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 HOLDING PLAINTIFF GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON GSR, LLC'S CONTRACT OBLIGATION UNDER THE CLUB LEASE AGREEMENT AND MOTION FOR SPECIFIC PERFORMANCE IN ABEYANCE

This matter came before the Court this _____ day of July 2022. The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, has filed Glade Springs Village Property Owners Association, Inc.'s Motion Partial Summary Judgment On GSR, LLC's Contract Obligation Under the Club Lease Agreement and Motion for Specific Performance. The Plaintiff, Glade Springs Village Property Owners Association, Inc., (hereinafter "Plaintiff" or "the POA"), by counsel, Mark A. Sadd, Esq., and Defendant, GSR, LLC, (hereinafter "Defendant" or "GSR" or "the Resort"), 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 Second Amended Complaint[1], wherein Plaintiff, Glade Springs Village Property Owners Association, Inc. (hereinafter "Plaintiff" or "POA"), asserted claims against Defendants, EMCO Glade Springs Hospitality, LLC, GSR, LLC, Elmer Coppoolse, James Terry Miller, and R. Elaine Butler premised upon their alleged respective breach of various contracts with GSVPOA, as well as accounting claims and a claim of unjust enrichment, as well as a Answer, Counterclaims, and Third-Party Complaint of GSR, LLC and Answer of EMCO Glade Springs Hospitality, LLC filed on June 9, 2021. *See* Second Am. Compl; *see also* Ctrclm.

[1] The Court notes that by Agreed Order Granting Plaintiff's Motion for Leave to File Second Amended Complaint, entered May 20, 2021, the Second Amended Complaint in this civil action is deemed filed as of May 20, 2021. *See* Ord., 5/20/21.

2. The instant motion surrounds alleged contract obligations and alleged defaults of a 99-year Club Lease Agreement (hereinafter "Club Lease"). *See* Pl's Mot., p. 2-3.

3. On April 19, 2022, Plaintiff filed Glade Springs Village Property Owners Association, Inc.'s Motion Partial Summary Judgment On GSR, LLC's Contract Obligation Under the Club Lease Agreement and Motion for Specific Performance, seeking judgment on "GSR's [alleged] contract obligation to convey to GSVPOA title to one and a half acres of land adjacent to Glade Springs Village". *See* Pl's Mot., p.2. Specifically, the POA argues this is appropriate because "[t]here is no factual basis for GSR to have claimed that GSVPOA had defaulted under the Club Lease and to have terminated the agreement…"; therefore, "by falsely claiming, GSR has defaulted under Section 20(b) of the Club Lease by unilaterally terminating the agreement and failing to perform its contract obligation to convey to GSVPOA "the property comprising the Future Clubhouse Site". *Id.* at 3-4.

4. On May 10, 2022, the POA filed Amendment to Glade Springs Village Property Owners Association, Inc.'s Motion Partial Summary Judgment On GSR, LLC's Contract Obligation Under the Club Lease Agreement and Motion for Specific Performance, correcting the record regarding receipt of a notice of default. *See* court file.

5. On May 17, 2022, Defendant GSR filed its Response, arguing it was correct in its conclusion that the POA defaulted under the Club Lease when it decided to construct a new Starter House with amenities. *See* Def's Resp., p. 4. Further, GSR argued it notified the POA it was in default for failure to pay rent. *Id.* at 5. Specifically, GSR contends it sent a letter with regard to the installation of a direct sale/point of sale system/credit card machine in the new starter house. *Id.* at 5-6. GSR claims because of these alleged defaults, it terminated the Club Lease for cause on April 2, 2022. *Id.* at 6. Further, GSR provided an Affidavit of Arie M. Spitz

pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. *See Id.*, Ex. R. GSR sought more time to gather facts in discovery to oppose the instant Motion for Summary Judgment as discovery is still open. *Id.* at 12.

6. On May 27, 2022, Plaintiff filed its Reply, arguing the Response did not dispute the facts, and the issue of whether the POA breached and defaulted under the Club Lease is an issue of law for the Court. *See* Reply, p. 1. The POA argued that with regard to GSR's 56(f) Affidavit, it failed to "demonstrate the 'undiscovered *material* facts' can be reasonably obtained" and, further, fails to "demonstrate the 'undiscovered material facts' are indeed material and genuine". *Id.* at 3. Further, it argues counsel for GSR failed to show reasons GSR cannot present by affidavit facts essential to justify GSR's opposition to the instant motion, claiming that "Mr. Spitz's affidavit fails to explain why GSR cannot present a sworn affidavit of any person on GSR's behalf claiming the existence of any material evidence in addition to that which it already has given this Court in its Response". *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 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

Here, Plaintiff seeks judgment in its favor on the following: (1) The New Course identified in the Club Lease is Stonehaven; (2) GSVPOA's 2020 replacement of Stonehaven's 2003 Starter House, which had no restrooms, with a new Starter House with restrooms did not constitute a default of Section 2(c)(i) of the Club Lease by which GSVPOA agreed that "it shall not use or operate any other clubhouse, pro shop or golf-related amenities in conjunction with the operation or use of the New Course"; (3) GSR terminated the Club Lease effective April 2, 2020

without good cause; and (4) GSR's termination of the Club Lease constitutes a material default of its obligation under the Club Lease for which GSR is obligated to convey the Future Clubhouse Site to the POA for its future clubhouse; (5) That the Court grant the POA's motion to enjoin and thus ORDER and DECREE GSR to specific performance to transfer to the POA title to the Future Clubhouse Site in accordance with under Section 18 of the Club Lease; and (6) That the Court grant and award to the POA all costs and expenses incurred, including reasonable attorney's fees, for all trial and other proceedings. *See* Pl's Mot., p. 18-19.

"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).

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.

Therefore, the party 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 party must, at a minimum, (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (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).

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.

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 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).

As an initial matter, the Court considers that with regard to the instant motion, the issue of breach and default, and thus an obligation of property conveyance, turns on whether or not the POA's construction of a new starter house that included installation of amenities in the form of public restrooms (rather than private) and a credit card machine contained in a system referred to by the parties as EZLinks[3] violated the Club Lease. The Court notes that the POA does not dispute that it installed the EZLinks golf course management system in the new Stonehaven starter house. *See* Reply, p. 5. Likewise, the POA does not dispute that GSVPOA constructed and operates the new Stonehaven starter house, including restrooms. *Id.* The POA avers it sold no goods or services of any type at, in or around the new Stonehaven starter house through April 2, 2020, the date of GSR's unilateral termination of the Club Lease. *Id.* at 8. The POA avers it installed the EZLinks system at the new Stonehaven starter house to manage, track and memorialize tee times and golfers who already arranged play there at the Resort (that is, not by GSVPOA at Stonehaven) and to monitor green fees that GSR collected or should have collected for golf play at Stonehaven. *Id.* at 9.

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[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").

[3] EZLinks was described in the Reply a golf course management software to manage its two golf courses, including Stonehaven tee times. *See* Reply, p. 4-5.

However, in Paragraph 6 of his affidavit, Mr. Spitz claims that more discovery "is necessary regarding the construction of the new starter house, the installation of a point-of-sale system at the new starter house, and the POA's plans to make direct sales to golfers on Stonehaven." *See* Def's Resp., Ex. R.

Here, the Rule 56(f) request was done formally, with the submission of a detailed Rule 56(f) Affidavit by Arie M. Spitz, one of the attorneys of record for GSR. In his Affidavit, Spitz avers "the Resort cannot yet fully respond to, and oppose, [the instant motion]". *See* Aff., p. 2. Further, Mr. Spitz specifies that "the evidence that the Resort hopes to present in opposition to the POA's Motion...must be developed via depositions and additional written discovery". *Id.*

The Court considers that Mr. Spitz then detailed what still needed to be completed in discovery. He averred that GSR has not yet been able to depose David McClure, a 30(b)(6) representative of the POA. *Id.* at 3. Also, it was averred that GSR has not yet taken the deposition of any representative or employees of the construction company that constructed the starter house and EZLinks. *Id.* Further, it was averred that GSR still needs to obtain written discovery in the form of contracts, plans, designs, correspondence or emails between the POA and EZLinks and the construction company. *Id.*

With regard to written discovery, the Court notes initial written discovery took place in this case in 2019/2020. However, it was set forth in the Affidavit that discovery is ongoing and the discovery period is still open. *Id.* at 4. Finally, the Court notes that the Affidavit does not avers why the depositions could not be conducted earlier, but the Court considers that the discovery period is still open, a scheduling order and discovery deadline is not currently in place, and the fact that this case has had stays in place during the pendency of this litigation, for appeal and medical issues. The Court considers the Affidavit explained that Mr. McClure is a 30(b)(6)

representative who has not been deposed yet, as discovery is ongoing. The Court considers the deadline for filing dispositive motions is not yet set, let alone approaching. The Court finds it reasonable that there would still need discovery to be done at this point, that was not done earlier, considering the procedural posture of this case, specifically, the timing of the filing of the motion for summary judgment and the point which the parties are at in the ongoing discovery period.

This Court finds that in review of Rule 56 of the West Virginia Rules of Civil Procedure, the case law, and GSR's Response and Affidavit, GSR's Rule 56(f) request must be granted, and the instant Motion for Partial Summary Judgment shall be stayed and held in abeyance until the end of discovery, which does not currently have a deadline in place. The Court considers the formal request of GSR through its verified Affidavit. The Court also considers the specific requests for more discovery contained within the Affidavit. The Court further considers the fact that the discovery deadline is still several months away, at the very least, as one has not been set at this time. The Court finds GSR has met its burden to "articulate some plausible basis" for its belief that material discoverable facts still exist, have demonstrated a realistic prospect that material facts can be obtained within a reasonable time period, the discovery period in this litigation, and has demonstrated good cause for not having conducted the discovery earlier, in that David McClure was a 30(b)(6) representative who has not been deposed yet, and the deadlines for dispositive motions and the discovery deadlines are not yet approaching or currently set. *See Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104, 106 (1996). In sum, the Court finds that to rule on the instant Motion for Partial Summary Judgment at this juncture would be precipitous and premature.

Accordingly, Glade Springs Village Property Owners Association, Inc.'s Motion Partial Summary Judgment On GSR, LLC's Contract Obligation Under the Club Lease Agreement and Motion for Specific Performance shall be HELD IN ABEYANCE until the close of discovery, which is not currently set for a specific date. After a scheduling order has been entered, and the discovery period has been set, this Court will enter a further Order eliciting additional briefing on the instant motion.

The Court also notes that scheduling was docketed and taken up at the April 8, 2022 preliminary injunction and scheduling conference hearing. The parties had submitted an agreed scheduling worksheet prior to that hearing. At the hearing, the Court notes the parties proffered possible revisions to the agreed schedule they submitted, and cited concerns with some discovery moving forward while the UCIOA matter was on appeal in the Justice Holdings litigation. The undersigned directed counsel to submit an agreed order at the April 8, 2022 hearing. At this time, the Court directs the parties to submit an agreed scheduling order to the undersigned within thirty (30) days of the entry of this order, or, if no agreement can be met, to contact the Business Court law clerk to set up a scheduling conference.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED Glade Springs Village Property Owners Association, Inc.'s Motion Partial Summary Judgment On GSR, LLC's Contract Obligation Under the Club Lease Agreement and Motion for Specific Performance is hereby HELD IN ABEYANCE until further Order of this Court, which will be issued at the close of discovery, which is not set at this time.

The parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any scheduling orders entered by this Court. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

July 21, 2022
date of entry

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