

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

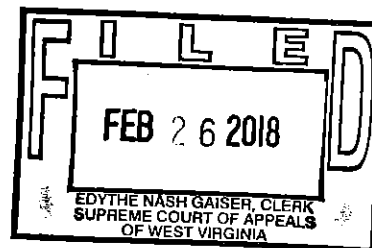
STOLLINGS TRUCKING COMPANY, INC.,

Plaintiff,

v.

MCDOWELL COUNTY CIRCUIT COURT  
CIVIL ACTION NO: 17-C-55

CONTINUUM COAL, LLC, a West Virginia  
Limited Liability Corporation, GS ENERGY, LLC,  
a West Virginia Limited Liability Corporation,  
IAN GANZER, Individually and in his capacity  
as a member of Continuum Coal, LLC, and  
GARY GANZER, Individually and in his capacity  
As a member of Continuum Coal, LLC,



Defendants.

TO: THE HONORABLE CHIEF JUSTICE

JUDICIAL MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Honorable Rudolph J. Murensky, II respectfully requests the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

- ☒ There are no known related actions.
- ☐ The following related actions could be the subject of consolidation, and are
  - ☐ now pending
  - or
  - ☐ may be filed in the future. (Please list case style, number, and Court if any)

\_\_\_\_\_  
This action involves: (Please check all that apply)

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Breach of Contract;              | <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; |
| <input type="checkbox"/> Sale or Purchase of Commercial Entity;      | <input type="checkbox"/> Terms of a Commercial Lease;  |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate; | <input checked="" type="checkbox"/> Commercial Non-consumer debts;                                       |

- |   |  |
|---|--|
| <input type="checkbox"/> Internal Affairs of a Commercial Entity;   | <input type="checkbox"/> Injunctive and Declaratory Relief Between Commercial Entities;                                  |
| <input type="checkbox"/> Trade Secrets and Trademark Infringement;  | <input checked="" type="checkbox"/> Liability of Shareholders, Directors, Officers, Partners, etc.;                      |
| <input type="checkbox"/> Non-compete Agreements;  | <input checked="" type="checkbox"/> Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest; |
| <input type="checkbox"/> Intellectual Property, Securities, Technology Disputes;  | <input type="checkbox"/> Shareholders Derivative Claims;   |
| <input type="checkbox"/> Commercial Torts;  | <input type="checkbox"/> Commercial Bank Transactions;   |
| <input type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies;  | <input type="checkbox"/> Franchisees/Franchisors;  |
| <input checked="" type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity; | <input type="checkbox"/> Internet, Electronic Commerce and Biotechnology   |
| <input type="checkbox"/> Anti-trust Actions between Commercial Entities;  | <input checked="" type="checkbox"/> Disputes involving Commercial Entities; or   |
|   | <input checked="" type="checkbox"/> Other (Describe): Bankruptcy   |

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful, as more fully described here:

The matter involves a dispute regarding a contract mining agreement and work performed between Plaintiff Stollings Trucking Company, Inc. and Defendant Continuum Coal, LLC, GS Energy, LLC, Ian Ganzer, Individually and in his capacity as member of Continuum Coal, LLC, and Gary Ganzer, Individually and in his capacity as member of Continuum Coal, LLC. Gary Ganzer is the father of Ian Ganzer. The purported twenty-three-page Contract Mining Agreement executed July 20, 2013 is between Plaintiff Stollings Trucking Company, Inc. and Defendant Continuum Coal, LLC on its face. However, Gary Ganzer and Ian Ganzer are members of both Continuum Coal, LLC and GS Energy, LLC. Plaintiff Stollings Trucking Company, Inc.'s Complaint alleges Continuum Coal, LLC and GS Energy, LLC act as the alter egos of both Defendant Gary Ganzer and Defendant Ian Ganzer, which is denied by Defendants.

Plaintiff Stollings Trucking Company, Inc.'s Complaint alleges the Contract Mining Agreement "was legally defective in various respects, including, but not limited to, by virtue of the lack of any

mutual assent or meeting of the minds as to numerous material terms.” Plaintiff Stollings Trucking Company, Inc.’s Complaint further alleges Defendants “induced Plaintiff to commence the development of a surface mine upon the [p]roperty under the pretenses of there being a legally binding contract under which Plaintiff would be fully, fairly and reasonably compensated for it[s] services through the payment of certain net profits to be generated from Defendant’s sale of coal resulting from Plaintiff[‘s] mining operations.”

Plaintiff Stollings Trucking Company, Inc.’s Complaint further alleges “[i]n response to Defendant’s inducements and promises, Plaintiff invested substantial sums of money and devoted substantial labor and equipment to develop substantial labor and equipment to develop the [p]roperty in anticipation of beginning coal mining operations.” Plaintiff Stollings Trucking Company, Inc.’s Complaint further alleges “Plaintiff prepared the [p]roperty by engaging in exploratory work, conducting engineering studies, obtaining permits, constructing hauling roads and performing all other services as were necessary to commence mining operations.” Plaintiff Stollings Trucking Company, Inc.’s Complaint alleges it invested over \$6,000,000.00 in the project and that it was forced to cease mining operations at the property “[d]ue to Defendants’ purported inability to procure any substantial and long term market for the coal mined upon the subject property[.]”

Plaintiff Stollings Trucking Company, Inc.’s Complaint further alleges “[o]n or about May 12, 2015, Defendants, without any prior knowledge or consent from Plaintiff, secretly transferred control of the mining operations at the [p]roperty to a third-party (Eagle Creek Mining, LLC) which was thereupon directed by Defendant to recommence the mining operations that Plaintiff had begun but was forced to cease.” Plaintiff Stollings Trucking Company, Inc.’s Complaint contains claims of quantum meruit, fraud, unjust enrichment and to the extent the Contract Mining Agreement is enforceable, a breach of

contract claim. Plaintiff Stollings Trucking Company, Inc.'s Complaint further requests attorney fees and costs. Defendants deny Plaintiff Stollings Trucking Company, Inc.'s claims.

Plaintiff Stollings Trucking Company, Inc.'s quantum meruit claim alleges, *inter alia*, "Plaintiff provided valuable services to Defendants in the absence of any binding contract"; that "Defendants accepted and received the services provided by Plaintiff"; and that "Defendants have failed to compensate Plaintiff for the reasonable value of services rendered by Plaintiff to Defendants."

Plaintiff Stollings Trucking Company, Inc.'s unjust enrichment claim alleges, *inter alia*, "Plaintiff conferred a significant benefit upon Defendants by expending a total of \$6,000,000 to prepare the [p]roperty for surface mining and coal removal (the "Mining Infrastructure") without being offered a meaningful opportunity to earn its share of the mining profits that would have allowed Plaintiff to recoup its full investment." Plaintiff's unjust enrichment claim further alleges "Defendants accepted, retained and appreciated such benefit by hiring another mining operator to replace Plaintiff and use the Mining Infrastructure to surface mine and remove coal from the [p]roperty, and enjoying the mining profits resulting therefrom."

Plaintiff Stollings Trucking Company, Inc.'s fraud claim indicates "Defendants intended to deceive and defraud Plaintiff from the outset of their anticipated mining arrangement" and that "Defendants induced Plaintiff into performing substantial and valuable mining services with the intention of terminating their relationship with Plaintiff before compensating Plaintiff for the value of the services performed. Defendants, after Plaintiff had completed substantial development and pre-mining services and had only begun to mine coal for a short duration of time, [i.e.], wrongly transferred control of the mining operations to a third-party, and, in so doing, completed their plan to defraud Plaintiff."

Plaintiff Stollings Trucking Company, Inc.'s breach of contract claim asserts "[t]o the extent the Contract Mining Agreement is considered legally binding and enforceable, then Defendants have

breached said contract in numerous ways including failing to pay Plaintiff amounts due and owing under the contract and other such ways as shall become evident in discovery.”

Defendant Continuum Coal, LLC filed a counterclaim against Plaintiff Stollings Trucking Company, Inc. alleging claims of breach of contract, equitable estoppel/detrimental reliance and specific performance. Defendant Continuum Coal, LLC claims it put Plaintiff on notice Plaintiff was in default of the Contract Mining Agreement and that Plaintiff thereafter signed on June 6, 2015 the West Virginia Department of Environmental Protection’s Notice To Cease Operator Assignment, effective April 27, 2015. The permittee name on the Notice To Cease Operator Assignment was GS Energy, LLC. *Defendants’ Motion for Partial Summary Judgment. Exhibit 4.* Moreover, the Contract Mining Agreement provides “10% of Gross Selling Price shall be paid to GSE; GSE shall be responsible for all royalty payments pursuant to leases of the mined property[.]” *Contract Mining Agreement, p. 10.*

Defendant Continuum Coal, LLC’s breach of contract counterclaim asserts the Contract Mining Agreement is “valid and binding” and that Plaintiff breached the Contract Mining Agreement “in a myriad of ways, including but not necessarily limited to: a. Failing a ‘secure the greatest commercially reasonable and economically feasible recovery of merchantable and minable coal’; b. Failing to timely fulfill Purchase Orders obtained by Continuum for coal; c. Failing to properly maintain its equipment; d. Failing to remove its equipment in compliance with the [Contract Mining Agreement], and otherwise abandoning some of its equipment, with said abandoned equipment becoming the property of Continuum; e. Failing to fulfill reclamation obligations; f. Otherwise breached the [Contract Mining Agreement], and g. Furthered breach of the [Contract Mining Agreement] as shall become evident by the discovery process.”

Defendant Continuum Coal, LLC’s breach of contract counterclaim further asserts “Continuum has been deprived of its lawful title and right to the aforesaid abandoned equipment of Plaintiff” and that

Continuum has “incurred damages in lost profits, additional costs, reclamation costs and continued reclamation requirements on the [p]roperty, as well as other damages due to Plaintiff’s breach of the [Contract Mining Agreement] and its obligations.”

Defendant Continuum Coal, LLC’s claim for equitable estoppel/detrimental reliance asserts “Plaintiff knowingly concealed material facts and/or made misleading representations and otherwise mislead Continuum concerning Plaintiff’s financial status and/or ability to mine coal” and that “Plaintiff intended that Continuum act, or not act on, by delaying the procurement of another mine operator to mine the [p]roperty all causing damages to Continuum and allowing Plaintiff to improperly maintain and prolong an interest in the [p]roperty.” The equitable estoppel/detrimental reliance claim further asserts “Continuum acted to its detriment by relying on the concealment and/or misrepresentations of Plaintiff” and that “Continuum suffered damages due to the concealment and/or misrepresentations of Plaintiff.”

Defendant Continuum Coal, LLC’s claim for specific performance asserts under the terms of the Contract Mining Agreement, Plaintiff Stollings Trucking Company, Inc. would be given 90 days to remove its equipment and Contractor’s Materials in the event the Contract Mining Agreement was terminated. If Plaintiff Stollings Trucking Company, Inc. failed to remove its equipment and Contractor Materials within 90 days after termination, all equipment and materials left on the premises would become the property of Defendant Continuum Coal, LLC. The specific performance claim alleges Plaintiff Stollings Trucking Company, Inc. abandoned the following equipment and contractor’s materials: a. Caterpillar Loader: VIN Number: 992C-208-49z2051; b. Caterpillar Dozer: Vin Number: D11-312-7pz968; c. Caterpillar Rock Truck: VIN Number: 777-509-4xj1048; d. Caterpillar Rock Truck: VIN Number: 777-516-4xj247; e. John Deere 850 Dozer; and f. Other equipment and Contractor’s Materials that shall become evident by the discovery process.

Defendant Continuum Coal, LLC seeks a declaration that this equipment and Contractor's Materials has been abandoned by Plaintiff Stollings Trucking Company, Inc, and that the equipment and Contractor's Materials are the sole property of Defendant Continuum Coal, LLC. Defendant Continuum Coal, LLC further requests attorney fees and punitive damages.

Plaintiff Stollings Trucking Company, Inc. filed a voluntary bankruptcy petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of West Virginia on December 7, 2015 in Case No. 2:15-bk-20624. On April 24, 2017, Plaintiff Stollings Trucking Company, Inc. filed a motion to employ Kaminski Law, PLLC as Special Counsel, to pursue in state court a claim against Continuum Coal, LLC, Ian Ganzer and GS Energy, LLC.

By Order entered May 30, 2017, the United States Bankruptcy Court for the Southern District of West Virginia granted Plaintiff Stollings Trucking Company, Inc.'s Motion and authorized the employment of Kaminski Law, PLLC, as Special Counsel on a contingency fee basis "to pursue litigation with Continuum Coal, LLC; et al., involving a dispute regarding a contract mining agreement and work performed by [Plaintiff Stollings Trucking Company, Inc.] pre-petition." Neither the motion nor the Order from the bankruptcy court referenced "Gary Ganzer." Defendants allege any claim against Gary Ganzer remains an asset to the bankruptcy estate and that no authority was granted to pursue Gary Ganzer in state court.

On October 13, 2017, Plaintiff Stollings Trucking Company, Inc. filed a Motion to Release Personal Property, seeking the release of the equipment and Contractor's Materials enumerated *supra*. The Motion indicates, *inter alia*, the equipment is "subject to IRS liens superior in right to any right claimed by Defendants, which rights are specifically denied by Plaintiff."

On October 30, 2017, Defendants filed an Objection to Plaintiff's Motion to Release Personal Property. Defendants' Objection indicates, inter alia, "the equipment described by [Plaintiff] is either an asset of the bankruptcy estate and within the exclusive jurisdiction of the bankruptcy court or is an asset of Continuum Coal, LLC... based on the [Contract Mining Agreement] ..." The Motion further indicates "[i]f the equipment is property of Continuum Coal, LLC, then it will be its obligation to contest any asserted lien by the IRS."

A hearing on the Motion was conducted on February 16, 2018. Plaintiff indicated during oral argument the equipment and Contractor's Materials enumerated *supra* "really doesn't belong at this point to [Plaintiff]" and are a "part of the bankruptcy and subject to IRS tax liens, etc." Plaintiff conceded the equipment and Contractor's Materials belonged to Plaintiff "in name" only and that "other entities have significant interests in that property." Plaintiff further conceded the IRS liens would have priority over all other creditors.

Defendants contended during oral argument Plaintiff had liquidated certain assets and now has sufficient monies to satisfy the IRS tax liens. Defendants conceded any interest they claim is subject to IRS tax liens and that Defendants would have to adjudicate their claimed ownership interests in the equipment with the IRS in the bankruptcy court.

Plaintiff contended there may not be sufficient assets to satisfy the claim(s) of Plaintiff's other creditors to the equipment and Contractor's Materials. Plaintiff proffered it intends to move the equipment and Contractor's Materials to Plaintiff's location in Logan County, where it would remain until further order of the bankruptcy court. Plaintiff indicated it would not use the equipment and Contractor's Materials during the pendency of this action. Plaintiff proffered Defendants have used the equipment from time to time, thereby creating wear and tear and depreciation on the property.



On October 16, 2017, Defendants filed a Motion for Partial Summary Judgment as to Plaintiff Stollings Trucking Company, Inc.'s quantum meruit, unjust enrichment and fraud claims. Defendants argue, *inter alia*, an implied contract cannot be maintained in the face of an express contract and that Plaintiff Stollings Trucking Company, Inc. failed to plead its fraud claim with the required particularity under Rule 9(b) of the West Virginia *Rules of Civil Procedure*. Defendants further moved for the dismissal of Defendant GS Energy, LLC and Defendant Gary Ganzer, arguing they were not parties to the Contract Mining Agreement. Plaintiff Stollings Trucking Company, Inc. filed a Response to Defendants' Motion for Partial Summary Judgment on October 27, 2017.

Plaintiff Stollings Trucking Company, Inc.'s Response argues, *inter alia*, that its quantum meruit and unjust enrichment claims were plead in the alternative and that its fraud claim was plead with sufficient particularity. The Response further argues such claims warrant factual development through the discovery process. The Response further argues inasmuch as Ian Ganzer and Gary Ganzer are members of both GS Energy, LLC and Continuum Coal, LLC at the same time, discovery is necessary to determine the extent of the intermingling of assets and decision-making. A hearing on the Motion was conducted on February 16, 2018. This Court held Defendants' Motion for Partial Summary Judgment in abeyance pending disposition of this Motion.

This matter is a complex commercial mining contractual dispute involving matters of significance to the transactions, operations and governance between a corporation and certain limited liability companies (business entities). Indeed, Plaintiff Stollings Trucking Company, Inc.'s motion filed on April 24, 2017 in the United States Bankruptcy Court for the Southern District of West Virginia seeking to employ Kaminski Law, PLLC, as Special Counsel described the services to be conducted by Kaminski Law, PLLC in this matter to be "complex in nature."

The esteemed judges of the Business Court Division are in the appropriate position given their training, collective expertise and specialized knowledge to determine whether Continuum Coal, LLC and GS Energy, LLC are the alter egos of Ian Ganzer and Gary Ganzer. The Business Court Division will be asked to determine whether certain funds have been intermingled between these legal entities and individuals and the extent of any liability resulting therefrom (i.e., whether or not the "LLC veil" should be pierced).

The Business Court Division is also the proper forum to expeditiously adjudicate, mediate and otherwise resolve issues in a less-costly manner that include, but may not be limited to: the extent to which the twenty-three page technically-specific Contract Mining Agreement is enforceable; the extent to which the Contract Mining Agreement was breached by either Plaintiff or Defendants and any damages resulting therefrom; whether Defendants mislead, induced Plaintiff to act or otherwise committed fraud against Plaintiff; whether Plaintiff concealed material facts from or otherwise misled Defendants and the extent thereto; whether Defendants detrimentally relied on Plaintiff's representations; the proper owner of the equipment and Contractor's Materials at issue and the effect of the pendency of Plaintiff Stollings Trucking Company, Inc.'s bankruptcy action and existence of Internal Revenue Service liens; and whether Kaminski Law, PLLC was duly authorized by the United States Bankruptcy Court for the Southern District of West Virginia to pursue a claim against Gary Ganzer, or if such claim remains property of the bankruptcy estate.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint, the operative answer and counterclaim (with Exhibit), the docket sheet, and the following other documents:

Answer of Plaintiff to Counterclaim; Motion to Release Personal Property; Defendants' Motion for Partial Summary Judgment; Plaintiff's Response to Defendants' Motion for Partial Summary Judgment;

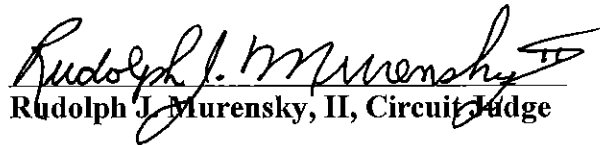
Defendants' Objection to Plaintiff's Motion to Release Personal Property; Defendants' Reply to Plaintiff's Response to Defendants' Motion for Partial Summary Judgment; Debtor's Application to Retain and Employ Special Counsel; Order Authorizing Employment of Special Counsel; Proof of Claim; Order Denying Plaintiff Stollings Trucking Company, Inc.'s Motion to Release Personal Property and Holding Defendants' Motion for Partial Summary Judgment in Abeyance.

In regard to expedited review, this Court:

- ✓ DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.
- ☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following constitutes good cause to do so: \_\_\_\_\_

**WHEREFORE**, the undersigned Judge hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

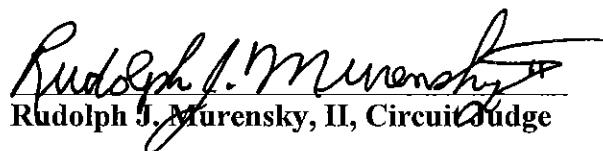
Respectfully submitted, this 23rd day of February, 2018.

  
Rudolph J. Murensky, II, Circuit Judge

CERTIFICATE OF SERVICE

I, Rudolph J. Murensky, II, do hereby certify that on this 23rd day of February, 2018, I have served the foregoing "Judicial Motion to Refer Case to Business Court Division," with attachments by first class mail to:

(1) Scott H. Kaminski, Kaminski Law, PLLC, Counsel for Plaintiff, P. O. Box 3548, Charleston, WV 25335; (2) Hunter B. Mullens, Mullens & Mullens, PLLC, Counsel for Defendants, P.O. Box 95, Philippi, WV 26416; (3) Thomas H. Fluharty, Counsel for Defendants, 408 Lee Ave. Clarksburg, WV 26301; (4) the McDowell County Circuit Clerk's Office; and (5) the Business Court Division Central Office, Berkeley County Judicial Center, 380 West South Street, Suite 2100, Martinsburg, WV 25401.

  
Rudolph J. Murensky, II, Circuit Judge