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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA  
FILED  
RANDOLPH COUNTY  
CIRCUIT COURT

2016 DEC 19 A 11:50

CIRCUIT CLERK'S OFFICE

UPTON CONSTRUCTION CO., INC.  
a West Virginia Corporation,

Plaintiff,

v.

BY \_\_\_\_\_ DEPUTY  
Civil Action No.: 16-C-165  
Judge: David Wilmoth

TOWN OF MILL CREEK WEST VIRGINIA,  
a West Virginia Municipal Corporation, and  
POTESTA & ASSOCIATES, INC.,  
a West Virginia Corporation.

Defendants.

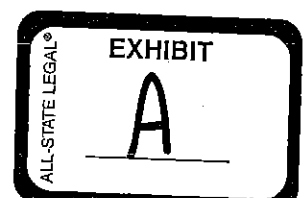
VERIFIED COMPLAINT

COMES NOW the Plaintiff, Upton Construction Co., Inc., by counsel, Charles M. Johnstone, II, and the law firm of Johnstone & Gabhart, LLP, and for its Complaint against Defendants, Town of Mill Creek West Virginia and Potesta & Associates, Inc. and states as follows:

1. Plaintiff, Upton Construction Co., Inc. ("Upton") is a corporation duly organized and licensed to do business under the laws of the State of West Virginia, with its principal office located at 2296 Roxalana Road, Dunbar, West Virginia 25064.

2. Defendant, Town of Mill Creek West Virginia ("Mill Creek") is at all times relevant hereto a municipal corporation in accord with West Virginia Code § 8-12-1 et seq. As a West Virginia Municipal Corporation, empowered to acquire, construct, repair, maintain and operate water works systems. Mill Creek lists as its principal office address 135 Woody Simmons Drive, Mill Creek, West Virginia 26280.

3. Defendant, Potesta & Associates (Potesta), is a corporation duly organized and licensed to do business under the laws of the State of West Virginia, with its principal office located at 7012 MacCorkle Avenue SE. Charleston, West Virginia 25304.



4. This Court has jurisdiction over the parties and the subject matter of this action because, among other things, the project and events giving rise to this claim took place in Randolph County and the breaches and negligent acts occurred in Randolph County.

#### FACTUAL BACKGROUND

5. On or about August 19, 2015, Mill Creek accepted bids for a construction project identified as "Water System Improvements Project Town of Mill Creek, West Virginia." This Contract was for construction work including installation of 38,500 linear feet of new water pipe, approximately 400 service lines and 28 fire hydrants as well as demolition of an existing water tank and installation of a new water storage tank.

6. The water line improvements were designed by or, such design was approved by the Defendant, Potesta.

7. As part of the solicitation, Mill Creek provided bidders with Defendant, Potesta's design, including plans, specifications, bid documents and other contract documents prepared or approved by Potesta. The information designed and prepared by Potesta and provided to prospective bidders by Mill Creek was intended to provide a road map for contractors to be able to reasonably anticipate conditions and to be able to prepare bids for construction of the project.

8. In specific reliance upon all of the information provided by Mill Creek and Potesta and in reliance upon its past experience, Upton submitted a bid for Contract "Water System Improvements Project Town of Mill Creek, West Virginia" in the amount of \$3,561,430.00.

9. Upton's bid was determined to be the lowest responsible, responsive bid and therefore, it was awarded the Contract.

10. The date of the Contract between Upton and Mill Creek was November 12, 2015, and the Contract required completion of the Contract within 400 consecutive calendar days.

11. Upton's planned manner and method of performing the construction contract was to first install the new water storage tank. Therefore, Upton mobilized substantial equipment, material and personnel for this task.

12. Prior to Upton being allowed to commence work on the access road and site for the new water tank, the Defendants notified Upton that the design for the access road and tank site were Incorrect and would have to be redesigned. Over the course of months thereafter, the Defendants provided several potential, additional designs for the access road and tank site none of which were finally approved by the Defendants and none of which would have actually worked. Meanwhile, Upton continued to suffer losses including idle equipment, lost production and efficiency.

13. Additionally, almost immediately upon Upton's attempting to commence installation of the water line, it encountered the following Defendant caused problems including, but not limited to:

- a. Defendants failed to properly identify subsurface utilities to be encountered and failed to identify and/or locate these utilities when contacted by Upton and/or mis-utility;
- b. Defendants orally directing changes in the plans and/or work without preparing or modifying design documents, without preparing change orders and without compensating Upton;
- c. Incomplete and inaccurate plans; and
- d. Defendants changing/dictating Upton's planned manner and method of performance of the work;

14. Upton timely notified the Defendants of each and every item which resulted in delay, disruption, extra or additional work or extra costs.

15. In violation of their duties to Upton, the Defendants failed and refused to review, process and execute Change Orders, to pay for the original contract amount, or

to compensate Upton for substantial extra and additional work performed, and increased costs, delays and disruptions.

16. When it became obvious that the Defendants were breaching the duties owed to Upton to properly evaluate and pay for changed work/changed conditions/design failures, etc. representatives of Upton met with representatives of the Defendant and submitted a partial listing of claims for the value in excess of \$300,000.00.

17. At that time, the Defendants disclosed that the amount of Upton's claims to date exceeded the entirety of the contingency fund for changes for the Project. Faced with a situation where legitimate claims of the Contract exceeded the contingency amount, the Defendant, Mill Creek, proposed to terminate the Contract for Convenience. Upton agreed with this proposition and submitted claims in accord with the Contract.

18. Despite an agreement to properly compensate Upton, the Defendants failed and refused to consummate a Termination for Convenience and have failed to pay outstanding Pay Applications for original contract work not to mention the substantial change order claims.

19. Subsequent to cessation of work on the Project, Upton has investigated the facts and circumstances that led to the award of the Contract. That investigation reveals a fraudulent scheme by and between the Defendants, the purpose of which was to defraud not only Upton but the State of West Virginia, the funding agencies as well as other bidders for the work. The fraudulent scheme involved the following:

- a. Defendant, Potesta, purchased the design and contract for this Project from another engineer who had previously determined that the Project was not financially feasible;
- b. Defendant, Potesta, intentionally and fraudulently, created numerous sets of design drawings for the purpose of persuading the State of West Virginia and/or funding agencies to fund the Project while knowing full

- well that the representations made were false and knowing that the actual costs to construct the Project would be substantially higher;
- c. Specifically, Defendants made available to bidders for the work including, Upton, design drawings which willfully, intentionally and fraudulently misrepresented the location of both, the line to be installed as well as known existing utilities that would interfere with the construction work. The purpose of such fraudulent misrepresentations was to obtain lower bids from construction bidders, including Upton, so that the project would be approved allowing the Defendants to profit;
  - d. Additionally, the Defendants have manipulated the construction and design process relating to the construction of the access road and new water tank for the project. Again, the Defendants intentionally, willfully and fraudulently set forth a design in the bid documents that Upton relied upon which would have provided a workable solution for this project. However, while doing so, the Defendants, with intent to defraud, had no intention of allowing the access road and water tank to be constructed as set forth in the bid documents. In fact, the Defendants possessed numerous other designs at the time the project was bid that were not provided to bidders. The Defendants had no intention of constructing the project as it was bid by Upton. The several redesigns would have substantially increased the costs and profited the Defendants while causing substantial losses to Upton;
  - e. When each of these deficiencies were brought to the attention of the Defendants, no responsibility was accepted by them but, instead, Upton was blamed for the problems;

- f. In fact, the Defendants initiated a smear campaign against Upton both orally and in writing maliciously, intentionally and fraudulently defaming Upton meanwhile knowing Upton had no responsibility for any of the problems of the project;
- g. Specifically, the Mayor of Mill Creek authored several letters which were sent to the entire population of the Town defaming Upton by willfully, fraudulently and falsely claiming that all problems with the Project were the responsibility of Upton and that Upton was going broke;
- h. Had the Defendants exercised the proper diligence, and absent fraud, neither would have ever pursued this project as it is not financially feasible nor was it necessary; and
- i. The fraudulent scheme and purpose of the Defendants was for their own profit and for the extreme financial and other detriment to Upton.

COUNT I: BREACH OF CONTRACT AGAINST DEFENDANT,  
TOWN OF MILL CREEK WEST VIRGINIA

20. Upton restates and re-alleges each and every allegation set forth in paragraphs 1 through 19 of its Complaint as if the same were fully set forth herein.

21. Prior to the parties' mutual agreement that the Project could not go forward, Upton fully and faithfully performed all of its obligations under its Contract with Mill Creek.

22. The Defendants were aware of and Upton has provided proper notice of all of its claims including, but not limited to, those related to errors in the plans and specifications, utility conflicts, oral directives, claims for extra compensation, delays, disruptions and differing site conditions.

23. Specifically, during the course of the project, Upton incurred, and provided Notice of Claim for, substantial additional and extra costs, delays and disruptions as a result of, but not limited to, the following:

- a. Utility conflicts;
- b. Interference by the Defendants with Upton's planned manner and method and performance;
- c. Differing site conditions;
- d. Lack of appropriate design;
- e. Changed design;
- f. Oral directives;
- g. Loss of productivity;

24. Mill Creek materially breached its contractual and other duties owed to Upton as a result of, but not limited to, the following:

- a. Mill Creek failed and refused to pay Upton for work performed pursuant to the contract;
- b. Mill Creek failed to provide Upton with accurate and adequate plans, specifications and contract documents relating to the work to be performed;
- c. Mill Creek dictated and changed the manner and method of performance contemplated by Upton when it submitted its bid;
- d. Mill Creek caused compensable interruptions and interference with Upton's ability to perform its contractor obligations; and
- e. Mill Creek failed and refused to timely respond to requests for change orders, equitable adjustments and requests for clarifications and corrections to the project plans and specifications.

25. As a direct, proximate and foreseeable result of the Mill Creek's material breach of Contract and breach of other duties owed to Upton, Upton has suffered a substantial financial loss, including the cost of additional work performed, extra costs and delay resulting from loss of productivity and efficiency, extended overhead, changed

manner and method of performance and changed sequence of work, lost profits and lost business opportunities.

COUNT II: UNJUST ENRICHMENT AGAINST DEFENDANT,  
TOWN OF MILL CREEK WEST VIRGINIA

26. Upton restates and re-alleges each and every allegation set forth in paragraphs 1 through 25 of its Complaint as if the same were fully set forth herein.

27. In addition to construction work contemplated by the original contract documents, the additional work and costs incurred by Upton as referenced in Count I above were all satisfactorily performed and installed by Upton and have been incorporated into the Project for the benefit of the Mill Creek thereby creating an implied or quasi contract between Upton and Mill Creek to pay the reasonable value for all work performed and installed.

28. Mill Creek has breached its Implied or quasi contract with Upton by failing and refusing to pay for the extra work and additional work performed and incorporated into the Project by Upton.

29. Mill Creek continues to be unjustly enriched by retaining the benefit of the work performed by Upton without compensating Upton therefore.

30. As a direct, proximate and foreseeable result of Mill Creek's breach of duties owed to Upton and Mill Creek's unjust enrichment, Upton has suffered a substantial financial loss, including the cost of additional work performed, extra cost and delay resulting from loss of productivity and efficiency, extended overhead, changed manner and method of performance and changed sequence of work, lost profits and lost business opportunities.

COUNT III: DEFAMATION AGAINST MILL CREEK

31. Upton restates and re-alleges each and every allegation set forth in paragraphs 1 through 30 of its Complaint as if the same were fully set forth herein.



32. Mill Creek, through its Mayor, Bill Brock, has published non-privileged, defamatory and false statements concerning the Plaintiff Upton.

33. Specifically, on at least two occasions the Mayor authored and published to all residents of Mill Creek false and defamatory statements alleging malfeasance by Upton with regard to its performance on the construction project at issue in this case. Those representations were false and were known to be false at the time of their publishing.

34. Additionally, representatives of Mill Creek, including its Mayor, have orally published false and defamatory statements regarding Upton including assertions of malfeasance as well as assertions that Upton was suffering financial distress. All of these false and defamatory statements were known to be false at the time they were made.

35. As a direct, proximate and foreseeable result of the defamatory statements, Upton has suffered damage including, but not limited to, actual damages, damages to its character and reputation as well as other general damages.

36. The defamatory statements were made intentionally, willfully, wantonly, expressly and maliciously and therefore entitle Plaintiffs to recover punitive damages.

#### COUNT IV: NEGLIGENCE AGAINST DEFENDANT, POTESTA

37. Upton restates and re-alleges each and every allegation set forth in paragraph 1 through 36 of its Complaint as if the same were fully set forth herein.

38. In its capacity as the design and project engineer for the Project and the owner's representative on the Project, Potesta owed a duty of care to Upton to render its services including, but not limited to, design, preparation of drawings, specifications and contract documents, as well as project administration, recommending and approving payments and change order requests, with the ordinary skill, care and diligence commensurate with that rendered by members of its profession in the same or similar circumstances.

