

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

MARKWEST LIBERTY MIDSTREAM
& RESOURCES, L.L.C.,
Plaintiff/Counterclaim Defendant,

v.

CIVIL ACTION NO. 16-C-66
JUDGE H. CHARLES CARL, III

BILFINGER WESTCON, INC.,
Defendant/Counterclaim Plaintiff/
Third Party Plaintiff,

v.

MARKWEST LIBERTY BLUESTONE, LLC,
MPLX LP, MARKWEST ENERGY PARTNERS
LP, THE HARTFORD STEAM BOILER
INSPECTION & INSURANCE COMPANY OF
CONNECTICUT, TEAM INDUSTRIAL
SERVICES, INC., FURMANITE AMERICA, INC.,
O'DONNELL CONSULTING ENGINEERS, INC.,
CEMI, LLC, AND QUALITY INTEGRATED
SERVICES, INC.,
Third Party Defendants.

**ORDER DENYING O'DONNELL CONSULTING ENGINEERS, INC.'S
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

This matter came before the Court this 7th day of June, 2019, upon Third-Party Defendant O'Donnell Consulting Engineers, Inc.'s *Motion to Dismiss Bilfinger Westcon, Inc.'s Third Party Complaint*. 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. Therefore, upon the full consideration of the issues, the record, and pertinent legal authorities, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This matter arises out of certain civil, structural, piping, mechanical, and electrical construction work performed by Defendant Bilfinger Westcon, Inc. (“Defendant” or “Bilfinger” or “Westcon”) in relation to three contracts (“Contracts” or “Mobley Contracts”) for a construction project at Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.’s (“Plaintiff” or “MarkWest”) Mobley Processing Plant, an oil and natural gas processing facility located in Wetzel County, West Virginia (“Mobley Site”). *See* Am. Ctrclms., p. 6. The Mobley site originally consisted of four natural gas facilities, and Plaintiff sought to construct a fifth facility referred to as the Mobley V Processing Plant. *Id.* It is this construction project which is at the heart of the instant civil action.

2. It is undisputed that Plaintiff and Defendant entered into three separate contracts for Defendant’s work on the expansion project. *Id.* The Contracts are: the Mobley V and Flare, Residue, and PSV Piping Lump Sum Construction Contract (“Contract 1”) entered May 19, 2015 (*See* Compl., Ex. A); the Mobley Inlet Compression Lump Sum Contract (“Contract 2”) entered October 5, 2015 (*See* Compl, Ex. B); and the Mobley NE Corner Lump Sum Construction Contract (“Contract 3”) entered October 7, 2015 (*See* Compl., Ex. C).

3. This matter commenced with the filing of the Complaint on June 16, 2016, alleging Breach of Contract (Count I); Negligence/Gross Negligence (Count II); Fraud (Count III); Negligent Misrepresentation (Count IV); and Specific Performance (Count V). *See* Compl, ¶¶ 120-163. These Counts surround the civil, structural, piping, mechanical and electrical construction work for the construction of a natural gas facility involved in the transportation and processing of natural gas and natural gas liquids produced in Northern West Virginia. *Id.* at ¶¶ 2-4.

4. On December 4, 2018, this Court dismissed Plaintiff's tort claims against Defendant based on the gist of the action doctrine. Counts II, III, and IV of the Complaint against Defendant (negligence/gross negligence, fraud, and negligent misrepresentation, respectively) were dismissed with prejudice. The remaining causes of action are breach of contract and specific performance (Counts I and V, respectively).

5. Meanwhile, on July 13, 2018, Defendant Bilfinger Westcon, Inc. filed a Third-Party Complaint entitled "First Amended Counterclaims of Bilfinger Westcon Inc. and Third-Party Complaint", alleging the following causes of action against Third-Party Defendant O'Donnell Consulting Engineers, Inc. (hereinafter "O'Donnell"): "Contribution" against Third-Party Defendants The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, Furmanite America, Inc., TEAM Industrial Services, Inc., CEMI, LLC, Quality Integrated Services, Inc., and O'Donnell Consulting Engineers, Inc. (Count X); and "Indemnity" against Third-Party Defendants The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, Furmanite America, Inc., TEAM Industrial Services, Inc., CEMI, LLC, Quality Integrated Services, Inc., and O'Donnell Consulting Engineers, Inc. (Count XI). *See Am. Ctrclms.*, p. 40-45. Westcon alleges Third-Party Defendant O'Donnell is an "engineering and consulting firm" headquartered in Pennsylvania. *Id.* at 5. According to the Amended Counterclaims, O'Donnell's involvement in the Mobley Contracts and this civil action is alleged to have been based upon the following: "O'Donnell, a professional engineering consulting firm, was the firm responsible for performing fitness for service analysis on the Vessels". *Id.* at 41. Further, Westcon alleges in the Amended Counterclaims that "O'Donnell, using incorrect methodology, wrongly reported that the Vessels were not fit for service and could not legally be operated". *Id.* Therefore, Westcon alleges in the Amended Counterclaims that "[t]o the extent

