

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

WW CONSULTANTS, INC.,

FILED
2020 MAR 16 AM 8:40
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 18-C-115
Honorable Christopher C. Wilkes

**POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT, MARK SMITH,
DAVID GANDEE, DAVID DRAGAN,
the WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
and the WEST VIRGINIA WATER
DEVELOPMENT AUTHORITY.**

**ORDER GRANTING IN PART MOTION TO STRIKE PCPSD'S
NEW HEADWORKS IMPROVEMENT CLAIM**

On a previous day came Plaintiff and Counterclaim Defendant WW Consultants, Inc., (hereinafter "WWC") and moved the Court to order certain documents produced in Defendant Pocahontas County Public Service District's (hereinafter "PSD") Third Supplemental Responses to Requests for Production as stricken from the record, and order that PSD should not be permitted to pursue the related Headworks Improvement Claim and related damages. Alternatively, to the extent PSD is permitted to pursue the Headworks Improvement Claim, WWC requests additional time to re-open discovery and a new scheduling order be implemented to allow for the amendment of pleadings, joinder of parties, additional discovery, and supplementation of expert witness reports. PSD indicated it had no objection to the alternative relief sought. For the reasons set forth more fully herein, the motion is GRANTED IN PART, and while the documents will not be stricken from the record, discovery shall be re-opened to allow for necessary development of the recently produced evidence.

FINDINGS OF FACT

1. On February 6, 2018, WWC filed the instant Complaint in the Circuit Court of Kanawha County against the Pocahontas County Public Service District (“PSD”), its board members Mark Smith, David Gandee, and David Dragan, (the “individual Defendants” or “individual board members”) the West Virginia Department of Environmental Protection (“DEP”) and the West Virginia Water Development Authority (“WVWDA”) asserting claims for breach of contract, personal liability of the individual board members, and a special receivership as to the PSD, DEP, and WVWDA.

2. The claims arise out of the design and construction of a large waste water treatment facility and collection system in Pocahontas County, West Virginia. According to the allegations in the Complaint, WWC designed the system and provided resident project representatives during the construction. PSD was the project’s owner, and the WVDEP and WVWDA provided financial backing and administration for the project.

3. The PSD answered and filed a counter-claim against WWC, alleging that WWC failed to provide certain services that it was contractually obligated to perform at the conclusion of the project. The PSD also alleges professional negligence against WWC for certain design features and for its handling of some issues that came up during construction.

4. On July 24, 2018, an Order was entered granting the parties’ joint motion and transferring this matter to the Business Court Division and assigning it to the undersigned as the Presiding Judge.

5. As represented to the Court by correspondence dated September 6, 2019, by Resolution Judge Lorensen, the parties successfully mediated the claims filed by WWC against PSD and the three board members who were sued in their official capacities.

6. As a result, the only claim pending before the Court is the counterclaim filed by the PSD for breach of standard of care and professional negligence and breach of contract against WWC.

7. On November 27, 2019, this Court entered an Order Granting Plaintiff's Motion for Partial Summary Judgment as to certain of these remaining counterclaims, finding the motion granted as to Paragraphs 12(a), 12(b), 12(d), 12(f), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(n), 12(o), 12(p), 12(q), 12(r), 12(v), 12(y), 12(z), 12(aa), and 12(bb) contained within Count I of PSD's Counterclaim. *See Ord.*, 11/27/19, p. 11.

8. Meanwhile, on or about November 4, 2019, WWC filed the instant Motion to Strike PCPSD's New Headworks Improvement Claim, seeking the Court to order certain documents produced in Defendant Pocahontas County Public Service District's (hereinafter "PSD") Third Supplemental Responses to Requests for Production as stricken from the record, and order that PSD should not be permitted to pursue the related Headworks Improvement Claim and related alleged damages. *See Pl's Mot.*, p. 7. Alternatively, to the extent PSD is permitted to pursue the Headworks Improvement Claim, WWC requests additional time to re-open discovery and a new scheduling order be implemented to allow for the amendment of pleadings, joinder of parties, additional discovery, and supplementation of expert witness reports. *Id.*; *see also Id.* at 9.

