

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

2020 FEB 13 AM 10:00

CIRCUIT COURT
WETZEL COUNTY, WV

**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 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court this 13th day of February 2020, upon Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.'s Motion for Partial Summary Judgment as to Liability Against Defendant J.F. Allen Company. 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, Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (hereinafter "Plaintiff" or "MarkWest") Redstone International, Inc. (hereinafter "Defendant" or "Redstone") filed the instant Motion for Partial Summary Judgment as to Liability Against Defendant J.F. Allen Company (hereinafter "Defendant" or "JFA"), wherein it argued that summary judgment should be granted in its favor as to liability on Count I (Breach of Contract) of the Plaintiff's Complaint against JFA. *See* Pl's Mot., p. 1. Specifically, Plaintiff argues there is no genuine issue of material fact as to the issues of liability regarding JFA failing to complete the retaining wall by the contract deadline of March 31, 2015, and JFA failing to construct the retaining wall with the required minimum global factor of safety of 1.5. *See* Pl's Mem., p. 2.

2. Thereafter, Redstone International, Inc. (hereinafter "Defendant" or "Redstone") filed its Memorandum of Redstone International, Inc. in Opposition to MarkWest Liberty Midstream and Resources, LLC's Motion for Partial Summary Judgment as to Liability Against Defendant J.F. Allen Company, urging the Court to consider the assertions of fact it contests from the instant motion when making its determination. *See* Def's Resp., p. 5.

3. Also, JFA filed J.F. Allen's Response in Opposition to Plaintiff MarkWest Liberty Midstream & Resources, LLC's Motion for Partial Summary Judgment, arguing various disputed questions of fact remain regarding the delay in the completion date of the retaining wall and whether the retaining wall actually met the required standard. *See* Def's Resp., p. 2.

4. Finally, Plaintiff filed its Reply Brief in Further Support of MarkWest Liberty Midstream & Resources, LLC's Motion for Partial Summary Judgment as to Liability Against Defendant J.F. Allen Company, averring Response to the instant motion does not dispute that JFA failed to complete the retaining wall by the contract deadline of March 31, 2015, and JFA failed to

construct the retaining wall with the required minimum global factor of safety of 1.5. *See Reply*, p. 2. MarkWest urges that a dispute as to which parties should be liable for the damages resulting from the breach does not create a dispute as to whether the contract was, in fact, breached. *Id.* at 3.

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

STANDARD OF REVIEW

6. This matter comes before the Court upon a partial motion for partial summary judgment. 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).

7. 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).

8. 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

9. Plaintiff filed the instant Motion for Partial Summary Judgment, moving this Court for summary judgment in its favor as to liability on Count I (Breach of Contract) of the Plaintiff’s Complaint against JFA. *See* Pl’s Mot., p. 1. Specifically, Plaintiff argues there is no genuine issue of material fact as to the issues of liability regarding JFA failing to complete the retaining wall by the contract deadline of March 31, 2015, and JFA failing to construct the retaining wall with the required minimum global factor of safety of 1.5. *See* Pl’s Mem., p. 2, 6.

10. In response, JFA has pointed to various issues of material fact it avers remain as to these two issues. *See* Def’s Resp. The Court will take the issues up in turn.

11. As an initial matter, it is black letter law that for a cause of action for breach of contract, a party must prove the following elements: (1) the formation of a contract; (2) a breach of the terms of that contract; and (3) resulting damages. *Sneberger v. Morrison*, 235 W.Va. 654, 669, 776 S.E.2d 156, 171 (2015).

12. The parties do not dispute the existence of the contract at the heart of the breach of contract cause of action. 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* Compl, ¶17, *see also* Compl., Ex. A.

13. First, the Court addresses the issue of JFA allegedly failing to complete the retaining wall by the contract deadline of March 31, 2015.

14. As previously stated, 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* Compl, ¶17, *see also* Compl., Ex. A. According to paragraph 2.0 of this contract, the parties agreed to a Mechanical Completion date of February 28, 2015 and a Project Completion date of March 31, 2015. *Id.*, *see also* Pl's Mem., p. 5.

