

**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 GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON ITS CONTRIBUTION FOR EXPENSES UNDER THE
DEED OF EASEMENTS**

This matter came before the Court this _____ day of May, 2021, upon Plaintiff Glade
Springs Village Property Owners Association's Motion for Summary Judgment On Its

Contribution For Expenses Under The Deed of Easements. The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, Mark A. Sadd, 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 premised upon their alleged respective breach of various contracts with GSVPOA. *See* Am. Compl.

2. On a prior day, the issue of security at Glade Springs Village came before the Court in this civil action. On April 17, 2020, Plaintiff filed Glade Springs Village Property Owners Association, Inc.'s Motion for Preliminary Injunction to Enforce Specific Performance of Easement, complaining of reduced security patrols in Phase 1 and no patrols in Stonehaven and Woodhaven, referred to by Plaintiff as the Village. *See* Pl's Mot. for Prelim. Inj., p. 2.

3. On May 5, 2020, a Response to the Preliminary Injunction motion was filed, and on May 26, 2020, this Court entered its Order denying Plaintiff filed Glade Springs Village Property Owners Association, Inc.'s Motion for Preliminary Injunction to Enforce Specific Performance of Easement. *See* Ord. Denying Prelim. Inj., 5/26/20.

4. On March 4, 2021, Plaintiff, Glade Springs Village Property Owners Association, Inc. (hereinafter "Plaintiff" or "POA"), filed the instant Plaintiff Glade Springs Village Property Owners Association's Motion for Summary Judgment On Its Contribution For Expenses Under

The Deed of Easements, moving this Court to grant it summary judgment that its mandatory contribution for expenses under Deed of Easements is limited to and comprises only those security, operation, maintenance, repair and replacement expenses related to the Easement Area described and defined in the DOE, and requesting this Court order Defendants to surrender to POA the vehicles and machinery that they now use for security and maintenance but are unnecessary to provide security and maintenance under the DOE. *See* Pl’s Mot., p. 1-2. Specifically, Plaintiff argued Section 2 of the Deed of Easements limits the scope of security to staffing the Gatehouse and controlling access to entry of the property. *Id.* at 11-13.

5. On March 23, 2021, Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC (hereinafter “Defendants” or “the Resort”) filed GSR and EMCO’s Response to the POA’s Motion for Summary Judgment On Its Contribution For Expenses Under The Deed of Easements, arguing the motion should be denied because Paragraph 3, not Paragraph 2 of the Deed of Easements dictates the POA’s reimbursement obligations, which are not conditioned upon the POA’s approval of a budget or exercise of its audit and review rights. *See* Defs’ Resp., p. 2.

6. On April 6, 2021, Plaintiff filed its Reply, arguing Defendants cannot object to the instant motion for summary judgment because they conceded in their Response that the DOE does not obligate the Resort to provide security or road maintenance services in Glade Springs Village and so does not obligate the POA to reimburse the Resort for such services. *See* Reply, p. 2. Further, Plaintiff argues that Defendants’ argument that the Memorandum of Understanding reached in this case in May 2020 obligates the Resort to provide such services fails because the Memorandum of Understanding stated that the DOE remains in effect and shall not be altered in any way by the Memorandum of Understanding. *Id.* at 2-3.

7. 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 Glade Springs Village Property Owners Association’s Motion for Summary Judgment On Its Contribution For Expenses Under The Deed of Easements, arguing its mandatory contribution for expenses under Deed of Easements is limited to and comprises only those security, operation, maintenance, repair and replacement expenses related to the Easement Area described and defined in the DOE, and requesting this Court order Defendants to surrender to POA the vehicles and machinery that they now use for security and maintenance but are unnecessary to provide security and maintenance under the DOE. *See* Pl’s Mot., p. 1-2. Specifically, Plaintiff argued Section 2 of the Deed of Easements limits the scope of security to staffing the Gatehouse and controlling access to entry of the property. *Id.* at 11-13. Further, the POA argues its approval of the security and maintenance budget are prerequisites to its obligation to reimburse GSR under the DOE, and because the POA has not approved any budget that provides for security services outside of staffing the Gatehouse, its obligation reimburse GSR is limited to staffing the Gatehouse. *Id.* at 14-16. With regard to maintenance, the POA argues the DOE does not grant Defendants any right to “provide maintenance services within Glade Springs Village or its common elements”, due to the definition of “Common Properties” in Section 3 of the DOE. *Id.* at 17-18. Finally, the POA argues its right to review and audit Defendants’ records, and their duty to maintain expenditures at reasonable and prudent levels are prerequisites for its obligation to reimburse Defendants under Section 3 of the DOE. *Id.* at 18-19. The Court will take the issues in turn.

The Court notes that this not the first time the issue of security at Glade Springs Village has been raised before the Court in this civil action. On April 17, 2020, Plaintiff filed Glade Springs Village Property Owners Association, Inc.’s Motion for Preliminary Injunction to Enforce Specific Performance of Easement, complaining of reduced security patrols in Phase 1 and no patrols in Stonehaven and Woodhaven, referred to by Plaintiff as the Village. *See* Pl’s Mot. for Prelim. Inj., p. 2. Specifically, the POA argued that its members have been “anxious and uneasy about the lack of security patrols within the Village”. *Id.* at 3. The POA argued the following:

“the members of POA are experiencing increased fear, anxiety and unrest due to the complete lack of security patrols within the Village and reduced patrols within Phase 1 of the community. Each day the lives and property of the members are placed in jeopardy by the lack of security. The urgency of this matter cannot be understated. This harm is irreparable...”.

Id. at 7.

Additionally, the POA urged that “responding to an emergency is far different from actively patrolling an area and enforcing the community’s rules and regulations”. *Id.* at 5.

The Court also notes that this motion was briefed and on May 26, 2020, this Court entered its Order denying Plaintiff filed Glade Springs Village Property Owners Association, Inc.’s Motion for Preliminary Injunction to Enforce Specific Performance of Easement. *See* Ord. Denying Prelim. Inj., 5/26/20.

Further, Section 2 of the DOE reads as follows:

2. **Compliance, Security.** The POA acknowledges that access to the Glade Springs Resort is currently controlled by security guards hired by Glade and stationed at the Gatehouse shown on the Map and attached hereto as Exhibit A and that access to the Roads and Common Properties under this Deed of Easements and Licenses shall be restricted to the POA and its permitted assignees, invitees, and guests; to POA members and their guests and invitees; and to

Cooper and Cooper's guests and invitees. The POA and any party entitled to access hereunder agrees that they will comply with the rules and regulations reasonably adopted by Glade regarding the use of the Roads, the Common Properties and security procedures. The POA and any party entitled to access hereunder further acknowledge that Glade at any time may determine not to employ security guards or otherwise not to restrict access into the Glade Springs Resort in which event Glade shall provide reasonable prior written notice of such action by Glade and the POA shall have the right to provide security services to restrict access, and to have non-exclusive use of the Gatehouse and other security-related amenities to provide such security services, all at the POA's expense.

See Pl's Mot., Ex. A, p. 2.

Also, Section 3 of the DOE, in pertinent part, reads as follows:

3. Operation, Maintenance and Repair of Easement Area.

- (a) Glade shall operate, maintain and repair the Roads, areas adjacent to the Roads, the Gatehouse, the Common Properties and parking lots located within the Glade Springs Resort in a manner commensurate with the current level of services at Glade Springs Resort. Without limiting the foregoing, Glade shall (i) make any and all capital expenditures, repairs and replacements and pay all operating costs, including without limitation, payroll and utility costs necessary to operate, repair and maintain the Roads, including repairs caused as a result of construction activities on the Cooper Property, areas adjacent to the Roads, the Gatehouse, the Common Properties and the parking lots, (ii) remove snow and debris from the Roads and the parking lots, (iii) landscape and maintain the Common Properties and areas adjacent to the Roads, the Gatehouse, the parking lots and the Common Properties, and (iv) at Glade's option, and subject to the parties' Agreements in Section 2 above, engage guards who will control access through the Glade Springs Resort and otherwise provide security and related services. Glade shall use reasonable efforts to maintain all expenditures at necessary and prudent levels, and to consult with the POA in establishing yearly budgets for such expenditures, which budgets shall be provided to the POA; provided, that the POA's approval of such budget is not required before an expenditure is made by Glade hereunder.
- (b) The POA shall pay the costs incurred by Glade pursuant to paragraph 3(a) hereunder (the "Glade Costs"). For Glade's

Share of the Glade Costs, Glade shall pay to POA by the 15th day of each month an amount equal to .75% of the gross sales from Glade's operation of the Glade Springs Resort, excluding real property sales for the previous month Glade shall invoice the POA on the 15th day of each month for the estimated entire amount of the preceding month's Glade Costs, with a final reconciliation in reasonable detail for the previous calendar year to be made on February 15 of each year. Payment shall be due upon receipt of the invoice from Glade. To the extent the POA has overpaid Glade for the Glade Costs for the preceding calendar year, any overpayment will be refunded within ten (10) days of the determination that an overpayment has been made. To the extent the POA has underpaid Glade for the Glade Costs for the preceding calendar year, the POA shall pay any additional amounts due within ten (10) days of demand for payment by Glade. The POA shall have the right to review and audit any records of Glade relating to such expenditures.

See Pl's Mot., Ex. A, p. 3.

The Court concludes that Section 3 plainly provides for security access through the Resort, but not Glade Springs Village. *Id.* The language of Section 3 states that "Glade shall...engage guards who will control access through the Glade Springs Resort and otherwise provide security and related services". *Id.* The Court notes it appears Defendant conceded the DOE does not apply to Glade Springs Village because on page 4 of Defendant's response to the instant motion, the following is stated: "Second, the DOE does not obligate the Resort to provide security or road maintenance services in Glade Springs Village and so does not obligate the POA to reimburse the Resort for such services." *See* Def's Resp., p. 4.

Therefore, the Court finds that maintenance and security services under the DOE do not apply to the Village, and the POA would not be obligated to reimburse for security services within Glade Springs Village. There being no genuine issue of material fact in dispute as to this issue, the instant motion is granted as to this issue.

Next, the Court concludes that under the DOE, security encompasses not just the Gatehouse, but security “*through* the Glade Springs Resort”. *See* Pl’s Mot., Ex. A, p. 3 (emphasis added). The Court finds it pertinent that Paragraph 3 uses the word “through”. The Court finds the DOE is unambiguous on this issue. The Court notes nothing in the DOE expressly limits the engagement of guards to be only those who are stationed at the Gatehouse. *See* Def’s Resp., p. 7. For all of these reasons, the Court cannot accept the POA’s argument that the scope of security services under the DOE is limited to security guards stationed at the Gatehouse to control access *to* the property – and nothing more. *See* Pl’s Mot., p. 13. At a very minimum, the DOE contemplated security services being provided to and through the Resort. Therefore, the Court cannot grant summary judgment in the POA’s favor that the POA would not be liable for any other security costs and expenses beyond the staffing of the Gatehouse, as it requests. *See* Pl’s Mot., p. 16.

Moreover, the Court considers Paragraph 3 of the DOE also states: “Glade shall...(iv) at Glade’s option, and subject to the parties’ Agreements in Section 2 above, engage guards who will control access through the Glade Springs Resort **and otherwise provide security and related services.**” *See* Pl’s Mot., Ex. A, p. 3 (emphasis added). The Court finds what constitutes “related services” to and through the Resort may be an issue of fact. For instance, the POA argues the DOE does not cover patrols of Resort property, patrols of Glade Springs Village, the purchase or use of security vehicles, monitoring parking areas at the Resort, answering calls at homeowners’ houses, providing personal protection to certain property owners, security supervisor costs, or administrative fees. *See* Pl’s Mot., p. 13. However, the Court, in considering each of those activities, find that it is an issue of fact as to whether those each do or

do not constitute “and otherwise provide security and related services”. Accordingly, the Court cannot grant summary judgment as to that issue.

Next, the Court addresses the POA’s argument that under the DOE, GSR must get the POA’s approval of the security and maintenance budget and that such approval is a prerequisite to the POA’s obligation to reimburse GSR. *See* Pl’s Mot., p. 14. As outlined above, Section 3 of the DOE provides that: “Glade shall use reasonable efforts to maintain all expenditures at necessary and prudent levels, and to consult with the POA in establishing yearly budgets for such expenditures, which budgets shall be provided to the POA; provided, that the POA’s approval of such budget is not required before an expenditure is made by Glade hereunder.” *See* Pl’s Mot., Ex. A, p. 3.

Therefore, it is unambiguous that the POA’s approval of a budget is not required before an expenditure is made by Glade. *See* Def’s Resp., p. 7. Stated another way, this means that the Resort must use reasonable efforts to consult with the POA in establishing a budget and must provide a copy of the budget to the POA, but POA’s approval of the budget is not necessary in order for the Resort to spend money to provide the services listed, and then get reimbursed by the POA. *Id.* at 8. Indeed, the Court has already found that the POA’s reimbursement obligation is unconditional. *See* Ord. Denying Prelim. Inj., 5/26/20, p. 7 (“The obligation of the POA to immediately reimburse GSR upon receipt of GSR’s invoices is unconditional.”). But this is subject to the dispute and reconciliation process which is to occur in February of each year. The Court, therefore, will not issue any ruling regarding the instant motion that the approval of a budget is a prerequisite to its reimbursement obligation. *See* Def’s Resp., p. 7. However, the Court notes that the POA is also not able to reduce the figure they challenge in the invoice by an amount of money which is in dispute. The proper recourse is in Section 3(b) of the DOE,

regarding overpayment or underpayment. *See* Pl’s Mot., Ex. A, p. 3. The DOE lays out a reconciliation process and allows the Resort to be timely reimbursed but gives the POA the opportunity to review and contest the Resort’s charges. *See* Def’s Resp., p. 10. The DOE dictates that the parties complete this process by receiving an invoice on the 15th of each month, and receiving a **final** reconciliation in reasonable detail for the previous calendar to be made on February 15 of each year. *See* Pl’s Mot., Ex. A, p. 3. It appears that the DOE contemplates good faith actions between the parties monthly, including monthly invoicing and maintaining the expenditures at necessary and prudent levels. It is then anticipated that “to the extent” there has been any “over[payment]” or “under[payment]”, a **final** reconciliation is then mandated in February of each year.

Finally, with regard to the POA’s review and audit rights, and the documents it needs, the Resort has proffered that it has provided copies of all the documents necessary to perform a review and audit of the Easement Area expenditures and the POA has not identified any specific documents or Resort records related to Easement Area expenditures that it needs to review and audit the Resort’s invoices. *See* Def’s Resp., p. 9; *see also* Def’s Resp., Ex. 3. The Resort also averred it provides copies of the records needed for a review and audit for its expenditures, including invoices, expenses, and payroll records, to the POA with its monthly invoice. *Id.* For this reason, the Court cannot grant summary judgment in the POA’s favor on this issue, as it requests. *See* Pl’s Mot., p. 19.

The Court reiterates that the reconciliation process has been detailed in Paragraph 3(b) of the DOE. *See* Pl’s Mot., Ex. A, p. 3. As the West Virginia Supreme Court of Appeals stated in *State Dept. of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995), “ ‘.... Judges are not like pigs, hunting for truffles buried in briefs.’ ” (*quoting United States v.*

Dunkel, 927 F.2d 955, 956 (7th Cir.1991)). If the POA can state with specificity any documents or Resort records related to Easement Area expenditures that it needs to review and audit the Resort's invoices, it may inform the Court. The parties are directed and reminded to work together in the reconciliation process in good faith. The Court concludes summary judgment will not be granted in the POA's favor on this issue.

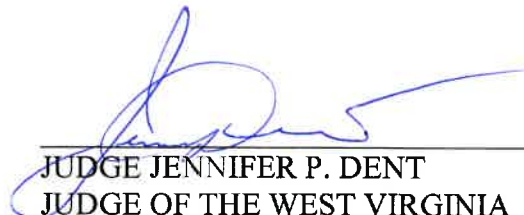
Accordingly, the Court finds that Plaintiff Glade Springs Village Property Owners Association's Motion for Summary Judgment On Its Contribution For Expenses Under The Deed of Easements is hereby GRANTED IN PART AND DENIED IN PART. The Motion is granted to the extent that those security expenses are limited and encompass the Glade Springs Resort area as defined in the DOE, and do not encompass Glade Springs Village. Further, the issue of specific security services provided, including patrolling through the Resort in vehicles, are an issue of fact, and summary judgment cannot be granted as to those fact-intensive issues.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff Glade Springs Village Property Owners Association's Motion for Summary Judgment On Its Contribution For Expenses Under The Deed of Easements is hereby GRANTED IN PART AND DENIED IN PART.

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.

May 24, 2021
date of entry


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