

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 GRANTING IN PART AND DENYING IN PART
MARKWEST'S MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter came before the Court this 8th day of July 2019, upon Plaintiff and Counterclaim Defendant MarkWest Liberty Midstream & Resources, L.L.C., and Third-Party Defendants, MarkWest Energy Partners, LP, MPLX, LP and MarkWest Liberty Bluestone, L.L.C.'s ("MarkWest") *Motion for Judgment on the Pleadings*. 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”) 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* MarkWest’s Mem., p. 2; *see also* Am. Ctclms., 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 July 13, 2018, Defendant Bilfinger Westcon, Inc. filed its Counterclaims and Third-Party Complaint entitled “First Amended Counterclaims of Bilfinger Westcon Inc. and Third-Party Complaint”, alleging “Breach of Contract” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count I); “Quantum Meruit/Unjust Enrichment” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count II); “Cardinal Change” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count III); “Fraud” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count IV); “Tortious Interference with Contractual Relations” against Third-Party Defendants MPLX, LP, MarkWest Energy Partners, LP (to which Defendant refers to as “MarkWest Parent”), and “MarkWest Subsidiaries¹” (Count V); “Conspiracy” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. and MarkWest Energy Partners, LP, MarkWest Liberty Bluestone, L.L.C., and MPLX, LP (the latter three to which Defendant refers to as “MarkWest Conspirators²”) (Count VI); “Constructive Fraud” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count VII); “Mechanics’ Lien Enforcement” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count VIII); “Declaratory Judgment” against Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (Count IX); “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,

¹ This refers to Third-Party Defendant MarkWest Liberty Bluestone, LLC and Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. See Am. Ctrclms., p. 2-3. However, the Court notes that Bilfinger alleges in its Response to the instant Motion that Count V is asserted against only those certain Third-Party Defendants and not Plaintiff MarkWest Liberty Midstream & Resources, LLC. See Def’s Resp., p. 7.

² See Amended Counterclaims, p. 2, footnote 1.

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. 20-45.

5. On April 16, 2019, Plaintiff MarkWest Liberty Midstream & Resources, L.L.C., and Third-Party Defendants MarkWest Liberty Bluestone, L.L.C., MPLX, LP, and MarkWest Energy Partners, LP collectively filed the instant Motion for Judgment on the Pleadings, arguing for the entry of judgment on the pleadings with respect to Counts IV, V, VI, and VII of the First Amended Counterclaims of Bilfinger Westcon, Inc. and Third-Party Complaint. *See* MarkWest's Mot., p. 1.

6. On May 6, 2019, Defendant Bilfinger Westcon, Inc. filed Bilfinger Westcon, Inc.'s Response in Opposition to the MarkWest Defendants' Motion to for Judgment on the Pleadings, averring judgment on the pleadings is not appropriate in this instance. *See* Def's Resp.

7. On May 20, 2019, the MarkWest entities filed their Reply Brief in Further Support of MarkWest's Motion for Judgment on the Pleadings, reiterating their argument that judgment on the pleadings with respect to Counts IV, V, VI, and VII of the First Amended Counterclaims of Bilfinger Westcon, Inc. and Third-Party Complaint should be entered. *See* Reply.

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

STANDARD OF REVIEW

9. This matter comes before the Court upon a motion for judgment on the pleadings. Motions for judgment on the pleadings are governed by Rule 12(c) of the West Virginia Rules of Civil Procedure. Rule 12(c) provides that:

[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

W. Va. R. Civ. P. 12.

10. Further, the West Virginia Supreme Court of Appeals examined the standard for judgment on the pleadings, and held that a circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant a motion for judgment on the pleadings only if it appears beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim or defense. *Copley v. Mingo Cty. Bd. of Educ.*, 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). Further, it was stated that “[a] motion for judgment on the pleadings presents a challenge to the legal effect of given facts rather than on proof of the facts themselves. . . .” *Id.* It was noted in *Kopelman and Associates, L.C. v. Collins*, that “[i]t will be a rare case in which the parties’ differences will be resolved appropriately on the pleadings alone.” 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996).

11. This is true because a circuit court may only grant judgment on the pleadings when, “after the close of the pleadings, no material fact remain[s] in dispute and the defendants . . . [are] entitled to judgment as a matter of law.” *Id.* (cited by *Choice Lands, LLC v. Tassen*, 224 W. Va. 285, 289, 685 S.E.2d 679, 683 (2008)).

CONCLUSIONS OF LAW

12. In this matter, Plaintiff and Counterclaim Defendant MarkWest Liberty Midstream & Resources, L.L.C., and Third-Party Defendants, MarkWest Energy Partners, LP,

MPLX, LP and MarkWest Liberty Bluestone, L.L.C., seek this Court for an entry of judgment on the pleadings with respect to the following: Count IV (Fraud), Counts V (Tortious Interference With Contractual Relations), Count VI (Conspiracy), and Count VII (Constructive Fraud) of the First Amended Counterclaims. *See* MarkWest's Mot., p 1. The Court will take these issues up in turn.

Torts: Fraud, Tortious Interference, Conspiracy, and Constructive Fraud

13. MarkWest argues the tort claims ((Count IV (Fraud), Counts V (Tortious Interference With Contractual Relations), Count VI (Conspiracy), and Count VII (Constructive Fraud) of the First Amended Counterclaims) should be dismissed via judgment on the pleadings pursuant to the gist of the action doctrine. *See* MarkWest's Mem., p. 2. MarkWest avers that just as the gist of the action doctrine was applied MarkWest's own tort claims, it should be applied to Bilfinger's tort claims, and that dismissal would be proper under the doctrine. *Id.*

14. Bilfinger, on the other hand, argues the gist of the action doctrine does not bar the claims (notwithstanding the fact that the doctrine caused the dismissal of Plaintiff's own tort claims) due to "significant differences between the parties' tort claims". *See* Def's Resp., p. 4. First, Bilfinger argues Count IV (Fraud) is not barred by the doctrine because this claim stems from the fact that MarkWest did not intend to fulfill the promise at the time it was made. *Id.* Next, Bilfinger argues Count V (Tortious Interference with Contractual Relations) is not barred by the gist of the action doctrine because "the claim is only alleged against the MarkWest Defendants that were not parties to the Mobley Contracts". *Id.* at 7. Next, Bilfinger argues Count VII (Constructive Fraud) is not barred by the gist of the action doctrine because it is a claim "alleging a breach of a legal or equitable duty" that does not arise solely from a contract, but rather a larger social duty beyond the contract, so it is not barred by the gist of the action

doctrine. *Id.* at 8. Finally, Bilfinger argues Count VI (Conspiracy) is not barred because there are underlying torts, contrary to MarkWest's argument that it should be dismissed as it cannot exist as a standalone claim. *Id.* at 9; *see also* MarkWest's Mem., p. 16. The Court will take these issues in turn.

Fraud (Count IV)

15. First, Bilfinger argues Count IV (Fraud) is not barred by the gist of the action doctrine because this claim stems from the fact that MarkWest did not intend to fulfill the promise at the time it was made. *See* Def's Resp., p. 4.

16. Under the gist of the action doctrine, "[a]n action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract." Syl. Pt. 9, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W.Va. 609, 567 S.E.2d 619 (2002). In other words, "whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract." *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W.Va. 577, 746 S.E.2d 568, 577 (2013) (*per curiam*) (citing *Goldstein v. Elk Lighting, Inc.*, No. 3:12-CV-168, 2013 WL 790765, at *3 (M.D.Pa. Mar. 4, 2013)).

17. This doctrine will bar an action in tort, such as fraud, if a party establishes any of the following:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Id. (quoting *Star v. Rosenthal*, 884 F.Supp.2d 319, 328-29 (E.D.Pa.2012)).

18. An exception to the gist of the action doctrine is fraud based “on expression[s] of intention” if a party lacks such intent “to fulfill the promise at the time it was made...” *Soyoola v. Oceanus Ins. Co.*, 986 F. Supp. 2d 695, 707–08 (S.D.W. Va. 2013) citing *Croston v Emax Oil Co.*, 195 W.Va. 86, 464 S.E.2d 728, 732 (1995).

19. Here, the Court finds again³ that Bilfinger has clearly and adequately pled that MarkWest never had any intention of paying fully for any additional or out of scope work performed by Bilfinger. See Am. Ctrclms., p. 15-16, 26-27; see also Ord. Denying in Part Mot. to Dismiss Am. Coutercl., p. 9. Bilfinger sets forth Count IV (Fraud) in detail in the Amended Counterclaims. Bilfinger alleges MarkWest intentionally and fraudulently misled and induced it into completing additional work directed by it with no intention of fully paying for the work. See Am. Ctrclms., p. 26. Indeed, the heart of Count IV (Fraud) is that Plaintiff induced Bilfinger to perform work at the Mobley site that it never intended to pay for.

20. Although MarkWest argues control of the work is contemplated by the contract, here, Bilfinger argues MarkWest retained control under a scheme with the intent to never pay for the work that it directed. *Id.* at 27. Therefore, the element of control is a factor in whether or not MarkWest made a promise it never intended to fulfill. Whether or not MarkWest intended to keep control over the work goes toward Bilfinger’s allegation that MarkWest had an alleged scheme and plan to not fulfill the promise to pay at the time that it made said promise.

21. In all, construing the facts in the light most favorable to Bilfinger, it states a viable claim for Count IV (Fraud). For these reasons, the Court finds the cause of action for

³ The Court notes it found in its Order Granting in Part and Denying in Part MarkWest’s Motion to Dismiss Amended Counterclaims entered January 29, 2019 that “Bilfinger alleges in the Amended Counterclaims that MarkWest never intended to fulfill its promises, dating from the time it made said promises”. See Ord., 1/29/19, p. 9

Count IV (Fraud) shall not be subject to an entry of judgment on the pleadings, as it is plainly centered around the allegation that Plaintiff never intended to fulfill its promise, and therefore is not subject to the gist of the action doctrine pursuant to a recognized exception to the gist of the action doctrine.

Tortious Interference (Count V)

22. Next, Bilfinger argues Count V (Tortious Interference with Contractual Relations) is not barred by the gist of the action doctrine because “the claim is only alleged against the MarkWest Defendants that were not parties to the Mobley Contracts”. See Def’s Resp., p. 7

23. To establish prima facie proof of tortious interference, a plaintiff must show:

- (1) existence of a contractual or business relationship or expectancy;
- (2) an intentional act of interference by a party outside that relationship or expectancy;
- (3) proof that the interference caused the harm sustained; and
- (4) damages.

Syl Pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983).

The Court notes the second element to establish a claim of tortious interference necessarily must allege an act of interference *by a party outside that relationship or expectancy*. *Id.* (emphasis added)

24. As an initial matter, the Court’s review of the Amended Counterclaims reveals Count V (Tortious Interference with Contractual Relations) is alleged against “MPLX, MarkWest Parent, and MarkWest Subsidiaries”. See Am. Ctrclms., p. 28. MPLX LP is a Third-Party Defendant in this matter. According to the Amended Counterclaims, Bilfinger defines “MarkWest Parent” as Third-Party Defendant MarkWest Energy Partners, LP. *Id.* at 1. Further, according to the Amended Counterclaims Bilfinger defines “MarkWest Subsidiaries” as Plaintiff

MarkWest Liberty Midstream & Resources, LLC and Third-Party Defendant MarkWest Liberty Bluestone, LLC. *Id.* at 2-3.

25. However, Bilfinger alleges in its Response that Count V (Tortious Interference with Contractual Relations) is asserted against only those certain Third-Party Defendants and not Plaintiff MarkWest Liberty Midstream & Resources, LLC. *See* Def's Resp., p. 7. Therefore, to the extent that the Amended Counterclaims assert Count V (Tortious Interference with Contractual Relations) against Plaintiff, the Court finds this Count shall be dismissed as withdrawn, as specified in Bilfinger's Response to the instant motion⁴.

26. As to Count V (Tortious Interference with Contractual Relations) as it alleged against Third-Party Defendant MarkWest Energy Partners, LP, Third-Party Defendant MarkWest Liberty Bluestone, LLC, and Third-Party Defendant MPLX LLC, Bilfinger alleges in the Amended Counterclaims that all of the entities collectively intentionally interfered with the Mobley Contracts. *See* Am. Ctrclms., p. 28. Specifically, Bilfinger alleges that Third-Party Defendant MarkWest Energy Partners, LP and Third-Party Defendant MPLX LP induced Plaintiff MarkWest Liberty Midstream & Resources, LLC to breach the Mobley Contracts by controlling the work. *Id.*

27. Further, Bilfinger averred in the Amended Counterclaims that Third-Party Defendant MarkWest Energy Partners, LP, Third-Party Defendant MPLX LP, and Third-Party Defendant MarkWest Liberty Bluestone, LLC performed this alleged tortious interference in furtherance of a plan to "avoid and derail payments that MarkWest Parent's subsidiaries owed Westcon for work performed at Mobley, Bluestone, Cadiz, and Hopedale". *Id.* at 29.

⁴ The Court notes Bilfinger also states that it made this averment in its Response to MarkWest's Motion to Dismiss. *See* Def's Resp., p. 7.

28. Turning to the requirements for the gist of the action doctrine set forth in *Gaddy*, this doctrine will bar an action in tort if a party establishes any of the following:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Gaddy, at 577. (quoting *Star v. Rosenthal*, 884 F.Supp.2d 319, 328–29 (E.D.Pa.2012))

Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract. *Id.* (citing *Goldstein v. Elk Lighting, Inc.*, No. 3:12–CV–168, 2013 WL 790765 at *3 (M.D.Pa.2013)).

29. First, the Third-Party Defendants⁵ who were not parties to the Mobley Contracts cannot have liability to Bilfinger that arises “solely from the contractual relationship between the parties”, as none of the Third-Party Defendants were parties to the Mobley Contracts. Only Plaintiff and Bilfinger were parties to the Mobley Contracts.

30. Second, the duties that Bilfinger alleges the Third-Party Defendants to have breached were not grounded in the contract itself, as it is alleging inducement for Plaintiff to breach the Mobley Contracts via retaining control, inducement for Plaintiff to withhold payments without justification, and attempts to avoid and derail payments owed to Bilfinger for work at Mobley and other sites in Pennsylvania and Ohio. Although these allegations involve activities which constitute an alleged breach of the Mobley Contracts, they are not totally grounded in the contract themselves. Instead, Bilfinger’s averments are grounded in an overarching alleged

⁵ The Court is referring to the following Third-Party Defendants, whom Count V is asserted against: Third-Party Defendants Third-Party Defendant MarkWest Energy Partners, LP, Third-Party Defendant MarkWest Liberty Bluestone, LLC, and Third-Party Defendant MPLX LLC.

T&M Cap Scheme. Third-Party Defendants' alleged acts were not discussed or contemplated in the Mobley Contracts, as the Third-Party Defendants were not parties to or in any way involved in the Mobley Contracts between Plaintiff and Bilfinger.

31. Third, it cannot possibly be said that "any liability arises from the contract", as the Third-Party Defendants are not parties to the Mobley Contracts. The actions Bilfinger is claiming Third-Party Defendants have liability for do not in any way arise from the Mobley Contracts between Plaintiff and Bilfinger, because these entities are not parties to said Contracts.

32. Fourth, the tort claim does not essentially duplicate the breach of contract claim in this matter, because the breach of contract claim is against the party to the contract, Plaintiff, and the Third-Party Defendants are non-parties to the contract. The cause of action for breach of contract is thus not asserted against Third-Party Defendants. Therefore, the claim cannot be a duplicate.

33. For all of these reasons, the Court finds an analysis of the *Gaddy* factors reveals that the gist of the action doctrine does not bar Bilfinger's cause of action for Count V (Tortious Interference with Contractual Relations) as it relates to assertions against Third-Party Defendants Third-Party Defendant MarkWest Energy Partners, LP, Third-Party Defendant MarkWest Liberty Bluestone, LLC, and Third-Party Defendant MPLX LLC.

34. The Court notes it has concluded that as to the extent that the Amended Counterclaims assert Count V against Plaintiff, the Court finds Count V (Tortious Interference with Contractual Relations) shall be dismissed as withdrawn, as Bilfinger has stated it is asserting the claim against Third-Party Defendant MarkWest Energy Partners, LP, Third-Party

Defendant Mark West Liberty Bluestone, LLC, and Third-Party Defendant MPLX LLC only, and not Plaintiff. *See* Def's Resp., p. 7.

35. Accordingly, Mark West's Motion for Judgment on the Pleadings is denied as to Count V (Tortious Interference with Contractual Relations).

Constructive Fraud (Count VII)

36. Next, Bilfinger argues Count VII (Constructive Fraud) is not barred by the gist of the action doctrine because it is a claim "alleging a breach of a legal or equitable duty" that does not arise solely from a contract, so it is not barred by the gist of the action doctrine. *See* Def's Resp., p. 8. Specifically, Bilfinger relies on case law⁶ which specifies that the gist of the action doctrine does not apply where a plaintiff's claim is based on "larger social policies" beyond the contract. *Id.*

37. On the other hand, Mark West argues in its Reply that no social duty exists between Mark West and Bilfinger outside of the Mobley Contracts, relying on the Court's prior finding that the Mobley Contracts are private, contractual construction agreements and that neither party has held themselves out to the community as a purveyor of public services, citing this Court's prior Order Granting Defendant's Motion for Partial Dismissal. *See* Reply, p. 5.

38. The Court agrees with Mark West's recitation and reiterates its finding that neither Plaintiff nor Defendant, private companies in the construction and oil and gas field, have held themselves out to the community as a purveyor of public services. *See* Ord., 12/4/18, p. 8.

⁶ Bilfinger cited to *Tri-State Petroleum Corp. v. Coyne*, 240, W.Va. 542, 555, 814 S.E.2d 133, 142 (2017)(Gist of the action doctrine did not apply where plaintiff's claim was based on "larger social policies" beyond the contract"). *See* Def's Resp., p. 8.

39. The court notes that the fraud cause of action was exempted from the gist of the action doctrine via a recognized exception to the doctrine that dictates that alleged conduct constituting fraud which results from the fact that the alleged tortfeasor did not intend to fulfill the promise at the time it was made. Bilfinger's cause of action for constructive fraud, however, is based upon allegations that by contracting on a lump sum basis but controlling the work and directing Bilfinger to perform additional work representing it would pay, Plaintiff "breached its legal and equitable duties to [Bilfinger]." *See Am Ctrclms.*, p. 35. Further, Bilfinger alleges in the Amended Counterclaims that Plaintiff's "breaches of these legal and equitable duties constitute a constructive fraud." *Id.*

40. The Court finds and concludes that Bilfinger's cause of action for Count VII (Constructive Fraud) arises from an alleged breach of contract claim, and unlike the cause of action for fraud, no exception exists. The Court finds that Bilfinger has alleged breaches of "legal and equitable duties" in the Amended Counterclaims, and has argued the gist of the action doctrine does not apply to Count VII (Constructive Fraud) because the claim is based on "larger social policies" (*See Def's Resp.*, p. 8), but that the Court has found that neither Plaintiff nor Defendant have held themselves out to the community as a purveyor of public services, citing the very rule of law that Bilfinger relies on for its contention. *See Ord. 12/4/18*, p. 8 ("The Court notes that neither Plaintiff nor Defendant, private companies in the construction and oil and gas field, had held themselves out to the community as a purveyor of public services. *See Gaddy*, 746 S.E.2d at 577 (quoting *Goldstein v. Elk Lighting, Inc.*, No. 3:12-cv-168, 2013 WL 790765, at

*4 (M D.Pa. 2013)(finding that tort claims were not barred because the parties' obligations were governed by social policies rather than the terms of the contract⁷)."

41. For these reasons, the Court finds that Mark West's motion for judgment on the pleadings shall be granted as to Count VII (Constructive Fraud), and Mark West is entitled to judgment on the pleadings as to Count VII (Constructive Fraud) of the Amended Counterclaims.

Conspiracy (Count VI)

42. Finally, with regard to the cause of action for conspiracy contained in Count VI (Conspiracy), Mark West argues in its motion that the conspiracy claim should be dismissed because all the other torts should be dismissed pursuant to the gist of the action doctrine, as it is not permissible for it to remain as a "standalone claim". See Mark West's Mem., p. 16. Specifically, Mark West argues that if the Court was to grant its motion as to the causes of action for fraud, tortious interference, and constructive fraud, there would be no underlying tort to support a cause of action for conspiracy, pursuant to West Virginia case law that dictates that a claim for conspiracy is not a standalone claim. *Id.*

43. As the Court has determined above that the causes of action for Count IV (Fraud) and Count V (Tortious Interference with Contractual Relations) are not barred by the gist of the action doctrine, and declined to enter judgment on the pleadings in favor of Mark West on these counts, the Court finds Mark West's argument regarding Count VI (Conspiracy) constituting an impermissible standalone claim must fail. Count VI (Conspiracy) is not standing alone.

⁷ See, *supra*, footnote 6.

44. Further, it appears MarkWest also argues that Count VI (Conspiracy) is barred by the gist of the action doctrine on its own “because the claim is for a conspiracy to commit a tort”. *Id.*

45. According to the Amended Counterclaims, Bilfinger has alleged that MarkWest entities have conspired to defraud it, as well as to tortuously interfere with its contracts with Plaintiff. *See* Am. Ctrclms., p. 30. Further, it alleges this is “part of a larger conspiracy” involving the work performed in Pennsylvania and other sites. *Id.*

46. As the Court has found that the causes of action for Count IV (Fraud) and Count V (Tortious Interference with Contractual Relations) are not barred by the gist of the action doctrine, the Court finds this argument must fail. As the tort causes of action referenced in Count VII remain, the Court finds the trier of fact could find a cause of action for conspiracy to commit those alleged torts exists between the named MarkWest entities.

47. For these reasons, the Court finds MarkWest’s Motion for Judgment on the Pleadings is denied as to Count VI (Conspiracy), and the Court declines to enter judgment on the pleadings in MarkWest’s favor on this Count.

CONCLUSION

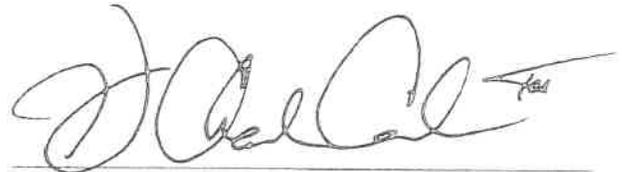
WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** that Plaintiff and Counterclaim Defendant MarkWest Liberty Midstream & Resources, L.L.C., and Third-Party Defendants, MarkWest Energy Partners, LP, MPLX, LP and MarkWest Liberty Bluestone, L.L.C.’s *Motion for Judgment on the Pleadings* is **GRANTED IN PART** and **DENIED IN PART**.

It is further ORDERED that judgment on the pleadings shall be entered as to Count VII of Defendant/Third-Party Plaintiff's Amended Counterclaims filed July 13, 2018, and the same is hereby DISMISSED WITH PREJUDICE.

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, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 8th day of July 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 THIS OFFICE.
ATTEST: Abu of Mc Coy CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK