

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

MARKWEST LIBERTY MIDSTREAM
& RESOURCES, LLC.

Plaintiff/Counterclaim Defendant

v.

Civil Action No.: 16-C-66
The Hon. H. Charles Carl, III

BILFINGER WESTCON, INC.,

Defendant/Counter-claim 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
AMERICAN, INC., O'DONNELL CONSULTING ENGINEERS,
INC., CEMI, LLC, AND QUALITY INTEGRATED
SERVICES, INC.

Third-Party Defendants.

ORDER GRANTING O'DONNELL CONSULTING ENGINEERS, INC.'S
MOTION FOR JUDGMENT ON THE PLEADINGS WITH RESPECT TO THIRD-
PARTY COMPLAINT

On the 27th day of September, 2019 the Third-Party Defendant, O'Donnell Consulting Engineers, Inc. ("OCE"), by counsel, filed its Motion for Judgment on the Pleadings With Respect to Third-Party Complaint asserting that, based on this Court's June 3, 2019 Order granting Third-Party Plaintiff, Bilfinger Westcon, Inc.'s ("BWI") Motion for Partial Judgment on the Pleadings related to Markwest Liberty Midstream & Resources, LLC's ("Markwest Liberty") claims for

damages related to BWI's defecting welding on pressure vessels at the Mobley, West Virginia natural gas processing plant, that there are no remaining claims against BWI that, as a matter of law, OCE can contribute to or for which implied indemnification may be obtained.

The Court notes BWI filed a Response to the instant motion, indicating it had no objection to OCE's position, averring that "Westcon agrees with O'Donnell that the third-party contribution and indemnifications claims are moot and can be dismissed." See *Bilfinger Westcon, Inc.'s Response to O'Donnell Consulting Engineers, Inc.'s Motion for Judgment on the Pleadings With Respect to Third-Party Complaint*, p. 2. BWI even submitted a proposed order to the Court granting OCE's motion.

Upon a review of the motions and briefs filed by the parties and upon a review of the applicable law, the Court hereby GRANTS OCE's Motion for Judgment on the Pleadings and makes the following findings:

I. Standard of Review

1. Pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure, "[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." W.Va. R. Civ. P. 12(c). Essentially, a motion for judgment on the pleadings is like a delayed motion to dismiss, which "presents a challenged to the legal effect of given facts rather than on proof of the facts themselves." *Ward v. Ward*, 236 W.Va. 757 (2016). Accordingly, for purposes of a motion for judgment on the pleadings, factual allegations in the Complaint are taken to be true. *Id.*

II. Findings

2. This action originally arose out of disputes between Plaintiff Markwest Liberty and BWI concerning BWI's performance under a series of construction contracts whereby BWI was

retained to perform construction work in connection with Markwest Liberty's expansion of its Mobley natural gas processing plant in Wetzel County, West Virginia. Markwest Liberty filed its Complaint against BWI in the Circuit Court of Wetzel County on June 16, 2016.

3. According to the Complaint, the expansion added a fifth natural gas processing unit known as the Mobley V Processing Plant. See Compl. at ¶¶3-4. Portions of the work were contracted to BWI in three lump sum contracts:

- a. Mobley V Flare, Residue, and PSV Piping Contract ("Plant Contract") executed on May 19, 2015, with a Mechanical Completion date of October 15, 2015 and a final Project Completion date of November 30, 2015. *Id.* at ¶¶17-19;
- b. Mobley Inlet Compression Contract ("Inlet Compression Contract") executed on October 5, 2015, with a Mechanical Completion for Unit 1 of January 31, 2016 and a Mechanical Completion for Unit 2 of March 31, 2016. *Id.* at ¶¶21-23; and
- c. Mobley NE Corner Contract ("NE Corner Contract") executed on October 7, 2015, with a Mechanical Completion date of December 14, 2015, and a Project Completion Date of December 21, 2016. *Id.* at ¶¶26-28.

4. The Plant Contract is part of the pleadings in this case, having been included as Exhibit A to Markwest Liberty's Complaint and as Exhibit 3 to BWI's First Amended Answer. In the Plant Contract, BWI included the cost associated with the welding inspections of two pressure vessels, the T-501 De-Methanizer tower and the T-531 DeEthanizer tower. BWI's "Contractor's Assumptions and Clarifications Mobley V" incorporated as Exhibit F to the Plant Contract provides in Section 4.0 Towers/ Vessels/ Equipment (TVE) that:

4.0 Towers/Vessels/Equipment (TVE)

...

- e. Westcon's proposal assumes that the T-501 De-Methanizer and T-531 DeEthanizer will be shipped in (2) EA sections.
 - a. Westcon's proposal assumes that the (4) EA sections will be beveled prior to arriving on site.
 - b. Westcon's proposal includes welding of the two towers along with the following.
 - i. (2) EA Non-Destructive Inspections (RT) of the T-531 DeEthanizer tower
 - ii. (1) EA Non-Destructive Inspections (RT) of the T-501 De-Methanizer tower.

iii. API cost associated with the welding inspection of the (2) EA Towers

See, Compl. at Ex. A; BWI First Amended Answer at Ex. 3; *see also* Ex. A. to BWI Motion for Partial Judgment on the Pleadings.¹

5. Markwest Liberty alleges that in July 2015, BWI performed welding on De-Ethanizer and De-Methanizer pressure vessels (the "Vessels"), that was specified in the Plant Contract scope of work and that BWI represented to Markwest Liberty that it had tested and inspected the welds on the Vessels pursuant to the applicable ASME Boiler and Pressure Vessel Safety Code as specified. *See* Compl. at ¶¶70-72.

6. BWI alleges Third-Party Defendant O'Donnell Consulting Engineers, Inc. ("OCE") was the professional engineering consulting firm responsible for performing fitness for service analysis on the Vessels, and that it used incorrect methodology and wrongly reported that the Vessels were not fit for service and could not be legally operated. *See* Third-Party Compl. at ¶¶226-227. Further, OCE's scope of work, as found in its proposal and Fitness-for-Service Evaluation, related to the solely to the welds. *See* Compl., Ex. D.

7. BWI further alleges that Furmanite and TEAM were responsible for performing non-destructive evaluation² ("NDE") on the respective Vessels and using the appropriate standards. BWI alleges that HSB, as the authorized inspector, was responsible for evaluating and approving the repair welds, the inspections, and the standards that Furmanite and TEAM used. *See* Third-Party Comp. at ¶¶219-220.

¹ While the Plant Contract does not contain a "Scope of Work" as part of Exhibit A to the Contract, both the Inlet Compression and NE Corner Contracts contain a "Scope of Work" that provides that "Pressure vessels" are to be constructed to "ASME VIII Div. 1" standards. *See* Inlet Compression Contract "Scope of Work" Ex. A at p. 3, attached as Exhibit B to Markwest Liberty Complaint and as Exhibit 4 to BWI First Amended Answer; *see also*, NE Corner Contract, Ex. A "Scope of Work" at p. 3, attached as Exhibit C to Markwest Liberty Complaint and as Exhibit 5 to BWI First Amended Answer.

² *See* Third-Party Complaint, ¶14.

8. Finally, BWI alleges Furmanite and Team performed NDE on the Vessels and provided documentation indicating the standards that they used in connection with the NDE. It alleges HSB reviewed Furmanite and TEAM's documentation and approved Furmanite and TEAM's work and the standards that they used. HSB approved applying "R stamps" to the pressure vessels, indicating that the repair welds were satisfactory and that the pressure vessels were safe to operate. *See Third-Party Comp.* at ¶¶221-222.

9. Markwest Liberty alleged BWI breached its contracts for the construction of these facilities and was otherwise negligent in the performance of its duties under these construction contracts. *Compl.* at ¶16. In its Complaint, Markwest Liberty asserts claims against BWI for breach of contract, negligence/gross negligence, fraud, negligent misrepresentation, and specific performance. *See Id.*, Counts I-V.

10. By Order entered December 4, 2018, this Court dismissed Counts II, III, and IV of Markwest Liberty's Complaint on the basis that the claims asserted in those counts were barred by the gist of the action doctrine. *See Dec. 4, 2018 Order Granting Defendant's Motion for Partial Dismissal.* Markwest Liberty thereafter filed a Motion for Reconsideration of December 4, 2018 Order, which motion was denied by Order entered February 22, 2019.

11. Plaintiff's remaining claims against BWI are for breach of contract and specific performance. The count for specific performance seeks the return of certain project materials Markwest Liberty contends BWI was contractually obligated to return to it. *See Compl.*, Count V.

12. On April 8, 2019, BWI filed its motion for Partial Judgment on the Pleadings against Markwest Liberty seeking dismissal of any portion of Markwest Liberty's claimed damages that seek to recover costs related to its repair of allegedly defective welds on the Vessels at the Mobley facility. In its motion, BWI asserted that the dismissal of these damages claims was

required because Markwest Liberty did not provide BWI an opportunity to repair the welds as required by contract.

13. The specific contract under which BWI was to perform welding work on the Vessels was the Plant Contract. The sole issue presented by BWI's motion for partial judgment on the pleadings arose from its obligation under the Plant Contract to perform welding work on the Vessels at the Mobley facility. Two sections of the contract were particularly relevant to BWI's motion. First, Section 10 governs warranties. *See* BWI Motion for Partial Judgment on Pleadings, Ex. 1. Second, Section 23 governs termination. *Id.* Section 10.0 of the Plant Contract provides in relevant part, that:

10.1 [BWI] warrants that the Scope of Work shall be performed and completed in accordance with the terms of this Contract and all applicable federal, state and local laws, ordinances and governmental rules and regulations; ... that all Work performed under this Contract shall conform in all respects to the drawings and specifications, if any, and shall be performed in a good and workmanlike manner and shall be free from defective workmanship.

10.2 If during the performance of the Scope of Work or within one (1) year after the completion of the Scope of Work or termination of this Contract, any portion of the Scope of Work or its performance fails to conform to the requirements of the paragraph above, [BWI] shall promptly correct, at [BWI's] own expense, such a nonconformance after receipt of a written notice from [Markwest Liberty] which shall be given within thirty (30) days after discovery and evaluation of such nonconformance. Contractor shall promptly remedy (but in no event later than five (5) days following notice from [Markwest Liberty]) at its expense defects which appear during the term of this warranty and if [BWI] does not remedy those defects in a timely fashion, then [Markwest Liberty] may arrange for the remedy thereof, all at [BWI's] expense....

Under Section 10.2 of the Plant Contract, Markwest Liberty is required to provide BWI an opportunity to cure before it may collect damages for any alleged failure to conform to the requirements in Section 10.1.

14. Markwest Liberty alleged in its Complaint that on May 24, 2016, BWI forwarded it a letter by OCE in which it opined the pressure vessels at the Mobley natural gas processing

plant were improperly welded. Compl. ¶97. Markwest, on March 26 and 27, 2016, abruptly terminated BWI by letter and ordered BWI to leave the worksite. Compl. ¶114. Markwest Liberty then filed suit seeking damages related to the allegedly defective welds. It is undisputed that Markwest Liberty did not provide BWI an opportunity to cure the allegedly defective welding. In fact, in its Response, Markwest Liberty simply argues that it invoked the Termination for Cause provision in Section 23 of the Plant Contract. *See* Markwest Liberty Resp. to BWI Motion for Judgment on the Pleadings at p. 2.

15. In granting BWI's Motion for Partial Judgment on the Pleadings, this Court previously concluded that because Markwest Liberty did not adhere to the procedure in the Plant Contract by which it could collect damages for breach of contract for defective work, its claims for damages must fail as a matter of law. *See* June 3, 2019 *Order Granting Westcon's motion for Partial Judgment on the Pleadings*. While Paragraph 23 of the Plant Contract enumerated certain circumstances under which Markwest Liberty may terminate BWI for cause, take possession of the worksite, and withhold future payments, BWI did not raise the issue of whether Markwest Liberty properly terminated the Plant Contract. The sole issue raised by BWI therein was whether, in light of that termination –whether proper or not – Markwest Liberty could maintain an action to collect all monies related to the allegedly defective welds on the Vessels. In granting BWI's motion, this Court concluded that Sections 10 and 23 of the Plant Contract “can be easily harmonized by application of their plain language” as “even if termination ‘for cause’ is permitted under Section 23.0, an action for damages is not permitted absent compliance with Section 10.2 for items (such as defects) that are covered by Section 10.0.” *Id.* at ¶ 7. Further, the Court concluded that, since Section 10.2 requires notice and an opportunity to cure within one (1) year

after termination of the Contract, that the provision “contemplates and provides for its own application even if the [Plant] Contract is terminated.” *Id.*

16. Based on the foregoing analysis, the Court granted BWI’s Motion and concluded that “any portion of [Markwest Liberty’s] Complaint which seeks to recover damages related to allegedly defective welding on pressure vessels at its Mobley natural gas processing plant is **DISMISSED.**” *Id.* at §III, Conclusions, p. 8.

17. BWI, in Counts X and XI of its Third-Party Complaint, asserts claims against OCE for contribution and implied indemnification, respectively. BWI’s third-party claims for contribution and indemnity against OCE arise solely out of OCE’s alleged responsibilities as it was retained to perform a review of the welds on the pressure vessels. *See* Th. Pty. Def’s Mot., p. 9; *see also* Third-Party Compl. at ¶¶226, 242(“O’Donnell, a professional engineering consulting firm, was the firm responsible for performing fitness for service analysis on the Vessels”); ¶¶ 227, 244(“O’Donnell...wrongly reported that the Vessels were not fit for service and could not legally be operated”). Also, OCE’s scope of work, as found in its proposal and Fitness-for-Service Evaluation, related solely to the welds. *See* Compl, Ex. D. Moreover, in its Response to the instant motion, BWI states that “[a]ll welding-related damages asserted by MarkWest have been dismissed, and MarkWest may not recover damages related to the allegedly defective pressure vessel welds. Because MarkWest may not collect these damages against Westcon, there are simply no damages for O’Donnell to contribute to or indemnify Westcon against. Therefore, Westcon agrees with O’Donnell that the third-party claims for indemnification and contribution are moot and can be dismissed.” *See Bilfinger Westcon, Inc.’s Response to O’Donnell Consulting Engineers, Inc.’s Motion for Judgment on the Pleadings With Respect to Third-Party Complaint*, p. 4.

18. In its contribution claim, BWI alleges that OCE was responsible for providing a review of the welds by performing a fitness for service analysis on the Vessels. Third-Party Compl. at ¶226. Therefore, based on their role in the inspection of the welds on the Vessels, BWI asserts that if it is liable to Markwest Liberty, it is entitled to contribution from OCE and the other Third-Party Defendants.

19. In its indemnity claim, BWI alleges that the Third-Party Defendants, including OCE, were in a "special relationship" with it "in connection with the inspection, approval, and fitness for service evaluation of the Vessel repairs and are the parties responsible for the injuries as alleged by Plaintiff." *Id.* at ¶233. With respect to OCE, the purported special relationship was based on OCE's alleged responsibility "for performing fitness for service analysis on the Vessels" as a professional engineering consulting firm. *Id.* at ¶242. Further, BWI alleges that "as a result of the special nature of its relationship with [OCE], and through no fault of its own, [it] has been subjected to claims by Plaintiff". *Id.* at ¶246. BWI asserts that it is completely fault free, but as a result of its special relationships with the Third-Party Defendants relating to the inspection and/or testing of the welds on the Pressure Vessels it has become subject to claims by Markwest Liberty for which it is entitled to indemnification. *Id.* at ¶¶246-247.

20. Count V of Markwest Liberty's Complaint is for specific performance. *See* Compl., Count V. What Markwest Liberty seeks in this count is the return by BWI of all "Project Materials" as described in Section 23.3.3 of the contracts. *See* Compl. ¶160. Section 23.2.2 provides that "Contractor shall return to Company all information furnished by Company in connection with the Scope of Work, together with all data developed by Contractor under this Contract;..." *See* Compl., Ex. A at 16, §23.2.2 (Bold original).

21. Markwest Liberty alleges that it has demanded the return of Project Materials but that BWI has not returned all of them. *See* Compl. ¶¶159-162. Under the Plant Contract the obligation to return materials is solely BWI's as the contracting party. BWI generally denies that it has failed to provide Markwest Liberty with any Project Materials it was contractually obligated to provide. *See* BWI First Am. Partial Ans. at ¶164. The Third-Party Complaint only alleges that OCE had responsibilities with respect to the review and approval of the inspection of the welds on the Vessels. *See* Third-Party Compl. at ¶¶226-27, 243-44, 246. There are no allegations asserted by BWI that it thereafter provided Project Materials to OCE and that OCE is preventing BWI from now returning those materials to Markwest Liberty.

