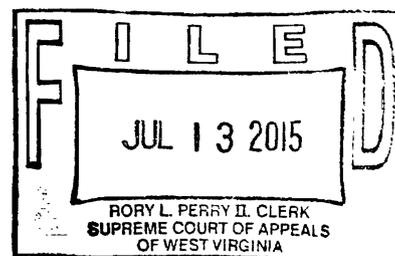


No. 15-0089
IN THE
SUPREME COURT OF APPEALS
FOR WEST VIRGINIA



J.F. ALLEN CORPORATION
a West Virginia Corporation,

Plaintiff/Petitioner,

v.

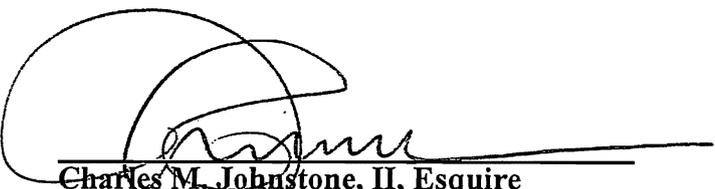
DOCKET NO.: 15-0089

THE SANITARY BOARD OF
THE CITY OF CHARLESTON,
WEST VIRGINIA,

Defendant/Respondent.

PETITIONER'S REPLY BRIEF

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA



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INTRODUCTION

The Sanitary Board's response to what it refers to as the "substantive aspects" of J.F. Allen's petition, can be boiled down to the following simple arguments: (1)The Board argues that the contract entirely bars claims for extra work and delays resulting from undisclosed or inadequately disclosed underground utilities in the area of J.F. Allen's work; and (2) the Board argues that J.F. Allen's claims for additional compensation for extra work and delays are barred because they allege that it failed to give adequate and timely notice of its claims. These arguments can be easily countered and are addressed, in turn, below.

ARGUMENT

At the outset it should be noted that the Respondent fails to even acknowledge the fact that J.F. Allen's Complaint asserts claims other than those for delay and extra work attributable to underground utilities not shown or not accurately shown on the Plans. J.F. Allen alleges in its Amended Complaint that it entered into a subsequent oral agreement with the Board to provide additional, temporary paving performed at the direction of and for the convenience of the Board. J.F. Allen performed the extra work consistent with this subsequent agreement as directed by the Board but was not adequately compensated for this extra work. *See, Petitioners Amended Complaint paragraphs 21-24; Appendix pp. 188-189.* The Amended Complaint further sets out claims for other extra-contractual work performed at the direction of the Board and for extra work and delays resulting from the Board's interference with and disruption of J.F. Allen's work. All of J.F. Allen's claims are adequately stated and none are barred by the language of the Contract.

A. The claims asserted in J.F. Allen's Amended Complaint are not barred by in terms of the Contract between the parties.

In one breath the Board argues that the contract places no duty on it as Owner for delays or extra work resulting from damage to underground facilities. In the next, the Board argues that J.F. Allen's claims are barred because it allegedly failed to adhere to the contract protocol for asserting such claims. Surely, if the contract foreclosed any possibility of a claim related to damage to underground facilities it would not also contain language providing the means by which the contractor should assert such a claim. Paragraph 4.04, relating to underground facilities, "Not Shown or Indicated", provides as follows:

1. "If an Underground Facility is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer. Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the contract documents to reflect and document the consequences of the existence or location of the Underground Facility. During such time Contractor should be responsible for the safety and protection of such Underground Facility.
2. If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or not shown indicated with reasonable accuracy in the Contract Documents and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, Owner or Contractor may make a Claim therefore as provided in Paragraph 10.05."

General Conditions, Section 4.04; Appendix p. 255.

Thus, the contract not only does not preclude J.F. Allen's claims related to underground utilities not shown on the plans, or not shown with reasonable accuracy, but, in fact, makes specific provision for such claims.

Further, a party to a contract has an obligation to refrain from impeding or interfering with performance by the other party. The Board, in this case, had an express duty to give notice to J.F. Allen prior to using its own forces or other contractors to perform work in the area of J.F. Allen's work. In such case the contract required the Board to provide written notice of the conflicting work and to compensate J.F. Allen for additional costs and or interruptions that the conflicting work caused. In its Amended Complaint, J.F. Allen alleged that the Board did, interfere with its work and failed to give the required notice, causing delays and disruptions in J.F. Allen's performance. *Amended Complaint Paragraph 17-20; Appendix p. 188.*

Rather than precluding damages for delays caused by the Owners conduct, the contract between the parties in this case specifically provides for additional compensation in such cases, as follows:

12.03.B. If Owner, Engineer, or other contractors or utility owners performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with their performance or progress of the Work then Contractor shall be entitled to equitable adjustment in the Contract Price or the Contract Times, or both. Contractors' entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractors ability to complete the Work with the Contract Times.

General Conditions Paragraph 12.03.B; Appendix pp. 289-290.

So, the various claims asserted by J.F. Allen in its Amended Complaint are not barred by the terms of the Contract but are, in fact, consistent with the types of claims contemplated by the Contract and the law. But Petitioner's claims are not limited to those contemplated by the contract. J.F. Allen has asserted a variety of claims based on a subsequent agreement amending

the obligations of the parties, based on its right to insist that the Board refrain from actively interfering with its work, or that it give advance written notice when it intended to have other contractors or its own forces working in the same area. Finally, J.F. Allen has asserted claims based on its entitlement to additional compensation for delays and extra work caused by the failure to show, or the failure to show with reasonable accuracy, the locations of underground facilities on the plans. Each of these is adequately stated and provides grounds to reverse the Trial Court's erroneous Order.

B. Petitioner alleged adequate Notice of Claims under the Contract and the Law.

As argued by the Petitioner in its initial brief in support of this appeal, for purposes of reviewing a Motion to Dismiss under Rule 12(b)(6) a complaint is construed in the light most favorable to the plaintiff and its allegations are to be taken as true. Forshey v. Jackson, 222 W.Va. 743, 671 S.E. 2d 748 (2008). In its Amended Complaint, Paragraph 38, J.F. Allen alleged that "CSB had contemporaneous actual notice of each claim of J.F. Allen and further was provided notice in accord with the contract and/or the course of dealing by and among J.F. Allen, CSB and B&N (Burgess and Niple, the Owner's Engineer). To the extent that any alleged notice provision set forth in the written contract was not strictly complied with, it was alleged that such term of the contract was waived by CSB's actions or inactions." *Appendix p. 192*. As detailed in Petitioner's initial brief, J. F. Allen's Amended Complaint contains other, repeated allegations that it provided written notice of its claims despite the Board's actual knowledge of the claims and the Board's waiver of its right to rely on a requirement of advance written notice of claims. *See, Amended Complaint Paragraphs 19, 26, 31, 34; Appendix pp. 188-191.*

Taken as true, these allegations state claims not only under the claims provisions of the contract between the parties, but also they support claims based on waiver of the requirement of

advance written notice of claims, amendment or abrogation of the requirement of written notice by subsequent agreement between the parties, that the notice requirements of the contract were satisfied by the Board's actual knowledge of J.F. Allen's claims, and that the Board's right to rely on contractual notice provisions is precluded by its own anticipatory breach.

The Trial Court in this case made findings in support of its dismissal order that J.F. Allen had failed to give adequate notice according to the terms of the contract. This finding is contrary to the allegations of the Amended Complaint and improperly addressed a question of fact. The Court, while being clear as to its intent to address the Board's Motion as one made under 12(b)(6), addressed the factual question of the sufficiency of notice provided by J.F. Allen based on nothing more than the bald allegations of Respondent's counsel. By doing so it committed error and its Order dismissing J.F. Allen's Amended Complaint should be reversed.

