

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 PLAINTIFF'S MOTION TO ALTER OR AMEND FINAL
JUDGMENT ORDER AND FOR OTHER RELIEF AND REQUEST FOR EXPEDITED
RULING**

This matter came before the Court this 10th day of April, 2024. The Plaintiff, American Bituminous Power Partners, LP (hereinafter "Plaintiff" or "AMBIT"), by counsel, have filed a Motion to Alter or Amend Final Judgment Order and for Other Relief and Request for Expedited Ruling. The Plaintiff, by counsel, Roberta F. Green, Esq., and Defendant, Horizon Ventures of West Virginia, Inc. (hereinafter "Defendant" or "Horizon"), by counsel, Mark A. Kepple, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. The trial was conducted after this matter was remanded to the West Virginia Business Court by the West Virginia Supreme Court of Appeals, via 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 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 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).

2. Following the Supreme Court's remand and directive, a trial on damages was held before the undersigned on October 10-12, 2023. The Court notes the trial was conducted as a bench trial at the agreement of the parties and the damages determination was held at a separate, later damages hearing by the agreement of the parties. To this end, on December 15, 2023, the Court held the agreed upon damages hearing, wherein the Court took evidence to determine the rent due to Horizon from AMBIT and other damages calculations.

3. The Court thereafter gave the parties until January 4, 2024 to submit proposed orders to the Court.

4. On or about February 23, 2024, this Court issued its Final Judgment Order.

5. It is from this Order that Plaintiff filed the instant motion to alter or amend. On March 5, 2024, Plaintiff filed the instant Motion to Alter or Amend Final Judgment Order and for Other Relief and Request for Expedited Ruling, seeking "a review of evidentiary and damages issues created by the Final Judgment Order". *See* Pl's Mot., p. 20. Specifically,

AMBIT sought the following relief: (1) that the Order should be amended as it provides for a bond but no stay; (2) that the bond amount should be reduced; (3) the Order reflects “errors relative to the evidence adduced at the” damages hearing; and (4) the damages calculation is in error because the Court found simple interest applies and also assessed pre and post judgment interest. *Id.* at 4.

6. On March 26, 2024, Defendant filed Horizon’s Response to AMBIT’s Motion to Amend Final Judgment, arguing the instant motion should be denied because none of the requested relief is appropriate, and because its arguments have been brought before and denied by the West Virginia Supreme Court of Appeals and West Virginia Intermediate Court of Appeals. *See* Defs’ Resp., p. 3. Further, Horizon argues the motion should be denied because AMBIT has not alleged any meaningful assignments of error which must be changed to prevent obvious injustice or which constitute a clear error of law under Rule 59. *Id.*

7. On April 2, 2024, Plaintiff filed its Reply in Support of Alter or Amend, reiterating its arguments, and seeking “in particular a reduction in bond, as set forth in its filings before this Court”. *See* Reply, p. 17.

8. Meanwhile, on March 20, 2023, AMBIT filed AMBIT’s Request for Accommodation – Briefing Schedule and Request for Expedited Relief, seeking a reduction in bond, additional time after the alter or amend process to locate bond, and noting the due date for the posting of its bond is April 12, 2024.

9. On March 27, 2024, Horizon filed Horizon’s Response to AMBIT’s Request for Accommodation, arguing the request for accommodation is not a recognized type of motion, and does fall under Trial Court Rule 5.04, cited by AMBIT to support the request, as that

rule deals with scheduling conflicts. *See* Def’s Resp., p. 1-2.

10. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

This matter comes before the Court upon a motion to alter or amend judgment brought pursuant to Rules 52(b), 59(b), and 59(e) of the West Virginia Rules of Civil Procedure. Rule 59(e) states that “[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment”. W. Va. R. Civ. P. 59. The Court finds that the instant motion to alter or amend was timely filed, within ten days of the entry of judgment, as required by West Virginia Rule of Civil Procedure 59(e).

A circuit court's consideration of a motion brought pursuant to Rule 59(e) is discretionary in nature. *See, e.g., Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995); *Stillwell v. City of Wheeling*, 201 W.Va. 559, 604, 558 S.E.2d 598, 603 (2001).

The reconsideration of a prior ruling pursuant to Rule 59(e) “**is an extraordinary remedy which should be used sparingly.**” *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 57, 717 S.E.2d 235, 244 (2011)(emphasis added).

Further, the West Virginia Supreme Court of Appeals has provided guidance on when a trial court should grant a Rule 59(e) motion to alter or amend. Specifically, in syllabus point 2 of *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals said:

A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Syl. pt. 1, *Acord v. Colane Company*, 228 W.Va. 291, 719 S.E.2d 761 (2011); *see also Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351, 356 (2012).

Also, a motion to alter or amend judgment may be used to correct manifest errors of law or fact or to present newly discovered evidence. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011).

West Virginia Rule of Civil Procedure 59(e) is not an appropriate instrument for presenting new legal arguments, factual contentions, or claims that could have previously been argued. *Mey*, 228 W. Va. at 56, 717 S.E.2d at 243. Even in circumstances where a party intends to rely upon newly discovery evidenced, the party “must produce a legitimate justification for not presenting the evidence during the earlier proceeding.” *Mey*, 228 W. Va. at 57, 717 S.E.2d at 244, quoting *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996).

In the present case, none of the grounds for reconsideration are present. The Court, after review of the pleadings and the court file, finds there are no manifest errors of law or fact to be corrected. It is apparent from the review of the record that the Court considered all the matters before the Court. Specifically, the Court considered all evidence presented at the bench trial, and, as factfinder, gave said evidence the weight and credibility it opined each deserved. AMBIT’s motion devotes pages to discussing the weight the Court gave to the testimony of AMBIT’s representative, Christophe Collet. *See* Pl’s Mot., p. 14-18. AMBIT argues the Court failed to reflect the knowledge Mr. Collet had of the company and its financials. *Id.* at 14-15. Ultimately, AMBIT argues because of the “lack of regard for Mr. Collet’s testimony as a corporate representative, the Court erred in designating that portion of accrued rent as subordinated rather than subordinated and thus the application of 10% interest to rent payments in Period 1.” *Id.* at 18. The Court gave Mr. Collet’s testimony the credit and weight it opined it deserved. The Court also gave Mr. Sears’s testimony the weight and credibility it opined it deserved. The Court considered the fact that Mr. Sears was the only witness with first-hand knowledge of the Lease at the time it was entered into. In considering the totality of the evidence, the Court considered AMBIT’s arguments and theory of the case, and ultimately

rejected its argument regarding whether Period 1 was subordinated or unsubordinated. The Court finds no manifest error of law or fact occurred.

Further, the Court considers AMBIT reiterated its arguments in the instant motion. The Court's failure to accept its arguments does not constitute error under the standard for Rule 59 motions. AMBIT addressed many different arguments, and the Court will address each one below:

Liens

AMBIT argued that under the Lease, Horizon waived the right to raise any prospective lien with respect to AMBIT's property, and recording or execution of the lien would violate the Lease and cause unintended consequences. *See* Pl's Mot., p. 2. The Court disagrees. Based on a review of the relevant Lease provisions, the section AMBIT is referring to plainly establishes the priority of debts and does not erase Horizon's ability to execute on a judgment. *See* Def's Resp., p. 4-6.

Damages

Next, AMBIT argues Horizon had no pending claim for damages at the time of the hearing. *See* Pl's Mot., p. 3. AMBIT argues this is because on March 15, 2019, the Court dismissed all of Horizon's counterclaims with the exception of Horizon's counterclaim for declaratory relief. *Id.*

As an initial matter, AMBIT admits that the Court found the sole claim remaining was the determination of rent owed. *Id.* (*citing* March 15, 2019 Order). Further, as another initial matter, this Court notes the Supreme Court directed the factfinder determine the remaining issues. Then, AMBIT agreed to have this Court act as factfinder and agreed to a separate damages hearing. *See* Def's Resp., p. 7, 8. Further, the Court considers that the Uniform Declaratory Judgment Act permits damages when appropriate. *Id.* at 8. The Court notes AMBIT raised this issue to the Supreme Court in its Writ of Prohibition, which was denied. *Id.*

at 7; *see also Id.*, Ex. E. For all of these reasons, the Court finds AMBIT has demonstrated no clear error or manifest injustice as to this argument. The Court further notes in addition to agreeing to the damages hearing, AMBIT did not raise this issue at the Pretrial Conference, where the parties agreed to the bifurcated hearing, nor did it object to the Day Order from the Pretrial Conference.

