

FILED

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

2021 APR 12 PM 2:42

WW CONSULTANTS, INC.,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

VS.

Civil Action No.: 18-C-115

Presiding Judge: Christopher C. Wilkes

Resolution Judge: Michael D. Lorensen

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

**ORDER DENYING WW CONSULTANTS, INC.'S
MOTION TO ALTER JUDGMENT**

This matter came before the Court this 12th day of April 2021 upon WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party Defendant, Orders Construction Company, Inc. (hereinafter "Third-Party 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.

SCANNED

282-283

FINDINGS OF FACT

1. In 2014, Orders Construction Company, Inc. 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* Ord., 1/14/21. Orders was the low 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.* 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.* 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.
3. On or about 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

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

dismissed a vast majority of the design negligence claims. *See* Ord., 11/27/19; *see also* Th. Pty. Def's Mem., p. 2. 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 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* Ord., 1/14/21; *see also* WWC's Th. Pty. Compl., ¶¶15-33.

9. A motion to dismiss followed. On July 6, 2020, Orders filed 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. to Dismiss, p. 2-3.

10. The motion to dismiss was fully briefed. On January 14, 2021, this Court entered its Order Granting Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint. It is from this Order that WWC files the instant motion to alter judgment.

11. On January 28, 2021, WWC filed the instant WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, reiterating its argument that its claim for contribution/negligence is not barred by the

statute of limitations as it relates to the New Headworks Improvement Claim and thus should be measured from October 2019, and arguing WWC properly pled a claim for indemnity based on Orders sole negligence, not based on negligent design or supervision. *See* Pl's Mot., p. 2. Specifically, it argues the date of accrual should be determined to be May of 2020 when PSD first filed its New Headworks Claim in its Amended Counterclaim, or, at the very earliest, October 2019, as it argues that it did not have knowledge or notice of the new claims of defective headworks until October 2019, rather than being on notice of the existence of potentially at fault non-parties at the filing of PSD's original counterclaim. *Id.* at 5-6. Further, it argues the date of accrual for statute of limitations as it relates to contribution has not occurred because there has not yet been a judgment in this case. *Id.* at 6-7.

12. On January 29, 2021, a Briefing Order was entered on the instant motion. On February 16, 2021 Orders filed Orders Construction Company, Inc.'s Response to WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, arguing the Court's conclusions in its January 14, 2021 Order were proper. *See* Th. Pty. Def's Resp., 5.
13. No Reply was filed.
14. On or about April 6, 2021, Orders filed Orders Construction Company, Inc.'s Motion for Leave to Supplement its Response to WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, requesting to supplement its response to the instant motion to address the impact of this Court's order dismissing third party claims against A-3, USA, Inc. *See* Th. Pty. Def's Mot. for Leave, p. 2.

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

CONCLUSIONS OF LAW

This matter comes before the Court upon a motion to alter judgment brought pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Rule 59(e) simply states that “[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment”. W. Va. R. Civ. P. 59.

Further, the West Virginia Supreme Court of Appeals has provided guidance on when a trial court should grant a Rule 59(e) motion to alter or amend. Specifically, in syllabus point 2 of *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals said:

A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Syl. pt. 1, *Acord v. Colane Company*, 228 W.Va. 291, 719 S.E.2d 761 (2011); *see also* *Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351, 356 (2012).

Also, a motion to alter or amend judgment may be used to correct manifest errors of law or fact or to present newly discovered evidence. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011).

In the present case, none of the grounds for reconsideration are present. The Court, after review of the pleadings and the court file, finds there are no manifest errors of law or fact to be corrected. It is apparent from the review of the record that the Court considered all the matters before the Court, including that multiple considerations supported a finding that the statute of limitations would begin to accrue at the time the PSD’s original counterclaim was filed,

including the fact that WWC relied on the allegations in the original counterclaim as the basis for its November 2019 tender letter. *See* Th. Pty. Def's Resp., p. 9. The Order also reflected that the Court considered that Orders 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* Ord., 1/14/21, p. 6-7. Further, the Order reflected it was proffered to the Court that WWC was observing Orders's work during construction and was in the position at the time the work was performed to verify compliance with the project specifications. *Id.* at 7.

The Court also found and concluded in its Order that the PSD filed and served its original counterclaim on March 28, 2018, more than two years before WWC filed its Third-Party Complaint, and since WWC brought the Third-Party Complaint in its capacity as Counterclaim Defendant, it was the service of the original Counterclaim on WWC in March of 2018 that triggered its 180-day period to file a third-party complaint. *Id.*

The assertion of the Headworks Claims has no bearing on when WWC knew there were possible third party claims regarding the project and as such, does not require this Court to change its determination regarding the date of accrual of the statute of limitations in this matter. The Court also considers that the thrust of the Headworks Claims is that because of alleged issues with the design of the Headworks, the plant cannot process the capacity of wastewater it was designed to process. *See* Th. Pty. Def's Resp., p. 11 (*citing* Am. Ctrclaim ¶ 55). The original Counterclaim also specifically alleged that because of design negligence of WWC, the plant cannot process the amount of wastewater it was designed to process. *Id. citing* Am. Ctrclaim ¶ 12(b). Additionally, the original Counterclaim alleged that WWC "failed to provide for heat in headworks area resulting in equipment freeze up". *Id. citing* Am. Ctrclaim ¶ 12(j).

The Headworks Claims are a more detailed version of the claims already asserted in the PSD in the original Counterclaim. *See Id.*

For all of these reasons, the Court finds WWC has presented no clear error in the Court's findings in its January 14, 2021 Order regarding the triggering of the time frame for filing the WWC's third-party complaint. This Court has rejected WWC's arguments regarding its assertion of when the accrual date should be twice: once when granting Orders's Motion to Dismiss and once in its Order Granting Orders Construction Company, Inc.'s and A-3 USA, Inc.'s Joint Motion to Strike Notice of Nonparty Fault. *See Ord.*, 2/4/21, p. 8. Although WWC reiterates its position, WWC's arguments in the instant motion simply do not demonstrate a clear error of law upon which to alter or amend a judgment.

The Court also considers the instant motion's arguments as to the contractual defense and indemnity claims. WWC has not presented any facts which WWC could be held responsible for any damage from the alleged negligence of Orders. Because the issue of indemnity was addressed in Orders's contract, and the indemnity obligation was limited to Orders being obligated to indemnify WWC only for losses and damages to persons or property (other than the work) that arise out of or relate to the performance of the Work, but only to the extent caused by Orders's negligence, and the indemnity provision specifically excludes any obligation of Orders to indemnify WWC for WWC's own design negligence and claims arising out of WWC's giving directions or instructions, if that is the primary cause of the injury or damage, and because this Court found in its Order that all the claims against WWC pertain to its own design work or its giving directions/instructions, the Court did not make a clear error of law in determining that Orders has no duty to indemnify WWC under the contract. The Court analyzed the indemnity provision in full and provided such analysis in its January 14th Order. *See Ord.*, 1/14/21, p. 8-9.

Likewise, the Court has been presented with no evidence of a manifest error regarding its conclusion in its January 14th Order that no special relationships were proffered between WWC and Orders upon which a claim for implied indemnity could be based. *See* Ord., 1/14/21, p. 10.

For all of these reasons, the Court declines to reconsider or alter or amend its determinations contained in its January 14, 2021 Order Granting Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint.

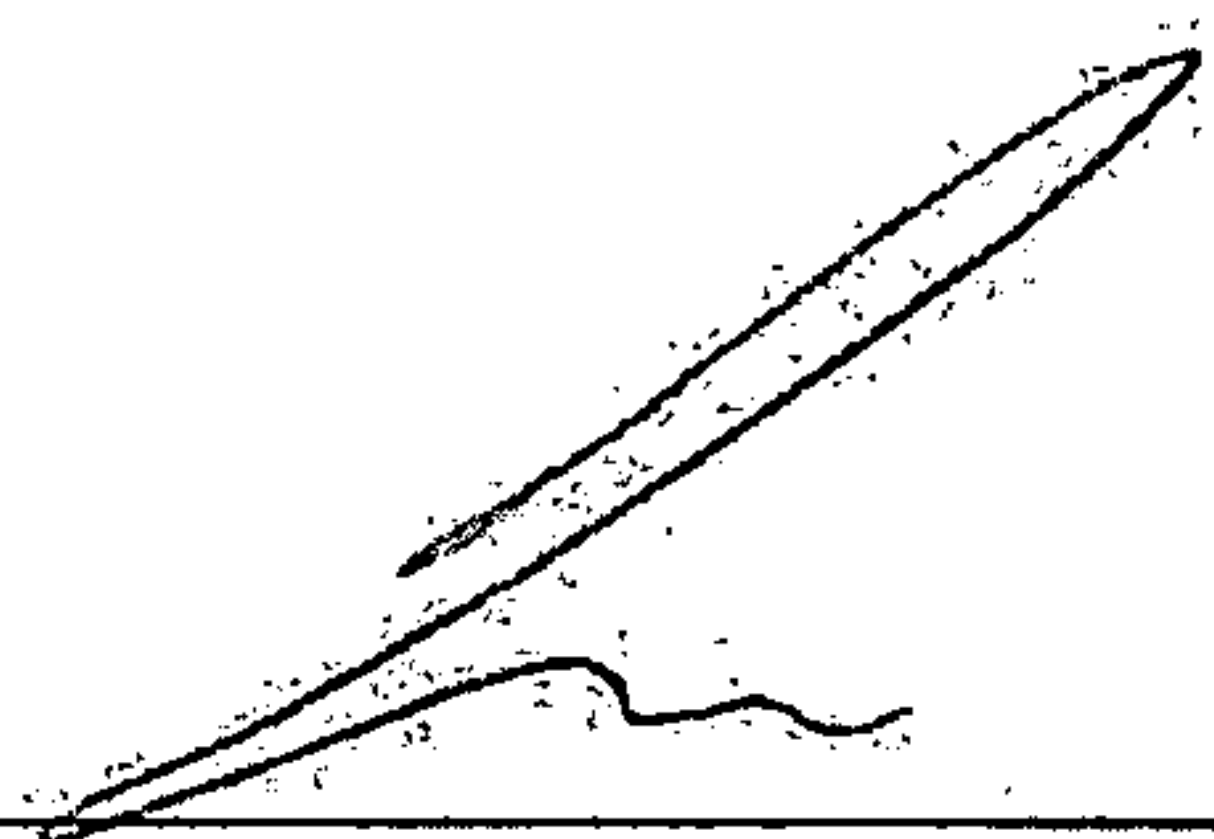
The Court finds that the Orders's request for dismissal of the third-party complaint against it was properly granted, and declines to alter said dismissal.

Because of the foregoing, the Court denies Orders Construction Company, Inc.'s Motion for Leave to Supplement its Response to WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure and does not consider it. The Court, finding no need to supplement the Response to the instant matter, and having disposed of the motion on the grounds described in this Order, finds it was fully informed by the briefing contemplated by the Briefing Order on the instant motion. For this reason, it is **ADJUDGED** and **ORDERED** that Orders construction Company, Inc.'s Motion for Leave to Supplement its Response to WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure is hereby **DENIED**.

CONCLUSION

Accordingly, it is hereby **ADJUDGED** and **ORDERED** that WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure is hereby **DENIED**. Third-Party Defendant Orders Construction Company, Inc. remains **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

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