

In the Circuit Court of Marion County, West Virginia

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

v.

Case No. CC-24-2018-C-76
Judge Patrick N. Wilson

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

FINAL ORDER GRANTING HORIZON'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Motions for Summary Judgment filed by both parties. Both Horizon Ventures of West Virginia, Inc. ("Horizon") and American Bituminous Power Partners, LP ("AMBIT") also timely filed its Motion for Summary Judgment on June 3, 2022. AMBIT timely filed its Response to Horizon's Motion for Summary Judgment on June 20, 2022. Horizon timely filed its Response to AMBIT's Motion for Summary Judgment on June 21, 2022.[1] The parties argued their motions before this Court on June 24, 2022.

Having thoroughly considered the parties' briefings and oral arguments, as well as the allegations within the Complaint, the Court finds the allegations and legal arguments to have been adequately presented. The parties did not object to the Court's statement that this case presents a question of law to be decided by the Court. Having given mature consideration to the pertinent facts and legal authorities in this matter, the Court finds that summary judgment in favor of Horizon is appropriate at this time, for the reasons stated herein.

I. FINDINGS OF FACT

1. On June 25, 1987, Horizon Ventures of West Virginia, Inc. ("Horizon")

entered into a contract ("Consulting Contract") with American Bituminous Power Partners, L.P. ("AMBIT").

2. The contract obligated AMBIT to pay Horizon \$50,000.00 per year, and in exchange, Horizon was obligated to perform the following tasks:

It is agreed that the Second Party will perform from time to time upon the reasonable request of First Party, such public and governmental relations and liaison functions as are necessary or incident to aiding and assisting First Party in locating, permitting, licensing, developing, maintaining and operating power plants in the State of West Virginia and will further aid in such other ventures as locating coal "gob" and all like coal resources when the same may be needed by First Party.

Consulting Contract, ¶ 2.[2]

3. AMBIT paid this amount, whether it used these services or not, for approximately thirty (30) years.

4. The genesis of this case occurred when Horizon sent AMBIT the annual invoice for this payment on December 26, 2017.

5. AMBIT refused to pay:

By letter dated January 27, 2018, AMBIT's executive director responded to Horizon noting that their relationship had become "considerably strained over the past several years due primarily to the ongoing litigation." Additionally, AMBIT stated that it ha[s] been engaged before the [Public Service Commission] in a battle for [its] very existence, and part of that process has mandated that [it] review every invoice with an eye to value for services rendered. With that in mind, we have taken a frank and full look at the relationship between us and at the Consulting Agreement. Given the realities of both, we believe the Consulting Agreement has no value to [AMBIT] and that it is time to disband the Agreement and simplify our relationship to just landlord-tenant.

Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P., 245 W. Va. 1, 5, 857 S.E.2d 33, 37.

6. Horizon claims that this letter, combined with AMBIT's failure to pay the amounts due, constitutes breach of contract, and therefore filed its instant Complaint for breach of contract with this Court on or around May 14, 2018, almost five months after

AMBIT's refusal to pay.

7. AMBIT claims, in response, that the contract is substantively unconscionable, that Horizon breached its responsibilities under the contract because over time, Horizon lost the expertise necessary to fulfill its duties under the contract, and that Horizon breached the duty of good faith and fair dealing implicit in every contract by filing lawsuits against AMBIT and otherwise expressing what it contends is hostility to AMBIT in other forums, such as the Public Service Commission.

8. AMBIT initially filed a Motion to Dismiss and/or for Summary Judgment on June 13, 2018.

9. This Court denied the Motion to Dismiss, and this Court deferred ruling on the Motion for Summary Judgment until discovery had been conducted.

10. Approximately two months later, in November 2018, AMBIT filed another Motion for Summary Judgment.

11. This Court granted the Motion on January 30, 2019, finding, in relevant part, that the Consulting Contract was substantively, but not procedurally, unconscionable.

12. This Court found, however, that AMBIT waived its objections to the contract until June 2018, and was therefore required to pay the \$50,000.00 for the 2018 year.