Bond Without Stay

The Court next addresses AMBIT's arguments regarding the bond. AMBIT argues that in contravention of West Virginia law, the Order provides for an appeal bond, without also providing for a stay, but AMBIT provides no controlling West Virginia law to support this. *See* Pl's Mot., p. 5-6. It appears the parties, and the Court, agree that the primary purpose of an appeal bond is to preserve or protect security for the judgment creditor from erosion during appeal in the event of an unsuccessful appeal by the judgment debtor. *See* Pl's Mot., p. 6. The Court does not agree that the Court's decision to award a bond, and find that good cause did not exist for a stay, defeats the purpose of an appeal bond. *Id.* The Court exercised its discretion in considering AMBIT's request for stay and also in ordering an appeal bond totaling \$9,168.608.00. The Court notes AMBIT raised this issue to the Intermediate Court of Appeals in its Emergency Motion to Stay Pending Review, and the IAC denied that motion. *See* Def's Resp., p. 10. AMBIT showed no evidence of an intervening change in controlling law, new evidence not previously available, evidence of a clear error of law or obvious injustice. Therefore, the Court finds AMBIT's motion and request must be denied as to this request. Likewise, the Court declines to change the bond amount. Although AMBIT has argued in the motion that the bond amount is unavailable and inappropriate, the Court, in its discretion, chose a bond amount that will adequately protect Horizon's interests. *See* Pl's Mot., p. 8. The Court declines to change the bond amount. The bond amount is what the Court decided would adequately protect Horizon's interests, and AMBIT has presented to evidence of a clear error or

obvious injustice in the motion. Instead, AMBIT lodged its “due and payable” argument, which was already made, and rejected by this Court.

Interest

Next, the Court addresses AMBIT’s arguments related to interest. *See* Pl’s Mot., p. 12-13. AMBIT argues the Order errs by awarding Horizon 10% per annum simple interest (via the parties’ contract) on all unsubordinated rent, and finding AMBIT also owes as an operation of law pre-judgment interest on all amounts it failed to pay from February 2013 to February 23, 2024 when the judgment was rendered, and post-judgment interest on all amounts it failed to pay afterwards. AMBIT requests this Court strike the award of pre-judgment interest and post-judgment interest. *See* Pl’s Mot., p. 13. AMBIT presented no evidence where Horizon agreed to waive pre-judgment interest in favor of the contractual 10% per annum calculations. *See* Def’s Resp., p. 16.

AMBIT did not present new evidence not previously available to the Court coming to light, or any change in controlling law on the issue of interest since the entry of this Court’s February 23, 2024 Final Judgment Order. The Court denies this motion as to AMBIT’s request to remove pre-judgment interest and post-judgment interest. Further, the Court addresses Period 2. AMBIT’s corporate bond rate interest calculation was used in calculating the interest due for Period 2 while the rent was unsubordinated. *See* Def’s Resp., p. 16. The Period 2 rent amounts then begin to accrue 10% interest as per the Lease after the period of subordination. *Id.* The Court finds no clear error is present here, and AMBIT’s argument that the Order “suggests that both the 10% interest and corporate bond interest were applied to Period 2” is unfounded. *See* Pl’s Mot., p. 13. Therefore, the motion is denied as to this argument.

Calculations

Finally, this Court addresses AMBIT’s argument that the Order stated that AMBIT offered no competing calculations. AMBIT submitted calculations at trial submitted in support

and comporting with their theory of the case regarding subordinated and unsubordinated rent periods. AMBIT did not offer competing calculations showing different numbers for Horizon's method of calculating amounts owed, which the Court accepted. *See* Def's Resp., p. 18. Once the Court decided up on which method of calculating amounts owed (which periods were subordinated vs. unsubordinated) was to be used, there were not competing calculations. *Id.* The Court did not adopt AMBIT's theory with regard to which periods were subordinated v. unsubordinated. The Court finds no manifest error exists as to the calculations, or whether competing calculations were presented and considered. The motion is denied as to this assertion.

Conclusion

For all of these reasons, the Court finds AMBIT has presented no clear error in the Court's findings in its Final Judgment Order. Although Plaintiff reiterates its position, Plaintiff's arguments in the instant motion simply do not demonstrate a clear error of law upon which to alter or amend a judgment.

Accordingly, the Court declines to reconsider or alter or amend its determinations contained in its Final Judgment Order. Therefore, the Court finds the instant motion must be DENIED.

Further, the issues presented in AMBIT's Request for Accommodation – Briefing Schedule and Request for Expedited Relief are addressed in this Order, which is entered before the due date for the posting of bond is April 12, 2024. Because of the timeframe, the Court grants an additional thirty (30) days from April 12, 2024 for bond to be posted. Accordingly, the appeal bond shall be posted within thirty (30) days of April 12, 2024 by depositing the bond amount with the Circuit Clerk of Marion County to be held in trust.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Alter or Amend Final Judgment Order and for Other Relief and Request for Expedited Ruling is hereby

DENIED. The Court notes the objections and exceptions of the parties to any adverse ruling herein. It is further hereby ADJUDGED and ORDERED that AMBIT's Request for Accommodation – Briefing Schedule and Request for Expedited Relief is GRANTED IN PART as described above.

The Court notes the objections 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: April 10, 2024

/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/ for more details.