
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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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' REPLY BRIEF TO
RESPONDENT QUARRIER ST, LLC'S CROSS-ASSIGNMENTS OF ERROR**

/s/ Arie M. Spitz

September 23, 2024

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STATEMENT OF THE CASE RELATED TO CROSS-ASSIGNMENTS OF ERROR¹

From February 14, 2022, the date Respondent Quarrier St, LLC (“Quarrier”) filed its Complaint, through May 15, 2024, Quarrier advanced a breach of contract cause of action against the Trust² premised upon the following: (1) the Demolition Agreement required the Trust to bind its successor-in-interest to the Demolition Agreement; (2) Petitioner Charles WV Mall, LLC (“CWV”) is the successor-in-interest to the Trust by virtue of its purchase of the Mall; (3) CWV has asserted that it is not bound by the Demolition Agreement; and (4) if the Trust failed to bind CWV to the Demolition Agreement, then the Trust has breached the Demolition Agreement. (JA 00088–00091).

On May 16, 2024, Quarrier asserted Cross-Assignments of Error in its Response Brief (the “Cross-Assignment”), before this Court and, for the first time, asserted a brand new theory to argue a breach of contract cause of action against the Trust: specifically, that the Trust refused to “consent to permit demolition” in breach of the Demolition Agreement. (Cross-Assignment at 26). Quarrier did not identify any page in the appendix record to show that it had raised this theory before the Circuit Court. (Cross-Assignment at 25-27). Quarrier did not cite to any provision of the Demolition Agreement in support of this new theory. (Cross-Assignment at 25-27). Nor did Quarrier cite to any evidence in the appendix record to support its new assertion that the Trust refused to “consent to permit demolition.” (Cross-Assignment at 25-27).

Because Quarrier failed to raise this issue before the Circuit Court, failed to cite to the appendix record in support of its assertions, and because Quarrier did not apply for a Demolition Permit until after CWV purchased the Mall, Quarrier’s Cross-Assignment of Error fails, the relief

¹ The Trust Respondents incorporate by reference the Statement of the Case contained in their Response Brief.

² As used herein, the term the “Trust” refers to Respondents U.S. National Bank Association, Successor by merger to LaSalle Bank National Association, as Trustee for Bear Sterns 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.

Quarrier requested should be denied, and this Court should affirm the Circuit Court's Order granting the Trust Summary Judgment with respect to Quarrier's breach of contract cause of action.

1. Short timeline of key events related to the Demolition Agreement and the permitting of the demolition.

May 8, 2018	Quarrier purchases the Sears Parcel. (JA 00082, 00357).
Late 2019	Rodney Loftis, Quarrier's demolition contractor, finishes pre-demo work (asbestos abatement) and was told by Quarrier to stop work because development was halted due to COVID. (JA 01848-01851).
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).
May 5, 2021	Quarrier signs a contract with DD&B to build the temporary wall. (<i>See</i> JA 00083; JA 01770).
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).
Spring 2021	Rodney Loftis is given approval by Quarrier to resume development work and move forward with the demolition. (JA 01855).
Aprox. May 20, 2021	Rodney Loftis tries to pull a permit for the demolition of the Sears building and it is denied by the City because the City wants to know if the new owner of the Mall has signed off on the Demo Agreement. (JA 01852, 01856).
May 26, 2021	City Attorney emails a copy of the Demo Agreement to Caroline Hatcher and others at CWV. (JA 01014-01015).
July 13, 2021	Wayne Grovenstein, in-house attorney for CWV, writes to the City Attorney, informing the City Attorney that CWV did not "approve of the [Demo Agreement] or its contents." (JA 01139-01140).
February 14, 2022	Quarrier files this lawsuit. (JA 00075-00143).
May 19, 2022	The City issues the Demo Permit. (JA 00250-00251).

