

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 THIRD-PARTY DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court this 18th day of February 2020, upon Third-Party Defendant The Lane Construction Corporation's Motion for Summary Judgment. 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, Third-Party Defendant The Lane Construction Corporation (hereinafter “Third-Party Defendant” or “Lane”) filed the instant Motion for Summary Judgment, wherein it argued that the Court should dismiss the Defendant J.F. Allen Company’s (hereinafter “Defendant” or “JFA”) Third-Party Complaint against it because no genuine issue of material fact remains for the jury because Lane owes no duty to JFA. *See Th. Pty. Def’s Mot.*, p. 1.

2. Thereafter, JFA filed its Response in Opposition to Third-Party Defendant The Lane Construction Corporation’s Motion for Summary Judgment, arguing the motion should be denied because there is clear evidence in the record that Lane owed a duty of care to JFA. *See Def’s Resp.*, p. 2.

3. Finally, Lane filed its Reply of Lane Construction Corporation in Support of Its Motion for Summary Judgment, reiterating its averment that the Lane does not have a duty to JFA, and averring that the Response to the instant motion did not establish a duty owed by Lane to JFA. *See Reply*, p. 2. For this reason, Lane argues JFA’s negligence claim against Lane fails as a matter of law. *Id.*

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

STANDARD OF REVIEW

5. This matter comes before the Court upon a 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. Lane filed the instant Motion for Summary Judgment, arguing summary judgment in its favor is appropriate because no genuine issue of material fact remains for the jury because Lane owes no duty to JFA. *See* Th. Pty. Def’s Mot., p. 1.

9. On September 5, 2014, Plaintiff MarkWest Liberty Mistream & Resources, L.L.C., (hereinafter “Plaintiff” or “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. Thereafter, MarkWest also contracted with Lane for Mobley V site work. *See* Th. Pty. Def's Mem., p. 2. According to Lane's memorandum, Lane was responsible for excavating the pad for the Mobley V plant and for providing crushed material from that excavation to be used by the JFA design/build team for placement and compaction behind the retaining wall. *Id.* Lane was responsible for providing the fill material in accordance with the specifications set forth in its contract with MarkWest. *Id.* JFA did not have a contract with Lane. *Id.* at 5.

10. On October 20, 2016, JFA filed its Third-Party Complaint Against The Lane Construction Corporation, requesting that if MarkWest is entitled to recovery against JFA, that Lane should be solely liable to MarkWest, or jointly and severally liable for all the alleged damages to the project. *See* Th. Pty. Def's Mot., Ex. C, p. 4. Also, JFA requested in its Third-Party Complaint Against The Lane Construction Corporation that judgment be entered in its favor against MarkWest, but that in the alternative, JFA requests that if MarkWest is entitled to recover against JFA at trial, that Lane be liable to JFA for any said recovery. *Id.*

11. JFA also alleged in its Third-Party Complaint Against The Lane Construction Corporation that Lane owed a duty to JFA to perform its work in a skillful, competent, and workmanlike manner in order to assure that it supplied the rock fill to JFA in conformance with the rock fill specification and in quantities sufficient so as not to create a delay in the construction of this project. *Id.* at ¶17; *see also* Def's Resp., p. 6.

12. The Court notes the Third-Party Complaint Against The Lane Construction Corporation does not contain numbered counts or causes of action for any specific causes of action, such as breach of contract or negligence. *See* Th. Pty. Def's Mot., Ex. C. However, Lane asserts in its

motion/memorandum that it appears JFA is attempting to assert a negligence claim against Lane based on contractual duty owed by Lane to MarkWest, citing paragraphs 17 and 18 of the Third-Party Complaint Against The Lane Construction Corporation. *See* Th. Pty. Def's Mem., p. 6. Lane also asserts in its motion/memorandum that JFA also seeks indemnity and contribution from it in paragraph 21 of JFA's Third-Party Complaint Against The Lane Construction Corporation. *Id.*

13. "In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981)." Syl. Pt. 4, *Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995).

14. JFA argues there is clear evidence in the record that Lane owed a duty of care to JFA in the manner it performed its obligations in the storage and provision of fill material that would be acceptable for the construction of the retaining wall. *See* Def's Resp., p. 2. JFA avers it relied upon Lane's skill and expertise, particularly when it came to moisture levels of the fill material. *Id.* JFA proffers evidence that Lane acknowledged that because the MarkWest contract and the Lane contract were awarded to different entities, the placer of the fill, being JFA, would be reliant on the creator of the fill stockpile, being Lane, to "avoid issues". *Id.* at 3. JFA proffers that MarkWest's corporate designee acknowledged in his deposition that JFA and Lane had to rely on each other's performance. *Id.*

15. JFA additionally proffered that MarkWest set forth specifications for the acceptable level of moisture content to Lane via a contract addendum. *Id.* Specifically, JFA proffers the Lane contract incorporated by reference a "Technical Specifications Manual – Mobley Gas Plant – April 2012" document which included a requirement that the moisture content of the soil fill shall be plus or

minus 3% of optimum moisture content as determined by a proctor soil test. *Id.* at 4; *see also* Def's Mot., Ex. G. However, JFA proffers that Lane claimed it didn't receive a moisture level specification. *Id.* at 4.

16. The Court finds summary judgment would be inappropriate at this time. As an initial matter, the Court cannot find no genuine issue of material fact remains to a negligence claim when negligence has not been specifically pled in the Third-Party Complaint against Lane. *See* Th. Pty. Def's Mot., Ex. C. Further, JFA proffers evidence from the record regarding MarkWest's corporate designee and the concern of an allegedly growing moisture control problem, as the stockpiled fill was becoming too wet and "a problem" in 2014. *See* Def's Resp., p. 5.

17. JFA also points to the fact that it had to rely upon the work of Lane in order to complete its obligations to MarkWest, such as the completion date deadline. *Id.* at 7. In this case, JFA and Lane had no subcontract, instead, MarkWest had an individual contract with Lane. However, the Court notes and considers that JFA had to rely on Lane's completion of its work in compliance with Lane's own contract with MarkWest in order to fully perform JFA's own contract with MarkWest. Stated another way, Lane was obligated by its contract with MarkWest to excavate and blast 220,000 cubic yards of material, process and stockpile the material for a four-inch minus specification, and control the levels of moisture in that stockpiled material, and JFA was reliant upon this to accomplish JFA's obligation to MarkWest to place appropriate fill behind the retaining wall. *Id.* at 10-11. JFA proffered evidence in the record, such as the testimony of Lane's corporate designee, that JFA's ability to complete its work was reliant upon Lane's excavation, processing, storage, and delivery of fill. *Id.* at 10. The Court notes that JFA could only receive the fill from Lane pursuant to the parties' contracts – it didn't have the option to get it from someone else, like its own subcontractor.

18. The Court finds that genuine issues of material fact remain as to the issues before the Court. JFA has proffered evidence from the record in this case that raise genuine issues of fact as to the parties' contractual relationships and forced reliance on one another's work/performance. "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). Because the Court finds issues of fact have been raised as to the issues pled in the Third-Party Complaint against Lane, the Court finds summary judgment would be inappropriate. See Th. Pty. Def's Mot., Ex. C.

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

CONCLUSION

WHEREFORE, it is hereby ORDERED and ADJUDGED that Third-Party Defendant The Lane Construction Corporation's Motion for Summary Judgment 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 18th day of February 2020.

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
ATTORNEY
BY: [Signature] CLERK
WETZEL CO. WEST VIRGINIA
DEPUTY CLERK

[Signature]
JUDGE H. CHARLES CARL, III
West Virginia Business Court Division