

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 MOTION TO VACATE SUGGESTEE EXECUTIONS

On the 1st day of May, 2024, the Plaintiff, by counsel, filed a Motion to Vacate Suggestee Executions, for Expedited Relief and to Stay Execution Pending Verification of Process. On May 3, 2024, Defendant, by counsel, filed Horizon's Response to AMBIT's Motion to Vacate Suggestee Executions, for Expedited Relief and to Stay Execution Pending Verification of Process. On May 6, 2024, Plaintiff filed its Reply in Support of Motion to Vacate. The matter was heard on Monday, May 6, 2024 at 2:00 p.m. via Microsoft Teams Meeting. During the hearing, it was determined that the matter be reset for hearing on Friday, May 10, 2024 at 2:00 p.m. before the undersigned in the 4th Floor of the Berkeley County Judicial Center, Courtroom B, 380 West South Street, Martinsburg, West Virginia, and the matter was heard and said date and time.

CONCLUSIONS OF LAW

Plaintiff brought the instant motion pursuant to West Virginia Code § 38-5A-6. See Pl's Mot., p. 1, 6. West Virginia Code § 38-5A-6 governs vacation and modification of suggestee executions. W. Va. Code Ann. § 38-5A-6 (West). West Virginia Code § 38-5A-6 provides, in pertinent part:

Either party may apply at any time to...the court or a judge

thereof...from which such an execution shall have issued, upon such notice to the other party as such court or judge shall direct for the vacation or modification of the execution. After conducting a hearing thereon, the court or judge shall vacate the execution if satisfaction of the same or the judgment be made out by affidavit or otherwise, and in any case may make such modification of the execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until paid and satisfied, or until vacated or further so modified. Such an execution may be vacated at any time upon the application of the judgment creditor without notice or a hearing and in such a case the clerk of a court of record shall have power to vacate the execution if issued out of his court.

W. Va. Code Ann. § 38-5A-6 (West).

On February 23, 2024, this Court entered a Final Judgment Order, ordering a judgment of \$9,168,608.00 be paid by Plaintiff to Defendant. See Pl's Mot., p. 1. Subsequently, Horizon procured suggestee executions from the Circuit Clerk, and the Clerk issued a Writ of Execution. *Id.* at 2; see also *Id.*, Ex. B. Plaintiff contended these suggestee executions were improper as they sought garnishment of wages of certain entities, and AMBIT is not an employee of any of the entities that Horizon sought and acquired suggestee executions directed toward. *Id.* at 3-4. Defendant averred the limitations of the efilng system/template caused the suggestions to be processed as wage garnishments after submission. See Def's Resp., p. 1-2; see also Def's Resp., Ex. 1a, 1b. Defendant then worked with the Clerk's Office to vacate these "first" suggestions and subsequently issue new, correct suggestions. See Ord., 5/9/24. Defendant contends it has attempted to comply with the Clerk's requirements, and it is allowed to collect debts in this case. See Def's Resp., p. 4. As the "first" suggestions were vacated by the agreement of the parties by Order entered by the undersigned on May 9, 2024, the Court finds the instant motion is denied as moot as to this argument.

Plaintiff also contended that the suggestee executions were “incorrect with regard to the unpaid principal and interest amounts applicable to the Court’s judgment”. See Pl’s Mot., p. 5. Plaintiff avers the documents should have reflected the \$211,812.68 payment made by AMBIT in December 2023, and also should have been reduced “over time by as much as \$407,000.00”. *Id.* As an initial matter, the Court notes that with regard to the argument Defendant has miscalculated amounts owed, Defendant argues “Horizon’s use of the incorrect form in collecting a judgment does not create license for AMBIT to relitigate issues which have already been decided”. See Def’s Resp., p. 5. Defendant also argues that AMBIT has never provided any mathematical challenge to the damages calculations which were made part of the Abstract issued by the Clerk’s Office and Defendant retained a CPA firm to perform the calculations. *Id.* at 6. In the Reply, Plaintiff detailed more of what the alleged amounts “as much as” \$407,000.00 that should have reduced the Judgment were comprised of. In the Reply, Plaintiff avers this number is actually “nearly \$468,000”. See Reply, p. 1. Plaintiff contends it has paid rent and made accrued subordinated payments each month since the entry of this Court’s October 31, 2023 Order, along with an additional \$51,766.99 each month against the judgment. *Id.* Specifically, Plaintiff detailed in the Reply it contended there was a difference of \$155,896.00 in contract interest, an unexplained \$155,896.00 was added to the Judgment without explanation, the Court did not order payment of interest on pending subordinated accrued rent resulting from Period 2, prejudgment interest was calculated improperly during 2020 as it was a leap year, the Court credited AMBIT with \$211,812.68, but it actually paid \$211,815.68, AMBIT overpayment to be applied as credit against the judgment amount each month is \$51,766.99 and two of these payments were made prior to the entry of the Final Judgment Order and were to be credited against the total prior to the determination of pre-judgment interest, Horizon

deposited AMBIT's January rent payment on March 7, and its February rent payment on April 8, so the calculation of post-judgment interest should reflect, at the latest, those dates, and the post-judgment interest calculation also did not take into account that 2024 was a leap year. See Reply, p. 1-2.

The Court held hearings on this motion on May 6, 2024, and May 10, 2024. At the hearing on May 10, 2024, Plaintiff and Defendant called witnesses. Plaintiff called Mr. Christophe Collet to testify as to his analysis and calculations of what AMBIT thinks is the correct calculation of the Court's Judgment. As such, he was designed as an expert witness in financial documents, verifying calculations, and accounting. Defendant called Louis J. Costanzo, III, the CPA who prepared Horizon's calculations. Mr. Costanzo was admitted, without objection, as an expert in accounting, finance, and the necessary mathematical expertise one needs to evaluate the spreadsheet and perform math for post-judgment piece of this case. The Court considers Mr. Costanzo explained his calculations. For example, the Court considers that with regard to the leap year discrepancies, it was not that Horizon overlooked that 2020 and 2024 were leap years, but that Mr. Costanzo chose one of five widely used, generally accepted day count conventions to perform his calculations. As another example, Mr. Costanzo likewise explained the \$155,896.00 discrepancy that AMBIT averred was due to the fact that AMBIT did not calculate the corporate bond rate and he did, and that he noted Horizon accepted AMBIT's corporate bond rate of 1%.

The Court also notes that Defendant's Exhibit C was presented and admitted into evidence without objection, and it outlines the differences in the calculations that Mr. Costanzo prepared and that which AMBIT prepared. For the reasons stated herein and for the reasons set forth more fully on the record during Mr. Costanzo's testimony, the Court finds Mr. Costanzo adequately supported Horizon's calculations supporting its

suggestions. The Court is not persuaded to amend its Judgment amount. The Court heard and considered the testimony of the witnesses for Plaintiff and Defendant, and accepts Mr. Costanzo's explanations as to how Horizon's calculations were performed. The Court likewise declines to vacate the suggestions on Plaintiff's argument that the suggestee executions were incorrect mathematically. For these reasons, the instant Motion to Vacate Suggestee Executions, for Expedited Relief and to Stay Execution Pending Verification of Process is DENIED.

CONCLUSION

It is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Vacate Suggestee Executions, for Expedited Relief and to Stay Execution Pending Verification of Process is DENIED. The Court notes the objections of the parties to any adverse ruling herein.

The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 15th day of May, 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.