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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FREDERICK MANAGEMENT
COMPANY, LLC,

Plaintiff,

v.

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

Defendant.

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CIVIL ACTION NO. 04-C-323
JUDGE F. JANE HUSTEAD

ORDER

On December 19, 2008, came the parties, Plaintiff, Frederick Management Company, LLC, ("St. James") by counsel, Thomas L. Craig, Todd A Biddle and Bailes, Craig & Yon, PLLC and Defendant, City National Bank of West Virginia, ("City") by counsel, Ancil G. Ramey and Steptoe & Johnson, PLLC, for a hearing on *Plaintiff's Motion For Entry of Order Delineating Justiciable Issues; Defendant's Motion to Dismiss for Failure to Prosecute under Rule 41; and Defendant's Motion For Summary Judgment.* Upon review of the pleadings filed herein and hearing the arguments of counsel, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In 1976, Bill Frazier and four other investors formed First Huntington Building Corporation ("FHBC") and purchased the St. James Building, a twelve-story building in downtown Huntington. In 1979, Bill Frazier and Lee Oxley formed The Old National Bank of Huntington ("ONB").
2. On May 7, 1980, FHBC and ONB entered into a lease ("prime lease") for various areas of the St. James Building. The prime lease included the banking lobby, the mezzanine, and a storage area in the basement and was for a term of 20 years, beginning on November 1, 1979 and ending on October 31, 1999. The prime

lease also provided that it would automatically renew for twenty (20) consecutive one-year terms unless the lessee provided the lessor with written notice of its intent to vacate the premises within sixty (60) days prior to the expiration of the original term of the lease, or any renewal term of the lease.

3. On June 15, 1987, ONB and the law firm of Frazier & Oxley entered into a sublease ("sublease") for portions of the space described in the prime lease, including the mezzanine area.
4. On June 16, 1987, Frazier & Oxley assigned all their rights and obligations under the sublease to Bill Frazier (hereinafter collectively referred to as the "Frazier Defendants").
5. In 1996, ONB became part of City and the ONB location became a branch office of City. As a result, City became lessee under the prime lease and lessor of the sublease.
6. A dispute arose between City and the Frazier Defendants regarding the sublease. In November 1999 the parties settled this dispute. The settlement agreement stated that the sublease would expire "upon the expiration or termination of the master/primary lease." The settlement agreement was silent as to what would happen to the sublease if City should surrender the prime lease.
7. By the spring of 2000, City decided that it did not want to continue to occupy its branch office in the lobby of the St. James Building, but did want to keep a drive through in this location.

8. In April 2000, approximately six (6) months prior to the expiration of the current one year lease term under the prime lease, City and St. James agreed that City would vacate its branch office in the St. James Building, but retain a drive through banking location.
9. On September 27, 2000, approximately thirty (30) days before the expiration of the one year term of lease under the prime lease, City and St. James entered into a lease for the drive through location.
10. Also on September 27, 2000, immediately after signing the lease for the drive through, City and St. James signed a Lease Termination Agreement ("LTA"). The LTA had an effective date of October 31, 2000.
11. John Hankins is and was an owner and officer of St. James, and was present during the discussions leading up to the LTA and the drive through lease. Mr. Hankins is a licensed attorney and prepared the LTA.
12. The LTA was not entitled "Notice of Nonrenewal." The word nonrenewal was not found anywhere in the LTA.
13. The prime lease required that the lessee, City, provide written notice to the lessor of its intent to terminate the lease, sixty (60) days prior to the expiration of the lease.
14. Mr. Hankins knew that Frazier & Oxley occupied the mezzanine.
15. Mr. Hankins, on behalf of St. James, engaged in negotiations with Merrill Lynch to lease the space occupied by City.

16. On August 22, 2000, more than sixty (60) days prior to the expiration of the prime lease, Mr. Hankins sent a set of proposed floor plans to Merrill Lynch. The proposed floor plans showed the mezzanine space as being occupied by "LAW FIRM & ST. JAMES."
17. On August 23, 2000, more than sixty (60) days prior to the expiration of the prime lease, Mr. Hankins forwarded a copy of the plans to Fred Davis, another owner of St. James. The letter to Mr. Davis stated, "Enclosed herewith is Plan One that has both tenants in this space along with the Frazier Law Firm on the mezzanine..."
18. Also, on August 23, 2000, Mr. Hankins sent a letter to Robert Hardwick, a City employee in Huntington, regarding City's desire to both end the prime lease and maintain a drive-through location. The letter stated that "If we decide to proceed, it will probably be necessary to cancel your existing lease and to enter into a new lease for the reduced space. We will also take the responsibility of negotiating a new lease for the law firm located on the mezzanine."
19. On September 7, 2000, Mr. Hankins forwarded proposed floor plans to Jeffrey Stidham, who represented Merrill Lynch. The proposed floor plans clearly showed the mezzanine continuing to be occupied by a law firm.
20. On September 8, 2000, after the sixty (60) day notice requirement but several weeks prior to the signing of the LTA, Mr. Hankins forwarded a proposal directly to Merrill Lynch. Section 1.2 of the proposal provided in part that the "downtown branch of City National Bank is presently located on the first floor space being offered for lease in the proposal..." Section 1.3, in part provided that "City

National Bank is the only tenant on the ground floor and a law firm is the only tenant on the mezzanine.”

