

In the Circuit Court of Berkeley County, West Virginia

**Dan Ryan Builders West Virginia,
LLC, a West Virginia limited liability
company,**
Plaintiff,

vs.)

**Overlay I, LLC, a Virginia limited
liability company,
Overlay I, LLC, a Virginia limited
liability company,**
Defendants

Case No. CC-02-2020-C-110

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

On June 28, 2021, the Defendant filed a Rule 59(e) Motion to Alter or Amend Judgment ("Motion"). The Motion has been fully briefed in accordance with the Court's Briefing Order. The Court has fully considered and review the briefs of the parties, their arguments, and controlling authorities. The Court is of the opinion that the Motion should be denied based upon the following findings of fact and conclusions of law:

1. Defendant's Motion is in fact a motion for the Court to reconsider its ruling on Plaintiff's Motion for Partial Summary Judgment, which is interlocutory. The Court has the inherent authority to revise, reconsider, alter or amend such an order. *Taylor v. Elkins Home Show Inc.*, 210 W.Va. 612, 617, 558 S.E. 2d 611, 616 (2001).

2. The Motion argues that the Court's Order Denying Defendant's Motion to Dismiss the Amended Complaint and its Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment, both entered simultaneously on June 17, 2021, are inconsistent because of the "law of the case doctrine."

3. In its Order Denying Defendant's Motion to Dismiss, the Court held that

based upon the Amended Complaint and the documents at issue attached to the Amended Complaint, the Court cannot rule that Plaintiff's specific performance claim could be dismissed as untimely. The Court also noted, at Paragraph #19 of the Order, that "[f]urther discovery may occur on the issue."

4. In its Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment, at Paragraph #32, the Court held:

"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 Plaintiffs 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 Plaintiffs 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."

5. The Defendant contends that its denial of the Motion to Dismiss with the Court's comment that further discovery may occur on the issue of the timeliness of Plaintiff's filing established the law of the case and is inconsistent with its ruling on Plaintiff's Motion for Partial Summary Judgment that as a matter of law, Plaintiff's Complaint was timely filed. The Defendant has moved that Paragraph #32 of that Order be removed.

6. The Court finds and concludes that the "law of the case doctrine" does not apply to the Motion. The law of the case doctrine only applies when a case is appealed and remanded to the trial court, at which time the Supreme Court's rulings and instructions become binding on the trial court. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 807-

808, 591 S.E. 2d 728, 733-734 (2003). That has not occurred in this case.

7. The Court also finds and concludes that the Court's Orders at issue are not inconsistent. The Court's ruling on Defendant's Motion to Dismiss involved a determination of whether or not the Amended Complaint stated a cognizable claim under Rule 12(b)(6). The Court ruled that the Amended Complaint and the documents attached to that pleading support the claim that this civil action was timely filed. The statement that discovery might occur was *dictum* and was made within the context of the application of Rule 12(b)(6).

8. The Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment found as a matter of law under Rule 56 that there were no material facts in dispute based on the admissible evidence presented and that the specific performance claim was timely filed, whereas the Order Denying Defendant's Motion to Dismiss accepted the allegations of the Amended Complaint as true. The Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment required the Court to look beyond the contentions in the pleading and required the party opposing summary judgment to present some evidence that the facts are in dispute. *See, e.g. Guthrie v. Northwestern Mut. Life Ins. Co.*, 158 W.Va. 1, 8-9, 208 S.E. 2d 60, 65 (1974).

9. The Defendant's Motion therefore fails because the "law of the case doctrine" does not apply and the Court's rulings of June 17, 2021, are not inconsistent.

Accordingly, it is ADJUDGED and ORDERED that Defendant's Motion to Alter or Amend Judgment is DENIED.

The Court notes the objections exceptions of the parties to any adverse rulings 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 West South Street, Suite

2100, Martinsburg, WV 25401.

It is so ORDERED.

ENTERED this ____ day of August 2021.

Submitted by:

/s/ Charles F. Printz, Jr.
Charles F. Printz, Jr. (WVSB #2985)
Counsel for Plaintiff

/s/ H. Charles Carl, III
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.