

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35438

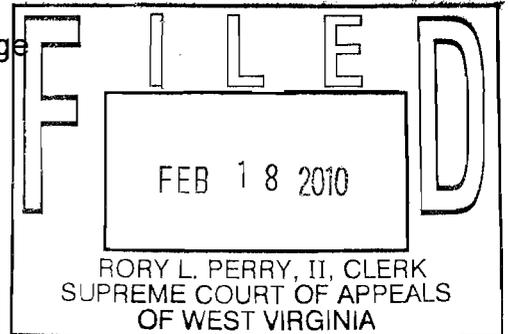
FREDERICK MANAGEMENT COMPANY, LLC, Plaintiffs Below, Appellant

vs.

CITY NATIONAL BANK OF WEST VIRGINIA, a national banking
association, Defendant Below, Appellee

Honorable F. Jane Husted, Judge
Circuit Court of Cabell County
Civil Action No. 04-C-323

BRIEF OF APPELLANT



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**I. KIND OF PROCEEDING AND NATURE OF THE RULING
IN THE LOWER TRIBUNAL**

This is the appeal of Frederick Management Company, LLC, successor to The St. James Management Company, LLC and the plaintiff in the underlying litigation (hereinafter referred to as "FMC")¹ from an Order entered on the 23rd day of March 2009, by the Honorable F. Jane Husted, Judge of the Circuit Court of Cabell County, holding that the breach of contract claim advanced by FMC against defendant, City National Bank of West Virginia (hereinafter referred to as "City") be dismissed upon City's motion for summary judgment because, in a separate civil action from which City was removed as a party, the Court ordered that the only remaining issue extant between FMC and a party other than City was whether or not a prime lease between FMC and City had been surrendered by the parties to such lease. Judge Husted's Order further provided that following the Court's decision in the Frazier matter referenced above, a judicial determination was made in Cabell County Circuit Court that a surrender of the Prime Lease had, indeed, occurred; that FMC's contract which is the subject of the instant petition did not survive such surrender; and that FMC is now collaterally estopped from re-litigating the surrender issue. Finally, Judge Husted's Order concluded that, even if collateral estoppel is not a bar to the re-litigation of the surrender issue, FMC's breach of contract claim fails as a matter of law because: first, the surrender issue previously litigated in that separate action referenced above triggered the doctrine of impossibility of performance; second, the contract at issue was ambiguous; and third,

¹FMC is the successor to St. James Management Company, LLC. During the underlying litigation, a name substitution motion was granted by the trial court. The Complaint herein was filed at a time when FMC was St. James Management Company, LLC. Also, in two separate matters adjudicated before the Court which involved Petitioner, City, and Frazier, Petitioner proceeded as St. James Management Co., LLC. Therefore, any reference to St. James Management Co, LLC is always hereinafter a reference to FMC.

there was no mutual mistake of fact or law between FMC and City regarding the formation of the contract which is at issue in this petition for appeal.

However, in light of the fact that the Order awarding City a summary judgment ignores important and salient facts, some of which are undisputed, and is based on some well established principles of West Virginia decisional contract law which are inadequately analyzed, Appellant respectfully submits that review by the Court is warranted and that this petition for appeal should be granted.

II. STATEMENT OF FACTS

A. INTRODUCTION

On April 12, 2004, FMC filed the civil action herein against City alleging breach of contract arising out of a Lease Termination Agreement between these two parties dated September 27, 2000 (hereinafter sometimes referred to as “the LTA”). The LTA governed the non-renewal of a lease between FMC and City for “that certain banking facility located on the ground floor and Mezzanine in the St. James Building at Tenth Street and Forth Avenue, along with the drive-thru banking facility located on Fifth Avenue in the City of Huntington . . .” *See*, Record at pp. 193 - 196. FMC created the LTA because, in the spring of 2000, City communicated its decision not to renew such lease on October 31, 2000, which was the expiration date for the then current term. *See, Id.* at pp. 235 - 42. At the same time City also informed FMC of its interest in obtaining a lease solely for the drive-thru facility. *Id.* Therefore, under the provisions of the LTA, on November 1, 2000, City was contractually obligated to deliver possession of the main banking facility, including the Mezzanine (hereinafter referred to as the “Mezzanine”) in the St. James Building to FMC. Paragraphs 17 and 18 of the Complaint

allege that, since FMC was neither able to take possession of such Mezzanine on that day nor on any other day thereafter throughout the day of the sale of the St. James Building in August of 2005, City is liable to FMC for breach of contract. *See, Id.* at pp. 1 - 11.

B. HISTORICAL BACKGROUND

The St. James Building is a twelve (12) story building used for commercial and residential purposes located at 401 Tenth Street, Huntington, Cabell County, West Virginia. At the time the instant action was filed in 2004, it was owned by FMC, which purchased the building in April, 1999. However, long before FMC acquired the St. James Building, the First Huntington Building Corporation owned the premises in question. In 1980, said corporation leased such premises to the Old National Bank of Huntington (hereinafter "Old National Bank"). Old National Bank leased the ground floor and the Mezzanine of the main banking facility to operate its bank. *See, Id.* at pp. 197 - 210. The Lease Agreement between the First Huntington Building Corporation and the Old National Bank (hereinafter referred to as the "Prime Lease") was dated May 17, 1980. *Id.* In addition to the ground floor and the Mezzanine, the Prime Lease gave Old National Bank space in the basement and access to and use of certain areas of a parking garage. *Id.* The term of the Prime Lease was twenty (20) years beginning November 1, 1979 and ending at midnight, October 31, 1999. *Id.* Under its terms, the Prime Lease could be automatically renewed for twenty (20) successive one (1) year terms at the option of the lessee. *Id.* The lessee had the right to terminate the Prime Lease upon the giving of written notice of its intent to vacate at least sixty (60) days prior to the expiration of the original term or any successive one (1) year renewal term. *Id.*

During the 1980s, William Frazier, Esquire, was a practicing attorney and an officer and director of Old National Bank. As an attorney, he represented such bank. By Lease and Agreement dated June 15, 1987 (hereinafter referred to as the "Sublease") Old National subleased the Mezzanine of the St. James Building to Mr. Frazier's law firm, Frazier & Oxley, LC (hereinafter referred to as "Frazier"). *See, Id.* at pp. 211 - 221. The Sublease was drafted by Mr. Frazier and/or Mr. Oxley, despite their positions as officers, directors, and attorneys for Old National. *See, Id.* at pp. 222 - 224. At various times, this Sublease has been amended to further sublease to Frazier & Oxley other portions of the premises originally leased by Old National.

Under the terms of the Sublease, Frazier & Oxley agreed to pay the sum of Two Hundred Fifty Dollars (\$250.00) per month for the Mezzanine which consists of four thousand (4,000) square feet of office space on the Mezzanine, seven (7) covered parking spaces and storage space in the basement. *See, Id.* at pp. 211 - 221. The term of the Sublease was for one (1) year beginning on December 1, 1987 or at such date that certain renovations were completed and was to be renewed automatically for thirty-one (31) successive one (1) year terms unless written notice was given to the sublessor of the sub-lessee's intent to vacate the premises sixty (60) days prior to the expiration of any renewal term. *Id.* Despite the fact that the Prime Lease provides for escalation of rent to be paid by Old National, the Sublease contained no provision for escalation of the rent based on CPI or otherwise during the thirty-one (31) year option period. *Id.* The option period to sublease corresponded with the remaining option terms of the Prime Lease. *Id.*

On June 16, 1987, Frazier & Oxley assigned to William M. Frazier all rights and obligations under the Sublease between Old National and Frazier & Oxley. On June 17, 1987,

Mr. Frazier subleased back to Frazier & Oxley the right to occupy the Mezzanine for Four Thousand Dollars (\$4,000.00) a month, thereby achieving a net profit of Three Thousand Seven Hundred Fifty Dollars (\$3,750.00) per month for Mr. Frazier. (All these facts are critical to FMC's eventual damage claim as a result of City's breach of the LTA in 2000).

