

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

FILED

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CURTIS S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**JULIUS WOLFORD,**

**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 CONSTRUCTION SOLUTIONS, INC.'S MOTION TO DISMISS  
THIRD PARTY COMPLAINT**

This matter came before the Court this 31 day of March 2021 upon Construction Solutions, Inc.'s Motion to Dismiss Third Party Complaint. The Defendant/Third-Party Plaintiff, Form Tech Concrete Forms, Inc. (hereinafter "Defendant" or "Form Tech"), by counsel, Roberta F. Green, Esq., and Third-Party Defendant, Construction Solutions & Leasing, LLC (hereinafter "Third-Party Defendant" or "Construction"), by counsel, M. Shane Harvey, 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 Julius Wolford 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, Counterclaim, and Third-Party Complaint of FormTech Concrete Forms, Inc. wherein it alleged a one-count third-party complaint against Construction, alleging tortious interference with a business contract. *See* Th. Pty. Compl., p. 17-20.
3. On November 18, 2020, Construction filed the instant Construction Solutions, Inc.'s Motion to Dismiss Third-Party Complaint, seeking to dismiss the third-party complaint against it because Form Tech did not plead an essential element of tortious interference with a business contract because it did not allege any act of interference by Construction, and merely alleged that Construction, as a landowner, failed to take numerous actions that resulted in an uninsured spill of hazardous waste on Construction's property. *See* Th. Pty. Def's Mot., p. 1.

4. On November 23, 2020, Form Tech filed its Response, arguing the motion should be denied because it is premature to dismiss the claim because discovery has not commenced, and because its allegations clearly meet the notice pleadings standard contained in West Virginia Rule of Civil Procedure 8. *See* Def's Resp., p. 2.
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 23, 2021, Construction filed its Reply, arguing Form Tech still had not pled or alleged that Construction intentionally interfered with a contract and West Virginia case law directs the granting of motions to dismiss where there are no factual allegations supporting stating each essential element of the complaint, even considering Rule 8's liberal pleading standard and the fact that discovery has not commenced. *See* Reply, p. 1-3. Form Tech argues the notice pleading standard does not allow Form Tech to conduct discovery to find the facts that it never alleged. *Id.* at 1.
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, Construction seeks to dismiss the third-party complaint against it because Form Tech did not plead an essential element of tortious interference with a business contract because it did not allege any act of interference by Construction, and merely alleged that Construction, as a landowner, failed to take numerous actions that resulted in an uninsured spill of hazardous waste on Construction’s property. *See* Th. Pty. Def’s Mot., p. 1.

On the other hand, Form Tech argued the motion should be denied because it is premature to dismiss the claim because discovery has not commenced, and because its allegations clearly meet the notice pleadings standard contained in West Virginia Rule of Civil Procedure 8. *See* Def’s Resp., p. 2.

It is well-established that “[t]o establish prima facie proof of tortious interference with prospective employment or business relations by restrictive employment contract employee must prove existence of contractual or business relationship or expectancy, intentional act by third party interfering with that relationship or expectancy, that interference caused harm, and

damages”. Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. & Tr. Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983).

In light of the purpose behind the Rules of Civil Procedure, the West Virginia Supreme Court of Appeals has steadfastly held that, to survive a motion under Rule 12(b)(6), a pleading need only outline the alleged occurrence which (if later proven to be a recognized legal or equitable claim), would justify some form of relief. “The complaint must set forth enough information to outline the **elements of a claim** or permit inferences to be drawn that these elements exist.” *Fass v. Nowasco Well Serv., Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986) (emphasis added).

All essential elements of a cause of action must be stated in a complaint. *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981).

The Supreme Court of Appeals in *Kittle* opined: “On the other hand, liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading. As stated in Lugar and Silverstein, *West Virginia Rules of Civil Procedure* (1960) at 75: ‘Simplicity and informality of pleading do not permit carelessness and sloth: the plaintiff’s attorney must know every essential element of his cause of action and must state it in the complaint.’” *Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157–58 (1981).

Here, the Court’s review of the third-party complaint finds that it plainly does not plead every essential element of the tortious interference count. It does not plead element number two, an intentional act of interference by a party outside the contractual relationship or expectancy.

