

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 FRONTIER'S MOTION FOR SUMMARY JUDGMENT

On this 21 day of June 2023, came the Court upon Frontier's Motion for
Summary Judgment.

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 utilized by
Defendant Frontier. *See* Def's Mot., p. 5; *see also* Pl's Resp., p. 3; Compl. Plaintiffs
have sought the relocation of facilities in order to develop natural resources on said
property. *See* Pl's Resp., p. 3.

On January 7, 2022, Frontier filed the instant Frontier's Motion for Summary Judgment, seeking summary judgment against Plaintiffs. *See* Def's Mot., p. 1.

On a prior day, prior Defendant Appalachian Power Company filed its Opposition to the instant motion. The Court notes Defendant Appalachian Power Company has now been dismissed from this lawsuit.

On February 7, 2022, Plaintiffs filed their Opposition, in which they argued a jury should decide the parties' claims, that the parties' respective mining engineers, having reviewed the evidence, have come to very different conclusions about the value of Plaintiffs' proposed mine, and only a jury could resolve that disagreement. *See* Pl's Resp., p. 2.

On February 21, 2022, Frontier filed its Reply, reiterating its position that Frontier is entitled to summary judgment.

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, Frontier seeks summary judgment against Plaintiffs. As an initial matter, the Court considers there was a 1939 Easement and a 2014 Easement surrounding the telecommunication lines/facilities of Frontier other utilities, such as Suddenlink. These Easements are at the heart of this litigation. By way of background, 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* Order Denying Plaintiff’s Motion for Summ. J. 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. *Id.*

With regard to the instant motion, all of the claims surround whether Frontier has rightfully remained on the old poles. While Plaintiffs’ position is the 2014 Easement immediately superseded the 1939 Easement, Frontier contends the 2014 Easement contemplates that the 1939 Easement would remain in effect until all the utilities relocated to the new right of way, and then Appalachian Power removed the old poles. *See* Reply p. 5. In support of its position that the 2014 Easement did not create an immediate termination of the 1939 Easement, Frontier argues Plaintiffs conceded that Appalachian Power and Suddenlink’s relocation to the new poles were consistent with the terms of the 2014 Easement, and it took months and years for those entities to do so. *Id.*

Further, Frontier alleges it is “trapped” (because as a public utility it cannot abandon its lines) on the old poles, as Plaintiff, after asking Frontier to relocate, is refusing to give Frontier permission to use the new right of way. *See* Reply, p 5-6. The Court considers that Plaintiff, on the other hand, argues that a property owner is not required to “cooperate” with a trespasser by providing the trespasser with a free easement, pointing to evidence in the record that shows Frontier knew it was required to move its lines from the old poles. *See* Pl’s Resp., p. 1-2. Further, with regard to this easement, Plaintiff avers it cannot be forced to offer a trespasser whatever easement

¹ The 1939 Easement was executed by prior property owner W.T. Floyd and Appalachian Power Company.

Defendant demands, and Plaintiff denies it has done anything to prevent Frontier from removing its lines from the property. *See* Pl's Resp., p. 11-12.

Plaintiff has alleged a claim for tortious interference. Given the factual nature of the dispute regarding Frontier's reasons for not relocating to the new poles (and Plaintiff's evidence of contracts to develop gas wells on the property, the Court cannot find that no genuine issue of material fact remains, and find summary judgment in Frontier's favor. *See* Pl's Resp., p. 13. If the jury finds in favor of Plaintiff on the tortious interference claim, the damages Plaintiff claims can likewise not be decided on this motion for summary judgment. Plaintiff and Defendant each have their own evidence and expert testimony to proffer damages evidence to the jury. Plaintiff avers it has multiple mining and timbering experts who will testify as to future economic benefits and damages amounts. *Id.* at 14. This Court cannot conclude that no genuine issue of material fact remains at this juncture. The motion must be denied as to this claim.

With regard to Plaintiffs' claim for unjust enrichment, this too surrounds whether or not Frontier is rightfully or wrongfully on the old poles. Plaintiffs allege Frontier has obtained inequitable benefits from its unauthorized use of Plaintiffs' land. *See* Pl's Resp., p. 17. Further, they allege these benefits approach nearly \$8 million. *Id.* As stated, the Court cannot find that no issues of fact exist regarding Frontier's use of the old poles. Further, if Plaintiff is successful in its claim, the amount of damages is for the jury to determine. *See* Ord. Denying Pl's Mot. for Summ. J. on Trespass and Unjust Enrichment Damages. The motion must be denied as to this claim.

Further, the Court agrees with Plaintiffs that any claim for lost profit damages is a factual dispute that can only be resolved by a jury. *See* Pl's Resp., p. 18. If Plaintiffs

prevail at trial on their trespass claim, then that trespass would be an obstacle to Plaintiffs' plans to develop the resources that Plaintiffs encountered. Frontier avers mining and timbering operations are limited by access/property issues, and Plaintiffs' deny this. *See* Def's Mem., p. 14. The Court cannot find summary judgment in favor of Frontier at this stage.

The Court also notes Frontier seeks summary judgment on Plaintiffs' trespass claim. *See* Def's Mem., p. 3. As described above, there are genuine issues of material fact that remain regarding whether or not Frontier was on the old poles rightfully under the 2014 Easement, or prevented from timely relocating to the new poles. This includes any facts or evidence the jury would need to consider attributable to Plaintiffs.

Finally, Plaintiffs assert a cause of action for declaratory judgment that Frontier is not authorized to be on the old poles. *See* Def's Mem., p. 30. Frontier argues this Court should grant summary judgment in its favor for the same reasons that it should grant summary judgment in its favor on the trespass claim. *Id.* As discussed above, this Court cannot find no genuine issue of material fact exists as to this issue. While the 2014 Easement certainly contemplated all utilities relocating to the new poles, numerous fact issues remain as to whether or not Frontier has rightfully remained on the old poles or whether they were prevented by other entities from relocating from 2015, when the new poles were installed, to present. *See* Def's Mem., p. 48. This includes, for example, evidence of governmental regulations regarding the order of utilities moving, a delay caused by the incarceration of one of the Plaintiffs, and a required eighteen-foot clearance at the new location. *Id.* at 7, 48-53.

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

It is hereby ADJUDGED AND ORDERED that Frontier's Motion for Summary Judgment 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 27, 2023



MARYCLAIRE AKERS, JUDGE
BUSINESS COURT DIVISION