2. Key procedural history.

On February 14, 2022, Quarrier filed its Complaint against CWV, the Trust, the City of Charleston, and the City’s Building Commissioner, Tony Harmon. With respect to the City and Mr. Harmon, Quarrier alleged that they had improperly refused to issue a permit to Quarrier to allow it to demolish the former Sears Parcel based solely on CWV’s objections to the demolition work.³ (JA 00087–00088 at ¶¶66–67, 72–73). CWV sought to prevent the demolition based on its opinion that it owned an easement into the Sears Parcel and was not bound by the Demolition Agreement entered into by Quarrier and the Trust as previous owner of the Charleston Town Center. (JA 00088 at 70–72). Quarrier avers that the Demolition Agreement is binding on the Trust’s successor in interest, and, as successor in interest to the Trust, CWV is bound by the Demolition Agreement. (JA 00091 at ¶¶97–98). For its part, CWV argued that it was not properly assigned the Demolition Agreement, so it could not breach the contract. (JA 00939–00940).

As it pertains to the Trust, Quarrier has solely maintained that the Trust breached its contractual duties *if* it had “failed to bind its successor in interest,” i.e. CWV, to the Demolition Agreement. (JA 00002; JA 00090 at ¶85; JA 01252–01253; JA 01683–01684). Indeed, each and every cause of action against Trust is based on the alleged failure to provide CWV with the Demolition Agreement: it “did indeed fail or refuse to provide the binding contract to [CWV],” (Count I, JA 00090 at ¶85); “did not disclose the existence of the [Demolition] Agreement,” (Count IV, JA 00096 at ¶133); “did not inform [CWV] of, or provide [CWV] with, the [Demolition] Agreement,” (Count VI, JA 00099 at ¶155); “intentionally concealed the [Demolition] Agreement from [CWV],” (Count VII, JA 00100 at ¶166); “fail[ed] to provide [CWV] with notice and a copy of the Agreement,” (Count XI, JA 00106 at ¶208).

³ Following the City of Charleston’s issuance of a demolition permit on May 19, 2022, Quarrier voluntarily dismissed its claims against the City of Charleston and Tony Harmon. (JA 00216–00219).

After the parties engaged in extensive written discovery and 21 depositions, the Trust moved for Summary Judgment, arguing that Quarrier’s breach of contract claim should be dismissed because the Trust had assigned the Demolition Agreement to CWV and so had complied with the successors-in-interest provision of the Demolition Agreement. (JA 02017-0235; JA 01231-01404). Specifically, the Trust noted that Quarrier’s “claims against the Trust Defendants are premised on a finding that Hull [CWV] is not bound by the Demolition Agreement.” (JA 01241). Quarrier did not disagree, stating in its Response that the issue at summary judgment is “which party is bound to (and breached) the Demolition Agreement,” and arguing CWV “expressly assumed the Demolition Agreement when it acquired the Charleston Town Center Mall, and continues to be in breach of that Agreement to this very day.” (JA 01683–01684).

Significantly, at no point in any pleading or in any of the briefings that Quarrier submitted in connection with dispositive motions (Quarrier’s Motion for Summary Judgment, Response to Defendants’ Summary Judgment Motions, Reply in Support of Motion for Summary Judgment, and Motion for Leave to File Supplemental Reply and Supplemental Reply) did Quarrier argue that the Trust breached the Demolition Agreement by refusing to “consent to permit demolition.” (JA 01128-01138; JA 01681-01698; JA 01808-01813; and JA 01990-01883). Nor did Quarrier make any such argument during the hearing on the Trust’s Motion for Summary Judgment. (JA 01995-02016).

The Circuit Court entered the Order subject to this appeal on January 15, 2024, granting summary judgment to the Trust as to the breach of contract claim against it (the “Order”). (JA 00001–00012). In the Order, the Circuit Court found that Quarrier “alleges that the Trust Defendants breached the Demolition Agreement by failing to cause CWV, the successor in interest to the Trust with respect to ownership of the Mall, to be bound to the Demolition Agreement.” (JA 00002). After finding that CWV is bound by the Demolition Agreement, the Circuit Court then

concluded that “the Trust Defendants are entitled to Summary Judgment on [the breach of contract] cause of action because the Court concludes that, . . . , the Trust assigned, and Charles WV Mall, LLC (‘CWV’) assumed, the Demolition Agreement.” (JA 00001). In so concluding, the Circuit Court gave Quarrier a win: CWV is bound by the Demolition Agreement.