Between 1980 and 1999, the ownership of the St. James Building was transferred, subject to the Prime Lease and Sublease from First Huntington Building Corporation to the St. James Limited Partnership, to the West Virginia Investment Management Board and, ultimately, to the St. James Management. Old National became a part of City Holding Company as a result of an agreement and plan of reorganization and merger in August, 1996. Accordingly, City became the successor lessee under the Prime Lease. Both Mr. Frazier and Mr. Oxley remained on the Board of Directors of City National and/or City Holding Company after the above-described reorganization and merger.

Thereafter, a dispute arose between City and the partners of the Frazier & Oxley law firm. In order to settle the dispute between Frazier and City, said entities entered into negotiations and ultimately reached an agreement which was memorialized on November 9, 1999. *See, Id.* at pp. 225 - 234. Significantly, the settlement agreement between the parties states that the Sublease:

shall be concurrent with the term of the master/primary lease, or any extensions or renewals thereof, and shall expire, with no further obligation upon any party thereto, upon the expiration or termination of the master/primary lease, or any extensions, renewals, or substitute leases of essentially identical premises by CHCO (City Holding Company) or its assigns and/or CNB (City National Bank) or its assigns. . . .

Id. at pp. 226 - 227 (emphasis added). Thus, the settlement agreement clearly recognized the right of City to terminate the Prime Lease and provided for the expiration of the Sublease upon the termination of the Prime Lease. (These facts are significant to FMC's breach of contract/mistake of law theory).

In the fall of 1999 or winter of 2000, City undertook an evaluation of the economic viability of maintaining a "downtown" presence since it had acquired another banking facility located on the corner of 20th Street and 3rd Avenue in Huntington, West Virginia (the 20th Street Bank). *See, Id.* at pp. 235 - 254. After analyzing several factors, City decided that it was not economically viable to keep its "downtown" branch open. *See, Id.* at pp. 255 - 262.

Accordingly, a meeting was scheduled between Fred Davis and John Hankins of FMC and Matthew Call, Larry Dawson and Robert Hardwick of City National and City Holding Company. The meeting took place on April 25, 2000 at Bobby Pruett's Steak House in the Radisson Hotel in Huntington, West Virginia. *See, Id.* at pp. 235 - 242, 263 - 264. At this meeting, it is unquestioned that Mr. Call, Mr. Dawson, and Mr. Hardwick had the authority to act on behalf of City. *See, Id.* at pp. 265 - 266. During the meeting, FMC, through John Hankins and Fred Davis, were advised in direct and unambiguous terms of the bank's decision to not renew the Prime Lease. *See, Id.* at pp. 239 - 242, 267 - 269, 270- 273.

Thus, as early as April, 2000, FMC, was put on notice that the Prime Lease would not be renewed. Moreover, it is undisputed that FMC, through its agents, agreed to accept City's oral notice of its intent to not renew and, accordingly, a new agreement between the parties herein was formed. *See, Id.* at pp. 274 - 275 (John Hankins knew City was not going to renew and he accepted the notice of non-renewal because he was "fine with it"); *see also, Id.* at pp. 276 - 277.

On November 1, 2000, City vacated the ground floor and basement of the main banking facility. However, City did not ensure the Mezzanine was vacated. Rather, Frazier remained in the Mezzanine.

Although City provided notice of its intent to not renew the Prime Lease, it approached FMC seeking to maintain a drive-thru banking facility located on Fifth Avenue, if possible. *See, Id.* at pp. 278 - 280. After some negotiations, the parties agreed to a new and separate lease for the drive-thru banking facility. *See, Id.* at pp. 281 - 288. Significantly, the decision not to renew the Prime Lease was not contingent or otherwise dependent on whether a lease for the drive-thru banking facility could be achieved. *See, Id.* at pp. 289 - 292.

In order to memorialize City's decision to not renew and the resulting termination of the Prime Lease, FMC and City executed the Agreement on September 27, 2000. *See, Id.* at pp. 263 - 264. On the same date, City and FMC also entered into a lease agreement for the drive-thru banking facility located on Fifth Avenue for a period of one (1) year commencing on November 1, 2000 and ending on October 31, 2001 with a renewal option for additional periods of one (1) year. *See, Id.* at pp. 281 - 288. The terms of the lease for the drive-thru banking facility were totally different from the terms of the Prime Lease. Among the obvious differences were the space leased, the amount of rent, the duration of the lease, and the method of renewal. *Id.* Eventually, City failed to renew its lease on the drive-thru banking facility located on Fifth Avenue and such space was subsequently leased to Fifth Third Bank.

On October 26, 2001, FMC gave notice, by letter, to Frazier & Oxley to vacate the premises in accordance with West Virginia Code §37-6-5. *See, Id.* at pp. 291. Despite the notice

to vacate Frazier has refused to vacate the premises or to pay rent at a rate reasonably demanded by FMC.

Also on October 26, 2001, FMC instituted separate litigation in the Circuit Court of Cabell County against Frazier & Oxley, L.C. and William Frazier bearing Civil Action No. 01-C-0892, which sought to evict the law firm from the Mezzanine of the St. James Building. Frazier, in the eviction suit, answered and counterclaimed on December 7, 2001. Frazier's Answer denied both liability and the obligation to move, and their Counterclaim sought damages. Later, in the discovery phase of the eviction action, FMC learned for the first time that the law firm defendants came into possession of the Mezzanine by entering into the above-referenced Sublease for such premises with City.

On December 7, 2001, Frazier filed a Third Party Complaint in the eviction litigation against City claiming that the bank violated both the Sublease terms and the covenant of good faith and fair dealing by entering into the LTA with FMC. One (1) month later, City filed a Motion to Dismiss the Third Party Complaint on the grounds that the above-referenced Settlement Agreement called for concurrent termination terms for the Prime Lease and the Sublease and, therefore, according to City's motion, the Sublease also terminated on October 31, 2000. Further, the Motion to Dismiss the Third Party Complaint asserted that the same Settlement Agreement contained a release of any and all claims arising out of the Sublease.

Frazier opposed City's Motion to Dismiss, claiming prematurity and third-party beneficiary status. Such status, according to Frazier, entitled the law firm to receive the same right to sixty (60) days termination notice which City enjoyed as a tenant under the Prime Lease. Further, Frazier claimed that City mischaracterized the effect of the Settlement Agreement.

Frazier claimed the effective date of that agreement was 1999, and the Lease Termination Agreement arose in 2000. Such facts, according to Frazier, rendered the law firm free from the terms of the Settlement Agreement regarding the Mezzanine because FMC's eviction litigation was initiated after the effective date of the Settlement Agreement. These issues between City and Frazier, however, never reached a point of judicial resolution. The Trial Court never ruled on any of the issues created by City's dismissal motion at any time during the pendency of any of the eviction litigation which occurred over the Mezzanine.