Even if J.F. Allen had failed to allege that it complied with the contract notice provisions, it would still have sufficiently stated a claim upon which it could prevail. As noted it is initial brief, it has long been established law in the state of West Virginia that the parties to a contract may, by their conduct, waive or modify the requirement of written notice. See, Caldwell & Drake v. Schmulbach, 175 F. 429 (N.D. W.Va. 1909); Groundbreakers, Inc. v. City of Buckhannon, 188 W.Va. 42, 422 S.E. 2d 519 (1992); WL Thaxton Construction Company v. O.K. Construction Company, Inc., 170 W.Va. 657, 295 S.E. 2d 822 (1982). J.F. Allen asserted in its Amended Complaint that the Board, by its own failure to adhere to contract notice provisions, by its acquiescence in extra work performed by J.F. Allen, by orally ordering additional work outside the scope of the written Contract, and by entering into subsequent, oral agreements for extra work, has waived and/or amended its Contract so as to prevent its right to rely on any formal notice provisions contained therein.

As the Amended Complaint alleges that the Sanitary Board was given adequate notice under the terms of the contract and West Virginia law, it follows that there remains a question of fact as to whether claims were pending at the time of contract completion. It should also be noted that whether final payment was made *and accepted* is a question of fact which should not have provided a basis for review of a Motion to dismiss under Rule 12(b)(6). J.F. Allen was required to do no more than provide “a short and plain statement of claims showing that [it] is entitled to relief”, and to make a demand for the judgment it seeks. *Rule 8, West Virginia Rules Civil Procedures*. Under the circumstances J.F. Allen was required only to allege facts sufficient to support the existence of a valid, enforceable contract; that it has performed under its contract; that the Sanitary Board breached its duty under the contract; and that J.F. Allen was injured as a result. See, Executive Risk Indemnity, Inc., v. Charleston Area Medical Center, Inc., 681 F.Supp.2d 694 (S.D. W.Va. 2009), Citing 23 Williston on Contracts Section 63; 1 (Richards A. Lord, Ed. 4th Ed. West 2009).

J. F. Allen has alleged sufficient facts which, when taken as true, support each of these required elements. The existence of a valid contract is not in dispute, nor is J.F. Allen’s performance except, as argued by the Respondent, as to whether it gave sufficient notice of its claims. J. F. Allen has alleged that the Sanitary Board breached its obligations under its contract by failing to provide accurate and adequate plans, by interfering with J.F. Allen’s work, and by failing to pay for work performed. Finally J.F. Allen has alleged that it has suffered a loss as a result. As such, the only issues in dispute are whether the Sanitary Board received adequate notice of claims or whether it is entitled to rely on contractual notice provisions at all. As argued above, J.F. Allen’s Amended Complaint contains more than sufficient allegations to

support the satisfaction of its obligations in that regard. For that reason, the Trial Court erred in granting the Respondent's Motion to Dismiss.

C. The Trial Court should not have relied on the Parties' Written Contract in its review of the Respondent's Motion to Dismiss.

Our rules of pleading provide for the short and succinct statement of claims. The rule relating to pleadings contemplates a succinct complaint containing a plain statement of the nature of the claim together with a demand for judgment. *West Virginia Rules of Civil Procedures 8(a)*; Barker v. Traders Bank, 152 W.Va. 774, 166 S.E.2d 331 (1969). The Petitioner acknowledges that, in appropriate cases, the Court may consider documents appended to a Complaint in response to a motion to dismiss for failure to state a claim. However, there is no West Virginia controlling precedent which allows the Court to consider documents outside the pleadings which are not appended to the complaint.

In the present case, J.F. Allen alleged the existence of its contract with the Sanitary Board but did not incorporate it by reference or attach it to its Complaint. A copy of the contract was attached to the Respondent's Motion to Dismiss and the Court relied upon certain terms of the contract to support its Order dismissing the Amended Complaint. This case and the Trial Court's Order demonstrate the danger of allowing the Court to consider the terms of a contract in response to every motion to dismiss a case involving a claim of breach of contract. The contract in this case is an 84 page document involving a complex commercial relationship. Whether J.F. Allen did, in fact, satisfy the requirements of the contract, whether the Sanitary Board did, in fact, breach its obligations under the contract, or whether elements of the contract were waived or amended by the parties are all questions of fact that should be dealt with after the parties have had an opportunity to discover the facts of the case, in response to a motion for summary judgment under Rule 56 or by the ultimate trier of fact. The Trial Court in this case was

somehow lead to believe that provisions of the contract precluded J.F. Allen's claims despite the fact that other provisions specifically provide for additional compensation to the contractor under the circumstances alleged here. The Trial Court further concluded that J.F. Allen had not provided sufficient notice of its claims to the Sanitary Board despite the allegations and the Amended Complaint to the contrary.

