/s/ Jennifer P. Dent
Circuit Court Judge
Ref. Code: 21QZJKGV

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Raleigh County Circuit Clerk
Paul H. Flanagan

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., a West Virginia non-profit corporation,

Plaintiff,

vs.

Civil Action No.: 19-C-357
Presiding: Judge Dent
Resolution: Judge Lorensen

EMCO GLADE SPRINGS HOSPITALITY, LLC, a West Virginia limited liability company; ELMER COPPOOLSE, an individual; JAMES TERRY MILLER, an individual; R. ELAINE BUTLER, an individual; and GSR, LLC, a West Virginia limited liability company,

Defendants,

and

EMCO GLADE SPRINGS HOSPITALITY, LLC, a West Virginia limited liability company, and GSR, LLC, a West Virginia limited liability company,

Counterclaim Plaintiffs,

vs.

Civil Action No.: 19-C-357
Presiding: Judge Dent
Resolution: Judge Lorensen

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., a West Virginia non-profit corporation

Counterclaim Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY IN PART AND ORDERING FURTHER BRIEFING

This matter came before the Court this 25th day of February, 2021, upon Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven. The Plaintiff,

Glade Springs Village Property Owners Association, Inc., by counsel, Ramonda C. Marling, Esq., and Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC, by counsel, Arie M. Spitz, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds the claims in the Amended Complaint, wherein GSVPOA asserted claims against EMCO and GSR (the Moving Defendants) premised upon their alleged respective breach of various contracts with GSVPOA. *See* Am. Compl.

2. On August 25, 2020, this Court entered an Order granting Defendants' motion for a preliminary injunction, wherein Defendants obtained a preliminary injunction enjoining the POA from operating its restaurant, The Haven, which is located on the POA's Woodhaven Golf Course property. *See* Ord. Granting Prelim. Inj., 8/25/20.

3. On December 29, 2020, Plaintiff, Glade Springs Village Property Owners Association, Inc. (hereinafter "Plaintiff" or "POA"), filed Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, moving this Court to grant it summary judgment as to unenforceability of the noncompete covenant in the Declaration for Glade Springs Village and the POA's "unencumbered property right to provide food and beverage services at The Haven and, accordingly, to dissolve the preliminary injunction restraining [the POA] from providing such services. *See* Pl's Mot., p. 1-2. Specifically, Plaintiff contends the doctrines of laches and equitable estoppel/acquiesce bar Defendant GSR from enforcing the noncompete covenant because it abandoned its right to enforce the noncompete when it declined

to object to the POA operating food and beverage services at The Haven since 2010 in direct competition with it. *Id.* at 12-13. Additionally, Plaintiff argues its motion should be granted because it has now terminated the noncompete covenant via termination letter to Justice Holdings, LLC, who it avers is the current Declarant under the Declaration, under its rights under West Virginia Code §36B-3-105. *Id.* at 2-4, 8-9.

4. On January 28, 2021, Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC (hereinafter "Defendants" or "the Resort") filed their Response in Opposition to Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, arguing the motion should be denied because laches and equitable estoppel do not apply because the Resort's restaurants did not actually compete with The Haven until 2020 because EMCO managed both The Haven and the Resort's restaurants. *See* Defs' Resp., p. 5-6. Further, Defendants argued the POA failed to brief the key issue upon which the UCIOA argument is based. *Id.* at 14. Specifically, Defendants averred if the POA argues Judge Burnside's Orders in another civil action should apply to this litigation, and the UCIOA should apply to Glade Springs, Defendants must be given the opportunity to read and respond to such arguments. *Id.* at 15. Defendants thus requested the Court rule on the issue of laches now and to order further briefing as to the UCIOA's applicability and Judge Burnside's Orders applicability. *Id.* at 14-15.

5. On February 11, 2021, Plaintiff filed its Reply to Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, arguing laches and equitable estoppel are appropriate because EMCO merely provided management services for both The Haven and the Resort's restaurants, and the profits from the Resort's restaurants went to GSR, while the profits from The Haven went to EMCO and Plaintiff, and importantly, not to GSR, and thus GSR and Plaintiff were competing, and had been

competing since 2010. *See* Reply, p. 5-6. Further, Plaintiff put forth in argument in the Reply that because of the doctrine of collateral estoppel, Defendants are precluded from arguing the UCOIA does not apply to Glade Springs Village, explaining why it believes Judge Burnside's Orders from another litigation should apply to this case. *Id.* at 5-19.

6. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

The Plaintiff filed the instant Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, arguing the doctrines of laches and equitable estoppel/acquiesce bar Defendant GSR from enforcing the noncompete covenant because it abandoned its right to enforce the noncompete when it declined to object to the POA operating food and beverage services at The Haven since 2010 in direct competition with it. *See* Pl's Mot., p. 12-13.

The West Virginia Supreme Court of Appeals has held that a "court of equity in dealing with a covenant in a deed conveying land, in respect to the use to which such land may be devoted, will not enforce such covenant, at the suit of one originally entitled to its enforcement, where the plaintiff has, over an unreasonable period of time, acquiesced in the violation thereof; and has, without protest, observed the expenditure of substantial sums of money, and the employment of time and labor by another, in connection with such violation, and where, in such circumstances, to enforce such covenant would be inequitable, and impose upon the person violating the same a loss out of proportion to the benefits which would accrue to the plaintiff from its enforcement". Syl. Pt. 4, *Ballard v. Kitchen*, 128 W. Va. 276, 36 S.E.2d 390 (1945).

The Supreme Court has further stated that a "party may be barred from enforcing such restriction where, through laches or acquiescence for an unreasonable period, it would be

inequitable to enforce the same, and in such circumstances the defense of equitable estoppel may be relied upon by a defendant who, through such laches or acquiescence, has been misled to his prejudice". *Id.* at 283, 393.

As recently as 2020, the Supreme Court has stated that the "doctrine of laches has been long recognized by this Court", finding that in syllabus point 2, in part, of *Carter v. Price*, 85 W. Va. 744, 102 S.E. 685 (1920), laches was identified as the "delay in the assertion of a claim which works disadvantage to another, and where it appears that by reason of such delay the adverse party would be injuriously affected ....". *Van Camp v. McIntyre*, No. 18-0760, 2020 WL 877817, at *3 (W. Va. Feb. 24, 2020).

The Supreme Court has defined laches as follows:

> Laches has been defined as 'such neglect or omission to do what one should do as warrants the presumption that he has abandoned his claim, and declines to assert his right.' 6 Michie Va. and W.Va.Digest, 602. Another definition is: 'Laches is inexcusable delay in asserting a right, and is an equitable defense, controlled by equitable considerations. To be a bar, the lapse of time must be so great, and the relation of the defendant to the right such, that it would be inequitable to permit the plaintiff to assert it where he has had, for a considerable period, knowledge of its existence, or might have acquainted himself with it by the use of reasonable diligence.'

Id. at 284–85, 394.

Further, as a general rule, the doctrine of equitable estoppel allows a court to prevent a nonsignatory from embracing a contract, but then turning his, her, or its back on the portions of the contract, such as an arbitration clause, that the nonsignatory finds distasteful. *Bayles v. Evans,* 243 W. Va. 31, 842 S.E.2d 235 (2020). Equitable estoppel is defined as follows:

> "Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of

> things as existing at the same time." *Citing Preston v. Mann*, 25 Conn. 118, 128 (1856).

Id. at 842, 245 (n. 10).

The Court notes that by prior Order, Defendants obtained a preliminary injunction enjoining the POA from operating its restaurant, The Haven, which is located on the POA's Woodhaven Golf Course property, due to the restrictive covenant not to compete. *See* Ord. Granting Prelim. Inj., 8/25/20.

The Non-Compete Covenant reads as follows:

> 22. Non-competition. No commercial lot or any parcel of land subject to these Protective Covenants or to this Declaration shall be used to operate any business which competes in any manner with Glade Springs Resort L.L.C.[1]'s food....

See Defs' Resp., p. 3.

The Court has already found in its August 25, 2020 Preliminary Injunction Order that in 2010, Cooper Land Development, Inc. deeded the Woodhaven property, including the property upon which The Haven sits, to the POA. *See* Ord. Granting Prelim. Inj., 8/25/20, ¶18. This deed specifically stated that the conveyance was made subject to the covenants and restrictions set forth in the May 25, 2001 Declaration for Glade Springs Village (hereinafter "Declaration")[2]. *See* Defs' Resp., p. 3.

The parties do not dispute that also on March 1, 2010, Defendant EMCO and Plaintiff entered into a lease. Per the Defendant, they entered into a lease that provided that EMCO

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[1] The Court notes it has been proffered that Defendant GSR, LLC is successor-in-interest to Glade Springs Resort, L.L.C. *See* Reply, p. 3.

[2] The Court noted and explained in its prior Order that Woodhaven golf course was not included in this original Declaration, but was annexed via the May 4, 2010 Supplemental Declaration which was executed by Glade Springs Resort Limited Liability Company and Cooper Land Development, Inc., annexing the Woodhaven golf course property, and making Woodhaven subject to the original Declarations, including the non-compete clause. *See* Ord. Granting Prelim. Inj., 8/25/20, ¶¶11, 16.

would operate The Haven for food and beverage, the POA would receive rent for 5%. Per the Plaintiff, the lease establishes that the POA "operated food and beverage in a revenue-sharing joint venture" with EMCO. *See* Reply, p. 3. The Court notes a copy of said lease was proffered to the Court as Exhibit 5 to Defendants' Response and as Exhibit N to Plaintiff's motion.

Plaintiff proffers that EMCO then managed The Haven for the POA under this arrangement until late 2019 or early 2020. *See* Reply, p. 3. The parties also do not dispute that in addition to operating The Haven, EMCO also operated and managed the Resort's restaurants, Glade's Grill, Small Talk Café, Bunkers Sports Bar, and the Rotunda Restaurant. *See* Defs' Resp., p. 4; *see also* Reply p. 3.

The Court has reviewed the EMCO/POA lease, proffered to the Court as Exhibit 5 to Defendants' Response and as Exhibit N to Plaintiff's motion. Rather than merely utilizing EMCO as its management company, the Court's review of the lease reveals POA was EMCO's landlord and the lease sets forth a clear landlord/tenant relationship.

Plaintiff proffers that EMCO and Plaintiff were operating The Haven has a revenue-sharing joint venture together. *See* Reply, p. 3; *see also* Pl's Mot., p. 13. However, plainly, Paragraph 24 of the lease unequivocally states that the POA and EMCO are in no way partners or in a "joint venture", but are "solely" landlord and tenant. *See* Def's Resp., Ex. 5, ¶24. In this lease, the POA leased the entire property to EMCO for 5% as rent payment. EMCO ran the business as the tenant – not a management company.

Further, the Letter Agreement attached to the lease states that EMCO was also running the other restaurant businesses in harmony with The Haven. Paragraph 10 of the Letter Agreement states that representatives from EMCO and the POA "will meet monthly…to review and discuss operation of Stonehaven, Woodhaven and Cobb golf courses….to provide for

efficient operation of all three courses to insure that golfers on all three courses are provided a good golf and good food and beverage experience". *See* Def's Resp., Ex. 5 (Letter Agreement), ¶10.

Defendant also proffers at Exhibit 6, an Affidavit of Elmer Coppoolse that verifies that EMCO has operated both The Haven and the Resort's restaurants on a long-term basis. *See* Def's Resp., Ex. 6. Specifically, Mr. Coppoolse verifies he has served as the CEO of EMCO and GSR since 2004. *Id.* at ¶1. Further, he verifies he has personal knowledge EMCO has operated both The Haven and the Resort's restaurants since 2010. *Id.* at ¶¶7-8. With this frame of reference, to say that POA was in competition with GSR is disingenuous. It is clear that evidence supports the conclusion that "The Haven was operated in harmony with, and not in competition with, the Resort's restaurants", like Defendants claim. *See* Defs' Resp., p. 4.

Further, the POA, which was a party to the Letter Agreement with EMCO, acknowledged therein that all three operations were working together for effective operations to ensure good food and beverage services for all three courses, and thereby acknowledge there is no competitive spirt between the POA and Defendants. *See* Def's Resp., Ex. 5 (Letter Agreement), ¶10.

Finally, the Court notes that even if Plaintiff disagrees with this analysis, at a minimum, the POA certainly has not met its burden to show no genuine issue of material fact remains with regard to its laches/equitable estoppel/acquiesce argument.

For this reason, the Court finds Defendants did not sit on their rights to challenge the EMCO/POA operation of The Haven, in violation of the doctrine of laches or equitable estoppel/acquiesce. *Id.* at 5-6. Accordingly, summary judgment will not be found in favor of Plaintiff on these grounds.

Next, the Court addresses the arguments regarding collateral estoppel and the application of Judge Burnside's Orders in the "Justice Holdings litigation"[3] cited by the parties, as well as the application of the Uniform Common Owners Interest Act (West Virginia Code §36B-3-105 *et seq.*).

Plaintiff has argued its motion that summary judgment in its favor is appropriate because it has now terminated the noncompete covenant via termination letter to Justice Holdings, LLC, who it avers is the current Declarant under the Declaration, under its rights under West Virginia Code §36B-3-105. *See* Pl's Mot., p. 2-4, 8-9. Plaintiff argues this is because the POA provided notice of termination of that covenant under West Virginia Code §36B-3-105, it has the power to terminate contracts with Justice Holdings, LLC under the Uniform Common Owners Interest Act (West Virginia Code §36B-3-105 *et seq.*), and that the Uniform Common Owners Interest Act (West Virginia Code §36B-3-105 *et seq.*) applies to Glade Springs Village in this litigation because Judge Burnside ruled the same via Order in the Justice Holdings litigation. *Id.* at 18.

However, Defendants argued the POA failed to brief the key issue upon which the UCIOA argument is based. *See* Def's Resp., p. 14. Specifically, Defendants averred if the POA argues Judge Burnside's Orders in another civil action should apply to this litigation, and the UCIOA should apply to Glade Springs Village, Defendants must be given the opportunity to read and respond to such arguments. *Id.* at 15. Defendants thus requested the Court rule on the issue of laches now and to order further briefing as to the UCIOA's applicability and Judge Burnside's Orders applicability. *Id.* at 14-15.

Subsequently, in its Reply, Plaintiff provided a detailed analysis and argument that because of the doctrine of collateral estoppel, Defendants are precluded from arguing the UCOIA

[3] The Court notes this case is Raleigh County Civil Action No. 19-C-481-P, J. Burnside presiding. *See* Pl's Mot., p. 3.

does not apply to Glade Springs Village, explaining why it believes Judge Burnside's Orders from another litigation should apply to this case. *See* Reply, p. 5-19.

The Court agrees that Defendants should have the opportunity to read and respond to such an analysis and argument related to collateral estoppel and the Justice Holdings litigation. *See* Def's Resp., p. 15. The Court concludes and orders that Defendants shall file a response brief to the collateral estoppel argument raised by Plaintiff in its Reply within fifteen (15) days of the entry of this Order.

The Court hereby finds the instant motion must be denied in part at this time, and must be held in abeyance as to the collateral estoppel issue, until such time as the Court may consider the arguments from Defendants on the collateral estoppel issue. After the Court receives and reviews Defendants' forthcoming response, it will issue an Order.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven is hereby DENIED IN PART.

It is hereby further ADJUDGED and ORDERED that Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven is hereby HELD IN ABEYANCE as to the aforementioned collateral estoppel argument. It is hereby further ADJUDGED and ORDERED that Defendants shall file a response brief to the collateral estoppel argument raised by Plaintiff in its Reply within fifteen (15) days of the entry of this Order.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

February 25, 2021
date of entry

JUDGE JENNIFER P. DENT
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION