In the Circuit Court of Marion County, West Virginia

American Bituminous Power Partners, LP, Plaintiff,	)	
vs.)	)	Case No. CC-24-2018-C-130
Horizon Ventures of West Virginia, Inc., Defendant	)	

Order Granting, In Part, Motion for Summary Judgment of the Defendant, Horizon Ventures of West Virginia, Inc.

On the 15th day of January, 2020, the plaintiff, American Bituminous Power Partners, L.P., by its representative, Herbert Thompson, and by counsel, Robert F. Green and John F. McCuskey, and the defendant, Horizon Ventures of West Virginia, Inc., by its representative, Stanley Sears, and by counsel, Gregory H. Schillace, appeared pursuant to the scheduling order entered in the above-styled action for the purpose of the Final Pretrial Conference. Thereupon, the Court took up the motion of the defendant for summary judgment and the motion of the defendant for partial summary judgment.

After review of the motion for summary judgment of the defendant and the response to the motion for summary judgment of the plaintiff, the Court heard argument of counsel. The Court then **GRANTED, IN PART,** the motion for summary judgment of the defendant as provided more fully herein.

Further, the Court considered the motion for partial summary judgment of the defendant; the response of the plaintiff to the motion for partial summary judgment; and, the reply of the defendant in support of the motion for partial summary judgment. After hearing argument of counsel, the Court DENIED the motion for partial summary judgment and further DISMISSED, without prejudice, the paragraphs of the counterclaim seeking financial and other records from the plaintiff.

FINDINGS OF FACT

1. The Court **FINDS** that the primary issue in this litigation is the percentage used to determine the monthly rent owed by the plaintiff to the defendant.

2. The defendant, Horizon Ventures of West Virginia, Inc., is the owner and landlord, as defined in the various agreements at issue in this litigation, of the real property located in Marion County, West Virginia where the Grant Town Power Plant is located.

3. The plaintiff, American Bituminous Power Partners, L.P., is the tenant, as defined in the various agreements at issue in this litigation, of the subject property and is the operator of the Grant Town Power Plant.

4. Pursuant to the various agreements at issue in this litigation, the defendant, Horizon Ventures of West Virginia, Inc., leased to American Bituminous Power Partners, L.P., doing business in West Virginia as American Bituminous Power Partners, Limited Partnership, the real property owned by it in Marion County, West Virginia.

5. The November 29, 1989, Amended and Restated Lease Agreement between the defendant and the plaintiff was changed and modified by several subsequent written agreements such as, the Amendment to Amended and Restated Lease dated December 28, 1989; a Second Amendment to Amended and Restated Lease dated January 11, 1990; a March 31, 1993 letter agreement; a May 23, 1994 Settlement Agreement; and, a Third Amendment to Amended and Restated Lease dated April 1, 1993; as well as a May 28, 1996 Agreement to Resolve Pending Litigation.

6. The Third Amendment to the Lease provided that all use of “Foreign Fuel” by the plaintiff would be deemed to be for non-operating reasons and also provided for a committee formed by the plaintiff and the defendant for the purposes of monitoring the reclamation of “Local Fuel”.

7. The Third Amendment was declared void by the May 28, 1996 Agreement to Resolve Pending Litigation with the express language of the plaintiff admitting that as long as “Local Fuel” remained on the “Leased Premises” the use of “Foreign Fuel” was for non-operating reasons regardless of the quality of the “Local Fuel”.

8. On March 31, 1993 American Bituminous Power Partners, L.P., by its representative M.F. Erwin, agreed to a modification of the Amended Restated Lease Agreement of November 29, 1989; the December 29, 1989 Amendment to the Amended and Restated Lease Agreement; and the Second Amendment to the Amended and Restated Lease Agreement of January 11, 1990.

9. As related to the use of “Foreign Fuel”, American Bituminous Power Partners, L.P. agreed that from April 1, 1993 for a period of eighteen (18) years, all use of “Foreign Fuel” was for non-operating reasons requiring the payment of three percent (3%) of all gross revenues as rent to the defendant, Horizon Ventures of West Virginia, Inc.

10. On or about February 2, 1996 the defendant, Horizon Ventures of West Virginia, Inc., instituted the civil action styled: Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., Civil Action No. 96-C-32, Circuit Court of Ohio County, West Virginia. (hereinafter “1996 Action”).

11. The 1996 Action was resolved pursuant to the Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, L.P. and Horizon Ventures of West Virginia, Inc. entered into by the parties on or about May 28, 1996.

12. Following the execution of the May 28, 1996 Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, L.P. and Horizon Ventures of West Virginia, Inc; the defendant, Horizon Ventures of West Virginia, Inc., was paid rent by the plaintiff in accordance with the May 28, 1996 agreement based upon the use of “Foreign Fuel” being done for non-operating reasons.

13. After May 28, 1996 the plaintiff did not raise any issue regarding the percentage of rent; the existence of "Local Fuel"; or the modification of the agreement regarding the lease of the subject property by the May 28, 1996 Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, L.P. and Horizon Ventures of West Virginia, Inc. until July 29, 2013, when it filed its answer and counterclaim in the civil action styled: Horizon Ventures of West Virginia, Inc., a West Virginia corporation v. American Bituminous Power Partners, L.P., a Delaware limited partnership, Pleasant Valley Energy Company, a California corporation, American Hydro Power Partners, L.P., a Pennsylvania limited partnership, Civil Action No. 13-C-196G, in the Circuit Court of Ohio County, West Virginia, Business Court Division.

14. From the entry of the May 28, 1996 Agreement to Resolve Pending Litigation until a partial payment in December of 2012 the plaintiff, American Bituminous Power Partners, L.P., made payments as if "Local Fuel" remained on the lease premises as provided by the 1996 agreement.

15. The plaintiff has made no rent payments from January 2013 to the present.

16. The plaintiff made the same arguments regarding "Local Fuel" verses "Foreign Fuel" that it asserted in the 2013 litigation and that it is asserting in this litigation despite the admissions made in Section 2a of the May 28, 1996 Agreement and the express agreement to not make such claims after May 28, 1996.

17. From the execution of the May 28, 2019 agreement until the filing of the counterclaim in the 2013 action, the plaintiff paid and/or acknowledged that the monthly rent was due to be paid based upon the existence of "Local Fuel" and any use of "Foreign Fuel" being for a non-operating reason.

CONCLUSIONS OF LAW

1. A motion for summary judgment should be granted 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. Zimmerer v. Romano, 223 W.Va. 769, 679 S.E.2d 601 (2009).

2. The common law doctrine of waiver focuses on the conduct of the party upon against whom the waiver is sought. This doctrine requires that the party to have intentionally relinquished a known right. Williams v. Tucker, 2017 WL 2623965 (W.Va. Sup.Ct. June 13, 2017).

3. A waiver of a known contractual right may be by an express statement or agreement or it may be implied from the contract of the party who is alleged to have waived the right. Parsons v. Haliburton Energy Services, Inc., 237 W.Va. 138, 785 S.E.2d 844 (2016). To establish waiver, three (3) elements must exist. These elements are:

(1) the existence of a right;
(2) knowledge of the existence of a right; and,
(3) voluntary intention to relinquish.

Hoffman v. Wheeling Savings and Loan Association, 133 W.Va. 694, 57 S.E.2d 725 (1950).

4. The Court **FINDS** that the plaintiff was aware that if all of the "Local Fuel" was exhausted, it had the right under the November 29, 1989 Amended and Restated Lease Agreement to reduce the percentage upon which monthly rent was calculated and paid to the defendant.

5. The Court **FINDS** that the plaintiff voluntarily relinquished any claim that useable "Local Fuel" no longer existed from May 28, 1996 up through and including July 29, 2013 which is the date of the filing of the counterclaim in the 2013 litigation.

6. Accordingly, the Court **FINDS** that the defendant is entitled to a judgment as a matter of law with respect to the claim of overpayment of rent from May 28, 1996 up through and including, July 29, 2013 based upon the waiver by the plaintiff.

7. Collateral Estoppel acts to bar a claim if the following four (4) conditions are met:

(1) The issue previously decided is identical to the one presented in the action in question;

(2) There is final adjudication on the merits of the prior action;

(3) The party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and,

(4) The party upon whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

West Virginia Department of Transportation v. Veech, 239 W.Va. 1, 799 S.E.2d 78 (2017).

8. The West Virginia Supreme Court of Appeals held in West Virginia Department of Transportation v. Robertson, 217 W.Va. 497, 618 S.E.2d 506 (2005), that the doctrine of judicial estoppel:

> bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, (2) the position was taken in proceedings involving the same adverse party; (3) the party taking the inconsistent position received some benefit from the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party and the integrity of the judicial process.

9. The doctrine of res judicata or claim preclusion assures that judgments are conclusive thus avoiding re-litigation of issues that were or could have been raised in a previous action. Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc., 2017 WL 2537018 (W.Va. Sup.Ct. June 8, 2017). Res judicata relieves parties of the cost and vexation of multiple lawsuits as well as prevents inconsistent decisions and encourages reliance on prior adjudication. Id.

10. The Court **FINDS** that the doctrines of res judicata and collateral

estoppel do not apply to the claims asserted in the plaintiff's complaint.

11. Res judicata as applied by the West Virginia Supreme Court of Appeals prohibits not only the re-litigation of claims that were actually asserted in the prior action, but also precludes every other matter which the parties might have litigated as incident thereto. Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997).

12. The Court further **FINDS** that the claims to overpayment of rent asserted by the plaintiff are precluded from being asserted by the equitable doctrine of laches.

13. Laches applies where there is a delay in the assertion of a known right which works to the disadvantage of another or that the delay has been such that it warrants the presumption that the other party has waived any right. Warner v. Kittle, 167 W.Va. 719, 280 S.E.2d 276 (1981).

14. Laches is an equitable defense whose application depends upon the particular facts of each case. State ex rel. West Virginia Department of Health and Human Resources v. Carl Lee H., 196 W.Va. 369, 472 S.E.2d 815 (1996).

15. The defense of laches consists of two (2) elements, the first is unreasonable delay and the second is prejudice. State ex rel. Webb v. West Virginia Board of Medicine, 204 W.Va. 234, 506 S.E.2d 830 (1998).

16. The Court **FINDS** that the unreasonable delay by the plaintiff in attempting to claim an overpayment of rent requires the application of the doctrine of laches, therefore, the plaintiff is precluded from seeking any claimed overpayment of rent prior to July 29, 2013.

17. The plaintiff continually paid and/or acknowledged that the rent was based upon the percentage determined by the existence of useable "Local Fuel" from May 28, 1996 through July 29, 2013.

18. The plaintiff never made any claim of overpayment prior to the filing of the counterclaim in the 2013 civil action.

19. The course of performance between the parties is an appropriate factor to consideration as to meaning of the contractual provision. Young v. McIntyre, 223 W.Va. 60, 672 S.E.2d 196 (2008); Fraternal Order of Police v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996).

20. Written contracts may be modified by the post agreement course of performance of the contracting parties. Doctors Hospital of Hyde Park, Inc., v. Desnick, 336 B.R. 357 (N.D. Ill. 2005).

21. The Court **FINDS** that pursuant to Rule 56 of the West Virginia Rules of Civil Procedure there are no genuine issues of material fact upon which the plaintiff can prevail with respect to any claimed overpayment of rent on or before July 29, 2013.

22. The Court **FINDS** that the defendant is entitled to a judgment as a matter of law with respect to the claims of overpayment of rent asserted by the plaintiff.

Accordingly, based upon the foregoing findings of fact and conclusions of law, the motion for summary judgment of the defendant is **GRANTED, IN PART**, as provided more fully herein.

The objections and exceptions of the parties are hereby preserved for the record.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Submitted by:
s/Gregory H. Schillace
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/s/ James H Young Jr.
Circuit Court Judge
16th Judicial Circuit

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