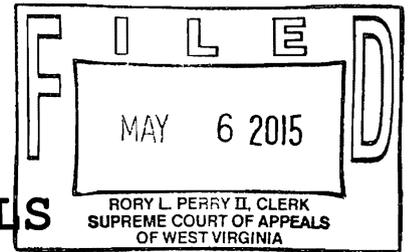


No. 15-0089
IN THE
SUPREME COURT OF APPEALS
FOR WEST VIRGINIA



J.F. ALLEN CORPORATION
a West Virginia Corporation,

Plaintiff/Petitioner,

v.

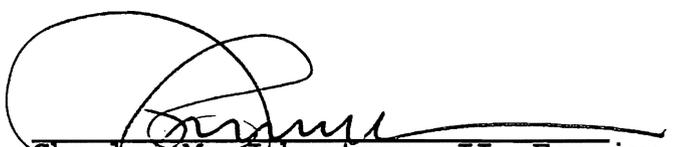
DOCKET NO.: 15-0089

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

Defendant/Respondent.

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

PLAINTIFF - PETITIONER, J.F. ALLEN CORPORATION'S
PETITION FOR APPEAL



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I.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in finding that the Petitioner failed to state a claim for breach of contract upon which relief can be granted.

2. The Trial Court erred by failing to take the allegations of the Petitioner's Amended Complaint as true and to give the Petitioner the benefit of all reasonable inferences. This includes, but is not limited to, the Court's finding that the Petitioner failed to give timely written notice of claims according to Contract notice provisions although the Petitioner alleged timely notice, actual notice, and that the terms of the Contract relating to changes and claims were waived and/or altered by subsequent oral agreement.

3. The Trial Court erred by considering matters outside the scope of the Petitioner's Amended Complaint, including, but not limited to the following:

a. The Trial Court examined and selectively and erroneously applied terms of the Contract although the Contract was not attached to the Petitioner's Complaint or Amended Complaint.

b. The Trial Court erred in finding that the so-called "No Damage for Delay Clause" prevented recovery of delay damages caused by the Owner's own actions or inactions.

c. The Trial Court erred in finding that the Contract placed the risk of liability for underground facilities entirely on the Petitioner.

d. The Trial Court erred in concluding that all delays were anticipated or foreseeable although the Contract specifically allows claims for unanticipated underground conditions and does not prevent delays resulting from the actions or inactions of the owner.

4. The Trial Court erred in dismissing the Petitioner's Amended Complaint with prejudice in response to a Motion to Dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

II.

STATEMENT OF THE CASE

This case involves a series of disputes that arose during construction of a public works construction project involving the Respondent, The Sanitary Board of the City of Charleston, West Virginia, as the Owner, and the Petitioner, J.F. Allen Corporation, as Prime Contractor. The Project involved a series of improvements to the City of Charleston's municipal sewer system. After completion of the Project J.F. Allen filed a complaint in the Circuit Court of Kanawha County, West Virginia, alleging breach of contract on the part of The Sanitary Board and that the Sanitary Board has been unjustly enriched by retaining the benefit of J.F. Allen's work without paying for it. **Appendix p. 1.**

The Sanitary Board responded by filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, attaching the Agreement between the parties and a copy

of a letter from the Project Engineer returning J.F. Allen's Request for Equitable Adjustment without action. **Appendix p. 8.** J.F. Allen opposed the Motion filing "Plaintiff's Response to Motion to Dismiss" arguing that it had indeed stated claims for breach of contract and unjust enrichment upon which it could prevail. **Appendix p. 159.**

At the hearing on the Motion, The Sanitary Board argued that notice pleading required J.F. Allen to identify each of the more than 120 individual events that resulted in additional costs and delays that were the bases for a portion of its claim. Judge Kaufman ruled from the bench that J.F. Allen's Count Two claim for Unjust Enrichment would be dismissed and that J.F. Allen would be allowed thirty (30) days to amend its Complaint regarding its claim for Breach of Contract. **Appendix p. 165.**

No formal order regarding the Judge's ruling was ever entered because the parties could not agree as to the wording of the order, both submitting separate proposed orders. Upon receipt of the competing orders Judge Kaufman scheduled a subsequent hearing to resolve the matter. Shortly thereafter and despite the absence of an entered order, J.F. Allen filed its Amended Complaint. **Appendix p. 185.**

In its Amended Complaint J.F. Allen made a series of allegations concerning unanticipated extra costs, delays, and extra work ordered by The Sanitary Board. It was alleged that J.F. Allen performed its obligations under the Contract, including providing adequate notice of claims, that The Sanitary Board breached the

Contract by, among other things, failing to pay for work performed, and that J.F. Allen suffered substantial losses as a result. **Amended Complaint ¶ 11. Appendix p. 187.**

J.F. Allen also alleged the facts listed below in support of its claims:

The Contract provides that all known underground structures will be indicated on the plans and where conditions are found to be different the contract price would be adjusted accordingly. **Amended Complaint ¶ 12. Appendix p. 187;** Through no fault on the part of J.F. Allen, underground utilities were often unmarked or mismarked resulting in damage to the lines, extra costs of repair, delays and lost production. **Amended Complaint ¶ 13. Appendix p. 187;** Each such event was conscientiously documented by The Sanitary Board's onsite representative. **Amended Complaint ¶ 14. Appendix p. 187.**

Petitioner further alleged that the Contract required The Sanitary Board to compensate J.F. Allen for extra costs associated with encountering underground utilities that were not accurately or properly marked or shown on the plans. **Amended Complaint ¶ 15. Appendix p. 187.** J.F. Allen further asserted that The Sanitary Board had immediate notice of each of the 122 incidents involving unmarked or mismarked underground utilities that were either not accurately located on the plans or were not shown at all and the additional costs and delays suffered by J.F. Allen as a result. **Amended Complaint ¶ 16. Appendix pp. 187 and 188.**

The Amended Complaint alleged that the Contract required notice to J.F. Allen when other work performed by The Sanitary Board may interfere with the Contract work and provided for additional compensation for additional costs that resulted. **Amended Complaint ¶ 17. Appendix p. 188.** The Sanitary Board interfered with J.F. Allen's contract work without giving the required notice. **Amended Complaint ¶ 18. Appendix p. 188.** And, even though the Sanitary Board had knowledge of its own actions allowing other work to interfere with J.F. Allen's contract work but J.F. Allen also put The Sanitary Board on notice that its actions were causing delays and disruptions. **Amended Complaint ¶ 19. Appendix p. 188.**

