

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THUNDERING HERD DEVELOPMENT, LLC,
a West Virginia Limited Liability Company, and
THD INVESTORS 7, LLC., a West Virginia
Limited Liability Company,

Plaintiff,

v.

Civil Action No. 03-C-0490
Honorable F. Jane Husted

S&ME, INC., a Corporation, and
J.A. STREET & ASSOCIATES, INC., a Corporation

Defendants.

and

J A. STREET & ASSOCIATES, INC., a Corporation,

Third-Party Plaintiff,

v.

CTL ENGINEERING OF WEST VIRGINIA, INC., a
West Virginia Corporation, BIZZACK, INC.,
a Foreign Corporation,

Third-Party Defendants.

**NUNC PRO TUNC ORDER ON J.A. STREET & ASSOCIATES, INC.'S
MOTION FOR RECONSIDERATION**

On the 6th day of August, 2010, came the parties, by counsel, on J.A. Street & Associates, Inc.'s "Motion for Reconsideration of Order Granting S&ME's Partial motion to Dismiss Amended Cross Claims Asserted by J.A. Street & Associates, Inc." Before the Court at this

¹Though titled as a motion for "Reconsideration," J.A. Street & Associates, Inc.'s Motion is properly a Motion under Rule 54(b) of the West Virginia Rules of Civil Procedure to modify this Court's July 20, 2010 Order granting S&ME's Partial Motion to Dismiss to declare the order a final judgment to allow J.A. Street & Associates, Inc. to immediately appeal this Court's July 20, 2010 Order. The second ground raised by J.A. Street was a motion to alter or amend this

FILED
2010 SEP 24 P 3:09
CABELL COUNTY
CIRCUIT CLERK

time was J.A. Street & Associates, Inc.'s, "Motion for Reconsideration of Order Granting S&ME's Partial motion to Dismiss Amended Cross Claims Asserted by J.A. Street & Associates, Inc." "S&ME, Inc.'s, Response to J.A. Street & Associates, Inc.'s Motion for Reconsideration of Order Granting S&ME's Partial Motion to Dismiss Amended Cross Claims Asserted by J.A. Street & Associates, Inc." and "Response of Plaintiffs Thundering Herd Development, L.L.C., and THD Investors 7, L.L.C. to Motion of J.A. Street & Associates, Inc., for Reconsideration of Order Partially Dismissing Cross-Claim." After considering the parties briefings on this issue and after a consideration of applicable law, and the oral arguments of the parties, which were spread upon the record and which are adopted and incorporated herein, the Court does hereby **GRANT, in part, and DENY, in part**, J.A. Street & Associates, Inc.'s Motion as follows:

1. When more than one claim for relief is presented in an action or when multiple parties are involved, Rule 54(b) permits the Court to direct entry of a final judgment as to one or more, but not all of the claims or parties. *See* W.Va. R. Civ. P. 54(b). The Court finds that, given the importance of resolution of issues surrounding the interpretation and application of W.Va. Code §55-2-21 to the parties claims, cross-claims, and counterclaims in the above-styled civil action that there is no just reason for delay, and, that therefore, J.A. Street & Associates, Inc. is permitted to file a Petition for Appeal of said Order. *See* Hubbard v. State Farm Indemnity Company, 213 W.Va. 452 (2003). With regard to J.A. Street & Associates, Inc.'s motion seeking to certify this Court's July 20, 2010 Order granting S&ME, Inc.'s partial Motion to

Court's July 20, 2010 Order. Because J.A. Street's Motion for Reconsideration was filed within ten (10) days of the entry of this Court's July 20, 2010 Order granting S&ME, Inc.'s Partial Motion to Dismiss, this Court will treat J.A. Street & Associates, Inc.'s Motion as a Motion to Alter or Amend Judgment under Rule 59(e) of the West Virginia Rules of Civil Procedure.

Dismiss as a final order for purposes of allowing J.A. Street & Associates, Inc., to file an appeal, the Court does hereby **GRANT** J.A. Street & Associates, Inc.'s Motion and does expressly **ORDER** that this Court's July 20, 2010 Order granting S&ME, Inc.'s partial Motion to Dismiss, which is adopted and incorporated by reference herein, be and hereby is **CERTIFIED** as a final order in its nature and effect pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure with regard to its rulings pertaining to the application of the statute of limitations and W.Va. Code §55-2-21. Those portions of the Court's July 20, 2010 Order granting S&ME's Partial Motion to Dismiss with respect to J.A. Street & Associates, Inc.'s claim that it was a third-party beneficiary to any contract or contracts between S&ME, Inc., and Thundering Herd Development, L.L.C. are not effected by this Order. The Court **DENIES** J.A. Street & Associates, Inc.'s Motion to the extent it seeks a stay of the underlying action during the pendency of any appeal. If J.A. Street & Associates, Inc.'s Petition for Appeal is accepted by the Supreme Court of Appeals of West Virginia, the parties may revisit the issue of a stay at that time, however, in the interim, this matter will proceed according to the Scheduling Order entered January 19, 2010. J.A. Street & Associates, Inc, shall take all practicable steps to file its Petition for Appeal within the next **forty-five (45) days**.

2. The Court hereby **DENIES** J.A. Street & Associates, Inc.'s Rule 59(e) Motion to Alter or Amend this Court's July 20, 2010 Order granting S&ME, Inc.'s Partial Motion to Dismiss except to the limited extent it is modified to be declared a final order under Rule 54(b) as set forth herein.

3. J.A. Street & Associates, Inc., alternatively requested in its motion to permit the deposition transcripts of George Cross, Jeff Harless, and Jim Street to be included in the record

for appeal purposes. No parties objected to this request, therefore, the Court permits the transcripts of the depositions of Jim Street, Jeff Harless, and George Cross to be filed with the Clerk for inclusion in the record for appeal.

The objections and exceptions of parties aggrieved by this Order are noted and preserved.

The Clerk is directed to send certified copies of this Order to counsel of record, the mediator, and to counsel for Bituminous Casualty Corporation and J.A. Street & Associates, Inc., in Civil Action No. 08-C-623 at the addresses listed below

Scott A. Damron, Esquire
Damron Law Office, PLLC
Post Office Box 1822
Huntington, West Virginia 25719-1822
Co-Counsel for Plaintiff, Thundering Herd Development, LLC

J. H. Mahaney, Esquire
Huddleston Bolen, LLP
Post Office Box 2185
Huntington, West Virginia 25722-2185
Co-Counsel for Plaintiff, Thundering Herd Development, LLC

James D. McQueen, Jr., Esquire
Baker, Davis & McQueen, PLLC
Suite 200
Huntington Central Building
320 Ninth Street
Huntington, West Virginia 25701
Counsel for J.A. Street & Associates, Inc.

Gerard R. Stowers, Esquire
J. Mark Adkins, Esquire
Bowles, Rice, McDavid, Graff & Love, LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Counsel for CTL Engineering of West Virginia, Inc.

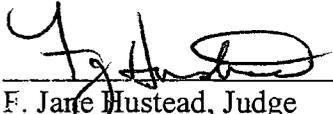
Gene W. Bailey, II, Esquire
Bowles Rice McDavid Graff & Love
Post Office Box 1386
Charleston, West Virginia 25325-1386
Counsel for Bizzack, Inc.

Charles Piccirillo, Esq.
Shaffer & Shaffer, PLLC
P.O. Box 38
Madison, WV 25130-0038
Mediator

Avrum Levicoff, Esq.
Levicoff, Silko & Deemer, P.C.
Centre City Tower, Suite 1900
650 Smithfield, St.
Pittsburgh, PA 15222
Counsel for Bituminous Casualty Company
Civil Action No. 08-C-623

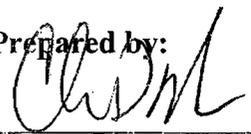
S. Douglas Adkins, Esq.
Cyrus & Adkins, PLLC
636 Fourth Ave.
P.O. Box 2144
Huntington, WV 25722-2144
Counsel for J.A. Street & Associates, Inc.,
Civil Action No. 08-C-623

Entered this 23rd day of September, 2010.



F. Jane Husted, Judge

Prepared by:

 CSB 6086 for

John D. Hoblitzell III, Esq. (WVSB # 9346)
Shuman, McCuskey & Slicer, PLLC
P.O. Box 3953
Charleston, WV 25339-3953
(304) 345-1400

ENTERED Circuit Court Civil Order Book
No. 231 Page 477A this

9/24/10

**Counsel for Defendant/Third-Party Plaintiff
S&ME, Inc.**

Inspected and approved by:

Scott Damron by CON w/ permission

Scott A. Damron, Esq. (WVSB # 935)
DAMRON LAW OFFICE, PLLC
Post Office Box 1822
Huntington, West Virginia 25719
**Co-Counsel for Plaintiff, Thundering Herd
Development, LLC**

and

J. H. Mahaney, Esquire (WVSB # 6993)
Huddleston Bolen, LLP
Post Office Box 2185
Huntington, West Virginia 25722-2185
Co-Counsel for Plaintiff, Thundering Herd Development, LLC

James D. McQueen by CON w/ permission

James D. McQueen, Jr., Esquire
Baker, Davis & McQueen, PLLC
Suite 200
Huntington Central Building
320 Ninth Street
Huntington, West Virginia 25701
Counsel for J.A. Street & Associates, Inc.

Gerard R. Stowers by CON w/ permission

Gerard R. Stowers, Esq. (WVSB # 3633)
J. Mark Adkins, Esq. (WVSB # 7414)
Bowles, Rice, McDavid, Graff & Love, LLP
600 Quarrier Street, P.O. Box 1386
Charleston, WV 25325-1386
**Counsel for CTL Engineering of West Virginia,
Inc.**

Gene W. Bailey, II, Esq. (WVSB # 203)

Gene W. Bailey, II, Esq. (WVSB # 203)
Bowles, Rice, McDavid, Graff & Love, LLP
600 Quarrier Street, P.O. Box 1386
Charleston, WV 25325-1386
Counsel for Bizzack, Inc.