

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

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

Plaintiff,

v.

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

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

Defendants,

v.

THE LANE CONSTRUCTION
CORPORATION,

Additional Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

This matter came before the Court this 10th day of February 2020, upon Defendant AMEC Foster Wheeler Environment & Infrastructure, Inc.'s Motion for Partial Dismissal. The parties have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. On a prior day, Defendant AMEC Foster Wheeler Environment & Infrastructure, Inc. (hereinafter (“Defendant” or “AMEC”)) filed the instant Motion for Partial Dismissal, wherein it argued for dismissal of Count IV (Negligence) of Plaintiff’s Complaint against it due to the gist of the action doctrine. *See* Def’s Mot., p. 1.

2. Thereafter, Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (hereinafter “Plaintiff” or “MarkWest” filed its Response in Opposition to Defendant AMEC Foster Wheeler Environment & Infrastructure Inc.’s Motion for Partial Dismissal, arguing the gist of the action doctrine has no applicability to the negligence claim because AMEC and MarkWest have no contract and MarkWest is not asserting a breach of contract claim against AMEC. *See* Pl’s Resp., p. 9.

3. Finally, AMEC filed its Reply, arguing that the gist of the action bars not only MarkWest’s duplicative negligence claim against Defendant J.F. Allen Company (the party it contracted with), but any other duplicative design deficiency tort claim against any other party should also be barred under the doctrine. *See* Reply, p. 2.

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

STANDARD OF REVIEW

5. This matter comes before the Court upon a partial motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). “Since the preference is to decide cases on their merits, courts presented with

a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true.” *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). “We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

6. 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

7. In the instant matter, AMEC argues Count IV of Plaintiff’s Complaint should be dismissed because the tort cause of action, negligence, is improper as the claims arise out of MarkWest’s contract agreement with Defendant J.F. Allen Company (hereinafter “JFA”). *See* Def’s Mot., p. 1. Specifically, AMEC argues dismissal of this cause of action is proper pursuant to the West Virginia gist of the action doctrine, as Count I, MarkWest’s breach of contract claim against JFA, is recast as Count IV, the negligence claim against AMEC. *Id.* at 4.

8. In seeking to prevent the recasting of a contract claim as a tort claim, courts apply the “gist of the action” doctrine. Under this doctrine, recovery in tort will be barred when any of the following factors are demonstrated:

- (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 Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP, 231 W. Va. 577, W.Va.586, 746 S.E.2d 568, 577 (2013) (internal citations omitted). 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).

9. "Contract law has been traditionally concerned with the fulfillment of reasonable economic expectations. Tort law, on the other hand, is concerned with the safety of products and the corresponding quantum of care required of a manufacturer." *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 83, 297 S.E.2d 854, 858 (1982) (quoting *Northern Power and Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 328 (Alaska 1981)). Under the gist of the action doctrine, 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. *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205 (2018).

10. Here, the Court cannot apply the gist of the action doctrine to find that the liability for the alleged actions described and alleged in the Complaint clearly arises from the parties' contracts because MarkWest was only in a contract with JFA. Importantly, MarkWest did not have a contract with AMEC. On September 5, 2014, MarkWest and JFA entered into the Mobley 5 Retaining Wall Construction contract, wherein JFA was identified as the contractor responsible for the design and construction of the retaining wall at the heart of this litigation. *See* Def's Mot., p. 4; *see also* Compl, ¶17, Compl., Ex. A.

11. The Court notes that AMEC even admits that AMEC's involvement is the following: JFA then sub-contracted with AMEC to perform certain wall design services, but MarkWest did not contract with AMEC for the supply or performance of any design services related to the project. *See* Def's Mot., p. 4.

12. Although AMEC argues in its Reply that *Gaddy* does not limit its ruling to situations where direct contractual privity exists, the Court does not agree that the current case law applies the gist of the action doctrine to situations in which a tort against one party allegedly duplicates breach of contract claims against another party, when only that other party is in privity of contract with the plaintiff. See Reply, p. 2.

13. The Court concludes, that because there exists no contract between MarkWest and AMEC, the gist of the action doctrine, as a matter of law, has no applicability. The Court cannot opine that MarkWest's negligence claims against AMEC were clearly contract claims against JFA disguised as tort claims – it would be impossible given the breach of contract claim is against JFA and JFA only, and AMEC was not a party to the contract.

14. Simply stated, this case does not present the Court with the gist of the action scenario where a plaintiff brings both a breach of contract and negligence claim against a party with whom it has a contract and the Court must look at the contract and the facts to determine whether plaintiff has simply re-cast or disguised its breach of contract claim against the defendant party to its contract as a negligence claim. Importantly, even if MarkWest's breach of contract claim against JFA did not succeed, a trier of fact could still find that AMEC was negligent based on MarkWest's allegations specific to AMEC.

15. The Court notes that MarkWest pleads in Count IV of the Complaint as its basis for its negligence claim against AMEC, not the MarkWest/JFA contract, but an alleged special relationship with regard to the work on the retaining wall because AMEC allegedly knew that MarkWest would own the retaining wall and any design deficiencies would significantly harm MarkWest. See Compl., ¶92.

16. For all of these reasons, the Court finds the instant motion must be denied.

CONCLUSION

WHEREFORE, it is hereby ORDERED and ADJUDGED that Defendant AMEC Foster Wheeler Environment & Infrastructure, Inc.'s Motion for Partial Dismissal must be DENIED. The Court notes the objections of the parties to any adverse ruling herein.

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

ENTERED this 10th day of February 2020.



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: Joan of McLoyn CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK