

FILED

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

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KANAWHA COUNTY CIRCUIT COURT

WW CONSULTANTS, INC.,

Plaintiff,

VS.

Civil Action No.: 18-C-115

Presiding Judge: Christopher C. Wilkes

Resolution Judge: Michael D. Lorensen

POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT, et al.,
Defendants.

**ORDER GRANTING ORDERS CONSTRUCTION COMPANY, INC.'S
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

This matter came before the Court this 14th day of January 2021 upon Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint of WW Consultants, Inc. The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party Defendant, Orders Construction Company, Inc. (hereinafter "Defendant" or "Orders"), by counsel, John D. Hoblitzell, III, Esq., 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. In 2014, Orders bid on a project to construct the consolidated wastewater treatment plant near Snowshoe Mountain in Pocahontas County, West Virginia, which was being built by Defendant/Counterclaim Plaintiff Pocahontas County Public Service District (hereinafter "PSD"). See Th. Pty. Def's Mem., p. 2. Orders was the low

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bidder and contracted with the PSD for the construction of the plant. *Id.* Orders entered into a contract with the PSD to construct the plant, effective April 19, 2015. *Id.* at 3. The plant was substantially complete on May 16, 2017. *Id.*

2. This matter was commenced with the filing of the complaint on February 6, 2018, wherein WWC sought to recover fees allegedly owed by the PSD. *Id.* at 4. The PSD was the project's owner and WWC was the engineer of record on the project, providing certain design and consulting services during the construction of the wastewater treatment plant and related facilities. *Id.* at 2; *see also* Compl., ¶8.
3. On April 2, 2018, PSD filed its Answer and Counterclaim of the Pocahontas County Public Service District, alleging twenty-eight individual allegations of professional negligence. *See* Ctrclm, p. 26-28.
4. On August 1, 2019, the WWC filed a Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims, seeking judgment as a matter of law in its favor on 20 of the 28 counterclaims PSD asserts in paragraph 12 (professional negligence)¹ of the Counterclaim because Defendant did not support those allegations with expert testimony. *See* Pl's Mot. Summ. J. This motion was fully briefed, and on November 27, 2019, this Court granted said motion and dismissed a vast majority of the design negligence claims. *See* Ord., 11/27/19; *see also* Th. Pty. Def's Mem., p. 4. After the entry of this Order, seven design negligence claims remained. *Id.*
5. On April 20, 2020, the PSD moved the Court for leave to permit it to amend its Counterclaim in this matter to add two additional counterclaim defendants due to

¹ These claims are set forth in paragraph 12(a) through 12(cc) of PSD's Counterclaim. *See* Pl's Mot., Ex. A.

newly produced evidence. The Court, finding good cause existed, and considering there was no objection from WWC, granted said motion for leave by Order entered on May 4, 2020.

6. On April 29, 2020, WWC moved the Court for leave to permit it to file a third-party complaint against three third-party defendants due to newly produced evidence. The Court, finding good cause existed, and considering there was no objection from the PSD, granted said motion for leave by Order entered on May 4, 2020.
7. On May 12, 2020, the PSD filed its First Amended Counterclaim, asserting claims against WWC for design professional negligence and breach of contract. *See Am. Ctrclm, ¶¶53-63.*
8. On May 18, 2020, WWC filed its Third-Party Complaint against Orders, A3-USA, Inc., and Pipe Plus, Inc. With respect to Orders, WWC asserted it was entitled to common law contribution and implied indemnity, express contractual indemnification pursuant to Orders Construction's contract with the PSD, and it also asserted a cause of action against Orders for breach of contract, alleging Orders breached its contract with PSD by failing to indemnify and assume WWC's defense from the design based negligence and breach of contract claims that PSD had asserted against it. *See Th. Pty. Def's Mem., p. 5-6; see also WWC's Th. Pty. Compl., ¶¶15-33.*
9. The instant motion to dismiss followed. On July 6, 2020, Orders filed the instant Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint of WW Consultants, Inc. pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, arguing that the Third-Party Complaint against it should be dismissed because: 1) WWC fails to state claims for contribution and implied indemnification