13. The Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court" or "Supreme Court") overturned this Court's decision on April 1, 2021. *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 857 S.E.2d 33 (2021).

14. In granting Horizon's appeal, the West Virginia Supreme Court found that this Court was required to address procedural unconscionability, and that, *inter alia*,

AMBIT incorrectly “stated to the circuit court that it could grant summary judgment based on substantive unconscionability alone, in spite of our clear law to the contrary.” *Id.* at 41; *see also Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217 (2012) (setting forth the legal requirements to apply the doctrine of unconscionability) (overruled on other grounds).

15. Further, the Supreme Court specifically found that there was *no* procedural unconscionability present when the contract was signed. *See Horizon* at 8, S.E.2d at 40.

16. Specifically, the Court explained:

Here, there are no allegations that inequities, improprieties, or unfairness existed in the bargaining process or formation of the contract in this particular case, nor can we discern any. Therefore, we find that the consulting agreement was not procedurally unconscionable. Because we find the consulting agreement not to be procedurally unconscionable, we need not examine substantive unconscionability, and the circuit court erred in granting summary judgment based upon unconscionability.

Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P., 245 W. Va. 1, 11, 857 S.E.2d 33, 43 (2021).

17. The Supreme Court then remanded the case back to this Court “for further proceedings consistent with this opinion.”

18. In proceedings before this Court following the remand, Horizon argued that since the Supreme Court found the doctrine of unconscionability did not apply, the contract needed to be paid.

19. In response, AMBIT argued that this contract was breached when AMBIT received a favorable ruling in a lawsuit filed by Horizon in 2017 which is unrelated to the consulting agreement.

20. AMBIT instead offered, at the September 28, 2021 status hearing before this Court, this concise summary of the legal theories on which it intended to proceed in

this matter:

It would be our position that the thing we have to do now, is we believe that the contract, as the Court is aware, is a bad contract and whether that's under changed circumstances, impossibility, you know, their breach, whatever it is, we intend to continue fighting the consulting agreement, and we would fight the providing them any money at this time.

Sept. 28, 2021 Hrg. Tr., p. 5, ¶ 2.

21. This Court ultimately explained that it would allow the case to proceed, and that if Horizon believed there were “no other factual issues that need to be determined by this court or should be determined in a jury trial,” then it would hear the summary judgment motion on those issues.”

22. As above, both parties timely filed their respective Motions for Summary Judgment.

23. This Court finds that in those Motions, the parties submitted nearly identical statements of relevant law, explaining that the questions of law before the Court were whether the contract’s purpose was frustrated due to changed circumstances between the parties and whether the contract was impracticable, for the reasons set forth in ¶ 7, *supra*.

24. Moreover, the parties set forth additional arguments at the hearing which were not part of its initial motion practice *vis a vis* the summary judgment motions.

25. Specifically, Horizon argued at the hearing, as it did in its Motion for Summary Judgment, that AMBIT never actually asked Horizon to perform a duty under the contract, and that Horizon could not breach a contract under which it was never asked to perform.

26. During the hearing, AMBIT admitted to this Court that it did not make a request to Horizon “since 2006.”

27. AMBIT further claimed that its December 27, 2017 letter refusing to pay

the contract was actually intended to inform Horizon that Horizon breached the contract.

28. AMBIT also claimed, during the June 24, 2022 hearing, for the first time, that it asked Horizon to “remain patient” in regards to debt payments in 2013, that Horizon then filed suit, and that the request to “remain patient” was actually a “real live formal request” for expertise.

29. This Court explained then, and finds now, that such a “request” was “just asking to be patient,” “not a request for expertise,” which AMBIT disputed.

30. This Court asked AMBIT, at least four (4) times, to provide a specific time it made a request to AMBIT to exercise its expertise under this contract. AMBIT never successfully did so, instead offering evasive and unclear answers like the following:

COURT: And when did – and when did you ask them to exercise their expertise?

MS. GREEN: I think in the litigation actually, your Honor, when they heard the things coming out of the mouth of Horizon, that’s what started the process, and that was, you know what – and in fact, you don’t have to –

...

