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

DAN RYAN BUILDERS WEST VIRGINIA, LLC,
a West Virginia limited liability company,

Plaintiff,

vs.

Civil Action No. 20-C-110
Presiding Judge: H. Charles Carl, III
Resolution Judge: Shawn D. Nines

OVERLAY I, LLC,
A Virginia limited liability company,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now the Court this 17th day of June 2021, upon Plaintiff's Motion for Partial Summary Judgment, and Contingent Request for Hearing.

The Dan Ryan West Virginia Builders, LLC, by counsel, William F. Gibson, II, Esq., and Defendant, Overlay I, LLC, by counsel, Gregory E. Kennedy, 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 action commenced on May 6, 2020, with the filing of the Complaint in which Plaintiff, Dan Ryan West Virginia Builders, LLC (hereinafter "Dan Ryan" or "Plaintiff") alleged causes of actions against Defendant Overlay I, LLC (hereinafter "Overlay" or "Defendant") regarding agreements between the parties to develop residential lots for building residential real

estate improvements for sale as new homes to consumer purchasers in Berkeley County, West Virginia. *See* Compl., ¶¶1, 3; *see also* Pl's Mem., p 2. On March 23, 2021, Plaintiff filed its Amended Complaint asserting the following causes of action against Defendant: 1) Count 1 – Declaratory Judgment/Specific Performance/Injunctive Relief; 2) Count 2 – Breach of Money Damages (in the Alternative); and 3) Count 3 – Establishment of a Vendee's Lien (in the Alternative). *See* Am. Compl., ¶¶20-31.

2. Attached to the Amended Complaint were certain contracts/documents at issue in this civil action. The May 14, 2018 Original Lot Purchase Agreement (hereinafter "LPA") was attached as Exhibit 2 to the Amended Complaint. *See also* Am. Compl., ¶3. The First Amendment to the Original LPA was attached as Exhibit 3 to the Amended Complaint. *See also* Am. Compl., ¶5. The Second Amendment to the Original LPA (hereinafter "Second Amendment") was attached as Exhibit 5 to the Amended Complaint[1]. *See also* Am. Compl., ¶8. An April 1, 2019 letter to Defendant in which Plaintiff allegedly informed Defendant it was in default (hereinafter "4/1/19 Default Notice") was attached as Exhibit 4 to the Amended Complaint. *See also* Am. Compl., ¶7. An October 1, 2019 Notice of Termination letter (hereinafter "10/1/19 Notice of Termination") was attached as Exhibit 7 to the Amended Complaint. *See also* Am. Compl., ¶13.

3. On May 4, 2021, Plaintiff filed Plaintiff's Motion for Partial Summary Judgment, and Contingent Request for Hearing, arguing summary judgment should be granted in its favor confirming the following: 1) that it did not terminate the Original LPA in its entirety, but instead merely exercised its limited rights to terminate the defaulting Seller's rights under the Second Amendment and to return the parties to the pre-Second Amendment status quo ante (the Original LPA as amended by the First Amendment thereto); 2) that Defendant failed to timely cure its

[1] The Court notes a Third Amendment, Fourth Amendment and Fifth Amendment to the Original LPA was attached to the Amended Complaint as Exhibit 9. *See also* Am. Compl., ¶14.

default; and 3) that Plaintiff was and remains entitled to enforce its default remedies under the Original LPA as amended by the First Amendment, including but not limited to its claim for specific performance, which was timely filed. *See* Pl's Mot., p. 1. In support of its contentions, Plaintiff proffered an Affidavit of Matthew Powell, attached to the instant motion as Exhibit A.

4. On May 20, 2021, Defendant filed its Opposition to Plaintiff's Motion for Partial Summary Judgment, arguing summary judgment is not proper because genuine issues of material fact exist. *See* Pl's Resp., p. 5, 10, 13. Specifically, Defendant argued factual disputes exist regarding the contract language pertaining to default, termination, and default remedies in the Agreement and Second Amendment factual disputes exist regarding whether the Plaintiff terminated the Agreement or Second Amendment, factual disputes exist regarding when Plaintiff provided a proper notice of default, factual disputes exist regarding when Defendant failed to cure any such default, and factual disputes exist regarding which default remedy the Plaintiff elected. *Id.* at 15. Additionally, Defendant argued Plaintiff's proffered Affidavit of Mr. Powell fails to comply with Rule 56(e) of the West Virginia Rules of Civil Procedure. *Id.* at 17-18. Finally, Defendant argued more discovery is needed, and submitted a Rule 56(f) Affidavit. *Id.* at 19-20.

5. On June 1, 2021, Plaintiff filed Reply in Further Support of Motion for Partial Summary Judgment, arguing the Response failed to show the existence of any material facts in genuine dispute via the submission of admissible evidence, failed to show that Plaintiff is not entitled to partial summary judgment as a matter of law, and failed to show that Defendant is unable to adequately respond to the instant motion without engaging in discovery. *See* Reply, p. 1. Further, the Reply argued Defendant's Rule 56(f) Affidavit is devoid of any actual evidence of material facts in genuine dispute. *Id.* at 6. Finally, it argues Mr. Powell's affidavit is clearly compliant, and Response arguments to the contrary should be flatly rejected. *Id.*

6. The Court now finds this issue ripe for adjudication.

STANDARD OF LAW

7. 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).

8. 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).

9. 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

10. In the instant motion, Plaintiff argued summary judgment should be granted in its favor confirming the following three issues: 1) that it did not terminate the Original LPA in its entirety, but instead merely exercised its limited rights to terminate the defaulting Seller's rights under the Second Amendment and to return the parties to the pre-Second Amendment status quo ante (the Original LPA as amended by the First Amendment thereto); 2) that Defendant failed to timely cure its default; and 3) that Plaintiff was and remains entitled to enforce its default remedies under the Original LPA as amended by the First Amendment, including but not limited to its claim for specific performance, which was timely filed. *See* Pl's Mot., p. 1. The Court will take the issues in turn.

11. As an initial matter, in support of its contentions, Plaintiff proffered an Affidavit of Matthew Powell, attached to the instant motion as Exhibit A. In its Response, Defendant has challenged the Powell Affidavit, arguing it fails to comply with Rule 56(e) of the West Virginia Rules of Civil Procedure and should be stricken by this Court. *See* Def's Resp., p. 17.

12. The Court considers in both the first paragraph of Mr. Powell's affidavit and in the affirmation of his affidavit Mr. Powell represents that all the facts stated in his affidavit are made on the basis of his personal knowledge. *See* Reply, p. 7. Further Mr. Powell's affidavit affirmatively states that he is competent to testify as to the facts set forth in his affidavit, and identifies Mr. Powell as an employee and officer of Plaintiff. *Id.* The Court's review of the Affidavit does not find it to be improper. The Court finds Plaintiff has not met the burden of Rule 56(e) and the Court declines to strike the Powell Affidavit.

13. Turning to the three issues in the motion for partial summary judgment, the Court finds as follows:

Termination of LPA vs. Second Amendment

14. First, Plaintiff argues summary judgment should be granted in its favor confirming that it did not terminate the Original LPA in its entirety, but instead merely exercised its limited rights to terminate the defaulting Seller's rights under the Second Amendment and to return the parties to the pre-Second Amendment *status quo ante* (the Original LPA as amended by the First Amendment thereto). *See* Pl's Mot., p. 1.

15. The Court, in its Order Denying Defendant's Motion to Dismiss Plaintiff's Amended Complaint, declined to rule as a matter of law that the original LPA was terminated in its entirety by Plaintiff via the 10/1/19 Notice of Termination. However, the Court cannot find that no genuine issue of material fact remains as to the effect of the 10/1/19 Notice of Termination at this stage of the litigation. The Court cannot find that the 10/1/19 Notice of Termination terminated the defaulting Seller's rights under the Second Amendment and to return the parties to the pre-Second Amendment *status quo ante* (the Original LPA as amended by the First Amendment thereto) as a matter of law at this stage.

16. Further discovery is needed as to the issues. The Court considers that the case is relatively in its beginning stages, and discovery conducted thus far has been minimal. *See* Def's Resp., p. 13. Defendant has proffered that factual disputes remain and exist regarding the contract language pertaining to default, termination, and the default remedies in the Agreement and Second Amendment, whether Plaintiff did in fact terminate the Agreement or Second Amendment, when Plaintiff provided a proper notice of default, when Defendant failed to cure any such default, and which default remedy the Plaintiff elected. *Id.* at 15. The Court agrees.

17. Further, the Court considers that Defendant has proffered a Rule 56(f) Affidavit of Ralph R. Polacheck, provided contemporaneously with its Response, which set forth Defendant's need for additional discovery, including the depositions of specific individuals, including Matthew Powell. *See* Def's Resp., p. 20.

18. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); Syl. Pt. 5, *Toth v. Bd. of Parks & Recreation Comm'rs*, 215 W.Va. 51, 593 S.E.2d 576 (2003). However, the West Virginia Supreme Court of Appeals has cautioned that "a decision for summary judgment before discovery has been completed must be viewed as precipitous." *Bd. of Ed. of Ohio Cty. v. Van Buren & Firestone, Architects, Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980); *see also Pingley v. Huttonsville Pub. Serv. Dist.*, 225 W. Va. 205, 208, 691 S.E.2d 531, 534 (2010).

19. Further, Rule 56(f) of the West Virginia Rules of Civil Procedure provides, in pertinent part:

> "[s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit ... depositions to be taken or discovery to be had....

W. Va. R. Civ. P. 56.

20. Therefore, the plaintiff may request a continuance for further discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. In order to obtain such a discovery continuance, a plaintiff must, at a minimum, (1) articulate some plausible basis for the plaintiff's belief that specified "discoverable" material facts likely exist which have not yet become

accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104, 106 (1996).

21. The West Virginia Supreme Court of Appeals has explained that "a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion." *Citynet, LLC v. Toney*, 235 W. Va. 79, 90, 772 S.E.2d 36, 47 (2015) *citing Williams v. Precision Coil, Inc.*, 194 W.Va. at 61–62, 459 S.E.2d at 338–39, footnote added. The Supreme Court of Appeals explained in *Citynet*:

> In *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954 (4th Cir.1996), the Fourth Circuit held that "the nonmoving party cannot complain that summary judgment was granted without discovery unless that party made an attempt to oppose the motion on the grounds that more time was needed for discovery or moved for a continuance to permit discovery before the [trial] court ruled." *Id.* at 961. As we have often explained, "[t]he law ministers to the vigilant, not those who slumber on their rights." *Powderidge* [*Unit Owners Ass'n v. Highland Props., Ltd.*], 196 W.Va. [692,] 703, 474 S.E.2d [872,] 883 [(1996)], quoting *Banker v. Banker,* 196 W.Va. 535, 547, 474 S.E.2d 465, 477 (1996), citing *Puleio v. Vose,* 830 F.2d 1197, 1203 (1st Cir.1987). *Payne's Hardware,* 200 W.Va. at 690–91, 490 S.E.2d at 777–78 (footnote omitted).

Id.

22. West Virginia, like the Fourth Circuit, places great weight on the Rule 56(f) affidavit[2], believing that "[a] party may not simply assert in its brief that discovery was

[2] See also *Smith v. Corp. of Harpers Ferry*, No. 13-0752, 2014 WL 1272515, at *5 (W. Va. Mar. 28, 2014)(calling Rule 56(f) Affidavit "vital").

necessary"; instead it should comply "with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.,* 196 W.Va. 692, 702, 474 S.E.2d 872, 882 (1996) *citing Nguyen v. CNA Corp.,* 44 F.3d 234, 242 (4th Cir.1995).

23. Here, the Rule 56(f) request was done formally, with the submission of a detailed Rule 56(f) Affidavit by Ralph R. Polacheck, who is manager and sole member of Defendant Overlay. In his Affidavit, Polacheck avers "discoverable material facts exist that have not yet become accessible because discovery has not commenced, and when discovery is commenced the discoverable material facts will be obtained within the discovery period....". *See* Aff., p. 2. Further, Mr. Spitz specifies that written discovery requests and "depositions of appropriate representatives of the Plaintiff, including the deposition of Matthew Powell" are needed. *Id.* at 2-3.

24. With regard to discovery, the Court considers that minimal (if any) discovery has been completed, and the discovery deadline is months away (the Scheduling Order entered by Judge Cohee on February 25, 2021 provides a discovery completion date of October 25, 2021). *See* Def's Resp., p. 19.

25. This Court finds that in review of Rule 56 of the West Virginia Rules of Civil Procedure, the case law, and Defendant's Response and Affidavit, Defendant's Rule 56(f) request must be granted, and the instant Motion for Summary Judgment shall be denied without prejudice at this time on this basis.

