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

DIRECTIONAL ONE SERVICES, INC. USA,
a foreign corporation authorized to do business in the State of West Virginia,

Plaintiff,

v.

Civil Action No. 18-C-14
Presiding Judge: H. Charles Carl, III
Resolution Judge: Christopher C. Wilkes

ANTERO RESOURCES CORPORATION,
a foreign corporation authorized to do business in the State of West Virginia,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court upon Antero Resources Corporation's Motion for Summary Judgment. The Plaintiff, Directional One Services Inc. USA, by counsel, Sean P. McGinley, Esq., and Defendant, Antero Resources Corporation, by counsel, W. Henry Lawrence, Esq., have fully briefed the issues necessary. Oral argument on this motion was held on June 21, 2019, in Morgantown, West Virginia. Upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced with the filing of the Complaint on April 6, 2018.[1] alleging claims of Breach of Contract (Count I); Lien Foreclosure (Count II); Estoppel (Count III); Mutual Mistake/Equitable Reformation of Contract (Count IV); and Negligent Misrepresentation (Count V). *See* Compl. ¶¶ 44-79. The allegations involve a dispute between

[1] The Court notes the court file reflects that a First Amended Complaint with Jury Demand was filed April 19, 2018, but the causes of action are the same.

Plaintiff, Directional One Services Inc. USA ("Plaintiff"), a directional drilling contractor, and Defendant, Antero Resources Corporation ("Defendant"), an oil and gas well owner and operator.

2. On a prior day, Defendant hired Plaintiff to perform directional drilling services, and the parties executed a contract known as the Master Services Agreement ("MSA") on September 30, 2015.[2]

3. This civil action surrounds the parties' relationship and the MSA as it pertains to "lost in hole" equipment and tools. During the course of directional drilling, equipment may, and often does, become lodged in the well bore, and cannot be freed or recovered. In this Order, the Court shall refer to this term as "lost in hole" or "LIH."

4. On August 3, 2018, Defendant filed its Answer and Counterclaim, alleging Breach of Contract for Lost In Hole Charges (Count I); Breach of Contract for Lost In Hole Insurance Charges (Count II); Breach of Contract for Repair Charges (Count III); and Breach of Contract for Day-Rate and Standby Charges (Count IV). *See* Counterclaim, ¶¶ 40-28.

5. On May 10, 2019, Defendant filed the instant Antero Resources Corporation's Motion for Summary Judgment, seeking the Court to enter summary judgment in its favor as to all of Plaintiff's claims against it, dismissing the case with prejudice, and as to its breach of contract claims in the Counterclaims, arguing Plaintiff breached the contract by improperly billing it for lost in hole charges, repair, redress, and replacement charges, and lost in hole insurance. *See* Def's Mot., p. 1, 3.

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[2] The parties initially executed the MSA on August 29, 2014, and later executed a new MSA on September 30, 2015. The two documents are identical in all relevant respects. Pl.'s First Am. Compl. ¶21. Because the events of which Directional One complains occurred after the 2015 MSA was executed, it is the controlling contract. The 2014 MSA is relevant only to Antero's counterclaim to recover charges Directional One improperly billed Antero between the signing of the 2014 MSA and the 2015 MSA. Any references to the "MSA" in this Order refer to the 2015 MSA

6. On May 30, 2019, Plaintiff filed Plaintiff's Response to Defendant's Motion for Summary Judgment, arguing summary judgment should be entered in its favor, not Defendant's.[3] *See* Pl.'s Resp., p. 2.

7. On June 12, 2019, Defendant filed its Reply in Support of Antero Resources Corporation's Motion for Summary Judgment, reiterating its arguments that it is entitled to summary judgment in its favor on all of Plaintiff's claims and arguing that it is also entitled to summary judgment on its claims against Plaintiff to recover amounts billed and paid for regarding lost in hole tools and equipment, repair, redress, and replacement charges, and lost in hole insurance. *See* Def's Reply, p. 2-3.

8. The Court heard oral argument on the motion at the hearing held Friday, June 21, 2019, in Morgantown, West Virginia. The Court received proposed Orders, with regard to this Motion, from counsel on July 8, 2019.

STANDARD OF REVIEW

9. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

[3] The Court notes Plaintiff also filed its Motion for Partial Summary Judgment on May 13, 2019.

10. Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

11. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

12. In this matter, Defendant seeks summary judgment in its favor as to all of Plaintiff's claims against it. *See* Def's Mot., p. 1. Further, Defendant seeks summary judgment in its favor regarding its claims (in its Counterclaims) against Plaintiff to recover amounts billed and paid for regarding lost in hole tools and equipment, repair, redress, and replacement charges, and lost in hole insurance. *See* Def's Reply, p. 2-3.