in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute, there is no basis in law for the implied indemnity claim, and WWC's contribution and indemnity claims are time barred by West Virginia Code §55-2-21(b); 2) WWC's claims for express contractual indemnity and breach of contract must be dismissed because WWC is not entitled to any indemnification for claims of design negligence or negligence in the supervision of contractors or subcontractors, Orders is only obligated to indemnify WWC to the extent that WWC suffers damages or losses caused by Orders's negligence and WWC cannot as a matter of law be liable for such damages, the contractual indemnity provisions impose no obligation on Orders to defend WWC, and WWC's contractual indemnity and breach of contract claims are not yet ripe. *See* Th. Pty. Def's Mot., p. 2-3.

10. On July 8, 2020, a briefing order on the instant motion was entered. On July 23, 2020, WWC filed its Brief in Response to Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint, averring that Orders's arguments seeking dismissal are not supported by West Virginia law and the instant motion should be denied. *See* WWC's Resp., p. 3.
11. On August 3, 2020, Orders filed its Reply of Orders Construction Company, Inc. to WW Consultants, Inc.'s Response in Opposition to Orders' Motion to Dismiss.
12. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

First, this matter comes before the Court upon a motion to dismiss under Rule 12(b)(6).

"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).

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

In this matter, Orders filed the instant Orders Construction Company, Inc.’s Motion to Dismiss Third-Party Complaint of WW Consultants, Inc. pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, arguing that the Third-Party Complaint against it should be dismissed because: 1) WWC fails to state claims for contribution and implied indemnification in the negligence cause of action because common law claims for contribution are precluded by West Virginia’s several liability statute, there is no basis in law for the implied indemnity claim, and WWC’s contribution and indemnity claims are time barred by West Virginia Code §55-2-21(b); 2) WWC’s claims for express contractual indemnity and breach of contract must be dismissed because WWC is not entitled to any indemnification for claims of design negligence or negligence in the supervision of contractors or subcontractors, Orders is only obligated to indemnify WWC to the extent that WWC suffers damages or losses caused by Orders’s negligence and WWC cannot as a matter of law be liable for such damages, the contractual

indemnity provisions impose no obligation on Orders to defend WWC, and WWC's contractual indemnity and breach of contract claims are not yet ripe. *See* Th. Pty. Def's Mot., p. 2-3.

Considering the record, the relevant law, and the briefing by the parties, the Court finds as follows:

Negligence Cause of Action

West Virginia Code §55-2-21(b) governs statutes of limitation as it applies to third-party pleadings. Pursuant to §55-2-21(b), "[a]ny defendant who desires to file a third-party complaint shall have one hundred eighty days from the date of service of process of the original complaint, or the time remaining on the applicable statute of limitations, whichever is longer, to bring any third-party complaint...". W. Va. Code Ann. § 55-2-21.

WWC has claimed contribution and indemnity in its "Negligence" count in its Third-Party Complaint. *See* Th. Pty. Def's Mem., p. 12; *see also* Th. Pty. Compl., ¶¶15-19. Contribution and indemnity are "personal action for which no limitation is otherwise prescribed" and are governed by a two-year statute of limitations, pursuant to §55-2-12. W. Va. Code Ann. § 55-2-12.

In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. *Syl. Pt. 4, Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 708, 487 S.E.2d 901, 903 (1997).

It is undisputed that Orders entered into a contract with the PSD for the construction of the project. *See* Th. Pty. Compl., ¶11. Orders has proffered that WWC was charged with

preparing and evaluating the bids, and then, as the owner's representative, with overseeing and monitoring the construction of the project. *See* Th. Pty. Def's Mem., p. 3, 12. Because of this role, it has known since beginning of the project who built the plant. *Id.* at 12-13. It was also proffered to the Court that WWC was even observing Orders's work during construction and was in a position at the time the work was performed to verify compliance with the project specifications. *Id.* at 13. Substantial completion of the project was on May 16, 2017. *Id.* In fact, it was WWC who prepared, certified, and filed with the Public Service Commission a Certificate of Substantial Completion. *Id.* at 3. The Court notes WWC did not file its Third-Party Complaint until May of 2020, nearly three years later.

Further, the PSD filed and served its original Counterclaim on March 28, 2018, more than two years before WWC filed its Third-Party Complaint. Since WWC brings this third-party complaint in its capacity as Counterclaim Defendant, it was the service of this original Counterclaim on WWC in March of 2018 that triggered WWC's 180-day period to file a third-party complaint. Therefore, this deadline expired on September 24, 2018.

Accordingly, regardless of whether the 180-day period or the remaining time on the statute of limitations applies, WWC's Third-Party Complaint, filed more than three years after the substantial completion and more than two years after the filing of the original counterclaim, is untimely. So, its negligence claims, contained in paragraphs 15-19, of the Third-Party Complaint must be dismissed.

Indemnity Cause of Action

Further, with regard to the contractual defense and indemnity claims, contained in paragraphs 20-25 of the Third-Party Complaint, Orders argues the contractual indemnity

provision is a limited indemnity obligation and it specifically excludes any obligation of Orders to indemnify WWC for design negligence. *See* Th. Pty. Def's Mem., p. 14.

The indemnity obligation, contained in Section 7.18 of the contract reads as follows:

7.18 Indemnification

- A. To the fullest extent permitted by Laws and Regulations, and in addition to any other obligations of Contractor under the Contract or otherwise, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

See WWC's Resp., p. 14; *see also* Th. Pty Compl., ¶21.

The exceptions to the contract's indemnity clause are enumerated in Paragraph 7.18.C, which reads as follows:

- C. The indemnification obligations of Contractor under Paragraph 7.18.A shall not extend to the liability of Engineer and Engineer's officers, directors, members, partners, employees, agents, consultants and subcontractors arising out of:
1. The preparation or approval of, or the failure to prepare or approve maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or
 2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

See WWC's Resp., p. 15; *see also* Th. Pty. Def.'s Mem., p. 6.

This Court's review of the relevant provisions, and the third-party complaint, reveal that the claims are related to the exceptions to indemnity contained in the exceptions to the contract's indemnity clause which are enumerated in Paragraph 7.18.C. When the indemnity provision is examined in full, it is apparent that it is limited in scope. The indemnity obligation is not broad based, and does not entitle WWC to indemnification regardless of its fault and does not impose an obligation on Orders to defend WWC. Rather, it is clearly limited to damages and losses arising out of or related to the performance of the Work and that are attributable to bodily injury or injury to or destruction of tangible property other than the Work itself. And, such obligations are limited only to those damages or losses caused by a negligent act or omission of Orders. WWC is not entitled to indemnification for damages or losses it may suffer that are caused by its own negligence.

Further, the indemnity obligations specifically exclude indemnity for any liability imposed on WWC arising out of its design work. The PSD alleges WWC breached the standard of care applicable to engineers by: a) *designing* a wastewater treatment plant and accompanying facilities that failed to process wastewater at the designed rate due to the Headworks and screening issues thereto; b) failing to provide field locations for the collection system; c) failing to properly *design* the lagoon; d) failing to *design* a proper waste sludge pump; e) failing to properly *design* membrane racks in Train A; f) failing to properly *design* the membrane cleaning solution tank; g) failing to supervise contractors so that proper as-builts of the force mains could be made; and h) *designing* the MBR area so that valves can only be accessed by climbing over safety railings or by removing grates. *See* Th. Pty. Def's Mem., p. 5.

The Court also examines implied indemnity. The general principle of implied indemnity arises from equitable considerations. *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 452, 693 S.E.2d 815, 817 (2010), at Syl. Pt. 6. “At the heart of the doctrine is the premise that the person seeking to assert implied indemnity--the indemnitee--has been required to pay damages caused by a third party--the indemnitor.” *Id.*

The requisite elements of an implied indemnity claim in West Virginia are a showing that: “(1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.” *Harvest Capital v. West Virginia Department of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002), Syl. Pt. 4.

Here, WWC has no legally viable claim for implied indemnity against Orders. The Court also considers there have been no special relationships proffered between WWC and Orders upon which a claim for implied indemnity can be based. *See* Th. Pty. Def’s Mem., p. 11. With regard to WWC’s fault, PSD has affirmatively alleged WWC’s design negligence caused its injuries and damages. *Id.* at 12. The jury could find WWC is liable and was negligent in its design and supervision of the project, thus rendering the doctrine of implied indemnity inapplicable. For all of these reasons, no legal claim of implied indemnity may exist between these parties. *Id.* Because of the plain language of the indemnity provision, it is apparent on the face of the pleading that the claimant has no legal right that can be asserted. *See Fass w. Nowasco Well Service, Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986)(internal citations omitted).

Contribution Cause of Action

The Court next examines contribution. Syllabus Point 4 of *Sydenstricker v. Unipunch Prod., Inc.* states as follows:

The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.

169 W. Va. 440, 441, 288 S.E.2d 511, 513 (1982).

The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages? *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. *Id.*

As an initial matter, here, a review of the Third-Party Complaint reveals the claim for contribution is contained within the negligence count. *See* Th. Pty Compl., ¶¶15-21. Specifically, WWC alleges in the Third-Party Complaint's negligence count that Orders had a duty to exercise a reasonable degree of care ordinarily employed by contractors, and that in the event that the PSD proves its allegations and causes of action at trial, PSD's damages resulting from any alleged defects in the wastewater treatment plant or related work "were caused by the negligence and carelessness of Orders Construction". *Id.* at ¶¶17-18.

Wherefore, WWC pleads in the Third-Party Complaint's negligence count that it demands "that judgment be entered in its favor and against Orders Construction and that Orders Construction be adjudged solely liable to [the PSD] or liable to WWC for contribution and/or common law indemnity and otherwise liable for any for any [sic] and all damages provide by [the PSD] and that the Court award such other relief as may be deemed just and appropriate". *Id.* at ¶19.

As an initial matter, the Court notes that WWC's negligence claims, contained in paragraphs 15-19 of the Third-Party Complaint, were dismissed by this Order.

Further, with regard to the paragraphs, including the "Wherefore" paragraph, asserting contribution by Orders, the Court finds this activity was the type of activity that was specifically contracted between to the parties to be deemed not to be indemnifiable, via the indemnity exceptions contained in Paragraph 7.18.C. The Court concludes Orders is expressly excluded from being held liable from this type of action, as specifically contemplated by the parties at the time of the contract. An indemnity exclusion, such as the one contained in Paragraph 7.18.C, would not have any force or effect if a party could still be sued for contribution. For all of these reasons, the Court finds and concludes that the contribution claim must be dismissed.

For this reason, the Court need not analyze the parties' arguments regarding the abolishment of common law contribution in West Virginia in 2015 when the West Virginia legislature repealed West Virginia Code § 55-7-13.

For all of the foregoing reasons, the Court finds the instant Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint of WW Consultants, Inc. must be granted. Therefore, there being no remaining causes of action against it, Third-Party Defendant Orders Construction Company, Inc. must be dismissed with prejudice from this civil action.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint of WW Consultants, Inc. should be GRANTED. Third-Party Defendant Orders Construction Company, Inc. is hereby DISMISSED WITH PREJUDICE from this action. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel and *pro se* parties 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.


CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION

Date: 1/19/2021
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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 19 DAY OF Jan 2021
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

380 West South Street
Martinsburg, WV 25401
304264-1992
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**Business Court
Division**

Fax

To:	Cathy S. Gatson	From:	Tessa Bowers, Law Clerk
Fax:	304-357-0473	Pages:	14 (incl. cover sheet)
Phone:	304-357-0440	Date	1/14/2021
Re:	Business Court Order to be filed	cc:	n/a

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Comments:

This is an Order signed by Judge Christopher Wilkes, Circuit Judge in Berkeley County, who is Presiding Judge in 18-C-115 (Kanawha County) as this case has been referred to the Business Court Division. This Order is to be entered in Kanawha County 18-C-115.

Please file and send attested copies to all counsels of record, as well as to the Business Court Central Office at 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.