

FILED
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2021 APR -1 PM 2: 58

JULIUS WOLFORD,

CATHY S. GATSON, CLERK *UK*
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

vs.

Civil Action No. 20-C-660

Presiding Judge: Paul T. Farrell

Resolution Judge: Shawn D. Nines

FORM TECH CONCRETE FORMS, INC.,
a Michigan corporation,

Defendant,

and

FORM TECH CONCRETE FORMS, INC.,
a Michigan corporation,

Third-Party Plaintiff,

vs.

CONSTRUCTION SOLUTIONS & LEASING, LLC,
a West Virginia General Partnership,

Third-Party Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNT II OF
DEFENDANT'S AMENDED COUNTERCLAIMS

This matter came before the Court this _____ day of March 2021 upon Plaintiff's Motion to Dismiss Count II of Defendant's Amended Counterclaims. The Plaintiff, Julius D. Wolford, (hereinafter "Plaintiff" or "Wolford"), by counsel, Christopher D. Pence Esq., and Defendant, Form Tech Concrete Forms, Inc. (hereinafter "Defendant" or "Form Tech"), by counsel, Roberta F. Green, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced on August 6, 2020 when Plaintiff filed a Complaint based on the following causes of action: 1) Count 1 – Breach of Contract (consulting agreement); 2) Count 2 – Violations of WVWPCA; 3) Count 3 – Breach of Oral Contract (forklift rental); and Count 4 – Quantum Meruit (forklift rental). *See* Compl. The matter surrounds contracts between the parties related to employment and the rental of a forklift. *Id.* Further, the matter also surrounds allegations of the alleged hazardous disposal of Plaintiff's curing compound and subsequent leak into a nearby stream and DEP violation(s). *Id.*
2. On September 25, 2020, Defendant filed its Amended Answer and Counterclaim, wherein it alleged the following causes of action: 1) Count 1 – Breach of Contract; and 2) Count 2 – Common Law Fraud.
3. On October 15, 2020, Plaintiff filed the instant Plaintiff's Motion to Dismiss Count II of Defendant's Amended Counterclaims, seeking to dismiss with prejudice Count 2 – Common Law Fraud of the Amended Answer and Counterclaim. *See* Pl's Mot., p. 1. Plaintiff argued the fraud claim was not pled with the required particularity because he failed to set forth the circumstances constituting fraud. *See* Pl's Mem., p. 5.

4. On October 26, 2020, Defendant filed its Response, arguing the fraud claim was based upon Plaintiff's filing of the Complaint, wherein he brought causes of action as both an employee and independent contractor. *See* Pl's Resp., p. 5.
5. This matter was subsequently referred to the Business Court Division and assigned to the undersigned as Presiding Judge.
6. Upon referral to the Business Court Division, the undersigned set forth a deadline for the filing of a reply to the instant motion. *See* Briefing Ord., 2/26/21.
7. Thereafter, on or about March 8, 2021, Plaintiff filed its Reply, arguing Defendant cannot circumvent Rule 9(b)'s particularity requirement based on its own interpretation of allegations in Plaintiff's Complaint, and that Plaintiff alleges the nature of the employment relationship changed, prompting the filing of a Complaint containing causes of action as both as an employee and an independent contractor. *See* Reply, p. 3, 5.
8. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, 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." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). "We recognized, however, that liberalization in the rules of

pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

In this matter, Plaintiff Wolford alleges dismissal of Count II (Common Law Fraud) of Defendant’s Amended Answer and Counterclaim with prejudice is appropriate, because it did not plead such facts constituting fraud with the required particularity required under Rule 9(b) of the West Virginia Rules of Civil Procedure. *See* Pl’s Mem., p. 5.

Defendant indicated in its Response that the fraud claim was based upon Plaintiff’s filing of the Complaint, wherein he brought causes of action as both an employee and independent contractor. *See* Pl’s Resp., p. 5.

It is well-established that “[t]he essential elements in an action for fraud are: “(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.” *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927); Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); *Sneberger v. Morrison*, 235 W. Va. 654, 670, 776 S.E.2d 156, 172 (2015).

As a general rule, the West Virginia Rules of Civil Procedure permit the assertion of claims by “short and plain statements.” R.C.P., 8(a). Rule 9(b) of the Rules, however, specifically requires that “[i]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity....” R.C.P., 9(b).

The same requirement is included in Rule 9(b) of the Federal Rules of Civil Procedure, the rule on which West Virginia's Rule 9(b) is based. *See* 5 Wright and Miller, Federal Practice and Procedure: Civil 2d § 1297 (1990). In *Hager v. Exxon Corporation*, 161 W.Va. 278, 241 S.E.2d 920 (1978), the West Virginia Supreme Court of Appeals examined the rationale behind the requirement of Rule 9(b) that fraud be stated with particularity. The Court concluded that fraud is of such gravity that the strict requirements of Rule 9(b) were included to afford a party charged with fraud an opportunity to prepare an adequate defense. *See Pocahontas Min. Co. P'ship v. Oxy USA, Inc.*, 202 W. Va. 169, 171, 503 S.E.2d 258, 260 (1998).

“In determining whether a workman is an employee or an independent contractor, the controlling factor is whether the hiring party retains the right to control and supervise the work to be done.” Syllabus Point 2, *Myers v. Workmen's Compensation Com'r*, 150 W.Va. 563, 148 S.E.2d 664 (1966); Syl. Pt. 6, *Bowens v. Allied Warehousing Servs., Inc.*, 229 W. Va. 523, 526, 729 S.E.2d 845, 848 (2012).

“If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and the determining factor in connection with this matter is not the use of such right of control or supervision but the existence thereof in the person for whom the work is being done.” Syllabus Point 2, *Spencer v. Travelers Insurance Company*, 148 W.Va. 111, 133 S.E.2d 735 (1963); Syl. Pt. 7, *Bowens v. Allied Warehousing Servs., Inc.*, 229 W. Va. 523, 526, 729 S.E.2d 845, 848 (2012).

Here, Plaintiff has averred that Defendant did not plead its fraud claim with particularity. Plaintiff has averred that Defendant did not make any allegations that any act of Plaintiff was false, did not plead any reliance, and did not plead how any act of Plaintiff caused Defendant to

suffer damages. *See* Pl's Mem., p. 6-7. Defendant explained in its response to the instant motion that Defendant's rationale for the fraud claim at issue is the fact that Plaintiff pled in the Complaint in this civil action causes of action both as an employee under the West Virginia Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq.*, and as an independent contractor in its breach of contract cause of action. *See* Def's Resp.

The Court has reviewed the Complaint in the instant civil action. The Court finds the act of pleading the allegations contained in the Complaint, and Defendant's interpretation of them, does not satisfy Defendant's burden of pleading fraud with particularity. Defendant argues it relied on Plaintiff holding himself out as an independent contractor (as per their employment contract) to its detriment. However, employment relationships can, and often do, change from independent contractor to employee *based on acts of the employer* (in this case, the employer was Defendant). It appears that is exactly what is alleged to have happened here, and why Plaintiff brought causes of action based under a statute designed for employees and a breach of contract cause of action related to an employment contract wherein it was contemplated that Plaintiff would be categorized as an independent contractor.

Indeed, the Court finds that Plaintiff could not have committed any unilateral false act (required elements of fraud) to change his employment status from an independent contractor to an employee, because in West Virginia, where a contract purportedly establishes an independent contractor relationship, the actual nature of the employment relationship may differ and is determined by several factors, mainly the right to exercise control and supervision. *See Bowens v. Allied Warehousing Servs., Inc.*, 229 W. Va. 523, 526, 729 S.E.2d 845, 848 (2012). Therefore, the Court finds the issue of whether Plaintiff's employment relationship changed would thus be

based primarily off of actions *by Defendant* employer, and not by any unilateral act, fraudulent or not, of Plaintiff.

The Court does not find Defendant's argument that the filing of the Complaint "opened the door" to a fraud claim against it to be persuasive under these circumstances. See Reply, p. 5.

For all of these reasons, the Court finds Count II (Common Law Fraud) of Defendant's Amended Answer and Counterclaim must be dismissed. Accordingly, the Court concludes the instant motion should be granted.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Dismiss Count II of Defendant's Amended Counterclaims is GRANTED. It is further hereby ADJUDGED and ORDERED that Count II (Common Law Fraud) of Defendant's Amended Answer and Counterclaim is hereby DISMISSED WITH PREJUDICE.

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, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

March 29, 2021
date of entry



JUDGE PAUL T. FARRELL
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

Date: 4/2/21
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Bus Ct.
P. Mannix
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T. Spears
C. Negley

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2nd
DAY OF April, 2021
Cathy S. Gatson
CLERK
Circuit Court of Kanawha County, West Virginia