

In the Circuit Court of Marion County, West Virginia

**Horizon Ventures of West Virginia, Inc.,)
a West Virginia Corporation,)
Plaintiff,)**

vs.))

**American Bituminous Power Partners,)
LP,)
Defendant)**

Case No. CC-24-2018-C-76

**ORDER GRANTING DEFENDANT AMERICAN BITUMINOUS POWER PARTNERS,
L.P.'S MOTION FOR SUMMARY JUDGMENT**

On the 6th day of December, 2018, appeared the parties - the Plaintiff, through counsel, Jeffrey V. Kessler, and the Defendant, through counsel, Roberta F. Green for a hearing on Defendant's Motion for Summary Judgment.

Having reviewed the motions, memoranda, and arguments of the parties, and having researched the legal issues presented, the Court is of the opinion that Defendant's Motion for Summary Judgment should be granted. In support of its decision, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. On May 14, 2018 Plaintiff initiated this breach of contract action in the Circuit Court of Marion County. The complaint consists of a breach of contract claim and specifically alleges that the Defendant has failed to pay a contractual \$50,000.00 annual consulting fee due and owing as of January 2018 pursuant to a June 25, 1987 agreement between the parties.

2. The June 1987 contract between the parties provides in relevant part that Plaintiff is to "provide expertise and consulting services within its field to [Defendant] in its projects in West Virginia" for which the Defendant "will pay unto

[Plaintiff] the sum of \$50,000.00... being due... on the same date of each succeeding year as long as such plant continues to produce power.” The contract further provides that “[n]either party may assign, transfer, encumber or otherwise alienate this Contract and Agreement or its interests herein without the prior written consent of the other.”

3. There is no dispute that the parties entered into the contract, nor is there any dispute regarding the language in the contract or the duties flowing therefrom.

4. In response to Plaintiff's Complaint Defendant filed a Motion to Dismiss or in the Alternative for Summary Judgment on or around June 13, 2018. Upon hearing the motion, the Court denied Defendant's Motion to Dismiss and deferred ruling on the alternative request for Summary Judgment until the parties had the opportunity to participate in discovery.

5. Defendant renewed its Motion for Summary Judgment on or around November 7, 2018. The Court held a hearing on Defendant's motion on December 6, 2018 at which time the bulk of discovery which had been exchanged consisted of the 30(b) depositions of each party's 30(b) representative.

6. Defendant's renewed Motion for Summary Judgment requests judgment from the Court on the following grounds:

- a. That the underlying contract between the parties is unenforceable as written as it is unconscionable and violative of public policy;
- b. That the underlying contract between the parties is unenforceable as written as there has

been a frustration of its purpose;

- c. That the underlying contract between the parties is unenforceable as written in light of changed circumstances between the parties;
- d. That the underlying contract between the parties is inequitable and unfair evidencing a lack of a meeting of the minds; and
- e. That Plaintiff has breached its duty of good faith and fair dealings to such a level as to create a material breach of the contract.

7. In support of its positions the Defendant spent great length recounting recent litigation between the parties initiated by Plaintiff and how the relationship had been strained by litigation, discovery disclosures, and other offenses allegedly perpetrated by Plaintiff against the interest of Defendant in more recent years. The Plaintiff acknowledged the litigation and discovery disclosures' existence but asserted that the same had no effect in the instant matter.

8. Additionally Defendant proffered the deposition testimony of Stanley Sears, President of Horizon (Exhibit 1); a portion of Day One of the trial transcript of Ohio County Business Court Civil Action Number 13-C-196, November 28, 2017 (Exhibit 2); a portion of Day Two of the trial transcript of Ohio County Business Court Civil Action Number 13-C-196-C-70, March 20, 2018 (Exhibit 3); a portion of Day One of the trial transcript of Ohio County Business Court Civil Action Number 13-C-196, November 28, 2017 (Exhibit 4); a portion of Day Two of the trial transcript of Ohio County Business Court Civil Action Number 13-C-196-C-70, March 20, 2018 (Exhibit

5); a portion of the Amended and Restated Lease Agreement between the parties regarding the Grant Town/Joanna Parcels (Exhibit 6); and a portion of Day One of the trial transcript of Ohio County Business Court Civil Action Number 13-C-196-C-70, March 19, 2018 (Exhibit 7).

