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2021 FEB -4 PM 2:27
CATHY S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

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

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 AND A-3 USA,
INC.'S JOINT MOTION TO STRIKE NOTICE OF NONPARTY FAULT**

This matter came before the Court this 4th day of February 2021 upon Third-Party

Defendants Orders Construction Company, Inc. and A-3 USA, Inc.'s Joint Motion to Strike

Untimely and Defective Notice of Nonparty Fault. The Plaintiff, WW Consultants, Inc.

(hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party

Defendants, Orders Construction Company, Inc. (hereinafter "Orders") and A-3 USA, Inc.

(hereinafter "A-3"), by counsel, John W. Burns, 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

252-253

District (hereinafter "PSD"). *See* Joint Mot., p. 2. Orders entered into a contract with the PSD to construct the plant, effective April 19, 2015. *Id.*

2. A-3 secured a bid through Orders to supply certain component parts used in the construction of the wastewater treatment plant. Specifically, A-3 was to provide the membrane bioreactor system and related components. *See* Th. Pty. Compl.
3. 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. *See* Joint Mot., p. 2. 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. *See* Compl., ¶8.
4. On or about April 2, 2018¹, 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.
5. Orders and A-3 were not parties to WWC's original Complaint and were not added as Third-Party Defendants by WWC in response to the PSD's Counterclaim. *See* Joint Mot., p. 2. Additionally, it is undisputed that WWC did not file any Notice of Nonparty Fault pursuant to West Virginia Code §§55-7-13d after the filing of PSD's original Counterclaim. *Id.*
6. Subsequently, the parties litigated this matter for over a year, conducting extensive discovery, some of which indicates WWC was aware throughout the discovery

¹ The Court notes Orders and A-3 contend in the Joint Motion the PSD's original Counterclaim was filed on March 28, 2018. WWC contends in the Response that it was filed on April 2, 2018. *See* Pl's Resp., p. 3. The Court's own review of the court file reveals the PSD's original Counterclaim was filed on April 2, 2018, as indicated by the Circuit Clerk's Office time-stamp.

period, and certainly before PSD filed its Amended Counterclaim in May 2020, of the identity of nonparties that may potentially be at fault. *Id.* at 3. For example, on November 22, 2019, WWC filed fact witness disclosures identifying both Orders and A-3 personnel as fact witnesses. *Id.* Further, in his August 2019 report, WWC's expert attempted to cast blame on equipment suppliers, including the fine screen manufacturer and MBR equipment supplier. *Id.* At no time during this discovery period did WWC file any notices of nonparty fault. *Id.*

7. 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)² 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* Joint Mot., p. 3. After the entry of this Order, seven design negligence claims remained. *See* Ord., 11/27/19.
8. On November 5, 2019, Third-Party Defendants proffer that WWC sent it a Notice of Tender and Defense and Indemnity letter. *See* Joint Mot., p. 3
9. 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 newly produced evidence. The Court, finding good cause existed, and considering

² These claims are set forth in paragraph 12(a) through 12(cc) of PSD's Counterclaim. *See* Pl's Mot., Ex. A.

there was no objection from WWC, granted said motion for leave by Order entered on May 4, 2020.

10. On May 12, 2020, the PSD filed its First Amended Counterclaim, asserting claims against A-3. A-3 has proffered in previous motions practice before this Court that even after having summary judgment granted against it on the claim that the plant does not meet design capacity, the PSD re-asserted those same claims against A-3 in the Amended Counterclaim. *See* A-3's Mem., Mot. to Dismiss, p. 2. Thereafter, on July 2, 2020, A-3 proffered that after asserting claims against A-3 in the Amended Counterclaim focusing on its supply of products used in the screens that were installed at the Headworks area of the plant, the PSD voluntarily dismissed its Counterclaim against A-3. *Id.*; *see also* Joint Mot., p. 3.
11. On November 4, 2020, WWC filed its Notice to Attribute Nonparty Fault. *See* Pl's Resp., p. 3.
12. On or about November 6, 2020, Orders and A-3 filed the instant Joint Motion to Strike Untimely and Defective Notice of Nonparty Fault, arguing WWC's Notice of Nonparty Fault against them should be stricken for being untimely and for being deficient as they are parties, not nonparties. *See* Joint Mot., p. 4-7.
13. On a prior day, WWC filed its Response to Motion to Strike and Objection to WW Consultant's Notice of Intent to Attribute Fault, arguing the notice is timely as it was filed within 180 days of the Amended Counterclaim which affirmatively plead the New Headworks Improvement Claim, and that it was filed in the alternative to be effective only in the event that Orders and A-3 are dismissed as parties. *See* WWC's Resp., p. 2. Further, WWC argued no case law was proffered which demonstrates it

is prohibited from filing a notice of fault that identifies a party that is presently a party. *Id.* at 3. Finally, WWC requested that to the extent that Orders and A-3 are dismissed from this action as parties, WWC should be permitted to attribute fault to them as non-parties on the New Headworks Improvement Claim. *Id.* at 4.

14. On or about November 30, 2020, Orders and A-3 filed its Reply in Support of Joint Motion to Strike Untimely and Defective Notice of Nonparty Fault, asserting that the Response “offers no persuasive arguments that its Notice of Intent to Attribute Fault was timely filed, much less permitted by law”. *See* Reply, p. 2. Additionally, the Reply argues WWC’s Response did not dispute the motion’s argument that WWC was aware of the existence of potentially at fault nonparties with the service of process upon it of the original counterclaim in Spring of 2018. *Id.* Further, the Reply argued WWC was aware of the Headworks claims at this time as well. *Id.* at 3. Finally, the Reply argued the Response ignored the case law cited by Orders and A-3 which held the 180 day period within which to file a notice of nonparty fault under West Virginia Code §§55-7-13d(a)(2) runs from the service of process of that filing which first puts a defendant on notice concerning the potential fault of nonparties, which includes discovery responses. *Id.* at 3-4. Finally, the Reply argues that the statute itself is clear in unambiguous that it pertains to nonparties, and therefore Orders and A-3 do not need to identify case law which prohibits such a filing. *Id.* at 4.

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

CONCLUSIONS OF LAW

In this matter, Third-Party Defendants Orders Construction Company, Inc. and A-3 USA, Inc. filed the instant Joint Motion to Strike Untimely and Defective Notice of Nonparty Fault, arguing that WWC's Notice of Intent to Attribute Fault should be stricken by the Court because it is untimely under West Virginia Code §§55-7-13d(a)(2) and defective as A-3 and Orders are not nonparties. *See* Joint Mot., p. 1-2. Considering the record, the relevant law, and the briefing by the parties, the Court finds as follows:

Timeliness

First, the Court addresses the joint motion's argument that WWC's Notice of Intent to Attribute Fault should be stricken by the Court because it is untimely under West Virginia Code §§55-7-13d(a)(2). *See* Joint Mot., p. 2.

West Virginia law allows for the consideration of fault of nonparties in certain circumstances. West Virginia Code §§55-7-13d(a)(2) provides the following:

(2) Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault;

W. Va. Code Ann. § 55-7-13d.

It is undisputed by the parties that WWC had 180 days to file any notices of nonparty fault. However, the Joint Motion contends that the notice is untimely because 180 days from the

filing of the PSD's original counterclaim on March 28, 2018 was September 24, 2018³. *See* Joint Mot., p. 4. On the other hand, WWC argues its notice is timely because it was filed within 180 days of the date the PSD filed its Amended Counterclaim on May 11, 2020, because it was in that Amended Counterclaim that the PSD first affirmatively and officially plead its New Headworks Improvement Claim. *See* Pl's Resp., p. 2-3.

The Court finds that although WWC contends the Amended Counterclaim in May 2020 was the first time the PSD first affirmatively and officially plead its New Headworks Improvement Claim, the record shows the potential for Orders and A-3 to be identified as nonparties that may be potentially or wholly at fault came much earlier.

First, the Court considers that WWC admits in filings of record that it was aware of the potential fault of nonparties from the filing of the original Counterclaim, which was on April 2, 2018. *See* Reply, p. 2. Specifically, in its November 5, 2019 tender letter to Orders, which WWC incorporated into its Third-Party Complaint, WWC specifically cited to the allegations in the original Counterclaim as the basis for its tender. *Id.*

Further, claims regarding the headworks area of the wastewater treatment plant were asserted by the PSD in its original Counterclaim filed April 2, 2018. *Id.* For example, in the Amended Counterclaim, upon which WWC bases its 180 day argument, as it pertains to the headworks area, the pleading claims it is because of issues with the design of the headworks and "screening issues related thereto", causing the plant to lack capacity. *Id.* at 2-3.

