrument or contract either contemporaneous with or preexisting the deed.

Conclusions of Law

The Court makes the following Conclusions of Law based upon its Finding of Facts.

1. The purpose of a motion to dismiss under Rule 12(b)(6) is to test the formal sufficiency of the complaint. *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987). "The 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." Syl. pt. 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158-59 (1978).
2. Plaintiff Lanna Klein in her Complaint alleges causes of action against defendant Darlene McCullough for Breach of Contract (Counts I and II) and Declaratory Judgment (Count IV).
3. These claims fail against defendant Darlene McCullough if Lanna Klein was a stranger to the Deed. The West Virginia Supreme Court of Appeals has held that "[a] reservation to

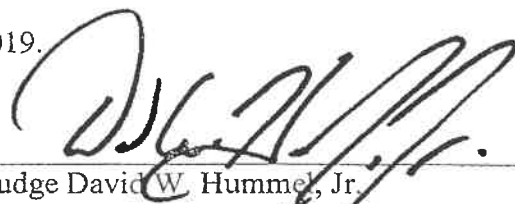
a stranger to the instrument is void for all purposes.” *Erwin v. Bethlehem Steel Corp.*, 134 W.Va. 900, 909, 62 S.E.2d 337, 343 (1950) (quoting *Beckley National Exchange Bank v. Lilly*, 116 W.Va. 608, 182 S.E. 767 (1935). This holding in *Erwin* was reaffirmed in the 1997 decision of the West Virginia Supreme Court in *Meadows v. Belknap* in which the Court declared that “[o]ur case law has been definitive in holding that “[a] reservation to a stranger to the instrument is void for all purposes.”” 199 W.Va, 243, 250 n.14, 483 S.E.2d 826, 834 (1997) (quoting *Erwin*, supra).

4. Having found that the plaintiff is a stranger to the Deed, the right of first refusal in favor of Lana Klein in the deed is void, inoperative and cannot be enforced by the plaintiff. As such, defendant McCullough’s motion to dismiss should be granted.
5. This Court further finds that, as a matter of law, the claims of Lana Klein against the other defendants Eric Cochran, Brian Cochran and Greenbrier Royalty Fund, LLC are dependent upon the plaintiff being able to maintain a claim against defendant McCullough. Without a claim against defendant McCullough the entirety of the civil action is subject to dismissal.

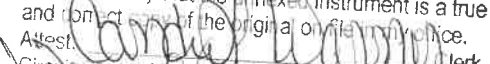

WHEREFORE, for the reasons stated herein, the motion to dismiss of defendant Darlene McCullough is GRANTED. This Court also, sua sponte, dismisses the claims of plaintiff against the remaining defendants Eric Cochran, Brian Cochran and Greenbrier Royalty Fund, LLC.

The objections and exceptions of the parties to this Order are noted and saved.

Entered this 10 day of Sept., 2019.



Judge David W. Hummel, Jr.
Circuit Court of Tyler County, West Virginia

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest:  Clerk
Circuit Court of Tyler County, West Virginia
By:  Deputy