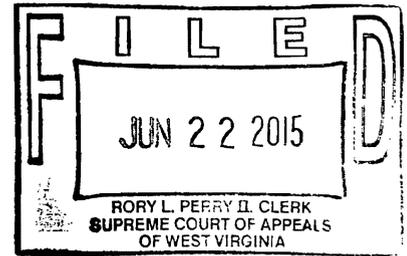


IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA



Docket No. 15-0089

ON APPEAL FROM THE
CIRCUIT COURT OF KANAWHA COUNTY

J.F. ALLEN CORPORATION,
A West Virginia corporation,
Petitioner

v.

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

RESPONDENT THE SANITARY BOARD OF THE CITY
OF CHARLESTON, WEST VIRGINIA'S BRIEF

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June 22, 2015

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA:**

The Sanitary Board of the City of Charleston, West Virginia, (“Respondent” or “CSB”), by counsel, respectfully submits its Respondent’s Brief in opposition to J.F. Allen Corporation’s (“Petitioner” or “J.F. Allen”) Petition for Appeal, which challenges the Circuit Court of Kanawha County’s January 5, 2015 *Final Order Granting Defendant The Sanitary Board of the City of Charleston’s Motion to Dismiss Plaintiff’s Amended Complaint* (“Order”) for failure to state any claim against CSB upon which relief could be granted. In support, CSB respectfully states as follows:

STATEMENT OF THE CASE

This is a case in which a seasoned, sophisticated contractor, J.F. Allen, entered into a standard construction contract with CSB on or about December 13, 2011 (the “Agreement”), while knowing full well the precise procedures for submitting change orders and the timeliness requirement for equitable adjustments within the life of the contract. For its work, J.F. Allen received from CSB full payment of the original contract amount, plus the cost of all properly submitted change orders and quantity adjustments, for a final adjusted contract amount of \$5,555,598.00. Under the plain terms of the Agreement, Petitioner is entitled to no more. Final completion of the Project occurred on August 15, 2013, and CSB issued Final Payment to J.F. Allen on or about November 20, 2013.¹ Even the one-year correction period under the Agreement expired on June 19, 2014. Thereafter, on June 30, 2014, Petitioner filed its original Complaint seeking “an equitable adjustment” of the contract price, a claim never before submitted pursuant to the Agreement. Under the circumstances, J.F. Allen is bound by the Agreement it struck. Its failure to follow the agreed-upon protocol for submitting its Claims or

¹ Capitalized terms not otherwise defined here have the same meaning as those terms are defined in the parties’ Agreement.

to timely seek equitable adjustment prior to Final Payment completely bars the remedies J.F. Allen sought in the proceeding below.

For the convenience of the Court, a summary of the allegations and facts contained in the Circuit Court record is reproduced with citations to the Petitioner's Appendix, as follows:

A. The Construction Agreement

1. On or about December 13, 2011, CSB, as Owner, and J.F. Allen, as Contractor, entered into a written construction Agreement for work generally described as "Kanawha Two-Mile Creek Sewer Improvements — Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8" (the "Project"). (*See* A.R. 28-125, Agreement at 1; *see also* A.R. 185, Am. Compl. ¶ 5.)

2. Pursuant to the Agreement, Defendant Burgess & Niple, Inc. provided professional services to CSB and was designated as the Engineer/Architect on the Project ("B&N" or "Engineer"). (A.R. 28 ¶ 2; *see also* A.R. 186, Am. Compl. ¶¶ 6-7.)

3. The Agreement provided an original contract price of \$5,160,621.75, "subject to additions and deductions by Change Order and quantities actually performed," required substantial completion by January 2, 2013, and required final completion by February 1, 2013. (A.R. 29 ¶ 4; *see also* A.R. 186, Am. Compl. ¶¶ 8-10.)

4. The actual course of performance of the Project is clear on the record. Construction began on or about January 9, 2012. A total of six change orders and quantity adjustments increased the contract price in the amount of \$394,977, for a final adjusted contract amount of \$5,555,598.

5. Actual final completion of the Project occurred on August 15, 2013, six months after the February 1, 2013 final completion date established by the Agreement.

6. The one-year correction period under the Agreement expired on June 19, 2014, prior to the institution of this action.

B. Pursuant to the Parties' Agreement, Petitioner Assumed Liability with Respect to Underground Facilities.

7. Even prior to being awarded the Project, J.F. Allen received specific instructions concerning Underground Facilities.² Paragraph 4.5 of the "Instructions to Bidders," which is incorporated in the Agreement, provides as follows:

Before submitting a Bid, each BIDDER will be responsible to obtain such additional or supplementary examinations, investigations, explorations, tests, studies, and data concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the site or otherwise, which may affect cost, progress, performance, or furnishing of the Work or which relate to any aspect of the means, methods, techniques, sequences, or procedures of construction to be employed by BIDDER and safety precautions and programs incident thereto or which BIDDER deems necessary to determine its Bid for performing and furnishing the Work in accordance with the time, price, and other terms and conditions of the Contract Documents.

(See A.R. 219, Instructions to Bidders ¶ 4.5.)³

8. The "General Notes" to the Agreement expressly provide, in no less than four separate provisions that, as Contractor, it was Petitioner's sole responsibility to locate underground utilities and structures, to provide advance notice to utilities, and if damage occurs, to repair and restore the damaged service lines, the cost of all of which will be considered as having been included in the Contract Price, as follows:

²The "General Conditions" of the Agreement define "Underground Facilities" as "[a]ll underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems." (A.R. 50.)

³ Article 8 of the Agreement defines "Contract Documents," to include Bidding Requirements including Advertisement, Bids and Instructions to BIDDERS, and Supplementary Instructions. (A.R. 32.)

2. UTILITIES AND STRUCTURES SHOWN ON THE PLANS. The location of utilities and structures, both surface and subsurface, are shown on the plans from data available at the time of design and are not necessarily complete or correct. ***The exact location and protection of all utilities and structures are the responsibility of the contractor.*** During construction, the contractor shall use due diligence to protect from damage all existing utilities and structures whether shown on the plans or not.

4. EXPOSE UTILITIES AND STRUCTURES. Contractor shall expose subsurface utilities and structures sufficiently in advance of the proposed work to verify the location and resolve any conflicts. ***Cost for all locations exposed shall be incidental to the various items of work.*** If it is determined by the engineer/architect that relocation of existing utilities is necessary, such work shall be conducted in accordance with “Changes in the Work” of the General Conditions.

5. UTILITY SERVICE LINES. Existing utility service lines were not field located and are not shown on the plans. ***The Contractor shall be responsible for determining the location of the utility service lines. If damage is caused, the Contractor shall be responsible for repair or restoration of the damaged service lines to the satisfaction of the Owner and the utility company involved at no extra cost to the Owner.*** If repairs are authorized by the utility owner, they shall be made in accordance with their instructions.

6. NOTIFICATION — UTILITY COMPANIES. The Contractor shall notify Miss Utility (1-800-245-4848) of the construction starting date at least five working days prior to beginning any work. If utilities are broken or damaged by the Contractor, the utility owner shall be notified immediately to avoid inconvenience to customers and the utility owner. Temporary arrangements, as approved by the utility owner may be used until any damaged items can be permanently repaired. If repairs are authorized by the utility owner, they shall be made in accordance with their instructions. ***The Contractor will be solely responsible for all costs resulting from the damage, repair, restoration, and resulting contingent damage of affected utilities.***

(See A.R. 221, General Notes, ¶¶ 2, 4-6 (emphasis added).)