³ The Court notes it has determined the PSD's original Counterclaim was actually filed in the court file on April 2, 2018, so the September 24, 2018 deadline which Orders and A-3 calculated would need to be adjusted accordingly. However, this adjusted date would still be in Fall of 2018, roughly two years before the filing of the notice of nonparty fault at issue in this motion.

However, in the original Counterclaim, the PSD specifically alleged the plant lacked capacity as designed, that there was no access to coarse screens, which are located in the headworks area, and that the fine screens WWC mandated in its design, which are also located in the headworks area, were not the type recommended by the MBR supplier. *Id.* at 3.

The Court finds that to the extent that WWC now contends it is the headworks area claims that trigger the notice that there may be potentially at fault nonparties, it was still aware of them on April 2, 2018.

In addition to the Court's finding that WWC knew of the existence of potentially at fault nonparties when the original Counterclaim was filed, the Court notes WWC admitted it knew of the existence of potentially at fault nonparties when the PSD filed its third supplemental discovery responses related to the headworks, which were filed on October 15, 2019. *Id.*

The Court has considered the federal cases cited by Orders and A-3 in their Motion holding that the 180 day period within which to file a notice of nonparty fault under West Virginia Code §§55-7-13d(a)(2) runs from the service of process of that filing which first puts a defendant on notice concerning the potential fault of nonparties, and which includes discovery responses, and finds such citations to be on point. The Court notes said federal cases involve West Virginia federal districts applying West Virginia Code §§55-7-13d(a)(2).

Therefore, in the alternative, if the Court were to apply the October 15, 2019 date as triggering West Virginia Code §§55-7-13d(a)(2)'s 180 day notice period, WWC's notice of nonparty fault would still be untimely, as 180 days from October 15, 2019 is April 12, 2020. *Id.* at 4.

Because of all of the foregoing, the Court finds it is clear that WWC's notice of nonparty fault is untimely. Therefore, the Joint Motion to Strike must be granted.

Defectiveness

The Court next addresses Orders and A-3's argument that WWC notice of nonparty fault is defective and deficient because Orders and A-3 are both parties, not nonparties. *See* Joint Mot., p. 2, 6. Orders and A-3 contend that West Virginia Code §§55-7-13d, by its plain language, clearly only applies to nonparties to a civil action. *Id.* at 6.

The Court notes at the time of the filing of the instant motion, both A-3 and Orders were parties to this action, though they both had motions to dismiss pending. *Id.*

Although the Court agrees that the plain language of West Virginia Code §§55-7-13d clearly indicates it applies to nonparties to a civil action, because the Court has found that the notice must be stricken as it is untimely, the Court need not address the parties' contentions regarding the applicability of West Virginia Code §§55-7-13d to named parties to a civil suit.


For all of the foregoing reasons, the Court finds Third-Party Defendants Orders Construction Company, Inc. and A-3 USA, Inc.'s Joint Motion to Strike Untimely and Defective Notice of Nonparty Fault must be granted. The Notice of Nonparty Fault filed by WWC on or about November 4, 2020 in the court file is hereby STRICKEN from this civil action.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Orders Construction, Inc. and A-3 USA, Inc.'s Joint Motion to Strike Untimely and Defective Notice of Nonparty Fault should be GRANTED. It is also hereby ADJUDGED and ORDERED that the Notice of Nonparty Fault filed by WWC on or about November 4, 2020 in the court file is hereby STRICKEN from this civil 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: 2/9/2021
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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. 9th
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 9th
DAY OF Feb 2021
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| Fax: | 304-357-0473 | Pages: | 11 (incl. cover sheet) |
| Phone: | 304-357-0440 | Date: | 2/4/2021 |
| Re: | Business Court Order to be filed | cc: | n/a |

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This is an Order signed by Judge Christopher Wilkes, Senior Status 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.