Notwithstanding this win, Quarrier filed a Cross-Assignment claiming the Circuit Court erred. Quarrier argues that the Circuit Court should not have granted the Trust’s motion for summary judgment as to Quarrier’s breach of contract claim. As detailed above, Quarrier asserts a whole new theory of liability against the Trust that was neither pled nor litigated before the Circuit Court in order to argue that the Circuit Court erred. Quarrier’s Cross-Assignment of Error, therefore, should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because: (1) Quarrier’s Cross-Assignment of Error is frivolous due to the fact that it does not comply with W. Va. R. App. P. 10(c)(7) and raises an issue that was not raised in the Circuit Court, (2) the dispositive issues have been authoritatively decided as West Virginia law is clear that Quarrier cannot raise a new, non-jurisdictional issue, for the first time on an appeal (*Noble v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009)), and (3) 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.

ARGUMENT

For the entirety of this case, Quarrier has consistently and exclusively claimed the Trust breached its obligations to Quarrier by failing to properly assign the Demolition Agreement. The Circuit Court’s Order found that the Trust properly assigned the Demolition Agreement to CWV. (JA 00001-13). As a result, the Circuit Court concluded that the Trust did not breach its contractual duties to CWV, as alleged in Count I of the Complaint, and a grant of summary judgment was

proper. (JA 00001-13). Any attempts by Quarrier to formulate new ways in which the Trust may have breached the contract are therefore irrelevant to this appeal.

1. The alleged failure to assign the Demolition Agreement has been Quarrier’s sole theory of liability against the Trust; therefore, Quarrier’s new argument brought for the first time on appeal should not be considered.

It is well-established in West Virginia that “[o]ur general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.” *Noble v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) (citation omitted); *see also, Whitlow v. Board of Education*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (“Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.”); *Konchesky v. S.J. Groves & Sons Co., Inc.*, 148 W. Va. 411, 414, 135 S.E.2d 299, 302 (1964) (“[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal.”).

The fact that the second cross-assignment of error has not been pled or argued before is made clear by the complete absence of a single citation to the record addressing this point below. (Cross-Assignment at 25–27). Indeed, the failure and/or inability to cite to the record on appeal is a violation of the West Virginia Rules of Appellate Procedure. As this Court has recognized repeatedly, the Rules impose a duty on petitioners to support their arguments with “‘appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal[.]’” *Roger D. Young v. West Virginia*, No. 23-ICA-124, 2024 W. Va. App. LEXIS 195, *7-8, 2024 WL 3252348 (W. Va. Ct. App. Jul. 1, 2024) (quoting W. Va. R. App. P. 10(c)(7)); *see also Ayers v. Jones*, No. 23-ICA-286, 2024 W. Va. App. LEXIS 258, *12, 2024 WL 4052869 (W. Va. Ct. App. Sept. 4, 2024); *Sierra J.*

v. David J., No. 23-ICA-444, 2024 W. Va. App. LEXIS 56, *9-10, 2024 WL 1270577 (W. Va. Ct. App. Mar. 25, 2024); *Hulvey v. Hulvey*, No. 22-ICA-263, 2024 W. Va. App. LEXIS 19, *6, 2024 WL 488295 (W. Va. Ct. App. Feb. 8, 2024). In fact, “[t]he Intermediate Court . . . may disregard errors that are not adequately supported by specific references to the record on appeal.” *Id.* (quoting W. Va. R. App. P. 10(c)(7)).

The West Virginia Supreme Court of Appeals has explained as follows:

“The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.”

Berkeley Cnty. Council v. Gov't Props. Income Trust LLC, 247 W. Va. 395, 405-406, 880 S.E.2d 487, 497-498 (2022) (quoting *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18).

Quarrier never raised the argument before the Circuit Court that the Trust remains bound and liable under the Demolition Agreement and breached the Demolition Agreement by refusing to “consent to permit demolition.” (Cross-Assignment at 26). Simply put, this contention was not presented to the Circuit Court in Quarrier’s written submissions or during oral argument. (JA 00088-91; JA 01128-01138; JA 01681-01698; JA 01808-01813; and JA 01990-01883; JA 01995-02016).

Consistent with its allegations in the Complaint, Quarrier’s response to the Trust’s and CWV’s motions for summary judgment as to its breach of contract claim was that either CWV or the Trust breached the Demolition Agreement, depending on whether it was properly assigned. Once again, Quarrier did not claim the Trust could be in breach regardless of the assignment. The entirety of Quarrier’s response on this issue is as follows:

[CWV] seeks summary judgment on the breach of contract claim, arguing that [the Trust] never properly assigned the Demolition Agreement. [The Trust] seeks summary judgment on the breach of contract claim, arguing that the Demolition Agreement was properly assigned. These arguments are mutually exclusive. Both cannot be true.

This issue—which party is bound to (and breached) the Demolition Agreement—is the subject of Quarrier's pending motion for partial summary judgment. Quarrier incorporates those arguments herein by reference: [CWV] expressly assumed the Demolition Agreement when it acquired the Charleston Town Center Mall, and continues to be in breach of that Agreement to this very day.

(JA 01683–01684).

The fact that Quarrier did not argue to the Circuit Court a theory that the Trust refused to “consent to permit the demolition” is also consistent with the evidence that was presented to the Circuit Court. Specifically, the Trust sold the Mall to CWV on May 10, 2021. (JA 01255-01266). It was not until AFTER CWV owned the Mall that Quarrier applied to the City for a demolition permit. (JA 00199; JA 01014–01015; JA 01856). And it was CWV, NOT the Trust, that told the City it refused to consent to issuance of a demolition permit. (JA 01139-01140).

Perhaps this evidence (which is in the appendix record) is why Quarrier (1) did not argue to the Circuit Court that the Trust refused to “consent to permit the demolition,” and (2) did not cite any evidence in the appendix record in support of its bald assertion that the Trust refused to “consent to permit the demolition.”

The Circuit Court’s Order was based on the *evidence*, issues, claims, and arguments raised below. Quarrier cannot now raise a new theory (without citation to any evidentiary support) as to why summary judgment on its breach of contract cause of action is not warranted when Quarrier failed to raise this issue (or proffer any evidence in support thereof) before the Circuit Court. As a result, this Court should find Quarrier’s Cross-Assignment of Error to be unmeritorious and should

affirm the Circuit Court's Order granting the Trust summary judgment as to Quarrier's breach of contract claim.

CONCLUSION

The Circuit Court correctly applied West Virginia law in concluding that 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. Notably, Quarrier does not dispute this conclusion; rather, it now argues for the first time that regardless of the assignment the Trust remains liable to Quarrier for breach of the Demolition Agreement due to a refusal by the Trust to "consent to permit demolition." West Virginia, however, law does not allow Quarrier to assert brand new arguments on appeal, nor does it allow Quarrier to prevail on an argument that is wholly unsupported by citation to the appendix record.

The Trust therefore respectfully requests that this Court affirm the Circuit Court's Order, deny CWV any of the relief requested in its Petition, deny Quarrier any of the relief requested in its Cross-Assignment, remand this case back to the Circuit Court for further proceedings, and award the Trust 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
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*From the Circuit Court of
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Civil Action No. 22-C-128*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **THE TRUST RESPONDENTS' REPLY BRIEF TO
RESPONDENT QUARRIER ST, LLC'S CROSS-ASSIGNMENTS OF ERROR** was
electronically filed with the Court on September 23, 2024 via File & Serve Xpress, which will
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