It was also alleged in the Amended Complaint that The Sanitary Board waived the Contract's provision for written notice of claims for extra compensation by itself failing to follow the provisions of the Contract regarding notice. **Amended Complaint ¶ 20. Appendix p. 188.** Further, it was alleged that The Sanitary Board ordered J.F. Allen to delay final paving and to perform additional work including temporary paving for which there was no bid item in the Contract. **Amended Complaint ¶¶ 21 and 22. Appendix pp. 188 and 189.** J.F. Allen and The Sanitary Board entered into a subsequent oral agreement, in contravention of the change order provision of the Contract, to provide for additional compensation for the extra work performed. **Amended Complaint ¶ 23. Appendix p. 189.** **Ultimately,** The Sanitary Board ordered far more temporary

paving than was agreed by the parties in their initial agreement amending the Contract. **Amended Complaint ¶ 24. Appendix p. 189.**

By orally directing and requiring J.F. Allen to perform work different from that specified in the Contract without utilizing the formal change order process set out in the contract documents The Sanitary Board waived the formal requirement that written notice be required for changes in the work or claims for additional compensation. **Amended Complaint ¶ 25. Appendix p. 189.** J.F. Allen alleged that The Sanitary Board had adequate notice of its claims, by written notice according to the notice provision of the Contract. Despite the fact that The Sanitary Board had actual notice of the greater quantity of temporary paving and waived the requirement of a written notice of changes, J.F. Allen nevertheless provided written notice of its claim. **Amended Complaint ¶ 26. Appendix pp. 189 and 190.**

The Sanitary Board also directed J.F. Allen to perform restoration work on the property of homeowners along the project right-of-way to repair damage that was unrelated to J.F. Allen's contract work. **Amended Complaint ¶ 27. Appendix p. 190.** The Sanitary Board had immediate, actual notice of this extra work since the work was performed at the direction of and under the order of The Sanitary Board. **Amended Complaint ¶ 28. Appendix p. 190.** J.F. Allen alleged that it suffered substantial losses as a result of the acts and omissions of The Sanitary Board. **Amended Complaint ¶ 30. Appendix p. 191.**

The Amended Complaint contains repeated allegations that J.F. Allen gave notice of its claims despite The Sanitary Board's actual notice and waiver of contractual notice provisions. **Amended Complaint ¶ 31. Appendix p. 191.** It was also alleged that J.F. Allen has fully and faithfully performed all of its obligations under its contract with The Sanitary Board. **Amended Complaint ¶ 34. Appendix p. 191.** The Amended Complaint also alleges breach by the Respondent. The Sanitary Board is in material breach of its Contract with J.F. Allen by failing and refusing to pay for work performed pursuant to the Contract, by failing to provide accurate and adequate plans, specifications and contract documents relating to the work to be performed, by controlling and changing J.F. Allen's manner and method of performing its work, by delaying, disrupting and interfering with J.F. Allen's performance of the Contract and by failing and refusing to timely respond to requests for change orders, equitable adjustments, and requests for clarifications and corrections to the project plans and specifications. **Amended Complaint ¶ 37. Appendix p. 192.**

The Amended Complaint then again alleged that The Sanitary Board had contemporaneous, actual notice of each of J.F. Allen's claims and was further provided notice by J.F. Allen in accord with the requirements of the Contract and course of dealing by and among J.F. Allen, The Sanitary Board, and The Sanitary Board's representative, Burgess & Niple Engineers, and that The Sanitary Board waived its right to rely on the notice provision set out in the Contract. **Amended Complaint ¶ 38. Appendix p. 192.** Finally,

Petitioner alleged that it suffered a substantial financial loss as a direct, proximate and foreseeable result of the Sanitary Board's material breach of contract. **Amended Complaint ¶ 39. Appendix p. 193.**

On November 26, 2014, three business days before the matter was heard, The Sanitary Board filed its Motion to Dismiss J.F. Allen's Amended Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. **Appendix p. 196.** The matter was heard by Judge Kaufman on December 2, 2014. **Appendix p. 350.**

In its Memorandum in Support of its Motion and during oral argument at the hearing of the matter, The Sanitary Board again argued that J.F. Allen failed to adequately plead its claims because it had not described each of the 122 occasions when it incurred additional costs and delays as a result of mismarked or unmarked utility lines. The Board also argued, notwithstanding a provision of the Contract specifically allowing claims for subsurface conditions found different, that the Contract placed the risk of loss related to damaged subsurface utility lines entirely on the contractor, and, even though the fact that the adequacy of notice is a disputed factual issue, that J.F. Allen failed to give proper notice of claims. **Transcript of December 2, 2014 Hearing, p. 14. Appendix p. 363.**

J.F. Allen responded, reciting portions of the Amended Complaint alleging breach of contract and a resulting loss. **Transcript of December 2, 2014 Hearing, pp. 35-41. Appendix pp. 384-390.** J.F. Allen argued that it had pled that it gave adequate

notice under the Contract, that The Sanitary Board had contemporaneous, actual notice of J.F. Allen's claims, and that The Sanitary Board waived its right to rely on the contractual notice provision.

At the conclusion of the hearing Judge Kaufman announced his decision saying, "Alright. Well, then I will grant your motion for 12(b)(6)." **Transcript of December 2, 2014, hearing, p. 44. Appendix p. 393.** In support of his ruling, Judge Kaufman further stated, among other things,

I am not going to go through a five million dollar contract when the parties have the expertise and expressed ability through their legal and economic resources to negotiate a contract and then come back after a final payment is made and say a million dollars is still owed. Unless there is some express language right in the contract that you can point to that gives you a cause of action over and above that five million dollars.

Id. at p. 45. Appendix p. 394. The Court also confirmed that it had not converted The Sanitary Board's Motion to one for summary judgment but that the Motion was granted under Rule 12(b)(6). **Id. at pp. 46-47. Appendix pp. 395 and 396.**

The Court explained its ruling and its reliance on the Contract between the parties, which was not attached to the Amended Complaint but was attached as an Exhibit to The Sanitary Board's Memorandum in Support of Its Motion to Dismiss as follows:

You have to read it. You have to start with something, but you have to read it interposed with whether or not the remedies were taken and whether or not the cause of action existed within the corners of the Contract to start

with. Whether it is even possible to bring an action now. At all.

