

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 AMBIT'S MOTION TO ENFORCE AND MOTION FOR TRO AND
GRANTING HORIZON'S MOTION TO DEEM AMBIT IN DEFAULT**

On or about the 25th day of November, 2024, the Plaintiff, by counsel, filed a Motion to Enforce Settlement and Memorandum of Law. On or about December 3, 2024, Defendant, by counsel, filed Horizon's Response to AMBIT's Motion to Enforce Settlement and Motion to Deem AMBIT in Default of Its Judgment Payment Obligations to Horizon. On December 5, 2024, Horizon filed Horizon's Supplemental Filing Regarding Pathward Documents Submitted in Support of Horizon's Response to AMBIT's Motion to Enforce Settlement and Motion to Deem AMBIT in Default of Its Judgment Payment Obligations to Horizon. On December 4, 2024, Plaintiff filed AMBIT's Motion for Temporary Restraining Order And/Or for Preliminary Injunction. On a prior day, Defendant filed Horizon's Response to AMBIT's Motion for Temporary Restraining Order And/Or Preliminary Injunction. The matter was heard on Wednesday, December 11, 2024 at 1:30 p.m. via Microsoft Teams Meeting.

CONCLUSIONS OF LAW

Plaintiff filed its motion for enforce settlement, seeking the Court to compel and enforce the "settlement" in this matter. See Pl's Mot., p. 1. By way of background, 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. The parties represent that they then met in May 2024 to discuss the payment of the judgment. It is this settlement^[1] that the instant motion seeks to enforce.

The dispute surrounds one particular issue in the payment agreement/settlement: AMBIT argues that the parties' agreement necessitates Horizon's consent and signature regarding the bank (which is financing one of AMBIT's lump sum settlement payments to Horizon) obtaining a priority position for liens on AMBIT's assets and a priority position on payments of Accrued Subordinated Rent. See Pl's Mot., p. 1. The bank in question is referred to by the parties as "Pathward". On the other hand, Horizon avers it did not agree to this. Horizon represents it agreed to give the financier first lien position with regard to the Note, but not to subordinate its payments. See Def's Resp. to Mot. to Enforce, p. 2.

A contractual agreement "may be oral or written, express or implied." *Dailey v. Ayers Land Dev., LLC*, 241 W. Va. 404, 411, 825 S.E.2d 351, 358 (2019) (citing Syl. Pt. 2, *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987)).

The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. Syl. Pt. 1, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W. Va. 91, 91, 159 S.E.2d 784, 785 (1968). Nevertheless, settlement agreements are to be construed "as any other contract." *Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 452, 590 S.E.2d 641, 645 (2003)(citing *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979)). In those instances where a settlement agreement was reached but not signed by the parties, the agreement may still be enforced provided the parties

produce sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms of the agreement. *Riner v. Newbraugh*, 211 W. Va. 137, 141, 563 S.E.2d 802, 806 (2002)(citing *Few v. Hammack Enters., Inc.*, 132 N.C.App. 291, 511 S.E.2d 665, 669–70 (1999)).

As an initial matter, the Court discusses the parties' agreement. The parties do not dispute that a valid Agreement exists. The Court finds that at the May 2024 meeting, the parties set forth their agreement on an audio recording, and file containing the audio recording and a file containing a transcript of said recording were provided to the Court as exhibits. See PI's Mot. to Enforce, p. 2. It is not disputed that the parties did not execute a written agreement, although drafts were exchanged. See Def's Resp. to Mot. to Enforce, p. 4-5; see also PI's Mot. to Enforce, p. 10. Further, both parties acknowledge that both parties then acted in performance of the May 2024 agreement. Horizon pulled back Suggestions on Personal Property of AMBIT and stopped collection efforts. See Def's Resp. to Mot. to Enforce, p. 3, 5. AMBIT moved the Supreme Court to dismiss its pending petition for writ of prohibition and tendered payments due per the May agreement on May 29, 2024 and June 5, 2024. See PI's Mot. to Enforce, p. 2.

The Agreement directed that AMBIT pay Horizon several lump sum payments on a schedule to satisfy the judgment. These included the following: (1) one payment of \$1,250,000 due on May 29, 2024; (2) one payment of \$1,000,000 due on June 5, 2024; (3) one payment of \$4,500,000 due on October 1, 2024; (4) one payment of \$1,000,000 due on April 1, 2025; and (5) one payment of \$1,000,000 due on October 1, 2025. See Def's Resp. to Mot. to Enforce, p. 2. The first two of these payments were made without apparent issue. It is the third payment due on October 1, 2024 that is the subject of the instant motion. In an attempt to finance the third payment for \$4,500,000, AMBIT's lender desires a priority position for liens on AMBIT's assets and a priority position on

payments of Accrued Subordinated Rent. See Pl's Mot. to Enforce, p. 1. The dispute turns on, as described above, whether or not Horizon agreed to this at the May 2024 meeting.

The Court considers that here, the Agreement contained no financing contingency. The Agreement contained no provision involving a landlord waiver with standstill language. Instead, the Agreement's explicit terms stated that AMBIT would pay Horizon "before all others". See Def's Resp. to Mot. to Enforce, p. 2, 5. The Court finds that the Agreement/recording establish that Horizon would not subordinate its rights to payment to any party, including any private equity credit lender or other entity. See Def's Resp. to Mot. to Enforce, p. 5.

Further, the Agreement plainly and explicitly stated that if default occurred on any payment, collection under the judgment can be made from the full amount with credits on the monies paid. *Id.* at 3.

The Court also considers that in the instant motion, filed on or about November 25, 2024, AMBIT's request for relief requested that this Court compel Horizon to "sign the documents required by Pathward, which will allow the financing deal to close, allow AMBIT to make payment to Horizon...". See Def's Resp. to Mot. to Enforce, p. 6. However, AMBIT never submitted the subject documents required by Pathward to Horizon before filing the instant motion and requesting this relief. In its Response to the instant motion filed on or about December 4, 2024, Horizon represented to the Court that it had not seen the documents that AMBIT "is talking with the financier about". See Def's Resp. to Mot. to Enforce, p. 11. In its Supplemental Response filed December 5, 2024, Horizon stated that on December 4, 2024, after the filing of the Response, AMBIT first provided Horizon with said draft documents/contracts. See Def's Suppl Resp., p. 1. Further, Horizon attached the Pathward documents as Exhibits to said Supplemental

Response on December 5, 2024. At the hearing, when the undersigned asked counsel for AMBIT to point out which exhibit contains the document AMBIT claims Horizon would not sign, counsel for AMBIT replied that AMBIT didn't have them at the time that AMBIT filed this motion (which was on November 25, 2024), but that AMBIT provided them to Horizon after they got them[2]. The Court notes that the motion was filed November 25, 2024, and AMBIT missed its scheduled lump sum payment on October 1, 2024. The paperwork AMBIT is claiming Horizon would not sign was not provided to Horizon by the October 1, 2024 deadline. This paperwork certainly wasn't provided or apparently discussed at the May 22, 2024 meeting between the parties. See Def's Resp. to Mot. to Enforce, p. 8, 10. The Court finds it was not contained in the audio recording of the verbal agreement. *Id.* at 10. The Court finds this is further evidence that the relief AMBIT seeks was not contemplated time of the May Agreement.

This Court's review of the Pathward documents reveal their terms plainly go beyond anything on the audio recording of the May 2024 Agreement. As an initial matter, the documents, "Landlord's Waiver and Agreement" and "Subordination Agreement" require Horizon to enter into a contract with a third party, Pathward, which was not contemplated in the May 2024 Agreement. See Def's Suppl. Resp., p. 2. Further, the unexecuted contracts propose terms that are plainly outside of the scope of the parties' payment plan. Landlord's Waiver and Consent proposes to modify the Lease at the heart of this civil action with regard to Accrued Subordinated Rent payment, change the due date for the October 1, 2024 payment, consent to dismantling and removal of Equipment from the plant premises by Pathward in the event of default, waive and consent to all right to claim, assert, or enforce any lien against the equipment, in a waiver that would survive the termination of the lease and credit agreement, allow Pathward to assume the lease and theoretically operate the plant as substitute tenant, give the tenant

the ability to assign the lease without the involvement of Horizon, compel Horizon to agree to extend the lease to Pathward for an unknown period of time and compel Horizon to lease additional ground to Pathward to stage the dismantling of the plant, provide that in the event Pathward assumes the lease, it would not have to pay the Accrued Subordinated Rent. *Id.* at 3-7. Subordination Agreement proposes to have Horizon undertake contractual liability with Pathward, certify to Pathward that there is no other lien when Horizon itself has a first priority judgment lien on all property not subject to indebtedness and a second priority lien on all property subject to indebtedness, agree to subordinate the Agreed Subordinated Rent, require Horizon not to accept payments while this debt is outstanding, require Horizon to file a Satisfaction of Judgment in this matter when the Judgment has only been approximately 10% satisfied, consent to the sale or collection of collateral by Pathward, require Horizon to facilitate the sale of collateral by Pathward, appoint Pathward as Horizon's attorney in fact with regard to money received by Horizon from AMBIT, enter into a choice of law provision waiving jury trials and transferring venue to Michigan, subject Horizon to a indemnification and claims for attorney's fees from Pathward, and have Horizon agree to accept payments only if AMBIT is profitable. *Id.* at 7-12.