15. Plaintiff avers there is no genuine issue of material fact remaining as to this issue, because the record in this case shows JFA did not complete the wall by this date, including that JFA admitted it failed to meet the contract deadline dates in its deposition of its corporate representative. *See* Pl's Mem., p. 8. In addition, Plaintiff points to the deposition of Defendant Redstone's corporate representative, who admitted the project was not complete as of March 31, 2015, a concession that JFA's subcontractor Redstone didn't perform its work within the JFA schedule contained within JFA's counterclaim, Redstone's admissions that its work fell behind schedule in their discovery answers, and construction communications. *Id.* at 9-10. For these reasons, Plaintiff contends JFA breached section 2.0 of the parties' contract. *Id.* at 8.

16. However, JFA proffers questions of fact remain as to breach of contract due to the completion deadline, including its averment that MarkWest's own actions caused the delay by its own alleged breach of the parties' contract. *See* Def's Resp., p. 10. JFA proffers there exists in

10.13044551069 02/13/2020 10:00 #243 P.007/009

the record witness testimony and party admissions that create this open question of fact regarding MarkWest's own actions and alleged breach on the part of MarkWest. *Id.* at 11.

17. For these reasons, the Court finds genuine issues of material fact remain as to the Breach of Contract cause of action contained in Count 1. While Plaintiff proffers evidence in the record including depositions of the corporate representatives of JFA and Redstone, and discovery request answers, JFA also proffers evidence in the record. JFA points to witness testimony and party admissions. Accordingly, the Court must find that a genuine issue of material fact remains as to this issue. Therefore, the instant motion is denied as to this first reason.

18. Second, MarkWest argues JFA failed to construct the retaining wall with the required minimum global factor of safety of 1.5, in violation of the contract, causing a breach. *See* Pl's Mem., p. 2, 11. Specifically, MarkWest contends because the record shows JFA failed to deliver a retaining wall in the condition that met these specifications, no genuine issue of material fact remains as to this issue. *Id.* at 11.

19. Section 10.1 of the parties' contract stated that all work on the retaining wall would be "performed in a good and workmanlike manner and shall be free from defective workmanship, materials, and equipment...". *See* Compl., Ex. A, *see also* Pl's Mem., p. 11. Also, the instructions to bidders, section 6.1 stated that JFA was to "evaluate the external, internal, and global stability of the structure and ensure that the Retaining Wall have a minimum factor of safety versus failure of 1.5". *See* Pl's Mem., p. 11.

20. Plaintiff contends that the record shows there is no genuine issue of material fact that JFA breached these provisions. *Id.* Plaintiff points to evidence in the record regarding alleged wall anchor deficiencies, such as testimony that wall anchors were suddenly shooting off the wall. *Id.* at 12. Further, Plaintiff cites evidence in the record in the form of the deposition

10-13048551009 02/13/2020 10:00 #243 P.008/009

testimony from Defendant AMEC's corporate representative, Chris Ramsey, wherein he testifies that the portion of the wall in the middle has a global factor of safety of 1.4, and the majority of the wall has a global factor of safety of 1.5. *Id.*

21. On the other hand, JFA argues issues of material fact remain. Importantly, JFA points to expert testimony in the record, wherein it avers AMEC's expert, Dr. Paul Sabatini, will offer expert opinion that the wall currently exhibits the correct safety factor. *See Def's Resp.*, p. 11. The Court notes JFA proffered portions of the deposition transcript of Dr. Sabatini. *Id.* at 11-12.

22. For this reason, the Court finds genuine issues of material fact remain regarding whether or not JFA, did in fact, breach the provision of the contract stating "that the Retaining Wall have a minimum factor of safety versus failure of 1.5". *See Pl's Mem.*, p. 11.

23. The Court notes Plaintiff's argument in its Reply as to this expert opinion, wherein it cites the expert report of Dr. Sabatini that states that one area of the wall had a factor of safety value lower than 1.5. *See Pl's Reply*, p. 8. The Court finds this is further evidence of genuine issue of material fact that remains as to this issue. For these reasons, the Court cannot grant summary judgment on this issue. Therefore, the instant motion is denied as to this second reason.

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

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.'s Motion for Partial Summary Judgment as to Liability Against Defendant J.F. Allen Company 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 13th 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 MY OFFICE.

ATTEST:  DEPUTY CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK