

**IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,**

Petitioner and Counterclaim Defendant,

vs.

**Civil Action No.: 20-C-142
Presiding: Judge Dent
Resolution: Judge Nines**

**POCAHONTAS LAND, LLC,
a Virginia limited liability company,
POCAHONTAS SURFACE INTERESTS, LLC,
a Virginia limited liability company,**

**Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,**

vs.

**DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,**

Third-Party Defendants.

**ORDER DENYING FRASURE CREEK MINING, LLC'S MOTION TO DISMISS
COUNTS 1 AND 2 OF THE COUNTERCLAIM**

This matter came before the Court this 16th day of August 2021, upon Plaintiff and Counterclaim Defendant, Frasure Creek Mining, LLC's Motion to Dismiss Counts 1 and 2 of the Counterclaim. The Plaintiff, Frasure Creek Mining, LLC (hereinafter "Plaintiff" or "Frasure Creek"), by counsel, R. Scott Long, Esq., and Defendants and Counterclaim Plaintiffs, Pocahontas Land, LLC and Pocahontas Surface Interests, LLC (hereinafter "Defendants" or "Pocahontas"), by counsel, J. Thomas Lane, 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. By coal lease dated September 1, 2017, Pocahontas and Deep Water Mining, LLC entered into a lease which relates to the mining of coal in the Page/Kincaid area of Fayette County, West Virginia (hereinafter “the Lease”)¹. *See* Pl’s Mot., p. 2. Said Lease leased to Deep Water the sole and exclusive mining rights on property owned by Pocahontas, referred to by the parties as the Pocahontas Property. *See* Def’s Resp., p. 2. Frasure Creek avers in the instant motion that it is not a party to the Lease, but “is an affiliated party of Deep Water and is the operator and permit holder with the West Virginia Department of Environmental Protection (‘WVDEP’) with respect to the mining of the coal covered by the Lease”. *See* Pl’s Mot., p. 2.

2. Arbitration occurred with regard to this Lease. On a prior day, Pocahontas submitted to Deep Water and New Trinity a Notice of Initiation of Arbitration pursuant to Article 32 of the Lease. *See* Def’s Resp., p. 3. Phase 1 of the Arbitration was completed on August 13, 2020 and August 14, 2020. *Id.* On September 22, 2020, the Arbitration Panel found that Deep Water defaulted under the Lease and declared the Lease terminated, and further found that Deep Water incurred numerous WVDEP Notices of Violation and Cessation Orders relating to the operations conducted by Frasure Creek on the Pocahontas Property. *Id.* at 3-4. The Arbitration Panel deferred consideration of the transferring of permits to Phase 2 of the proceedings. *Id.* at 4. Pocahontas proffered to the Court that it later sought relief before the

¹ The Court notes Third-Party Defendant New Trinity is guarantor under the Lease.

Arbitration Panel, requesting an order declaring Frasure Creek and New Trinity to be bound by the Lease after having accepted benefits from the Lease and performing obligations under the Lease, after it negotiated with Frasure Creek regarding entering the Pocahontas Property for remediation and demanded the transfer of permits. *Id.* Thereafter, on December 18, 2020, the Arbitration Panel ordered Deep Water to take all actions under its power to immediately cause the permits to be transferred to Pocahontas or others directed by Pocahontas. *Id.* Pocahontas proffered that this decision did not address whether Frasure Creek and New Trinity were subject to arbitration under the Lease. *Id.* Further, with regard to the arbitration, Pocahontas proffered that since February 25, 2021, the Arbitration Panel conducted the Phase 2 trial, and the decision is currently pending. *Id.* at 5.

3. This matter surrounds the claims in the Complaint, wherein in this case, on December 30, 2020, Plaintiff Frasure Creek Mining, LLC filed a Verified Petition for Preliminary and Permanent Injunction in Fayette County, West Virginia. The Verified Petition sought an order to enjoin Pocahontas from interfering in any efforts of Frasure Creek to engage in remediation activities as required by the State of West Virginia. Pocahontas answered the Petition and filed a Counterclaim and Third-Party Complaint against Frasure Creek, and Third-Party Defendants Deep Water Resources, LLC, and New Trinity Coal, Inc. Relevant to the instant motion are Counts 1 and 2 of said Counterclaim. Count 1 seeks a declaration that Frasure Creek and New Trinity are bound by the Lease at the center of this litigation and are thus subject to arbitration, and Count 2 seeks a declaration that Frasure Creek and New Trinity are bound by the Lease and are required to transfer permitting, as ordered by the Arbitration Panel on December 18, 2020. On March 1, 2021, Frasure Creek moved to dismiss Counts 1 and 2 of the Counterclaim, arguing Frasure Creek is not a signatory to the Lease.

4. The case was subsequently referred to the Business Court Division and assigned to the undersigned. On June 17, 2021, Pocahontas filed Pocahontas' Response in Opposition to Frasure Creek Mining, LLC's Motion to Dismiss Counts 1 and 2 of the Counterclaim.