9. To induce CSB to enter into the Agreement, Petitioner represented that:

CONTRACTOR acknowledges that OWNER and ENGINEER/ARCHITECT do not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities

(See A.R. 226, Agreement, ¶ 7.4 (capitalization in original).)

10. Sections 4.04 of the “General Conditions,” as amended in the “Supplemental Conditions,” defines Petitioner’s responsibilities with respect to Underground Facilities, whether shown or not shown on the Contract Documents, as follows:

4.04 *Underground Facilities*

A. *Shown or Indicated:* The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to Owner or Engineer by the owners of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

1. Owner and Engineer shall not be responsible for the accuracy or completeness of any such information and data provided by others; and
2. ***the cost of all of the following will be included in the Contract Price, and Contractor shall have full responsibility for:***
 - a. ***reviewing and checking all such information and data;***
 - b. locating all Underground Facilities shown or indicated in the Contract Documents;
 - c. coordination of the Work with the owners of such Underground Facilities, including Owner, during construction; and
 - d. ***the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.***
3. Location of Subsurface Utilities.⁴
 - a. The location of subsurface utilities is shown on the plans form information furnished by the utility owners.
 - b. The CONTRACTOR shall, at least 2 working days, excluding Saturdays, Sundays, and legal holidays, prior to construction in the area of the subsurface utility, notify the subsurface utility Owner in writing, by telephone, or in person. The marking or locating shall be coordinated to stay approximately 2 days ahead of the planned construction.

⁴ Section 4.04 of the “Supplemental Conditions” adds the following new paragraphs, i.e., ¶¶ 4.04.A.3 through 4.04.A.7, immediately after ¶ 4.04.A.2 contained in the “General Conditions.”

- c. The CONTRACTOR shall alter immediately the occupants of nearby premises as to any emergency that he may create or discover at or near such premises.
- d. ***The CONTRACTOR shall have full responsibility for coordination of the work with owners of such underground facilities during construction, for the safety and protection thereof as provided in paragraph 6.13 and repairing any damage thereto resulting from the work, the cost of all of which will be considered as having been included in the Contract Price.***

* * * *

B. *Not Shown or Indicated:*

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 shall 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 indicated or not shown or 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 such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in [¶] 10.05.

(See A.R. 255, General and Supplemental Conditions, § 4.04 (emphasis added).)

11. In its Amended Complaint, Petitioner has not produced any actual “written notice,” nor has it pled any specific facts to show that it followed the protocol for possible changes in the Contract Documents due to differing or unanticipated conditions arising from

Underground Facility not shown or indicated on the Contract Documents. (See A.R. 255-56 § 4.04(B).)

C. The Plain, Unambiguous Terms of the Agreement Establish the Procedure for Payments and Timely Submission of any Claims.

12. The agreed-upon protocols for all change orders, progress and final payments, as well as the precise procedures for filing, reviewing, and ruling on any Claim are established by the plain language of the Agreement.

13. Standard payment procedures are expressly set forth in Article 5 of the Agreement, as follows: “CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER/ARCHITECT as provided in the General Conditions.” (A.R. 224, Agreement ¶ 5.)

14. Article 10.05 of the Agreement (A.R. 283-84) allows for the submission of Claims, as follows:

A. *Engineer’s Decision Required:* All Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer for decision. A decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.

B. *Notice:* Written notice stating the general nature of each Claim shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim). A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B

C. *Engineer’s Action:* Engineer will review each Claim and, within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any, take one of the following actions in writing:

1. deny the Claim in whole or in part;
2. approve the Claim; or
3. notify the parties that the Engineer is unable to resolve the Claim if, in the Engineer's sole discretion, it would be inappropriate for the Engineer to do so. For purposes of further resolution of the Claim, such notice shall be deemed a denial.

D. In the event that Engineer does not take action on a Claim within 30 days, the Claim shall be deemed denied.

E. Engineer's written action under Paragraph 10.05.C or denial pursuant to 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.

F. ***No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.***

(See A.R. 283-84, Agreement ¶ 10 (emphasis added).)

15. Similarly, Article 12.01 provides that “[t]he Contract Price may only be changed by a Change Order. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05.” (A.R. 288, Agreement ¶ 12.01.)

16. Article 12.03 of the Agreement provides several key provisions governing Delays, which bar the recovery of damages for delay under the following circumstances:

C. If Contractor is delayed in the performance or progress of the Work by . . . failures to act of utility owners not under the control of Owner, or other causes not the fault of and beyond control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor's ***sole and exclusive remedy for the delays*** described in this Paragraph 12.03.C.

E. ***Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor.*** Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of Contractor.

(A.R. 289-90, Agreement § 12.03(C), §12.03(E) (emphasis added).)

17. Article 14.07, governing Final Payment, provides in subsection C that payment becomes due as follows: “[Forty-five] days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer’s recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor.” (A.R. 300, General Conditions ¶ 14; A.R. 318, Supplementary Conditions ¶ 14.07.)

18. The Agreement further provides that “[t]he making and acceptance of final payment will constitute” a waiver of claims as follows:

1. A waiver of all Claims by Owner against Contractor . . . ; and
2. *A waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.*

(A.R. 300, Agreement ¶ 14.09 (emphasis added).)

D. Petitioner Failed to Timely Submit Its Request for Equitable Adjustment in Accordance with the Agreement Procedures.

19. On or about November 4, 2013, Petitioner submitted its request for Final Payment.

20. On November 5, 2013, B&N submitted its written recommendation to CSB for Final Payment to J.F. Allen, with a copy issued to Petitioner and the West Virginia Department of Environmental Protection.

21. On or about November 20, 2013, CSB issued Final Payment, check no. 2068, in the amount of \$143,320.43 to J.F. Allen.

22. On or about May 7, 2014, approximately six months after J.F. Allen's request for Final Payment and B&N's recommendation for Final Payment had been made, J.F. Allen submitted a request to B&N for equitable adjustment under the Agreement.

23. On May 12, 2014, B&N returned J.F. Allen's request for equitable adjustment, noting that under the Agreement, "B&N is no longer authorized to provide professional services for this project."

24. On November 14, 2014, Petitioner filed its Amended Complaint, amending its claim for breach of contract against CSB.

25. After conducting a hearing (*see* Transcript at A.R. 350-408), the Circuit Court entered its Final Order (A.R. 409-26) and dismissed, with prejudice, the Amended Complaint for failure to state a claim for breach of contract against Respondent upon which relief could be granted.