9. Plaintiff filed a brief and perfunctory response merely asserting that the case is in its infant stages and that further factual development is necessary such that the Court should deny Defendant's Motion for Summary Judgment.

10. At the close of the hearing the Court took the motion under advisement and requested that the parties submit proposed findings of fact and conclusions of law.

11. Defendant timely submitted its proposed findings and conclusions. Plaintiff requested an extension and upon filing its proposed findings and conclusions attached and referenced an affidavit of Stanley Sears dated January 11, 2019, an affidavit of John Karras dated December 3, 2018, as well as a portion of deposition testimony of Richard Hallaran.

12. Immediately after the filing of Plaintiff's proposed findings and conclusions Defendant filed Objection to Proposed Order or, to the Extent Available, Motion to Strike Plaintiff's proposed findings and conclusions as the filing provides affidavits and arguments not previously before the Court.

13. The affidavits of Stanley Sears (January 2019) and John Karras were not before the Court at any time prior to the submission of the proposed findings and conclusions filed by Plaintiff on January 14, 2019. Therefore, they will not be considered by the Court for purposes of this ruling.

14. The deposition transcript of Richard Hallaran was not available at the

time of the hearing but referenced by both parties. The Court indicated it would make an allowance for use of this deposition in findings when the transcript became available.

Conclusions of Law

1. **Summary Judgment.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. W. Va. R. Civ. P. 56(b).

2. 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. 1, Williams v. Precision Coil, Inc., 194 W. Va. 52 (1995).

3. Rule 56 . . . is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to the salient facts or if it only involves a question of law. Williams, 194 W. Va. at 58.

4. The Supreme Court of Appeals of West Virginia "has repeatedly made it clear that, 'the question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined.'" Taylor v. W. Va. Dept. of Health and Human Resources, et al, 14-0679 W. Va. 9 (Apr. 14,, 2016); citing Syl. Pt. 5, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W. Va. 160, 133 S.E2d 770 (1963).

5. Summary judgment is appropriate if, from the totality of the evidence presented, the record 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. 2, Williams 194 W. Va. 52. Additionally, while the facts and evidence are to be considered in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could return a verdict in his favor. Id. at 59-60.

6. In the instant case, while there may or may not be issues of fact were the case to survive summary judgment, the Court's decision turns wholly on a determination of law and thus, is ripe for summary judgment. The Court's decision to grant summary judgment is based on its finding that the contract between the parties is unconscionable. The remaining positions of Defendant's Motion for Summary Judgment are unnecessary and too weighted in factual determinations for the Court to consider for purposes of summary judgment. The Court's decision is made only on one narrow issue of law.

7. **Unconscionability.** "Unconscionability is equitable principle, and determination of whether contract or provision therein is unconscionable should be made by court." Troy Min. Corp. v. Itmann Coal Co., 176 W. Va. 599, 346 S.E.2d 749 (1986).

8. "A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract." Brown ex rel. Brown v. Genesis Healthcare Corp., 228 W. Va. 646, 724 S.E.2d 250 (2011), cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012).

9. "If a court...finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result." Id.

10. Under West Virginia law, the court will analyze unconscionability of a contract term in terms of two component parts: procedural unconscionability and substantive unconscionability. Id.

11. "Procedural unconscionability" addresses inequities, improprieties, or unfairness in the bargaining process and the formation of the contract. Id.

12. "Substantive unconscionability" involves unfairness in the contract itself—overall imbalance, one-sidedness, laesio enormis, and the evils of the resulting contract—and whether a contract term has overly harsh or one-sided results or is so one-sided as to lead to absurd results. Id.

13. When conducting substantive unconscionability analysis, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns, which can include the federal and state constitutions, public statutes, judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government is factually established.

Id.

14. To determine substantive unconscionability, courts have focused on vague matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns. Id.

15. In assessing substantive unconscionability, the paramount

consideration is mutuality. Id.

16. Neither party asserts that the relative positions of the parties or the adequacy of the bargaining positions by either party in 1987 was unconscionable. There is no allegation that sufficient experience, education, training, ability, or knowledge was lacking by either party at the initiation of the contract. Therefore, the focus of the Court's analysis is one of substantive unconscionability - specifically a concern of the lack of meaningful alternatives and the existence of unfair terms in the contract.

17. The provision(s) which Defendant has asserted are unconscionable such that the Court should deem the contract unenforceable center on the parties' ability to terminate the contract or the lack/limited options thereof. As written, the contract will run in perpetuity with no end in sight absent one of two very specific occurrences.

18. First, the contract (and the payments flowing therefrom) will terminate in any event in which the power plant on which the contract centers ceases operations. Second, the contract may be terminated by the will of the parties but only through mutual consent of both parties, in writing.

19. There is no evidence, suggestion, or allegation proffered by either party that there is any plan for or situation which would require the power station to cease operations.

20. The clear and undisputed evidence is that the parties entered into a consulting agreement contract, the Defendant has requested to terminate the contract, and that Plaintiff has indicated that under no circumstance will Plaintiff agree to terminate the contract as requested by Defendant. Namely, Stanley Sears'

deposition testimony when asked about Defendant's request to terminate that contract is that "[o]f course [Plaintiff] said no" when Defendant expressed interest in discontinuation of the consulting agreement contract. Mr. Sears further stated that refusing to agree to terminate the agreement is "the only reasonable answer we should have given. Why would we say - what reason do we have to say 'yes'?" Deposition of Stanley Sears (9 13 18) (Sears Dep.) at 171-72).

21. **Public Policy.** Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. See Brown 228 W. Va. 646, 724 S.E.2d 250.

22. Freedom to contract, however, is not unfettered. [The Supreme] Court has recognized that "no action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void." Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 39, 614 S.E.2d 680, 686 (2005) citing State ex rel. Boone Nat. Bank v. Manns, 126 W.Va. 643, 647, 29 S.E.2d 621, 623 (1944), *overruled on different grounds by* State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1992).

23. Public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public. Wellington at 38, 614 S.E.2d 685.

24. In the instant action the escape terms of the contract are so one-sided and favorable to Plaintiff that the lack of a unilateral escape clause, including notice and/or consequential provisions stemming from unilateral withdrawal, and a requirement of payment into what amounts to eternity but for cessation of business, regardless the bargaining position of the parties, is so outrageous and oppressive

that public policy mandates that the contract be disbanded rather than enforced.

There is no leeway for the Court to enforce the remainder of the contract or to reform the same as the only provision(s) which creates a duty is obviated by the Court's ruling that the contract is unconscionable.

Accordingly, it is **ORDERED** that Defendant's Motion for Summary Judgment should be, and is hereby **GRANTED**. Further, in adjudicating the merits by way of summary judgment and Defendant's admission of the existence of a contract, albeit unconscionable, the Court **FINDS** that Defendant owes to Plaintiff the contracted fees for the 2018 year.[1]

This Order is a full and **FINAL** order as to the action herein.

The Circuit Clerk of Marion County is hereby directed to provide certified copies of this Order to all counsel of record.

[1] The Court is granting Defendant's Motion for Summary Judgment, however, as Defendant has paid under the instant contract for nearly thirty years but raised an assertion of unconscionability of the contract only as of June 2018, the argument has been waived up until that point. Therefore, in acknowledging that the contract exists, albeit an unconscionable contract, and acting as such until June 2018, the Court grants judgment to the Plaintiff as to fees due and owing for 2018.

/s/ Patrick N. Wilson
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/ for more details.