NO. 19-0171

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

HORIZON VENTURES OF WEST VIRGINIA, INC.,
a West Virginia corporation,

Plaintiff,

v. Civil Action No. CC-24-2018-C-76

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,

Defendants.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE PATRICK N. WILSON, JUDGE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF CITATIONS

State Cases

Rules of Appellate Procedure

Rules of Civil Procedure

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FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE PATRICK N. WILSON, JUDGE

BRIEF OF THE APPELLANT, HORIZON VENTURES OF WEST VIRGINIA, INC.

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I. Statement of the Kind of Proceeding and Nature of the Ruling Below

On May 14, 2018 a civil action was instituted by the appellant, Horizon Ventures of West Virginia, Inc., against the appellee, American Bituminous Power Partners, L.P. Appendix at page 00001. The complaint asserts that the appellee, American Bituminous Power Partners, L.P., breached the June 25, 1987 Contract and Agreement as well as the Amendment to the Contract and

Agreement - Consulting Agreement of January 1990 by failure to pay the $50,000.00 annual consideration for 2018. Appendix at page 00003.

On June 13, 2018 the appellee, American Bituminous Power Partners, L.P., filed a motion to dismiss or in the alternative, for summary judgment. Appendix at page 00015. The appellant, Horizon Ventures of West Virginia, Inc., filed an Affidavit in Opposition to Defendant's Motion to Dismiss on August 7, 2018 along with a Reply Memorandum in Opposition to the Motion to Dismiss. Appendix at page 00072 and page 00076. By order entered August 14, 2018 the circuit court denied the motion to dismiss. Appendix at page 00080. The August 14, 2018 order expressly provides that no ruling was made with respect to the motion for summary judgment of the appellee. Appendix at page 00080.

On October 3, 2018 the appellee filed a motion to file its answer to the complaint out of time. Appendix at page 00082. At the same time the appellee filed its answer to the complaint. Appendix at page 00085.

On October 12, 2018 an agreed order permitting the late filing of the answer of the appellee was entered. Appendix at page 00092. Less than one (1) month later the appellee filed a motion for summary judgment. Appendix at page 00102. At the time the motion for summary judgment was filed, no discovery had been conducted and no scheduling order had been entered. Appendix at page 00358.

On November 29, 2018 the appellant served a notice of deposition pursuant to Rule 30(b)(7) of the West Virginia Rules of Civil Procedure scheduling the deposition of the designated representative of the appellee. Appendix at page 00385. On December 3, 2018, the appellant served its first set of interrogatories and requests for production of documents upon the appellee. Appendix at page 00358.

On December 4, 2018, the appellant filed a response to the motion for summary judgment of the appellee. Appendix at page 00216. The scheduling conference order was entered on December 4, 2018 containing, among other deadlines, a discovery completion date of June 14, 2019. Appendix at page 00213.

On December 5, 2018 the appellee filed a reply in support of its motion for summary judgment. Appendix at page 00219. The deposition of the designated representative of the appellee pursuant to Rule 30(b)(7) of the West Virginia Rules of Civil Procedure was taken on November 30, 2018. Appendix at page 00230.

On December 6, 2018, a hearing was held with respect to the motion for summary judgment of the appellee. Appendix at page 00329. On December 31, 2018 the appellee filed a motion for protective order seeking to preclude any further discovery asserting that the appellant had been "less than diligent in pursuit of its claim". Appendix at page 00287 (00288 at footnote 1). Accordingly, the appellee attempted to forestall any further

discovery with the filing of its motion for protective order December 31, 2018 despite a discovery completion date of June 14, 2019.

On January 30, 2019 the circuit court entered an order granting the motion for summary judgment on behalf of the appellee. Appendix at page 00329. The circuit court determined that as a matter of law the June 1987 contract between the parties was substantively unconscionable as there was a "lack of meaningful alternatives and the existence of unfair terms in the contract". It is from the January 30, 2019 order granting summary judgment to the appellee which the appellant appeals and seeks a reversal. Appendix at page 00339.

II. Assignments of Error

The Circuit Court of Marion County, West Virginia, erred in its determination that the June 25, 1987 contract and agreement was unconscionable.

III. Statement of Facts

1. The appellant, Horizon Ventures of West Virginia, Inc., and the appellee, American Bituminous Power Partners, L.P., are parties to multiple agreements with respect to the Grant Town Power Plant which was substantially financed by $150 million in tax exempt Solid Waste Disposal Bonds issued by the Marion County Commission. Appendix Volume 1 at page 00043.

2. The $150 million in tax exempt Solid Waste Disposal Bonds has now been fully satisfied with all of the bonds receiving full payment.

3. The appellant, Horizon Ventures of West Virginia, is the owner and landlord, as defined in the various agreements between the parties, of the real property located in Marion County, West Virginia, where the Grant Town Power Plant is located.

4. Pursuant to the various agreements between the parties, the appellant, Horizon Ventures of West Virginia, Inc., leased to the appellee, American Bituminous Power Partners, L.P., the real property owned by it in Marion County, West Virginia. Appendix Volume 1 at page 00058.

5. The appellee, American Bituminous Power Partners, L.P., within the context of this litigation, is the tenant as defined by the various agreements between the parties in this civil action. Appendix Volume 1 at page 00044.

6. The November 29, 1989, Amended and Restated Lease Agreement between the appellant and the appellee was amended by an 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. Appendix Volume 1 at page 00044.

7. The June 25, 1987 Contract and Agreement was executed by the parties and was one of several contracts that included these parties regarding the construction and operation of the Grant Town Power Plant, including the original 1987 Lease Agreement between these parties for the real property where the Grant Town Power Plant is located. Appendix Volume 1 at page 00234.

8. The Third Amendment was declared to be void by the May 28, 1996 Agreement to Resolve Pending Litigation. Appendix Volume 1 at page 00044.

9. The appellee, American Bituminous Power Partners, L.P., paid the appellant, Horizon Ventures of West Virginia, Inc., pursuant to the June 25, 1987 Contract and Agreement and any amendments thereof for "nearly thirty years" without any assertion that the June 25, 1987 contract was unconscionable. Appendix Volume 2 at page 338.

10. Despite the March 31, 1993 Agreement, the defendant, Horizon Ventures of West Virginia, Inc., was forced to institute litigation to recover rent due from American Bituminous Power Partners, L.P. on April 12, 1994. The civil action was styled: Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., Civil Action No. 94-43-C (Keeley), United States District Court for the Northern District of West Virginia. Appendix Volume 1 at page 00047.

11. The 1994 Action was resolved on or about May 23, 1994 with American Bituminous Power Partners, L.P. paying the defendant, Horizon Ventures of West Virginia, Inc., $201,739.57 in rental payments as well as other costs.

12. On or about February 2, 1996 the defendant, Horizon Ventures of West Virginia, Inc., was forced by the willful, wrongful and intentional conduct of American Bituminous Power Partners, L.P. to again institute a civil action which was 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. Appendix Volume 1 at page 00045.

13. 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. Appendix Volume 1 at page 00045.

14. Contrary to the terms of the agreements with respect to the lease of the subject property, the appellee paid and continues to pay monthly and annual amounts of money, including, but not limited to, employee bonuses and payments to entities owned and/or controlled by the general partner of the tenant, Richard Halloran, and wrongfully, fraudulently and willfully refuses to pay rent owned to the appellant. Appendix Volume 1 at page 00051.

15. The appellee has failed and/or refused to pay the full amount of rent due to the appellant, Horizon Ventures of West Virginia, Inc., for the month of December, 2012. Appendix Volume 1 at page 00028.

16. The appellee has failed and/or refused to pay any rent due to the appellant, Horizon Ventures of West Virginia, Inc., from January 2013 to the present. Appendix Volume 1 at page 00028.

17. On February 2, 1996, the appellant was forced to file 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 with respect to the refusal of American Bituminous Power Partners, L.P. to pay the rent. Appendix Volume 1 at page 00045.

18. The 1996 litigation between the appellant and the appellee was resolved pursuant to the Agreement to Resolve Pending Litigation dated May 28, 1996. Appendix Volume 1 at page 00045.

19. This Court rendered a Memorandum Decision regarding the civil action filed by the appellant in 2013 seeking to be paid for rent owed by the appellee. Appendix Volume 1 at page 00042.

IV. Summary of Argument

Without the finding of both procedural unconscionability and substantive unconscionability a contract cannot be determined to be unconscionable. The circuit court in this instance found no procedural unconscionability, therefore, the circuit court erred in

its decision to grant summary judgment based on the unconscionability of the June 25, 1987 agreement.

Further, the circuit court erred by granting summary judgment five (5) months prior to the close of discovery providing an insufficient record for the circuit court as well as this Court to make any determination as to the existence of substantive unconscionability based upon the totality of the interactions between the appellant and the appellee. For each of these reasons, the order granting summary judgment should be reversed.

V. Statement Regarding Oral Argument

Pursuant to Rule 19(a), the appellant, Horizon Ventures of West Virginia, Inc., believes that oral argument should be held in this case. Further, oral argument pursuant to Rule 19(a) is warranted, as this case involves a fairly narrow issue of law.