On January 22, 2002, FMC filed with the lower Court a Motion for Partial Summary Judgment and immediate possession of the Mezzanine. The Motion was partial in nature because the issue of damages was not addressed. As grounds for such Motion, FMC recited the terms of five previously identified documents: (i) LTA; (ii) Prime Lease; (iii) Sublease; (iv) Settlement Agreement; and (v) Eviction Notice pursuant to WV Code. On February 6, 2002, the Circuit Court of Cabell County concluded that these five documents substantiated FMC's claims and entered an Order granting FMC's motion. Frazier, by this Order, was obligated to vacate the Mezzanine.

Frazier responded to the substance of the Trial Court's Order by filing a Writ of Prohibition with the West Virginia Supreme Court on February 14, 2002. The office of the Writ was a claim of error in allowing FMC to have immediate possession of the premises in question and a protest that genuine issues of fact remained unaddressed and unacknowledged by the trial judge. The Petition, however, did not include any reference to the legal issue of surrender of the Prime Lease to the detriment of a subtenant. That concept was advanced approximately one month later for the first time by Frazier when a Motion to Supplement the Petition for the Writ of

Prohibition was filed with the Supreme Court. Three (3) days thereafter the Supreme Court denied the Motion to Supplement. However, at the hearing on the Petition which occurred in April of 2002, Frazier's counsel was permitted to argue the surrender concept. On June 27, 2002, the Supreme Court handed down its decision in the case now commonly known as *Frazier I*. See, *State ex rel. Frazier and Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 196 (2002). The decision remanded the case to allow contested and genuine issues of fact to be developed in further discovery. The *Frazier I* remand also inferred that the surrender of the Prime Lease to the detriment of a subtenant was unlawful, if, indeed, a surrender occurred in the eviction case. City and FMC filed Petitions seeking a Rehearing on the surrender issue, but both were denied and the litigation moved forward.

On February 2, 2003, FMC filed a Motion to Amend its Complaint. Included in the attempt to amend were claims that Frazier should not occupy the Mezzanine because the law firm's presence violated recording statutes. The second attempted amendment involved, for the first time in the eviction litigation, a claim by FMC that City was liable to FMC for City's breach of the Lease Termination Agreement, inasmuch as City failed to deliver possession of the Mezzanine to FMC on October 31, 2000. This second branch of the attempted Amended Complaint is the same claim for breach of contract presently being advanced by FMC against City in the case at bar.

Two days following FMC's filing of its Motion to Amend the Complaint in the eviction action, Frazier and City served a Notice of Dismissal of the Third Party Complaint advanced by Frazier against City. Thereafter, Frazier and City compromised and settled their claims, and a Notice of Dismissal was filed by Frazier on February 2, 2003, which resulted in City being

dismissed with prejudice from Civil Action No. 91-C-0892. With this action, City ceased being a named party in the Frazier eviction action.

On August 1, 2003, the lower Court entered an Order granting FMC's Motion to Amend Complaint. The Summons was issued for the Second Amended Complaint on April 21, 2003. Frazier filed an Answer to such amended pleading and City moved to dismiss the amended FMC Complaint. Frazier followed its Answer with the filing of its second Writ of Prohibition before the West Virginia Supreme Court. City filed its response to the second Petition, but the bank changed its position and this time agreed, in essence, with the Frazier argument that *Frazier I* was the law of the case and the Circuit Court erred in allowing amended claims to be heard along with the sole issue of surrender.

On October 15, 2003, the decision in *Frazier II* was handed down. *See, State ex rel. Frazier and Oxley, L.C. v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003). In granting the aforementioned second Writ, this Court issued an opinion which remanded the proceeding to the Circuit Court of Cabell County and limited the justiciable issues in the eviction proceeding between FMC and Frazier & Oxley, L.C., solely to "a factual determination of whether a surrender of the prime lease [between Plaintiff and Defendant herein] occurred." *Id.*

In footnote 17 of *Frazier II*, this Court observed:

n 17 Because we grant the writ of prohibition requested by **Frazier & Oxley**, we need not consider issuing a separate writ on behalf of City National as City National is a party of this litigation only as a result of the now prohibited amended complaint.

Id. Accordingly, the current breach of contract claim asserted by FMC in the case at bar was expressly carved out of the *Frazier II* decision regarding the pending issue between FMC and

Frazier about whether or not a surrender of the base lease by City ever occurred in the eviction action.

On April 9, 2004, FMC filed *St. James Management Company, LLC v. City National Bank of West Virginia*, Civil Action No. 04-C-323 in the Circuit Court of Cabell County, which litigation is the subject of the instant petition and, as was stated in the Introduction above, alleges, in its current posture, that City breached the LTA and FMC sustained damages as a direct consequence of such breach.

Judge David Pancake of the Sixth Judicial Circuit, the presiding judge over the remand contained in *Frazier & Oxley II* ruled on November 18, 2004 that Frazier's summary judgment motion be granted because: (i) City did, in fact, surrender the Prime Lease to FMC; (ii) the Prime Lease did not allow for a waiver of the requirement that termination of the Prime Lease be made sixty (60) days prior to the end of the term of the Prime Lease; (iii) that the 1999 settlement agreement between City and Frazier, wherein the parties agreed that their mutual occupancy of the main banking facility would be co-terminus, had no effect on the question of surrender between FMC and Frazier; and (iv) the LTA, the contract at issue in the instant petition, had no effect on the Sublease as it relates to FMC/Frazier claims. *See*, Record at pp. 324 - 346. FMC did not appeal Judge Pancake's award of a summary judgment to Frazier.

In the summer of 2007, FMC and Frazier settled the *Frazier I and II* eviction actions. On June 18, 2007, the Final Order of Dismissal in the *Frazier I and II* eviction litigation was entered by Judge Pancake.

Accordingly, since June of 2007, FMC has and continues to recognize the following facts regarding its former attempts to evict Frazier from the St. James Building:

- (a) *Frazier I and II* are the law of the case regarding FMC's desire to vacate Frazier from the Mezzanine inside the main banking facility;
- (b) Frazier cannot be evicted from such premises because the Court has ruled that City and FMC surrendered the Prime Lease and it is unlawful to require a subtenant to vacate a valid sublease when the base lease has been surrendered; and
- (c) FMC is collaterally estopped from attempting to re-litigate the surrender issue as between itself and Frazier.

C. IMPORTANT FACTS OMITTED FROM THE TRIAL COURT'S FINDINGS OF FACT

1. The Complaint filed herein went forward into the hearing on City's summary judgment motion under a breach of contract theory of liability which FMC unambiguously pled wherein it was claimed that City breached the LTA. Such breach created a cause of action completely unrelated to the surrender question at issue in the *Frazier I and II* eviction proceedings. *See, Id.* at pp. 1 - 11.

2. Neither FMC's president, John Hankins, nor any other FMC agent was aware at any time during the negotiations of the LTA or at any prior time that City and Frazier had entered into a Sublease during the term of the Prime Lease. This fact is contested by the deposition testimony of City's in-house counsel, John Alderman, who claims that Mr. Hankins did know of the existence of such Sublease. This factual contest, therefore, is one of credibility for the jury.

3. It is undisputed that City did not notify Frazier, either in writing or orally, on or before sixty (60) days prior to the termination date of the Prime Lease that City was ending such lease with FMC and that, pursuant to a previously written agreement between City and Frazier, their Sublease would end commensurate with the ending of the Prime Lease. Frazier was obligated to vacate the Mezzanine on or before October 31, 2000.

4. It is also undisputed that City could have provided Frazier with such notice in a timely manner because in April of 2000, approximately six (6) months prior to the expiration of the then current one (1) year lease term under the Prime Lease, City and FMC agreed that City would vacate the main banking facility inside the St. James Building, including the Mezzanine, but would possibly retain the drive-thru banking facility located on property adjacent to such building. Therefore, at all times between the formation of such an agreement and August 31, 2000, there were no absolutely circumstances rendering City's notice to Frazier to vacate the Mezzanine premises impossible to perform.

5. Accordingly, City could have, and should have, during the above-identified 120 day period provided Frazier with such notice to vacate, but did not, of its own volition, choose to do so.

6. At the time the LTA was made and entered into, both City and FMC believed that the law of the State of West Virginia regarding voluntary non-renewal, termination, or surrender of a base lease also ended a sublease because the term of the base lease controlled the term of the Sublease. *See, Argument No. 6, infra.*

7. Despite its failure to inform FMC of the existence of the Frazier Sublease and despite its failure to notify Frazier sixty (60) days in advance that its sublease would expire contemporaneously with the Prime Lease on October 31, 2000, City executed, and thereafter breached, the parties' contract to FMC's financial detriment and, to-date, has not compensated FMC for such breach.

III. ASSIGNMENTS OF ERROR

- NO. 1:** THE TRIAL COURT ERRED IN HOLDING THAT THE BREACH OF CONTRACT ISSUE RAISED BY FMC IN THE COMPLAINT HEREIN DID NOT SURVIVE THE WEST VIRGINIA SUPREME COURT'S HOLDING IN *FRAZIER & OXLEY II*
- NO. 2:** THE TRIAL COURT ERRED IN HOLDING THAT THE BREACH OF CONTRACT ISSUE RAISED BY FMC IN THE COMPLAINT HEREIN IS COLLATERALLY ESTOPPED BY THE EVENTUAL ADJUDICATION OF THE SURRENDER ISSUE IN THE EVICTION PROCEEDING
- NO. 3:** THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT THE DOCTRINE OF IMPOSSIBILITY PREVENTED CITY FROM COMPLYING WITH ITS CONTRACTUAL DUTIES TO FMC
- NO. 4:** EVEN IF THE TRIAL COURT IS CORRECT IN ITS ANALYSIS THAT THE DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE APPLIES HEREIN, IT WAS ERROR FOR SUCH COURT TO DISMISS THIS MATTER WITHOUT ORDERING CITY TO RETURN FMC TO ITS PRE-CONTRACT STATUS
- NO. 5:** AFTER THE TRIAL COURT APPROPRIATELY DETERMINED THAT THE CONTRACT AT ISSUE WAS AMBIGUOUS, IT WAS ERROR TO CONSTRUE THE AMBIGUITY EXCLUSIVELY AGAINST FMC
- NO.6:** THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT NO MUTUAL MISTAKE OF LAW OCCURRED HEREIN WHEN SUBSTANTIAL EVIDENCE REGARDING GENUINE ISSUES OF MATERIAL FACT EXISTS TO THE CONTRARY

IV. DISCUSSION OF AUTHORITIES AND ARGUMENT

- A.** THE TRIAL COURT ERRED IN HOLDING THAT THE BREACH OF CONTRACT ISSUE RAISED BY FMC IN THE COMPLAINT HEREIN DID NOT SURVIVE THE WEST VIRGINIA SUPREME COURT'S HOLDING IN *FRAZIER II*
- (i) In both the *Frazier I* and *Frazier II* decisions, the Court did not address or include FMC's breach of contract claim against City

Within the four corners of the *Frazier I* decision, there is no reference, either directly or indirectly, to FMC's instant claim of breach of contract by City. There is no mention of such claims in any syllabus point, headnote, in the statement of facts, in the discussion of the issues, in dicta, in any footnote, or in the holding of the case. Whether City is liable to FMC under a theory of liability based on City's breach of the LTA was simply not considered or addressed by the Supreme Court in *Frazier I*. City's status at the time *Frazier I* was handed down was a named third-party defendant defending itself against Frazier's Third Party Complaint, but nowhere in the decision is there any attention given to the issue of FMC's potential contract claim against the Third Party Defendant.

In the Circuit Court action below for *Frazier I*, none of the claims or counterclaims advanced by Frazier or City in the third-party action involved, expressly or indirectly, any aspect of FMC's potential breach of contract claim against City.

Also, within the four corners of the *Frazier II* decision, there is likewise no headnote, factual involvement, dicta, or holding regarding the breach of contract claim at issue herein. However, footnote 17 of *Frazier II* does carve out of the eviction litigation the same breach of contract claim advanced herein. This Court in *Frazier II* observes that City's position regarding the Writ will not be addressed because, at this point in the litigation, City is only a party due to FMC's failed attempt to amend its complaint. City's status, therefore, when considered through this Court's eyes in *Frazier II* is one of non-involvement as a party to the action. Since City was no longer a party in *Frazier II*, the only question regarding the Frazier/FMC issue was whether or not City surrendered the Prime Lease in signing the LTA and not whether or not City breached the LTA in a separate action advanced by FMC.

(ii) The Frazier case is separate and distinct from the instant litigation

Certainly the eviction case issue of whether or not City's conduct constituted a surrender of the Prime Lease to the detriment of Frazier and the instant case of whether or not City's conduct resulted in a breach of contract which caused FMC to sustain damages involved the same document - the LTA. However, the similarities between the two (2) cases essentially end there.

There are distinctly different theories of liability between the two cases. As explained above, the Frazier litigation was essentially an eviction proceeding based upon an entity's wrongful occupation of certain premises in the St. James Building. Accordingly, the issues presented were in the realm of landlord-tenant law.

The case *sub judice*, however, is not an eviction proceeding. It is not grounded in landlord-tenant law. Rather, FMC has alleged, and should be permitted to pursue, a breach of contract case against City.

Also, there are different parties being pursued by FMC in the two (2) cases. In the eviction case, FMC seeks direct relief from the effect of a subtenant, which after the *Frazier II* decision was handed down, became a full fledged tenant, and which possesses the Mezzanine by paying rent disproportionate to the fair market value of the premises. Alternatively, upon the sale of the St. James Building, FMC is faced with a tenant which occupies the Mezzanine and prevents FMC from receiving the full market value of the asset being sold. In the instant case, by contrast, FMC seeks direct compensation from City for its failure to deliver possession of the Mezzanine upon its non-renewal of the Prime Lease.

(iii) The FMC/Frazier eviction/surrender litigation has been settled

The surrender issue which the West Virginia Supreme Court of Appeals left open for litigation in *Frazier I* and *II* was settled between FMC and Frazier in the summer of 2007. City herein was not a party to that settlement. Likewise, as was pointed out above, the issue of City's breach of contract was never addressed by this Court when mandating to FMC and Frazier that the only issue extant between them was whether or not City surrendered the Prime Lease.

(iv) Since the issue of surrender in *Frazier I* and *II* does not apply to the contract action alleged herein, FMC is the master of its own Complaint and should be given wide discretion in deciding its chosen cause of action

This Court should permit FMC to pursue the cause of action it chose rather than be limited to an issue solely relevant to past litigation involving a different defendant and different causes of action. The law of West Virginia has long permitted a plaintiff to control his or her own litigation with respect to the named parties as well as the theories of liability asserted in an action. For instance, in *Carter v. Willis*, this Court held that a Plaintiff is permitted to choose his or her own cause of action. *See*, 145 W.Va. 779, 784, 117 S.E.2d 596, 597 (1960). In reaching said decision, the Court stated that the "plaintiff herein has elected to pursue his remedy in tort [rather than in contract], **as was his privilege.**" *Id.* (emphasis added). Likewise, in *Stone v. Kaufman*, this Court recognized that a plaintiff is permitted to chose its remedy against a party. *See*, 88 W.Va. 588, 107 S.E. 295 (1921).

Additionally, in *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1995), the Court stated that, in a civil context, parties are allowed a choice of which motive or

theory it will present to the jury. *Id.* at fn. 26. The Court also noted that procedural law allows a plaintiff to put forth “alternative contentions . . .” *Id.*; *see also* W.Va.R.Civ.P. 15 (liberally allowing amended pleadings to allow a trial on the merits). Accordingly, this Court has repeatedly indicated that a plaintiff is master of his own case.²

In this instance, FMC has elected to pursue a breach of contract claim against City as a result of its failure to satisfy its responsibilities under the LTA. Under the law cited above, FMC’s choice of filing its breach of contract suit should not be disturbed.

B. THE TRIAL COURT ERRED IN HOLDING THAT THE BREACH OF CONTRACT ISSUE RAISED BY FMC IN THE COMPLAINT HEREIN IS COLLATERALLY ESTOPPED BY THE EVENTUAL ADJUDICATION OF THE SURRENDER ISSUE IN THE EVICTION PROCEEDING

- (i) **Collateral estoppel is irrelevant to FMC’s breach of contract claim herein as there has never been any judicial determination made regarding such claim**

The Order of the Trial Court in the underlying litigation interprets Judge Pancake’s Judgment Order in the Frazier eviction litigation as disposing of all contract issues raised in the instant Complaint. To the contrary, such Order has no bearing whatsoever on the instant contract issues raised in this petition.

²The fact that the law provides a plaintiff with the right to choose its own course in litigation is further highlighted in the area of products liability. For example, when pursuing a products liability theory against one or more defendants, a plaintiff has the choice of pursuing up to three (3) separate theories of liability – negligence, warranty, or strict liability – to prove its case. *See, Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603 (1983).

While not directly on point, this Court can also be guided by the case of *Board of Ed. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990), which provides that a plaintiff may elect to sue any or all of the parties legally responsible for his injuries. *Id.* at 802. In other words, the party who brings an action gets to choose who is sued and what causes of action will be asserted against the defendants.

As was stressed in §III, A above, FMC's Complaint does not seek a determination of whether a surrender of the Prime Lease occurred. Rather, FMC's claims herein are for City's breach of the LTA. Nothing found in *Frazier I*, *Frazier II*, or the Judgment Order provides that FMC was or is forever barred from filing a breach of contract action against City.

(ii) An eviction action is a different cause of action than a claim of breach of contract

In fact, the current breach of contract claim asserted by FMC in the case at bar as well as any other allegations which FMC could assert against City were expressly carved out in the *Frazier II* decision which focused solely on the surrender issue pending between FMC and Frazier. More specifically, in footnote 17 of *Frazier II*, the Supreme Court observed: “[b]ecause we grant the writ of prohibition requested by Frazier & Oxley, **we need not consider issuing a separate writ on behalf of City National as City National is a party of this litigation only as a result of the now prohibited amended complaint.**” *See, State ex rel. Frazier & Oxley, L.C. v. Cummings*, 591 S.E.2d 728 (W.Va. 2003) (emphasis added). If City is expressly removed from all of the considerations in *Frazier II*, then also removed from the reach of the *Frazier II* decision FMC's claim that City breached the LTA.

The issue of estoppel has no bearing on the breach of contract claims against City asserted herein. Of course, in the event the Court concludes that FMC is wrong on this point, then all the remaining Assignments of Error become moot and this petition becomes ripe for dismissal.

C. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT THE DOCTRINE OF IMPOSSIBILITY PREVENTED CITY FROM COMPLYING WITH ITS CONTRACTUAL DUTIES TO FMC

At Paragraph 60 of the Trial Court's Conclusions of Law, the legal doctrine of impossibility of performance is raised as a valid defense to FMC's claim of contract breach by City. *See*, Record at pp. 1429 - 1444. The Trial Court relies on the authority of *Toledo Police Patrolmen's Assn., Local 10, IUPA v. Toledo*, 94 Ohio App.3rd 734, 739, 641 N.E.2d 799, 802 (1994) for the proposition that, after a contract is formed and the breaching party to such contract experiences an event which substantially frustrates that party's principal purpose and the disruptive event undermines a basic assumption of the contract's formation, the basic duties of the breaching party to thereafter render performance are discharged. The Trial Court's Order identifies other authorities, also from other jurisdictions, which similarly stand for the excuse of a party to a contract from performing where the law intervenes to prohibit such performance.

Paragraph 61 of the Order then observes that even if the LTA required City to surrender the Mezzanine, City could not have performed the task of removing Frazier because, through its execution of the LTA, City surrendered the Prime Lease to Frazier's detriment and, in so doing, rendered City's ability to remove Frazier from the premises impossible.

The Trial Court Order would have been better served had the law of the State of West Virginia been consulted as authority for the doctrine of impossibility of performance and its application to the instant case. In *Waddy v. Riggleman, et al.*, 216 W.Va. 250, 606 S.E.2d 222 (2004), the Court discussed at length the principles of the discharge by impossibility theory.

Where performance of a party to a contract is rendered impractical or impossible, four factors are to be considered in excusing a party from its obligation to perform. The third factor raised by the Court is squarely on point for the instant petition. That third factor which trial courts should consider before invoking excuse for impossibility is whether or not the impracticability or impossibility “resulted without the fault of the party seeking to be excused.” *Id.* at p. 233.

In considering City’s performance of its contractual obligations to FMC herein, attention must be given to the timing in which events occurred. The LTA was in reality a memorialization of the agreement which City and FMC made on April 25, 2000, when these two parties met at the Bobby Pruet Steakhouse and City announced both its intention not to renew the Prime Lease, and its desire to carve out the Drive-thru facilities from the soon to be terminated Prime Lease. FMC was under no obligation to accept such an oral proposal. Once the Prime Lease ends, full occupancy of the Drive-thru premises returns to FMC. Therefore, in agreeing to accept City’s proposal for a new freestanding drive-thru banking facility lease, consideration for the newly formed drive-thru contract was created.

Accordingly, the timing consideration herein is this: following the above-referenced April 25, 2000, meeting where City’s contractual obligations were formed, and until August 31, 2000, the last date to terminate the Prime Lease (a termination which City initiated) City’s notice to Frazier to vacate the Mezzanine was always possible for City to perform. Between these dates, FMC had no notice obligation to Frazier whatsoever.

The Trial Court committed error in ruling that City is discharged from its notice obligation by the doctrine of impossibility. It only became impossible for City to perform herein after the surrender occurred. According to the Trial Court City's surrender occurred in its execution of the LTA. In other words, City created the surrender and is now attempting to benefit from it under the banner of the discharge by impossibility defense. Since City could have performed before surrender even became an issue in the instant case, granting a motion for summary judgment based on legal principles of impossibility of performance is fundamentally, analytically flawed.