39. The Defendant, Potesta was negligent and breached duties owed to Upton by, among other things, the following:

- a. Failing to prepare an adequate and accurate design of the Project including, but not limited to accurate plans, specifications and contract documents;
- b. Recommending that this Project be let/performed considering Mill Creek did not have sufficient funds;
- c. Orally making changes to the design and to the Project but without properly modifying design documents and without making assurances that Upton would be paid for making such changes;
- d. Dictating Upton's planned manner and method of performing the work;
- e. Changing portions of the design and failing to redesign the work;
- f. Failing to timely and properly consider, approve and process change orders for extra and additional work performed by Upton at the direction of the Defendants, Mill Creek and/or Potesta;
- g. Failing to properly administer the Contract as Mill Creek's representative on the Project; and
- h. Requiring Upton to perform unnecessary and unfounded additional work without approving payment therefore.

40. Potesta's actions or inactions constitute negligence and a failure to render services with the ordinary skill, care and diligence commensurate with members of the engineering profession under similar circumstances.

41. As a direct, proximate and foreseeable result of Potesta's breach of duties owed to Upton and Potesta's unjust enrichment, Upton has suffered a substantial financial loss, including the cost of additional work performed, extra cost and delay resulting from loss of productivity and efficiency, extended overhead, changed manner

and method of performance and changed sequence of work, lost profits and lost business opportunities.

COUNT V: FRAUD AGAINST MILL CREEK AND POTESTA

42. Upton restates and re-alleges each and every allegation set forth in paragraph 1 through 41 of its Complaint as if the same were fully set forth herein.

43. The Defendants have perpetrated a fraud against Upton by falsifying and manipulating submissions to the State of West Virginia and to funding sources for the purpose of obtaining funding for construction of this project. These Defendants knew that this project was not necessary and that, with truthful representations, it would have been cost prohibitive and would not have been approved for construction.

44. In order to consummate their fraudulent scheme, the Defendants needed to willfully, intentionally and fraudulently misrepresent the complexity of this Project to allow bidders, including Upton to submit bids to perform the work. Upton reasonably relied upon the material, false and fraudulent representations of the Defendants relating to the design and characteristics of the Project.

45. The Defendants' actions constitute fraudulent misrepresentation which misrepresentations were material and false.

46. Plaintiff Upton's reliance on such fraudulent misrepresentations was justified under the circumstances.

47. As a direct, proximate and foreseeable result of the fraudulent misrepresentations and conduct of the Defendants, Plaintiff Upton has and continues to suffer the following damages:

- a. all losses resulting from its attempt to construct the Project as it was represented;
- b. loss of bonding capacity and missed opportunities due to the Project not yet being released;
- c. attorney's fees and Court costs;

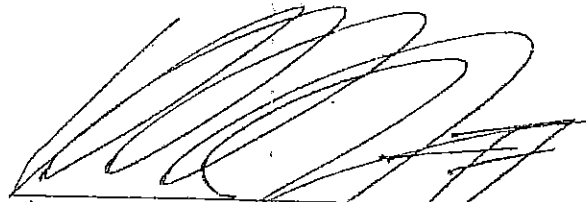
- d. Incidental and consequential damages;
- e. the fraudulent acts and omissions of the Defendants were intentional, willful, wanton, oppressive and malicious and therefore entitle the Plaintiff to recover punitive damages.

WHEREFORE, the Plaintiff, Upton Construction Co., Inc., demands judgment against the Defendants, Town of Mill Creek West Virginia and Potesta & Associates, Inc., jointly and severally, in an amount that will fully and fairly compensate them as a result of the breaches, negligence, defamation, fraud and other acts and omissions perpetrated by the Defendants. Plaintiffs further demand an assessment of punitive damages and all other relief this Court deems and appropriate.

UPTON CONSTRUCTION CO., INC., DEMANDS A TRIAL BY JURY.

Respectfully submitted,

UPTON CONSTRUCTION CO., INC.  
By Counsel:



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*Counsel for Plaintiff*

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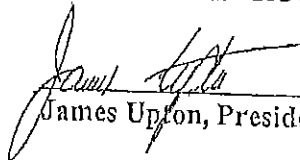
VERIFICATION OF COMPLAINT

State of West Virginia

County of Kanawha, to wit:

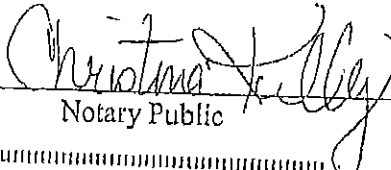
James Upton, President of Upton Construction Co., Inc., the Plaintiff named in the foregoing Complaint have duly sworn, says that the facts and allegations contained therein are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, he believes them to be true.

UPTON CONSTRUCTION CO., INC.

  
James Upton, President

Taken, sworn to and subscribed before me this 13<sup>th</sup> day of December, 2016.

Commission Expires: 02-24-2024

  
Notary Public

