

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

HORIZON VENTURES OF WEST VIRGINIA,  
INC.,  
Plaintiff,

v.

Civil Action No. 13-C-196  
Judge James H. Young, Jr.

AMERICAN BITUMINOUS POWER  
PARTNERS, L.P.,  
Defendant.

**TRIAL ORDER**

Came the parties upon the Trial of the matters pending between them, claim and counterclaim, beginning on or about November 28, 2017. Plaintiff appeared by and through its corporate president Stanley Sears, and by its counsel Gregory H. Schillace, attorney at law. Defendant appeared by and through its plant manager Steven D. Friend, and by its counsel John F. McCuskey and Roberta F. Green, attorneys at law. Whereupon a jury was impaneled, and the trial of the matters between the parties proceeded as follows.

Plaintiff Horizon Ventures of West Virginia, Inc. ("Horizon"), presented to the jury its case for breach of contract, trespass and conversion, and unjust enrichment, calling as its only fact and expert witness Stanley Sears. Horizon argued that American Bituminous Power Partners, LP's (AMBIT's) placement of 177,000 tons of boiler ash upon the Demised Premises, Joanna Parcel, precluded Horizon's sale of the waste coal or gob located there, given that the ash hardens like cement, Horizon alleged, and would be impossible or cost prohibitive to remove. Horizon's principal Stanley Sears was qualified as an expert witness and testified that the coal would have a market value today of no less than \$1/ton, were Horizon able to access and/or remove the waste coal. Additionally, Horizon argued that the Lease Agreement allows for placement of ash on the Demised Premises/Grant Town Parcel (§ 3(a)) but that the Lease Agreement expressly does not provide for the placement of ash on the Demised Premises/Joanna Parcel (§3(b)).

In defense, AMBIT relied upon the Lease Agreement Section 1A(e), which states that "Landlord hereby . . . conveys to Tenant for the term of the Lease . . . all waste coal located on the . . . Joanna Parcel" (§1A (e)). AMBIT further argued that, as a result, Horizon's right to sell the waste coal arises at the end of the lease term (50 years from inception), if ever, making the price/market a future damage and speculative by Horizon's expert's own admission. Additionally, the Lease Agreement Section 3(b) specifically provides that AMBIT may "consume, use in any manner, relocate. . . , store, treat, handle, process, permanently place, remove and/or grade any waste coal material presently located on the Joanna Parcel, to perform any other actions incidental to the reclamation of the Joanna Parcel and to use the Joanna Parcel . . . as required to discharge or effect

any reclamation obligations of Tenant" (§3(b) (emphasis added)). Given that AMBIT's placement of ash was solely for reclamation and was a Permitted Use<sup>1</sup> under the Lease Agreement per the regulatory authorities (DEP), the placement of ash (AMBIT argued) was not a breach. Further, even if it could be found to be a breach (which it is not), Horizon has suffered no present damages and may not recover future, speculative damages. Finally, AMBIT placed the deeds into evidence, demonstrating that Horizon's basis in the property was \$3,000.

Whereupon, at the close of Horizon's case and pursuant to West Virginia Rule of Civil Procedure 50, AMBIT moved for directed verdict (judgment as a matter of law) on the basis that the Amended and Restated Lease (Lease Agreement) between the parties does not preclude placement of ash upon the Joanna Parcel but conversely does expressly allow AMBIT to pursue all acts necessary for reclamation as was the uncontroverted use demonstrated at trial. Additionally, AMBIT argued that Horizon's alleged damages are speculative, as even Horizon's expert admits, given that Horizon's right to access and/or sell whatever gob remains arises at the end of the lease term (lease term is 50 years).

Horizon countered that reasonable minds could differ as to the weight of its factual evidence, and, therefore, it should be allowed to submit its case to the jury.

Wherefore, and upon mature consideration, this Court did grant AMBIT's motion for directed verdict, finding that the Lease Agreement provides for reclamation efforts such as the placement of ash and further finding that Horizon's damages, if any, are speculative, given that its right to the waste coal on the Joanna Parcel arises, if ever, at the termination of the Lease Agreement. The Court noted the exceptions/objections of Horizon to its ruling.

Whereupon AMBIT presented its expert (mining engineer Herbert Thompson) in support of its counterclaim for reimbursement of costs incurred in treating the preexisting acid mine drainage (AMD) on the Joanna Parcel. When AMBIT called its plant manager Steve Friend in support of its presentation of damages, AMBIT came to rely upon information that was received at the time of trial. Therefore, AMBIT moved that the trial of the counterclaim be bifurcated on liability and damages.

Horizon opposed the motion for bifurcation and moved for judgment as a matter of law.

It is the decision of the Court that AMBIT presented sufficient evidence on liability to potentially sustain the claim, such that the Court denied Horizon's motion for judgment as a matter of law. It is the further decision of the court that the Plaintiff has not been afforded adequate time to review and respond to Defendant's claim for damages and that judicial economy will be promoted by

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<sup>1</sup> The Lease Agreement provides that "Tenant may . . . make [and] construct on, in, to and under the Demised Premises . . . any and all other improvements as Tenant may desire for the pursuit and conduct of any Permitted Uses and thereafter may make such alterations, additions, installations and substitutions, all as Tenant deems desirable for the pursuit and conduct of the Permitted Uses (collectively, 'Tenant Changes')." Lease Agreement (Exhibit A) at § 18 (a).

denying Defendant's motion and, instead, declaring a mistrial of the Defendant's counterclaim to allow further discovery by Plaintiff of the pending damages claim.

It was therefore ORDERED, ADJUDGED and DECREED, as follows.

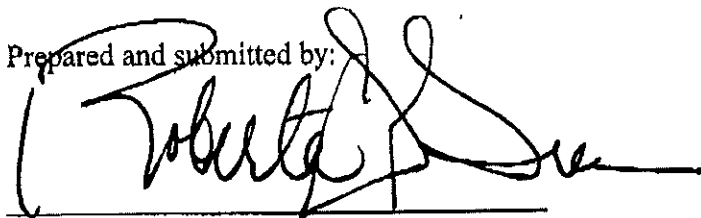
For good cause shown, it is the *sua sponte* ruling of this Court that a new, abbreviated scheduling order shall be entered to allow discovery of the damages portion of Defendant's counterclaim, which scheduling order shall provide for limited discovery of damages issues, along with mediation and trial. The parties shall await further order of this Court relative to that process.

The exceptions and objections of any aggrieved parties are noted and preserved.

Entered December 20, 2017

  
Judge James H. Young, Jr.

Prepared and submitted by:



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