that MarkWest Midstream shut down the plants and undertook vessel repairs in reliance on O'Donnell's incorrect report, O'Donnell would be the party responsible for MarkWest Midstream's damages". *Id.* Finally, Westcon alleges in the Amended Counterclaims that O'Donnell shared a special relationship with it in connection with the inspection, approval, and fitness for service evaluation of the vessel repairs and is one of the parties responsible for the injuries as alleged by Plaintiff. *Id.* at 42. Specifically, with regard to O'Donnell's alleged special relationship with Westcon, Westcon alleges the following in the Amended Counterclaims: "Westcon retained O'Donnell to perform the fitness for service analysis and had a special relationship with O'Donnell in connection with the fitness for service analysis". *Id.* at 44. Westcon alleges that "[a]s a result of the special nature of its relationship with O'Donnell, and through no fault of its own, Westcon has been subjected to claims by Plaintiff". *Id.*

6. On August 17, 2018, Third-Party Defendant O'Donnell Consulting Engineers, Inc. filed the instant O'Donnell Consulting Engineers, Inc.'s Motion to Dismiss Bilfinger Westcon, Inc.'s Third-Party Complaint, alleging the action was brought outside of the statute of limitations and the claims against it are time-barred. *See Th. Pty. Def's Mot.*, p. 1-2.

7. On September 10, 2018, O'Donnell Consulting Engineers, Inc. filed a Motion to Amend Motion to Dismiss Bilfinger Westcon, Inc.'s Third Party Complaint, seeking leave to amend the instant Motion to Dismiss Third Party Complaint to correct a scrivener's error in the motion designating the year the Complaint was filed from 2018 to 2016. On October 10, 2018, this Court entered an Order Granting Defendant's Motion to Amend Motion to Dismiss. *See Ord.*, 10/10/18. Thereafter, on October 15, 2018, O'Donnell Consulting Engineers, Inc.'s

Amended Motion to Dismiss Bilfinger Westcon, Inc.'s Third Party Complaint and Incorporated Memorandum of Law in Support¹ was placed in the court file.

8. On October 26, 2018, Defendant Bilfinger Westcon Inc. filed Bilfinger Westcon, Inc.'s Omnibus Response in Opposition to the Motions to Dismiss Third-Party Complaint Filed by the Hartford Steam Boiler Inspection & Insurance Company of Connecticut, O'Donnell Consulting Engineers, Inc., and Quality Integrated Services, Inc.

9. On November 7, 2018, O'Donnell filed its Reply to Bilfinger Westcon Inc.'s Omnibus Response in Opposition to Amended Motion to Dismiss Bilfinger Westcon, Inc.'s Third Party Complaint.

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

STANDARD OF REVIEW

11. This matter comes before the Court upon a 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

¹ For the purposes of this Order, the Court shall simply refer to O'Donnell's Motion to Dismiss Bilfinger Westcon, Inc.'s Third Party Complaint; however, it shall consider and incorporate the singular change of said amended motion wherein the year of the filing of the Complaint was corrected from 2018 to 2016.

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, Third-Party Defendant O’Donnell seeks this Court to dismiss the following Amended Counterclaims against it: “Contribution” against it and others (Count X); and “Indemnity” against it and others (Count XI). *See* Th. Pty. Def’s Mot., p. 1. The Court will take these issues up in turn.

14. O’Donnell sets forth a singular argument for why the causes of action for Contribution and Indemnification should be dismissed: that the action was brought outside the statute of limitations. *See* Th. Pty. Def’s Mem., p. 4.

Statute of Limitations (both Contribution (Count X) and Indemnification (Count XI))

15. In the instant motion, O’Donnell argues the Court should dismiss Westcon’s contribution cause of action (Count X) and indemnification cause of action (Count XI) because they are time barred by the statute of limitations. *See* Th. Pty. Def’s Mem., p. 4.

16. As an initial matter, the Court acknowledges the applicable statute of limitations for contribution and indemnification, the causes of action contained in Counts X and XI of the Amended Counterclaims. Contribution and indemnification are governed by the two-year statute of limitations found in West Virginia Code § 55-2-12.

17. Further, the West Virginia Supreme Court of Appeals has repeatedly stated that the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the *particular nature* of the injury. *See Harrison v.*

Seltzer, 165 W.Va. 366, 371, 268 S.E.2d 312, 315 (1980); *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 712, 487 S.E.2d 901, 907 (1997); *McCoy v. Miller*, 213 W.Va. 161, 166, 578 S.E.2d 355, 360 (2003) cited by *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005).

18. O'Donnell argues the actions at the heart of the causes of action against it are time-barred because they are alleged to have taken place in early 2016. *See* Th. Pty. Def's Mem., p. 5-6. Specifically, O'Donnell alleges the following:

“[T]he event giving rise to the [*sic*] Westcon's Third-Party Complaint, OCE's engineering report, was prepared and provided to Westcon on May 20, 2016....In the present matter, any alleged injury was made clear at the time OCE's report was issued on May 20, 2016...At the latest, Westcon was on notice of any alleged issues related to the OCE report when Plaintiff Markwest served Westcon with a copy of its Complaint on June 22, 2016.”

Id. at 6. (internal citations omitted).

19. Therefore, O'Donnell argues “May 20, 2018, or more conservatively, June 22, 2018” would have been the latest deadline for Westcon to file a timely suit. *Id.* O'Donnell does not dispute that the Third-Party Complaint would have been timely filed in January 2018.

20. Westcon argues that because it filed its Motion to file Amended Counterclaims and a Third-Party Complaint in January of 2018, along with the proposed Amended Counterclaims, including claims against Third-Parties, it satisfied the statute of limitations². *See* Def's Resp., p. 6-7. However, the Court notes O'Donnell argues in its Reply that Westcon unnecessarily delayed its effort to file a third-party complaint by not filing its motion until January 2018 when it was “adequately positioned” to file its third-party complaint within Plaintiff served it with a copy of the Complaint on June 22, 2016. *See* Reply, p. 3-4.

² This includes the deadline that O'Donnell argued, May 20, 2018, or more conservatively, June 22, 2018.

21. As a matter of law, the filing of the amended complaint with the Court on a motion for leave to amend “is sufficient to toll a statute of limitations regardless of other technical requirements under the rules”. *Charlton v. M.P. Indus., Inc.*, 173 W. Va. 253, 256, 314 S.E.2d 416, 419 (1984).

22. Here, Westcon filed its Motion for Leave to Amend on January 4, 2018 and properly submitted the proposed Amended Counterclaims and Third-Party Complaint at that time. At that time, this civil action was still in Wetzel County Circuit Court, before Judge Cramer. Thereafter, on February 2, 2018, Judge Cramer moved the West Virginia Supreme Court of Appeals to refer the case to the West Virginia Business Court Division. Then, the West Virginia Supreme Court of Appeals granted said Motion to Refer on April 10, 2018. Subsequently, the case was assigned a presiding and resolution judge in the Business Court Division. After that, the undersigned then heard oral argument on the Motion to Amend on July 6, 2018. Westcon received the Court’s order granting it permission to file its Amended Counterclaims and Third-Party Complaint on July 11, 2018 and filed the same on July 13, 2018.

23. The Court finds it is undisputed that the proposed Amended Counterclaims and Third-Party Complaint was filed in a timely manner on January 4, 2018. This proposed pleading was later entered as the Amended Counterclaims and Third-Party Complaint without change once the Motion for Leave to Amend was granted after the case was transferred to the Business Court Division. This Court finds the unique procedural timeline of the instant civil action is of no fault to Westcon. Certainly, the Court finds no dilatoriness on the part of Westcon, regardless of when O’Donnell opines Westcon could have been adequately prepared to have filed its third-party complaint. The filing of the Motion to Refer by Judge Cramer, the approval and referral of this case to the Business Court Division by the Supreme Court of Appeals, and the subsequent

assignment and transition to the undersigned were all outside of Westcon's control. However, importantly, it is undisputed that Westcon sought permission to amend and provided the proposed Amended Counterclaims and Third-Party Complaint well before either date that O'Donnell argued the statute of limitations expired. *See* Th. Pty. Def's Mem., p. 6.

24. To bar Westcon's claims because it was waiting on a "judge's signature on an order to amend, would be to lend impracticality and injustice to . . . judicial processes and procedure." *Charlton*, 173 W. Va. at 256.

25. Further, the Court considers O'Donnell's notice of the instant lawsuit. Before Westcon filed its Motion for Leave to Amend Counterclaims and File Third-Party Complaint on January 4, 2018, it had filed its Notice of Non-Party Comparative Fault Designation wherein it designated O'Donnell on December 19, 2016. *See* Def's Resp., p. 7. Further, O'Donnell admits that it and Westcon engaged in correspondence and communications regarding O'Donnell's involvement in this this litigation. *Id.*; *see also* Th. Pty. Def's Reply, p. 3. Therefore, the Court finds that O'Donnell, as a relevant party, was on notice of Westcon's claims.

26. Because Westcon sought permission to amend and provided its Amended Counterclaims and Third-Party Complaint well before either of the dates O'Donnell avers the statute of limitations expired, and O'Donnell, as a relevant party, had notice, the Court finds O'Donnell's argument that the statute of limitations bars the action for contribution shall be rejected. Accordingly, the Court will not dismiss Westcon's contribution cause of action (Count X) or Westcon's indemnification cause of action (Count XI), and O'Donnell's motion to dismiss must be denied.

CONCLUSION

WHEREFORE, the Court does hereby ADJUDGE and ORDER that Third-Party Defendant O'Donnell Consulting Engineers, Inc.'s *Motion to Dismiss Bilfinger Westcon, Inc.'s Third Party Complaint* is DENIED.

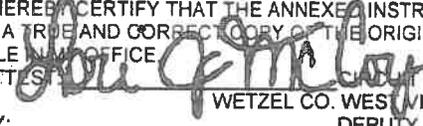
The Court notes the objections of the parties to any adverse ruling herein.

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

ENTERED this 7 day of June, 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:  CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK