
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Aug 23 2024
09:32AM EDT
Transaction ID 74130229

HULL PROPERTY GROUP, LLC and CHARLES WV MALL, LLC

Defendants Below, Petitioners,

v.

QUARRIER ST, LLC

Plaintiff Below, Respondent

and

**U.S. BANK NATIONAL ASSOCIATION, SUCCESSOR BY MERGER TO LASALLE
BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BEAR STEARNS
COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2007-TOP28 and C-III Asset Management
LLC, f/k/a Centerline Servicing, Inc., incorrectly designated as d/b/a Greystone Special
Servicing Corporation Service Company**

Defendants Below, Respondents

*From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 22-C-128*

THE TRUST RESPONDENTS' BRIEF

/s/ Arie M. Spitz

August 22, 2024

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STATEMENT OF THE CASE

On May 10, 2021, the Trust sold the Charleston Town Center Mall (the “Mall”) to CWV. (JA 00484-00555). The terms of the Agreement of Purchase and Sale (the “P&SA”) required the Trust and CWV to enter into an Assignment and Assumption of Leases and Contracts (the “Assignment and Assumption Agreement”). (JA 00488 and JA 00529-00539). Through the Assignment and Assumption Agreement, the Trust assigned, and CWV assumed, all of the Trust’s rights, title and interest, in and to “the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property [the Mall], Improvements or Personal Property, *including specifically, without limitation*, the assignable equipment leases described on **Exhibit B** attached hereto (collectively, “**Contracts**”).” (JA 01256) (emphasis added).

At the time of execution of the Assignment and Assumption Agreement, the Trust was a party to a contract (the “Demolition Agreement”) pertaining to the demolition of a common wall shared by the former Sears building and the Mall. (JA 01268-01297). The Demolition Agreement is an assignable contract. (JA 01273). And the Demolition Agreement relates to the operation of the Mall. (JA 01313-01314).

The Circuit Court correctly concluded (1) that the Assignment and Assumption Agreement is clear and unambiguous, and (2) that through the Assignment and Assumption Agreement the Trust assigned, and CWV assumed, the Demolition Agreement. (JA 00001-00014).

Notably, the Assignment and Assumption Agreement is not limited to only those Contracts that CWV has knowledge of, nor to only those the Trust disclosed to CWV, nor to only those listed on Exhibit B to the Assignment and Assumption Agreement (hence the use of the words “without limitation”). (JA 01255-01266). And, while noting that an analysis of these issues was not necessary, the Circuit Court went on to correctly find (based upon the admissions/testimony of CWV’s Rule 30(b)(7) corporate representative) that (1) CWV had knowledge of the Demolition

Agreement, and (2) the Trust did not have an obligation to disclose the Demolition Agreement to CWV prior to closing/execution of the Assignment and Assumption Agreement. (JA 00001-00014).

1. A short timeline of the key events relative to this appeal (facts) are:

May 8, 2018	Quarrier purchases the Sears Parcel. (JA 00082).
August 13, 2020	Quarrier and the Trust execute the Demolition Agreement, which, among other things, provides for the manner in which the common wall shared by the Mall and the Sears building will be demolished and replaced. (JA 01268-01297).
February 5, 2021	In response to the Trust's marketing of the Mall for sale, CWV executes a confidentiality agreement to gain access to an online due diligence vault of information about the Mall. (JA 01302-01305). CWV is told in this agreement that the vault may not contain all pertinent documents. (JA 01302-01305). As part of its marketing process, the Trust provides CWV with a brochure which states, among other things, that the Sears building will be demolished and will be replaced by a free-standing hotel. (JA 01333-01383).
March 23, 2021	CWV makes 2 offers to purchase Mall, one with a due diligence period and one without a due diligence period. (JA 01884-01886).
March 26, 2021	Representatives of CWV, including Elizabeth Wilson, an officer of CWV/Hull, tour the Mall. (JA 01329; and JA 01385-1391).
April 9, 2021	CWV signs the P&SA to buy the Mall (with no due diligence period – CWV became obligated to purchase the Mall on the terms of the P&SA as soon as it signed the P&SA). (JA 00484-00555).

April 17, 2021	Representatives of CWV/Hull, including Hull officer Elizabeth Wilson, tour the Mall. Either during this tour, or during the prior one on March 26, the Trust's agent, Greg Jordan, told Ms. Wilson there was a demolition agreement and she was given access to Mr. Jordan's files, which included a final, unsigned copy of the agreement with all exhibits attached in a file folder marked "Sears Demolition" and which had Mr. Patel's contact information on the outside of it. (JA 01308-01311; JA 01331; JA 01385-1391; and JA 01393-01394)
May 10, 2021	The closing of the sale of the Mall occurs and CWV signs the Assignment and Assumption Agreement through which the Trust assigned, and CWV assumed, the Demolition Agreement (among other things). (JA 01255-01266).

2. A short timeline of the key events relative to this appeal (procedure) are:

August 31, 2022	Mr. Jordan is deposed and testifies that he informed Ms. Wilson that there was an agreement for the demolition of the Sears building, that she was given access to his files, and that his files contained a copy of the final agreement (albeit unsigned) in a folder marked "Sears Wall." (JA 01383-01392).
January 26, 2023	A hearing is held on Quarrier's Motion for Partial Summary Judgement re: whether the Demolition Agreement was assigned to Hull via the Assignment and Assumption Agreement. (JA 00707-00737). Notably, as of this hearing date, discovery had not been completed.
August 18, 2023	Discovery continues, including the deposition of Patrick Muller, the Rule 30(b)(7) representative of CWV/Hull. During this deposition Mr. Muller

admits that (1) the Demolition Agreement relates to the operation of the Mall (JA 01312-01314); (2) Mr. Jordan testified truthfully at his deposition (JA 01308-01311); (3) Ms. Wilson was given access to, and reviewed, Mr. Jordan's files (JA 01331); and (4) the Demolition Agreement is not a maintenance or service contract (JA 01327-01328).

December 11, 2023 The Circuit Court enters an order denying Quarrier's Motion for Partial Summary Judgment based upon the evidence and arguments submitted during the hearing back in January 2023. (JA 01897-01904).

December 21, 2023 A hearing is held on the Trust Defendants' Motion for Summary Judgment focusing exclusively on the issue of whether the Demolition Agreement was assigned to Hull via the Assignment and Assumption Agreement. (JA 01995-02016). As of the date of this hearing, discovery had been completed.

January 15, 2024 The Circuit Court grants the Trust Defendants partial summary judgment, finding that the Assignment and Assumption Agreement was unambiguous and that by its terms, the Assignment and Assumption Agreement operated to assign the Demolition Agreement to CWV. (JA 00001-000014).¹

3. Details of the facts and procedural history of the case that are relevant to the assignments of error.

A. The Demolition Agreement.

1. On August 13, 2020, the Trust and Quarrier entered into the Demolition Agreement relating to Quarrier's planned demolition of the Sears building, including the common wall shared by the Sears building and the Mall. (JA 01268-01297).

¹ It is important to note that while the Circuit Court's Orders were issued roughly one month apart, the Order of December 11, 2023 pertains to evidence and argument presented in January 2023, prior to the conducting of key discovery – which discovery was the basis for the Circuit Court's January 15, 2024 Order.

2. The Demolition Agreement placed conditions upon the manner in which Quarrier was permitted to demolish the common wall, including construction of a temporary common wall, and discussed the “impact and effect on the Mall Property, and the minimizing of any such impact and effect.” (JA 01268-01297).

3. The Demolition Agreement also contains a successors in interest clause, which states, “This Agreement shall be binding upon and inure to the benefit of each of the parties hereto, and their respective heirs, successors, assigns, beneficiaries, personal representatives, subsidiaries, parties, and affiliated or related legal entities, as applicable.” (JA 01273).

B. The Assignment and Assumption Agreement.

4. On April 19, 2021, the Trust and CWV entered into the P&SA in connection with CWV’s planned purchase of the Mall from the Trust. (JA 00484-00555). One of the conditions for the closing of the sale of the Mall was execution by the Trust and CWV of an assignment and assumption agreement. (JA 00488 and JA 00529-00539). The Assignment and Assumption Agreement was entered into by the Trust and CWV as part of the closing on CWV’s purchase of the Mall on May 10, 2021. (JA 01268-01297).

5. The Assignment and Assumption Agreement states in relevant part that “Assignor [the Trust] does hereby SELL, ASSIGN, CONVEY, TRANSFER, SET OVER, and DELIVER unto Assignee [CWV] all of the Assignor’s right, title and interest, if any, in and to the following: (a) all oral or written agreements pursuant to which any portion of the Real Property or improvements is used or occupied by anyone other than the Assignor (collectively, “**Leases**”) ... (b) the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property [the Mall], Improvements or Personal Property, including specifically, without limitation, the assignable equipment leases described on **Exhibit B** attached hereto (collectively, “**Contracts**”).” (JA 01256).

6. The Assignment and Assumption Agreement states that consideration of \$10, and other good and valuable consideration, was paid by CWV to the Trust in exchange for the Trust's assignment of the Contracts. (JA 01256).

C. The Circuit Court's first hearing and Subsequent Evidence.

7. On January 26, 2023, the Circuit Court heard Quarrier's Motion for Partial Summary Judgment – in which Quarrier sought an order from the Circuit Court finding that CWV was bound to the Demolition Agreement by virtue of the Assignment and Assumption Agreement. (JA 00707-00737).

8. The focus of the arguments during this hearing was Quarrier's contention that the Demolition Agreement met the definition of the term "Lease" as defined by the Assignment and Assumption Agreement. (JA 00707-00737). Notably, CWV's counsel conceded at this hearing that the Demolition Agreement is not a service or maintenance contract. (JA 00719).

9. On December 11, 2023, the Circuit Court entered an Order denying Quarrier's Motion (the "Prior Order"). (JA 01897-01904). The Prior Order analyzed why Quarrier's argument that the Demolition Agreement was a "Lease" as defined by the Assignment and Assumption Agreement was insufficient to convince the Circuit Court that, for summary judgement purposes, the Demolition Agreement was subject to the Assignment and Assumption Agreement. (JA 01899-01903).

10. The Prior Order also noted CWV's arguments that there was a factual dispute as to whether the Trust disclosed or provided a copy of the Demolition Agreement to CWV during CWV's due diligence and that there was an issue of fact as to whether CWV was aware of the Demolition Agreement at the time the Assignment and Assumption Agreement was executed. (JA 01901-01903). The Prior Order then found that the Assignment and Assumption Agreement did not explicitly reference the Demolition Agreement, thus making it a question of fact as to whether,

or not, the Trust and CWV intended for the Demolition Agreement to be conveyed to CWV via the Assignment and Assumption Agreement. (JA 01903).

11. After the hearing on Quarrier's Motion, in January 2023, the parties continued to conduct discovery. After the close of discovery, the Trust Defendants filed their Motion for Summary Judgment. (JA 01231-01404). The Trust Defendants then submitted additional evidence as exhibits to their Motion for Summary Judgment and other briefs, as did Quarrier and CWV. (JA 01905-01953).

12. Most notably, after the January 2023 hearing on Quarrier's Motion, a Rule 30(b)(7) deposition of CWV/Hull was held on August 16, 2023 in which CWV made the following admissions:

- a. The Demolition Agreement relates to the demolition and construction of an exterior wall of the Mall. *See* Rule 30(b)(7) Depo of CWV/Hull at Pg 91 – Pg 92. (JA 01313-01314).
- b. Having an exterior wall, and having an exterior wall torn down, relates to and affects the operation of the Mall. (JA 01313-01314).
- c. Greg Jordan told the truth during his deposition testimony. *See* Rule 30(b)(7) Depo of CWV/Hull at Pg 74 Ln 14 – Pg 77 Ln 9. (JA 01308-01311).
- d. Elizabeth Wilson, a CWV/Hull officer, had access to, and reviewed, Greg Jordan's files before CWV purchased the Mall, which included the final version of the Demolition Agreement along with all of the exhibits to the Demolition Agreement, which included engineering documents and drawings. *See* Rule 30(b)(7) Depo of CWV/Hull at Pg 283 Ln 1-13. (JA 01331).

- e. The Demolition Agreement is not a service contract, is not a maintenance contract, and is not an equipment contract. *See* Rule 30(b)(7) Depo of CWV/Hull at Pg 276 Ln 9 – Pg 277 Ln 5. (JA 01327-01328).

13. With respect to CWV's admission that Greg Jordan testified truthfully at his deposition (JA 01308-01311), this means that CWV conceded the truth of the following testimony by Mr. Jordan as to what he told Ms. Wilson:

- a. "I told her basically that the Sears deal was important and that she needed to maybe look into the Sears deal with, you know, Patel's group." Greg Jordan Depo, at Pg 31 Ln 3 – Pg 37 Ln 16. (JA 01385-01391).
- b. That there had been a meeting and plans to demolish the Sears building. Greg Jordan Depo, at Pg 32. (JA 01386).
- c. That while walking by the Sears building he told Ms. Wilson that it was his understanding there was an agreement to tear it down. Greg Jordan Depo, at Pg 36-37. (JA 01390-01391).
- d. And that a copy of the Demolition Agreement with the demolition plans (albeit unsigned) was in his files and that CWV had access to his files, including a folder on which he had written 'SEARS WALL' along with contact information for one of the Patels. Greg Jordan Depo, at Pg 37. (JA 01391 and JA 01394).

14. In addition, documents were produced after the hearing on Quarrier's Motion which show that CWV submitted two offers for the purchase of the Mall: one for \$8.1 Million, with a fifteen day due diligence period, and one for \$7.5 Million, without a due diligence period. (JA 01951-01953). And it was the second offer, \$7.5 Million with "no due diligence," that was accepted by the Trust. (JA 01951-01953).

15. Importantly, the P&SA does not contain a review or due diligence clause giving Hull the right to refuse to close on the sale of the Mall based upon the performance of a review or due diligence. (JA 00484-00555).

16. The substance of an email chain evidencing the Trust's acceptance of the lower price without a due diligence period for CWV was read into the record by the Circuit Court during the hearing of December 21st and a complete copy of the email chain and related documents were tendered by Quarrier to the Circuit Court on October 6, 2023. (JA 02011-02012; and JA 01882-01886).

D. Impact of the evidence obtained after the January 2023 hearing.

17. In its Prior Order, the Circuit Court noted several arguments made by CWV/Hull that were undermined by the evidence that was discovered after the hearing of January 24, 2023, each is detailed below.

18. CWV argued that there was an issue of fact as to whether the Trust disclosed the existence of the Demolition Agreement to CWV and whether CWV had any knowledge of the Demolition Agreement prior to execution of the Assignment and Assumption Agreement. (JA 01901-01902). Contrary to this argument, CWV's Rule 30(b)(7) corporate representative later admitted during his deposition that (1) Greg Jordan told an officer of Hull, Elizabeth Wilson, that there was an important deal to tear down the Sears building and that it was his understanding that there was an agreement to tear it down; and (2) that Ms. Wilson reviewed Greg Jordan's files, which included a copy of the Demolition Agreement, albeit unsigned, including all of the attached engineering/demolition plans. (JA 01308-01311 (CWV admitting that Greg Jordan told the truth) and (JA 01385-01391 (Greg Jordan's testimony)). Of further note, CWV has not asserted any counter-claims against the Trust for any alleged breach of the terms of the P&SA. (JA 01190-01226).

19. CWV argued that the P&SA required the Trust to inform CWV of all service and maintenance contracts and equipment leases related to the Mall, and so the Trust was obligated to inform CWV of the Demolition Agreement. (JA 01901-01902). The PS&A did require the Trust to provide CWV with a list of all service and maintenance contracts and equipment leases related to the Mall. (JA 00487 at Section 4 and JA 00517). Contrary to this argument, CWV's Rule 30(b)(7) corporate representative later admitted during his deposition that the Demolition Agreement is not a service or maintenance contract and is not an equipment lease (JA 01327-01328). Again, of further note, CWV has not asserted any counter-claims against the Trust for any alleged breach of the terms of the P&SA. (JA 01190-01226).

20. Finally, and most importantly, CWV argued that the Assignment and Assumption Agreement was ambiguous with respect to whether it includes an assignment of the Demolition Agreement. (JA 01899-01902). Contrary to this argument, CWV's Rule 30(b)(7) corporate representative later admitted during his deposition that that the Demolition Agreement relates to the operation of the Mall. (JA 01313-01314). During the December 21, 2023 hearing, CWV's counsel argued that the Rule 30(b)(7) representative admitted that the act of demolishing the common wall relates to the operation of the Mall, but that the representative did not actually admit that the Demolition Agreement relates to the operation of the Mall. (JA 02004). The Circuit Court, however, noted that the Rule 30(b)(7) representative admitted that the Demolition Agreement relates to the demolition of the common wall and then admitted that the demolition of the common wall relates to the operation of the Mall. (JA 01313-01314 and JA 00007). And the Circuit Court then found, correctly, that despite the arguments of counsel, there can be no **genuine** dispute over the fact that the Demolition Agreement relates to the operation of the Mall. (JA 00007).

21. Based upon the evidence that was discovered after the January 2023 hearing, which evidence was not analyzed in the Circuit Court's December 11, 2023 Order, the Circuit Court

correctly concluded that CWV's admissions caused there to be no genuine dispute of material fact that the scope of the Assignment and Assumption Agreement includes the Demolition Agreement because CWV admitted that the Demolition Agreement relates to operation of the Mall. (JA 00001-00014).

SUMMARY OF THE ARGUMENT

Pursuant to Syl. Pt. 9, *Arnold v. Palmer*, 224 W. Va. 495, 686 S.E.2d 725 (2009), the Circuit Court must apply and enforce the Assignment and Assumption Agreement as written, unless it is ambiguous. Ambiguity, however, is not created simply because the parties are in a dispute. *See* Syl. Pt. 3, *FOP, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712 (1996). In this case, the language at issue is plain and clear: "Assignor [the Trust] does hereby SELL, ASSIGN, CONVEY, TRANSFER, SET OVER, and DELIVER unto Assignee [CWV] all of the Assignor's right, title and interest, if any, in and to the following: ... (b) the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property [the Mall], Improvements or Personal Property, including specifically, **without limitation**, the assignable equipment leases described on **Exhibit B** attached hereto (collectively, **"Contracts"**)." (JA 01256) (emphasis added). Because CWV admitted that the Demolition Agreement relates to operation of the Mall (JA 01313-01314), there can be no dispute that application of the Assignment and Assumption Agreement results in CWV being bound by the Demolition Agreement.

As argued by Quarrier's Counsel, CWV chose to sign an Assignment and Assumption Agreement that included, *but was not limited to*, contracts that were identified on Exhibit B of the agreement, and in doing so CWV chose to take the risk that there were contracts out there in addition to those listed on Exhibit B that would be assigned to CWV. (JA 00715-00716). In order to limit the scope of the assignment to only those contracts CWV knew of, only those contracts

that were listed on Exhibit B, or only those contracts that were disclosed to CWV, a Court would have to delete the words “without limitation” from the Assignment and Assumption Agreement and would have to add words to limit the scope of the assignment. West Virginia law, however, requires that the exact opposite thing be done: the law requires a contract to be applied as written. Syl. Pt. 1, *FOP, Lodge No. 69*, 196 W. Va. 97, 468 S.E.2d 712.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary for this appeal because the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This is because the basis of the Circuit Court’s Order was application of the Assignment and Assumption Agreement, while the majority of CWV’s arguments pertain to the Circuit Court’s findings relating to CWV’s knowledge of the Demolition Agreement, which the Circuit Court noted were not necessary for its decision. (JA 00010).

ARGUMENT

1. Standard of review for a motion for summary judgment.

“Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*.” *W. Va. DOT, Div. of Highways v. Robertson*, 217 W. Va. 497, 499, 618 S.E.2d 506, 508 (2005).

West Virginia Rule of Civil Procedure 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried

and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Fed. Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

“Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil*, 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995).

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Id. at Syl, Pt, 3.

2. Standard of review for the application, or interpretation, of a contract.

“The interpretation of a contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgement, shall be reviewed *de novo* on appeal.” *Mt. Lodge Ass’n v. Snowshoe Mt., Inc.*, No. 23-ICA-1, 2024 W. Va. App. LEXIS 25, *10, 2024 WL 492355 (W. Va. Ct. App. Feb. 8, 2024) (citing Syl. Pt. 2, in part, *Riffe v. Home Finders Assocs., Inc.*, 205 W. Va. 216, 217, 517 S.E.2d 313, 314 (1999)) (cleaned up). And an assignment, such as the Assignment and Assumption Agreement at issue here, is a contract that is subject to the same case law and analysis as any other contract. *Hays & Co. v. Ancro Oil & Gas*, 186 W. Va. 153, 155, 411 S.E.2d 478, 480 (1991) (“An assignment does not differ in its essential elements from any other contract.”).

“A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied

and enforced according to such intent.” Syl. Pt. 9, *Arnold* 224 W. Va. 495, 686 S.E.2d 725 (citations omitted). “It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.” Syl. Pt. 1, *FOP, Lodge No. 69*, 196 W. Va. 97, 468 S.E.2d 712 (citations omitted).

“The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” *Id.* at Syl. Pt. 3 (citations omitted).

While the general rule is that the construction of a writing is for the court; yet where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. If the parol evidence be not in conflict, the court must construe the writing; but, if it be conflicting on a material point necessary to interpretation of the writing, then the question of its meaning should be left to the jury under proper hypothetical instructions.

Syl. Pt. 2, *Hays & Co.*, 186 W. Va. 153, 411 S.E.2d 478 (citations omitted).

3. The Circuit Court correctly concluded that the Assignment and Assumption Agreement is unambiguous.

The Assignment and Assumption Agreement states in plain language that it pertains to “the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property [the Mall], Improvements or Personal Property, including specifically, without limitation, the assignable equipment leases described on **Exhibit B** attached hereto (collectively, “**Contracts**”).” (JA 01256). These terms are not “inconsistent on their face,” nor does their “phraseology [. . .] support reasonable difference of opinion as to the meaning of words employed an obligations undertaken.” *Mt. Lodge Ass’n*, 2024 W. Va. App. LEXIS 25, *9, 2024 WL 492355 (citations omitted). If the Trust was party to a contract that was assignable and the contract related

to the upkeep, repair, maintenance or operation of the Mall, including, but without limitation, the contracts listed on Exhibit B to the Assignment and Assumption Agreement, then that contract was assigned to, and assumed by, CWV. It is as simple as that.

Indeed, the Assignment and Assumption Agreement does not contain any limitations on the scope of the “Contracts.” For example, the Agreement does not contain language in it that limits the “Contracts” to solely those contracts provided to CWV prior to execution of the Assignment and Assumption Agreement (JA 01255-01266), nor does it limit “Contracts” to those for which CWV had previously agreed to assume (*Id.*), nor does it limit “Contracts” to those CWV had knowledge/notice of, nor does it define the term “Contracts” in the same manner as the term “Contracts” is defined in the P&SA (*Id.* and JA 00485). And while some “Contracts” were specifically enumerated in Exhibit B to the Assignment and Assumption Agreement, the Agreement expressly notes that this listing was “without limitation.” (JA 01256).

CWV’s arguments as to why the assignment language is ambiguous depend upon reference to parol evidence: the P&SA and what information was disclosed to CWV; or require deleting the words “without limitation” from the Assignment and Assumption Agreement. (CWV’s Brief at 36-40). Such arguments are unavailing because (1) in order for the Court to assess parol evidence, it must first find a contract to be ambiguous and (2) the Court cannot alter the clear terms of a contract (such as by deleting the phrase “without limitation”). Syl. Pt. 2, *Hays & Co.*, 186 W. Va. 153, 411 S.E.2d 478; Syl. Pt. 1, *FOP, Lodge No. 69*, 196 W. Va. 97, 468 S.E.2d 712; and *Leasetronics, Inc. v. Charleston Area Med. Ctr.*, 165 W. Va. 773, 778, 271 S.E.2d 608, 611 (1980) (citations omitted) (“extrinsic evidence can be introduced where the contract is ambiguous or subject to more than one interpretation to be applicable.”).

To reiterate – extrinsic evidence can only be used if the Court first determines that the language of a contract is ambiguous – if the contract is unambiguous, then extrinsic evidence

cannot be considered. Syl. Pt. 2, *Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 162 S.E.2d 189 (1968) (“Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objects relative to the matters involved. However, where the language of a contract is clear the language cannot be construed and must be given effect and no interpretation thereof is permissible.”).

4. The Circuit Court correctly concluded that the Demolition Agreement falls within the scope of Paragraph 2(b) of the Assignment and Assumption Agreement.

Because application of the Assignment and Assumption Agreement covers all contracts that relate to the upkeep, repair, maintenance or operation of the Mall, the question then becomes: Is the Demolition Agreement a contract that relates to the upkeep, repair, maintenance, or operation of the Mall? The answer to this question is a definitive “Yes” based upon the admissions of CWV’s Rule 30(b)(7) representative.

CWV admitted that the Demolition Agreement relates to the operation of the Mall. (JA 01313-01314). CWV’s arguments to the contrary (CWV’s Brief at 35-36) run afoul of the admissions of its Rule 30(b)(7) representative and the application of common sense: an agreement governing the procedure and manner in which one of the Mall’s exterior walls is torn off relates to the operation of the Mall. (JA 01313-01314 and JA 01268-01297).

Because of CWV’s admission, the Circuit Court correctly concluded there is no *genuine* dispute of material fact that the Demolition Agreement is subject to the Assignment and Assumption Agreement. Syl. Pt. 3, *Greenfield v. Schmidt Baking Co.*, 199 W. Va. 447, 485 S.E.2d 391 (1997) (citations omitted); and *Powderidge Unit Owners Ass’n v. Highland Props.*, 196 W. Va. 692, 707, 474 S.E.2d 872, 887 (1996) (citations omitted).

And it is because of CWV's admission that the Circuit Court's Orders can be reconciled. CWV argues that the Circuit Court erred by finding in the Prior Order that the "lack of reference to the Demolition Agreement in the Assignment and Assumption of Leases and Contracts creates an ambiguity," and then subsequently finding that the Demolition Agreement is subject to the Assignment and Assumption Agreement as a matter of law. (CWV's Brief at 22). The reason the Circuit Court was able to come to both of these conclusions is because the Prior Order is based solely on evidence obtained prior to January 2023 (JA 00707-00737 and JA 01897-01904), and CWV's corporate representative deposition (in which CWV admitted that the Demolition Agreement relates to the operation of the Mall) did not take place until August 2023 (JA 01312-01314).

In January 2024, with the benefit of having CWV's corporate representative deposition testimony, the Circuit Court was readily able to conclude that the Demolition Agreement falls within the scope of the Assignment and Assumption Agreement. (JA 00001-00014). This is because of CWV's admissions, which leave no room for a *genuine* dispute over the fact that the Demolition Agreement relates to the operation of the Mall (JA 01312-01314). Syl. Pt. 3, *Greenfield*, 199 W. Va. 447, 485 S.E.2d 391; and *Powderidge Unit Owners Ass'n*, 196 W. Va. at 707, 474 S.E.2d at 887. Taking this admission and applying it to the clear language of the Assignment and Assumption Agreement results in the conclusion that the Demolition Agreement falls within the scope of the Assignment and Assumption Agreement. (JA 01255-01266 and JA 01312-01314).

5. Every other argument raised by CWV is a red herring.

CWV spends almost the entirety of its brief arguing why evidence outside the four corners of the Assignment and Assumption Agreement raise an issue of fact as to whether, or not, the Assignment and Assumption Agreement is ambiguous. What CWV leaves out from its brief,

however, is the applicable standard of review for a Circuit Court's interpretation of a contract as well as the procedure that a Circuit Court is to follow when making such a determination.² Why this was left out of CWV's brief is obvious: the procedure renders CWV's arguments moot because those arguments are based upon parol evidence that does not get considered unless the Assignment and Assumption Agreement is first found to be ambiguous. Syl. Pt. 2, *Hays & Co.*, 186 W. Va. 153, 411 S.E.2d 478; Syl. Pt. 1, *FOP, Lodge No. 69*, 196 W. Va. 97, 468 S.E.2d 712; *Leasetronics, Inc.*, 165 W. Va. at 778, 271 S.E.2d at 611; and Syl. Pt. 2, *Berkeley Cty. Pub. Serv. Dist.*, 152 W. Va. 252, 162 S.E.2d 189.

6. Whether CWV knew of the Demolition Agreement is not relevant because the Assignment and Assumption Agreement is not limited to only those contracts CWV had knowledge of.

The Assignment and Assumption Agreement pertains to all assignable contracts that relate to the upkeep, repair, or operation of the Mall. (JA 01256). The scope of the assigned contracts is not limited to those that are specifically identified in Exhibit B to the Agreement, nor is the scope otherwise limited to contracts that CWV specifically consents to, has knowledge of, or otherwise approves of. (JA 01255-01266). So while CWV's first assignment of error argues that a genuine issue of material fact exists as to whether CWV knew of the Demolition Agreement, this argument is irrelevant. (CWV's Brief at 28-32).

This argument is irrelevant because even assuming, for the sake of argument, that CWV did not know of the Demolition Agreement, CWV agreed to assume it by executing the Assignment and Assumption Agreement. (JA 01255-01266). By executing the Assignment and Assumption Agreement, which did not limit its scope to only those contracts related to the upkeep,

² CWV did not cite any legal authority in the argument of its first two assignments of error. (CWV's Brief at 28-34). In particular, CWV did not cite any legal authority in support of its contention that the parol evidence discussed in these two assignments of error are relevant to the Circuit Court's conclusion that the Assignment and Assumption Agreement is unambiguous. (CWV's Brief at 28-34). As such, these assignments of error should be struck. W. Va. R.A.P. 10(c)(7); *In re B.P.*, No. 17-0787, 2018 W. Va. LEXIS 153, at *1 n.2 (W. Va. Feb. 23, 2018); and *Baker v. Chemours Co. FC, Ltd. Liab. Co.*, 244 W. Va. 553, 562 n.10, 855 S.E.2d 344, 353 (2021).

repair, or operation of the Mall that CWV has knowledge of, CWV agreed to take the risk that there were contracts related to the upkeep, repair, or operation of the Mall that it did not know about which it was agreeing to assume. (JA 00715-00716).

Again, there is a reason CWV did not cite to any legal authority in its argument on this issue (CWV's Brief at 28-32), which is that the case law says that the clear language of the Assignment and Assumption Agreement must be applied. Syl. Pt. 9, *Arnold*, 224 W. Va. 495, 686 S.E.2d 725. And application of the clear language renders irrelevant CWV's argument.

Moreover, CWV's corporate representative admitted (1) that Greg Jordan testified truthfully – and Greg Jordan testified that he told Elizabeth Wilson, CWV/Hull's representative, about the Demolition Agreement (JA 01308-01314 and (JA 01385-01391) and (2) that Elizabeth Wilson reviewed Greg Jordan's files (which contained a copy of the Demolition Agreement) (JA 01328). CWV's arguments as to why these admissions are not really admissions (CWV's Brief at 29-32), like its arguments about whether the Demolition Agreement relates to the operation of the Mall, do not raise a **genuine** issue of material fact as to whether CWV/Hull had knowledge of the Demolition Agreement. Syl. Pt. 3, *Greenfield v. Schmidt Baking Co.*, 199 W. Va. 447, 485 S.E.2d 391; and *Powderidge Unit Owners Ass'n*, 196 W. Va. at 707, 474 S.E.2d at 887

7. The Trust did not have an obligation to disclose the Demolition Agreement to CWV prior to closing, and the Assignment and Assumption Agreement does not condition assignment of the Demolition Agreement upon such disclosure.

CWV's second assignment of error suffers the same shortcomings as its first: the Assignment and Assumption Agreement does not limit its scope to only those contracts previously disclosed to CWV (JA 01255-01266) and the merits of this argument fall short. None of the documents related to the sale of the Mall required disclosure of the Demolition Agreement and, in fact, the confidentiality agreement, CWV's offers, and the P&SA show that CWV assumed the risk that it was purchasing the Mall with incomplete/imperfect information.

First, as argued above, CWV did not cite to any legal authority in its argument on this issue (CWV's Brief at 32-34). This is clearly because the case law says that the clear language of the Assignment and Assumption Agreement must be applied. Syl. Pt, 9, *Arnold*, 224 W. Va. 495, 686 S.E.2d 725. And application of the clear language renders irrelevant CWV's argument.

Second, in the lead up to the sale, CWV/Hull executed a confidentiality agreement in order to gain access to an online vault of information and documents created by the Trust. (JA 01302-01305). In signing the confidentiality agreement, CWV/Hull specifically acknowledged that information and materials may not be accurate or complete. (JA 01303). In other words, CWV acknowledged that the materials it was being given access to might not be the entirety of the documents that pertain to the Mall. (JA 01303).

Third, CWV made two offers to purchase the Mall: one for \$7.5 Million with no due diligence and one for \$8.1 Million with a 15 day due diligence period. (JA 01885). The Trust accepted the \$7.5 Million offer, with no due diligence period. (JA 00484-00555). And the P&SA agreement does not contain any due diligence period. (JA 00484-00555).

Fourth, the P&SA identifies items that must be disclosed by the Trust to CWV prior to closing – these are called the Review Items. (JA 00487 at Section 4). Specifically, the P&SA required the Trust to provide CWV with a list of all service and maintenance contracts and equipment leases related to the Mall. (JA 00487 at Section 4 and JA 00517). According to CWV's Rule 30(b)(7) corporate representative, however, the Demolition Agreement is not a service or maintenance contract, nor is it an equipment lease. (JA 01327-01328). CWV's admission that the Demolition Agreement is not a service contract likewise renders moot CWV's argument that the Demolition Agreement should have been terminated in response to Caroline Hatcher's April 29, 2021 letter that requested termination of "all service contracts" except for those listed in the letter. (JA 01099 and CWV's Brief at 36-37). Again, because CWV admitted that the Demolition

Agreement is not a service contract, CWV cannot now argue that the Demolition Agreement should have been terminated, or otherwise addressed, pursuant to a letter regarding service contracts. (JA 01099).

Fifth, the Seller's Affidavit referenced by CWV (CWV's Brief at 33-34) pertains to the title for the Mall's real property. (JA 00486-00487 and JA 01119-01123). As quoted by CWV, this pertains to any "encumbrance of or upon the subject property ... which is now outstanding or enforceable against the subject property." (CWV's Brief at 33). To put it plainly, the Demolition Agreement is not outstanding or enforceable against the property – it does not run with the land. The Demolition Agreement provides the roadmap to be followed by Quarrier and the owner of the Mall in the context of the demolition of the Sears building and the impact of that demolition on the Mall. If the Demolition Agreement was outstanding or enforceable against the property, then this case would not exist because CWV, as the current title holder of the Mall's real property, would be bound by the Demolition Agreement.

In other words, if the Demolition Agreement is outstanding or enforceable against the property, then it would not need to have been assigned from the Trust to CWV in order for CWV to be bound by it. Because the Demolition Agreement does not run with the land, the Trust did not need to disclose it in the Seller's Affidavit. (JA 01119).

Because the Assignment and Assumption Agreement did not require the Trust to disclose the Demolition Agreement to CWV prior to execution of the Assignment and Assumption Agreement, CWV's argument that extrinsic evidence should be used to impose such an obligation or to create an ambiguity in the Assignment and Assumption Agreement fails. *Syl. Pt. 2, Berkeley Cty. Pub. Serv. Dist.*, 152 W. Va. 252, 162 S.E.2d 189. Moreover, because the documents CWV attempts to rely upon do not actually impose an obligation upon the Trust to disclose the Demolition Agreement to CWV prior to closing, CWV's argument is unavailing.

8. The *IPI, Inc. v. Axiall Corp.* case is completely inapplicable because it applies Pennsylvania law that only governs the interpretation of an indemnification agreement and applies a different standard than that applied by West Virginia to contracts such as the Assignment and Assumption Agreement.

CWV's failure to provide citation to the controlling West Virginia Supreme Court Opinions on the interpretation and application of contracts is compounded by its argument of the *Axiall* case. (CWV's Brief at 38-40) and *IPI, Inc. v. Axiall Corp.*, 897 S.E.2d 572 (W. Va. Ct. App. 2024). As this Court knows, *Axiall* involved the application of Pennsylvania law concerning indemnification agreements whereby a negligent party claims the right to be indemnified by an injured party against its own negligence. *Id.* at 581. And in *Axiall*, this Court applied two key holdings of Pennsylvania law specific to these specific types of indemnification agreements to find that the Circuit Court erred in its interpretation of the contract: (1) that "the Supreme Court of Pennsylvania has frequently observed that it will not assume that parties have agreed to act as insurers and expose themselves to potentially devastating liability unrelated to their own actions," and (2) "under Pennsylvania law ... the indemnity language was required to be strictly construed against the indemnitee, and any ambiguities resolved against the drafter, especially when the drafter was also the indemnitee." *Id.* at 586 (citations omitted).