While Count 1 – tortious interference with a business contract is well-written and detailed, encompassing three pages and thirteen paragraphs, and including copy of a contract provision, the Court cannot ignore that an essential element of the claim it is alleging has not been pled.



The Court's review of the conduct pled in Count 1 – tortious interference with a business contract does not reveal any allegations of intentional interference. In Paragraph 5 of the third-party complaint, Form Tech alleges Construction stored or allowed a previous tenant to store and/or purchased property as-is (acknowledging the existence of hazards on the property) without making provision for or protecting Form Tech or the public generally from the 55-gallon drums of hazardous waste and other hazardous refuse. *See* Th. Pty. Compl., ¶5. This conduct does not appear to be intentional, let alone an intentional interference with Wolford and Form Tech's contract.

Further, Paragraph 6 of the third-party complaint alleges the 55-gallon drums were abandoned and left leaking by Plaintiff Wolford – not Construction. *See* Th. Pty. Compl., ¶6. It alleges they were purchased by Construction as a feature of real property purchased as-is from Wolford. *Id.* The Court finds Construction's position as a buyer of real estate that included the waste, and its subsequent alleged failure to mitigate risks associated with that risk, does not amount to intentional act in order to interfere with the contract between Wolford and Form Tech.

Further, the Court notes and considers that Construction was benefitting from the contract between Wolford and Form Tech. Construction has proffered that it was receiving rental payments from Form Tech in furtherance of the contract between Wolford and Form Tech. *See* Th. Pty. Def's Mot. p. 2.

Finally, the Court considers Paragraph 8 of the third-party complaint alleges that Construction failed to insure for environmental risks of the property, failed to mandate that the prior owner, Wolford, place a bond or maintain insurance on the risks, allowed Wolford to continue to occupy the property without bond/insurance in place relative to the as-is condition of the property, and failed to remediate the property. *See* Th. Pty. Compl., ¶8. The Court concludes

that this type of conduct, if true, is not intentional interference with the contract between Wolford and Form Tech, a contract Construction was benefitting from.

With regard to discovery and the stage of litigation the instant civil action is in at this time, the Court notes Form Tech argues elements of tortious interference set forth in *Torbett* merely establish standards of proof necessary for recovery after completion of discovery and a trial, and that “[t]here is nothing to support [Construction’s] suggestion that the Court should dismiss FormTech’s Third-Party Complaint for failing to **plead** an intentional act. *See* Def’s Resp., p. 5 (emphasis in original). The Court disagrees. The West Virginia Supreme Court of Appeals has been clear in decisions like *Kittle* that the “every essential element” of a plaintiff’s cause of action must be stated in the Complaint. Indeed, as recently as last week in the March 26, 2021 decision of the West Virginia Supreme Court of Appeals in *W. Virginia State Police, Dep’t of Mil. Affs. & Pub. Safety v. J.H. by & Through L.D.*, No. 19-0741, 2021 WL 1153246 (W. Va. Mar. 26, 2021), the West Virginia Supreme Court of Appeals has recognized this principle. *See W. Virginia State Police, Dep’t of Mil. Affs. & Pub. Safety v. J.H. by & Through L.D.*, No. 19-0741, 2021 WL 1153246, at \*7 (W. Va. Mar. 26, 2021)(“However, a plaintiff’s complaint must, ‘at a minimum[,] ... set forth sufficient information to outline the elements of his [or her] claim,’ ....”).

There is simply nothing in the third-party complaint that pleads that Construction intentionally allowed the drums of hazardous waste to spill on and pollute its own property in furtherance of somehow intentionally interfering with the contract between Form Tech and Plaintiff Wolford, a contract Construction was benefitting from.

For all of these reasons, the Court finds the one-count third-party complaint against Construction must be dismissed. Accordingly, the Court concludes the instant motion should be granted.

### CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Construction Solutions, Inc.'s Motion to Dismiss Third Party Complaint is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that FormTech's Amended Third Party Complaint Against Construction Solutions & Leasing, LLC 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 31, 2021  
date of entry



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

4/6/2021  
Date: 4/6/2021  
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