D. EVEN IF THE TRIAL COURT IS CORRECT IN ITS ANALYSIS THAT THE DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE APPLIES HEREIN, IT WAS ERROR FOR SUCH COURT TO DISMISS THIS MATTER WITHOUT ORDERING CITY TO RETURN FMC TO ITS PRE-CONTRACT STATUS

The Trial Court's ruling provides that City was legally prohibited from performing the duty upon which Appellant bases its breach of contract claim and, therefore, summary judgment was appropriate. The Trial Court's ruling, however, stops short under West Virginia case law of the full analysis necessary to dispose of all issues relative to this case under the doctrine of legal impossibility of performance. Thus, this case should be remanded for a jury trial even if City's duty to surrender the Mezzanine was legally impossible.

Appellant certainly acknowledges the body of law upon which the Trial Court relied in reaching its decision which provides that a party is excused from performing an illegal act. However, West Virginia case law does not mandate that the inquiry end upon a finding of legal impossibility. Rather, since at least 1920, West Virginia case law has required a jurist who is

confronted with the issue of impossibility of performance to also analyze the consideration paid for the contractual duty which is legally impossible to perform. For instance, in *Wysong v. Board of Ed. of Town Dist.*, this Court ruled that

where a contract is lawful at the time it is entered into but performance is rendered impossible by legislative act or some other supervening cause over which the parties have no control, they will be excused from further performance; but that **where one party has paid the full consideration for the contract, in accordance with its terms, and the other party has not performed, or only partly performed, the party who paid the consideration in full is entitled to recover back the consideration paid by him, or its value, *in toto* or *pro tanto***, as the failure to perform by the other party is total or only partial.

86 W.Va. 57, 63, 102 S.E. 733, 736 (1920) (citing *Bell v. Kanawha Traction & Elec. Co.*, 83 W.Va. 640, 98 S.E. 885 (1919)) (emphasis added). Thus, if a Court finds the doctrine of legal impossibility as an applicable defense to a breach of contract claim, the Court is required to determine whether one party paid consideration for the “illegal act” and, if so, ensure that said party recovers the consideration paid.

In this case, the Circuit Court of Cabell County did find the doctrine of legal impossibility applicable; however, the Trial Court did not analyze further. The trial court did not assess the legality of the contract at the time the agreement was reached or the supervening cause making the act illegal. Likewise, the trial court failed to analyze whether Appellant gave consideration for the “illegal act” and, if so, the value of the consideration to be given back to Appellant, since the contract is now purportedly illegal to perform.

Had the Trial Court undertaken such a fundamental analysis, a different result would be necessary. It is and has been undisputed that FMC and City entered into an oral agreement in April of 2000 for the non-renewal of the Prime Lease. *See*, Record at pp. 235 - 242, 263 - 273. Likewise, it is undisputed that the intervening act which prohibited the removal of Frazier from the Mezzanine was not in the control of FMC as it was only City who could provide the written notice of an intent to non-renew. In other words, had City complied with all terms of the Prime Lease to non-renew, it would have given written notice of its intent on or before August 31, 2000. It failed in this regard and, accordingly, when it signed the LTA, a surrender – the legal impossibility herein – occurred.

Likewise, it is undisputed that FMC gave full consideration for the agreement it entered into with City. However, FMC never received the full benefit of its bargain because it has yet to receive possession of the Mezzanine. Accordingly, this Court should remand this proceeding back to the Circuit Court of Cabell County so a determination of the value of FMC's consideration for the parties' contract can be determined and returned to FMC by City in the form of monetary damages.

E. AFTER THE TRIAL COURT APPROPRIATELY DETERMINED THAT THE CONTRACT AT ISSUE WAS AMBIGUOUS, IT WAS ERROR TO CONSTRUE THE AMBIGUITY EXCLUSIVELY AGAINST FMC

The Trial Court, in summarily dismissing FMC's Complaint, held that the LTA is ambiguous. The Trial Court then ruled that the ambiguity must be construed against FMC because its member, John Hankins, drafted the LTA. Accordingly, the Court found that the

contract did not, as a matter of law, impose a duty upon City to give up the Mezzanine when it vacated the ground floor of the St. James Building on October 31, 2000. *See, Id.* at pp. 1429 - 1444 at ¶¶ 62 - 66.

Appellant acknowledges, at the outset, that the Court could and did properly find that the LTA contained an ambiguity because it provides that the Prime Lease was for a “‘certain banking facility’ located on the ground floor and mezzanine located in the St. James Building” while also providing that City was to surrender the “‘main banking facility’ located within the St. James Building.” *See generally*, Syl. Pt. 1, *Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968). Appellant does contend, however, that the Trial Court erred in its application of the law regarding the fact that an ambiguity exists in the LTA given the underlying facts of this case.

First, the Trial Court erred in holding that the LTA is to be construed against the drafter, i.e., FMC. In ruling that any ambiguity must be construed against the drafter, the Circuit Court relied upon the case of *Nisbet v. Watson*, 162 W.Va. 522, 251 S.E.2d 774 (1979). Appellant acknowledges *Nisbet* as well as other West Virginia case law in which there are statements by this Court that an ambiguity should be construed against the drafter of the contract.

However, *Nisbet* and the other cases in this jurisdiction so holding primarily involve a situation where the contracts in issue are either consumer loan or insurance policies. The case *sub judice* is clearly distinguishable from all of the cases involving adhesion contracts. The contract at issue between Appellant and Appellee was not a consumer contract, an insurance

policy, or any other form of adhesion contract where there is unequal bargaining power. Here, we have two (2) sophisticated, business entities – one of which is wholly owned by a publically traded corporation (City Holding) – that routinely enter into contracts involving real estate. Both of the entities are on equal footing from a bargaining power perspective. Both entities had lawyers involved in the drafting, revising and/or editing stages of the preparation of the LTA. Accordingly, the Trial Court should not have applied the doctrine of *contra proferentem*. See generally, *Terra Int'l v. Mississippi Chem. Corp.*, 119 F.3d 688, 693 (8th Cir. 1997)(declining to apply the doctrine of *contra proferentem* to the case due to the relatively equal bargaining strengths of both parties and the fact that Terra was represented by sophisticated legal counsel during the formation of the license agreement); *Tri-State Fin., LLC v. First Dakota Nat'l Bank*, 538 F.3d 920, 926 (8th Cir. 2008)(same)(citing *Terra Int'l, supra*); *Lloyd Noland Found., Inc. v. Tenet Healthcare Corp.*, 277 Fed. Appx. 923, 928 (11th Cir. 2008)(where both parties to a contract are sophisticated business persons advised by counsel and the contract is a product of negotiations at arm's length between the parties, we find no reason to automatically construe ambiguities in the contract against the drafter)(citing *Western Sling & Cable Co. v. Hamilton*, 545 So.2d 29, 32 (Ala. 1989); *Nadherny v. Roseland Prop. Co.*, 390 F.3d 44, 51 (1st Cir. 2004)(construction against the drafter is a default rule that arguably has more force when the parties differ in sophistication or where standard forms are used. It should only be used as a last resort if other aids of construction leave the case in equipoise)(citations omitted); *Boston Ins.*

Co. v. Fawcett, 357 Mass. 535, 258 N.E.2d 771, 776 (Mass. 1970) (refusing to construe the contract against the drafter when parties negotiated the contract as equals).

Second, even if the LTA is to be construed against the drafter in a contract between two (2) sophisticated business entities which were represented by attorneys, the Trial Court erred in ruling, as a matter of law, the contract could not impose upon City an obligation to give up the Mezzanine of the St. James Building. Essentially, the Trial Court held that if there is an ambiguity in a contract, the person or entity who drafted the contract cannot, as a matter of law, prosecute a claim for breach of contract. This holding is in error as it ignores long standing jurisprudence with respect to parol evidence and the role of the jury.

In Syllabus Point 2 of *Hays and Company v. Hays*, this Court stated:

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 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.

186 W.Va. 153, 411 S.E.2d 478 (1991)(citing Syl. Pt. 4, *Watson v. Buckhannon River Coal Co.*, 95 W.Va. 164, 120 S.E. 390 (1923); Syl. Pt. 1, *McShane v. Imperial Towers, Inc.*, 164 W.Va. 94, 267 S.E.2d 196 (1980); Syl. Pt. 1, *Leasetronics, Inc. v. Charleston Area Med. Ctr.*, 165 W.Va. 773, 271 S.E.2d 608 (1980)). Accordingly, a finding that a contract contains ambiguities is not

dispositive. Rather, a trial court must analyze the parol evidence of record to determine whether a conflict on a material point necessary to interpretation of the contract could exist given the totality of the circumstances. Had the Trial Court performed such an analysis in this case, summary judgment would have been properly denied because the parol evidence as to what the phrase “main banking facility” in the LTA means was in conflict.

The situation of the parties and the circumstances surrounding the execution of the contract reveal a conflict as to the material point of the contract which Appellant should be permitted to be present to a jury during trial. As explained above, the parties to the LTA are two (2) sophisticated entities which each met and discussed the terms of the contract approximately six (6) months before its execution. The parties kept open their dialogue about the non-renewal of the Prime Lease throughout the six (6) month period leading up to the contract’s memorialization, via the LTA. *See*, Record at pp. 235 - 242, 263 - 292. The written contract was submitted to City for review and comment prior to its execution. City’s Vice-President and General Counsel reviewed the terms of the written contract and failed to suggest any changes to it (which could have eliminated the ambiguity of which it now complains).

City then had Robert Hardwick, a Vice-President and branch manager in Huntington, execute the LTA. Mr. Hardwick has testified that he did not execute the LTA until he “received direction from Mr. Alderman that [the terms of the contract] were acceptable.” As testified to by Mr. Hardwick, at the time he executed the Lease Termination Agreement on City’s behalf, he believed the Mezzanine was included in the space to be given up to FMC. To wit: “City

National Bank intended for the non-renewal of the Lease to provide the St. James Management Company with the right to possession of the main banking facility, **including the Mezzanine.**” *See, Id.* at pp. 235 - 238 (emphasis added).

Another employee of City during the relevant time period, Matthew Call, also testified that “[i]t was the **intention of City National Bank to give up its right to occupy all of the premises** at 401 10th Street including the first floor, Mezzanine and basement upon the expiration of the then current lease term on October 31, 2000. I understood that **the term ‘main banking facility’ as used in the September 27, 2000 agreement included the Mezzanine.**” *See, Id.* at pp. 239 - 242 (emphasis added).

Moreover, the bank’s own general counsel has authored correspondence which indicates the Mezzanine was part of the “main banking facility”. More specifically, on June 27, 2001 (approximately nine (9) months after the execution of the LTA but three-and-a-half (3.5) years before the filing of this lawsuit), Attorney Alderman provided notice to Frazier which stated that “City National previously terminated its lease agreement on September 27, 2000. This lease termination was for the Old National Bank premises **which includes the banking facility on the ground floor and the mezzanine level. . . .**”

Additionally, the practical construction of the LTA establishes a conflict as to the material point of the contract – what “main banking facility” means – given the fact that the

parties' entered into a total of three (3) contracts³ which, by and through the testimony and documents, undoubtedly dealt with two (2) "banking facilities." There is exhaustive testimony by employees, officers, and/or members of each of the parties to this litigation that, by April of 2000, City made two (2) decisions with respect to the leasehold: (1) to non-renew the Prime Lease thereby vacating the entire leasehold by October 31, 2000, and (2) to obtain a new lease solely for the "drive-thru banking facility" which was part of the original leasehold. *See, Id.* at pp. 235 - 242, 263 - 292. It is also undisputed that City obtained the new lease solely for the "drive-thru banking facility". *See, Id.* at pp. 281 - 288. Accordingly, in the parties' dealings with each other, they were discussing the "main banking facility located within the St. James Building," including the ground floor and Mezzanine, and the "Drive-Thru banking facility" located on an adjacent parcel of land on Fifth Avenue, Huntington, West Virginia.

In sum, the Trial Court committed reversible error by construing an ambiguous contract against the drafter of the document when the parties had equal bargaining power and both parties had counsel involved in the finalization of the language of the LTA. The trial court compounded its error by ignoring the plethora of parol evidence regarding the totality of the circumstances surrounding the execution of the LTA which created a conflict about whether the parties believed the "main banking facility" which City had to surrender included the Mezzanine. For these

³

The first contract is the Prime Lease which included both the banking facility in the St. James Building and a drive-thru banking facility. The second contract between the parties is the oral agreement between the parties which was memorialized in the LTA dated September 27, 2000 which had provisions for both the "main banking facility" and the "drive-thru banking facility." The third contract is a lease dated the same day as the LTA which City entered into solely for the "drive-thru banking facility".

reasons, the Trial Court's granting of summary judgment should be reversed and this case should be remanded for a trial on the merits.

F. THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT NO MUTUAL MISTAKE OF LAW OCCURRED HEREIN WHEN SUBSTANTIAL EVIDENCE REGARDING GENUINE ISSUES OF MATERIAL FACT EXISTS TO THE CONTRARY

As a final matter, the Trial Court ruled that, as a matter of law, there was no genuine issue of fact with respect to whether or not the parties were operating under a mutual mistake of fact or law. This finding as well as the resulting entry of summary judgment were erroneous as there is a genuine issue of material fact pertaining to the parties' mutual mistaken belief as to the legal effect of their execution of the LTA.

At the outset, it should be noted that the Appellant herein has not asserted that both parties were actually operating under a mistake of fact at the time the LTA was executed. FMC believes, based upon the evidence presented, that the parties both were mistaken as to the legal effect of said contract at the time of executing the LTA. In other words, FMC asserts there was a mutual mistake of law which, by operation of West Virginia law, becomes a mistake of fact. The bases of Appellant's assertion is this Court's ruling in *Brandon v. Riffle*, 197 W. Va. 97, 100 - 01, 475 S.E.2d 97, 100 - 01 (1996):

It is generally recognized that a mistake as to the legal effect of a contract, though a mistake of law will be treated as a mistake of material fact where the mistake is mutual, or common to all parties to the transaction, and results in a written instrument which does not embody the 'bargained for' agreement of the parties (citations omitted). The significance of this exception is obvious as a mistake of law does not normally permit the avoidance of an obligation, whereas, 'where one who enters into a contract or performs some

act while laboring under a mistaken material fact is entitled to have the transaction or the act set aside in a court of equity.’ (citations omitted).