SUMMARY OF ARGUMENT

Disposition of this appeal is straightforward. Petitioner's Amended Complaint represents precisely the kind of "unfounded" claim that Rule 12(b)(6) is designed to "weed out." *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996). To pass Rule 12(b)(6) muster, the test is not whether the Amended Complaint merely states a possible claim for breach of a *theoretical* contract, but rather, whether Petitioner has stated an actual claim against CSB for breach of a specific provision of the parties' *agreed-upon* contract. This, Petitioner has failed to do, and no amount of re-pleading can cure that fatal deficiency and create a contractual duty that does not exist. As discussed below, Petitioner's claim (including the additional \$1.3 million recovery that it seeks from CSB) is expressly barred by at least nine separate provisions of the parties' Agreement. For that reason, the Circuit Court correctly rejected the Amended Complaint as

insufficient to state a breach of contract claim against CSB arising from the parties' *actual* Agreement, which instrument supplies the law that governs these parties. None of the arguments Petitioner has raised in this appeal alter the Circuit Court's reasoning or its conclusion. Indeed, each of the four "assignments of error" raised by Petitioner involves a misstatement of the law, the facts, or both, and consequently, provides no viable basis at all to disturb the Circuit Court's sound ruling.

A. Petitioner's Procedural Challenges to the Circuit Court's Order Are Unavailing.

Of Petitioner's four "assignments of error," two challenge the procedural aspects of the Circuit Court's Order. Petitioner argues, contrary to well-established procedure, that (i) because Petitioner did not attach a copy of the Agreement to its Amended Complaint, the Circuit Court erred in "reviewing and considering" the written Agreement in evaluating the sufficiency of Petitioner's *breach of contract* claim, or alternatively, (ii) that the Circuit Court's ruling should be vacated because a dismissal pursuant to Rule 12(b)(6) should never be "with prejudice." (Pet.'s Brief at 14-15, 32-39.) On both accounts, Petitioner is wrong on the law.

As a preliminary matter, Petitioner's attempt to evade dismissal by failing (twice) to attach the relevant document — a document which proves that Petitioner's claim, as pled, has no merit — to its pleading is precisely why the "incorporation by reference" exception exists. In West Virginia, "[t]he mere fact that documents are attached to a Rule 12(b)(6) motion to dismiss does not require converting the motion to a Rule 56 motion for summary judgment." Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* at 394 (4th ed. 2012) ("For example, in a case involving a contract, a court may examine the contract documents in deciding a motion to dismiss."). The fact that the Circuit Court examined the parties Agreement in evaluating whether the Amended Complaint was

sufficient to state a claim for breach of *that particular contract* shows that the court below was diligently performing its function under Rule 12(b)(6), not committing reversible error.

Alternatively, Petitioner argues on appeal that dismissal pursuant to Rule 12(b)(6) should *never* be “with prejudice,” and for that reason too, the Order should be vacated and reversed. (Pet.’s Brief at 36-38.) Petitioner’s argument misconstrues the law and is defeated by clear West Virginia precedent. In Syllabus Point 5 of *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975), this Court held, in pertinent part, that:

[i]n all future cases the dismissal of an action under Rule 12(b)(6) W. Va. RCP for failure to state a claim upon which relief can be granted shall be a bar to the prosecution of a new action grounded in substantially the same set of facts, unless the lower court in the first action specifically dismissed without prejudice.

Thus, since *Sprouse*, a Rule 12(b)(6) dismissal by the circuit courts of this State is *always* with prejudice *unless* it is specifically stated to be made without prejudice. Accordingly, none of the procedural aspects of the Circuit Court’s Order constitute an “error” at all, and Petitioner’s arguments on appeal should be rejected.

B. Petitioner’s Challenges to the Merits of the Circuit Court’s Order Are Unavailing.

The substantive challenges to the Court’s final Order fare no better. (Pet.’s Brief at 12-14, 17-32.) Petitioner’s breach of contract claim against CSB fails as a matter of law for two independently-sufficient reasons: (i) CSB’s lack of any contractual duty with respect to the delay damages alleged, and (ii) Petitioner’s failure to satisfy the conditions precedent to making and preserving any claim.

First, the lack of contractual duty by CSB is a complete bar to Petitioner’s claim. In its Amended Complaint, Petitioner identified its own errors relating to “one hundred and twenty-two (122) incidents involving unmarked or mismarked lines and utilities,” which allegedly caused the “additional costs and delays” for which it seeks relief *from CSB*. (A.R. 187-88, Am.

Compl. § 16.) The fatal flaw in Petitioner’s theory is that the Agreement contains at least *nine* express provisions establishing *Petitioner’s sole responsibility* for issues with respect to all Underground Facilities. These issues relate to Petitioner’s duty to determine the exact location of all utilities and structures, to expose subsurface utilities and structures sufficiently in advance of the proposed work, and if damage is caused, to repair and restore all underground utilities, the cost of which is deemed incidental to the Contract Price. (*See, e.g.*, A.R. 219, Instructions to Bidders ¶ 4.5; A.R. 221, “General Notes” ¶¶ 2, 4-6; A.R. 226, “Agreement” ¶ 7.4; A.R. 225-26, “General Conditions” § 4.04(A)-(B) and A.R. 310, “Supplemental Conditions” § 4.04(A).) In addition, the Agreement contains several more key provisions with respect to “Delays,” including *inter alia*, that “Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delay within the control of Contractor.” (*See* A.R. 290, Agreement § 12.03(E).) These contract provisions, which are enforceable against Petitioner, are fully dispositive of Petitioner’s breach of contract claim.

Clearly, without a contractual duty owed in relation to Petitioner’s performance of its work, CSB has no liability to Petitioner for “delays and costs” arising from anything related to Underground Facilities. *See, e.g., McNamee Constr., Corp. v. City of New Rochelle*, 60 A.D.3d 918 (N.Y. 2009) (dismissing contractor’s breach of construction contract claim where parties clearly contemplated the possibility of the project being delayed due to the presence of the infrastructure of underground utilities and, as here, the agreement allocated that risk of liability to the contractor). These same principles apply here. Under the Agreement, delay due to the discovery of Underground Facilities was expressly contemplated by the parties, and any potential costs were deemed to be incidental to the Contract Price. Simply put, the risk of this precise liability was allocated to Petitioner, and the happenstance that those same, foreseeable delays

may have actually occurred does not entitle Petitioner to re-write the Agreement, re-allocate the liability, and reap a windfall recovery in excess of \$1.3 million. (A.R. 194, Am. Compl. ¶ 44 and “Wherefore” paragraph.) Accordingly, Petitioner’s breach of contract claim against CSB is barred by the plain terms of the Agreement that placed the risk of discovering underground structures squarely on Petitioner.

Second, Petitioner has completely failed to satisfy the conditions necessary to make and preserve any claim alleged. To state a valid claim under Agreement ¶ 4.04, Petitioner must satisfy three prerequisites: (i) prompt written notice by Petitioner to both CSB and the Engineer, (ii) the Engineer’s determination that a change to the contract is necessary; and (iii) the issuance of a Change Order. (*See* A.R. 255, ¶ 4.04(B).) These requirements were never met, and the Amended Complaint does not contain allegations to suggest that all three prerequisites actually occurred with respect to *even one* of the alleged “122 instances” for delay damages. In the face of the Agreement’s eminently clear conditions precedent, the Amended Complaint is grossly deficient and, as pled, does not state a claim for breach of the Agreement upon which relief could be granted against Respondent.

Even if such a claim were initially made, there is no question that it was not preserved in accordance with the Agreement procedures. It is evident on the face of the Amended Complaint that Petitioner cannot identify *any* claim against CSB that was initially made according to the Agreement protocol and expressly acknowledged by CSB in writing as still unsettled at the time that CSB issued Final Payment in November 2013. Because Petitioner has not even alleged that those specific facts (which are necessary to make and preserve any cognizable claim) actually exist — and they do not — its Amended Complaint is deficient for precisely the same reason as its original pleading: the claim Petitioner alleges is barred by the plain terms of the parties’

Agreement, and thus, fails to state any claim for breach of the Agreement upon which relief could be granted. As discussed more fully below, Petitioner's recovery in this action is precluded both by the unambiguous, plain terms of the Agreement and by the well-settled rule of contract law that "a formal contract governing the subject matter at issue precludes an unjust enrichment claim." *Johnson v. Ross*, 2009 WL 4884374 *4 (S.D. W. Va. Dec. 10, 2009). Thus, the Circuit Court's rulings comport with the law and the facts, as pled.

In the final analysis, this case presents nothing more than the typical owner-contractor-engineer relationship governed by a standard construction contract. Through written contract, these experienced parties have established the scope of their rights and obligations, and determined the precise protocol to govern contract performance, payments, and claims, thereby injecting predictability and regularity into their relationship and the construction of the Project. Now, long after the time frame contemplated by the Agreement has expired, Petitioner asks this Court to alter that established framework, change the agreed-upon contractual terms, and force CSB to pay more than it bargained for. The Circuit Court correctly recognized that there is no cognizable claim at law or in equity for such a request. Accordingly, because Plaintiff is unable to state any valid claim for breach of contract or unjust enrichment against CSB upon which relief could plausibly be granted, the Amended Complaint was properly dismissed in its entirety as to Respondent, and that sound ruling should be affirmed in all respects.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for disposition by memorandum decision. There is no substantial question of law other than those correctly resolved by the Circuit Court, and additional oral argument is unnecessary. W. Va. R. App. P. 21(c).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

A. Petitioner's Assignments of Error as to the Procedural Aspects of the Circuit Court's Order Are Unavailing.

1. The Circuit Court Was Not Required to Convert the Motion to Dismiss to Summary Judgment Because the "Incorporation by Reference" Exception Applies.

In its third assignment of error, Petitioner argues that the Circuit Court committed reversible error by "reviewing and considering" the parties' Agreement (which proves that Petitioner's *breach of contract* claim has no merit), in ruling on Respondent's motion to dismiss. (Pet.'s Brief at 1, 32-35.) Petitioner argues on appeal that it did not attach a copy of the Agreement to its Complaint, and for that reason, "matters outside of the pleadings should not [have been] considered" by the Circuit Court in deciding the motion to dismiss. (*Id.* at 32.) Petitioner is incorrect as a matter of law, and its attempt to evade dismissal by failing to attach the relevant document to its pleading is precisely why the "incorporation by reference" exception exists. (*See infra* at 16.)

By operation of the exception, the written Agreement upon which Petitioner based its claim and framed its breach-of-contract Complaint is not "outside the pleadings," and thus, the Circuit Court did not improperly consider "extraneous evidence" requiring conversion to summary judgment. In West Virginia, "[t]he mere fact that documents are attached to a Rule 12(b)(6) motion to dismiss does not require converting the motion to a Rule 56 motion for summary judgment." Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* at 394 (4th ed. 2012). Instead, as

articulated by Professor Cleckley, an important exception to the general rule of Rule 56 conversion is recognized as follows:

Under the doctrine of ‘incorporation by reference’ a document attached to a motion to dismiss may be considered by the trial court, without converting the motion into one for summary judgment, only if the attached document is (1) central to the plaintiff’s claim, and (2) undisputed. Undisputed means that the authenticity of the document is not challenged. ***For example, in a case involving a contract, a court may examine the contract documents in deciding a motion to dismiss*** The court may consider, in addition to the pleadings, ***materials embraced by the pleadings***, and may take judicial notice of matters of public record

Id. (emphasis added).

Decisions from federal courts, construing the federal counterpart to West Virginia’s Rule 12(b)(6), are universally in accord.⁵ *See* Cleckley, at 395 n.1216 (collecting cases from multiple federal circuits for the proposition that courts may consider and rely upon materials embraced by the pleadings). *E.g.*, *Edes v. Verizon Communications, Inc.*, 417 F.3d 133, 137 n.4 (1st Cir. 2005) (“Where . . . a complaint’s factual allegations are expressly linked to — and admittedly dependent upon — a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).”); *Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 196 (2d Cir. 2005) (“Where a plaintiff has ‘reli[ed] on the terms and effect of [the parties’ contract] in drafting the complaint, and that document is thus integral to the complaint, [a court] may consider its contents even if it is not formally incorporated by reference.”); *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir.2004) (holding that a court may consider documents attached to a motion to dismiss so long as they are “integral to and explicitly

⁵ This Court has consistently held that, “because the [West Virginia Rules of Civil Procedure] are practically identical to the federal rules of civil procedure, substantial weight will be given to federal cases and the advisory committee notes to the federal rules in determining the meaning and scope of the state rules.” *See supra*, Cleckley at 4 n.29 (collecting cases, omitted herein).

relied on in the complaint and . . . the plaintiffs do not challenge [their] authenticity”); *Continental Cas. Co. v. Am. Nat. Ins. Co.*, 417 F.3d 727, 732 n.2 (7th Cir. 2005) (“Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to the claim.”); *see generally* 5 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1327, pp. 762–63 (2d ed. 1990).

The underlying purpose of the “incorporation by reference” exception is “to prevent parties from surviving a motion to dismiss by artful pleading or by failing to attach relevant documents.” *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir.2002) (citations omitted); *Paterno v. Wells Fargo Ins. Servs., Inc.*, No. 2:12-CV-04692, 2013 WL 1187932, at *3 (S.D.W. Va. Mar. 21, 2013) (internal citations omitted); *see also Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002) (finding that the “incorporation by reference” exception addresses the “concern . . . that, were in not for the exception, the plaintiff could evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proved that his claim had no merit”); *see also Cleckley, supra*, at 394 (“For example, in a case involving a contract, a court may examine the contract documents in deciding a motion to dismiss.”). As discussed below, and in holding with these widely-recognized principles, the Circuit Court correctly considered the parties’ Contract as a document embraced within the pleading, not extraneous to it.

a. The Contract “is central to” Petitioner’s breach of contract claim.

Both requirements of the “incorporation by reference” exception are fully satisfied here. First, there is no question that the parties’ Contract, which Petitioner identified and referenced throughout its Amended Complaint, “is central to the plaintiff’s claim” for *breach of contract*. *Cleckley, supra*, at 394; *see also Am. Compl.* at A.R. 186-94, 186 ¶ 8 (referencing “Contract 10-

08 - “Kanawha Two-Mile Creek Sewer Improvements - Sewer Replacement Sugar Creek Drive Sub Area” and Petitioner’s winning bid in the amount of \$5,160,621.75.)

In fact, in a breach of contract case, the Contract *is* the law vis-à-vis the parties. West Virginia recognizes the foundational principle of contract law that “[w]here parties contract lawfully and their contract is free from ambiguity or doubt, ***their agreement furnishes the law which governs them.***” *Rollyson v. Jordan*, 205 W. Va. 368, 376, 518 S.E.2d 372, 380 (1999) (quoted in *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38-39, 614 S.E.2d 680, 685-86 (2005) (emphasis added). Similarly, West Virginia law provides that “[u]nder the broad liberty of contract allowed by law, parties may make performance of any comparatively, or apparently, trivial and unimportant covenant, agreement, or duty under the contract a condition precedent, and, in such case, ***the contract will be enforced and dealt with as made.***” Syllabus Point 2, *Watzman v. Unatin*, 101 W. Va. 41, 131 S.E. 874, 878 (1926) (emphasis added). Moreover, as “[i]t is the duty of the court to construe contracts as they are made by the parties thereto and to give full force and effect to the language used,” it was the province of the Circuit Court to evaluate the plain terms of the unambiguous Contract. *Id.* As such, the actual terms of the Agreement itself are not just “central” to the claim, but also indispensable to evaluating Respondent’s motion and whether the Amended Complaint, as pled, sufficiently stated a claim for breach of *that particular contract* upon which relief could be granted. *See Paterno*, 2013 WL 1187932, at *4 (“***Where the plain language of a contract contradicts the allegations of the plaintiff’s complaint, dismissal of the claims is proper.***”) (emphasis added).)

Indeed, the most common scenario in which the “incorporation by reference” exception to Rule 56 conversion arises is in a breach of contract case, where a copy of the parties’ agreement is attached to the motion to dismiss without requiring conversion. *See, e.g., Broder*,

418 F.3d at 196 (finding that on review of a 12(b)(6) motion, a court may consider a contract that is integral to the plaintiff's claims and upon which the plaintiff relied in framing his complaint). Such a rule comports with the purpose of a motion to dismiss under Rule 12(b)(6), which “enables a court to weed out unfounded suits.” *Harrison*, 197 W. Va. 651, 478 S.E.2d 104. Accordingly, because the Contract supplied the law governing the parties, including their rights and obligations, the Contract is “central to” Petitioner’s breach-of-contract claim, and the first requirement for the incorporation by reference exception is fully satisfied.

b. The authenticity of the Contract is “undisputed.”

Likewise, the authenticity of the Contract is “undisputed.” *Cleckley*, *supra*, at 394 (“Undisputed means that the authenticity of the document is not challenged.”). As reflected in the record below, Respondent twice produced a copy of the operative Agreement, duly executed by Petitioner and Respondent (*see* A.R. at 35, 230), first as an attachment to its motion to dismiss the original Complaint and subsequently with its motion to dismiss the Amended Complaint. (A.R. at 28-125 and A.R. 223-321.) If Petitioner had any reasonable basis to challenge the authenticity of the Agreement, it had ample opportunity to do so in the proceeding below. Even upon direct questioning by the Circuit Court Judge, Petitioner did not raise any grounds to challenge its authenticity, and no such grounds exist. (A.R. at 379.) *Cf. Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 433, 693 S.E.2d 789, 798 (2010) (*citing H. Sand & Co., Inc. v. Airtemp Corp.*, 934 F.2d 450 (2d Cir.1991) (finding that Rule 56 does not preclude consideration of unauthenticated documents when the opposing party does not challenge the authenticity in trial court)). The requirement that the authenticity of the document attached to the motion to dismiss be “undisputed” is thus fully satisfied.

Both requirements of the exception being met, the Circuit Court properly viewed the Contract to be exactly what it was, i.e., an authentic document integral to Petitioner's claim and "embraced within" its pleading, just as the "incorporation by reference" exception required the Circuit Court to do. Accordingly, the fundamental premise upon which Petitioner has filed this appeal — that the Circuit Court erroneously "reviewed and considered" the parties' Agreement in deciding Respondent's Rule 12(b)(6) motion to dismiss (Pet.'s Brief at 1, 33-35) — provides no legal or factual basis at all to overturn the Circuit Court's final Order and should be rejected by this Honorable Court.

2. After Having Afforded Petitioner One Opportunity to Amend its Complaint, the Circuit Court Properly Dismissed the Amended Complaint, with Prejudice, Because any further Amendment Would Be Futile.

Petitioner's forth assignment of error — that the Circuit Court committed reversible error because it dismissed Petitioner's Amended Complaint "with prejudice" in response to the motion to dismiss — is a misstatement of law that is defeated by clear West Virginia precedent. (Pet.'s Brief at 15-16, 36-38.)

The case that Petitioner cites for the proposition that a Rule 12(b)(6) dismissal can *never* be with prejudice, *United States Fidelity and Guaranty Company v. Eades*, 150 W. Va. 238, 144 S.E.2d 703 (1965), was overturned by this Court on precisely this issue. In Syllabus Point 5 of *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 428, 211 S.E.2d 674, 679 (1975), this Court held that:

[i]n all future cases the dismissal of an action under Rule 12(b)(6) W. Va. RCP for failure to state a claim upon which relief can be granted shall be a bar to the prosecution of a new action grounded in substantially the same set of facts, unless the lower court in the first action specifically dismissed without prejudice.

Thus, since the clarification in *Sprouse*, a Rule 12(b)(6) dismissal by the circuit courts of this State is *always* with prejudice *unless* it is specifically stated to be made without prejudice.

In fact, *Sprouse* decisively disposes of Petitioner’s challenge to the Circuit Court’s final Order. In *Sprouse*, this Court recognized the then-existing split in authority and extensively discussed both the minority view (adhered to in *United States Fidelity*) and the majority view (followed in other West Virginia cases and in other jurisdictions) on the finality of a 12(b)(6) dismissal. 158 W. Va. at 457-61; 211 S.E.2d at 694-96. In deciding *Sprouse*, this Court squarely rejected the prior, minority rule in *United States Fidelity*, and settled the law in this State by adopting the majority rule presumption that “dismissal under Rule 12(b)(6) is a final judgment unless the court specifically dismisses without prejudice.” 158 W. Va. at 460; 211 S.E.2d at 696. As the *Sprouse* Court explained:

...a judgment dismissing an action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and without reservation of any issue, ***shall be presumed to be on the merits, unless the contrary appears in the order***, and the judgment shall have the same effect of Res judicata as though rendered after trial in a subsequent action on the same claim [and] we further hold that a judgment on the merits shall not require a determination of the controversy after a trial or hearing on controverted facts.

158 W. Va. at 461, 211 S.E.2d at 696 (emphasis added). It logically follows that, if an order is silent as to whether the dismissal is with or without prejudice, and the law, after *Sprouse*, presumes that the dismissal is “with prejudice,” a reviewing court certainly has the power to enter dismissal “with prejudice.” In filing its appeal, however, Petitioner relies exclusively on *United States Fidelity’s* rejected “minority view” about the presumption of finality for 12(b)(6) motions. (Pet.’s Brief at 36.) The Circuit Court unquestionably had the power to dismiss this case with prejudice, and Petitioner’s position to the contrary is untenable.⁶

⁶ To the extent Petitioner argues that dismissal with prejudice was improper because the Circuit Court should have afforded Petitioner yet another opportunity to amend its pleading, that argument fails for similar reasons. Leave to amend a complaint is properly denied when the proposed amendments would be futile or when no utility is served by permitting an amendment. *See Farmer v. L. D. I., Inc.*, 169 W. Va. 305, 308, 286 S.E.2d 924, 926 (1982); *Hinchman v. Gillette*, 217 W. Va. 378, 385, 618 S.E.2d 378, 385, 618 S.E.2d 387, 394 (2005). Leave to amend is also properly denied “when the moving party

Indeed, since *Sprouse*, this Court has repeatedly reaffirmed the power of a circuit court to grant a 12(b)(6) dismissal “with prejudice,” even remanding with instructions for that result. For instance, in *Caperton v. A.T. Massey Coal Co.*,

. . . this Court conclude[d], based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit, that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries. Accordingly, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing, *with prejudice*, this case against A.T. Massey Coal Company and its subsidiaries.