26. The Court notes Plaintiff has challenged Defendant's Rule 56(f) Affidavit of Mr. Polacheck. *See* Reply, p. 4-6. However, the Court, in its review of the Rule 56(f) Affidavit,

finds it proper and declines to strike such Affidavit. Instead, the Court will give it such weight that it concludes it deserves.

Defendant's Failure To Cure Default

27. Second, Plaintiff argues summary judgment should be granted in its favor confirming that Defendant failed to timely cure its default. *See* Pl's Mot., p. 1.

28. Like in the previous section, the Court finds more discovery is necessary at this time. The Court considers the small amount, if any, discovery that has been completed, and considers the Rule 56(f) Affidavit provided by Defendant.

29. Discovery may, in fact, reveal that Defendant failed to timely cure its default, but further factual development is needed in order to flesh out the issues and facts related to Defendant's default and any failure to cure.

30. Specifically, Defendant argued that factual disputes exist regarding when Defendant failed to cure any such default, and when Plaintiff provided a proper notice of default. *See* Def's Resp., p. 15. Further factual development is needed. For all of these reasons, the Court finds the instant motion must be denied on this issue.

Plaintiff's Entitlement To Enforce Remedies, Including Specific Performance

31. Finally, third, Plaintiff argues summary judgment should be granted in its favor confirming that Plaintiff was and remains entitled to enforce its default remedies under the Original LPA as amended by the First Amendment, including but not limited to its claim for specific performance, which was timely filed. *See* Pl's Mot., p. 1.

32. As an initial matter, the Court notes it declined to dismiss the claim for specific performance based on untimeliness in its Order Denying Defendant's Motion to Dismiss Plaintiff's Amended Complaint. As to this limited issue, to which the Rule 56(f) Affidavit and further

discovery would not aid in discovering material facts, the Court finds the motion shall be PARTIALLY GRANTED. No genuine issue of material fact remains regarding the calculation of the date by which Plaintiff was required to file suit. The Court has already concluded in its Order Denying Defendant's Motion to Dismiss Plaintiff's Amended Complaint that Plaintiff was required to file suit not later than May 28, 2020, which was the 240th day after the date of the 10/1/19 Notice of Termination. The 10/1/19 Notice of Termination began a 240-day timeframe by adding the 60 days for cure contained in Paragraph 2(ii) of the Second Amendment with the 180-day period in which Plaintiff had to file suit. *See* Pl's Mem., p. 18.

33. As to Plaintiff's other remedies, the Court found in its Order Denying Defendant's Motion to Dismiss Plaintiff's Amended Complaint that Plaintiff that Count II and Count III were validly pled in the alternative, pursuant to Rule 8(a) of the West Virginia Rules of Civil Procedure. For these reasons, the Court finds partial summary judgment should be awarded in Plaintiff's favor on this limited point.

34. In conclusion, the Court finds Plaintiff's Motion for Partial Summary Judgment, and Contingent Request for Hearing must be GRANTED IN PART AND DENIED IN PART as detailed in this Order. The Court notes Plaintiff's request for a hearing, and finding a hearing is not necessary to aid the Court's decisional process, denies said request for the same.

35. Due to limited discovery at this stage of the case, and Defendant's 56(f) Affidavit of Mr. Polacheck, the Court notes that at a later date, after more discovery has been completed and further factual development has occurred, the parties may bring the issues of termination of the LPA versus Second Amendment and Defendant's alleged failure to cure its default before the Court by motion at that time. However, at this stage, summary judgment cannot be granted on these issues.

36. Therefore, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Partial Summary Judgment, and Contingent Request for Hearing is GRANTED IN PART AND DENIED IN PART. It is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Partial Summary Judgment, and Contingent Request for Hearing is GRANTED IN PART as to the Court's findings that Plaintiff's cause of action for specific performance has been timely filed and Plaintiff's Count II and Count III were validly pled in the alternative. As to all other arguments contained in the instant motion, the Court finds it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Partial Summary Judgment, and Contingent Request for Hearing is DENIED IN PART as to those.

37. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk is directed to provide a copy of this Order to counsel of record; and to the West Virginia Business Court Division, Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, WV.

IT IS SO ORDERED.

ENTERED this 17th day of June 2021.

JUDGE H. CHARLES CARL, III
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION