IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

MARKWEST LIBERTY MIDSTREAM & RESOURCES, L.L.C.,

Plaintiff/Counterclaim Defendant,

v.

BILFINGER WESTCON, INC.,

Defendant/Counterclaim Plaintiff/Third-Party Plaintiff,

v.

MARKWEST LIBERTY BLUESTONE, LLC, MPLX LP, MARKWEST ENERGY PARTNERS LP, THE HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY OF CONNECTICUT, TEAM INDUSTRIAL SERVICES, INC., FURMANITE AMERICA, INC., O'DONNELL CONSULTING ENGINEERS, INC., CEMI, LLC, AND QUALITY INTEGRATED SERVICES, INC.,

Third-Party Defendants.

Civil Action No.: 16-C-66
Presiding Judge: H. Charles Carl, III
Resolution Judge: Paul T. Farrell

ORDER GRANTING WESTCON'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Pending before the Court is Bilfinger Westcon, Inc.'s ("Westcon") Motion for Partial Judgment on the Pleadings (the "Motion"). The Motion pertains to MarkWest Liberty Midstream & Resources, L.L.C.'s ("MarkWest") claimed damages for all monies related to allegedly defective welding on pressure vessels at its Mobley, West Virginia natural gas processing plant. MarkWest opposes the Motion. As set forth below, the Court **FINDS** that Westcon's Motion should be granted.

I. Standard of Review

1. Pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."[1] Essentially, a motion for judgment on the pleadings is like a delayed motion to dismiss, which "presents a challenge to the legal effect of given facts rather than on proof of the facts themselves." *Ward v. Ward*, 236 W.Va. 753, 757, 783 S.E.2d 873, 877 (2016) (internal quotations and citations omitted). Accordingly, for purposes of a motion for judgment on the pleadings, factual allegations contained in the Complaint are taken to be true. *Id.* (internal quotations and citations omitted).

2. Issues arising from a clear and unambiguous contract provision present questions of law, and therefore, are particularly well-suited to judgment on the pleadings. *Wood v. Acordia of W.Va., Inc.*, 217 W.Va. 406, 411, 618 S.E.2d 415, 420 (2005) ("[I]nterpretation of contract language is a question of law."); Syl. Pt. 1, *Toppings v. Rainbow Homes*, 200 W.Va. 728, 490 S.E.2d 817 (1997) ("It is the province of the circuit court, and not of a jury, to interpret a written contract."). Indeed, "[i]f a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law[.]" *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 66 n.26, 459 S.E.2d 329 n.26 (1995).

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[1] This Court notes MarkWest's invitation to treat the Motion as a summary judgment motion. The parties have not presented, and this Court has not considered, information extrinsic to the pleadings in relation to the Motion. The Supreme Court of Appeals of West Virginia has stated, "it is well-settled that the summary judgment standard applies only when the court considers information extrinsic to the pleadings. . . . [i]t is only then that the motion on the pleadings is transformed into a motion for summary judgment." *Copley v. Mingo Cnty. Bd. of Educ.*, 195 W.Va. 480, 484 n.9, 466 S.E.2d 139, 143 n.9 (1995). In light of this clear directive by the Supreme Court of Appeals, this Court declines MarkWest's invitation to treat the Motion as a motion for summary judgment.

II. Findings

3. The sole issue presented by Westcon's Motion arises from a contract ("the Contract") under which Westcon was to perform welding work on pressure vessels at MarkWest's Mobley natural gas processing plant.[2] Two sections of the contract are particularly relevant to the instant motion. First, Section 10 governs warranties. *See* Def's Mot., Ex. 1. Second, Section 23 governs termination. *Id.* Section 10.0 of the Contract provides, in relevant part, as follows:

> 10.1 [Westcon] warrants that the Scope of Work shall be performed and completed in accordance with the terms of this Contract and all applicable federal, state and local laws, ordinances and governmental rules and regulations; . . . that all Work performed under this Contract shall conform in all respects to the drawings and specifications, if any, and shall be performed in a good and workmanlike manner and shall be free from defective workmanship.
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> . . . .
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> 10.2 If during the performance of the Scope of Work or within one (1) year after the completion of the Scope of Work or termination of this Contract, any portion of the Scope of Work or its performance fails to conform to the requirements of the paragraph above, [Westcon] shall promptly correct, at [Westcon's] own expense, such a nonconformance after receipt of a written notice from [MarkWest] which shall be given within thirty (30) days after discovery and evaluation of such nonconformance. Contractor shall remedy promptly (but in no event later than five (5) days following notice from [MarkWest]) at its expense defects which appear during the term of this warranty and if [Westcon] does not remedy those defects in a timely fashion, then [MarkWest] may arrange for the remedy thereof, all at [Westcon's] expense. . . .

Under Section 10.2 of the Contract, MarkWest must provide Westcon an opportunity to cure before it may collect damages for any alleged failure to conform to the requirements in Section 10.1.

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[2] There are three contracts at issue in this overarching litigation under which MarkWest seeks damages, but the specific contract under which Westcon was to perform welding work on the pressure vessels was the Mobley V Plant Contract. Compl. ¶ 70.

4. MarkWest alleges in its Complaint that on May 24, 2016, Westcon forwarded it a letter by a third-party expert in which he opined that the pressure vessels at the Mobley natural gas processing plant were improperly welded.[3] Compl. ¶ 97. MarkWest further alleges that, on May 26 and 27, 2016, it abruptly terminated Westcon by letter and ordered Westcon to leave the worksite. Compl. ¶ 114. Mark West then filed this lawsuit seeking damages related to the allegedly defective welds. It is undisputed that MarkWest did not provide Westcon an opportunity to cure the allegedly defective welding. In fact, in its Response, MarkWest simply argues that it invoked the Termination for Cause Provision in Section 23. *See* Pl's Resp., p. 2.

5. Because MarkWest did not adhere to the procedure in the Contract by which it could collect damages for breach of contract for defective work, its claim for damages must fail as a matter of law. As courts have found, a terminating party who fails to provide the other party with an opportunity to cure cannot recover damages related to the alleged breach. *See, e.g.*, *IP Global Inv. Am., Inc. v. Body Glove IP Holdings, LP*, Case No. 2:17-cv-06189, 2018 U.S. Dist. LEXIS 194461, at *9—11 (C.D. Cal. 2018) (granting plaintiff's motion for partial summary judgment on defendant's counterclaim seeking damages for breach of contract because defendant failed to comply with contract's notice and right-to-cure provision, notwithstanding the fact that the defendant may have been permitted to terminate the contract for the complained-of breach). *Un Boon Kim v. Shellpoint Partners,* LLC, Case No. 15-cv-611, 2016 U.S. Dist LEXIS 44144, at *23 (S.D. Cal. 2016) (dismissing plaintiff's claim on same grounds and not passing judgment on

[3] In its Motion, Westcon disputes that the welding work it performed on the pressure valves was defective. For the limited purpose of ruling on this Motion for a Judgment on the Pleadings, this Court takes the allegations contained in the Complaint as true. By doing so, this Court does not pass judgment on any allegation contained in MarkWest's Complaint for the larger purpose of the overarching litigation between the parties.

whether plaintiff was permitted to terminate contract with defendant); *Shelter Prods. v. Steelwood Constr. Inc.*, 307 P.3d 449, 461 (Ore. Ct. App. 2013) (internal citations omitted) ("[I]n the absence of an opportunity to correct allegedly defective work, . . . where a party has terminated a contract for convenience, that party may not then counterclaim for the cost of curing any alleged default."); *Scherer Constr. LLC v. Hedquist Constr. Inc.*, 18 P.3d 645, 657—58 (Wyo. 2001) (affirming trial court's determination that terminating party was not entitled to offset based on cost of correcting subcontractor's defective work because terminating party did not strictly comply with right-to-cure provision in the subcontract); *Bruning Seeding Co. v. McArdle Grading Co.*, 439 N.W.2d 789, 791 (Neb. 1989) (General contractor acted wrongfully when, "[i]nstead of complying with the notice provisions that [it] itself demarcated in the subcontract, [the general contractor] chose merely to hire another subcontractor to perform the work, without giving [the subcontractor] the opportunity to cure any defect.").

6. MarkWest bases its opposition to the Motion on Section 23.0 of the Contract, which enumerates certain circumstances under which MarkWest may terminate Westcon for cause, take possession of the worksite on the termination date, and withhold future payments. However, Westcon made clear in the Motion that the issue of whether MarkWest had the right to terminate the Contract is not an issue currently before the Court. The Motion also does not present the issue of whether MarkWest had the right to take possession of the worksite or to withhold future payments from Westcon. The sole issue before the Court is whether MarkWest may maintain an action to collect all monies related to allegedly defective welding on the pressure vessels. Of particular importance to the Court is the fact that Section 10.0 of the Contract resolves this issue, *even in the circumstance of the Contract being terminated for cause*. Under Section 10.0,

MarkWest must provide Westcon an opportunity to cure before it can seek damages for the allegedly defective welding at issue.

7. Further, the Court is not persuaded by MarkWest's assertion that Section 23.0 of the Contract operates to the exclusion of Section 10.0 under the facts of this case. Section 10.1 plainly states that it applies to work that fails to conform to the Contract, work that fails to conform to the law, and defective workmanship. Section 23.0 contains the same requirements regarding contractual compliance (§ 23.1.6); compliance with federal, state, and local laws (§ 23.1.8); and work quality (§ 23.1.5). These overlapping provisions can be easily harmonized by application of their plain language: even if termination "for cause" is permitted under Section 23.0, an action for damages is not permitted absent compliance with Section 10.2 for items (such as defects) that are covered by Section 10.0. Moreover, the plain language of Section 10.2 requires notice of and an opportunity to cure purported defects in the work "during performance of the Scope of Work or within one (1) year after . . . *termination of this Contract.*" (Emphasis added). In other words, Section 10.2 expressly contemplates and provides for its own application even if the Contract is terminated. This plain-language reading is the only way to harmonize these overlapping provisions and give meaning to all provisions in the Contract as is required under West Virginia law. *See* Syl. Pt. 1, *Wood Coal Co. v. Little Beaver Mining Corp.*, 145 W.Va. 653, 654, 116 S.E.2d 394, 395 (1960) (citing Syl., *Clayton v. Nicely*, 116 W.Va. 460 (1935)) ("A contract must be considered as a whole, effect being given, if possible, to all parts of the instrument."). The contract, and specifically the termination for clause provision, clearly contemplates its use in the event of a termination for cause. For this reason, the Court does not find MarkWest's argument that Section 23.0's termination provision operates to the exclusion of Section 10.0. The Court finds the contract's provision contained within Section 10.0 of the contract must be enforced.

8. MarkWest fails to cite any legal authority for the proposition that it may ignore the clear provisions of Section 10.0 of the Contract and collect damages against Westcon under the facts of this case. In its response to the Motion, MarkWest cites two cases from West Virginia involving transactions in goods under Article II of the Uniform Commercial Code. *City Nat'l Bank of Charleston v. Wells*, 181 W.Va. 763, 384 S.E.2d 374 (1989) (revocation of goods); *In re Jones*, 397 B.R. 775, 794 (S.D. W.Va. 2008) (repossession of a car). Clearly, neither of these cases apply here because the Motion involves a construction contract, not a transaction in goods. W.Va. Code § 46-2-102 (1963) ("[T]his article applies to transactions in goods[.]").

9. Similarly, the other cases cited by MarkWest are irrelevant as well because they address an issue not currently before the Court: whether a contract was properly terminated. *See* MarkWest Resp. at 9—10 (citing *Milner Hotels, Inc. v. Norfolk & W. Ry. Co.*, 822 F. Supp. 341 (S.D. W.Va. 1993); *Allied Health Ass'n, Inc. v. Arthocare Corp.*, Case No. C 05-04276, 2009 WL 1424509 (N.D. Cal. 2009); *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 599 Pa. 546, 962 A.2d 639 (2009); *Larken Inc. v. Larken Iowa Cty. Ltd. P'ship.*, 589 N.W.2d 700 (Iowa 1998); *M & M Elec. Contr., Inc. v. Cumberland Elec. Membership Corp.*, 529 S.W.3d 413 (Ct. App. Tenn. 2016)). Notwithstanding MarkWest's assertion that it had the right to terminate the Contract for safety reasons, it cannot argue that being able to collect damages from Westcon was necessary for the safety of its workers. Accordingly, MarkWest's arguments are easily rejected.

10. MarkWest has failed to cite any legal authority under which it may evade the procedure by which it was contractually required to abide in order to collect certain damages from Westcon in this case. Accordingly, the Court finds that, under the plain and unambiguous terms contained in Section 10.0 of the Contract, MarkWest was required to provide Westcon an opportunity to cure its allegedly defective work before it could seek damages from Westcon related to its welding on

the pressure vessels. The Court further finds that MarkWest failed to do so and that this failure is dispositive on the issue of whether it may collect damages from Westcon related to the allegedly defective welds. The Court finds that this remedy is unavailable to MarkWest as a matter of law.

III. Conclusion

For the foregoing reasons, and having considered the briefs submitted by the parties regarding Westcon's Motion for Partial Judgment on the Pleadings, it is hereby **ADJUDGED** and **ORDERED** that Westcon's Motion be **GRANTED**. Accordingly, any portion of MarkWest's Complaint which seeks to recover damages related to allegedly defective welding on pressure vessels at its Mobley natural gas processing plant is **DISMISSED**.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 3 day of June, 2019.

JUDGE H. CHARLES CARL, III
West Virginia Business Court Division

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
ATTEST: CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
BY: DEPUTY CLERK