9. On November 18, 2019, PSD filed its Response to WW Consultants, Inc.'s Motion to Strike, arguing the documents should not be stricken as it is not a "new" claim, and that it has no objection to WWC's alternative request. *See Def's Resp.*, p. 2-3.

10. On or about January 29, 2020, WWC filed WW Consultants, Inc.'s Supplemental Brief In Support of Its Motion to Strike PCPSD's New Headworks Improvement Claim, arguing the documents were untimely as they were produced after the close of discovery and the expert

witness disclosure deadline had passed, and that the PSD is attempting to assert through production of recently created documents from its experts a newly-developed, significant claim. *See Reply*, p. 3, 5. It reiterated its request for relief and alternative relief. *Id.* at 5.

11. On or about February 20, 2020, PSD filed its Supplemental Response Brief to WW Consultants, Inc.'s Motion to Strike, reiterating that there is no new cause of action and arguing there is no prejudice to WWC by allowing the claim to go forward because it is agreeable to opening the discovery period and there is not a trial date set in the matter. *See Suppl. Resp.*, p. 2.

12. The Court finds the motion is now ripe for adjudication.

CONCLUSIONS OF LAW

13. The general rule of depositions and discovery is governed by Rule 26 of the West Virginia Rules of Civil Procedure. Rule 26(b)(4) provides, in pertinent part, that “[d]iscovery of facts known and opinions held by experts...acquired or developed in anticipation of litigation or for trial, may be obtained...through interrogatories [that] require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” W. Va. R. Civ. P. 26. Further, “[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial. *Id.*

14. One of purposes of discovery process under Rules of Civil Procedure is to eliminate surprise; trial by ambush is not contemplated by Rules. *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995); *see also Smith v. Clark*, 241 W. Va. 838, 858, 828 S.E.2d 900, 920 (2019).

15. The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict. *Graham v. Wallace*, 214 W. Va. 178, 184–85, 588 S.E.2d 167, 173–74 (2003).

16. The Court finds the case of *Duling v. Bluefield Sanitarium* instructive. 149 W. Va. 567, 142 S.E.2d 574 (1965). In *Duling*, one element of the appeal involved the circuit court's refusal to allow a witness to testify whose name was not a list of ten witnesses to be exchanged ten days prior to trial. *Id.* In reversing the decision, the Supreme Court of Appeals held:

While it is proper for a trial court to direct counsel for the respective parties to exchange lists of witnesses ten days in advance of the commencement of the trial, such a requirement should not be so applied as to create undue hardship or unduly to impede the development of pertinent facts before the jury. The trial court, in the light of the situation subsequently arising, may commit reversible error in refusing to permit a witness to testify before the jury on the ground that opposing counsel were apprised less than ten days in advance of the trial that such person would be called as a witness.

Id., Syl Pt. 6.

17. Here, the Court considers the fact that PSD has proffered that proving the design flaw alleged in the counterclaim was not possible until sometime later, and notably, before a trial date has even been set. *See* Suppl. Resp., p. 4. Further, the Court considers the fact that PSD does not object to WWC's alternative relief requested, wherein the Court would reopen discovery, a new scheduling order would be implemented, allowing for possible amendment of

pleadings, joinder of parties, additional discovery and supplementation of expert witness reports related to the documents produced. See Reply, p. 5.

18. For this reason, the Court finds that WWC's Motion shall be granted as to the alternative request. While the produced documents will not be stricken, the Court finds justice requires WWC to have the benefit of discovery to develop these claims. Therefore, discovery shall be reopened, and a new scheduling order shall be issued. The Court will hold a telephonic status conference soon to conduct this scheduling conference.

19. Accordingly, the instant motion is GRANTED IN PART.

CONCLUSION

WHEREFORE, for the reasons set forth herein, it is hereby ADJUDGED and ORDERED that WWC's Motion to Strike PCPSD's New Headworks Improvement Claim is hereby GRANTED IN PART. 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.

IT IS SO ORDERED.

Enter this 21st day of March, 2020.

Date: 3/16
Certified copies sent to:
 counsel of record
 parties
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(please indicate)
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Bus Ct
C. Megley
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JUDGE CHRISTOPHER C. WILKES
West Virginia Business Court Division

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 16
DAY OF March 2020
Cathy S. Gatson CLERK
CLERK OF KANAWHA COUNTY, WEST VIRGINIA