The Court finds there is no evidence these terms were agreed to by the parties, and the Court cannot, as a matter of law, read these terms into the parties' May 2024 Agreement. The Agreement contained no financing contingency, and failure to secure financing, if needed, is the responsibility of AMBIT.

For these reasons, the instant Motion to Enforce Settlement and Memorandum of Law is DENIED.

The Court next examines Horizon's Motion to Deem AMBIT in Default of Its Judgment Payment Obligations to Horizon, contained in its Response to the motion to

enforce. On February 23, 2024, this Court entered Judgment in favor of Horizon and against AMBIT. The parties agreed to certain dates for AMBIT to make lump sum payments to satisfy its Judgment entered in this civil action, as described above. Essentially, the parties agreed to a payment plan amongst themselves, after the Court entered Final Judgment. The Court notes that this Agreement includes Horizon agreeing to accept less than the judgment amount in exchange for AMBIT making agreed upon payments on agreed up on dates. See Def's Resp. to Mot. for TRO, p. 6. It is undisputed by the parties that although AMBIT made the timely tender of payment for the first two deadlines, May 29, 2024 and June 5, 2024, AMBIT did not tender the payment due on October 1, 2024[3]. The Agreement explicitly provides that if AMBIT fails to make any of the agreed upon payments, AMBIT would be in default of the Agreement and Horizon could seek immediate collection of the entire judgment amount. The Agreement states: "If Default on any payment, collection under the judgment can be made from the full amount with credit on the monies paid." The Court finds this language is clear, and in the event of AMBIT's default of any of the payments, Horizon has the right to immediately resume collection efforts that it began before the May 2024 meeting of the parties and subsequent payment plan agreement between the parties. The parties negotiated with counsel and chose not to include any financing contingency, right to cure, or other default provisions. See Def's Resp. to Mot. to Enforce, p. 3. It is not in dispute that AMBIT did not pay the October 1, 2024 payment. See Pl's Mot. for TRO, p. 4. For these reasons, the Court finds that Horizon's Motion to Deem AMBIT in Default of Its Judgment Payment Obligations to Horizon must be GRANTED.

The Court turns next to AMBIT's Motion for Temporary Restraining Order and/or for Preliminary Injunction. This motion sought this Court to prohibit Horizon from serving suggestions of execution or otherwise collecting on the judgment in this case. See Pl's

Mot. for TRO, p. 1. At the time of the filing of the motion, the parties were in the process of scheduling a hearing on this matter for December 30, 2024, and AMBIT argued “irreparable harm AMBIT seeks to halt will occur prior to that date, necessitating this motion”. *Id.* After a continuance in the docket of the undersigned, this matter was heard on December 11, 2024. The decision is outlined above. Therefore, the Court finds the Motion for Temporary Restraining Order and/or for Preliminary Injunction to be moot.

CONCLUSION

It is hereby ADJUDGED and ORDERED that Plaintiff’s Motion to Enforce Settlement and Memorandum of Law is hereby DENIED. It is further hereby ADJUDGED and ORDERED that AMBIT’s Motion for Temporary Restraining Order And/Or for Preliminary Injunction is hereby DENIED as MOOT. It is further hereby ADJUDGED and ORDERED that Horizon’s Motion to Deem AMBIT in Default of Its Judgment Payment Obligations to Horizon is hereby GRANTED. 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 13th day of December, 2024.

[1] See Def's Resp. to Mot. For TRO, p. 2 ("payment agreement"), 5-6 ("an agreement by which AMBIT could and would pay Horizon the judgment"); see *also* Pl's Mot. to Enforce, p. 1 ("On May 22, 2024, the parties met in Morgantown, West Virginia, to discuss settlement of all claims and the judgment against AMBIT...").

[2] See *also* Def's Resp. to Mot. to Enforce, p. 9-10 (explaining AMBIT did not have the paperwork as of November 22, 2024).

[3] The Court notes that at that time, Horizon avers it then offered subsequent cure periods and AMBIT did not make the \$4,500,000 payment during any of these cure periods. See Def's Resp. to Mot. for TRO, p. 10.

/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.