225 W. Va. 128, 134, 690 S.E.2d 322, 328 (2009) (emphasis added). In other cases, this Court reviewed and affirmed a circuit court’s grant of dismissal, with prejudice. *E.g.*, *Highmark W. Virginia, Inc. v. Jamie*, 221 W. Va. 487, 494, 655 S.E.2d 509, 516 (2007).

Accordingly, Petitioner’s fourth “assignment of error” amounts to a misstatement of law that runs contrary to decades of established precedent in West Virginia jurisprudence; it presents no viable basis to vacate or overturn the Circuit Court’s final Order, and should be rejected.

B. Petitioner’s Assignments of Error as to the Substantive Aspects of the Circuit Court’s Order Are Unavailing.

1. The Circuit Court Correctly Ruled that the Complaint, as Pled, Failed to State a Claim for Breach of Contract upon which Relief Could Be Granted.

In its first and second assignments of error, Petitioner challenges the substantive findings of the Circuit Court’s ruling, arguing that the Circuit Court “erred in finding that the Petitioner failed to state a claim for breach of contract upon which relief can be granted.” (Pet.’s Br. at 1.)

knew about the facts on which the proposed amendment was passed but omitted the necessary allegations from the original pleading.” *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 533, 618 S.E.2d 537, 542 (2005).

Here, Petitioner was afforded one opportunity to amend its breach of contract claim. The Amended Complaint cured none of the deficiencies of the original pleading, and upon the Circuit Court Judge’s direct questioning at the hearing on the subsequent motion to dismiss, Petitioner could not identify any provisions of the Agreement upon which its breach of contract claim could arise. (*E.g.*, A.R. 382, 383, 397.) In light of the insufficiency of the claims and the futility of any further amendment, the Circuit Court properly dismissed with prejudice.

The Amended Complaint alleges a single cause of action: a breach of contract claim against Respondent arising from the parties' construction Agreement. Because the plain terms of the Agreement completely bar the recovery sought by Petitioner, the Amended Complaint was properly dismissed with prejudice. Thus, for the identical reasons considered and rejected by the Circuit Court, Petitioner's breach of contract claim cannot pass rule 12(b)(6) muster, and its argument on appeal fails as a matter of law.

To state a claim for breach of contract under Rule 12(b)(6), Petitioner is required to allege facts sufficient to support each of the following essential elements: the existence of a valid contract; that Petitioner performed under its contract with Respondent; that Respondent breached or violated its duties or obligations under the contract; and that Petitioner has been injured as a result. *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F.Supp.2d 694, 714 (S.D. W. Va. 2009); *Charleston Nat'l Bank of Charleston v. Sims*, 137 W. Va. 222, 70 S.E.2d 809, 813 (1952) (a plaintiff must show that it complied with the terms of the contract in order to allege a breach of contract claim); *Harper v. Consol. Bus Lines*, 117 W. Va. 228, 185 S.E. 225, 225–26 (1936) (finding that a complaint alleging the existence of a contract, the satisfaction of conditions precedent, the defendant's conduct constituting breach, and resulting damages is sufficient to state a claim for breach of contract). Furthermore, “[w]here the plain language of a contract contradicts the allegations of the plaintiff's complaint, dismissal of the claims is proper. *Paterno*, 2013 WL 1187932, at *4 (emphasis added).

Viewing the allegations pled in the light most favorable to Petitioner, the Amended Complaint alleges that Respondent materially breached duties it owed to it under the Agreement by, *inter alia*, failing to pay for “the additional extra costs, for the delays and disruptions and other compensable damages,” which arose in connection to the Underground Facilities. (A.R.

191-92, Am. Compl. ¶ 36; *see also* ¶¶ 33-39.) As discussed below, Petitioner’s claim, as alleged, fail on two separate grounds: (i) Respondent lacks any contractual duty with respect to the delay damages alleged, and (ii) Petitioner completely failed to satisfy the conditions precedent to making and preserving any such claim.

a. West Virginia Rules of Contract Interpretation Require Enforcement of the Plain Language of the Agreement.

Under West Virginia law, “it is the province of the court and not of the jury, to interpret a written contract,” which must be applied according to its terms. *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550, 552 (1937). This Court has long has been clear in its analysis of contract claims:

7. “Where the terms of a contract are clear and unambiguous, they must be applied and not construed.”

8. “It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.”

9. “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.”

Syl. Pts. 7-9, *Benson v. AJR, Inc.*, 226 W. Va. 165 (2010) (internal citations omitted). When valid, the “agreement furnishes the law which governs [the parties].” *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005).

Moreover, as a general rule, West Virginia courts enforce private agreements between parties, to the extent that such agreements do not conflict with the applicable law. *Rollyson v. Jordan*, 205 W. Va. 368, 376, 518 S.E.2d 372, 380 (1999). “Our law provides that “[u]nder the broad liberty of contract allowed by law, parties may make performance of any comparatively, or apparently, trivial and unimportant covenant, agreement, or duty under the contract a condition

precedent, and, in such case, the contract will be enforced and dealt with as made.” *Wellington Power Corp.*, 217 W. Va. at 37-38, 614 S.E.2d at 684-85 (considering “pay-if-paid” condition precedent clause in construction contract and holding that plaintiffs “bear a heavy burden in urging the non-enforcement of their contracts” in light of the fact that these are valid, unambiguous agreements) (*quoting* Syllabus Point 2, *Watzman v. Unatin*, 101 W.Va. 41, 131 S.E. 874 (1926)).

On the record below, it is undisputed that the Agreement is a valid and enforceable contract whose unequivocal terms were freely negotiated and agreed to by sophisticated parties. Further, the parties’ meaning and intent as to Claims and the allocation of responsibility relating to Underground Facilities are clear, as evidenced by the fact that Petitioner has never alleged or shown that any ambiguity exists. Accordingly, the Agreement must be “applied and enforced according to such intent” and its plain language, which furnishes the law between the parties. *Id.* at Syl. Pt. 9.

b. Petitioner’s Failure to Identify any Contractual Duty on the Part of CSB Relating to the Underground Facilities Is Fatal to Its Breach of Contract Claim.

Petitioner’s breach of contract claim asserted in the Amended Complaint is precisely the type of claim that the unambiguous Agreement intended to preclude. In its Amended Complaint, Petitioner claims that it is entitled to recover, from CSB, alleged “extra costs” and delay damages based on unforeseen changes, including the discovery of underground utilities.

However, under the Agreement itself, CSB owes no such duty to Petitioner related to Underground Facilities. As between CSB and Petitioner, the Agreement contemplated that *Petitioner* would bear the risk of any of the difficulties that might arise from conditions on the Project related to unforeseen locations of Underground Facilities. For instance, the responsibility

to investigate and discover Underground Facilities was solely Petitioner's duty. Under "Instructions to Bidders," Petitioner was responsible to obtain additional examinations, investigations, tests, and data "concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the site" (A.R. 219 at ¶ 4.5.) By contrast, Petitioner acknowledged that CSB "do[es] not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities at or contiguous to the site." (A.R. 226 at ¶ 7.4.)

In addition, the parties clearly contemplated — and addressed — the possibility of construction delays and costs arising from Underground Facilities. The Agreement places the financial risk of encountering or repairing those Underground Facilities on Petitioner, as the Contractor, not on CSB, as the Owner. (*See, e.g.*, A.R. 221 ¶ 2 ("The exact location and protection of all utilities and structures are the responsibility of the Contractor. During construction, the Contractor shall use due diligence to protect from damage all existing utilities and structures whether shown on the plans or not."); ¶ 4 ("Cost for all [subsurface utilities and structures] exposed shall be incidental to the various items of work."); ¶ 5 ("If damage is caused, the Contractor shall be responsible for repair or restoration of the damaged service lines . . . at no extra cost to the Owner."); ¶ 6 ("The Contractor will be solely responsible for all costs resulting from the damage, repair, restoration, and resulting contingent damage of affected utilities.")) Moreover, Section 4.04 of the General and Supplemental Conditions specifies the method by which Petitioner may obtain possible contract adjustments due to unanticipated conditions arising from an Underground Facility not indicated in the Contract Documents. (A.R. 310.)

Generally, under these circumstances, there can be no recovery for delay damages when delays are specifically anticipated by the parties and contemplated in the contract. *See Corinno*

Civetta Const. Corp. v. City of New York, 67 N.Y.2d 297, 314-15, 502 N.Y.S.2d 681, 689 (1986) (recognizing principle that, if the owner makes a factual showing sufficient to establish as a matter of law that the delays which actually occurred were initially contemplated by the parties as potential events on the project, and the contractor does not demonstrate triable issues of fact as to whether the owner acted in bad faith or with reckless indifference to the contractor's rights, the contractor's delay claim will be subject to dismissal); *see also* 22A N.Y. Jur. 2d Contracts § 431 ("A contractor will not be allowed to recover damages for delay where the parties foresaw the possibility that subsurface conditions at the site might materially differ from those shown in the contract plans . . . and changes in the work were contemplated by contract, which also provided for methods of payment for changes.")

When delays are contemplated in the contract, as they were here, they become reasonably foreseeable and delay damages may not be recovered. *See, e.g., McNamee Constr. Corp.*, 60 A.D.3d at 919, 875 N.Y.S.2d at 267 (dismissing contractor's breach of construction contract claim where parties clearly contemplated the possibility of the project being delayed due to the presence of the infrastructure of underground utilities and, as here, the agreement allocated that risk of liability to the contractor); *cf. Wrecking Corp. of America v. Mem'l Hosp.*, 63 A.D.2d 615, 615, 405 N.Y.S.2d 83, 85 (1st Dept. 1978) (holding that plaintiff had assumed the risk and the responsibility of subsurface conditions and dismissed plaintiff's complaint where the contract stated that the owner and architect made no representations about the character and quality of subsurface soil conditions and did not guarantee the accuracy of such conditions); *Bilotta Constr. Co. v. Village of Mamaroneck*, 199 A.D.2d 230, 604 N.Y.S.2d 966 (2d Dep't 1993) (contract containing numerous clauses exculpating the owner and requiring contractor to undertake its own investigation required dismissal of complaint against owner and architect). As the *Bilotta* Court

observed, “the ultimate guide in determining whether or not the contractor is to be paid for extra work is the contract itself [I]f the parties intended the contractor to rely upon its own investigation, no recovery for extra work may be had, absent a showing of fraud or misrepresentation as to existing conditions.” *Id.* 199 A.D.2d at 231, 604 NY.S.2d at 967. Here too, Petitioner’s alleged “delay damages” are barred by the Agreement, and as a result, its breach of contract action does not properly state a claim upon which relief could be granted.

c. Petitioner’s Failure to Timely Assert Its Equitable Adjustment Claim and to Satisfy all Conditions Precedent under the Agreement Is Fatal to Its Breach of Contract Claim.

Even if, assuming *arguendo*, Petitioner could state some viable claim relating to the Underground Facilities (which it did not) the Agreement only provides a limited means for possible adjustment to the Contract Documents. Strict compliance with protocol is necessary to preserving any such claim. In § 4.04(B), the Agreement provides that any possible change due to differing or unanticipated conditions involving Underground Facilities not shown or indicated in the Contract Documents require (i) Petitioner’s prompt written notice to CSB and the Engineer, (ii) the Engineer’s determination that a change, if any, is required in the Contract Documents to reflect and document the consequences of the existence or location of the Underground Facility; and (iii) if the Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or Change Order will be issued to reflect and document such consequences. (A.R. 255-56.) Finally, if Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Time, Owner or Contractor may make a Claim as provided in Paragraph 10.05. *Id.*

By failing to give timely written notice to allow for the Engineer’s determination and, if warranted, the issuance of a Change Order, Petitioner did not meet the condition precedent to

recovery under the Claims procedures or the Change of Contract Price provisions expressly set forth in the Agreement. (*Id.* ¶ 4.04(B); A.R. 283 ¶ 10.05; A.R. 288 ¶ 12.) The Agreement unequivocally provides that “[n]o Claim for an adjustment in Contract Price . . . will be valid if not submitted in accordance with [the Claims procedure of] this Paragraph 10.05.” (See A.R. 283 ¶ 10.05(A)-(F) (emphasis added); see also A.R. 288 ¶ 12.01(A) (“The Contract Price may only be changed by a Change Order. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted . . . in accordance with the provisions of Paragraph 10.05.”)). Thus, to preserve any valid Claim, Petitioner had to follow the procedures in the Agreement.

In particular, to comply with Paragraph 10.05, Petitioner was required, in part, to provide written notice of its Claim, no later than thirty days after the start of the event giving rise to the Claim, and to allow for B&N to render its decision. (See A.R. 283 ¶ 10.05.) Although compliance with the precise requirements of Paragraph 10.05 is a condition precedent to any recovery on a Claim, Petitioner failed to plead any specific facts to establish that the breach of contract claim raised in its Amended Complaint was ever submitted in accordance with the Paragraph 10.05 protocol. Absent doing so, “[n]o Claim for an adjustment in Contract Price . . . will be valid.” *Id.*

The Agreement further provides that Claims not timely asserted within the life of the contract are time-barred. Article 14.07, governing Final Payment, provides that payment becomes due as follows:

[Forty-five] days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer’s recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor.

(A.R. 299, General Conditions ¶ 14.07; A.R. 318, Supplementary Conditions § 14.07.) The Agreement expressly provides that “[t]he making and acceptance of final payment will constitute . . . a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.” (A.R. 300, Agreement ¶ 14.09.) Petitioner does not allege in its Amended Complaint that its claim for adjustment of the contract price, asserted herein, was “previously made . . . and expressly acknowledged by Owner in writing as still unsettled.” *Id.*

By operation of the Agreement, CBS’s obligations to J.F. Allen terminated with the actual completion of the Project and its issuance of Final Payment. At that time, there were no then-existing Claims that had properly been raised and preserved in accordance with the agreed-upon procedures set forth in the Agreement. By failing to give proper and timely notice of its Claim under the Agreement, Petitioner has not met the conditions precedent to the recovery it seeks. (A.R. 297 ¶¶ 4.04, 10, 12.) Furthermore, applying the plain, unambiguous terms of the Agreement, Petitioner’s failure to make and preserve its Claim prior to Final Payment constitutes a waiver of the Claim. (A.R. 294 ¶ 14.) *Cf., Appeal of Elco Corp.*, ASBCA No. 12149, 70-2 BCA P 8373 (1970) (affirming dismissal of plaintiff’s equitable adjustment claims arising under a government construction contract where claims were not asserted prior to final payment under the respective contracts). Because the fulfillment of the Agreement’s terms is a condition precedent to the pursuit of this breach of contract claim, the Amended Complaint fails to state a valid claim upon which relief could be granted, and the Circuit Court properly dismissed the claim with prejudice.

2. The Circuit Court Correctly Ruled that the Original Complaint Failed to State a Claim for Unjust Enrichment upon Which Relief Could Be Granted.

To the extent Petitioner intends to challenge the Circuit Court’s finding that its Original Complaint (A.R. 1-7) failed to state a claim for unjust enrichment (*see* Pet.’s Brief at 3), that argument lacks any merit and should be rejected. In Count II of its original Complaint, Petitioner incorporated by reference its breach of contract claim to further allege that CSB has been “unjustly enriched” at the expense of J.F. Allen “*for additional work performed and incorporated into the Project.*” (A.R. 5, Compl. ¶¶ 22-23 (emphasis added).) In support of this cause of action, J.F. Allen alleged that:

. . . the additional work and costs incurred by J.F. Allen as referenced in Count I [breach of contract] above were all satisfactorily performed and installed by J.F. Allen and have been incorporated into the Project for the benefit of CSB thereby creating an implied or quasi contract between J.F. Allen and CSB to pay the reasonable value for all work performed and installed.

CSB has breached its implied or quasi contract with J.F. Allen by failing and refusing to pay for the extra work and additional work performed and incorporated into the Project by J.F. Allen.

Id. The Circuit Court properly found that Count II failed to state a claim for unjust enrichment upon which relief could be granted, and dismissed the claim with prejudice. (A.R. 182.)

Briefly stated, under West Virginia Law “[a]n express contract and an implied contract, relating to the same subject matter, cannot co-exist.” *Case v. Shepherd*, 140 W. Va. 305, 311, 84 S.E.2d 140, 144 (1954). Because an “action for unjust enrichment is quasicontractual in nature[, it] may not be brought in the face of an express contract.” *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988); *Thompson v. Merchant's & Mechanics' Bank of Wheeling*, 3 W. Va. 651 (1869) (recognizing unjust enrichment cause of action in West Virginia)). Furthermore, unjust enrichment is an equitable, rather than legal, claim for relief. It is a court-developed theory of relief intended to be employed in the absence of a formal contract. Because “legal

remedies are favored over equitable remedies, a formal contract governing the subject matter [in dispute] precludes an unjust enrichment claim.” *Johnson*, 2009 WL 4884374 *4 (granting summary judgment and holding that “the plaintiffs’ unjust enrichment claim is precluded because an express contract governs this identical subject matter”); *see also Whipstock Nat’l Gas Services, LLC*, 2010 WL 785649 *4 (plaintiff could not pursue unjust enrichment claim seeking compensation for services rendered in drilling well where express contract covered identical subject matter).

The record is undisputed that the Agreement between Petitioner and CSB is an express contract governing the rights and remedies of the parties with respect to the construction Project. Whether J.F. Allen seeks damages under the Agreement or pursuant to an alleged “quasi-contract,” the subject matter is the same: Petitioner seeks additional payment for work performed and incorporated into the Project. (*Compare* A.R. 3-5, Compl. ¶¶ 16-19 (breach of contract) *with* A.R. 5, Compl. ¶¶ 21-23 (unjust enrichment).) The crux of the Petitioner’s unjust enrichment claim is that CSB allegedly violated its duties by failing “to pay for the extra work and additional work performed and *incorporated into the Project* by J.F. Allen.” (A.R. 5, Compl. ¶ 22 (emphasis added).) Indeed, the Petitioner’s own characterization of the facts undermine any plausible contention that its alleged quasi-contract claim is not actually a breach of contract claim covered by the Agreement itself. As such, the parties’ Agreement covers the identical subject matter as Petitioner’s unjust enrichment claim against CSB.

Accordingly, because unjust enrichment is designed to provide an equitable remedy where one does not exist at law, the doctrine may be invoked *only* when no express contract is present that governs the remedies available.⁷ Because an express contract, the Agreement, is in

⁷ Even with the dismissal of Plaintiff’s breach of contract claim, the principle that an unjust enrichment claim fails when an express contract exists still applies. It is the existence of the contract

place governing the rights and obligations of the CSB and J.F. Allen *vis-à-vis* each other, Petitioner cannot maintain an unjust enrichment claim. As a result, the Circuit Court properly ruled that Count II of Petitioner's original Complaint failed to state any claim upon which relief could be granted and required dismissal.

CONCLUSION

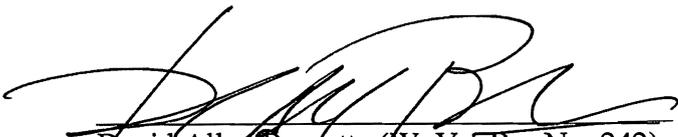
Based on the foregoing, The Charleston Sanitary Board of the City of Charleston, West Virginia respectfully requests that this Honorable Court affirm the decision of the Circuit Court of Kanawha County in all respects.

Respectfully submitted,

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

By Counsel

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itself — not the presence of plaintiff's claim for breach of contract — that is relevant. *E.g., Phrasavang v. Deutsche Bank*, 656 F.Supp.2d 196, 207 (D.D.C. 2009) (dismissing unjust enrichment claim because an express agreement existed, and stating: "Although the plaintiff argues that this principle does not apply here because he is not attempting to enforce the loan agreement, but rather seeking damages under an unjust enrichment theory for benefits allegedly obtained. . . ., that does not negate the fact that the alleged wrong stems from the contract he entered into with the defendant.").

**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Docket No. 15-0089

**ON APPEAL FROM THE
CIRCUIT COURT OF KANAWHA COUNTY**

J.F. ALLEN CORPORATION,
A West Virginia corporation,
Petitioner

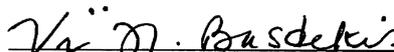
v.

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

CERTIFICATE OF SERVICE

I, Vivian H. Basdekis, counsel for Respondent, The Sanitary Board of the City of Charleston, West Virginia, do hereby certify that I have served the foregoing *Respondent's Brief* on all parties by depositing a true and exact copy thereof, in the United States Mail, postage paid, addressed to counsel of record at the addresses listed below on this the 22nd day of June 2015:

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