IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA
BUISNESS COURT DIVISION

HORIZON VENTURES OF WEST VIRGINIA, INC.,

Plaintiff,

Civil Action No.: 13-C-196

v.

Judge: James H. Young, Jr.

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,

Defendant,

and

DEUTSCHE BANK AG, NEW YORK BRANCH, IN ITS CAPACITY AS AGENT FOR THE BANK GROUP, WHICH ALSO INCLUDES JP MORGAN CHASE BANK, N.A.; MERRILL LYNCH CREDIT PRODUCTS, LLC; BNP PARIBAS; AND CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Intervenor-Plaintiffs,

v.

HORIZON VENTURES OF WEST VIRGINIA, INC.; and AMERICAN BITUMINOUS POWER PARTNERS, L.P.,

Intervenor-Defendants.

ORDER

This matter came before the Court on the 22nd day of August 2017, upon motions made by the parties, Plaintiff, Horizon Ventures of West Virginia, Inc. (Horizon), Defendant, American Bituminous Power Partners, L.P., (AMBIT), and Intervening Plaintiff, Deutsche Bank,

in its capacity as agent for the Bank Group. Horizon appeared by Counsel, Gregory Schillace, Esq., AMBIT appeared by Counsel, Roberta Green, Esq., and Deutsche Bank appeared by Counsel, Matt Gatewood, Esq. Before the Court was Deutsche Bank's motion for summary judgment and motion for summary judgment for Plaintiff's failure to oppose; AMBIT's motion for partial summary judgment, motion for judgment on the pleadings, and motion to strike; and Horizon's motion for summary judgment of count I of Defendant's Amended Counterclaim, motion for summary judgment of count II of Defendant's Amended Counterclaim, and motion for summary judgment to the status of the Intervener Banks as holders of Senior Debt.

Thereupon, the Court proceeded to hear the arguments of the parties; and at the conclusion of the same the Court held the motions in abeyance. Therefore, the Court upon reviewing the parties' pleadings, briefs, and legal authority finds as follows:

PROCEDURAL HISTORY

This litigation began in June of 2013 when Horizon filed a complaint against AMBIT due to AMBIT's failure to make rent payments. The Complaint alleges the following:

Count I – Plaintiff seeks a declaratory judgment to determine its rights in the priority of payment of rent and a declaration and interpretation of the applicable terms of the Lease Agreement.

Count II – Breach of contract for AMBIT's failure to pay rent.

Count III – Injunctive relief to prevent AMBIT from distributing funds, other than Senior Debt, prior to paying Plaintiff rent.

Count IV – Specific performance requiring AMBIT to make its financial records available to Plaintiff.

Count V – Breach of contract alleging that AMBIT has underpaid rent due under the Lease Agreement by using foreign fuel and classifying the fuel's use as operating reasons when it should have been classified as non-operating reasons.

Count VI – Fraud and misrepresentation based on the fact AMBIT allegedly built a electric generation plant that was not capable of using large quantities of local fuel, which figured into the calculation of the rent payment, and as a result, AMBIT paid less rent.

Count VII – Fraud and misrepresentation because Horizon entered into the Agreement to Resolve Pending Litigation based on AMBIT's false representation regarding the depletion of local fuel.

Count VIII – Unjust enrichment for AMBIT's use of the property without paying rent.

Count IX – Breach of contract due to AMBIT locating many tons of CFBC boiler ash material onto Plaintiff's property.

Count X – Trespass and conversion by locating the CFBC boiler ash onto Plaintiff's property.

Count XI – Equitable relief because by locating the CFBC boiler ash onto Plaintiff's property, AMBIT substantially altered and devalued the property.

AMBIT filed an Answer denying the claims alleged in the Complaint. AMBIT also counterclaimed alleging that Horizon failed to comply with its reclamation obligations under the Lease Agreement (Count I) and that it had overpaid rent to Horizon over the past several years because the usable local fuel on the property had been exhausted (Count II).

In the Circuit Court of Ohio County, Horizon filed a renewed motion for summary judgment on Count I of the Complaint and on Count II of the Counterclaim. Following a hearing, the Circuit Court granted Horizon's summary judgment motion on both Count I of the Complaint

and Count II of AMBIT's Counterclaim by order entered March 26, 2014. The Circuit Court found that the order did not affect count I of AMBIT's Counterclaim (failure to comply with reclamation obligations) and counts X and XI of Horizon's Complaint (locating the boiler ash onto Plaintiff's property). The Circuit Court stated that Horizon had advised that Count III and Count IV were rendered moot, and the Circuit Court dismissed, sua sponte, without prejudice, Counts V-VIII of Horizon's Complaint.

The case was then appealed to the Supreme Court of Appeals of West Virginia, which heard the case and issued a memorandum decision on May 13, 2015. Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc., No. 14-0446, 2015 WL 2261649 (W. Va. May 13, 2015). The Court found that (1) ambiguities existed in how the Lease Agreement, the Trust Indenture, and the Agreement to Resolve Pending Litigation (1996 Agreement) coalesced together and (2) factual issues remain in determining whether the parties intended for the terms of the 1996 agreement to operate prospectively and, if not, whether usable local fuel remains on the premises. The Court reversed the order of the Circuit Court and remanded the action for further proceedings. The Court then directed the Circuit Court to transfer the case to the Business Court Division.

On August 3, 2015, Deutsche Bank filed a motion to intervene, which was granted by this Court on August 18, 2015, and Deutsche Bank's Complaint seeking a declaratory judgment was deemed filed. Plaintiff, Horizon, filed an Answer and a Counterclaim against Deutsche Bank, who then answered. The parties are now before the Court seeking summary judgment.

STANDARD OF REVIEW

"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." Painter v. Peavey, Syl. Pt. 4, 192 W.Va. 189, 451 S.E.2d 755 (1994). Furthermore, the Court shall only grant a motion for summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. 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 Casualty and Surety Co. v. Federal Ins. Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963). The Supreme Court of Appeals of West Virginia stated in Williams that "summary judgment is appropriate if from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party." Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995).

ANALYSIS

Instead of going through each of the parties grounds for summary judgment one by one, the Court is going to first address four key issues: (1) defining Senior Debt, (2) the priority of rent payment, (3) the calculation of rent, and (4) the agreement not to sue found in Lease Agreement. After analyzing these four overarching issues, the Court will apply the analysis to the parties' motions and render its decision accordingly.

I. Deutsche Bank holds Senior Debt.

The "Amended and Restated Lease of American Bituminous Power Partners, L.P. for Grant Town/Joanna Parcels (the Lease Agreement)" dated November 29, 1989, defines Senior Debt as:

> [A]ll indebtedness, obligations, and liabilities of Tenant pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees . . . between (i) tenant . . . and (ii) any banks or other financial institutions providing a letter of credit or other form of security

> or credit enhancement for the tax-exempt bonds being used to finance a portion of the costs of the initial cogeneration plant ("Project Bonds") and/or providing other financing for the Initial Cogeneration Plant or the Kiln Facility including, without limitation, all principal, premium (if any) and interest on all loans and other extensions of credit made pursuant to the Credit Agreements and any and all refinancing, renewals or extensions thereof . . .

Lease Agreement, at ¶ 7A.

The Lease Agreement further provides that Senior Debt shall not include "any new loans or extension of credit made to Tenant . . ." Id. Although additional versions of the Lease Agreement would be made, one is dated January 11, 1990 and the other dated April 1, 1993, the definition of Senior Debt never changed.