Based upon the evidence submitted to the trial court, there can be little, if any, doubt that City was mistaken as to the legal effect of the LTA. For instance, Appellant submitted evidence to the Trial Court that City judicially admitted the following with respect to its belief about the legal effect of the Lease Termination Agreement:

- “[City National] made a business decision not to renew said lease effective on October 31, 2000, **thereby extinguishing, as a matter of law, any right in [sic] Frazier & Oxley, L.C. . . . under the June 15, 1987 sublease.**” *See*, Record at p. 1135 (emphasis added).
- “City National Bank approached St. James Management Company regarding **non-renewal of its lease**, but not regarding surrender, cancellation or termination of such lease.” *Id.* (emphasis added).
- “City National made a business decision **not to renew its lease . . .**” *Id.* (emphasis added).
- “[t]he parties to a lease may agree upon such terms of termination as are in their best interests and **City National Bank and St. James Management could terminate their lease in any manner they saw fit.**” *Id.* (emphasis added).
- “City National Bank and St. James Management Company, as the only parties to the lease, **had the right to decide upon the terms of its non-renewal**, as do the parties to any contract.” *Id.* (emphasis added).

Appellee’s mistaken belief as to the legal effect of the Lease Termination Agreement did not stop with said admissions. In fact, when submitting its Response to the Writ of Prohibition filed with this Court in *Frazier & Oxley I*, City continued to maintain the LTA operated, as a matter of law, to terminate Frazier & Oxley’s Sublease. To wit:

On September 27, 2000, City National terminated its matters lease with St. James, the successor-in-interest to its lessor. ... As any continued right of occupancy of Frazier & Oxley, as sub-lessee, was entirely dependent upon City National's lease of the space and as such lease terminated on September 27, 2000, **Frazier & Oxley have absolutely no right to the continued occupancy of such premises. Under West Virginia law, once a master lease terminates, any sub-lease terminates.**

See, Id. at p. 1136.

These admissions by Appellee are consistent with the testimony of many of its employees who believe the legal effect of the LTA was a non-renewal of the Prime Lease, instead of a surrender of the Sublease. More specifically, Robert Hardwick, the Vice President and Manager of the Bank's Huntington branch, testified that City intended to non-renew (as opposed to a surrender of) the Prime Lease. *See, Id.* at pp. 235 - 238. Likewise, Matthew Call, an employee of City at the relevant times herein, also testified that "the Bank would not be renewing the Lease upon the expiration of the then current renewal term on October 31, 2000." *See, Id.* at pp. 239 - 242.

In sum, the testimony of City's employees and its admissions in the *Frazier* litigation reveal that City believed the LTA non-renewed the Prime Lease which, by operation of law, ended the Sublease of Frazier & Oxley, L.C. Thus, at a minimum, there is a genuine issue of material fact with respect to whether City was, at the time of execution, operating under a mistake of law about the legal effect of the LTA.

Just like the evidence submitted to the Court which established that City was working under a mistake of law at the time of executing the LTA, the Trial Court was presented evidence that Appellant was also operating under a mistake of law. The record is replete with evidence that Appellant “did not believe that Defendant’s execution of the [Lease Termination Agreement] was a legal surrender of the lease.” *See, Id.* at p. 1137. In responding to City’s Interrogatories, Appellant further stated:

“the Plaintiff and the Defendant mutually assumed that the non-renewal of the Prime Lease terminated the Sub-Lease as a matter of law in West Virginia. This shared assumption constitutes a mutual mistake of law regarding the legal affect of the Lease Termination Agreement. The parties at the time of the execution of such Agreement believed they were memorializing their mutual decision not to renew the Prime Lease and their mutual decision to enter into a newly created lease governing the Bank’s drive-thru location. The Circuit Court of Cabell County, according to the decision of Judge David M. Pancake, disagreed with the implications of the Lease Termination Agreement and by entry of a summary judgment order against Plaintiff ruled that a surrender of the Prime Lease had occurred to the detriment of the Bank’s sub-tenant. The factual basis for Plaintiff’s participation in the mutual mistake of law was Mr. Hankins’ lack of knowledge that a sub-lease existed. Defendant’s factual basis for its participation in the mutual mistake of law was its reliance on the terms of the Settlement Agreement in the Frazier Ethics Committee Complaint, wherein the parties, City and Frazier, agreed that the sub-tenancy of Frazier would expire contemporaneously with the termination of the Prime Lease. With the West Virginia Supreme Court’s decisions in *Frazier & Oxley I and II*, sub-tenant Frazier became Plaintiff’s tenant and the terms of their Lease were the terms of Frazier’s old Sub-Lease with Defendant.”

See, Id. at pp. 1138 - 1139 (emphasis added). However, the surrender of the Frazier & Oxley Sublease was never FMC's intention.⁴

Pursuant to *Brandon*, a mutual mistake of law is to be judicially treated as a mistake of fact. *See, Brandon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996). Under mistake of fact analysis, a contract mistakenly agreed and entered into is to be set aside and the parties returned to their pre-contractual position. *Id.* As the Trial Court was presented with ample evidence regarding the parties' respective mistakes of law, summary judgment was improperly granted.

Nonetheless, the Circuit Court of Cabell County ignored or disregarded all of the aforementioned evidence on the parties' mutual mistake of law and ruled that, because the parties did not discuss what would happen with the Mezzanine during negotiations of the LTA, a mutual mistake of law cannot exist. The Trial Court's ruling is flawed for multiple reasons. First, the Mezzanine was undoubtedly identified in the recitals of the LTA and, therefore, was clearly contemplated by both parties when the LTA was drafted by Appellant and approved by Appellee. Second, the Mezzanine was included in the Prime Lease which was the exact contract the parties were attempting to non-renew by

the executing the Lease Termination Agreement. Third, Appellant had no reason to ask Appellee what would happen with the Mezzanine as the Appellant was not aware of the

¹ Likewise, the record establishes that "[o]n April 25, 2000, John Hankins and Fred Davis of St. James Mgt., LLC met with Bob Hardwick, Matt Call and Larry Dawson of City in a dinner meeting to discuss the **Bank's decision not to renew the Prime Lease agreement and the St. James' acceptance of such non-renewal.**" *Id.* (emphasis added). "On April 25, 2000, City National Bank's representatives informed John Hankins and Fred Davis of **City National Bank's decision not to renew the Prime Lease at the Non-Renewal Dinner Meeting.**" *Id.* (emphasis added).

Sublease. Appellant had no reason to think that anything would happen with the Mezzanine other than its return to Appellant because it did not know a new leasehold had been created for Frazier through a sublease with City.

The simple fact of the matter is that both parties believed the legal effect of the LTA was a non-renewal of the Prime Lease and they both, ultimately, were wrong. As a result of the parties' both being wrong as to the legal effect of the LTA, there was a mutual mistake of fact in this case. Thus, the trial court's conclusion that there was no mutual mistake of fact was erroneous and should be reversed.

V. CONCLUSION

For all of the above-stated reasons the award of summary judgment to City was error, and Appellant respectfully requests that this Honorable Court reverse the Trial Court's Order and remand this matter for a trial on the merits of Appellant's breach of contract claim.

Respectfully Submitted,

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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FREDERICK MANAGEMENT
COMPANY, LLC,

Plaintiff,

vs.

CIVIL ACTION NO.: 04-C-323
(Judge F. Jane Husted)

CITY NATIONAL BANK OF
WEST VIRGINIA, a national
banking association,

Defendant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing Brief of Appellant upon counsel named below by depositing the same in the United States Mail, postage prepaid at Huntington, West Virginia, on the 18th day of February 2010, addressed as follows:

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