

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

Civil Action No. 16-C-165
Honorable David H. Wilmoth

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

Defendants.

**TOWN OF MILL CREEK WEST VIRGINIA'S MOTION
TO PARTIALLY DISMISS PLAINTIFF'S COMPLAINT**

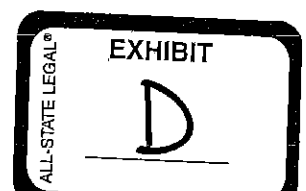
COMES NOW, The Town of Mill Creek, West Virginia, by counsel, the law firm of Bailey & Wyant, PLLC, John P. Fuller and Betsy L. Stewart, and pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and hereby moves this Court for entry of an Order dismissing Count II (Unjust Enrichment), Count III (Defamation), Count V (Fraud), and all claims for Punitive damages, and in support thereof shows this Court the following:

I. Procedural and Factual Background

Plaintiff brought this action alleging various causes of action following disputes with regard to the "Water System Improvements Project Town of Mill Creek, West Virginia." *See Plaintiff's Complaint, Paragraph 5.* In addition to various contract based or quasi contract based claims, the Plaintiff asserted causes of action against the Town of Mill Creek alleging defamation and fraud. *See Plaintiff's Complaint Counts III and V.*

With regard to the defamation claim, Plaintiff asserts that:

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 known to be false at the time of their publication.
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 entitles Plaintiffs to recover punitive damages. (emphasis added). Id.

As such, the Plaintiff is clearly asserting the defamation claim against the Town of Mill Creek for the alleged *intentional* acts of its alleged agents.

With regard to Count V of the Complaint, alleging a cause of action based upon fraud, the Plaintiff alleges that:

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 work. (emphasis added). Id.

Again, it is crystal clear that the Plaintiff is seeking damages against the Town of Mill Creek for the alleged *intentional* acts of its agents.

In Paragraph 36, Paragraph 47 and the WHEREFORE paragraph the Plaintiff seeks an

award of punitive damages from the Town of Mill Creek. *Id.* However, in Paragraph 2 of the Complaint, the Plaintiff alleges that “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.” *Id. at paragraph 2.* As such, there is no dispute that the Plaintiff concedes, and in fact alleges in a verified complaint, that the Town of Mill Creek is a municipal corporation.

II. Standard of Law

West Virginia Rule of Civil Procedure 12(b)(6) permits the dismissal of a case in which the allegations raised in the Complaint clearly demonstrate that Plaintiff does not have a claim and that no set of facts would support the plaintiff’s claim. *Owen v. Board of Education*, 190 W. Va. 677, 678, 441 S.E.2d 398, 399 (1994); *Holbrook v. Holbrook*, 196 W. Va. 720, 723, 474 S.E.2d 900, 903 (1996). A Complaint that fails to set forth claims upon which relief could be granted warrants dismissal where the counts either do not contain allegations setting forth facts in support of the required elements of the claims, or pertained to claims such that the complaining party does not have standing to pursue. *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 492, 655 S.E.2d 509, 541 (2007).

For purposes of evaluating a motion to dismiss, the complaint is to be 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, 749, 671 S.E.2d 748, 754 (2008). Although the court should read pleadings liberally and accept as true well-pleaded allegations of the complaint and inferences that reasonably may be drawn from allegations, legal conclusions, opinions or unwarranted averments of fact will not be deemed admitted and should not result in a denial of a dismissal motion. *Kopelman and Associates, L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996).¹

¹ Defendants further raise, so as not to waive, any and all defenses provided for in Rule 12 of the West Virginia Rules of Civil Procedure including lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency

III. Argument

A. The Town of Mill Creek cannot be held liable for the alleged intentional acts of its employees/agents

The West Virginia Governmental Tort Claims and Insurance Reform Act provides that political subdivisions are liable for injury or loss to persons “caused by the *negligent* performance of acts by their employees while acting within the scope of employment.” *W. Va. Code* § 29-12A-4(b)(1) (emphasis added).