5. On June 28, 2021, Deep Water and New Trinity filed Reply to Pocahontas' Response in Opposition to Frasure Creek Mining, LLC's Motion to Dismiss Counts 1 and 2 of the Counterclaim.

6. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

First, 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

Plaintiff and Counterclaim Defendant, Frasure Creek Mining, LLC has filed the instant Motion to Dismiss Counts 1 and 2 of the Counterclaim under Rule 12(b)(6) of the West Virginia

Rules of Civil Procedure, arguing Counts 1 and 2 should both be dismissed because Frasure Creek is not a signatory to the applicable lease at the heart of this litigation, which includes an arbitration provision, and is not subject to the terms and conditions thereof. *See* Pl's Mot., p. 1-3. Specifically, Frasure Creek argues that the arbitration provision would apply to disputes between Pocahontas and Deep Water, and not to any disputes involving Frasure Creek of Third-Party Defendant New Trinity. *Id.* at 3.

With respect to Count 2, Frasure Creek contends although Pocahontas contends that even if Frasure Creek is not bound by the arbitration agreement, the lease provisions should be enforced against Frasure Creek, and that this claim has no merit because the obligation to transfer permits is limited to permits held by the Lessee, which is Deep Water. *Id.* In addition, Frasure Creek argues that Pocahontas cannot show that a transfer of the permits is even possible, as Frasure Creek contends Pocahontas has not provided the necessary information to allow the transfer of the permits. *Id.* at 4.

On the other hand, Pocahontas argues the motion should be denied because it has a plausible and meritorious claim that Frasure Creek is bound to the terms of the Lease. *See* Def's Resp., p. 2. Pocahontas argues that although the Lease was between Pocahontas and Deep Water, Frasure Creek (not Deep Water) mined the subject property and held the mining permits for the duration of the applicable period. *Id.* When the Arbitration Panel recently declared that the Lease shall be terminated and ordered Deep Water as Lessee to take all actions to facilitate the transfer of the permits to Pocahontas or its designee, Frasure Creek failed to do so and therefore Counts 1 and 2 of the Counterclaim seek to effectuate the Lease and Arbitration Panel decisions on Frasure Creek as permit-holder, operator and beneficiary of the Lease. *Id.* Pocahontas argues Frasure Creek may not operate (mine) under the Lease on the one hand and

avoid Lease obligations on the other by seeking to dismiss those counts of the Counterclaim that it is not a signatory to the Lease. *Id.* Further, Pocahontas argues its other Counterclaim count, piercing the corporate veil, alleges manipulation of the corporate form between Frasure Creek, Deep Water, and New Trinity. *Id.*

Here, the Court finds and concludes that factual issues exist with regard to the parties' relationship. The Court considers the piercing of the corporate veil counterclaim that is pending in this action, amongst Deep Water, New Trinity, and Frasure Creek, which alleges the entities are alter egos of one another and have manipulated corporate form. *See* Def's Resp., p. 7. The Court notes this Counterclaim is at its early stage, but if proven, this could operate to impose the Lease obligations to Frasure Creek. The Court finds that further factual development is needed.

The Court also considers an apparent factual dispute with regard to whether or not Frasure Creek is an affiliate of Deep Water. The Court considers that it has been alleged in this civil action that although Deep Water is the Lessee, Frasure Creek was the entity mining and benefiting from the Lease. More factual development is needed as to the parties' relationship and actions.

The Court also considers the fact that the Lease required the Lessee, Deep Water, to acquire and maintain in its own name, the requisite permits for conducting mining operations. *See* Def's Resp., p. 3. In spite of this requirement, it has been proffered to the Court that the applicable permits were not held by Deep Water, but rather by Frasure Creek. *Id.* The access issues between the parties stem from needing to perform remediation as part of said permits. More discovery is needed regarding the parties relationship, and how, as a non-signatory, Frasure Creek was able to mine and operate as Lessee, and obtain permitting instead of Lessee. These issues, on which discovery is needed, are directly related to the heart of Counts 1 and 2 of the


Counterclaim. At the very least, at this stage in the litigation, Pocahontas has pled a viable claim that Frasure Creek is subject to the terms of the Lease. Further factual development will occur through discovery. It would be premature and inappropriate for this Court to grant a motion to dismiss at this stage. For all of these reasons, the Court finds the instant Plaintiff and Counterclaim Defendant, Frasure Creek Mining, LLC's Motion to Dismiss Counts 1 and 2 of the Counterclaim must be denied.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff and Counterclaim Defendant, Frasure Creek Mining, LLC's Motion to Dismiss Counts 1 and 2 of the Counterclaim is hereby DENIED.

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.

August 16, 2021
date of entry


JUDGE JENNIFER P. DENT
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION