

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

DEBRA BISHOP, as Executor of the Estate of Dallas
Runyon, and DAVID E. RUNYON,

Plaintiffs,

vs.

Civil Action No.: 17-C-108
Presiding: Judge Akers
Resolution: Judge Wilkes

CITIZENS TELECOMMUNICATIONS
COMPANY OF WEST VIRGINIA,
FRONTIER WEST VIRGINIA, INC., and
APPALACHIAN POWER COMPANY,

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON THEIR TRESPASS AND UNJUST ENRICHMENT CLAIMS**

On this 26th day of June 2023, came the Court upon Plaintiffs' Motion for Partial
Summary Judgment on Their Trespass and Unjust Enrichment Claims.

The parties have fully briefed the issues necessary. Oral argument was heard at a
hearing held before the undersigned on a prior day. So, upon the full consideration of the
issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

This civil action surrounds Plaintiffs' property in Mingo County, West Virginia,
which is encumbered by an easement involving telecommunication poles involving
Defendant Frontier. *See* Pl's Mot., p. 2; *see also* Compl. Plaintiffs have sought the
relocation of facilities in order to develop natural resources on said property. *Id.* at 3.

On January 7, 2022, Plaintiffs filed the instant Plaintiffs' Motion for Partial
Summary Judgment on Their Trespass and Unjust Enrichment Claims, seeking summary

judgment in their favor on their trespass and unjust enrichment claims. *See* Pl's Mot., p. 6. Plaintiffs argue this is appropriate because there is no genuine issue of material fact that Frontier has been unjustly enriched by its unlawful use of Plaintiffs' property to provide telephone and internet service to its customers. *Id.* at 7.

On February 7, 2022, Frontier filed its Opposition, in which it argued Frontier's lines are on poles under a license from Appalachian Power Company in which it pays payments on, and Frontier is entitled to use the old poles until the Plaintiffs cooperate reasonably and in good faith with Frontier's relocation under the Easements. *See* Def's Resp., p. 11. Further, Frontier claims the motion should be denied as to the unjust enrichment claim because it is a written contract, namely the 1939 and 2014 Easements which control and cover the parties' dispute, and because Plaintiffs have unclean hands by refusing to cooperate with Frontier's relocation. *Id.* at 16-17.

On February 21, 2022, Plaintiffs filed their Reply, reiterating its position that Frontier has no right to remain in its current location, that Frontier is not entitled to demand the easement of its choice, and that the record establishes that the Runyons have cooperated in good faith to negotiate the terms of an easement, but that Frontier is refusing the offer because of its requirement that Frontier maintain the 18-foot clearance necessary. *See* Reply, p. 1-2.

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 the instant motion, Plaintiff seeks summary judgment in their favor on their trespass and unjust enrichment claims. See Pl’s Mot., p. 6. Further they seek summary

judgment on the proper method for calculating compensatory damages on these claims, in the amount of \$7,919,454.95. *See* Def's Resp., p. 1. The Court considers the 1939 Easement and the 2014 Easement at the heart of this litigation. Frontier's telecommunication lines are currently on/remain on a "historical" set of three Appalachian Power utility poles (hereinafter "the old poles") placed under a 1939 Easement¹. *See* Def's Resp., p. 1. Appalachian Power installed "new poles" in 2015 under a new easement signed by Appalachian and Plaintiffs in 2014 (hereinafter "the 2014 Easement"). *Id.* The Court further notes that through a Joint Use Agreement between Appalachian Power and Frontier, Frontier's "facilities" resided on Appalachian Power's poles. *See* Pl's Mot., p. 3.

It does not appear to be in dispute that the 1939 Easement contained a provision allowing the property owner to request relocation of Appalachian Power's poles and facilities if they prohibited the commercial development of the property. *See* Pl's Mot., p. 1; *see also* Def's Resp., p. 3. Evidence in the record shows in 2008, Gene Brinager and Dallas Runyon purchased the property from Mr. Floyd's heirs, and in 2009, Gene Brinager and his wife sold their interest in the property to David Runyon. *Id.* at 2. Plaintiffs aver that the Runyons purchased the property in order to develop its natural resources, and realized in the process that the old poles (and lines located on them) would need to be relocated. *Id.*; *see also* Def's Resp., p. 4. Subsequently, in 2014, the Runyons and Appalachian Power entered into the 2014 Easement. *Id.* at 3; *see also* Def's Resp., p. 4.

¹ The 1939 Easement was executed by prior property owner W.T. Floyd and Appalachian Power Company. *See* Pl's Mot., p. 2.

The Court considers that the parties have competing theories on Frontier's continued presence on the telecommunication lines. Plaintiffs contend that the 2014 Easement superseded the 1939 Easement. *See* Pl's Mot., p. 3. Frontier contends that the 2014 Easement did not immediately cancel the 1939 Easement, and instead it remains in effect until all the utilities have been relocated (and that it is being prevented from relocating by Plaintiff's refusal to sign an easement contemplated by the 2014 Easement). *See* Def's Resp., p. 2, 5. Plaintiff, in turn, avers that it has offered an easement to Frontier, but it is Frontier who will not agree to the easement. *See* Reply.

The Court notes that Frontier points out that Appalachian Power's other licensee, Suddenlink Communications, remained on the old poles for an additional two years after Appalachian Power relocated. *Id.* at 2. In fact, Frontier's posits that when it tried to arrange its relocation to the new poles only two months after Suddenlink, Plaintiff refused and instead sued. *Id.* at 2, 8. The Court also considers Frontier asserts that Plaintiffs cannot assert a claim for unjust enrichment as they have unclean hands, by refusing to cooperate in allowing Frontier to relocate. *Id.*

With regard to trespass, the Court considers that Plaintiffs allege Frontier has trespassed on their property by remaining on the old poles, but Frontier alleges Plaintiff is refusing to cooperate in signing a needed easement for it to relocate to the new poles. *See* Def's Resp., p. 1-2. Further, Frontier avers it was not possible for it to move until Suddenlink moved first. *Id.* at 3.

The Court finds Plaintiffs have not established that no genuine issue of material fact remains as to their trespass and unjust enrichment claims. These claims surround the rights of Frontier to remain on the old poles until the contemplated contractual relocation

to the new poles is complete. The Court finds, as described above, there are many fact issues in dispute with regard to this question. If Frontier prevails at trial, it cannot be liable for trespass or unjust enrichment due to remaining on the old poles.

Further, regarding damages, Plaintiff proffers the evidence in the form of its expert, Robert Baldwin's lost profit calculation. *See* Pl's Mot., p. 4-5. It also uses expert opinion of the value of timber and coal on the subject property. *See* Def's Resp., p. 8. The Court finds each party's experts may present evidence of damages at trial, and it would be inappropriate and premature for this Court to conclude that no genuine issue of material fact remains as to the amount of damages at this juncture.

Given all of these facts that are in dispute, the Court finds Plaintiffs' motion must be DENIED.

It is hereby ADJUDGED AND ORDERED that Plaintiffs' Motion for Partial Summary Judgment on Their Trespass and Unjust Enrichment Claims is hereby DENIED. 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: _____

June 24, 2023


MARYCLAIRE AKERS, JUDGE
BUSINESS COURT DIVISION