National Westminster Bank, P.L.C., issued the initial letter of credit for the first seven and a half years of AMBIT's electrical plant operation. Memorandum in Support of Motion to Intervene by Deutsche Bank AG, New York Branch, at 3. On September 12, 2013, Deutsche Bank became the issuing bank of the letter of credit. Id. Currently, Deutsche Bank continues to hold this debt obligation. Horizon argues that this transfer between National Westminster Bank and Deutsch Bank constitutes a "new loan" under the Lease Agreement, which would prevent the debt obligation from being classified as Senior Debt. However, Horizon has failed to cite any authority to support this position. Further, nothing in the record convinces the Court that this debt obligation to Deutsche Bank is a new loan. The record shows that the debt obligation is the same letter of credit that was issued by National Westminster Bank, that the terms and obligations of the parties did not change, and that no new construction or other projects were undertaken as a result of the letter of credit. In short, Deutsche Bank assumed National Westminster Bank's existing obligation as part of the existing letter of credit.

Therefore, because AMBIT's debt obligation to Deutsche Bank is not a new loan or new extension of credit, the debt obligation is Senior Debt.

II. Horizon's right to collect rent is subordinate to "Senior Debt."

The Trust Indenture dated January 1, 1990, creates a "waterfall" payment scheme in which money is paid in descending priority order until the money ceases to flow. Trust Indenture, at 77-79. The waterfall scheme requires payment, generally, as follows:

> First – Rebate Fund
> Second – Operating and Maintenance Expenses
> Third – Bank Payment Fund
> Fourth – Fiduciaries
> Fifth – Interest Account of the Debt Service Fund
> Sixth – Principal Account of the Debt Service Fund
> Seventh – Other Lease Rent
> Eighth – The Overhaul Fund
> Ninth – The Maintenance Reserve Fund
> Tenth – If Surplus, to the Maintenance Reserve Fund
> Eleventh – Additional Surplus to the Maintenance Reserve Fund
> Twelfth – All Other Lease Rent that Remains Unpaid
> Thirteenth – Remainder to the Borrower
>
> Id.

Horizon contends that it should be paid rent in the second category, "Operating and Maintenance Expenses." However, AMBIT and Deutsche Bank contend Horizon's rent payment is subordinate to Senior Debt and, thus, the highest Horizon could be paid rent is category seven, "Other Lease Rent." The priority of category placement matters a great deal as it is estimated that AMBIT will soon owe over $18,000,000 of Senior Debt when its next payment becomes due.

According to the Lease Agreement, "[a]ll Percentage Rent, any and all interest with respect to Percentage Rent and all Post-Startup Minimum Rent . . . is subordinated and subject in right of payment to the prior payment in full when due of all Senior Debt of Tenant in accordance with the provisions of this section 7A." Lease Agreement, at ¶ 7A.

More recently, the 1996 Agreement discusses how rent is to be paid. The 1996 Agreement provides:

> Tenant is permitted to and shall pay rent which is due and payable under the Lease as 'Other Lease Rent' under the Trust Indenture or, if Revenues under the Trust Indenture are insufficient to pay Other Lease Rent, then as 'Operating and Maintenance Expenses' from the 'Maintenance Reserve Fund' under the Trust Indenture (so long as funds are available in the Maintenance Reserve Fund). Tenant Further acknowledges that all payments of rent due or to become due under the Lease constitute 'Operating and Maintenance Expenses' under the Trust Indenture.
>
> 1996 Agreement, at §2.b.

The Court finds that the plain language of the Lease Agreement shows that the parties contemplated and agreed that Horizon's rent payment would be "subordinated" to Senior Debt. Lease Agreement, at ¶ 7A. Even though Horizon was not a party to the Trust Indenture, Horizon agreed in the 1996 Agreement that it was subject to the payment scheme contemplated by the waterfall as laid out in the Trust Indenture. 1996 Agreement, at §2.b. Lastly, Horizon agreed in the 1996 Agreement that they were to be paid as "Other Lease Rent under the Trust Indenture . . ." Id.

Therefore, upon analyzing the Lease Agreement, the Trust Indenture, and the 1996 Agreement, the Court concludes that Horizon's right to collect rent is subordinate to Senior Debt.

III. Rent shall be calculated in accordance with paragraph six of the Lease Agreement as limited by paragraph five of the 1996 Agreement.

Horizon and AMBIT have negotiated issues involving the calculation of rent in the Lease Agreement and in the 1996 Agreement. Horizon contends that the 1996 Agreement set the rent at two and a half percent (2.5%) of applicable gross revenues without regard to presence of usable local fuel at the site. AMBIT contends that the two and a half percent (2.5%) figure laid out in 1996 Agreement was used solely for the purpose of settling the former lawsuit, had no prospective effect, and that rent should be calculated in accordance with the Lease Agreement.

The parties also dispute whether the presence of local fuel or presence of usable local fuel is used in determining the rental percentage.

The Lease Agreement states if local fuel is used to generate steam and electricity, or foreign fuel used for non-operating reasons, rent shall be "[t]here percent (3%) of all gross revenues actually received by Tenant . . ." Lease Agreement, at ¶ 6. Conversely, if foreign fuel is used to generate steam and electricity for operating reasons, rent shall be "one percent (1%) of all gross revenues actually received by the Tenant . . ." Id.

In determining whether to use the one percent or three percent figure, the Lease Agreement states that the term "operating reason" requires "that tenant, in its reasonable judgment, has determined that a percentage (partial or total) of foreign fuel is required for any one or more of the following reasons: . . . (f) due to exhaustion of the usable waste coal material on the Demised Premises." Id. As such, the Court must reason that if AMBIT can use foreign fuel for operating reasons due to the exhaustion of usable waste coal lowering the rental percentage to one percent (1%), then rent must be calculated by the presence of usable waste coal material.

As to the 1996 Agreement's role in calculating rent, the Court finds that the 1996 Agreement is convoluted and ambiguous in many respects. Some provisions of the agreement are prospective such as paragraph five, Horizon's Waiver of a Portion of Post-April Percentage Rent and other provisions are not. As to how the 1996 Agreement coincides with the Lease Agreement, paragraph fourteen of the 1996 Agreement provides:

> This Agreement constitutes the entire agreement between the Parties and supersedes all prior and contemporaneous agreements, representations, warranties, and understandings of the Parties, whether oral, written or implied, as to the subject matter hereof; provided, however, that this Agreement does not supersede the Lease, except only that the provision in paragraph 4 of this Agreement for the dismissal of the

> Pending Action and the provisions of paragraph 5 of this Agreement for the waiver for the Waived Percentage Rent and related provisions of paragraph 5 shall limit Horizon's rights under the Lease . . .

1996 Agreement, at ¶ 14.

In analyzing the 1996 Agreement, the Court finds that paragraph fourteen is clear in limiting the applicability of the agreement as it provides that the agreement did not supersede the Lease Agreement except for two sections, paragraph four – listing the parties closing obligations and paragraph five – Horizon's waiver of a portion of post-April percentage of rent.

As for how the 1996 Agreement effects the calculation of rent, paragraph five of the 1996 Agreement states that, "[t]enant shall pay Post-April Percentage Rent when it becomes due under the Lease, subject to the limitation as to amount contained in this paragraph 5." 1996 Agreement, at ¶ 5. The Court reasons that paragraph five, when read in conjunction with the entirety of the 1996 Agreement, is prospective and amends how rent is calculated. Paragraph five goes on to implement a formula to calculate rent that could potentially waive a portion of percentage rent as determined by the terms of the Lease Agreement. Paragraph five essentially requires the parties to calculate rent under the terms of the Lease Agreement, then calculate rent using the formula laid out in paragraph five. If the amount of rent calculated under the terms of the Lease Agreement are greater than the formula detailed in paragraph five, then paragraph five may waive a portion of the percentage of rent under the Lease Agreement.

Therefore, the percentage of rent payment shall be determined pursuant to the terms of the Lease Agreement subject to any waiver of a portion of percentage of rent as determined by the formula laid out in paragraph five of the 1996 Agreement.

IV. Horizon cannot bring an action to collect rent because it contracted its right to do so away.

AMBIT contends that Horizon cannot bring this suit to collect rent because it contracted away its right to do so in the Lease Agreement. The Lease Agreement provides:

> If any Senior Debt shall become or be declared to be immediately due and payable, all Subordinated Rent shall become immediately due and payable notwithstanding any inconsistent terms of this Lease. Unless and until all Senior Debt shall have been paid when due (at its stated maturity, by acceleration or otherwise) in full in accordance with its terms, Landlord shall not, without the prior written consent of the holders of Senior Debt, have any right to demand payment of, or institute any proceedings to enforce, any Subordinated Rent if at such time a default in payment of any Senior Debt when due shall have occurred and be continuing.
>
> Lease Agreement, at §7A.g.

Clearly, Senior Debt is due, soon to the tune of more than $18,000,000. It is also beyond dispute that Horizon has not received the prior written consent of the holders of Senior Debt, Deutsche Bank. Therefore, by initiating this suit to collect rent without prior written consent of Deutsche Bank, Horizon clearly committed a breach of the Lease Agreement.

Contracts, or covenants, not to sue are generally inserted into agreements to prevent a scenario, as here, that a party is forced to expend financial resources defending something previously contemplated. To remedy this wrong, Courts have, in some instances, awarded damages – litigation costs and attorney fees. Widener v. Arco Oil and Gas Co., Div. of Atlantic Richfield Co., 717 F. Supp. 1211 (N.D. Tex. 1989). The Court finds that the Supreme Court of Appeals of West Virginia has not addressed this issue. However, when faced with this issue most jurisdictions have applied the traditional American rule barring the recovery of attorney fees and litigation costs as damages for violating a release not to sue. Bunnett v. Smallwood, 793 P.2d 157, 161 (1990). Courts have applied limited exceptions to the traditional American rule when

authorized to do so by statute, when the agreement explicitly authorizes attorney fees and/or litigation costs, or in cases involving bad faith. Id.

It is clear Horizon breached the Lease Agreement by initiating this claim to collect rent. As such, its claims involving the collection of rent will be dismissed without prejudice. However, because the Lease Agreement did not specifically provide for attorney fees and litigation costs as a remedy, there is no statute awarding costs and fees, and Horizon did not bring this claim in bad faith as it was part of a larger suit with valid claims, the Court finds that AMBIT and Deutsch Bank are not entitled to attorney fees and litigation expenses. Further, Horizon's covenant not to sue does not affect claims that do not seek the collection of rent. It is clear that the covenant not to sue was limited to the singular issue of collecting rent.

CONCLUSION

As a result of the findings above, the Court grants in part and denies in part AMBIT's motions for summary judgment. The Court finds the declaratory judgment in this action has been rendered as requested in Count I of the Complaint. As to Count II, summary judgment is **GRANTED** because Horizon contracted to delay its right to seek rent payments while Senior Debt is owed. As to Counts III-VIII, the Court is of the opinion that it does not need to render a decision based on the Supreme Court of Appeals of West Virginia's direction and footnote noting that these claims had been dismissed at the circuit court level and appear to be resolved by Order dated March 26, 2014, and the fact neither party raised or briefed these issues. Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc., No. 14-0446, 2015 WL 2261649 (W. Va. May 13, 2015). Nonetheless, if the Court needs to address these issues it finds that Count III, V, VI, VII, VIII are precluded due to Horizon contracting away its right to seek rent when Senior Debt is due. Count IV would survive the motions for summary judgment.

Counts IX, X, XI are the only claims that survive AMBIT's motions for summary judgment. As such, AMBIT's motions for summary judgment are **DENIED IN PART** and **GRANTED IN PART**. This Court's granting of summary judgment in favor of AMBIT relating to Horizon's claims for rent are granted without prejudice as Horizon may pursue the collection of rents after Senior Debt is paid.

Turning to AMBIT's Counterclaim, Horizon's motions for summary judgment as to Count I and II are **DENIED**. However, Count II of the Counterclaim is dismissed without prejudice. The 1996 Agreement provides that:

> [t]enant agrees that it shall not, and it shall instruct its attorneys, . . . that none of them shall assert at any time in any court or other legal proceeding that any prospective, threatened or actual Non-Senior Project Obligation Default constitutes or effects as an excuse for or a defense to payment or performance of any Lease Obligations.
>
> 1996 Agreement, at 2.

This language makes the Court question whether AMBIT, like Horizon, contracted away its right to bring this claim against Horizon. However, more importantly, Count II is dismissed, for the sake of equity and judicial economy as the issues regarding the payment of rent between AMBIT and Horizon need to be pursued together, as potential damages are likely to offset one another. As detailed above, Horizon is currently precluded from bringing an action to seek rent. Therefore, to further the prospect of judicial economy Count II of AMBIT's Counterclaim is dismissed without prejudice.

The Court **GRANTS** Deutsche Bank's motion for summary judgment, as the Court determined the status of Senior Debt and the priority of rent payment.

Finally, the Court **GRANTS** AMBIT's motion to strike filed on August 7, 2017, due to Horizon's untimely filing. Nonetheless, the Court reviewed Horizon's response and found that the arguments proffered and the facts presented were duplicitous of Horizon's former pleadings.

As such, granting AMBIT's motion to strike did not influence the Court in ultimately reaching the decisions rendered in this Order.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that the AMBIT's motions for summary judgment are **Granted in Part** as the Court determined the status of Senior Debt, the priority of rent payments, Horizon's ability to seek rent payments, and **Denied in Part**, as Counts IX, X, and XI survive. Horizon's motions for summary judgment are **Denied**. However, the Court dismissed Count II of the Counterclaim sua sponte in the sake of judicial economy. Deutsche Bank's motion for summary judgment is **Granted** as the Court determined the status and of Senior Debt and priority of rent, and AMBIT's motion to strike is **Granted**.

This Order dismisses all but the following claims, Counts IX, X, and XI of Horizon's Complaint and Count I of AMBIT's Counterclaim. For these surviving claims, the pretrial conference is scheduled for **NOVEMBER 8, 2017 at 9:00 AM** in Kanawha County, West Virginia. Trial is scheduled for **NOVEMBER 28, 2017** at **9:00 AM** in Ohio County, West Virginia.

All accordingly which is ORDERED and DECREED.

Enter this 31st day of August, 2017.

ORDER
ENTER: _____
HONORABLE JAMES H. YOUNG, JR.

9/5/17

Horizon Ventures of West Virginia, Inc. vs. American Bituminous Power Partners, L.P., Pleasant Valley Energy Company, American Hydro Power Partners, L.P., Business Court Case, Civil Action No. 13-C-196, Ohio County

Judge Mazzone – Janet
Helen – Circuit Clerk's office keeps trial calendars

Resolution Judge:
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TWENTY-FOURTH JUDICIAL CIRCUIT

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August 31, 2017

Brenda L. Miller, Circuit Clerk
Ohio County Courthouse
1500 Chapline Street
Wheeling, West Virginia 26003

RE: Horizon Ventures of West Virginia, Inc. vs. American Bituminous Power Partners, L.P., et al., Civil Action No. 13-C-196

Dear Ms. Miller:

Please find enclosed an original Order in the above-referenced matter, along with a self-addressed envelope in order that **a time-stamped copy can be returned to me. Also, please mail copies to the Business Court Division, all attorneys of record, and the Resolution Judge in this matter.** For your convenience, I have also enclosed a list of the attorneys of record.

If you need anything further, please contact me.

Sincerely,

Diana Fields

Diana Fields
Secretary

Enclosures

RECEIVED
SEP 05 2017
Brenda L. Mi