And the 12(b)(6) basically says no. It doesn't even get to the discovery because the contract is so clear between the parties that agreed to it too.

Id. at p. 48. Appendix p. 397.

Following the hearing on January 5, 2015, the Court entered its "Final Order Granting Defendant The Sanitary Board of the City of Charleston's Motion to Dismiss Plaintiff's Amended Complaint," identifying its ruling as a final order and finding that there is no just reason for delay. **Appendix p. 409.** The Court further made a series of findings of fact that are unsupported by the pleadings and are contrary to the allegations of the Amended Complaint. The Court relied almost entirely on its erroneous and incomplete interpretation of the provisions of the Contract between the parties which was not attached to the Plaintiff's Complaint. This included a finding in paragraph 7 of the Order that "the risk of liability with respect to Underground Facilities was contemplated by the parties at the time of contracting and was allocated to J.F. Allen, not CSB." However, in paragraph 11 of the Order the Court references a section of the contract which specifically allows the contractor to claim an equitable adjustment to the contract price where underground utilities were not shown or accurately reflected in the Contract Documents and additional costs are incurred as a result. **Final Order ¶ 11. Appendix p. 413.**

The Court also found as a matter of fact that J.F. Allen had not made any claim of timely written notice despite J.F. Allen's

repeated allegations of notice according to the Contract Documents together with allegations supporting waiver of the notice provisions of the Contract and actual notice of claims. **Final Order ¶ 12. Appendix p. 415.** In paragraph 20 of the Final Order, the Court, relying on its recitation of selected terms of the Contract, found that "Plaintiff failed to timely submit its claim for change for equitable adjustment of the contract price," despite J.F. Allen's allegations to the contrary in its Amended Complaint. **Appendix p. 418.**

In paragraph 32 of the Court's Final Order, the Court concluded that the contract between the parties precluded claims for "alleged extra costs and delay damages based on unforeseen changes including the discovery of underground utilities" and further concluded in paragraph 33 that,

Under the agreement itself CSB owes no such obligation to plaintiff related to Underground Facilities. As between CSB and plaintiff, the Agreement contemplated that Plaintiff would bear the risk of any of the difficulties that might arise from conditions on the Project related to unforeseen locations of underground facilities...

The Court makes these conclusions despite an earlier reference in its own order to a provision which specifically allows the contractor to seek an equitable adjustment in such instances. **Appendix p. 421.**

In paragraph 41 of the Final Order the Court concluded that The Sanitary Board's obligations terminated with actual completion of the Project and issuance of final payment. **Appendix p. 425.**

"At that time, there were no then-existing Claims that had been properly raised and preserved in accordance with the agreed-upon procedure set forth in the Agreement. **Id. at ¶ 41. Appendix p. 425.** The findings are contrary to the allegations of the Amended Complaint. Finally the Court concludes that "because the fulfillment of the Agreement terms is a condition precedent to the pursuit of this breach of contract claim, the Court concludes that the Amended Complaint fails to state a valid claim upon which relief can be granted and should be dismissed with prejudice." **Id. at ¶ 42. Appendix p. 425.** This finding further ignores the allegations of the Complaint as to notice of claims and erroneously dismisses the action with prejudice in response to a motion to dismiss under Rule 12(b)(6).

Following entry of the Final Order Notice of Appeal was timely filed and J.F. Allen has perfected its appeal.

III.

SUMMARY OF ARGUMENTS

1. **J.F. Allen adequately pled the elements of a breach of contract claim.**

The procedural rules under which we operate provide for notice pleading. A complaint should contain a short and plain statement of the nature of a claim together with a demand for judgment. The purpose is to place the defendant on notice as to the nature of the claim asserted against it. But, while the basic

elements of a claim must be shown in a complaint, the plaintiff is not required to set out the facts upon which the claim is based. In this case, it was necessary only for the Petitioner to plead the basic elements of a claim for breach of contract. These are the existence of a complaint, performance by the Plaintiff, breach by the Defendant, and a loss suffered by the Plaintiff as a result. J.F. Allen has adequately pled each of these elements in its Amended Complaint.

The existence of a Complaint is not at issue and J.F. Allen pled that it performed all of its obligations under the Contract, including providing adequate notice of claims or that notice provisions were waived by the conduct of the parties or altered by subsequent agreement. Petitioner alleged that The Sanitary Board breached its Contract by failing to provide adequate plans and specifications, by failing to refrain from interfering with J.F. Allen's work and by failing to pay for increased costs arising from additional work and delays in performance. Finally, J.F. Allen alleged that it suffered a substantial financial loss as a result. As such, the Amended Complaint states a claim for breach of contract upon which it can recover.

2. The allegations of the Amended Complaint should have been taken as true.

When reviewing whether a complaint is procedurally sufficient in response to a motion to dismiss a Trial Court should limit its review to the allegations of the Complaint and accept those allegations as true. In this case, J.F. Allen alleged that

it performed all of its obligations under its Contract with The Sanitary Board and gave notice as required by the Contract. Petitioner further alleged that The Sanitary Board had immediate, actual knowledge of J.F. Allen's claims, that it waived its right to rely on strict adherence to the notice provisions of the Contract and that the terms of the Contract were altered by subsequent oral agreement. Each of these is sufficient, when taken as true, to support J.F. Allen's claim for breach of contract. The Trial Court in this case, disregarded or refused to accept these allegations, instead making findings of fact as to material issues in the absence of evidence including finding that J.F. Allen failed to give notice required by the Contract and that its claims were therefore precluded. This finding and the Court's Final Order granting dismissal are contrary to the Rules of Civil Procedure and the law applicable to the review of 12(b)(6) motions.

3. The Court improperly reviewed, interpreted and erroneously applied the Contract between the parties although it was not attached to the Plaintiff's Complaint.

While the general rule provides that the Court should limit its review to the allegations of the complaint, it has been held that the Court may review matters attached to the Complaint as exhibits. In this case, the lengthy and complex Contract between the parties was attached to neither the Petitioner's original Complaint nor its Amended Complaint. Nevertheless, the Trial Court made the Contract a part of the record and applied selected

provisions from the Contract in concluding, contrary to the allegations of the Complaint and of the Contract for that matter, that J.F. Allen had not provided notice of its claims as required, and that the risk of loss with respect to all costs associated with damage to existing underground utilities was placed on J.F. Allen.

These conclusions were made without giving the Petitioner the opportunity to present evidence as to their applicability and without considering other provisions of the Contract specifically providing for amendment of the Contract Price in the event of losses attributable to unmarked or mismarked underground utilities and were, therefore, inappropriate and in error.

4. An Order granting dismissal under Rule 12(b)(6) is not "with prejudice".

A Court may grant dismissal under Rule 12(b)(6) where a Plaintiff has failed to state a claim. When addressing a motion to dismiss the Court must review the complaint to determine whether it is procedurally sufficient to inform the defendant as to what claims are presented. It is not intended as a vehicle for reviewing the ultimate issues of the case and granting a judgment in favor of the defendant that would prevent the assertion of subsequent claims. In this case, the Court made a series of factual findings as to the ultimate issues of the case and dismissed the case with prejudice while continually affirming that it intended to treat the Respondent's Motion as one for dismissal under Rule 12(b)(6). So, after concluding erroneously that the Amended Complaint in this action failed to state a claim upon which

relief can be granted, the Trial Court compounded its error by dismissing the Petitioner's claims with prejudice, in effect granting final judgment in favor of the Respondent in response to a Motion to Dismiss.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary under the criteria of Rule 18 of the Rules of Appellate Procedure and that the Court would benefit from oral argument in this case. The Petitioner asserts that the case is suitable for a Rule 19 argument as a case involving assignments of error in the application settled law. The Petitioner further asserts that as the Order appealed from involves error in the application of well settled, existing law, the matter is appropriate for a memorandum decision.

V.

ARGUMENT

The purpose of a motion to dismiss is to test the sufficiency of a complaint and to provide the court with a mechanism to remove cases from its docket where it is clear that no relief can be granted. It should not be used as a forum to allow the trial court to apply its own opinions or biases as to the merits of the claim. Nor is it appropriate for the trial court to make findings as to

disputed issues of fact. The trial court in this case erred in dismissing the Plaintiff's Amended Complaint in a variety of ways, discussed in detail below, but most importantly it has taken from the Petitioner its opportunity to prove its case by making a series of findings as to disputed facts that conflict with the allegations of the Petitioner's Amended Complaint. The Trial Court further erred by dismissing the action with prejudice. For these reasons and the reasons argued below, the trial court's order dismissing Petitioner's Amended Complaint should be reversed and this matter remanded for further proceedings.

- 1. The Petitioner's Amended Complaint provided the Defendant with adequate notice of the nature of its claim and was sufficient to meet the requirements of the Rules of Civil Procedure.**

The purpose of a pleading asserting a claim for relief is not to list the facts or evidence required to support a claim. This would result in cumbersome pleadings and would place too high a burden on both the party asserting the claim and the party attempting to answer at the outset of litigation and before discovery has even begun. Our rules of civil procedure provide for notice pleading. As such, a complaint is sufficient if it gives a defendant notice as to the nature of the claim asserted. *Rule 8 of the West Virginia Rules of Civil Procedure* provides, in part, that a pleading asserting a claim "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. ..." *Rule 8, West Virginia Rules of Civil Procedure; Bowers*

v. Wurzburg, 205 W.Va. 450, 519 S.E.2d 148 (1999); *Barker v. Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331 (1969) (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).

This being the case, the burden on a plaintiff in resisting a motion to dismiss is a light one. The plaintiff is required only to allege sufficient information to outline the elements of its claim or to permit inferences to be drawn that those elements exist. In fact, the standard that the plaintiff must meet to overcome a motion to dismiss is liberal and few complaints fail to meet it. *Holbrook v. Holbrook*, 196 W.Va. 720, 474 S.E.2d 900 (1996). The Supreme Court of Appeals views motions to dismiss with such disfavor that it has counseled lower courts to rarely grant such motions. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008); *John W. Lodge Distributing Company, Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Chapman v. Kane Transfer Company, Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). When appraising the sufficiency of a complaint on a motion to dismiss for failure to state a claim the trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *R.K. v. St. Mary's Medical Center, Inc.*, 229 W.Va. 712, 735 S.E.2d 715 (2012); *Roth v. DeFeliceCare, Inc.*, 226 W.Va. 214, 700 S.E.2d 183 (2010); *Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66 (2009).

Even the pleading of conclusions which would not be sufficient to withstand a motion for summary judgment are satisfactory for determining whether a claim has been adequately stated in response to a motion to dismiss. *Guthrie v. Northwestern Mutual Life Insurance Company*, 158 W.Va. 1, 208 S.E.2d 60 (1974). In a case brought by a widow seeking to collect the proceeds of her deceased husband's life insurance policy, a general statement that all of the conditions of the policy had been performed was a sufficient allegation of compliance with the conditions of the policy to support her claim. *Id.*

The notice pleading theory underlying the Rules of Civil Procedure requires that complaints must be read liberally to do substantial justice. *Cantley v. Lincoln County Commission*, 221 W.Va. 468, 655 S.E.2d 490 (2007); *Whorton v. Malone*, 209 W.Va. 384, 549 S.E.2d 57 (2001); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, *supra*. The policy of construing pleadings to do substantial justice is that cases should be decided on their merits, not on how artfully a complaint is drafted. *Cantley v. Lincoln County Commission*, *supra*.

In the present case, the Petitioner, J.F. Allen, has asserted a claim for breach of contract against the Defendant, The Sanitary Board of the City of Charleston, West Virginia. In order to state a claim for breach of contract J.F. Allen was required only to allege facts sufficient to support the existence of a valid, enforceable contract; that it has performed under the contract; that The Sanitary Board has breached its duties 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* § 63:1 (Richard A. Lord, Ed. 4th Ed. West 2009; *Rhoades v. Chesapeake & O. Ry. Co.*, 49 W.Va. 494, 39 S.E. 209 (1901)). J.F. Allen's Amended Complaint more than adequately sets out the facts supporting each of these elements.

The Amended Complaint identified the Contract alleging that Petitioner was awarded the contract as the lowest responsible, responsive bidder in response to The Sanitary Board's solicitation of bids for a public works construction project. **Amended Complaint ¶¶ 5-9. Appendix p. 186.** The Sanitary Board did not dispute the existence of a valid contract and, in fact, attached a copy of the parties' Contract to its Motion to Dismiss the Amended Complaint and relied on selected portions of the Contract in support of its Motion.

J.F. Allen has also adequately alleged its own performance and sufficient facts to meet conditions precedent to recovery. It repeatedly alleged that it gave written notice of delays, disruptions, and extra work encountered during the performance of the Project. In paragraph 19 of the Amended Complaint, J.F. Allen alleged that, despite The Sanitary Board's full knowledge of its interference with J.F. Allen's work and despite The Sanitary Board's disregard of its own obligations to provide notice, J.F. Allen put The Sanitary Board on notice of the delays and

disruptions caused by The Sanitary Board's actions. **Appendix p. 188.**

In paragraph 26 of the Amended Complaint, J.F. Allen alleged that, despite actual notice and waiver by The Sanitary Board of its right to rely on the contract requirement of advance written notice of claims, J.F. Allen nevertheless provided notice of its claims. **Appendix pp. 189-190.** In paragraph 31 of the Amended Complaint, J.F. Allen again alleged that it gave notice of its claims despite The Sanitary Board's actual notice of claims and its waiver of contractual notice provisions. **Appendix p. 191.** In paragraph 34 of the Amended Complaint, J.F. Allen alleged that it fully and faithfully performed all its obligations under the Contract. **Appendix p. 191.** In paragraph 38 of the Amended Complaint, J.F. Allen alleged that it provided notice in accord with the Contract and its course of dealing with The Sanitary Board. It also alleged that The Sanitary Board had actual notice of its claims and that The Sanitary Board waived its right to rely on the notice provisions of the Contract. **Appendix p. 192.** So, J.F. Allen has repeatedly and thoroughly alleged sufficient facts to support its own performance under the contract and to satisfy notice provisions in the contract either through contractually adequate notice or the waiver or amendment of provision requiring written notice.

J.F. Allen has likewise described, in some detail, facts supporting a breach of contractual duties on the part of The Sanitary Board. J.F. Allen described The Sanitary Board's failure to accurately and adequately indicate the locations of underground

facilities on the plans for the Project. **Amended Complaint ¶¶ 12&13. Appendix p. 187.** It also alleged that the Contract requires The Sanitary Board to compensate J.F. Allen for costs associated with underground facilities that were not accurately or properly marked on the plans. **Amended Complaint ¶ 15. Appendix p. 187.** J.F. Allen also described the failure of The Sanitary Board to give notice as required by the Contract when it caused other contractors to be working in J.F. Allen's work zone thereby disrupting and delaying J.F. Allen's work. **Amended Complaint ¶¶ 17 & 18. Appendix p. 188.**

J.F. Allen further alleged that The Sanitary Board directed it to perform extra work involving the installation of temporary paving without issuing a formal change order as required by the Contract and entered into a subsequent oral agreement regarding compensation for that extra work. **Amended Complaint ¶¶ 22-24. Appendix p. 189.** In addition, J.F. Allen alleged that The Sanitary Board had directed J.F. Allen to perform other extra-contractual work related to restoration of property located along the project right of way although the damage being repaired was not related to J.F. Allen's work. **Amended Complaint ¶ 27. Appendix p. 190.** Finally, J.F. Allen alleged that The Sanitary Board breached its contractual obligations owed to J.F. Allen by failing and refusing to pay for extra costs, delays, disruptions and other compensable losses. **Amended Complaint ¶ 36. Appendix p. 192.** In particular, J.F. Allen alleges that The Sanitary Board breached its duties under its contract with J.F. Allen by failing and refusing to pay

for work performed under the Contract; by failing to provide accurate and adequate plans, specifications and contract documents relating to the work to be performed; by dictating and changing the manner and method of J.F. Allen's performance; by delaying, disrupting and interfering with J.F. Allen's performance; and by failing and refusing to timely respond to the requests for change orders, equitable adjustments, and requests for clarifications or corrections in the project plans and specifications. **Amended Complaint ¶ 37. Appendix p. 192.**

Finally, J.F. Allen alleged that it suffered a substantial financial loss as a result of The Sanitary Board's breach and demanded judgment awarding monetary damages. **Amended Complaint ¶¶ 39 and Addendum. Appendix p. 193.** So, J.F. Allen has alleged facts supporting each of the elements of a breach of contract claim against The Sanitary Board.

The purpose of a motion to dismiss under Rule 12(b)(6) is to test the formal sufficiency of the complaint, not to consider the evidence supporting those claims or the trial judge's opinion about the justice of an award. This being the case, J.F. Allen has made more than sufficient allegations to support its claim in response to a motion to dismiss, especially considering the relatively light burden carried by a plaintiff defending such a motion. These allegations are clearly sufficient to give The Sanitary Board adequate notice of the nature of the claims asserted by J.F. Allen.

This is true notwithstanding The Sanitary Board's position, apparently shared by the Trial Court in this case, that notice

pleading required J.F. Allen to identify in its Complaint each of the more than one hundred twenty separate events relating to damage to unmarked or mismarked underground utility lines. **See Transcript of September 16, 2014 Hearing, pp. 17 and 18; Appendix pp. 181 and 182** ("Count One. You have 30 days to amend that complaint on the 125 counts to let him know what they are.") This flies in the face of the long established standards for reviewing the sufficiency of a complaint in response to a motion to dismiss under Rule 12(b)(6).

J.F. Allen's Amended Complaint in this case was not liberally construed nor was substantial justice done. For these reasons, the Trial Court erred in finding that J.F. Allen failed to state a claim upon which relief can be granted and its Final Order dismissing the Petitioner's Amended Complaint should be reversed and the matter remanded for further proceedings.

2. The Trial Court ignored or failed to accept the allegations of the Amended Complaint as true.

The Trial Court's Final Order dismissing J.F. Allen's Amended Complaint was largely based on its finding that J.F. Allen failed to give proper notice of its claims for additional compensation. This was based on the Court's findings that the Contract between the parties established protocols for requesting changes and procedures for addressing claims. **Final Order ¶¶ 12 and 13. Appendix pp. 415 and 416.** The Court also erroneously found that J.F. Allen did not make any claim of timely written notice and, further, found as a matter of fact that J.F. Allen failed to timely submit its claims for changes or equitable adjustments for the

Contract Price. **Final Order ¶¶ 12 and 20. Appendix pp. 415 and 418.**

These findings address disputed issues of fact and are in direct conflict with several pleadings in J.F. Allen's Amended Complaint. In paragraph 26, J.F. Allen alleged that, despite the fact that the Defendant had actual notice of extra work having ordered it, and despite The Sanitary Board's waiver of the requirement of advance written notice, J.F. Allen nevertheless provided written notice of its claim. **Amended Complaint ¶ 26. Appendix pp. 189 and 190.** Also, in paragraph 19, J.F. Allen alleged that, despite The Sanitary Board's full knowledge of interference by its other contractors with J.F. Allen's work and its own failure to provide contractually mandated notice, J.F. Allen put the Sanitary Board on notice of the resulting delays and disruptions. **Amended Complaint ¶ 19. Appendix p. 188.**

In paragraph 31 of the Amended Complaint, J.F. Allen alleged that it gave notice of its claims despite The Sanitary Board's actual notice of the claims and despite the Board's waiver of contractual notice provisions. **Amended Complaint ¶ 31. Appendix p. 191.** Finally, J.F. Allen alleged in paragraph 38 of the Amended Complaint, 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. To the extent that any alleged notice provision set forth in a written contract was not strictly complied with, such term of the contract was waived by CSB's actions or inactions.

Amended Complaint ¶ 38. Appendix p. 192.

So, J.F. Allen did, in fact, allege that it provided written notice in accord with the Contract. For purposes of a motion to dismiss under Rule 12(b)(6), the 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). The Trial Court in this case failed to accept the allegations noted above as true, instead relying on the defendant's arguments, without evidence, that proper notice had not been given.

As noted above, J.F. Allen also alleged that The Sanitary Board had immediate, actual notice of each incident of delay and extra cost resulting from damage to an unmarked or mismarked underground utility line. **See Amended Complaint ¶¶ 14 and 16. Appendix pp. 187 and 188.** And, it alleged that The Sanitary Board had actual notice of other claims related to extra work as it had ordered J.F. Allen to perform it knowing it was not contract work. **See Amended Complaint ¶¶ 28 and 38. Appendix pp. 190 and 192.** J.F. Allen also alleged that The Sanitary Board ignored its own obligations to give written notice when its other contractors would be interfering with J.F. Allen's work. **Amended Complaint ¶¶ 17-20. Appendix p. 188.** It also alleged that The Sanitary Board ignored the change order protocol when directing and ordering extra work both in the application of large quantities of temporary paving and in the performance of unrelated restoration work. **Amended Complaint ¶¶ 21, 27 and 28. Appendix pp. 188 and 190.** Finally, J.F. Allen alleged that its discussions with The Sanitary Board,

including the Board's direction that it perform additional work in the form of additional temporary paving and its promise of additional compensation for that work, constituted a subsequent oral agreement amending the terms of the Contract. **Amended Complaint ¶¶ 23 and 24. Appendix p. 189.**

West Virginia law recognizes that contract provisions providing for timely written notice of changes or claims can be amended, waived or abrogated by the conduct of the parties. A constructive change may be made by means other than by written change order, such as by oral direction or by knowledge of an acquiescence in some change made necessary by an unforeseen condition. West Virginia courts have long and repeatedly recognized that parties to a contract may, by their conduct, waive or modify the requirement of a written change. In one often cited case from the Northern District of West Virginia, *Caldwell & Drake v. Schmulbach*, 175 F. 429 (N.D. W.Va. 1909), the Court found an implied obligation to pay the reasonable cost of alterations or requests to perform extra work. The Court stated:

If, therefore, extra work was performed by the contractors here, under express oral contract upon the part of the Owner personally or by and through its agents, the architects, or under such circumstances implying a consent to be liable therefore, such extra work should be allowed for; ...

Id. at 437.

In *Ground Breakers, Inc. v. City of Buckhannon*, 188 W.Va. 42, 422 S.E.2d 519 (1992), the Court combined waiver and subsequent oral modification arguments and found that where unanticipated work

became necessary as a result of an unforeseen condition and the need for extra work was known to and discussed by both parties to the contract, and where the contractor testified that the owner orally authorized the additional work, the contractor's claim was not barred by the requirement of a written change order. *Id.* Also, in *W.L. Thaxton Construction Co. v. O.K. Construction Co., Inc.*, 170 W.Va. 657, 295 S.E.2d 822 (1982), the Supreme Court of Appeals held that the requirement of a written change order could be modified or abrogated by subsequent oral agreement between the parties. *Id.* The Court observed in *W.L. Thaxton Construction*, that there is no more validity in a written contract not to agree orally than there is in an oral contract not to agree in writing and found that whether a written contract had been orally modified was a question of fact for the jury. *Id.*

So, a variety of circumstances exist where the courts have refused to enforce strict notice requirements of a contract. In this case, J.F. Allen has alleged that The Sanitary Board waived the requirement of written notice by ordering extra work without requiring a written change order, by failing to adhere to its own obligations to provide written notice and by acquiescing in extra work performed by J.F. Allen with the Board's actual knowledge of its intent to claim additional compensation. It also entered into a subsequent oral agreement as to additional compensation for work not provided for in the Contract.

In addition, a property owner may be estopped from asserting a lack of contractual notice where it has, by its own actions or

inactions, caused or contributed to additional costs or delays on the part of the contractor. For example, it has been held that while the failure to perform within the contractual time is a breach, a contractor should not be prevented from asserting a claim for damages resulting from the delay if it was caused by the owner. *Elkins Manner Associates v. Eleanor Concrete Works, Inc.*, 183 W.Va. 501, 396 S.E.2d 463 (W.Va. 1990).

Other jurisdictions have likewise found that an owner should not be allowed to rely on lack of written notice of delays to insulate itself from the consequences of its own actions or inactions. An owner should not be permitted to actively interfere with contract completion and then complain that the contractor failed to give written notice of the resulting delay. *CDL (Michie) Section 15.3c*. See also, e.g. *General Insurance Co. v. Commerce Hyatt House*, 5 Cal.App.3d 460, 85 Cal.Rptr. 317 (1970); *Johnson v. Thompson Construction*, 1 Wash.App. 194, 460 P.2d 291 (1991).

The courts of other jurisdictions have also often held that if the owner has actual knowledge of the delay, formal notice may be unnecessary. This is particularly true if the delay is the owner's fault or under its control, such as defective or incomplete plans or specifications. *Chaney and James Construction Company, Inc. v. United States*, 421 F.2d 728 (Ct. Cl. 1970); *Kelly Electric Inc.*, DOT CAB No. 71-34, 71 B.C.A. (CCH) Section 9127 (1971). For example, in *James Corp. v. North Allegheny School District*, 938 A.2d 474, WL 4208589, 2007 P.A. Commonwealth 636 (November 30 2007), the contractor failed to give notice of a delay within a

contractually set period after the event that gave rise to the claim. The court noted that the owner knew that the project was behind schedule and knew the operative facts that gave rise to the delays and the contractor's claims and allowed the contractor's claim for delay damages.

Sometimes courts have even allowed updates to a critical path method (CPM) schedule to serve as notice of delay. In *Vanderlinde Electric Corporation v. City of Rochester*, 388 N.Y.S.2d 388, 54 A.D.2d 155 (1976), the court held that owner was fully and continuously informed of delays through the monthly schedule updates and that further formal notice was not required. Meeting minutes have also been found to satisfy the requirements of written notice of a claim where the minutes documented the owner's knowledge of the contractor's loss and anticipated claim. *Welding, Inc. v. Bland County Service Authority*, 261 Va. 218, 541 S.E.2d 909 (Va. 2001).

In other cases, an owner's course of dealing or informal conversations with the contractor have been found sufficient to meet the requirements of a notice of claim. In *Redondo Construction Corp. v. Puerto Rico Highway & Transport Authority*, 678 F.3d 115 (1st Cir. 2012), failure to give formal notice of a claim did not prevent a contractor's claims where the owner had dealt informally with the contractor and had been orally advised of the contractor's claims and thus had actual knowledge of the claims. As noted above, the West Virginia Supreme Court of Appeals has long recognized that the requirement of a writing can be waived

by the conduct of the parties, for example where past billing practices indicate that the writing requirement has been disregarded. *Pasquale v. Ohio Power Company*, 186 W.Va. 501, 413 S.E.2d 156 (1991); *Groundbreakers, Inc. v. City of Buckhannon*, *supra*.

In this case, J.F. Allen has alleged facts supporting a finding of waiver of notice provisions or subsequent oral agreement even if it had not alleged adequate notice in accord with the requirements of the contract. It alleged that The Sanitary Board had actual knowledge of each of its claims and, with respect to the additional costs and delays attributed to damage to unmarked or mismarked underground utilities, that the Board's project representative had conscientiously documented each event. **Amended Complaint ¶¶ 14 and 16. Appendix pp. 187 and 188.**

Further, the allegations of the complaint reflect that the parties had ongoing conversations about extra work to be performed by J.F. Allen, that such work was directed by The Sanitary Board with the expectation of additional compensation on the part of J.F. Allen, and that J.F. Allen was delayed and caused to incur additional costs as a direct result of the actions or inactions of The Sanitary Board. These allegations are more than adequate to support a claim for damages under the law of this state. For these reasons, the Trial Court erred in granting The Sanitary Board's Motion to Dismiss and by disregarding or failing to give appropriate weight to the allegations of the Plaintiff's Complaint

and its Final Order should be reversed and remanded for further proceeding.

3. **The Petitioner's Amended Complaint should have been examined on its own merits without inappropriately and inaccurately applying portions of the Contract which was not attached to the Complaint.**

The sufficiency of the Complaint should be determined based on whether the allegations stated therein are sufficient, when taken as true, to state a claim or, at least, to create an inference that circumstances supporting the claim exist. Matters outside the pleadings should not be considered. If matters outside of the pleadings are considered by the court the motion should be treated as one for summary judgment not as a motion to dismiss under Rule 12(b)(6). *Rhododendron Furniture & Design, Inc. v. Marshall*, 214 W.Va. 463, 590 S.E.2d 656 (2003); Syl. Pt. 4, *United States Fidelity and Guaranty Company v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965), overruled on other grounds by *Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 211 S.E.2d 674 (1975). See also, *Franklin D. Clickly v. Robin J. Davis, and Louis J. Palmer, Jr.*, *Litigation Handbook on West Virginia Rules of Civil Procedure*, Section 12(b)(6) [3], at 354 (3d Ed. 2008) ("Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6). However, if matters outside the pleading are presented to the court and are not excluded by it, the motion must be treated as one for summary judgment and disposed of under Rule 56."). In this case, the Court has been quite clear that it considered the

Respondent's Motion as a motion to dismiss, not as a motion for summary judgment. See Final Order pp. 1 and 17; Appendix pp. 410 and 417; Transcript of December 2, 2014 Hearing pp. 44, 45, and 46-47. Appendix pp. 393, 394, 395-396.

The Supreme Court of Appeals has, however, held that a court ruling on a motion to dismiss for failure to state a claim may properly consider exhibits attached to the complaint without converting the motion to one for summary judgment. Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). The Court declined to extend this rule further despite its recognition that courts in other jurisdictions have allowed a court to consider materials incorporated within the complaint even if they are not attached to it. *Id.*

The extensive and complex contract between the parties in this action was not attached to or made an exhibit to J.F. Allen's Amended Complaint, nor was it appended to its original Complaint. The Trial Court nevertheless found that the contract was referenced in J.F. Allen's Amended Complaint and was integral to its claims and reviewed and applied selective portions of the Complaint as support for its dismissal of the Amended Complaint. In doing so it relied on an unreported decision from the United States Federal District Court for the Southern District, *Ballard v. Fifth Third Bank*, 2010 W.L. 3359572 (S.D. W.Va., August 23, 2010). But, J.F. Allen's Amended Complaint did no more than allege the existence of a complaint and the elements necessary to support a claim for breach of contract. It did not cite or quote any provisions of the

contract or otherwise seek to incorporate it by reference. To hold that the mere allegation of the existence of a contract and a breach thereof is sufficient to allow the Court to review and selectively apply portions of the Contract to support a dismissal under Rule 12(b)(6) would mean that the Court could review the contract between the parties in every breach of contract claim whether or not the contract was annexed to the complaint. The general rule stating that the court should consider only matters alleged in the Complaint would be completely abrogated with respect to breach of contract claims because it is impossible to assert a claim for breach of contract without referring, at least, to the existence of the contract between the parties.

Further, having reviewed the Contract, the court erred by applying it in a haphazard and one-sided manner. In its Final Order, the Trial Court referenced or quoted provisions of the Contract, including Article 12.03 which limits recovery of damages for delay under certain circumstances. These circumstances include delays within the control of the contractor or delays resulting from events beyond the control of either the owner or contractor. It does not, however, limit damages for delays caused by the owner's own actions or inactions. J.F. Allen asserted in its Amended Complaint that it was delayed and gave notice of claims for delays resulting from The Sanitary Board's failure to provide adequate and accurate plans and specifications and from the Board's interference with its contract work. Both result from the actions or inactions of the Respondent, The Sanitary Board.

The Trial Court also found that J.F. Allen's claims with respect to losses arising from damage to unmarked or mismarked underground utility lines were precluded because it found that the Contract places all of the risk of encountering unmarked underground utilities on J.F. Allen. This conclusion is nonsensical as the contract makes specific provision for adjustments in the contract price for extra work associated with the cost of repairing an "Underground Facility" which was not shown or indicated with reasonable accuracy in the contract documents. General and Supplement Conditions, Section 4.04; **Final Order p. 7. Appendix p. 415.** The Trial Court should not have concluded that J.F. Allen's claims for additional compensation resulting from the cost of repairing unmarked or mismarked "Underground Facilities" are precluded by the terms of the contract when the contract contains a provision specifically allowing such claims.

To uphold the Court's review of the Complaint in this action would create a new rule allowing the Trial Court to review the terms of the contract in response to every motion to dismiss a complaint founded on breach of contract. Surely this was not the intent of the Court when it established the rule announced in *Forshey*. Further, having reviewed and attempted to apply the contract, the Court should not have applied it in such a one-sided manner that it ignored provisions specifically allowing the types of claims asserted by J.F. Allen. For these reasons, the Trial Court's Final Order should be reversed and this matter remanded for further proceeding.

4. The Trial Court should not have dismissed Petitioner's Amended Complaint, with prejudice, in response to Respondent's Motion to Dismiss.

Even when a court examining a complaint in response to a motion to dismiss under Rule 12(b)(6) has determined that the complaint is not sufficient to state a claim and should be dismissed, it should not dismiss the complaint with prejudice. A finding that a plaintiff has failed to state a claim should not mean that the plaintiff is precluded from ever attempting to do so again. It has been repeatedly held in this state that "if a summary judgment is entered under Rule 56 R.C.P., it is a dismissal with prejudice; whereas, a judgment sustaining a motion to dismiss under Rule 12(b)(6) R.C.P. is not a dismissal with prejudice." Syl. Pt. 4, in part, *United States Fidelity and Guaranty Company v. Eades, et al.*, 150 W.Va. 238, 144 S.E.2d 703, *abrogated on other grounds by Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

In this case, the Court, while clearly intending to address Respondent's Motion as a motion to dismiss under Rule 12(b)(6), confirming this in response to a direct question by counsel at the hearing on the matter, nevertheless dismissed J.F. Allen's Amended Complaint with prejudice. To dismiss an action with prejudice in response to a 12(b)(6) motion, as is the case here, is in effect granting judgment in favor of the defendant although no claim had been asserted. To grant judgment in favor of a defendant without

allowing an aggrieved party an opportunity to present evidence in support of a claim is unjust and contrary to the law.

Here the Trial Court has concluded that the contract, which should not have been reviewed in the first place in response to a motion for dismissal, was so well drafted in favor of The Sanitary Board that it would preclude any subsequent effort on the part of J.F. Allen to assert any claim based on it.

But even if that were the case, the Trial Court failed to recognize the well-established, fundamental principle of contract law that a valid, unambiguous written contract may be modified or superceded by a subsequent contract based on valuable consideration. *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978). In the *John Lodge* case, the Plaintiff's Complaint alleged, among other things, that the contract between the parties was modified by subsequent oral agreements and that new, amended or implied contracts were created. The Court held that it was not beyond doubt that the Plaintiff could prove no set of facts in support of its claim that would entitle him to relief and that the Trial Court's Order granting a motion to dismiss was in error. The Plaintiff in that case alleged that the contract between the parties was altered by subsequent oral and written agreements between the parties and the Plaintiff was not required to submit evidence in order to withstand a motion to dismiss.

For these reasons the court erred in granting the Respondent's Motion to Dismiss with prejudice and the Court's Final Order should be reversed and remanded for further proceedings.

VI.

CONCLUSION

J.F. Allen's Amended Complaint filed in this action against The Sanitary Board of the City of Charleston, West Virginia, was sufficient to state a claim for breach of contract. Our system of notice pleading and liberal construction of complaints requires only that a Plaintiff plead the basic elements of a breach of contract claim, that is the existence of a contract, the performance of conditions precedent to payment by the plaintiff, a breach of contractual obligations by the defendant, and a loss suffered by the plaintiff as a result. J.F. Allen has adequately pled each of these elements and, therefore, has adequately stated a claim for breach of contract in this case.

The Trial Court failed in reviewing Petitioner's Complaint to take the allegations of the Amended Complaint as true. The Court either disregarded the allegations of the Complaint as to notice, waiver, or subsequent agreement or gave greater weight to the Defendant's unsupported arguments. Further, the Court improperly considered and erroneously applied the written contract between the parties though it was not made an exhibit to the Complaint. The Court's review should have been limited to a determination of

whether the allegations of the Complaint, when taken as true, were sufficient to meet the elements of a claim for breach of contract. The danger of forming conclusions without having had the benefit of reviewing evidence in the case is demonstrated in this case by the Court's Findings that the terms of the written contract preclude any claim by J.F. Allen despite its allegations that it gave notice of claims according to the terms of the Contract or that notice of claims were waived or altered by subsequent oral agreement. These allegations are certainly sufficient to create a question of fact as to whether the elements of a claim were adequately alleged.

Finally, while the Court was clear that it intended to address The Sanitary Board's Motion as one for dismissal under Rule 12(b)(6), it granted dismissal with prejudice, in effect granting judgment in favor of The Sanitary Board as to any claims by J.F. Allen relating to the Project.

For these reasons, as argued above, the Court erred by granting The Sanitary Board's Motion to Dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and the Court's Final Order granting dismissal should be reversed and the matter remanded to the Trial Court for further proceeding.

NO. 15-0089

IN THE SUPREME COURT OF APPEALS OF 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.

CERTIFICATE OF SERVICE

I, Johnson W. Gabhart, counsel for the Plaintiff, J.F. Allen Corporation, do hereby certify that on this 6th day of May, 2015, served a true copy of the foregoing "**Plaintiff - Petitioner, J.F. Allen Corporation's, Petition for Appeal**", via U.S. Mail, postage prepaid, addressed to the following:

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