22. Based upon the Court's June 3, 2019 ruling, BWI is not liable for any damages to Markwest Liberty related to defective welding on the Vessels. As such, it can now never be forced to pay more than its share of any obligation to Markwest Liberty for those damages. "A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." *Sneberger v. Morrison*, 235 W. Va. 654, 669 (2015); *see also* Syl. Pt. 1, *State ex rel. Thornhill Group, Inc., v. King*, 233 W. Va. 564, 565 (2014).

23. "The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share." Syl. Pt. 4, *Sydenstricker v. Unipunch Prod., Inc.*, 169 W. Va. 440, 441 (1982). OCE's sole involvement in this case, as alleged by BWI, is with respect to the defective welds. Any claims for damages Markwest Liberty has

against BWI arising out of or relating to the defective welds have now been dismissed and there is now no common obligation owed to Markwest Liberty by BWI and OCE. *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, No. 1:09CV161, 2013 WL 5352844, at *31 (N.D.W. Va. Sept. 24, 2013), *aff'd*, 783 F.3d 976 (4th Cir. 2015)(dismissing third-party claim for contribution as moot based on finding that plaintiff had failed to prove any damages)³; *see also Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 557(2017)(noting federal court dismissal of third-party claim, stating, “[t]he federal court found the claim moot because Dan Ryan “has failed to prove any damages sounding in negligence.”). Because Markwest Liberty’s claims for damages against BWI relating to or arising out of the welding work have been dismissed, BWI cannot proceed, as a matter of law, on its contribution claim against OCE.

24. Similarly, the dismissal of Markwest Liberty’s damages claims related to the welds also compels the dismissal of BWI’s implied indemnity claim set forth in Count XI of its Third-Party Complaint. To obtain implied indemnity, one must be 100% fault free yet still be required to pay a judgment. *See Syl. Pt. 2, Sydenstricker v. Unipunch Prod., Inc.*, 169 W.Va. 440, 441(1982). “At the heart of the doctrine is the premise that the person seeking to assert implied indemnity-the indemnitee-has been required to pay damages caused by a third party-the indemnitor.” Syl. Pt. 1, *Id.* at 440-41(Emphasis added). This liability is typically imposed by a statutory or common law duty even though the actual injury was not caused by the liable party. *See Syl. Pt. 2, Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W.Va. 22(1980). Again, because all claims for damages against BWI arising out of or relating to the welding work have been dismissed, there are no damages remaining for which BWI can claim indemnity from OCE. The

³ The dismissal of the derivative third-party contribution claims was not appealed. *See Dan Ryan Builders, Inc.*, 783 F.3d 976, 979, n. 4 (4th Cir. 2015).

law of the case is that BWI will not, as a matter of law, be required to pay any damages in connection with defective welds by virtue of Markwest Liberty's denial of BWI's right to cure.

25. Lastly, dismissal of any claims seeking contribution and/or indemnity as they pertain to Markwest Liberty's claim for specific performance set forth in Count V of its Complaint is required. Markwest Liberty alleges that it has demanded the return of Project Materials but that BWI has not returned all of them. See Compl. ¶¶159-162. Under the Plant Contract, the obligation to return materials is solely BWI's as the contracting party. BWI generally denies that it has failed to provide Markwest Liberty with any Project Materials it was contractually obligated to provide. See BWI First Am. Partial Ans. at ¶164. The Third-Party Complaint only alleges that OCE had responsibilities with respect to the review of the inspections of the welds on the Pressure Vessels. See Third-Party Compl. at ¶¶226-27, 242, 244. There is simply nothing to contribute to and nothing to indemnify BWI from in this respect.


III. Conclusion

Based on the foregoing, the Court does hereby GRANT OCE's Motion for Judgment on the Pleadings With Respect to Third-Party Complaint and does hereby ORDER that BWI's Third-Party Claims against OCE be, and hereby are, DISMISSED, with prejudice, from the active docket of this Court. The objections and exceptions of parties aggrieved by this Order are hereby noted and preserved. The Clerk is further directed to send certified copies of this Order to counsel of record.

Entered this 15th day of November, 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.
ATTY:  CLERK
BY: _____ WETZEL CO. WEST VIRGINIA DEPUTY CLERK