21. Ultimately, Merrill Lynch did not lease this property.
22. On May 23, 2001, approximately seven (7) months after the effective date of the LTA, St. James and Fifth Third Bank signed a lease. In a letter to Fred Davis dated May 24, 2001, Mr. Hankins wrote that the lease between St. James and Fifth Third was “for the banking facility located on the first floor of the St. James Building...” The lease itself contained an option to “lease the offices containing approximately 4,000 square feet on the mezzanine level presently leased to the law firm of Frazier and Oxley.”
23. On August 23, 2001, in response to a request by Fifth Third to invoke its option for the mezzanine space occupied by Frazier & Oxley, St. James prepared a modified lease agreement, which included the mezzanine space. Mr. Hankins, in a letter to Fifth Third that accompanied the modified lease, stated that the mezzanine was “currently occupied by Frazier and Oxley Law Firm” and that “As soon as I receive a copy of the lease signed by Fifth Third, I will immediately serve a termination notice to Frazier and Oxley...”
24. On August 31, 2001, Daniel Yon sent a letter to Bill Frazier, which stated that his firm “is counsel for St. James Management Company, LLC. On behalf of St. James Management Company, LLC and pursuant to West Virginia Code § 37-6-5, you are hereby given notice to vacate the premises your firm currently occupies at 401 Tenth Street, Mezzanine Level, by midnight, September 30, 2001.”

25. On August 30, 2001, Mr. Hankins sent another letter to Fifth Third informing it that St. James “served a notice as required under West Virginia law on the law firm of Frazier & Oxley to vacate the offices in the mezzanine of the St. James Building...”
26. St. James filed Civil Action No. 01-C-0892 in the Circuit Court of Cabell County (“underlying litigation”). In the underlying litigation, the Plaintiff, St. James, sought to evict the Frazier Defendants from their law firm offices. St. James’ alleged that by entering into the LTA with City a month before the prime lease was set to automatically renew, the prime lease was legally terminated. As such, St. James maintained that since the Frazier Defendants were occupying space pursuant to the sublease with City’s predecessor (and thus in a sublease with City), the LTA terminated the sublease and the Frazier Defendants were required to vacate their offices.
27. St. James argued that the settlement agreement entered into between City and the Frazier Defendants in 1999, included a provision that the sublease was to run concurrently with the prime lease and the sublease would terminate upon the termination of the prime lease or the expiration of the term of the prime lease.
28. On January 22, 2002, St. James filed a Motion for Partial Summary Judgment. On February 6, 2002, the Circuit Court granted St. James’ Motion for Summary Judgment.
29. On July 1, 2002, the Frazier Defendants filed a writ of prohibition with the West Virginia Supreme Court of Appeals (“Supreme Court”). On September 17, 2002, the Supreme Court granted the writ of prohibition. *See State ex rel. Frazier &*

Oxley, L.C. v. Cummings, 212 W. Va. 275; 569 S.E.2d 796 (2002) (“*Frazier & Oxley I*”).

30. In *Frazier & Oxley I*, the Supreme Court, held that a surrender of a lease did not terminate a sublease, and that parties to a lease could not waive termination provisions in that lease to the legal detriment of the sublessee. The Supreme Court remanded the case back to the Circuit Court and held that the only issue to be considered on remand was whether the prime lease had been surrendered or terminated pursuant to the LTA.
31. On February 4, 2003, St. James moved to amend its complaint, alleging several new causes of action against the Frazier Defendants. On April 1, 2003, the Circuit Court granted this motion.
32. In response, on the Frazier Defendants filed another writ of prohibition with the Supreme Court. See *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802; 591 S.E.2d 728 (2003) (“*Frazier & Oxley II*”).
33. In *Frazier & Oxley II*, the Supreme Court granted the writ of prohibition and stated again that the sole issue on remand was whether a surrender occurred and that as such, it was inappropriate to allow St. James to amend its Complaint. *Id.*
34. On November 18, 2004, after discovery was conducted on the surrender issue, the Circuit Court granted summary judgment in favor of the Frazier Defendants, holding that that (i) the LTA effected a surrender of the lease by City to St. James; (ii) that the prime lease did not allow for a waiver of the requirement that termination of the prime lease be made in writing at least 60 days prior to the end of

the term of the prime lease; (iii) that the 1999 settlement agreement between City and the Frazier Defendants had no effect on the surrender question; (iv) and that the LTA had no effect on the sublease.