COURT: My question is, when did your client ask for them to exercise their expertise in any form or fashion, do any act, comply with any obligations in the contract, and they were not able to do it or failed to do it? Not speculating that they might not be able to. When did they fail – when were they asked . . . and when did they fail?

MS. GREEN: Sure. So in 2013, and not to dig too far into the weeds of the last litigation. In 2012, Senior Debt was in default . . .

June 24, 2021 Hrg., pp. 16 – 17.

31. While AMBIT provided a long and interesting history of the relationship between the parties in other litigation, AMBIT ultimately never provided a substantive answer to this Court’s inquiry upon which it could make a decision in AMBIT’s favor.

32. Conversely, this Court finds that, as the Supreme Court noted, Stanley Sears specifically stated in his deposition that “Horizon “stands ready[,] able[,] and willing to perform in good faith;” and that “the goals of the parties to the [c]ontract are similar and that ... it is in the best interest of both parties to keep the Grant Town Power

Plant operated by [AMBIT] open, viable, and profitable,” *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 5, 857 S.E.2d 33, 37 (2021).

33. This Court finds that AMBIT did not provide evidence that Horizon ever failed to be ready, able, and willing to perform the contract.

34. This Court finds that AMBIT admits that it has not paid the monies due under the contract in this matter since 2018, in breach of the agreement.

35. This Court further finds that AMBIT provided no facts to support its claims that Horizon breached the contract in question as a matter of law.

II. APPLICABLE STANDARDS OF REVIEW

Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. ‘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.’ Nevertheless, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence,” and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor. Summary judgment is appropriate where the record taken as a whole 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.

Painter v. Peavy, 192 W. Va. 189, 192–93, 451 S.E.2d 755, 758–59 (1994) (internal citations omitted).

“The essence of the inquiry a trial court must make on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Syl. Pt. 5, *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 253, 685 S.E.2d 219, 226 (2009) (citing W. Va. R. Civ. P. 56(c)); *Wilson v. Daily Gazette Co.*, 214 W. Va. 208, 588 S.E.2d 197 (2003) (quoting *Williams v. Precision Coil*, 194 W. Va. 52, 61, 459

S.E.2d 329, 338 (1995)). "The nonmoving party must also present evidence that contradicts the showing of the moving party by pointing to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact." *Crum*, 224 W. Va. at 254, 685 S.E.2d at 227.

III. CONCLUSIONS OF LAW

A. AMBIT breached the contract at issue in this case.

1. "If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are at issue." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 66, 459 S.E.2d 329, 343 (1995).

2. In the instant case, the contract is short, simple, and unambiguous, and may be interpreted as a matter of law.

3. The contract requires, as above, that Horizon would perform, "within its field," "upon [AMBIT's] reasonable request," "such public and governmental relations and liaison functions as are necessary or incident to aiding and assisting [AMBIT] in locating, permitting, licensing, developing, maintaining and operating power plants in the State of West Virginia and will further aid in such other ventures as locating coal "gob" and all like coal resources" when needed by AMBIT.

4. This Court finds that AMBIT did not ask Horizon to perform under the contract, and has not set forth any facts which would allow this Court to find that AMBIT *did* ask Horizon to perform, or that Horizon breached any obligation it owed to AMBIT under the agreement.

5. AMBIT's new claim that its request to "remain patient" in regards to debt payments in 2013 was actually a request for expertise under *this* contract, and that such a request had anything to do with AMBIT's breach of the contract in 2018, is

without merit.

6. AMBIT's failure to make a "reasonable request" under the contract precludes its ability to claim that Horizon somehow breached it.

7. AMBIT has not set forth any evidence which indicates Horizon failed to perform any duties under the contract, and/or was unable or unwilling to do so.

8. Rather, the relevant evidence, *i.e.*, the December 27, 2017 letter from AMBIT to Horizon, indicates clearly that AMBIT intended to breach the contract because, specifically, AMBIT's relationship with Horizon had become "considerably strained over the past several years due primarily to the ongoing litigation," and that "the Consulting Agreement has no value to [AMBIT] and that it is time to disband the Agreement and simplify our relationship to just landlord-tenant." *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 5, 857 S.E.2d 33, 37.

9. AMBIT has not offered facts which support legally cognizable reasons to fail to pay a contract or to void the same.

10. Accordingly, this Court finds that there is no genuine issue as to any material fact as to whether AMBIT breached its contract with Horizon, and that AMBIT breached its contract with Horizon as a matter of law.

B. AMBIT's affirmative defenses are not applicable to the facts adduced in this matter.

11. AMBIT also alleges, *in aliud*, that the agreement is void and unenforceable based on "impossibility, frustration, and commercial impracticability," and because Horizon has allegedly breached the duty of good faith and fair dealing.

12. Specifically, AMBIT is claiming that the contract is impracticable or that its purpose is frustrated because Horizon does not have the expertise necessary to fulfill

its duties under the contract, and because Horizon breached the duty of good faith and fair dealing implicit in every contract by filing lawsuits against AMBIT and otherwise expressing hostility to AMBIT in other forums, such as the Public Service Commission.

13. It is critical to note, first, that the public policy behind allowing freedom of contract is *sacred*, and a public policy which supersedes that one must be significant:

In the case of *State v. Memorial Gardens Development Corp.*, 143 W. Va. 182, 101 S.E.2d 425 (1957), we quoted the following language with which we still strongly agree:

[Y]ou are not to extend arbitrarily those rules which say that a given contract is void as being against publicpolicy, because if there is one thing which more than another publicpolicy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount publicpolicy to consider,—that you are not lightly to interfere with this freedom of contract.

Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P., 245 W. Va. 1, 11, 857 S.E.2d 33, 43 (2021).

i. Impracticability

14. In support of this liberty to freely and fairly contract, West Virginia adopted Restatement (Second) of Contracts § 261 in 2004, which replaces the old impossibility standard with one for impracticability. *Waddy v. Riggleman*, 216 W.Va. 250, 606 S.E.2d 222 (2004).

15. The impracticability standard is as follows:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Waddy at 257, S.E.2d at 229.

The factors to be applied are as follows:

Under the doctrine of impracticability, a party to a contract who claims that

a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.

16. The *Waddy* Court further explained:

Although the present rule is less strict than its inflexible ancestor, it, nevertheless, remains a difficult standard to meet.

Substituting the term 'impracticability'—instead of the historical usage of 'impossibility'—better expresses the extent of the increased legal burden that is required. That is, while it remains difficult to prove that something is impracticable, that legal excuse is broader than having to prove that something is impossible.... While impracticability embraces situations short of absolute impossibility, mere increase in difficulty is not enough.

Waddy v. Riggleman, 216 W. Va. 250, 258, 606 S.E.2d 222, 230 (2004) (emphasis added).

17. AMBIT stated, in its letter to Horizon, that it was not going to pay the contract anymore because, in effect, the parties no longer got along, and it did not feel that it was receiving a benefit, financial or otherwise, from the contract.

18. AMBIT now claims, in the alternative, that it *actually* breached the contract because it did not, and does not, believe Horizon was competent to render advice.

19. The Restatement examples specifically preclude similar fact patterns from "impracticability."

20. Here, AMBIT identifies no supervening "event" which rendered performance impracticable, nor does it identify a "basic assumption" on which the contract was made.

21. AMBIT, further, did not ask Horizon to actually perform under the contract, and there was, therefore, never an opportunity to test the alleged "impracticability" created by Horizon's "lack of expertise."

22. Moreover, as above, "increased difficulty" is not enough to void a contract for impracticability.

23. AMBIT's claim that the contract would not be financially beneficial is specifically called out in the Restatement as an example of what *is not* impracticability.

Some examples given by the Restatement itself are as follows:

On June 1, A agrees to sell and B to buy goods to be delivered in October at a designated port. The port is subsequently closed by quarantine regulations during the entire month of October, no commercially reasonable substitute performance is available (see Uniform Commercial Code § 2-614(1)), and A fails to deliver the goods. A's duty to deliver the goods is discharged, and A is not liable to B for breach of contract.

A contracts to produce a movie for B. As B knows, A's only source of funds is a \$100,000 deposit in C bank. C bank fails, and A does not produce the movie. A's duty to produce the movie is not discharged, and A is liable to B for breach of contract.

A and B make a contract under which B is to work for A for two years at a salary of \$50,000 a year. At the end of one year, A discontinues his business because governmental regulations have made it unprofitable and fires B. A's duty to employ B is not discharged, and A is liable to B for breach of contract.

Restatement (Second) of Contracts § 261 (1981).

24. Notably, the attempt to breach due to unprofitability does not discharge A's duty.

25. This Court therefore finds that AMBIT has not provided any legal support for its position on impracticability.

26. This Court further finds that AMBIT has not, as a matter of law, provided facts which would allow this Court or a jury to find that this contract was "impracticable."

27. Summary judgment in Horizon's favor on AMBIT's affirmative defense that the contract is unenforceable because it is impracticable is therefore proper.

ii. Frustration of Purpose

28. Similarly, "frustration of purpose" is a companion rule to the rule of impracticability, and was also adopted by the West Virginia Supreme Court in *Waddy*.

The Court explained:

Likewise, the companion rule to the rule of impracticability mentioned in the foregoing footnote, discharge by supervening frustration as set out in the Restatement (Second) of Contracts § 265, proves to be a difficult standard to meet.

29. Comment *a* to § 265 states, in relevant part:

First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

Waddy v. Riggleman, 216 W. Va. 250, 258, fn. 10, 606 S.E.2d 222, 230, fn. 10.

(2004).

30. Here, the stated purpose of the contract is that Horizon be available, within the scope of their field of expertise, to help AMBIT on specifically-listed issues in the contract.

31. AMBIT, in breaching the contract, alleged that the relationship between the parties was “strained” and that the Consulting Agreement “lacked value.”

32. AMBIT now claims, in the alternative, that it *actually* breached the contract because it did not, and does not, believe Horizon was competent to render advice.

33. Neither a strained relationship, nor the alleged “lack of value” in the contract interfere with Horizon’s ability to complete the contract if necessary.

34. Moreover, AMBIT’s belief that Horizon was not competent to render advice is inapposite to this case, as it admits that it did not ask Horizon to perform tasks under the contract since 2006.

35. Again, the Restatement examples are helpful in analyzing the instant case:

A and B make a contract under which B is to pay A \$1,000 and is to have the use of A's window on January 10 to view a parade that has been scheduled for that day. Because of the illness of an important official, the parade is cancelled. B refuses to use the window or pay the \$1,000. B's duty to pay \$1,000 is discharged, and B is not liable to A for breach of contract.

A, who owns a hotel, and B, who owns a country club, make a contract under which A is to pay \$1,000 a month and B is to make the club's membership privileges available to the guests in A's hotel free of charge to them. A's building is destroyed by fire without his fault, and A is unable to remain in the hotel business. A refuses to make further monthly payments. A's duty to make monthly payments is discharged, and A is not liable to B for breach of contract.

A leases a gasoline station to B. A change in traffic regulations so reduces B's business that he is unable to operate the station except at a substantial loss. B refuses to make further payments of rent. If B can still operate the station, even though at such a loss, his principal purpose of operating a gasoline station is not substantially frustrated. B's duty to pay rent is not discharged, and B is liable to A for breach of contract. The result would be the same if substantial loss were caused instead by a government regulation rationing gasoline or a termination of the franchise under which B obtained gasoline.

Restatement (Second) of Contracts § 265.

36. Here, AMBIT has not provided evidence showing that a "principal purpose" of the contract was frustrated; *i.e.*, no object critical to the performance of the contract has disappeared.

37. Obviously, too, AMBIT admits it did not ask Horizon to satisfy its duties, precluding AMBIT from claiming Horizon could not do so.

38. Accordingly, AMBIT has not, as a matter of law, provided evidence which would allow this Court or a jury to find that this contract was "frustrated."

39. To the extent such theories on Horizon's competency state a factual question, as AMBIT posits, AMBIT has produced no evidence that it ever believed Horizon's competency was an issue at the time of the breach.

40. Rather, AMBIT has produced deposition testimony ostensibly “proving” Horizon’s alleged incompetence by asking Horizon senior executives questions about various state and federal rules, policies, government officials which hold particular offices, and so forth, which it believes shows that Horizon is incapable of providing advice.

41. However, such questions show only that the deposed individuals could not answer those questions at the time of their depositions, which is not dispositive of any issue in this case and does not create a question of material fact.

42. AMBIT, for one, cannot show that those deponents would be the individuals answering the questions, let alone that the deponents’ alleged failure to answer these questions in 2021 would in any way allow AMBIT to preemptively breach the contract in 2018.

43. AMBIT’s argument also fails to take into account that Horizon could satisfy its contract in multiple ways, including, but not limited to, refusing unreasonable requests, recommending experts or recommending AMBIT hire experts who can answer questions which lie outside Horizon’s field of expertise, and/or educating itself on the topic at issue before providing advice.

44. Accordingly, while this Court does not believe AMBIT’s *ex post facto* argument claiming frustration of purpose due to incompetence on Horizon’s part is *legally* sustainable because AMBIT never asked Horizon to satisfy its responsibilities under the contract, AMBIT has also not presented *facts* which would enable this Court or a jury to find that Horizon was or is incapable of fulfilling its duties under the contract.

45. Accordingly, this Court finds that AMBIT has not provided any legal support for its position on impracticability.

46. This Court also finds that AMBIT has also not, as a matter of law,

provided facts which would allow this Court or a jury to find that this contract was "impracticable."

47. Summary judgment in Horizon's favor on AMBIT's affirmative defense that the contract is unenforceable because its purpose has been frustrated is therefore proper.

iii. Breach of the duty of good faith and fair dealing

48. West Virginia law implies a covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract. See, e.g., *Miller v. WesBanco Bank, Inc.*, 245 W. Va. 363, 387, 859 S.E.2d 306, 330 (2021).

49. AMBIT tersely claims, in its Motion, that Horizon breached its duty of good faith and fair dealing by "maligning it in court documents."

50. AMBIT extrapolated on this at length at the summary judgment hearing, claiming, *inter alia*, that Horizon breached this duty by filing lawsuits against it, and representing before the Public Service Commission that AMBIT is less than honest in its dealings.

51. Horizon suing AMBIT, for failure to pay its contract or otherwise, does not violate any "duty of good faith and fair dealing."

52. Contract law would cease to exist if a party could breach the duty of good faith and fair dealing simply by attempting to enforce its own rights in court.

53. Further, based on AMBIT's representations at the hearing, AMBIT appears to be claiming that this breach of good faith and fair dealing occurred in 2013 when Horizon sued AMBIT in an unrelated matter, in 2018 when Horizon sued AMBIT in this matter, and by filing documents which portrayed AMBIT in a negative light in 2021.

54. AMBIT has not adduced facts which explain, despite the occurrence of

this 2013 “breach,” why it continued to pay Horizon for four (4) more years without complaint, and did not identify this alleged “breach” in its letter refusing to pay the contract.

55. Moreover, AMBIT’s claim that Horizon’s PSC filings are evidence of this “breach” fails to account for the fact that AMBIT itself identifies these filings as occurring on November 24, 2021, almost three (3) years after it breached the contract by refusing to pay, placing them far outside the scope of information relevant to this case.

56. Moreover, to the extent AMBIT is tacitly attempting to claim a fiduciary relationship between the parties, as evidenced by, *e.g.*, the “best interests at heart” language in its Answer, as well as its occasional references to duties of “loyalty” and similar language in its Motion for Summary Judgment, the law is clear that parties who enter into a services contract with each other do not, without more, have a fiduciary relationship. *See, e.g., Morrison v. Columbia Gas Transmission, LLC*, No. CV 3:20-0674, 2021 WL 4975743, at *3 (S.D.W. Va. Oct. 26, 2021) (“Parties to a contract are generally not considered to be in a fiduciary relationship with one another”); *see also Elmore v. State Farm Mut. Auto. Ins. Co.*, 504 S.E.2d 893, 898 (W. Va. 1998).

57. AMBIT has not identified a single case, statute, or other form of legal support which supports its express or tacit positions related to the breach of good faith and fair dealing in this matter.

58. Accordingly, this Court finds that AMBIT has not provided any legal support for its position on Horizon’s alleged breach of good faith and fair dealing.

59. This Court further finds that AMBIT has also not, as a matter of law, provided facts which would allow this Court or a jury to find that Horizon breached its duty of good faith and fair dealing.

60. Summary judgment in Horizon’s favor on AMBIT’s defense that the

contract is unenforceable because Horizon violated the good faith and fair dealing is therefore proper.

IV. CONCLUSION

1. This Court hereby finds that there are no questions of material fact in relation to the instant case, and that summary judgment is appropriate.

2. AMBIT breached the contract with Horizon at issue in this case by failing to pay the \$50,000.00 due to Horizon in 2018, and by failing to pay it every additional year that this case has been pending.

3. AMBIT admits that it last asked Horizon to perform a duty under this agreement in 2006.

4. AMBIT provided no evidence that it asked Horizon to *perform* a duty under this agreement in 2006, nor did it provide evidence that Horizon *breached* a duty in 2006 or at any later date.

5. AMBIT cannot claim Horizon breached a contract under which Horizon was not asked to perform the task which it was contracted to perform.

6. AMBIT has not adduced facts or law which would allow this Court to void the contract for impracticability, frustration of purpose, or breach of the duty of good faith and fair dealing.

7. AMBIT has not, therefore, provided more than a scintilla of evidence which would allow this case to proceed to a jury.

8. As a matter of law, this Court finds that Horizon did not breach its agreement with AMBIT, for the same reasons stated herein.

WHEREFORE, this Court hereby FINDS and CONCLUDES that Horizon's Motion for Summary Judgment be GRANTED, and that AMBIT's Motion for Summary Judgment be DENIED. AMBIT is accordingly required to pay Horizon all balances due

and owing on the contract which is the subject of this case. AMBIT's objections and exceptions are noted.

The Clerk is directed to enter judgment against AMBIT and in favor of Horizon in the amount of \$250,000.00. Fees and costs, if any, shall be paid by AMBIT.

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

So ordered this 19th day of July, 2022.

/s/ Patrick N. Wilson
Circuit Court Judge
16th Judicial Circuit

Respectfully submitted by:

/s/ Mark A. Kepple
Mark A. Kepple, Esq.
W. Va. Bar ID #7470
BAILEY & WYANT, P.L.L.C.
1219 Chapline Street
Wheeling, WV 26003
Telephone: (304) 233-3100
Fax: (304) 233-0201
mkepple@baileywyant.com

Respectfully provided to:

Roberta F. Green, Esq.
W. Va. Bar ID #6598
John F. McCuskey, Esq.
W. Va. Bar ID #2431
Shuman, McCuskey & Slicer, PLLC
1411 Virginia Street East, Suite 200
P.O. Box 3953
Charleston, WV 25301

[1] AMBIT also filed a brief Reply in this matter, but it was untimely filed at the end of the day on June 23, 2022, less than two (2) days before the hearing on June 24, 2022. The Reply was not compliant with W. Va. R. Civ. P. 6(d)(2) and (3). However, in the interest

of completeness and deference to AMBIT, this Court did read and consider the Reply.
[2] At the June 24, 2022 hearing, there was a dispute between the parties as to whether Horizon is to provide subjective expertise “within its field” or whether AMBIT determines the field of expertise. AMBIT argued at the June 24, 2022 hearing that the expertise in question was more or less determined by AMBIT, not Horizon. While not strictly germane to the summary judgment question before this Court, this Court notes that the Contract specifically contains the following paragraph:

WHEREAS, First Party and Second Party have negotiated an agreement wherein Second Party will provide expertise and consulting services *within its field* to First Party in its projects in West Virginia.

June 25, 1987 Contract, p. 1 (emphasis added).

Accordingly, it seems clear that the specific contractual requirements, e.g., “such public and governmental relations and liaison functions as are necessary or incident to aiding and assisting First Party in locating, permitting, licensing, developing, maintaining and operating power plants in the State of West Virginia and will further aid in such other ventures as locating coal “gob” and all like coal resources,” as set forth enumerated paragraph 2 of the Contract, *supra*, are by definition limited to expertise and consulting services within Horizon’s field of expertise. After all, it would make little sense to require Horizon to opine on topics outside its respective fields of expertise.

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.



West Virginia E-Filing Notice

CC-24-2018-C-76

Judge: Patrick Wilson

To: Roberta Frances Green
rgreen@shumanlaw.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
Horizon Ventures of West Virginia, Inc., a West Virginia Corporation v. American Bituminous Power
Partners, LP
CC-24-2018-C-76

The following order - motion was FILED on 8/4/2022 4:30:22 PM

Notice Date: 8/4/2022 4:30:22 PM

Rhonda Starn
CLERK OF THE CIRCUIT COURT
Marion County
219 Adams St Room 211
FAIRMONT, WV 26554

(304) 367-5360
Rhonda.Starn@courtswv.gov

In the Circuit Court of Marion County, West Virginia

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

v.

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

Case No. CC-24-2018-C-76
Judge Patrick N. Wilson

ORDER DENYING AMBIT'S MOTION TO ALTER, AMEND JUDGMENT

On July 29, 2022 the Defendant filed AMBIT'S Motion to Alter, Amend Judgment pursuant to West Virginia Rules of Civil Procedure Rule 59(e). After review of Defendant's motion, the court file, and the applicable law, the Court makes the following Findings of Fact and Conclusions of Law:

1. On July 19, 2022 the Court entered a Final Order Granting Horizon's Motion for Summary Judgment wherein the Court determined that there is no genuine issue of material fact in the above-captioned case and entered judgement in favor of Plaintiff.

2. Through motions practice and oral arguments counsel for both parties declared that the claims in this action were ripe for summary judgment consideration.

3. Upon entry of summary judgment in favor of Plaintiff, the Defendant filed the instant motion and argues that the factual recitations included in the order granting summary judgment are inaccurate, that Defendant's positions are not fully outlined in the order granting summary judgment, and now asserts that the matters before the Court were not ripe for summary judgment pursuant to language contained in an appellate decision issued in reference to Marion County Case Number 18-C-130, which

is proceeding in business court.

4. The factual recitations contained in the order granting summary judgment are accurate as to the dispositive issues in this case.

5. Plaintiff alleged a breach of contract and damages flowing from AMBIT's non-payment of an annual consulting fee provided for pursuant to a contract between the parties.

6. It is undisputed that the contract exists and that the annual consulting fee has not been paid since 2017.

7. Defendant argued that the contract, however, is unenforceable as the purpose of the contract has been frustrated leaving no duty of Defendant to perform; that Plaintiff failed to cure a material breach after having been provided notice of the same; and finally, that the expertise upon which the contract was formed is no longer existent, thereby making the performance of the contract impossible.

8. All positions of the Defendant were appropriately considered and disposed of through the Court's order granting summary judgment for the reasons stated therein.

9. The Defendant has asserted no grounds under which the Court could consider altering or amending the judgment previously entered.

10. Without sufficient grounds to alter or amend the judgment the Defendant now argues that the matter was not actually ripe for summary judgment consideration, entirely contradictory of its previously asserted position during the motions practice.

11. In its reversal of position, the Defendant attempts to invoke pronouncements of the Supreme Court made in a separate matter concerning a distinct contractual issue involving non-payment of rent between the parties – which is entirely unrelated to the matters at issue in this action.

Accordingly, the Final Order Granting Horizon's Motion for Summary Judgment was appropriate as written and AMBIT's Motion to Alter, Amend Judgment is hereby DENIED.

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

/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.