VI. Points and Authorities

State Cases

Ashland Oil, Inc. v. Donahue, 159 W.Va. 463, 223 S.E.2d 433 (1976)

Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011) (Brown I)

Clarence T. Coleman Estate v. R.M. Logging, Inc., 222 W.Va. 357, 664 S.E.2d 698 (2008)

Conrad v. ARZ Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996)

Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012)

Drake v. West Virginia Self-Storage, Inc., 203 W.Va. 497, 509 S.E.2d 21 (1998)

Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012)

Hampden Coal Company v. Varney, 240 W.Va. 284, 810 S.E.2d 286 (2018)

Kirby v. Lion Enterprises, Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014)

Nationstar Mortgage, LLC v. West, 237 W.Va. 84, 785 S.E.2d 634 (2016)

Pingley v. Perfection Plus Turbo-Dry, LLC, 231 W.Va. 553, 746 S.E.2d 544 (2013)

Powder Ridge Unit Owner's Association v. Highland Properties, Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996)

Rent-A-Center, Inc. v. Ellis, 2019 WL 1982983 (W.Va. S.Ct. 2019)

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 19(a)

Rules of Civil Procedure

West Virginia Rules of Civil Procedure Rule 30(b)(7)

VII. Discussion

A. Standard of Review

As the Circuit Court granted a motion for summary judgment this Court's review is de novo. Conrad v. ARZ Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996).

B. The Circuit Court Erred in its Determination that the June 25, 1987 Contract and Agreement was Unconscionable.

The Doctrine of Unconscionability means that, as a result of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract a court may be justified in refusing to enforce the

contract as written. Rent-A-Center, Inc. v. Ellis, 2019 WL 1982983 (W.Va. S.Ct. 2019). The analysis of unconscionability is based upon its two (2) component parts: (1) procedural unconscionability; and (2) substantive unconscionability. Nationstar Mortgage, LLC v. West, 237 W.Va. 84, 785 S.E.2d 634 (2016).

In order to determine that a contract is unconscionable both procedural unconscionability and substantive unconscionability must be present. Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012). Further analysis is unnecessary in this case as the circuit court found no procedural unconscionability. Appendix Volume 2 at page 00336.

Although procedural and substantive unconscionability need not be present to the same degree, both must be present for a contract term to be determined to be unconscionable. Syllabus Point 20 of Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011) (Brown I). A sliding scale is applied by the trial court with respect to the determination of procedural and substantive unconscionability.

As explained by this Court, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that a clause is unenforceable. The reverse also applies. Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012).

The circuit court determined in paragraph 16 of its order granting summary judgment for the appellee that:

> 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.

Appendix Volume 2 at page 00336. Accordingly, as a matter of law, the absence of any procedural unconscionability requires the reversal of the January 30, 2019 Order.

It is clear that there is no procedural unconscionability with respect to the June 25, 1987 Contract and Agreement. Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and the formation of the contract. Pingley v. Perfection Plus Turbo-Dry, LLC, 231 W.Va. 553, 746 S.E.2d 544 (2013).

Procedural unconscionability involves a variety of inadequacies that result in the lack of a real and voluntary meeting of the minds of the parties, considering all of the circumstances surrounding the transaction. Rent-A-Center, Inc. v. Ellis, 2019 WL 1982983 (W.Va. S.Ct. 2019). There are no factors of procedural unconscionability with these commercially experienced parties.

The inadequacies evidencing procedural unconscionability include, but are not limited to, the age, literacy or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed including whether each party had a reasonable opportunity to understand the terms of the contract. Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011) (Brown I). There is no question that the appellee was a sophisticated business entity well suited, knowledgeable and able to enter into the June 25, 1987 contract.

The appellee, American Bituminous Power Partners, L.P., with the appellant as the owner of the real property where the Grant Town Power Plant was to be constructed was able in 1987 to obtain government financing for $150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission. As recognized by the circuit court there is no procedural unconscionability with respect to the June 25, 1987 Contract and Agreement which is part of a series of other agreements involving the appellant, the appellee, and other parties including, the Marion County Commission, Allegheny Power Company, and international lenders which made up the entity identified by this Court as the Bank Group in its May 13, 2015 Memorandum Decision. Appendix Volume 1 at page 00042.

The concept of unconscionability must be applied in a flexible manner taking into consideration all of the facts and circumstances of a particular case. Pingley v. Perfection Plus Turbo-Dry, LLC, 231 W.Va. 553, 746 S.E.2d 544 (2013). However, over the objection of the appellant seeking further factual development the circuit court did not consider all of the facts and circumstances existing between these parties as well as the non-litigant entities involved in the various agreements with respect to the Grant Town Power Plant. Appendix Volume 2 at page 00332.

Unconscionability is an equitable principle and the determination of whether a contract or a provision therein is unconscionable should be made by the Court. Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012). However, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same, and the relationship between the documents is clearly apparent. Ashland Oil, Inc. v. Donahue, 159 W.Va. 463, 223 S.E.2d 433 (1976).

Accordingly, the circuit court should have analyzed all of the agreements executed between these parties in 1987 as well as the course of dealing with the appellee, American Bituminous Power Partners, L.P., paying the appellant, Horizon Ventures of West Virginia, Inc., for nearly 30 years prior to its refusal to pay. Appendix Volume 2 at page 00338. This analysis establishes that there exists no unconscionability.

As this Court recognized in Rent-A-Center, Inc. v. Ellis, 2019 WL 1982983 (W.Va. S.Ct. 2019), where there is no procedural unconscionability it is unnecessary to evaluate whether substantive unconscionability exists. Hampden Coal Company v. Varney, 240 W.Va. 284, 810 S.E.2d 286 (2018). As in Rent-A-Center, Inc. v. Ellis, *supra.*, even if there was some indication of procedural unconscionability, the circuit court erred in finding substantive unconscionability with respect to the June 25, 1987 agreement.

The focus of substantive unconscionability is on the nature of the contractual provisions rather than on the circumstances surrounding the formation of the contract. Nationstar Mortgage, LLC v. West, 237 W.Va. 84, 785 S.E.2d 634 (2016). In Nationstar, this Court stated:

> Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, 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.

The substantive unconscionability relied upon the circuit court to terminate the June 25, 1987 contract is the mutual inability of the parties to terminate the contract. Appendix Volume 2 at page 336. The June 25, 1987 agreement does not have a provision to allow the appellee to unilaterally terminate the

agreement, however, the agreement only exists so long as any power plant encompassed within the agreement continues to produce power.

Accordingly, the June 25, 1987 agreement does have a definite term of completion as the Grant Town Power Plant is anticipated to be operational based upon the various agreements among the appellant, the appellees and other interested parties for a period of approximately 25 to 30 years. Such facts would have been developed in this case had the circuit court considered the entirety of the relationship between the appellant and the appellee.

As a result of ruling before discovery was completed, the circuit court incorrectly concluded in paragraph 19 of its Order that:

> 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.

Appendix Volume 2 at page 00336. The circuit court terminated discovery five (5) months prematurely precluding the development of such evidence in the record of this case.

It is not the right or provenance of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them. Drake v. West Virginia Self-Storage, Inc., 203 W.Va. 497, 509 S.E.2d 21 (1998). If the language of a contract is found to be plaint and unambiguous, such

language should be applied according to such meaning. Id. S.E.2d at 24.

The June 25, 1987 Contract and Agreement was supported by an offer, acceptance and sufficient consideration. Kirby v. Lion Enterprises, Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014). Mutuality of obligation or separate consideration for each provision of a contract is not required so long as the overall contract is supported by sufficient consideration. Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012).

Accordingly, any consideration of the June 25, 1987 Contract and Agreement requires a consideration of all of the agreements between the appellant and the appellee which was not performed by the circuit court. If overall of these agreements between these parties there is sufficient consideration then the June 25, 1987 Contract cannot be found to be unconscionable. Kirby v. Lion Enterprises, Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014).

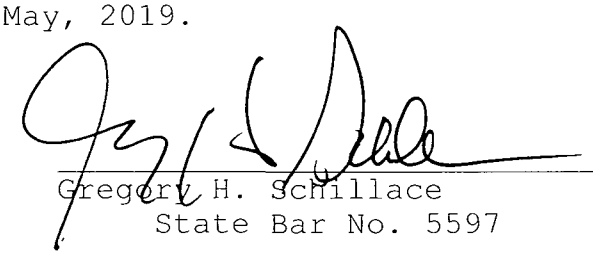
This Court has previously stated that the granting of summary judgment prior to the completion of discovery is precipitous. Powder Ridge Unit Owner's Association v. Highland Properties, Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996); Clarence T. Coleman Estate v. R.M. Logging, Inc., 222 W.Va. 357, 664 S.E.2d 698 (2008). The circuit court set a discovery completion date for June 14, 2019, the parties should have been permitted to engage in necessary discovery to provide the circuit court, as well as this Court, the

full scope of the relationship between the appellant and the appellee.

VIII. Conclusion

Based upon the foregoing, the appellant, Horizon Ventures of West Virginia, Inc., respectfully requests that the grant of summary judgment in favor of the appellee by the Circuit Court be reversed.

Dated this 30th day of May, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2019, I served the foregoing **APPENDIX PURSUANT TO RULE 7(e) OF THE WEST VIRGINIA RULES OF APPELLATE PROCEDURE** and the **BRIEF OF THE APPELLANT, HORIZON VENTURES OF WEST VIRGINIA, INC.** upon all opposing counsel of record via Federal Express, in an envelope addressed as follows:

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