These tenets of Pennsylvania law with respect to the interpretation of an indemnification agreement simply do not apply here. In this case, the Assignment and Assumption Agreement is governed by West Virginia law. *Lee v. Saliga*, 179 W. Va. 762, 767, 373 S.E.2d 345, 350 (1988) (citations omitted). And under West Virginia contract law, as set forth above, the Court must first assess whether the contract language is ambiguous. Syl Pt. 2, *Hays & Co.*, 186 W. Va. 153, 411 S.E.2d 478; Syl. Pt. 1, *FOP, Lodge No. 69*, 196 W. Va. 97, 468 S.E.2d 712; and *Leasetronics, Inc.*, 165 W. Va. at 778, 271 S.E.2d at 611. If the contract language is unambiguous, then the Court must apply the contract language as written. *Id.* If the contract language is ambiguous, then the

Court may consider evidence outside of the contract in order to determine the meaning of the contract's language. *Id.*

Moreover, the Assignment and Assumption Agreement is not an indemnification agreement nor does the clause at issue, the scope of the "Contracts" assigned by the Trust to CWV, pertain to indemnification. (JA 01255-01266). And so, while under PA law indemnification agreements (and in particular indemnification agreements in which a party will be indemnified for its own negligence) are viewed as very unique things which are therefore subjected to a heightened standard of scrutiny, the Assignment and Assumption Agreement is simply not subject to that standard. *IPI, Inc. v. Axiall Corp.*, 897 S.E.2d 572 at 586 (PA law on indemnification agreements) versus WV contract law: Syl Pt. 2, *Hays & Co.*, 186 W. Va. 153, 411 S.E.2d 478; Syl. Pt. 1, *FOP, Lodge No. 69*, 196 W. Va. 97, 468 S.E.2d 712; and *Leasetronics, Inc.*, 165 W. Va. at 778, 271 S.E.2d at 611. As a result, the *Axiall* case does not apply here.

In this case, the Circuit Court correctly concluded (1) that the language of the Assignment and Assumption Agreement was unambiguous and that as a result the Trust assigned, and CWV assumed, all assignable contracts related to the upkeep, repair, maintenance or operation of the Mall; (2) that there was no genuine dispute of material fact over the fact that the Demolition Agreement relates to operation of the Mall; and (3) that as a result summary judgment was warranted. *Id.* and (JA 00001-00014).

9. The Circuit Court's Order found consideration for the Assignment and Assumption Agreement.

CWV's last argument is that the Assignment and Assumption Agreement lacked consideration and that the Circuit Court did not address this issue in its Order. (CWV's Brief at 40). Contrary to CWV's arguments, the Assignment and Assumption Agreement had consideration and the Circuit Court found as much in its Order. (JA 00003 and JA 01256).

Specifically, the Assignment and Assumption Agreement states that consideration of \$10 was exchanged by the parties. (JA 01256). Because consideration was exchanged, no further inquiry is necessary to demonstrate that CWV's argument as to consideration lacks merit (i.e. it is not within the province of the Court to assess the adequacy of such consideration/whether \$10 in exchange for the assignment and assumption was a good business deal). *Janes v. Felton*, 99 W. Va. 407, 414, 129 S.E. 482, 484 (1925). Moreover, the Circuit Court's Order found that consideration was exchanged. (JA 00003). As such, the Circuit Court correctly found, as stated in its Order, that consideration was exchanged in the formation of the Assignment and Assumption Agreement. (JA 00003).

CONCLUSION

The Circuit Court correctly applied West Virginia law and procedure to the Assignment and Assumption Agreement to find that this contract is unambiguous. The Circuit Court proceeded to correctly apply this unambiguous language by holding that all assignable contracts related to the operation of the Mall were assigned by the Trust to CWV, which assumed such contracts. And the Circuit Court then correctly found that, given the testimonial admissions of CWV's Rule 30(b)(7) representative, there was no genuine dispute of material fact that the Demolition Agreement relates to the operation of the Mall, and so was assigned by the Trust to CWV, which assumed the Demolition Agreement.

The Trust Defendants therefore respectfully request that this Court affirm the Circuit Court's Order, deny CWV/Hull any of the relief requested in their Petition, remand this case back to the Circuit Court for further proceedings, and award the Trust Defendants any additional relief the Court finds just.

Respectfully Submitted,

**U.S. BANK NATIONAL ASSOCIATION,
SUCCESSOR BY MERGER TO LASALLE BANK
NATIONAL ASSOCIATION, AS TRUSTEE FOR
BEAR STEARNS COMMERCIAL MORTGAGE
SECURITIES, INC., COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES,
SERIES 2007-TOP28 and
C-III Asset Management LLC, f/k/a Centerline
Servicing, Inc., incorrectly designated as d/b/a Greystone
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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

HULL PROPERTY GROUP, LLC and CHARLES WV MALL, LLC

Defendants Below, Petitioners,

v.

QUARRIER ST, LLC

Plaintiff Below, Respondent

and

U.S. BANK NATIONAL ASSOCIATION, SUCCESSOR BY MERGER TO LASALLE
BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BEAR STEARNS
COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2007-TOP28 and C-III Asset Management
LLC, f/k/a Centerline Servicing, Inc., incorrectly designated as d/b/a Greystone Special
Servicing Corporation Service Company

Defendants Below, Respondents

*From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 22-C-128*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **THE TRUST RESPONDENTS' BRIEF** was electronically filed with the Court on August 22, 2024 via File & Serve Xpress, which will send notification of such filing to the following counsel of record:

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