35. On April 9, 2004, St. James filed this lawsuit against City. St. James alleged that City was bound to deliver the premises occupied by the Frazier Defendants pursuant to the LTA and claimed breach of contract. St. James also alleged that City had fraudulently concealed the existence of the Frazier Defendants and/or the sublease.
36. On August 2, 2006, after more than two years of no activity, this Court served a Rule 41(b) notice on St. James, which provided that the action would be dismissed for failure to prosecute unless good cause was shown by August 26, 2006.
37. Following this notice, on August 25, 2006, St. James served discovery requests on City.
38. Thereafter, for approximately seventeen (17) months nothing occurred in this case.
39. On January 24, 2008, the Court served a Rule 41(b) notice on St. James, which provided that the action would be dismissed for failure to prosecute unless good cause was shown by January 24, 2008.
40. In response to this Court's second Rule 41(b) notice, St. James requested that the Court not dismiss the case and advised the Court that it was dropping any fraud claim against the City. Additionally, St. James advised that its claims against the City was based on the theory that either St. James was unaware of the sublease and status of the Frazier Defendants as tenants of City (and thus there was a material mistake of fact in entering into the LTA) or that if St. James did know of the

sublease, St. James and City signed the LTA under a mutual mistake of law that the sublease would end along with the prime lease. The Court Ordered that the case would not be dismissed.

41. At a status conference on June 9, 2009, this Court found that the only issue to be considered in this case was whether a surrender of the prime lease had occurred.
42. At a status conference on September 4, 2008, although counsel for St. James disagreed, this Court again found surrender was the only issue left before the Court.
43. On October 10, 2008 this Court ordered the parties to conduct discovery until November 18, 2008; submit any dispositive motions by December 1, 2008; and have a hearing on dispositive motions on December 19, 2008.
44. Prior to the December 19, 2008 hearing, City propounded discovery requests to St. James and conducted Hankins' deposition, St. James, did not propound any discovery requests or conduct any depositions.

CONCLUSIONS OF LAW

45. Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. W.Va. R. Civ. P. 56(c); *Jividen v. Law*, 461 S.E.2d 451 (W.Va. 1995).

46. The Supreme Court has held that when considering a Motion for Summary Judgment, a Court shall consider all matters in the light most favorable to the non-movant. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).
47. The Supreme Court has held that a “surrender” is the giving up of a lease before its expiration. See *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275; 569 S.E.2d 796 (2002). Further “[t]he surrender of a lease by a lessee to his or her lessor, after a sublease, will not be permitted to operate so as to defeat the estate of a sublessee.” *Id.* The rights of the subtenant depend on whether the prime lease was “terminated” pursuant to the express terms of the sublease, which would thereby terminate the sublease, or whether the prime lease was “surrendered,” which would have no affect on the sublease. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802; 591 S.E.2d 728 (2003).
48. “Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit.” Syl. Pt. 2, in part, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).
49. Collateral estoppel will bar a claim if four conditions are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Holloman v. Nationwide Mut. Ins. Co.*, 217

W. Va. 269; 617 S.E.2d 816 (2005) (citing Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

50. This Court finds that the only issue remaining in this case is whether there was a surrender of the prime lease.
51. In the Court's Order granting the Defendant's Motion for Summary Judgment in the underlying litigation, the Court held that a surrender occurred and that the sublease survived the LTA. As such, the issue decided in the underlying litigation is identical to the one presented in this action.
52. A summary judgment is a final decision on the merits. *Tolley v. Carboline Co.*, 217 W. Va. 158, 164, 617 S.E.2d 508, 514 (2005).
53. In the underlying litigation, the Court granted the Frazier Defendants' Motion for Summary Judgment. This was a final decision on the merits. St. James could have appealed this decision, but did not.
54. This Court finds that St. James was a party in the underlying litigation.
55. This Court finds that St. James had a full and fair opportunity to litigate the surrender issue in the underlying litigation.
56. This Court finds that all of the four conditions for collateral estoppel are present and as such, St. James is collaterally estopped from relitigating whether a surrender of the prime lease occurred and that the sublease survived the LTA.
57. However, even if collateral estoppel does not bar relitigation of the surrender issue, this Court finds that it still must dismiss this action because Plaintiff, St. James'

breach of contract claim fails as a matter of law; the LTA was ambiguous; and there was no mutual mistake of fact or law.

