

**In the Circuit Court of Marion County, West Virginia**

**American Bituminous Power  
Partners, LP,**  
Plaintiff,

v.

Case No. CC-24-2018-C-130  
Judge Michael Lorensen

**Horizon Ventures of West Virginia,  
Inc.,**  
Defendant

**ORDER DENYING AMBIT'S MOTION TO STAY EXECUTION OF ORDER AND  
REQUEST FOR BRIEFING SCHEDULE TO ADDRESS AMBIT'S MOTION TO ALTER  
OR AMEND, AND FOR OTHER RELIEF**

On November 7, 2023, the plaintiff, American Bituminous Power Partners, L.P. (AMBIT), by counsel, filed a Motion to Stay Execution of Order ("Motion to Stay") and Motion to Alter or Amend, and for Other Relief ("Motion to Alter or Amend.") On November 13, 2023, and the defendant, Horizon West Virginia, Inc. (Horizon), by and through its counsel, Mark A. Kepple, Esq. of Bailey & Wyant, P.L.L.C. and Joseph G. Nogay, Esq. of Selitti, Nogay & Nogay, P.L.L.C. filed its response in opposition AMBIT's Motions.

I. Procedural History:

This matter came before the Court on remand from the West Virginia Supreme Court of Appeals' Order in *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners*, L.P., 246 W. Va. 374, 873 S.E.2d 905 (2022). There, the Supreme Court found that factual questions existed about the interaction between the 1989 Lease Agreement, the 1996 Settlement Agreement, and the Admissions within the 1996 Settlement Agreement, which factual questions were to be resolved by a factfinder:

While the 2017 Order appears to have resolved some issues while creating others, reasonable minds could disagree as to the scope of the 2017 Order and whether it did or did not resolve those apparent ambiguities. Despite the complexity of the positions advanced by AMBIT and Horizon, the solution, while perhaps not expedient, is simple. We find that the answer to the ambiguities contained in these various documents is not ours to give, nor is it the business court's to give – the factfinder must supply the answers to these questions. **There is simply too much ambiguity and too many factual disputes in the Lease Agreement, the 1996 Settlement Agreement, and AMBIT's admissions for this case to be appropriate for summary judgment when viewed through the lens of the 2017 Order and the ostensibly conflicting conclusions reached in the summary judgment orders on appeal to this Court.**

*Id.* at 386, S.E.2d at 917 (emphasis added).

At the final Pre-Trial Conference held in this matter on July 28, 2023, the parties agreed to a bench trial to determine the rent calculations and to a separate hearing on damages, “wherein the rent payments will be calculated based upon the calculations determined via the bench trial”. This agreement was set forth in the Court’s July 28, 2023 Pretrial Conference Day Order and Order Denying Motion for Self Help (“July 28, 2023 Pre-Trial Order.”) Neither party filed any objections to the July 28, 2023, Pre-Trial Order, further evidencing their agreement thereto.

Pursuant to the July 28, 2023, Pre-Trial Order, the bench trial took place from October 10, 2023 – October 12, 2023. On October 31, 2023, the Court entered its ORDER making Findings of Fact and Conclusions of Law, detailing the factual findings supporting the Court’s holding that plaintiff failed to present evidence to support its complaint’s liability theory and that defendant presented evidence to prove its counterclaim.

AMBIT’s instant Motion to Alter or Amend is predicated upon its assertion that the purpose of the bench trial was to determine whether rent was owed, but not to actually seek an award compelling payment of that amount owed. That assertion is contrary to the West Virginia Supreme Court’s directives, the agreement of the parties

at the Pre-Trial conference and Court's July 28, 2023, Pre-Trial Order.

The Court, by agreement of the Parties, served as the fact finder required by the West Virginia Supreme Court. The evidence presented at the trial established that the parties entered into the 1996 Agreement intending to resolve pending litigation, to eliminate future disputes over the reason Foreign Fuel was used, to protect Horizon from AMBIT allowing the permit on the coal to expire, and to eliminate future disputes over the quality of the waste coal in question, and, critically, that the parties intended the 1996 Admissions to establish a factual predicate for rent calculations and to be prospective, and the parties are bound by the terms of the 1996 Agreement in the determination of the payment of rents.

The evidence showed that Local Fuel is, and has been, present at the Demised Premises, and that the 1996 Admissions are still, therefore, effective, the Court finds in favor of Horizon on AMBIT's claims as set forth in AMBIT's Complaint.

Based upon the testimony of the witnesses and the evidence at the trial, the Court found:

1. That the 1996 Agreement specifically dispensed with any issue as to the quality of the coal. The economic viability of the coal for use in this power plant is a quality of coal issue and thus, not determinative of any fact admitted by AMBIT in the 1996 Agreement.
2. That Horizon did not breach the Lease Agreement.
3. That AMBIT did breach the Lease Agreement by failing to pay agreed-upon rent since 2013.
4. That AMBIT is not entitled to any rent reimbursement from the years 1996 – 2013.

Because the evidence showed that Local Fuel is, and has been, present at the

Demised Premises, and that the 1996 Admissions are still therefore effective, the Court found for Horizon on Horizon's claims as set forth in Horizon's Counterclaim.

The Court finds that the findings referenced above, along with the scope of the trial as set forth in the July 28, 2023, Pre-Trial Order, the Findings of Fact and Conclusions of Law and the relief Ordered in the Bench Trial Order of October 31, 2023, clearly falls within the jurisdictional purview of the West Virginia Declaratory Judgment Act. The Act contemplates "Further relief," which permits a court to grant further relief based on a declaratory judgment "whenever necessary or proper," and further states that "[t]he application therefor shall be by petition to a court having jurisdiction to grant the relief." W. Va. Code § 55-13-8. This Court finds that Horizon's pursuit of an Award and Determination of the rent was to be paid according to the lease agreement and the 1996 Agreement to be an appropriate use of the West Virginia Declaratory Judgment Act.

In this regard, the Court finds that Horizon's Answer and Counterclaim, cited *supra*, clearly asks this Court for "[a]ny and all other relief proved by the evidence at the trial of this matter or deemed appropriate by the Court." Horizon's Ans. and Countercl., p. 23, ¶ 1. The 2019 Order referenced by Horizon was primarily concerned with dismissing those claims that were deemed premature because Senior Debt was not retired. Evidence presented at trial was that Senior Debt was retired. This Court did not dismiss Horizon's claim and right to seek the rent payments and have such rent payments awarded. More importantly, AMBIT's counsel agreed that there would be a second trial for damages wherein the rent payments would be calculated. As set forth in the July 28, 2023, Day Order described *supra*, AMBIT *agreed* that the purpose of the trial was to a) determine the appropriate rent calculation for each period of time, and b) determine damages "wherein the rent payment amounts will be calculated based upon the calculations determined via the bench trial." Thus, there is and was no prejudice, surprise, or unfairness to AMBIT. Additionally, the corporate representative of AMBIT testified that AMBIT would honor this Court's Order if the Court found in Horizon's favor

– which it did.

The Court properly found that AMBIT is required to pay its unpaid balance of rents owed to Horizon from 2013 to the present to Horizon at the rate of 2.5% of AMBIT's gross revenue.

The Court properly ORDERED that AMBIT shall provide this Court and Horizon with all annual financial reports detailing gross revenues earned by AMBIT since January 1, 2013, as well as all transactional reports related to the sale of any product or waste produced by the Grant Town Power Plant since January 1, 2013, within seven (7) days of the entry of the ORDER. Because this is information likely required to be regularly provided, as part and parcel of AMBIT's normal business practices, and it is required to be submitted to Horizon under the contractual documents, there is no reason for AMBIT not to provide this information, in accordance with the Court's ordered deadlines, so that the parties may be adequately prepared for the December 15, 2023, hearing on damages.

Because AMBIT was found not to have presented evidence at trial to support its claims in its complaint, it is appropriate to require AMBIT to immediately tender the rent payments it owes to Horizon, that have been withheld by AMBIT since January 1, 2013, and that AMBIT immediately pay Horizon rent moving forward. There is no reason to delay the payment of rent as it should have been paid according to the requirements of the contractual documents since January 1, 2013. AMBIT shall continue to pay rent at 2.5% of Gross Revenues in concert with the 1996 Agreement and the 1989 Amended and Restated Lease until all Local Fuel, regardless of quality, is consumed and no longer present on the site.

The Court now turns to AMBIT's remaining complaints about the Bench Trial Order. These complaints can be broadly categorized as simply as AMBIT's disagreement with the Court's Bench Trial Order and the Findings and Conclusions made therein. There are no credible legal reasons offered by AMBIT's Motion to Alter or Amend to merit any different analysis by this Court. The West Virginia Supreme Court specifically asked a factfinder to make the decisions regarding rent owed between the

parties. The parties agreed to allow the Court to be that fact finder and agreed to how that fact finding would take place—first, via bench trial determine liability and second, via a damages hearing. The Court, after three (3) days of trial, made those findings, and contrary to AMBIT’s complaints, did not make the findings that AMBIT apparently wished it would.

AMBIT’s claimed “concerns” are an improper attempt by AMBIT to relitigate the trial, after its conclusion, and to attempt to delay this matter and ignore its obligations.

The Court takes note that AMBIT was chastised for engaging in this type of conduct against Horizon by the West Virginia Intermediate Court of Appeals:

In its second assignment of error, AMBIT contends that the circuit court's July 19, 2022, order fails to reflect the arguments and proceedings below and, thus, creates obvious injustice. **Upon our review of the extensive record, we find no error in the circuit court's order and believe that AMBIT's argument in this vein is nothing but a veiled attempt to relitigate the validity of the consulting agreement and breach of the same.**

*Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, 248 W. Va. 572, 889 S.E.2d 294, 299–300 (Ct. App. 2023) (emphasis added); see also *Id.*, S.E.2dat 300 (“[T]hroughout this litigation, **AMBIT has attempted to confuse the actual matter in controversy in this case and attempts to raise a number of facts that have absolutely no relevance to the very limited issue of whether AMBIT breached the parties’ consulting agreement.**”)[1] (emphasis added).

Additionally, AMBIT’s Memorandum in Support of its Motion to Alter or Amend complains that this Court improperly denied AMBIT’s attempt to present testimony in rebuttal and that this Court did not properly account for any number of years-old opinions which AMBIT contends resolved the issues before this Court. AMBIT Memo, pp. 10 – 15. This Court followed West Virginia law in sustaining Horizon’s objection to AMBIT’s improper attempt to submit evidence in rebuttal, and this Court followed the West Virginia Supreme Court’s directives in its opinion remanding this matter and

conducted the trial pursuant to the agreement of the parties. The fact that this Court did not agree with AMBIT's theory of the case, nor was it persuaded that AMBIT met its burden on any of the elements it was required to meet to succeed on any of its claims or defenses to Horizon's claims, is not a proper basis to grant AMBIT's Motion to Alter or Amend.

Finally, AMBIT asks that this Court provide it with Findings of Fact and Conclusions of Law in relation to the "issues" raised in a series of motions filed earlier in this case, *i.e.*, its repeated unsupportable claims that *res judicata* applies to bar this Court from hearing these claims. AMBIT Memo, p. 16.

This Court finds that the West Virginia Supreme Court rejected AMBIT's argument that the 2017 Order definitively resolved this case in AMBIT's favor, and rejects the premise that *res judicata* therefore applied, when it remanded this case for fact finding determinations and when the Supreme Court held "AMBIT asserts that this demonstrates a definitive allegiance on behalf of the business court to the findings made in the 2017 Order that paragraph six of the Lease Agreement controls the calculation of rent regardless of the admissions. We disagree..." See *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 246 W. Va. 374, 386, 873 S.E.2d 905, 917 (2022); At fn. 27. Nonetheless, this Court will further explain why AMBIT fails to mount a successful argument in this regard. To this end, this Court FINDS and CONCLUDES as a matter of law and fact the following:

1. The West Virginia Supreme Court of Appeals reversed the lower Court's grants of summary judgment and ordered this Court to resolve the factual disputes between these agreements. This would be a pointless finding if a question of law "interpreting" the 2017 Order could have been found to have resolved this issue

when it was before the West Virginia Supreme Court. See *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 246 W. Va. 374, 386, 873 S.E.2d 905, 917 (2022); see also *Id.* at fn. 27<sup>[2][3]</sup>