Defamation is an intentional tort. *See Rodgers v. Corporation of Harpers Ferry*, 179 W. Va. 637, 640-41, 371 S.E.2d 358, 361-62 (1988)(“personal tort actions such as libel, defamation, intentional infliction of emotional distress, false arrest, false imprisonment, and malicious prosecution take the one-year statute of limitations because they are excluded from statutory survivability under W.Va. Code § 55-7-8a(a) (1981), and not because of a statutory distinction between intentional and unintentional torts”).

Because defamation and fraud are intentional acts, not negligent ones, a political subdivision cannot be liable for either as it has immunity for the intentional misconduct of an employee. *Mallamo v. Town of Rivesville*, 197 W. Va. 616, 624-25, 477 S.E.2d 525, 533-34 (1996); *See also Kanode v. Swope*, 2013 W. Va. LEXIS 437 (W. Va. May 3, 2013)(finding no liability for County Sheriff’s Department where allegations were of intentional and malicious acts); *Harrison v. City of Charleston*, 2011 W. Va. LEXIS 557, *6 (W. Va. Nov. 28, 2011)(“claims of intentional and malicious acts are included in the general grant of immunity in *W.Va. Code*, 29-12A-4(b)(1)”); *Chapman v. Jarrell*, 2005 U.S. Dist. LEXIS 31132 (S.D. W. Va. Nov. 16, 2005)(holding City not liable in arrestee’s negligence claim based on alleged excessive force used against him by a police officer because West Virginia law envisioned vicarious liability on political

of service of process, failure to state a claim upon which relief can be granted and failure to join a party.

subdivisions only for employees' negligent acts and not intentional acts under W. Va. Code § 29-12A-4(c)(2)). Because the allegations against the Town of Mill Creek are based on intentional acts, and Plaintiff has even plead that such acts were intentional in the verified Complaint, the Town of Mill Creek is immune liability pursuant to *W. Va. Code*, 29-12A-4 with regard to Counts III and V of the Complaint.

B. The Town of Mill Creek is Statutorily Immune from claims for Punitive Damages.

The Plaintiff has plead, in its verified Complaint, that the Town of Mill Creek is a municipal corporation in accord with West Virginia Code § 8-12-1 et seq. W.Va. Code § 29-12A-7 provides that:

Notwithstanding any other provisions of this code or rules of a court to the contrary, in an action against a political subdivision or its employee to recover damages for injury, death, or loss to persons or property for injury, death, or loss to persons or property caused by an act or omission of such political subdivision or employee:

(a) In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.

As the Plaintiff has plead on the face of the Complaint that the Town of Mill Creek is a municipal corporation, therefore a political subdivision, this Defendant is immune from all claims for punitive damages. Therefore, it is proper for this Court to enter an Order dismissing all claims asserted by the Plaintiff and against this Defendant seeking punitive damages.

C. It is proper for the Court to Dismiss the Plaintiff's Claims based upon Unjust Enrichment because the parties' relationship is based entirely upon contract and the Unjust Enrichment claim is entirely based upon an alleged fraud or similar circumstances.

Because the Plaintiff has alleged in its verified Complaint that it had an express contract with the Plaintiff, it cannot also assert a claim for unjust enrichment. "Because and 'action for

unjust enrichment is quasicontractual in nature[, it] may not be brought in the face of an express contract.” *Bright v. QSP, Incorporated*, 20 F.3d 1300, 1306 (4th Cir. 1994) *citing* *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir.1988). Clearly, here, as in *Bright*, the vast of Plaintiff’s unjust enrichment claim is inconsistent with the parties’ contractual relationship and cannot survive in the face of the parties’ express contract.

In *Bright*, the Court held that “Having performed under an express agreement fixing its compensation, BOA cannot now seek through a claim of unjust enrichment to increase its compensation beyond the contract price.” *See Occidental Life Ins. Co. v. Pat Ryan & Assocs., Inc.*, 496 F.2d 1255, 1267 (4th Cir.1974) (refusing to award the plaintiff greater compensation than the contract price). *Id.* Just as the Plaintiff in *Bright* could not seek through unjust enrichment to increase what it may have been entitled to pursuant the express contract, the Plaintiff in the instant case cannot seek through unjust enrichment to increase what is may be entitled to through the express contract between the parties.

In *Hanlon v. AXA Equitable Life Ins. Co.*, 2016 WL 2968990 (*unpublished Memorandum Decision 2016*), the West Virginia Supreme Court of Appeals cited to *Bright* in affirming a summary judgment because an unjust enrichment claim is inconsistent with a contractual dispute.

In addition, aAs noted above, the Town of Mill Creek, West Virginia cannot be held liable to an alleged fraud. Similarly, because a “fraud” is a necessary element of unjust enrichment, the Town of Mill Creek, West Virginia cannot be held liable for a claim of unjust enrichment. “It is axiomatic that property which is the subject of an unjust enrichment claim must have been acquired by means of fraud or other similar circumstances which negate the property holder’s continued retention of the subject property.” *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love*,

LLP, 231 W.Va. 577, 587, 746 S.E.2d 568, 578 (2013) *citing Annon v. Lucas*, 155 W.Va. 368, 382, 185 S.E.2d 343, 352 (1971). In essence, to have a claim for unjust enrichment, the Plaintiff must assert that the party to be sued engaged in fraud or some other intentional act. Because the Town of Mill Creek, West Virginia cannot be held liable to the alleged intentional acts of its agents, the Town of Mill Creek, West Virginia cannot be held liable for unjust enrichment.

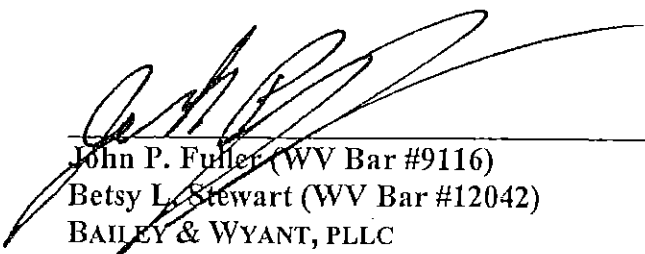
IV. Conclusion

Based upon the foregoing, it is clear that not only are fraud and defamation intentional acts, the Plaintiff has plead that such alleged acts were intentional. Because the Town of Mill Creek cannot be held liable for the alleged intentional torts of its agents, and as a claim of unjust enrichment cannot be brought in the face of the parties' express contract, it is proper for this Court to enter an Order dismissing Counts II, III and V of the Complaint as they relate to the Town of Mill Creek. Based upon W.Va. Code § 29-12A-7, the Town of Mill Creek is immune from any claim for punitive damages. Therefore, it is proper for this Court to dismiss all claims for punitive damages asserted against the Town of Mill Creek.

WHEREFORE, the Town of Mill Creek hereby moves this Court for entry of an Order dismissing Counts II, III and V of the Complaint as well as all claims for punitive damages as to this Defendant and all other relief that this Court deems just and proper.

TOWN OF MILL CREEK,
WEST VIRGINIA,

By Counsel,



John P. Fuller (WV Bar #9116)
Betsy L. Stewart (WV Bar #12042)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

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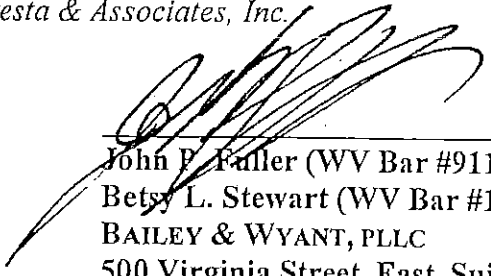
Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Town of Mill Creek West Virginia's Motion to Partially Dismiss Plaintiff's Complaint" was served upon the following parties by U.S. Mail on this day, Friday, March 17, 2017:

Charles "Sonny" M. Johnstone, II
Johnstone & Gabhart, LLP
P.O. Box 313
1125 Virginia Street East
Charleston, WV 25321-0313
Counsel for Upton Construction Company, Inc.

Phillip R. Earnest, Esq.
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219
Counsel for Potesta & Associates, Inc.



John P. Fuller (WV Bar #9116)
Betsy L. Stewart (WV Bar #12042)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222