

**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 REDSTONE INTERNATIONAL, INC.'S
MOTION FOR SUMMARY JUDGMENT
AS TO COUNT III OF PLAINTIFF'S COMPLAINT**

This matter came before the Court this 12th day of February 2020, upon Defendant Redstone International, Inc.'s Motion for Summary Judgment as to Count III of Plaintiff's Complaint. 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.

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WETZEL COUNTY CLERK
OFFICE

FINDINGS OF FACT

1. On a prior day, Redstone International, Inc. (hereinafter “Defendant” or “Redstone”) filed the instant Motion for Summary Judgment as to Count III of Plaintiff’s Complaint, wherein it argued that summary judgment should be granted in Redstone’s favor as to Count III (Negligence against Redstone) of the Plaintiff’s Complaint against it pursuant to the gist of the action doctrine, because the allegations sound in contract and would be the breach of contract cause of action in the Complaint against Defendant J.F. Allen recast against Redstone. *See Def’s Mot.*

2. Thereafter, Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (hereinafter “Plaintiff” or “MarkWest”) filed its Response in Opposition to Defendant Redstone International Inc.’s Motion for Partial Summary Judgment, arguing the gist of the action doctrine has no applicability to the negligence claim because Redstone and MarkWest have no contract and MarkWest is not asserting a breach of contract claim against Redstone. *See Pl’s Resp., p. 9-10.*

3. Finally, Redstone filed its Reply Memorandum in Support of Motion for Summary Judgment as to Count III of Plaintiff’s Complaint, averring the gist of the action doctrine does block the negligence claim because MarkWest’s cause of action against Redstone does ultimately arise from its interpretation of Defendant J.F. Allen Company’s (hereinafter “JFA”) contract with MarkWest. *See Reply, p. 9-10.*

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 for 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).

6. 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).

7. 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

8. Redstone filed the instant Motion for Summary Judgment, moving this Court for summary judgment in its favor as to Count III of the Complaint filed against it by Mark West, which was a cause of action for negligence against Redstone. See Def’s Mot., p. 1. The Court notes that Count III (Negligence) of Plaintiff’s Complaint is the only cause of action against Redstone. See Compl., ¶¶ 86-90.

9. Specifically, Redstone argues summary judgment in its favor under the gist of the action doctrine is appropriate because “Mark West’s claims are purely contractual in nature” because the primary

allegation is that Redstone did not build the retaining wall in accordance with the MarkWest/JFA contractual promises. *See* Def's Mot., p. 5-6.

10. 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).

11. “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).

12. 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 Redstone.

13. Additionally, the Court does not find Redstone's averments that the subcontracts JFA had with Redstone and Defendant AMEC Foster Wheeler Environment & Infrastructure, Inc. (hereinafter "AMEC") constitute assignments of portions of the main MarkWest/JFA contract, and the fact that the MarkWest/JFA contract includes mentions of subcontractors in one of its provisions has having any bearing on this. *See* Def's Mot., p. 3. Redstone, and AMEC for that matter, were not parties to the MarkWest/JFA contract, the contract that was allegedly breached for the basis of Count I. The Court agrees with MarkWest's averment that the Redstone Subcontract is not an assignment, but a separate contract creating a subcontractual relationship between JFA and Redstone, independent of the MarkWest/JFA contract. *See* Pl's Resp., p. 13-14.

14. By way of a contractual history in this matter, the Court notes that 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.

15. Subsequently, JFA subcontracted with Redstone for the construction of the wall¹. At no time did MarkWest have a contract with Redstone.

16. Here, the Court concludes that because there exists no contract between MarkWest and Redstone, the gist of the action doctrine, as a matter of law, has no applicability. The Court notes it is undisputed that MarkWest and Redstone are not in contractual privity. *See* Def's Mot., p. 9. For this reason, summary judgment cannot be granted in Redstone's favor as to the negligence cause of action against it

¹ The Court notes that on August 12, 2015, Redstone was terminated by JFA. Thereafter, on August 25, 2015, Defendant Coastal Drilling East, LLC entered a subcontract with JFA for a defined scope of work regarding the construction of the retaining wall.

on the basis of the gist of the action doctrine. The Court cannot opine that MarkWest's negligence claim against Redstone was clearly a contract claim against JFA disguised as a tort claim – it would be impossible given the breach of contract claim (Count I) is against JFA and JFA only, Redstone was not a party to said contract that was allegedly breached, and there existed no contract at all between MarkWest and Redstone.

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

CONCLUSION

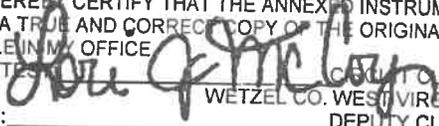
WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant Redstone International, Inc.'s Motion for Summary Judgment as to Count III of Plaintiff's Complaint must be **DENIED**. The Court notes the objections of the parties to any adverse ruling herein.

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 12th 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:  COURT CLERK
 BY: _____ WETZEL CO. WEST VIRGINIA
 DEPUTY CLERK