2. This Court finds that AMBIT does not provide any legitimate legal support for its repeated, and non-meritorious, argument that the issues that were tried, at the direction of the West Virginia Supreme Court of Appeals and by agreement of the parties, were disposed of by a 2017 Order that the West Virginia Supreme Court addressed in its opinion remanding this case.
3. This Court finds that the Supreme Court specifically tasked this Court with resolving all factual ambiguities between the 1989 Lease Agreement, 1996 Settlement Agreement, and the Admissions in that settlement agreement. See *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 246 W. Va. 374, 386 873 S.E.2d 905, 917. (2022). This Court, as the factfinder chosen by the parties, has done so, pursuant to an agreement between the parties.
4. To the extent that AMBIT continues to claim that these issues were already decided by a prior court in 2017, that presents a question of law, not of fact, which precludes any further findings of fact by this Court. If the Supreme Court believed that the *res judicata* issue was unresolved, it would have resolved that question itself or directed this Court to resolve it. It did not do so, and, in fact, identified the 2017 Order multiple times as “confusing” or



“ambigu[ous].” See, e.g., *Id.* at 374 - 375, S.E.2d at 913, 917 – 918.

This Court agrees and finds that the 2017 Order did not definitively resolve the issues tried by the parties to the Court in this proceeding.

5. This Court further finds that Judge Young presided over both the 2013 litigation between the parties *and* the current case, the latter of which was filed approximately a year after conclusion of the former, and that had he actually resolved this matter in the 2013 litigation, as AMBIT improperly claims, he would have confirmed the same immediately, instead of allowing the parties to continue with the instant litigation or that 2013 litigation would have been found dispositive of this case by the West Virginia Supreme Court .
6. This Court further finds that at no time in any of the proceedings before this Court, from 2018 to the present, including at the bench trial in this matter, has AMBIT offered any legal or factual justification as to why the 1996 Admissions *would not* apply prospectively. As such this Court properly rejected AMBIT’s unsupported claims regarding the Admissions.
7. This Court finds as a matter of law that the 2017 Order does not resolve the applicability of the Admissions as a matter of law, and that *res judicata* did not and does not apply to bar Horizon’s claims.

Having fully considered the parties’ briefs, the trial transcript, and this Court’s Order of October 31, 2023, the Court hereby DENIES Plaintiff’s Motion to Stay and DENIES Plaintiff’s Motion to Alter, Amend and for other Relief and awards Horizon its fees and costs associated with its response necessitated by AMBIT’s motion practice.

The Exceptions and Objections of Counsel are noted. The Parties and their Counsel are ORDERED to Appear on December 15, 2023, at 1:00 at the Berkely County Judicial Center for the Damages Hearing. AMBIT is ORDERED to immediately comply with the Court's other directives set forth in the October 31, 2023, Bench Trial Order.

The Clerk shall transmit a copy of this Order to all counsel of record.

So ordered this 14<sup>TH</sup> day of November, 2023.

Respectfully submitted by:

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[1] The West Virginia Reporter has not yet issued page numbers for this Opinion.

[2] "In an order entered after the summary judgment orders on appeal, the business court noted that "by and through its prior Orders the rate of rent over time and the practical tools for calculating rent in ar[r]ears and forward were determined as matters of law." AMBIT asserts that this demonstrates a definitive allegiance on behalf of the business court to the finding made in the 2017 Order that paragraph six of the Lease Agreement controls the calculation of rent regardless of the admissions. We disagree; that position ignores that the court was "adopting and incorporating as if fully set forth herein the prior Orders themselves and the findings of fact, conclusions of law delivered by this Court *from March 15, 2019, to the present*[" (emphasis added)."

[3] Indeed, this Court denied AMBIT's Motion to apply *res judicata* well before trial. See Dec. 29, 2022 Ord.

**/s/ Michael Lorensen**

Circuit Court Judge

16th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit [www.courtswv.gov/e-file/](http://www.courtswv.gov/e-file/) for more details.