Breach of Contract (Count I) and Lien Foreclosure (Count II)

13. First, Defendant argues that summary judgment should be entered in its favor as to Plaintiff's causes of action for Breach of Contract (Count I) and Lien Foreclosure (Count II) because Defendant did not breach the contract due to the MSA stating that Plaintiff bears the risk for lost in hole equipment, not Defendant. *See* Def's Mem., p. 6; *see also* Am. Compl, p. 5-6. In fact, Defendant argues that "it is clear and unambiguous that the parties intended Plaintiff to bear the risk for LIH equipment." *Id.*

14. On the other hand, Plaintiff argues that Defendant bears the risk for lost in hole equipment, not Defendant. *See* Pl's Resp., p. 7. To support this argument, Plaintiff argues that the MSA is clear that Plaintiff's lost in hole pricing is specified in the Rate Sheet. *Id.*

15. The parties both argue that the MSA should be considered clear and unambiguous, but disagree as to where the contract places responsibility for the lost in hole equipment. *See* Def's Mem., p. 6. Defendant avers that Plaintiff was to have built the cost of the lost in hole liability into its daily rate. *Id.* Plaintiff disagrees, and points out that the MSA provisions do not refer to the term "daily rate," and instead, use the term "compensation." *See* Pl's Resp., p. 4-5. "Compensation," Plaintiff argues, includes the lost in hole and tool repair pricing set forth in the Rate Sheets. *Id.* at 5. Plaintiff asserts it adequately set forth in the Rate Sheets that Defendant was to have borne the lost in hole equipment risk responsibility. *Id.* Plaintiff also proffers the fact that Defendant paid according to this Rate Sheet pricing for over three years. *Id.* Plaintiff invoiced Defendant, and Defendant paid the invoices for lost in hole equipment expenses.

16. With regard to the Rate Sheets, Defendant argues these Rate Sheets are not to be construed as part of the MSA, and are instead, akin to pricing "menus," wherein Plaintiff could

set forth its pricing for different items, and Defendant could select which items it wished to purchase.

17. Moreover, Defendant argues that Plaintiff "did not provide tools or equipment to Antero for it to own." *See* Def's Mem., p. 7. Instead, Defendant interprets the parties' contract as covering services, not goods, because Plaintiff is a directional drilling *services* provider. *See* Def's Resp. to Pl's Mot. for Summ. J., p. 4. In stark contrast, Plaintiff avers the exact opposite. Plaintiff argues that Defendant took full possession of, and title to, the tools whenever they became stuck in hole. *See* Pl's Resp., p 3. These opposite arguments center around the parties' interpretations of the word "provide." *Id.* It is undisputed that the contract stated that Plaintiff was to have "provided" equipment and tools to Defendant. *Id.*

18. For reasons set forth in its *Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment*, the Court is **denying** Defendant's Motion for Summary Judgment as to Breach of Contract (Count I). With regard to Defendant's Motion for Summary Judgment as to Lien Foreclosure (Count II), the Court is **denying** the Motion based upon the Court's findings as to the Breach of Contract claim.

19. Plaintiff's tort and equitable claims (Counts III, IV, and V of the First Amended Complaint) are pleaded as alternative theories of recovery, which assume a conflict between the Rate Sheets and the MSA. For the reasons set forth in its *Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment*, the Court found there is not a conflict between the Rate Sheets and the MSA. The Court has granted summary judgment in favor of Plaintiff as to the Breach of Contract claim. Therefore, the Court concludes that Plaintiff's tort and equitable claims are thus rendered moot and the Court declines to make any findings or conclusions with regard to these claims.

Lost Profits

20. Defendant argues that Plaintiff cannot prove it is entitled to lost future profits, and that it "is entitled to summary judgment on this claim." *See* Def's Mem., p. 16-17. Defendant contends this is because Plaintiff's claim for lost future profits is based on a "baseless assumption" that Plaintiff is entitled to provide directional drilling services to Defendant indefinitely. *Id.* at 16. Defendant also proffers an argument that Plaintiff is not entitled to lost future profits because the parties could not have reasonably anticipated these damages would result from a breach of the parties' MSA. *Id.* at 17.

21. On the other hand, Plaintiff argues that the at-will nature of the parties' relationship is only one factor and points to cases where lost future profits awards were awarded in "new, unproven businesses." *See* Pl's Resp., p. 13. Further, Plaintiff argues the MSA does not preclude the lost future profits claim because it is not an indemnifying party entitled to the protection of MSA §13 which Defendant cited to. *Id.* at 18. The Court will take the arguments in turn.

Reasonableness of Anticipating Lost Future Profits

22. First, the Court addresses Defendant's argument that Plaintiff is not entitled to lost future profits because the parties could not have reasonably anticipated these damages would result from a breach of the parties' MSA. *See* Def's Mem., p. 17.

23. Whether damages are compensatory or consequential is a question of law. Syl. Pt. 3, *Desco Corp. v. Harry W. Trushel Const. Co.*, 186 W. Va. 430, 432, 413 S.E.2d 85, 87 (1991). Compensatory or direct damages are those that flow directly from the contract breach; "there is no requirement that the parties must have actually anticipated them because they are a natural consequence of the breach." Syl. Pt. 2, *id.* Consequential or indirect damages "arise from the

special circumstances of the contract . . . [and] [t]o recover these damages, [Directional One] must show that at the time of the contract, the parties could reasonably have anticipated that these damages would be a probable result of a breach." *Id.*

24. Here, the Court concludes that Plaintiff cannot recover lost profits because the parties could not have reasonably anticipated these damages would result from a breach of the MSA. There has been no evidence proffered purporting to show that eighteen-years' worth of lost future profits were and could have been reasonably anticipated when Defendant entered into a routine MSA with one of many directional drilling services providers it utilized, much less any evidence showing that such a consideration would not have considered factors such as mitigating circumstances, or Plaintiff serving other customers.

25. As detailed in the following section, the parties entered into the MSA undisputedly in an at-will fashion. Further, the Court notes there has been no evidence proffered proving any explicit promises of future work. *See* Def's Reply, p. 15.

26. Plaintiff alleges that Defendant breached the MSA when it disputed the LIH invoices. Assuming for the sake of argument that disputing the invoices was a breach, the only damages that would have flowed from that breach were costs of the LIH tools. The eighteen years' worth of lost profits to which Plaintiff claims it is entitled would not flow directly from the breach. The Court finds Plaintiff cannot establish that the parties would have reasonably anticipated that Plaintiff would be entitled to eighteen years' worth of lost profits.

27. The Court notes Plaintiff seems to argue there are "special circumstances" to show such damages were within the reasonable contemplation of the parties, but Plaintiff does not argue what exactly these are. See Pl's Resp., p. 19.

28. To support a finding by this Court that this issue should be a question of fact for the jury rather than a question of law for the Court, Plaintiff cites a headnote from *Desco Corp. v. Harry W. Trushel Const. Co.*, which states the following:

> Whether contract damages are direct or consequential is question of law for trial court, but whether special circumstances exist to show that consequential damages were within reasonable contemplation of the contracting parties is ordinarily question of fact for jury.

186 W. Va. 430, 413 S.E.2d 85 (1991).

29. However, the Court finds Plaintiff does not plead any special circumstances that exist in this case that would cause the trier of fact to find that consequential damages were within the reasonable contemplation of the parties. This Court cannot conclude that Plaintiff's future lost profits damages were contemplated by the parties in entering the MSA. For this reason, the Court finds Defendant's Motion for Summary Judgment must be **granted** as to this issue.

Future Lost Profit Claim Is Speculative

30. Notwithstanding the fact the lost future profits damages could not have been contemplated by the parties, the Court has considered the argument that Plaintiff's claim for lost future profits should be denied as too speculative because the claim is based on a "baseless assumption" that Plaintiff is entitled to provide directional drilling services to Defendant indefinitely. *See* Def's Mem., p. 16.

31. West Virginia law is clear that a lost future profits claim "'must be proved with reasonable certainty'" and cannot "'be based on estimates [that] amount to mere speculation and conjecture[.]'" *Cell, Inc. v. Ranson Inv'rs*, 189 W. Va. 13, 14, 427 S.E.2d 447, 448 (1992) (quoting Syl. Pt. 5, *State ex rel. Shatzer v. Freeport Coal Company*, 144 W. Va. 178, 107 S.E.2d 503 (1959),

overruled on other grounds by Cell, 189 W. Va. 13, 427 S.E.2d 447)). "'The proof . . . must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." *Id.* (*quoting Shatzer*, 144 W. Va. at 185, 107 S.E.2d at 508).

32. As an initial matter, the Court notes that it is undisputed in this matter that the parties were operating under an at-will relationship, pursuant to the MSA. Section 4.2 of the MSA states that the parties' agreement "may be terminated at the option of either Party by giving the other Party thirty (30) calendar day's written notice." *Id.* at Ex. 1.

33. Further, as another initial matter, the Court notes that Plaintiff's claims for future lost profits is based upon an expert damage forecast prepared by its economic expert, Mr. Daniel Selby.

34. The Court finds that the indefinite future lost profits clam cannot be proven with reasonable certainty. Plaintiff seeks lost future profits for eighteen years. In Mr. Selby's deposition, he specifically testified that the income was calculated indefinitely:

> Q: You're not aware though – he never told you, I assume – that he was promised continued work from Antero?
>
> A: I don't know how you would phrase it. It's my understanding that it was – it was appropriate and reasonably certain for me to model the presumption that he would have access to this income, ad infinitum.

See Def's Mem., Ex. 11, p. 79-80.

35. Plaintiff makes a case that its record was of very good performance, proffering deposition testimony supporting this contention. *See* Pl's Resp., p. 15. Even so, the Court finds past good performance is no guarantee of the same amount of work provided to Plaintiff for

eighteen years from Defendant's drilling operations due to a number of factors in the oil and gas industry.

36. First, Plaintiff is just one of many directional drilling contractors that Defendant hires at any given time, and Defendant increases and decreases the work to each contractor based on a number of factors. *See* Def's Reply, p. 16. While Plaintiff is just one of many directional drilling services providers used by Defendant, it was proffered during oral argument on this Motion that Defendant was the only customer of Plaintiff.

37. Further, the Court has considered the nature of the oil and gas industry. It is an ever-changing field. National and international market prices fluctuate, affecting the amount of work a contractor, such as Plaintiff, may continue to get. In addition, the Court must consider that Defendant proffered that ARK, Mr. Oniskenko's former Colorado company, "was left without work" when Defendant abruptly sold its Colorado holdings. *Id.*

38. The Court also notes that Plaintiff is only a three-and-a-half year old company, with only one client. *See* Def's Mem., p. 18. While the Court has considered the case law provided by Plaintiff supporting the contention that lost future profits are available in the case of a new, unproven business, as well as the rule that past performance will form the basis for a reasonable prediction as to the future (*See* Pl's Resp., p. 13, 14), the Court finds that eighteen years' worth of lost profits based on the same volume of work from one client in a fluctuating industry is entirely too speculative. Further, the Court notes there has been no evidence proffered proving any explicit promises of future work. *See* Def's Reply, p. 15.

39. Finally, the Court has considered the fact that Mr. Selby did not include any mitigation factors in his report all the way to the year 2038. *See* Def's Mem., Ex. 11, p. 80. Mr. Selby stated he did not include mitigation factors because he "didn't have any known and

measurable determinations as to offsetting profits." *Id.* At the hearing on this Motion, counsel for Plaintiff proffered that because its tools had been lost in hole, "no tools equals no profits." The Court notes there is a duty to mitigate that was apparently not taken into consideration. It would be unreasonable to suggest that Plaintiff would not be able to replace its tools to mitigate the damages within eighteen years.

40. The Court also notes that Mr. Selby estimated Plaintiff's lost future profits to be zero if Defendant had terminated the MSA, but did not show how the result is any different because Plaintiff, instead of Defendant, terminated the MSA. *See* Def's Mem., p. 18.

41. In sum, the Court cannot make a finding that Plaintiff reasonably assumed its work with Antero would continue indefinitely. It would be too speculative. For this reason, Plaintiff's lost future profits claim must fail.

42. Therefore, the Court concludes Defendant is entitled to partial summary judgment on this lost future profits claim, and summary judgment is **granted** in Defendant's favor as to this claim.

Defendant's Counterclaims Against Plaintiff

43. Finally, Defendant seeks summary judgment in its favor as to its Counterclaims, against Plaintiff. *See* Def's Mem., p. 19. First, Defendant claims it is entitled to summary judgment because Plaintiff breached the MSA by allegedly improperly billing Defendant for lost in hole charges and repair, redress, and replacement charges (Counterclaims I and II). *Id.* This is based on the contention that Plaintiff was responsible for lost in hole expenses, not Defendant.

44. Next, similarly, Defendant claims it is entitled to summary judgment because Plaintiff breached the MSA by allegedly improperly billing Defendant for lost in hole insurance

charges (Counterclaim III). *Id.* Specifically, Defendant contends the MSA's terms clearly state that Plaintiff was to have covered the cost to maintain property insurance on its equipment. *Id.*

45. For reasons set forth in its *Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment*, the Court is **denying** Defendant's Motion for Summary Judgment as to Counts I, II, and III of Defendant's counterclaims. The only remaining claim is Defendant's fourth counterclaim, which seeks to ascertain if Plaintiff improperly charged Defendant such that Defendant is entitled to reimbursement of those alleged improper charges.

CONCLUSION

46. Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Defendant's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART** as detailed in this Order.

47. It is further **ORDERED** that judgment is granted in favor of Defendant as to Plaintiff's claim for lost profits and this claim shall be **DISMISSED with prejudice.**

48. The Court notes the objections and exceptions 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 19th day of August, 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
Circuit Court of Tyler County, West Virginia
By: _____ Deputy