

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

COMMUNITY CARE OF  
WEST VIRGINIA, INC.,

Plaintiff,

vs.

Civil Action No. 17-C-318  
Presiding Judge: Farrell  
Resolution Judge: Carl

FRONTIER COMMUNICATIONS OF  
AMERICA, INC.,  
its parents, subsidiaries, and affiliates,  
FRONTIER WEST VIRGINIA, INC.,  
CITIZENS TELECOM SERVICES COMPANY, LLC,  
CITIZENS TELECOMMUNICATIONS OF  
WEST VIRGINIA,  
TAMCO CAPITAL CORPORATION,  
its parents, subsidiaries, and affiliates,  
ANTHONY ROME, and  
MICHAEL SHAFFER,

Defendants.

**ORDER HOLDING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT IN ABEYANCE AND CANCELLING HEARING**

This matter came before the Court this 14th day of March 2019 upon Defendant TAMCO Capital Corporation's Motion for Summary Judgment. The Plaintiff, Community Care of West Virginia, Inc., by counsel Dan Earl, Esq., and Defendant, TAMCO Capital Corporation, by counsel Debra Scudiere, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows:

3-18-19  
M Dellinger  
A Spitz  
D Scudiere  
Judge Carl III  
Business Ct. Div

## **FINDINGS OF FACT**

1. This matter was commenced with the filing of the Complaint on October 12, 2017, seeking Declaratory Judgment on Contracts Signed by Mr. Shaffer (Count I); Declaratory Judgment on Contracts Approved of Due to the Influence of Mr. Shaffer (Count II); Fraud Via Mr. Shaffer (Count III); Breach of Contract by Mr. Shaffer (Count IV); Fraudulent Billing (Count V); Breach of Contract (Count VI); Negligence (Count VII); and Civil Conspiracy (Count VIII). *See Compl.*
2. On February 2, 2018, the Circuit Court of Harrison County filed a Judicial Motion to Refer Case to the Business Court Division, seeking to refer the instant civil action to the West Virginia Business Court Division. Subsequently, this case was assigned to the Business Court Division by the West Virginia Supreme Court of Appeals by Administrative Order dated April 9, 2018, and was assigned to the undersigned by Order entered May 8, 2018.
3. On December 17, 2018, Defendant TAMCO Capital Corporation (hereinafter “Defendant” or “TAMCO”) filed the instant Motion for Summary Judgment of the Defendant TAMCO Capital Corporation, seeking summary judgment in its favor against Plaintiff’s claims against it because it argues it is only named as a defendant in this matter because Plaintiff alleges it is an affiliate company of Defendant Frontier Communications of America, Inc. (hereinafter “Frontier”) and should be treated as an alter ego of Frontier; however, TAMCO argues the evidence demonstrates it is a separate company and there exists no control of Frontier by TAMCO or control of TAMCO by Frontier. *See Def’s Mem., p. 2, 7.*

4. On February 27, 2019, Plaintiff Community Care of West Virginia, Inc. (hereinafter “Plaintiff”) filed Community Care of West Virginia, Inc.’s Submission of a Rule 56(f) Affidavit in Response to TAMCO’s Motion for Summary Judgment, seeking more time, until the end of discovery on July 15, 2019, to gather facts in discovery to oppose the instant Motion for Summary Judgment. *See* Pl’s Resp., p. 1. Also on February 27, 2019, Plaintiff filed an Affidavit of Arie M. Spitz pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure.
5. The Court now finds the instant Motion is ripe for adjudication.

#### **STANDARD OF LAW**

Motions for summary judgment are governed by Rule 56, which states that “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987). Therefore, “[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 Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995).

A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted). However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

### **CONCLUSIONS OF LAW**

In this matter, the Defendant has filed a Motion for Summary Judgment, arguing it is not an alter ego to Frontier, and that Plaintiff’s allegations it is an alter ego of Frontier are the only reason TAMCO was named in the instant lawsuit. *See* Def’s Mem., p. 2. Therefore, Defendant argues that as no genuine issue of material facts exist as to its corporate status, summary judgment should be found against Plaintiff as to all of its claims against TAMCO. *Id.* In Response, Plaintiff filed its Submission a Rule 56(f) Affidavit in Response to TAMCO’s Motion for Summary Judgment, urging the Court to deny the motion or hold it abeyance until the close of discovery, which is set for July 15, 2019, so it can gather facts to oppose the motion. *See* Pl’s Resp., p. 1. Furthermore, Plaintiff filed the Affidavit of Arie M. Spitz contemporaneously with its Response, which set forth Plaintiff’s need for additional discovery, including additional written discovery and the depositions of specific individuals, including Michael Shaffer, Anthony Rome, and a corporate representative of TAMCO. *See* Aff., p. 2-3.

“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.” Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); Syl. Pt. 5, *Toth v. Bd. of Parks & Recreation Comm'rs*, 215 W.Va. 51, 593 S.E.2d 576 (2003). However, the West Virginia Supreme Court of Appeals has cautioned that “a decision for summary judgment before discovery has been completed must be viewed as precipitous.” *Bd. of Ed. of Ohio Cty. v. Van Buren & Firestone, Architects, Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980); *see also Pingley v. Huttonsville Pub. Serv. Dist.*, 225 W. Va. 205, 208, 691 S.E.2d 531, 534 (2010).

Further, Rule 56(f) of the West Virginia Rules of Civil Procedure provides, in pertinent part:

“[s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit ... depositions to be taken or discovery to be had....

W. Va. R. Civ. P. 56.

Therefore, the plaintiff may request a continuance for further discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. In order to obtain such a discovery continuance, a plaintiff must, at a minimum, (1) articulate some plausible basis for the plaintiff’s belief that specified “discoverable” material facts likely exist which have not yet become accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104, 106 (1996).

The West Virginia Supreme Court of Appeals has explained that “a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion.” *Citynet, LLC v. Toney*, 235 W. Va. 79, 90, 772 S.E.2d 36, 47 (2015) citing *Williams v. Precision Coil, Inc.*, 194 W.Va. at 61–62, 459 S.E.2d at 338–39, footnote added. The Supreme Court of Appeals explained in *Citynet*:

In *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954 (4th Cir.1996), the Fourth Circuit held that “the nonmoving party cannot complain that summary judgment was granted without discovery unless that party made an attempt to oppose the motion on the grounds that more time was needed for discovery or moved for a continuance to permit discovery before the [trial] court ruled.” *Id.* at 961. As we have often explained, “[t]he law ministers to the vigilant, not those who slumber on their rights.” *Powderidge [Unit Owners Ass’n v. Highland Props., Ltd.]*, 196 W.Va. [692,] 703, 474 S.E.2d [872,] 883 [ (1996) ], quoting *Banker v. Banker*, 196 W.Va. 535, 547, 474 S.E.2d 465, 477 (1996), citing *Puleio v. Vose*, 830 F.2d 1197, 1203 (1st Cir.1987). *Payne’s Hardware*, 200 W.Va. at 690–91, 490 S.E.2d at 777–78 (footnote omitted).

*Id.*

West Virginia, like the Fourth Circuit, places great weight on the Rule 56(f) affidavit<sup>1</sup>, believing that “[a] party may not simply assert in its brief that discovery was necessary”; instead it should comply “with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit.” *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W.Va. 692, 702, 474 S.E.2d 872, 882 (1996) citing *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.1995).

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<sup>1</sup> See also *Smith v. Corp. of Harpers Ferry*, No. 13-0752, 2014 WL 1272515, at \*5 (W. Va. Mar. 28, 2014)(calling Rule 56(f) Affidavit “vital”).

Here, the Rule 56(f) request was done formally, with the submission of a detailed Rule 56(f) Affidavit by Arie M. Spitz, one of the attorneys of record for Plaintiff. In his Affidavit, Spitz avers “Plaintiff cannot yet fully respond to, and oppose, TAMCO’s Motion for Summary Judgment”. *See* Aff., p. 1. Further, Mr. Spitz specifies that “the evidence that Plaintiff hopes to present in opposition to TAMCO’s motion...must be developed via depositions and additional written discovery”. *Id.* at 2.

The Court considers that Mr. Spitz then detailed what still needed to be completed in discovery. He averred that Plaintiff has not yet been able to depose Michael Shaffer, former employee of Plaintiff and the individual who executed the TAMCO leases. *Id.* at 2-3. Also, it was averred that Plaintiff has not yet taken the deposition of Anthony Rome, “Mr. Shaffer’s counterpart at Frontier who Plaintiff alleges was intimately involved in wrongful conduct”. *Id.* at 3. Further, it was averred that Plaintiff still needs to take other depositions, such as the deposition of a corporate representative of TAMCO and possibly depositions of employees of TAMCO, to flesh out allegations regarding TAMCO’s involvement in the selling/leasing of equipment to Plaintiff, the knowledge TAMCO had with respect to Michael Shaffer and his ability to execute leases. *Id.*

With regard to written discovery, the Court notes initial written discovery took place in this case in 2018. However, it was set forth in the Affidavit that Defendant Frontier is in the process of supplementing its responses, and “a significant amount of the evidence that will pertain to the interactions between Mr. Shaffer and Mr. Rome, as well as which will pertain to the improper conduct that gives rise to Plaintiff’s claim that its leases with TAMCO should be reformed, is likely to come from” the discovery produced by Frontier. *Id.* Finally, the Affidavit avers that the depositions could not be conducted earlier, as the supplemented discovery

responses were needed before the depositions, and the close of discovery was still months away.  
*Id.*

This Court finds that in review of Rule 56 of the West Virginia Rules of Civil Procedure, the case law, and Plaintiff's Response and Affidavit, Plaintiff's Rule 56(f) request must be granted, and the instant Motion for Summary Judgment shall be stayed and held in abeyance until the end of discovery, which is currently set for July 15, 2019. The Court considers the formal request of Plaintiff through its verified Affidavit. The Court also considers the specific requests for more discovery contained within the Affidavit. The Court further considers the fact that the discovery deadline is still several months away. The Court finds Plaintiff has met its burden to "articulate some plausible basis" for its belief that material discoverable facts still exist, have demonstrated a realistic prospect that material facts can be obtained within a reasonable time period, the discovery cutoff deadline as set forth in this Court's Scheduling Order, and has demonstrated good cause for not having conducted the discovery earlier. *See Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104, 106 (1996). In sum, the Court finds that to rule on the instant Motion for Summary Judgment at this juncture would be premature.

Accordingly, TAMCO's Motion for Summary Judgment shall be HELD IN ABEYANCE until the close of discovery, which is currently set for July 15, 2019 at which time TAMCO may request another hearing date if it wishes to renew its Motion. Further, the hearing on this Motion currently set for March 22, 2019 shall be CANCELLED.

### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that Defendant's Motion for Summary Judgment is HELD IN ABEYANCE until the close of discovery, which is currently



set for July 15, 2019. It is hereby further ADJUDGED and ORDERED that the hearing on this Motion currently set for March 22, 2019 shall be CANCELLED.

The parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any scheduling orders entered by this Court. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTER 3/14/19

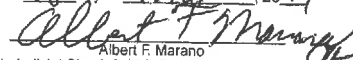


JUDGE PAUL T. FARRELL  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA,  
COUNTY OF HARRISON, TO-WIT;

I, Albert F. Marano, Clerk of the 15th Judicial Circuit and the  
18th Family Court Circuit of Harrison County, West Virginia, hereby  
certify the foregoing to be a true copy of the ORDER entered in the  
above styled action on the 14 day of March, 2019

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
Seal of this Court this the 18 day of March, 2019



Albert F. Marano  
15th Judicial Circuit & 18th Family Court Circuit Clerk  
of Harrison County, West Virginia