In some cases it may be helpful for the court to review a contract in response to a motion to dismiss a breach of contract action. However the review should be limited to determining whether the complaint alleges performance on the part of the plaintiff and breach on part of the defendant. It should not be used to make ultimate findings as to whether adequate notice was given. That is a question of fact that is inappropriate for review in the context of a Rule 12(b)(6) Motion.

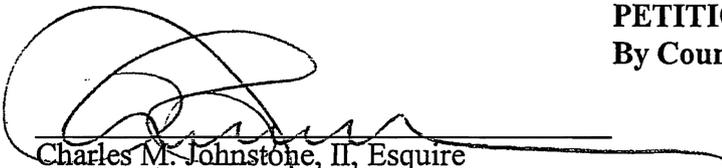
A statement of claims should be short and succinct and the burden on the plaintiff to meet the standard established for notice pleading is light. A plaintiff should not be required to address in its complaint myriad provisions of an 84 page commercial contract in order to meet that burden. For these reasons the Court should not have considered and improperly applied selected provisions from the contract between the parties in this case when addressing the Sanitary Board's Motion to Dismiss. For that reason the Trial Court's Order dismissing J.F. Allen's complaint was an error and should be reversed.

CONCLUSION

The Sanitary Board's response to J.F. Allen's appeal in this case is rather simple and comes down to a couple of substantive points. First, the Board argues that it bears no responsibility for any loss by J.F. Allen associated with damage to existing underground utilities during the performance of its work. Second, the Board argues that J.F. Allen failed to give

notice of its claims as required by the contract between the parties. J.F. Allen's reply is likewise is straightforward. First, J.F. Allen's claims are not limited to claims for additional cost and delays associated with damage to underground utilities. It has asserted a claim for additional compensation for extra work in the form of additional temporary paving under a subsequent, oral agreement with the Board along with claims for Owner delays and interference and other extra work. Further, the contract expressly provides J.F. Allen with a remedy where it suffers delay or additional cost as a result of underground utilities that are not shown, or are not shown with reasonable accuracy, on the Owner's Plans. Finally, J.F. Allen has plead that it provided written notice of it claims as required by the Contract, that the Board waived its right to rely on strict adherence to the Contract's claim procedure, that the Board had actual knowledge of J.F. Allen's claims sufficient to meet the requirements of the Contract, and that the Board should not be permitted to rely on strict adherence to the requirement of written notice where Petitioner's claims were the result of the Board's own actions. These allegations are sufficient to state claims upon which relief can be granted. The Board is free to oppose those claims as litigation proceeds and whether J.F. Allen ultimately prevails on its claims will depend on the evidence and the trier of fact. But they should not have been addressed in response to a motion under Rule 12(b)(6). For these reasons the Trial Court erred in dismissing J. F. Allen's Amended Complaint and its Order should be reversed and this matter remanded for further proceeding.

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By Counsel,**



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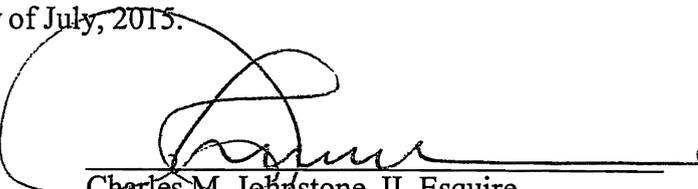
Defendant/Respondent.

CERTIFICATE OF SERVICE

I, Johnson W. Gabhart, do hereby certify that a true copy of the foregoing
“PETITIONER’S REPLY BRIEF” was served upon counsel of record:

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by placing the same in an envelope, properly addressed with postage fully paid and depositing
the same in the U.S. Mail, on this the 13th day of July, 2015.



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