

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION 2021 MAY 18 AM 11:33

WW CONSULTANTS, INC.,

CATHY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

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 DENYING A-3 USA, INC.'S
MOTION TO DISMISS THIRD-PARTY COMPLAINT (FILED 3/18/21) AS MOOT**

This matter came before the Court this 18th day of May 2021 upon A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint (filed March 18, 2021). The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party Defendant, A-3 USA, Inc. (hereinafter "Defendant" or "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 Construction Company, Inc. (hereinafter "Orders")¹ bid on a project to construct the consolidated wastewater treatment plant near Snowshoe Mountain in Pocahontas County, West Virginia, which was being built by

¹ The Court notes Orders Construction Company, Inc. was a former third-party defendant in this matter. Orders was dismissed by an Order Granting Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint entered January 14, 2021. See Ord., 1/14/21.

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- Defendant/Counterclaim Plaintiff Pocahontas County Public Service District (hereinafter “PSD”). *See* Th. Pty. Def’s First Mem., p. 2. Orders was the low bidder and contracted with the PSD for the construction of the plant. *Id.* A-3 secured a bid to supply certain component parts used in the construction of the wastewater treatment plant. *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 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)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* Th. Pty. Def’s First Mem., p. 2. After the entry of this Order, seven design negligence claims remained. *Id.*

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

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. On July 6, 2020, after asserting claims against A-3 in the Amended Counterclaim focused on its supply of products used in the screens that were installed in the Headworks area of the plant, the PSD voluntarily dismissed its counterclaim against A-3. *See Notice of Voluntary Dismissal*, filed 7/6/20; *see also Am. Ctrclm*, ¶¶68-71.
8. On May 18, 2020, WWC filed its Third-Party Complaint against Orders, A3-USA, Inc., and Pipe Plus, Inc. With respect to A-3, WWC asserted it was entitled to common law contribution and implied indemnity. *See Th. Pty. Def's First Mem.*, p. 3; *see also WWC's Th. Pty. Compl.*, ¶¶34-38.
9. A-3's first motion to dismiss followed. On July 22, 2020, A-3 filed its first motion to dismiss, titled "A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint", arguing that the Third-Party Complaint against it should be dismissed because: 1) WWC fails

to state a claim for contribution as set forth in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute; and 2) WWC's basis for implied indemnification has no basis in law. *See Th. Pty. Def's First Mot.*, p. 2.

10. On August 18, 2020, WWC filed its Brief in Response to A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint, averring that A-3's arguments seeking dismissal are not supported by West Virginia law and the instant motion should be denied. *See WWC's Resp. to First Mot.*, p. 3. No Reply was filed.

11. On March 30, 2021, this Court entered its Order granting A-3's first Motion to Dismiss, agreeing that the Contribution claims cannot be maintained because the allegations do not fit any of the exceptions to West Virginia's several liability law, and West Virginia's several liability statute, as amended in 2015, precludes any claim of WWC in this instance. *See Ord.*, 3/30/31, p. 7-8. Further, with regard to the indemnity cause of action, the Court found that WWC has no legally viable claim for indemnity against A-3. *Id.* at 10.

12. Meanwhile, on March 18, 2021, A-3 filed its second motion to dismiss, titled "A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint", this time setting forth the argument that the contribution and indemnity claims, which are contained within WWC's negligence count in the third-party complaint, are time-barred by West Virginia Code §55-2-21(b) and must be dismissed. *See Th. Pty. Def's Second Mot.*, p. 2.

13. On March 31, 2021, this Court entered a briefing order setting forth briefing deadlines for A-3's March 18, 2021 Motion to Dismiss (the second motion to

dismiss). No response or reply were filed. The Court notes WWC's proposed order filed May 7, 2021 and revised proposed order filed May 13, 2021 address both WWC's March 18, 2021 Motion to Dismiss and WWC's separate Motion to Alter Judgment.

14. 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, the Court finds A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint (filed March 18, 2021) is moot, given the Court dismissed the subject negligence/contribution and indemnity causes of action on separate grounds and dismissed A-3 as a party by Order entered March 30, 2021.

The Court does not find it necessary to address or analyze A-3's March 18, 2021 arguments that the contribution and indemnity claims, which are contained within WWC's negligence count in the third-party complaint, are time-barred by West Virginia Code §55-2-21(b) because the Court already concluded that the Third-Party Complaint against A-3 should be dismissed because: 1) WWC fails to state a claim for contribution as set forth in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute; and 2) WWC's basis for implied indemnification has no basis in law. *See Ord.*, 3/30/21. Also, A-3 was dismissed as a party at that time. *Id.*

Because the Court found the claims for contribution and indemnity are dismissed on other grounds, and because the Court found that A-3 should be dismissed as a party at that time, the Court now finds the instant arguments from A-3 are moot.

Accordingly, the Court finds the instant A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint (filed March 18, 2021) must be denied as moot. The Court notes that there being no remaining causes of action against it, Third-Party Defendant A-3 USA, Inc. remains dismissed with prejudice from this civil action.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint (filed March 18, 2021) is hereby DENIED AS MOOT. Third-Party Defendant A-3 USA, 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