

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,

**ORDER DENYING AMBIT'S RENEWED MOTION**  
**FOR PARTIAL SUMMARY JUDGMENT**  
**(Acid Mine Drainage)**

Came the parties by counsel on AMBIT's Renewed Motion for Partial Summary Judgment (Count I Counterclaim – Acid Mine Drainage (AMD)) ("Renewed MSJ"), whereby, pursuant to West Virginia Rule of Civil Procedure 56(b), (c), AMBIT renewed and amended its previous dispositive motions,<sup>1</sup> moving for judgment as a matter of law on the last remaining portion of this litigation – AMBIT's counterclaim against Horizon Ventures of West Virginia, Inc. (Horizon) – on the basis that the law of the case, along with the totality of the evidence presented on the remaining issue, could not lead a rational trier of fact to find for the nonmoving party.<sup>2</sup> AMBIT sought resolution of the liability portion of its claim, relying upon the sworn testimony from the November 27, 2017, trial, documents adduced in discovery and the Lease Agreement (the contract between the parties), as follows.

**Findings of Fact.**

<sup>1</sup> See Order (11/20/17).

<sup>2</sup> *Craddock v. Watson*, 197 W. Va. 62, 475 S.E.2d 62 (1996). See also Syl. pt. 1, *Gibson v. Little General Stores, Inc.*, 655 S.E.2d 106 (W. Va. 2007); *Williams v. Preston Coal, Inc.*, 194 W. Va. 52, 459 S.E.2d 329, 338 (1995), finding that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."

573-574

1. In support of its Renewed MSJ, AMBIT cited the Lease Agreement, the contract between Horizon and AMBIT, that expressly divides financial responsibility for the treatment of acid mine drainage (AMD) – termed “Reclamation Obligations” – between Horizon and AMBIT. Pursuant to the contract, Horizon must pay for all Reclamation Obligations for pre-existing AMD on the Joanna Parcel and must pay the expenses related to AMD resulting from pre-existing conditions of the Joanna Parcel. Also pursuant to the contract, AMBIT must pay for all Reclamation Obligations resulting from its operations on the Joanna Parcel, its use of equipment on the Joanna Parcel to the extent it produces AMD, or any condition AMBIT created on the Joanna Parcel that resulted in AMD.

2. AMBIT argued that the facts of this case adduced to date, including the sworn testimony at trial, the governmental reports appended to the Renewed MSJ and those admitted at the November 2017 trial, and the unambiguous<sup>3</sup> Lease Agreement itself demonstrate unequivocally that whatever AMD is present on the Joanna Parcel preexists the Lease Agreement or results from conditions that were present prior to the inception of the Lease Agreement – in particular, the waste coal or gob.

3. AMBIT cited the following, which it averred were sworn facts:

- a. AMD has existed on the Joanna Parcel since it was owned by Eastern Associated Coal and continued even after it was purchased by North Marion Development.<sup>4</sup>
- b. AMD continued to exist on the Joanna Parcel at the time North Marion transferred the Parcel to Horizon and continued throughout Horizon's tenure as permittee of the

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<sup>3</sup> See Trial Transcript (Nov. 28, 2017), attached to Renewed MSJ as Exhibit B, at 30 (Court finding the Lease Agreement unambiguous). See also Pretrial Transcript (3/9/18), where the parties confirmed that, in the estimation, the Lease Agreement is unambiguous.

<sup>4</sup> See State Reports, appended to Renewed MSJ as Exhibit A. AMBIT averred that these reports are available through FOIA of the permit number (0-21-83). See <https://dep.wv.gov/pla/Pages/default.aspx> See also Trial Transcript (Nov. 28, 2017) at 199-206 attached to Renewed MSJ as Exhibit B.

property.<sup>5</sup>

- c. AMD still can be found on the Joanna Parcel today, even absent any operations, except reclamation and treatment of the AMD by AMBIT, on that parcel since the 1980s, when Eastern Associated Coal ceased its mining operations there.<sup>6</sup>
- d. Horizon's representative Stanley Sears testified under oath to the progression of owners/permit holders on the Joanna Parcel: Eastern Associated Coal Corporation, North Marion Development, Horizon, and, most recently, AMBIT.<sup>7</sup>
- e. AMBIT's mining engineering expert Herbert R. Thompson testified at trial relative to his review of the inspection reports identified above, finding that they reflect the presence of AMD.<sup>8</sup>

4. The Lease Agreement starts by defining "Reclamation Obligations" as

all testing, reclamation and restoration of the Demised Premises relating to . . . all treatment of surface water runoff on or from the Demised Premises that are required to be performed under the applicable licenses and permits, laws, orders and regulations of all federal, state, courts and municipal authorities having jurisdiction[.]<sup>9</sup>

Commensurate with these obligations are costs that are divided by contract (the Lease Agreement).

Pursuant to Section 9.b. of the Lease Agreement,

. . . from the Commencement Date<sup>10</sup> until the expiration or other termination of this Lease . . . the responsibility for, and cost of, all Reclamation Obligations other than Tenant's Continuing Obligations, but including Reclamation Obligations arising from any cause or condition existing as of the date of this Lease shall be borne by Landlord.<sup>11</sup>

<sup>5</sup> See Trial Exhibits 3, 4, 5. See Trial Transcript (Nov. 28, 2017) at cross examination of Stanley Sears (Exhibit B) at 101-03, 107, 172, 176-78.

<sup>6</sup> See Trial Transcript (Nov. 28, 2017) (Renewed MSJ Exhibit B) at 101-02 (Stanley Sears testifying to end of Eastern's operations).

<sup>7</sup> See Trial Transcript (Nov. 28, 2017) (Renewed MSJ Exhibit B) at 178ff.

<sup>8</sup> See Trial Transcript (Nov. 29, 2017) Renewed MSJ (Exhibit B) at 49-50.

<sup>9</sup> See A&R Lease000044 (Trial Exhibit 1).

<sup>10</sup> See Trial Transcript (Nov. 28, 2017) (Renewed MSJ (Exhibit B) at 222 (acknowledging Commencement Date of December 1, 1987).

<sup>11</sup> See A&R Lease000042-43 (Trial Exhibit 1).

By the same section of the Lease Agreement, AMBIT is

responsible for that portion of the Reclamation Obligations ("Tenant's Continuing Obligations") to the extent that the same arise from (A) Tenant's conduct of Tenant's business or the operation of Tenant's equipment on the Demised Premises or (B) any condition on the Demised Premises created by Tenant.<sup>12</sup>

The Lease Agreement cites AMBIT's use of equipment on the Joanna Parcel as a determinant only to the extent AMD arises from that use.<sup>13</sup>

5. To the extent that Horizon has alleged that AMD has arisen from the equipment in use for reclamation of the Joanna Parcel (per the Lease Agreement, use of equipment on the Joanna Parcel is Tenant's Continuing Obligation only to the extent that AMD arises therefrom),<sup>14</sup> AMBIT argued that the uncontroverted evidence at trial was that the use of equipment on the Joanna Parcel did not cause AMD.<sup>15</sup> AMBIT's mining engineering expert testified that the equipment cannot logically be seen as causing or contributing to AMD, which is caused solely by surface water filtering over or through sulfur-bearing materials – here, the gob.<sup>16</sup>

6. AMBIT identified the costs undertaken to date in invoices provided to Horizon, demonstrated on a spreadsheet that was appended to the Renewed MSJ as Exhibit C and was provided to Horizon's counsel on January 19, 2018.<sup>17</sup>

7. AMBIT produced correspondence from 2012, demonstrating that it complied with the notice provisions of the Lease Agreement.<sup>18</sup>

8. AMBIT argued that its use of the Demised Premises has complied with the terms of

<sup>12</sup> See A&R Lease000045 (Trial Exhibit I).

<sup>13</sup> See A&R Lease000045 (Trial Exhibit I).

<sup>14</sup> See Trial Transcript (Nov. 29, 2017) (Renewed MSJ Exhibit B) at 85ff; see also A&R Lease000045 (Trial Exhibit I).

<sup>15</sup> See Trial Transcript (Nov. 29, 2017) (Renewed MSJ Exhibit B) at 91.

<sup>16</sup> See Trial Transcript (Nov. 29, 2017) (Renewed MSJ Exhibit B) at 38, 49, 51 (AMBIT's mining expert on causes of AMD).

<sup>17</sup> AMBIT's Responses for March 19, 2018, Trial to Combined Discovery Requests of the Plaintiff (1/19/18).

<sup>18</sup> AMBIT cites correspondence collectively identified as Exhibit H that was appended to the Amended Motion for Summary Judgment (10/25/17).

the Lease Agreement and all relevant law from inception to today.<sup>19</sup>

**Conclusions of Law.**

1. West Virginia law on contract construction is well settled. "The question as to whether a contract is ambiguous is a question of law to be determined by the Court."<sup>20</sup> West Virginia's Supreme Court has found that "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."<sup>21</sup> "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."<sup>22</sup>

2. In seeking summary disposition of liability on Count I of its counterclaim, AMBIT argued that it was seeking nothing more than the application of West Virginia law on contracts to the facts of this case as demonstrated through discovery, trial and motions practice. AMBIT moves the Court to apply and enforce the Lease Agreement according to the intent of the parties as that intent is set forth expressly in that agreement.

3. Horizon Ventures, Inc., of West Virginia (Horizon) filed a response on March 8, 2018, after the Court was in recess, such that the response was not received by the Court prior to the pretrial held at 9 am in Charleston, WV, on March 9, 2018. Nonetheless, at the pretrial/dispositive motion hearing, Horizon argued that genuine issues of material fact remain and that the sworn

<sup>19</sup> See Lease Agreement (Trial Exhibit 1) at §§ 3(b), 18.

<sup>20</sup> Syl. pt. 4, *Dan's Carworld, LLC, v. Serlan*, 223 W. Va. 478, 677 S.E.2d 914 (2009), quoting Syl. pt. 1, *Berkeley County PSD v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

<sup>21</sup> Syl. pt. 5, *Dan's Carworld, LLC, v. Serlan*, 223 W. Va. 478, 677 S.E.2d 914, quoting Syl. pt. 1, *Hofield v. Health Mgmt. Assocs. Of W. Va., Inc.*, 223 W. Va. 259, 672 S.E.2d 395 (2008), quoting Syl. pt. 3, *Cottiga Devel. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

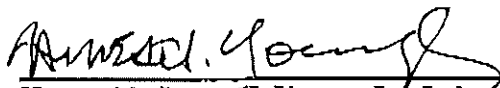
<sup>22</sup> Syl. pt. 6, *Dan's Carworld, LLC, v. Serlan*, 223 W. Va. 478, 677 S.E.2d 914, quoting *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981), quoting Syl. pt. 1, *Cottiga Devel. Co.*, 147 W. Va. 484, 128 S.E.2d 626.

testimony of the witnesses at trial never went to the factfinder and, therefore, was untested, inherently unreliable and, therefore, disputed.


WHEREFORE, the Court finds as follows. The Lease Agreement is the contract that governs the rights and responsibilities between AMBIT and its landlord Horizon, and it is unambiguous. The remaining issue before this Court – the allocation of responsibility for the existing and ongoing costs related to acid mine drainage on the Joanna Parcel – includes determinations of fact that were never submitted to the jury at the November 2017 trial. Because the damages portion of this claim has to be submitted to the jury in any event, and summary disposition of liability does not truncate or simplify the upcoming trial sufficiently to make a difference, the Court denies AMBIT's amended motion for partial summary judgment without prejudice at this time.

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

Entered April 24, 2018

  
Honorable James H. Young, Jr., Judge  
Business Court Division – WV Courts

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*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:*

*Honorable James A. Matish*

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