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

MARKWEST LIBERTY MIDSTREAM & RESOURCES, L.L.C.,

Plaintiff,

v.

CIVIL ACTION NO. 16-C-82
JUDGE H. CHARLES CARL, III

J.F. ALLEN COMPANY; AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC.; REDSTONE INTERNATIONAL, INC.; CIVIL & ENVIRONMENTAL CONSULTANTS, INC.; and COASTAL DRILLING EAST, LLC,

Defendants,

v.

THE LANE CONSTRUCTION CORPORATION,

Additional Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS DEFENDANT REDSTONE INTERNATIONAL INC.'S COUNTERCLAIMS AGAINST MARKWEST

This matter came before the Court this 7th day of May 2019, upon Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.'s Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest. The parties have fully briefed the issues necessary. 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 full consideration of the issues, the record, and pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter arises out of a construction contract between Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (hereinafter "Plaintiff" or "MarkWest") and Defendant J.F. Allen Company (hereinafter "Defendant" or "J.F. Allen"), wherein Defendant J.F. Allen Company was to design and construct a 100-foot tall, 1250-foot long retaining wall at MarkWest's Mobley Processing Plant in Wetzel County, West Virginia. J.F. Allen Company, in turn, entered into a subcontract with Defendant Redstone International Inc. (hereinafter "Defendant" or "Redstone") to perform the construction of the retaining wall. *See* Pl's Mem., p. 1-2; *see also* Compl.

2. On August 18, 2016, this matter commenced with the filing of the Complaint alleging Breach of Contract against J.F. Allen (Count I); Negligence/Gross Negligence against J.F. Allen (Count II); Negligence against Redstone (Count III); Negligence against Defendant AMEC Foster Wheeler Environment & Infrastructure, Inc. (hereinafter "AMEC") (Count IV); Negligence against Defendant Coastal Drilling, East, LLC (Count V); and Breach of Contract against Defendant Civil & Environmental Consultants, Inc. (Count VI). *See* Compl, ¶¶ 75-106. These claims surround the construction of a retaining wall needed to create flat land necessary to build a natural gas facility involved in the transportation and processing of natural gas and natural gas liquids produced in Northern West Virginia. *Id.* at ¶¶ 1-2; *see also* Redstone Ans., ¶¶ 1-2.

3. On September 23, 2016, Defendant Redstone filed its Answer and Affirmative Defenses to Plaintiff MarkWest's Complaint.

4. On November 2, 2016, Defendant Redstone filed its Answer and Affirmative Defenses to Cross-Claim of and Cross-Claim Against J.F. Allen, alleging that "[i]f and to the extent that Plaintiff sustained any of the injuries and/or damages and/or delays alleged in its Complaint, any such injuries and/or damages and/or delays are the result of JFA's acts and/or omissions as alleged in Plaintiff's Complaint". *See* Redstone Cross-Claim, ¶ 3. Further, Redstone alleged in its cross-claim against J.F. Allen that "to the extent that Redstone is found liable or is required to pay any amount to Plaintiff related to the allegations set forth in Plaintiff's Complaint...any such liability arises directly from the actions, failure to act, or breach by CEC, and Redstone is entitled to contribution and/or indemnification from JFA". *Id.* at ¶ 5.

5. Also on November 2, 2016, Defendant Redstone filed its Answer and Affirmative Defenses to Cross-Claim of and Cross-Claim Against Civil & Environmental Consultants, Inc., alleging that "[i]f and to the extent that Plaintiff sustained any of the injuries and/or damages and/or delays alleged in its Complaint, any such injuries and/or damages and/or delays are the result of CEC's acts and/or omissions as alleged in Plaintiff's Complaint". *See* Redstone Cross-Claim, ¶ 3. Further, Redstone alleged in its cross-claim against Defendant Civil & Environmental Consultants, Inc. that "to the extent that Redstone is found liable or is required to pay any amount to Plaintiff related to the allegations set forth in Plaintiff's Complaint...any such liability arises directly from the actions, failure to act, or breach by CEC, and Redstone is entitled to contribution and/or indemnification from CEC". *Id.* at ¶ 5.

6. On November 13, 2018, Redstone filed its Counterclaim Against MarkWest and Cross-Claims Against J.F. Allen and AMEC, asserting a Counterclaim against Plaintiff for the following claims: Failure to Coordinate (Count I); Quantum Meruit (Count II); and Unjust Enrichment (Count III). *See* Counterclaim, ¶¶ 12-27. Additionally, the Counterclaim contained

cross-claims against Defendants J.F. Allen and AMEC for the following causes of action: Breach of Contract by J.F. Allen (Count 1); Negligence by AMEC (Count II); and Tortious Interference by J.F. Allen (Count III). *Id.* at ¶¶ 39-58.

7. On December 12, 2018, Plaintiff filed the instant Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest. The Counterclaims at issue are: Failure to Coordinate (Count I); Quantum Meruit (Count II); and Unjust Enrichment (Count III). *See* Pl's Mem., p. 2.

8. On December 19, 2018, Defendant filed its Memorandum in Opposition to MarkWest Liberty Midstream and Resources, LLC's Motion to Dismiss Counterclaims.

9. On December 26, 2018, Plaintiff filed its Reply in Support of Motion to Dismiss Redstone International Inc.'s Counterclaims Against MarkWest.

10. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF REVIEW

11. This matter comes before the Court upon a partial motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "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., Inc.*, 160 W.Va. 530 (1977). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). "We recognized, however, that liberalization in the rules of

pleading in civil cases does not justify a carelessly drafted or baseless pleading." *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

12. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

13. In this matter, Plaintiff MarkWest seeks this Court to dismiss the following Counterclaims against it: Failure to Coordinate (Count I); Quantum Meruit (Count II); and Unjust Enrichment (Count III). *See* Pl's Mem., p. 2; *see also* Counterclaim, ¶¶ 12-27. The Court will take these issues up in turn.

Count I: Failure to Coordinate

14. First, Plaintiff argues Redstone's Failure to Coordinate claim (Count I) must be dismissed because West Virginia law does not recognize this claim. *See* Pl's Mem., p. 2-3. Plaintiff also argues no West Virginia court has ever found that an owner has an implied duty to coordinate its general contractor and the general contractor's subcontractors. *Id.* at 4.

15. Redstone, in its Response, avers it validly set out its claim in the Counterclaim and detailed the factual basis, but the Court notes it did not dispute that West Virginia has never recognized a claim for failure to coordinate.

16. The Court's own research has not found any West Virginia case which recognized a claim for failure to coordinate. The Court notes Redstone cites and relies on an out of state, federal case to allege its failure to coordinate claim in its Counterclaim. *See* Counterclaim, ¶14.

17. The Court finds this doctrine has not been accepted in West Virginia and declines to recognize the claim in the case at bar. For this reason, Plaintiff's Motion to Dismiss shall be GRANTED as to Count I. Count I of Redstone's Counterclaim shall be DISMISSED.

18. The Court notes Plaintiff also proffered two alternate arguments with regard to Count I. First, Plaintiff argued that even if West Virginia recognized a failure to coordinate claim, Redstone's claim must still be dismissed because Plaintiff contractually delegated the responsibility to coordinate the retaining wall project to Defendant J.F. Allen in the contract. *See* Pl's Mem., p. 4.

19. Second, Plaintiff argued that even if West Virginia recognized a failure to coordinate claim, and Plaintiff had not contractually delegated the duty to coordinate, the claim would fail because this case involves a private owner that retained one prime contractor and not a public owner that retained multiple contractors. *Id.* at 6.

20. However, because the Court is dismissing Count I, Failure to Coordinate, on the basis that it is not recognized by West Virginia law, the Court declines to rule on these two alternate arguments.

Quasi-Contract Claims: Quantum Meruit (Count II) and Unjust Enrichment (Count III)

21. Next, Plaintiff argues Redstone's Quantum Meruit (Count II) and Unjust Enrichment (Count III) claims must be dismissed because an express contract precludes an implied contract covering the same subject matter with Defendant. *See* Pl's Mem., p. 2.

22. Specifically, Plaintiff avers that through Counts II and III, Redstone is seeking restitution from Plaintiff for its work on the retaining wall; however, J.F. Allen was the general contractor for the retaining wall and Redstone entered into a subcontract with J.F. Allen to perform the construction of the retaining wall in exchange for payment. *Id.* at 9.

23. Redstone, on the other hand, argues these Counts were brought in the alternative. *See* Def's Resp., p. 8. Redstone avers in the absence of contract, Redstone's only claim for direct relief against Plaintiff is under the principles of equity[1]. *Id.*

24. Rule 8 of the West Virginia Rules of Civil Procedure governs the general rules of pleading. Rule 8(a) provides, in pertinent part: "A pleading which sets forth a claim for relief, whether an original claim [or] counterclaim...shall contain (1) a short a plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. *Relief in the alternative or several types may be demanded.*" W. Va. R. Civ. P. 8(a) (emphasis added).

25. Further, Rule 8(e) provides, in pertinent part: "A party may set forth two or more statements of a claim...alternately or hypothetically, either in one count...or in separate counts....A party may also state as many separate claims...as the party has regardless of consistency and whether based on legal or on equitable grounds or on both." W. Va. R. Civ. P. 8(e)(2).

26. Additionally, the West Virginia Supreme Court of Appeals ("Supreme Court") has stated that alternative claims or defenses are allowed. Specifically, the Supreme Court has held that "[t]his rule gives parties considerable latitude in framing their pleadings and expressly permits claims or defenses to be pled alternatively...". *Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999).

27. The Court notes Redstone avers it does not dispute that it is only entitled to one recovery for one loss. *See* Def's Resp., p. 8. It alleges that to the extent it is successful in its

[1] The Court notes Redstone averred its only claims for direct relief against Plaintiff were in the nature of tort (failure to coordinate) or under the principles of equity (unjust enrichment and quantum meruit), but this Court dismissed the failure to coordinate claim, leaving only the claims under the principles of equity. *See Id.*

breach of contract claim against J.F. Allen, or its negligence performance claim against AMEC, any damages recovered by way of those claims would not also be recoverable from Plaintiff. *Id.*

28. Put another way, Redstone avers it is not looking to recover from Plaintiff that which it may recover in breach of contract from J.F. Allen or in tort from Defendant AMEC. To the extent Redstone does not recover under those theories, Redstone avers the result would be that Plaintiff will have received and retained benefits from Redstone's extra work without payment, and Redstone believes it's entitled to a recovery for the extra work directly from Plaintiff. *Id.* at 9-10.

29. In *Highmark W. Va., Inc. v. Jamie*, the Supreme Court found that although a physician could not recover twice for the same injury in a dispute with a health insurance company, he was not precluded from pleading more than one theory of recovery; in fact, Rule 8 specifically authorized alternative pleading. 221 W. Va. 487, 655 S.E.2d 509 (2007).

30. In light of Rule 8 and the relevant case law, the Court finds Redstone has validly pled Counts II and III in the alternative. A review of the Counterclaim confirms these claims meet the pleading requirements of Rule 8. *See Barker v. Traders Bank*, 152 W. Va. 774, 166 S.E.2d 148 (1981)(This rules contemplates a succinct complaint containing a plain statement of the nature of the claim…). For this reason, Plaintiff's Motion to Dismiss is DENIED as to Counts II and III.

CONCLUSION

In conclusion, based upon the above set forth Findings of Fact and Conclusions of Law, the Court finds that Redstone's claim for "Failure to Coordinate" (Count I) must be dismissed with prejudice, and therefore, Plaintiff's motion shall be granted in part. The Court further finds

that Redstone's claims for "Quantum Meruit" (Count II); and "Unjust Enrichment" (Count III) shall not be dismissed; therefore, Plaintiff's motion shall be denied in part.

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.,'s Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest is hereby **GRANTED IN PART AND DENIED IN PART**. It is further **ORDERED** and **ADJUDGED** that Count I of Redstone's Counterclaim is **DISMISSED WITH PREJUDICE**.

The Court notes the objections of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 7th day of May 2019.

JUDGE H. CHARLES CARL, III
West Virginia Business Court Division

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
ATTEST: CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK