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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

2018 NOV -1 PM 3:04  
CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

WW CONSULTANTS, INC.,

v.

Civil Action No. 18-C-115  
Honorable Christopher C. Wilkes

POCAHONTAS COUNTY PUBLIC  
SERVICE DISTRICT, MARK SMITH,  
DAVID GANDEE, DAVID DRAGAN,  
the WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
and the WEST VIRGINIA WATER  
DEVELOPMENT AUTHORITY.

ORDER DENYING MOTIONS TO DISMISS OF  
MARK SMITH, DAVID DRAGAN, AND DAVID GANDEE

On a previous day came Defendants Mark Smith, David Gandee, and David Dragan, and moved the Court to dismiss Plaintiff's claims against them. For the reasons set forth more fully herein, the motions are DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. On February 6, 2018, WWC filed the instant Complaint in the Circuit Court of Kanawha County against the Pocahontas County Public Service District ("PSD"), its board members Mark Smith, David Gandee, and David Dragan, (the "individual Defendants" or "individual board members") the West Virginia Department of Environmental Protection ("DEP") and the West Virginia Water Development Authority ("WWWDA") asserting claims for breach of contract, personal liability of the individual board members, and a special receivership as to the PSD, DEP, and WWWDA<sup>1</sup>.
2. The claims arise out of the design and construction of a large waste water treatment facility and collection system in Pocahontas County, West Virginia. According to the

<sup>1</sup> The Court notes the WWWDA was dismissed from this litigation by Agreed Order entered on or about October 22, 2018.

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- allegations in the Complaint, WWC designed the system and provided resident project representatives during the construction. PSD was the project's owner, and the WVDEP and WWDA provided financial backing and administration for the project.
3. Count V, which alleges a claim of personal liabilities of the PSD board members, Smith, Gandee, and Dragan, arises out of W. Va. Code § 16-13A-4(f), which provides that PSD board members "are answerable only for willful misconduct in the performance of their duties."
  4. Specifically, the Complaint alleges that Smith, Gandee, and Dragan "have willfully and purposely disregarded the clear contractual obligations of the PSD out of a personal vendetta against WWC and David Rigby" and that their actions "have no reasonable justification under the terms of the contract between the PSD and WWC." (Compl. ¶¶ 121-122.)
  5. The Complaint further alleges that the board members breached their "duty of good faith and fair dealing with WWC by refusing to timely consider the Request for Equitable Adjustment, Sixth Amended Letter of Agreement, and Eighth Amended Letter of Agreement," resulting "in a scenario where existing excess construction funds that are currently available to pay WWC could be returned to the funding agencies prior to the resolution of the contract dispute leaving WWC unable to fully collect on money owed by the PSD." (Compl. ¶¶ 123-124.)
  6. Finally, the Complaint alleges that the board members "and WVDEP employee Robert Coontz have conspired to avoid paying WWC what is fairly owed under the circumstances." (Compl. ¶ 125.)
  7. The PSD answered and filed a counter-claim against WWC, alleging that WWC failed to provide certain services that it was contractually obligated to perform at the conclusion of the project. The PSD also alleges professional negligence against WWC for certain design features and for its handling of some issues that came up during

construction. WWC filed an Answer to the counter-claim denying that it breached any duties under the contract, and further disputing that it violated its professional duty of care. The DEP and WWDA have also both appeared and answered. Subsequently, an Agreed Order was entered dismissing WWDA from this civil action.

8. On March 28, 2018, Defendants Smith and Dragan appeared and moved to dismiss the claims against them pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.
9. On May 2, 2018, Defendant Gandee appeared and likewise moved to dismiss the claims against him pursuant to Rule 12(b)(6).
10. All three individual defendants are represented by the same counsel, and the motions appear to be substantially identical. Accordingly, this Order will address both motions as if they constituted a single motion filed jointly by all three individual defendants, Smith, Dragan, and Gandee.
11. On July 24, 2018, an Order was entered transferring this matter to the Business Court Division and assigning it to the undersigned as the Presiding Judge and the Honorable Joanna I. Tabit as the Resolution Judge<sup>2</sup>.
12. The Court entered a Scheduling Order on August 9, 2018. Thereafter, on September 10, 2018, a Trial Court Rule 22 Scheduling Order was entered noting the pending motion to dismiss filed by Defendant Gandee and directing the non-moving parties to file written responses and proposed orders within 15 days. Those responses and proposed orders were timely filed and address all pending motions to dismiss, including Defendant Gandee as well as Defendants Smith and Dragan.

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<sup>2</sup> The Court notes the Honorable Michael Lorenson is now the Resolution Judge in this civil action.

13. The Court has considered the Motions to Dismiss filed by Defendants Gandee, Smith, and Dragan, and all Responses and Replies. Accordingly, the motions are now ripe for adjudication.

#### APPLICABLE LAW

14. The Supreme Court of Appeals of West Virginia "has previously found that motions to dismiss are generally viewed with disfavor because the complaint is to be construed in the light most favorable to the plaintiff and its allegations are to be taken as true." *Roth v. Defelicecare, Inc.*, 226 W. Va. 214, 220, 700 S.E.2d 183, 189 (2010) (citing *Sticklen v. Kittle*, 168 W. Va. 147, 163-64, 287 S.E.2d 148, 157 (1981)).
15. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).
16. The provisions of Rule 8 of the West Virginia Rules of Civil Procedure, which address the general rules of pleading, are "rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).
17. "Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based." *Id.*

#### ANALYSIS

18. Defendants Smith, Dragan, and Gandee assert that the claim against them should be dismissed: (1) because they are not parties to the contract between the PSD and WWC and have not agreed to be responsible under it; (2) because the Complaint does not contain factual allegations that they have engaged in willful conduct; and (3)

because they are entitled to qualified immunity. Those arguments will be addressed in turn.

**(1) Defendants Gandee, Smith and Dragan argue that Plaintiff's claims against them should be dismissed because they are not parties to the contract between PSD and WWC and have not agreed to be responsible under it.**

19. Defendants' first argument is that they bear no exposure here because they are not parties to the contract between the PSD and WWC and have not otherwise agreed to be responsible or liable based on that contract.

20. Pursuant to W. Va. Code § 16-13A-4(f), although "members of the board are not personally liable or responsible for any obligations of the district or the board, [they] are answerable . . . for willful misconduct in the performance of their duties."

21. WWC has alleged that the individual Defendants "willfully and purposely disregarded the clear contractual obligations of the PSD out of a personal vendetta against WWC and David Rigby," (Compl. ¶ 121), "breached [their] duty of good faith and fair dealing with WWC," (Compl. ¶ 123), and "conspired to avoid paying WWC what is fairly owed under clear contractual obligations," (Compl. ¶ 125).

22. Accordingly, under § 16-13A-4(f), if those allegations are proven, the individual board members could be answerable for the PSD's obligations caused by their willful misconduct notwithstanding the lack of privity between WWC and them individually.

**(2) Defendants Gandee, Smith and Dragan argue that the factual allegations in the Complaint are insufficient to state a valid claim against them.**

23. Second, Defendants argue that the Complaint is "bare of any factual assertion that Smith, Gandee or Dragan engaged in any willful misconduct," and assert that "WWC must allege facts demonstrating willful misconduct." (Def. Mot. at 5.)

24. According to still-valid West Virginia law as authored by former Justice Cleckley: "Although entitlement to relief must be shown, a plaintiff is not required to set out facts

upon which the claim is based." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).

25. The Complaint complies with Rule 8's notice pleading requirements, as it cites the statute under which the individual Defendants may be liable and alleges that they engaged in willful misconduct that, if proven, could make them personally and individually liable under that statute.

26. The Complaint further alleges that the willful misconduct constituted disregarding contractual obligations out of a personal vendetta and without reasonable justification, (Compl. ¶¶ 121-122), refusing to timely consider WWC's requests made under the contract, (Compl. ¶ 123), and conspiring with the DEP to avoid paying WWC (Compl. ¶ 125).

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27. Accordingly, the allegations in the Complaint meet or exceed the requirements set forth in the West Virginia Rules of Civil Procedure.

**(3) Defendants Gandee, Smith and Dragan argue that they are entitled to qualified immunity.**

28. Finally, Defendants assert that they are entitled to qualified immunity for Plaintiff's claims against them.

29. An official seeking the protection of qualified immunity must be "acting within the scope of his authority" and not in violation of a "clearly established law[] of which a reasonable official would have known." *State v. Chase Sec., Inc.*, 188 W. Va. 356, 364-365, 424 S.E.2d 591, 599-600 (1992).

30. The Complaint has alleged that the individual Defendants engaged in willful misconduct as contemplated by § 16-13A-4(f). If that allegation is proven, they could be acting both outside the scope of their authority and could be acting in violation of a clearly established law of which a reasonable PSD board member would have known.

31. Thus, if the allegations of willful misconduct are proven, the protections of qualified immunity may not be available to shield the individual Defendants from liability.

32. In sum, Defendants Smith, Dragan and Gandee have failed to carry their heavy burden of demonstrating that it is beyond doubt that WWC can prove no set of facts that would entitle it to relief.

33. The Complaint having properly pleaded a valid cause of action against them, the individual Defendants' motions are hereby DENIED.

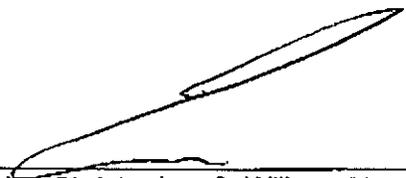
**CONCLUSION**

WHEREFORE, for the reasons set forth herein, the Motions to Dismiss of Defendants Mark Smith, David Gandee, and David Dragan are DENIED. Their objections to this Order are noted and preserved for the record.

The Clerk is DIRECTED to transmit a certified copy of this Order to all counsel of record and any unrepresented party.

IT IS SO ORDERED.

Enter this 1st day of November, 2018.

  
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Honorable Christopher C. Wilkes, Circuit Judge

Prepared by (with changes by the Court):

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5th  
DAY OF November 2018  
Cathy S. Gatson CLERK  
CIRCUIT COUNTY OF KANAWHA COUNTY, WEST VIRGINIA