58. This Court finds that St. James' claim for breach of contract fails as a matter of law.
59. This Court finds that there was a surrender of the prime lease, via the LTA, which terminated the City's right under the prime lease and allowed for the survival of the sublease.
60. West Virginia law provides that "Where performance of a contractual promise is rendered impossible by the law, nonperformance is excused." *Toledo Police Patrolmen's Assn., Local 10, IUPA v. Toledo*, 94 Ohio App. 3d 734, 739, 641 N.E.2d 799, 802 (1994)(citation omitted); *see also* RESTATEMENT OF THE LAW (SECOND) OF CONTRACTS § 265 (1981)("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."); *In re Parent*, 155 B.R. 310, 314 (Bank. D. Conn. 1993)("Performance by a party may be excused where the law intervenes to prohibit such performance."); *First Federal Sav. and Loan Ass'n of Rochester v. U.S.*, 76 Fed. Cl. 106 (2007)("[W]hen a party to a contract is sued for breach, it may defend on the ground that there existed a legal excuse for its nonperformance at the time of the alleged breach.")(citations omitted); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995)("The doctrines of

impossibility, impracticability, and frustration, which operate as implied terms in contracts, sometimes excuse noncompliance with contractual duty altogether.”).

61. As such, this Court finds that that even if the LTA could be construed as requiring City to surrender the mezzanine, City cannot be found to have breached the LTA by failing to perform an act that it was prohibited by the law of surrender from performing. Therefore, City is entitled to summary judgment on St. James’ breach of contract claim.
62. The Court further finds that the LTA was ambiguous.
63. The LTA states that the prime lease was for “that certain banking facility located on the ground floor and mezzanine located in the St. James Building” (emphasis supplied). The LTA also states that the prime lease “is hereby terminated effective October 31, 2000, at which time possession of the main banking facility located within the St. James Building will be surrendered to St. James.” (emphasis supplied). An ambiguity arises as to what is the “main banking facility” as opposed to a “certain banking facility.” A clear use of language would have repeated the word “certain” a second time, or would have used the word “main” both times and repeated the inclusion of the mezzanine in both instances. By defining the scope of the lease of “that certain banking facility” as including “the ground floor and mezzanine” in the beginning of the LTA, but referring to the “surrender” of only the “main banking facility,” St. James, as drafter of the LTA, created an ambiguity.
63. “The term ‘ambiguity’ is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds

might be uncertain or disagree as to its meaning.” Syl. pt. 4, *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006).

64. “The question as to whether a contract is ambiguous,” is not a question of fact to be presented to a jury, but “is a question of law to be determined by the court.” Syl. pt. 1, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 162 S.E.2d 189 (1968). Likewise, “‘It is the province of the court, and not of the jury, to interpret a written contract.’ *Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S.E. 225 [1909].” Syl. pt. 1, *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937).
65. “It is also well settled that any ambiguity in a contract must be resolved against the party who prepared it.” *Nisbet v. Watson*, 162 W. Va. 522, 251 S.E.2d 774 (1979).
66. Thus, the Court finds that the language in the LTA referencing “certain banking facility” and “main banking facility,” created an ambiguity, which must be resolved against St. James. As such, the LTA did not impose upon City a contractual obligation to surrender the mezzanine, which was occupied by Frazier & Oxley.
67. Finally, the Court finds that there was no mutual mistake of fact or mutual mistake of law in this case.
68. In Syllabus Point 2 of *Ryan v. Ryan*, 220 W. Va. 1, 640 S.E.2d 64 (2006), the Court found that, “‘A mutual mistake is one which is common to all parties, wherein each labors under the same misconception respecting a material fact or provision within the agreement.’ Syl. Pt. 4, *Smith v. Smith*, 219 W. Va. 619, 639 S.E.2d 711 (2006) (No. 33063).”

69. This Court finds that there was no mutual mistake of fact or law regarding whether Frazier & Oxley's continued occupancy of the mezzanine was discussed prior to the preparation of the LTA; whether surrender was discussed prior to the preparation of the LTA; or whether Frazier & Oxley continued to occupy the mezzanine.
70. As such, this Court finds that *Defendant's Motion For Summary Judgment* is GRANTED, *Plaintiff's Motion For Entry of Order Delineating Justiciable Issues* is DENIED and *Defendant's Motion to Dismiss for Failure to Prosecute under Rule 41* is DENIED. Further this Court ORDERS that this matter is DISMISSED, with prejudice.

Plaintiff's objections and exceptions are noted and preserved.

WHEREFORE, this Court ORDERS that *Defendant's Motion For Summary Judgment* is GRANTED, *Plaintiff's Motion For Entry of Order Delineating Justiciable Issues* is DENIED, *Defendant's Motion to Dismiss for Failure to Prosecute under Rule 41* is DENIED and this matter is DISMISSED, with prejudice.

The Circuit Clerk of Cabell County is directed to distribute a copy of this Order to the following:

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Executed this 23rd day of March 2009.



F. Jane Hustead, Chief Judge

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STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
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CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA