

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

2015 AUG -3 PM 2:14
J. S. GAISLER, CLERK
KANAWHA COUNTY CIRCUIT COURT

TM ASSOCIATES MANAGEMENT, INC.,
A Maryland Corporation,
PLAINTIFF,

VS

Civil Case No.: 15-C-568
Presiding Judge: H. Charles Carl, III
Resolution Judge: Thomas C. Evans, III

DEER FOREST LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
DYLAN HEIGHTS LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
OLD ASH VILLAGE LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
PAULI HEIGHTS LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
BARBARA HEIGHTS LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
BROOK VILLAGE LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
DUNHILL LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
HUDSON PLACE LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
SPRUCE COVE LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
VANMETER HEIGHTS LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
VIRGINIA WAY LIMITED PARTNERSHIP,
A West Virginia Limited Partnership, and
WILSHIRE LANDING LIMITED PARTNERSHIP,
A West Virginia Limited Partnership,
DEFENDANTS.

SCHEDULING ORDER

The following schedule is ORDERED by the Court in the above-styled civil action; and shall not be modified except by leave of Court.

1. TRIAL DATE: May 2 – 4, 2016, beginning at 9:00 a.m.

 X Jury Trial Requested Bench Trial Requested

Continuance motions must be heard prior to the pre-trial conference or they will not be considered. Trial is anticipated to last 2 to 3 days.

2. PRE-TRIAL CONFERENCE DATE: April 18, 2016, at 10:00 a.m.

At the Kanawha County Judicial Building, at which time lead counsel must appear. All parties are ORDERED to exchange and deliver their respective PRE-TRIAL CONFERENCE MEMORANDA to the Judge's Chambers NO LATER THAN TEN (10) DAYS BEFORE the conference. FAILURE TO COMPLY MAY RESULT IN CONTINUANCE OF TRIAL OR MONETARY SANCTIONS BEING IMPOSED. Memoranda are to contain at a minimum, the following:

- | | |
|--------------------------|--------------------------------------|
| 1. Statement of the Case | 7. Pending Motions |
| 2. Issues of Fact | 8. Motions <i>in Limine</i> |
| 3. Issues of Law | 9. Proposed Voir Dire |
| 4. Proposed Stipulations | 10. Proposed Instructions of Law |
| 5. Schedule of Exhibits | (Emailed to harold.carl@courtsww.gov |
| 6. List of Witnesses | and claire.watson@courtsww.gov and |
| | a hard copy provided to the Court) |

Parties shall confer and provide a joint instruction charge to the Court.

SCHEDULE OF EXHIBITS

The parties shall exchange a list of all proposed exhibits (including demonstrative) and shall make the exhibits available for viewing by counsel at least 5 (five) work days prior to the pre-trial conference. By the time of the pre-trial conference, counsel shall have stipulated as to which exhibits shall be admitted without objection and provide a list to the Court and Circuit Clerk. The parties shall mark all exhibits by use of standard exhibit stickers and provide a list to the Court and counsel.

VIDEO DEPOSITION TO BE USED AT TRIAL

If a video deposition is to be used, all parties must be prepared to argue objections at the pre-trial conference. Thereafter, the proponent of the video deposition shall have the video edited to reflect the Court's rulings. In addition, the proponent of the video deposition must have a videographer at trial.

JURY INSTRUCTIONS

The Court desires that all counsel read all parties' proposed jury instructions prior to the pre-trial conference and be prepared to discuss them at the pre-trial. The Court will not be inclined to receive instructions after the pre-trial conference.

3. EXPERTS DISCLOSED: Plaintiff: December 4, 2015
Defendant: January 8, 2016

- A. Any party desiring to use an expert witness must furnish opposing counsel with the specialty of such expert and copies of all reports submitted by such witness, or, if no reports have been submitted, a summary of the substance of such expert's contemplated testimony, on the date of Expert Disclosure per WVRCP 26(b)(4).
- B. The admissibility of expert testimony is subject to Rule 104(a) of the Rules of Evidence. Objection to the admissibility of expert testimony will be deemed waived if not objected to by a motion *in limine* 10 (ten) days prior to the pre-trial and a hearing thereon set with the Court prior to the first day of trial.
- C. Co-designation or co-reliance upon experts must also specifically be made in writing on the date of Expert Disclosure.

4. EXPERT EVIDENTIARY INSPECTIONS: October 30, 2015

All examinations by expert witnesses must be completed by this date.

5. DISPOSITIVE MOTIONS: Not later than March 18, 2016

WVRCP 12(b) and 56 motions shall be filed no later than the above date.

6. AMENDMENTS, THIRD PARTY PLEADINGS, AND OTHER MATTERS NO LATER THAN: November 30, 2015

- 7a. PLAINTIFF DISCLOSES FACT WITNESSES: August 31, 2015**
- 7b. DEFENDANT DISCLOSES FACT WITNESSES: September 21, 2015**

The parties shall disclose the names and addresses of all fact witnesses who may be called to testify in their cases in chief.

8. FINAL WITNESS LIST EXCHANGED: February 6, 2016

This is to be a *bona fide* list of intended trial witnesses.

- 9a. PLAINTIFF SERVES ALL/FINAL DEMANDS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS: November 2, 2015**
- 9b. DEFENDANT SERVES ALL/FINAL DEMANDS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS: December 1, 2015**

10. DISCOVERY COMPLETION DATE: February 19, 2016

All other discovery requests must be filed at least 35 (thirty-five) days in advance of this date so that all responses may be completed by this date. All trial depositions must be completed at least 5 (five) days before the pre-trial.

Any objection to an interrogatory or request for admission, notice of deposition, or demand for production of documents shall be filed within 30 (thirty) days after service. Any such objection not filed within 30 (thirty) days shall be deemed waived. Pending discovery disputes shall not extend the time in which the objecting party must otherwise appear or respond to any request as to which no objection has been filed.

If a party fails to answer an interrogatory or request for an admission, or fails to produce a document or make required disclosures, and does not file an objection thereto, the requesting party shall timely file a motion to compel. If the requesting party fails to file a motion to compel, the request shall be deemed waived.

ELECTRONICALLY STORED INFORMATION DISCOVERY:

All parties and counsel shall cooperate and work diligently to agree upon the methods and conduct for discovery of electronically stored information.

All counsel are required to be informed of and understand to a reasonable degree of their client's information management systems and electronically stored information processes, including how information is stored and retrieved. An attorney's lack of knowledge will not be considered as an excuse by this Court in ruling upon a motion to compel or a motion for discovery sanctions.

A party has an obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody, or control. The Court may issue sanctions for spoliation, the intentional or negligent destruction, or failure to preserve relevant electronically stored information. A party may move for an order to preserve electronically stored information upon a showing that the continuing existence and integrity of the information is threatened.

All requests made pursuant to Rule 34 of West Virginia Rules of Civil Procedure shall be construed to include information contained or stored in an electronic medium, regardless of format, unless otherwise stated.

Unless otherwise agreed upon, all production of electronically stored information shall be either in hard copy form or in the form of a compact disk (CD) utilizing a format best suited for viewing the information by the requesting party and reasonably accessible to the producing party. If the parties are unable to agree upon a format, the Court will rule upon the type of format to be used for a particular category or all discovery of electronically stored information.

If any party intends to utilize an electronic search of another party's electronically stored information, or if any other issue regarding electronically stored information arises between the parties, then all counsel and pro se parties shall hold a conference. The requesting party shall give reasonable notice to all parties, and all counsel and pro se parties shall be present. The conference must be held at least 40 (forty) days prior to the completion of discovery, as set by the scheduling order in this matter.

At the conference, all counsel and pro se parties shall use their best efforts to reach an agreement as to the method of search, the scope of the search, the amount of searching, and the words, terms, or phrases to be used. All counsel and pro se parties shall utilize this conference to resolve all remaining electronic discovery issues such as the allocation of discovery costs for material not readily accessible, form of production, etc.

If, during a search or otherwise, electronically stored information that contains privileged information or attorney work product is inadvertently released in whole or part, then:

- A. If the information, document, or material, on its face, appears to be privileged or attorney work product, it shall be immediately returned,
- B. If notice of the inadvertent disclosure is given, it shall be returned as soon as practicable, and in no case later than 10 (ten) days.

Upon returning the privileged or attorney work product material, any person to whom it has been disclosed must destroy any copies, notes, or information derived from the material. The filing of a motion for protective order or to compel or other similarly related motion shall not affect this order.

11. ALL PRE-TRIAL MOTIONS AND/OR MOTIONS *IN LIMINE* MUST BE FILED AT LEAST 10 DAYS BEFORE PRE-TRIAL AND WILL BE RULED UPON AT THE PRE-TRIAL CONFERENCE.

12. MEDIATION/ALTERNATIVE DISPUTE RESOLUTION

The Court finds that this is an appropriate case for mediation or alternative dispute resolution. Therefore, pursuant to Rule 25 of the West Virginia Trial Court Rules, this case is referred to mediation or other form of dispute resolution agreed to by the parties. By order of this Court, mediation or other form of dispute resolution shall be conducted by the Honorable Thomas C. Evans, III, as Resolution Judge and shall be scheduled and concluded on or before **MARCH 4, 2016**, unless such deadline is otherwise extended by the Presiding Judge for good cause shown. The Resolution Judge shall contact the parties for the purpose of scheduling mediation/alternative dispute resolution.

13. SANCTIONS

In accordance with WVRCP 16(f), the Court may impose the full spectrum of sanctions authorized by the WVRCP if a party or party's counsel fails to obey this order or other orders of this Court, including exclusion of evidence and granting of default for failure to comply.

14. UNLESS AUTHORIZED BY COURT ORDER, THE ABOVE DATES ARE FINAL.

No additional evidence developed as a result of deviations from the above schedule will be admissible at trial unless justice requires.

15. OBJECTIONS to the above schedule must be made to the undersigned Judge within 15 (fifteen) days of the date of this Order or will be deemed waived.

16. It will be the responsibility of plaintiff or their counsel to notify opposing counsel and *pro se* parties of the existence of this scheduling order, if and when such counsel or *pro se* party appears of record.

17. The dates set out above do not relieve counsel or parties from timely compliance with discovery requests propounded pursuant to the West Virginia Rules of Civil Procedure.

18. All counsel or *pro se* parties shall provide their email address to the Business Court Division Director at carol.miller@courtswv.gov and to the Presiding Judge's Law Clerk at jamie.ketterman@courtswv.gov.

The Circuit Clerk is directed to forward a copy of this Order to all counsel of record; the Presiding Judge H. Charles Carl, III, P.O. Box 856, Romney, WV 26757; the Resolution Judge Thomas C. Evans, III, P.O. Box 800, Ripley, WV 25271; the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 West South Street, Martinsburg, WV 25401; and *pro se* parties.

IT IS SO ORDERED this 29th day of July, 2015.



H. Charles Carl, III, Presiding Judge
Business Court Division

Date: 8/5/15
Certified copies sent to:
— counsel of record
— parties
— other (please indicate)
By: [Signature]
— certified/1st class mail
— fax
— hand delivery
— interdepartmental
Other duties accomplished:
[Signature]
Deputy Circuit Clerk

JT, MF
Bus Ct, Judge Evans
Judge Carl

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 4th
DAY OF August 2015
Cathy S. Batson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA