

In the Circuit Court of Kanawha County, West Virginia

Harold D. Ward,
Plaintiff,

v.

Case No. CC-20-2020-C-282
Judge Christopher C. Wilkes

ERP Environmental Fund, Inc.,
Defendant

**ORDER GRANTING MOTION OF SPECIAL RECEIVER TO ENFORCE
RECEIVERSHIP ORDER**

This matter came before the Court this 30th day of September, 2024, upon the Motion of Special Receiver to Enforce Receivership Order Against Fayette County, West Virginia Code Enforcement Agency and Its Information Demand Dated July 19, 2024. The Special Receiver for Defendant ERP Environmental Fund, Inc. (hereinafter “the Special Receiver”), by counsel, has briefed the issues, and the Fayette County Code Enforcement Agency (hereinafter “FCoWV CEA”), as well as any other non-movant as a party in this case or on the Special Service List, has not responded to the motion or the Court’s corresponding Trial Court Rule 22 Briefing Order. The Court notes that it directed the Circuit Clerk’s Office to transmit a copy of the Briefing Order to counsel for the Fayette County Code Enforcement Agency, as identified in the motion’s certificate of service, and also provided a courtesy copy of the same to said counsel via email. 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 record and the pertinent legal authorities, the Court finds granting instant motion is appropriate.

On August 27, 2024, the Special Receiver, by counsel, filed the Motion of Special Receiver to Enforce Receivership Order Against Fayette County, West Virginia Code

Enforcement Agency and Its Information Demand Dated July 19, 2024. The Special Receiver argued that Defendant ERP Environmental Fund, Inc. (hereinafter “ERPEF”) was served with said Information Demand, attached as an exhibit to the motion, which resembles a subpoena and seeks numerous responses, documents, records, and record searches concerning ERP Environmental Fund, Inc. and real property that ERP Environmental Fund, Inc. is alleged to own or have owned in Fayette County. See Mot., p. 2. The Special Receiver argued this Information Demand violates the Receivership Order in this action. *Id.* at 4. The Fayette County Code Enforcement Agency has not responded to the Motion nor to the corresponding Trial Court Rule 22 Briefing Order, nor has any other non-movant, either a party in this case or nonparty on the Special Service List.

The Special Receiver requests a stay of the Information Demand. By Order of this Court dated December 22, 2020, this Special Receiver was appointed by this Court to serve as receiver for Defendant and the Receivership Order governs the powers, duties, responsibilities, and authorities of the Special Receiver as well as those actions which may or may not be taken against the Special Receiver and Defendant ERPEF. The Receivership Order also created a “receivership estate” for ERPEF (including its property and records) under the control of the Special Receiver.

Paragraph 21 of the Receivership Order prohibits legal or enforcement actions against the Special Receiver except for limited circumstances. Paragraph 21 of the Order reads as follows:

21. No person shall file suit or take other legal or enforcement action against the Special Receiver without an Order of this Court permitting the suit or action; *provided, however*, that the foregoing restriction shall not apply to suits or other legal or enforcement actions against the Special Receiver solely in his capacity as the representative of the Defendant or the receivership estate if and to the extent such suit or other action is permitted by the express provisions of Paragraphs

37 through 41 of this Order.

Also, Paragraph 37 of the Order reads as follows:

37. Any and all existing proceedings against or in respect of the Defendant or its property are hereby stayed and suspended pending further Order of this Court, *provided, however*, that nothing in this Order shall (a) prevent any person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph or (b) affect any state or federal regulatory agency's police and regulatory authority in respect of the Defendant and the Defendant's assets and operations, including any action, suit or proceeding that is taken in respect of the Defendant by or before the regulatory agency, other than the enforcement of a payment order by the regulatory agency.

Similarly, Paragraph 38 of the Receivership Order provides as follows:

38. **No person shall file suit or take other legal or enforcement action against the Defendant** or the Defendant's property, except (a) any action taken by a state or federal regulatory agency pursuant to its police and regulatory authority in respect of the Defendant and the Defendant's assets and operations, including any action, suit or proceeding that is taken in respect of the Defendant by or before the regulatory agency, other than the enforcement of a payment order by the regulatory agency with respect to payment obligations incurred prior to the Special Receiver's appointment, (b) with the written consent of the Special Receiver, or (c) in accordance with an Order of this Court permitting the suit or action. (emphasis added).

On or about July 30, 2024, ERPEF was served with a twenty-three page Information Demand dated July 19, 2024 by the Fayette County, West Virginia Code Enforcement Agency. The Information Demand states that it concerns an "Investigation of Known & Reasonably Suspected Conditions of Public Nuisance within the Johnson Fork – Loup Creek (sic) Watershed within Fayette County, West Virginia". The Special Receiver avers this "investigation" appears to involve the presence of certain abandoned coal mine waste dumps located in the Johnson Fork area of Fayette County. The Special

Receiver avers that the Information Demand, which resembles a subpoena, seeks numerous responses, documents, records, and detailed record searches concerning ERPEF and real property that ERPEF is alleged to own or have owned in Fayette County, West Virginia, but which demands have nothing to do with any current or past mining, reclamation, or operational activities of ERPEF or with any mining permit(s) that are currently held by ERPEF or which may have previously been held by ERPEF.

Further, in addition to the Information Demand, FCoVW CEA also sent a letter dated July 30, 2024 to the Special Receiver indicating that the Information Demand was being provided to the Special Receiver solely as a “courtesy,” and that FCoVW CEA “issued” the Information Demand to ERPEF and “served” it upon ERPEF’s “Board of Directors and Statutory Agent In West Virginia” but that the Information Demand “now requires nothing from the Special Receivership and is provided for informational purposes only”.

The Special Receiver avers that even if the Information Demand does not seek or require any information or response from the “Special Receivership”, it is silent with respect to the numerous demands made by FCoVW CEA of ERPEF and ERPEF’s Board of Directors. Importantly, ERPEF currently has no officers or directors because all of its officers and directors resigned prior to this civil action being filed and prior to establishment of the receivership estate in March 2020. Additionally, ERPEF has no employees, assets, property, records, or operations outside of the receivership estate, which estate is under the sole control of the Special Receiver. Thus, the Court finds that to the extent the Information Demand separately seeks records and information from ERPEF or ERPEF’s Board of Directors, there is no person or any separate entity which could respond on behalf of ERPEF to the Information Demand outside of the Special Receiver or the receivership.

Further, the Court discusses the applicability of the Receivership Order. The Information Demand states that “You are LAWFULLY COMMANDED...” to produce information. Likewise, it states that failure to comply may subject the party to an Order to comply and a civil enforcement action with penalties of \$5,000.00 to \$10,000.00 per day. Finally, it closes with “IT IS SO ORDERED.” Therefore, the Court considers the Information Demand is a “legal or enforcement action” expressly prohibited by Paragraph 21 of the Receivership Order. The Court notes that while Paragraph 21 of the Receivership Order does permit legal or enforcement actions against the Special Receiver in very limited circumstances, none of those exceptions apply here.

Further, the Court finds the Information Demand violates Paragraphs 37 and 38, in that Paragraph 37 prohibits any proceedings against Defendant ERPEF or its property, except in limited circumstances – none of which apply here. Also, Paragraph 38 requires that any legal or enforcement action against ERPEF must be filed with either the consent of the Special Receiver, which was not obtained here, or by Order of this Court, which was also not issued here.

Finally, the Court notes the following regarding the background of the Information Demand. The Special Receiver represents the Information Demand states that it concerns an “Investigation of Known & Reasonably Suspected Conditions of Public Nuisance within the Johnson Fork – Loup Creek (sic) Watershed within Fayette County, West Virginia” and that this “investigation” appears to involve the presence of certain abandoned coal mine waste dumps located in the Johnson Fork area of Fayette County that were apparently left or created some seventy-plus years ago (well before the enactment of the Federal Surface Mine Control and Reclamation Act of 1977 (“SMCRA”)) by coal operators no longer in existence.

The Special Receiver avers that Fayette County has been involved in

litigation in Federal Court since 2021 with various parties, including past and present landowners, that it alleges have responsibility for the abandoned mine dumps in Johnson Fork, having made various claims of open dumps, surface and groundwater contamination, imminent environmental harm, public nuisance, and violations under the County's 2018 nuisance ordinance as well as under other state and federal laws. *The County Commission of Fayette County, West Virginia, et al., v National Grid NE Holdings 2, LLC*, et al Civil Action No. 2:21-cv-00307, United States District Court for the Southern District of West Virginia, Charleston Division. See Motion Exs. Further, the Special Receiver argues that all efforts by the County at its contamination and nuisance claims related to the abandoned mine dumps in Johnson Fork of Loop Creek have been dismissed and that the United States District Court for the Southern District of West Virginia has granted summary judgment and/or dismissal with prejudice in favor of the defendants on all counts in that matter and against Fayette County for the exact same abandoned mine dumps and watershed area for which the Information Demand now seeks a response from Defendant ERPEF.

In conclusion, after appropriate consideration, the Court finds that Plaintiff's motion must be granted because nonmovants fail to dispute the well-made motion. In this matter, the Special Receiver's motion is well made and includes copies of the Information Demand, as well as the July 30, 2024 letter to the Special Receiver and relevant federal court orders cited in the motion, establishing the facts set forth above which entitle the Special Receiver to the stay or quash of the Information Demand. Further, the motion explains how each of the above-mentioned paragraphs of the Receivership Order prohibit the type of action taken by Fayette County in its Information Demand. The Fayette County Code Enforcement Agency fails to respond at all, and, therefore, fails to present evidence or argument against said motion, or as to why the

Information Demand is valid in this circumstance. So, the Court should grant the Special Receiver's well-made motion, which has not been disputed by the Fayette County Code Enforcement Agency.

Accordingly, the Court GRANTS the Motion of Special Receiver to Enforce Receivership Order Against Fayette County, West Virginia Code Enforcement Agency and Its Information Demand Dated July 19, 2024.

Therefore, it is hereby ADJUDGED and ORDERED:

1. The Motion of Special Receiver to Enforce Receivership Order Against Fayette County, West Virginia Code Enforcement Agency and Its Information Demand Dated July 19, 2024 is hereby GRANTED; and
2. The Information Demand dated July 19, 2024 is hereby QUASHED as to ERPEF and ERPEF's "Board of Directors and Statutory Agent In West Virginia".

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 electronically, and the Fayette County Code Enforcement Agency at Michael O. Callaghan, Esq., Chief Assistant Fayette County Prosecuting Attorney, Environmental & Public Health Protection Unit, c/o Neely and Callaghan, 1337 Virginia Street East, Suite 200, Charleston, West Virginia, 25301-3011 (email mcallaghan@neelycallaghan.com).

/s/ Christopher C. Wilkes
Circuit Court Judge
13th 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.