

**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 GRANTING POCAHONTAS' MOTION TO DISMISS FRASURE CREEK'S
"COUNTERCLAIM TO THE COUNTERCLAIM"**

This matter came before the Court this _____ day of August 2021, upon Respondents, Counterclaimants, and Third-Party Plaintiffs Pocahontas Land, LLC and Pocahontas Surface Interests, LLC's Motion to Dismiss Frasure Creek's "Counterclaim to the Counterclaim". The Defendants, Counterclaimants, and Third-Party Plaintiffs, Pocahontas Land, LLC and Pocahontas Surface Interests, LLC (hereinafter "Defendants" or "Pocahontas"), by counsel, J. Thomas Lane, Esq., and Plaintiff and Counterclaim Defendant Frasure Creek, LLC (hereinafter

“Plaintiff” or “Frasure Creek”), by counsel, R. Scott Long, 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 surrounds the claims in the Complaint, wherein in this case, on December 30, 2020, Plaintiff Frasure Creek Mining, LLC (hereinafter “Plaintiff” or “Frasure Creek”) 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. On a prior day, Pocahontas answered the Petition and filed a Counterclaim and Third-Party Complaint against Frasure Creek, Deep Water, and New Trinity. Thereafter, on February 21, 2021, Frasure Creek served its Answer, Affirmative Defenses, and “Counterclaim to the Counterclaim”, which is a single claim of tortious interference against Pocahontas, asserting damages as a result of being blocked from entering the Pocahontas property to conduct remediation. *See* Def’s Mot., p. 3.

2. On March 18, 2021, Pocahontas filed the instant motion, arguing the Counterclaim to the Counterclaim is an invented pleading which is not permissible under the West Virginia Rules of Civil Procedure, and must be stricken pursuant to Rule 12(f) of the West Virginia Rules of Civil Procedure. *See* Def’s Mot., p. 1-2.

3. The case was subsequently referred to the Business Court Division and assigned to the undersigned. On June 17, 2021, Frasure Creek filed Frasure Creek’s Response to

Pocahontas' Motion to Dismiss Frasure Creek's "Counterclaim to the Counterclaim", arguing the motion should be denied because the "Counterclaim to the Counterclaim" should either be permitted as an appropriate pleading or leave should be given to allow Frasure Creek to amend its Petition/Complaint to assert a claim of tortious interference. *See* Pl's Resp., p. 1. To that end, Frasure Creek argued the "Counterclaim to the Counterclaim" should be treated as a motion to amend the complaint. *Id.* at 2.

4. On June 28, 2021, Pocahontas filed its Reply in Support of Its Motion to Dismiss Frasure Creek's Counterclaim to the Counterclaim, averring that an amendment of the Complaint would be futile because a tortious interference claim is not actionable here. *See* Reply, p. 2.

5. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Procedural Argument

Pocahontas filed the instant motion, arguing the Counterclaim to the Counterclaim is an invented pleading which is not permissible under the West Virginia Rules of Civil Procedure, and must be stricken pursuant to Rule 12(f) of the West Virginia Rules of Civil Procedure. *See* Def's Mot., p. 1-2.

Rule 7 of the West Virginia Rules of Civil Procedure governs pleadings allowed. Rule 7(a) provides as follows:

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

W. Va. R. Civ. P. 7.

Rule 13 of the West Virginia Rules of Civil Procedure governs counterclaims and cross-claims. Rule 13 provides, in pertinent part: “A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.” W. Va. R. Civ. P. 13. Rule 12(f) of the West Virginia Rules of Civil Procedure provides:

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

W. Va. R. Civ. P. 12.

The Court concludes the West Virginia Rules of Civil Procedure do not allow for a “Counterclaim to the Counterclaim”. Specifically, Rule 13, which governs counterclaims, does not provide for a counterclaim to the counterclaim by the Plaintiff who was counterclaimed against. Importantly, a “Counterclaim to the Counterclaim” is not listed in the permitted pleadings enumerated in Rule 7.

The Court finds that if Frasure Creek, as Plaintiff in this civil action, seeks to assert a new claim against Defendants Pocahontas, Frasure Creek must go through the proper channels for amending its original pleading, as governed by Rule 15. The Court therefore grants Frasure Creek's request in the response for leave to amend its Complaint to assert the claim of tortious interference, finding that would be the proper channel for such a cause of action. The Court

finds this would be appropriate procedurally, whereas Frasure Creek counterclaiming Pocahontas' counterclaim would not be procedurally appropriate.

Rule 15 of the West Virginia Rules of Civil Procedure governs amended and supplemental pleadings. Rule 15 provides that such leave shall be "freely given" by the Court. W. Va. R. Civ. P. 15(a).

Rule 15 of the West Virginia Rules of Civil Procedure provides, in pertinent part,

...a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...

W. Va. R. Civ. P. 15.

Further, the rule of civil procedure that leave to amend a pleading "shall be freely given when justice so requires" is to be liberally construed to promote substantial justice and to secure the just, speedy, and inexpensive determination of every action. *Perdue v. S. J. Groves & Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968). "The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syl. pt. 3, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973). Syl. Pt. 6, *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W.Va. 168, 381 S.E.2d 367 (1989); see also, Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 334 (2002).

The West Virginia Supreme Court of Appeals has held that motions to amend pleadings should always be granted when: (1) the amendment permits the presentation of the merits of the action, (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment, and (3) the adverse party can be given ample opportunity to meet the issue. Rules Civ.Proc., Rule 15(a). *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004) *holding modified on other grounds by Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005).

Applying the standard outlined in *Boggs*, this Court analyzes as follows. First, the proposed amendment to the Complaint in the form of the tortious interference cause of action permits the presentation of the merits of the action, because it will further the presentation of the merits of Plaintiff's Complaint against Defendants. The Court notes both causes of action surround the same factual issue of Frasure Creek accessing Pocahontas property for remediation purposes and the alleged blocking of such remedial efforts by restricting access to the property on the part of Pocahontas. Second, the amending of the Complaint in the form of adding a claim for tortious interference based on the same background facts as in the Petition related to access to the Pocahontas property for remediation will not prejudice Pocahontas by the sudden assertion of the subject of the amendment. As noted above, the causes of actions surround the same factual background. Further, the Court considered Pocahontas' argument regarding prejudice in the Reply, which was that Pocahontas argued the effect of including a Counterclaim to the Counterclaim prejudices Pocahontas because Frasure Creek has initiated two separate civil actions in addition to arbitration proceedings in an effort to shield itself from liability in connection with the breaches of the lease and WVDEP violations. *See Reply*, p. 2. It appears that Pocahontas' prejudice argument is centered around the impermissible pleading burdening

the courts and complicating proceedings, including impacting another motion to dismiss filed in this civil action. *Id.* However, the Court considers that the addition of a tortious interference claim via the Complaint as amended as the appropriate vehicle for such claim would not be prejudicial to Pocahontas, considering the facts arise from the same conduct or course of conduct between Plaintiff and Defendants alleged in the original Complaint, and the early stage of litigation this civil action is in presently. Finally, third, Pocahontas will have ample time to meet the issue, because they will have ample time to respond, the initial case management conference recently occurred and the scheduling order was recently entered in this matter, and much discovery will not need to be re-started. The Court finds amending the Complaint in this manner will not limit Pocahontas' access to evidence or witnesses. The Court notes there has been no argument that Frasure Creek has been dilatory in seeking an amendment, and finds the Court must allow for amendment, keeping in mind the presumption and standard that amending the Complaint is leave that shall be "freely given" under Rule 15.

The Court hereby GRANTS Frasure Creek's request for amendment, and concludes and orders that such amended complaint shall be filed within twenty (20) days of entry of this order.

Rule 12(b)(6) Argument

The Court next addresses Pocahontas' second argument, which is that even if it is not stricken, Frasure Creek's new claim fails to state a claim 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).

The Court finds such a finding would at this point be premature. The Court is granting the motion to dismiss the Counterclaim to the Counterclaim filed in this civil action, and granting a request by Frasure Creek to file an amendment to its complaint to add a claim for tortious interference. If at the time of the filing of the amended complaint, Pocahontas opines that the cause of action, as pled in the amended complaint, fails to state a claim, it may file such a motion under Rule 12(b)(6) at that time. Since the amended complaint has not been filed yet, to dismiss the claim for tortious interference under Rule 12(b)(6) would be premature at this time. For this reason, the Court will not grant the instant motion under this basis.

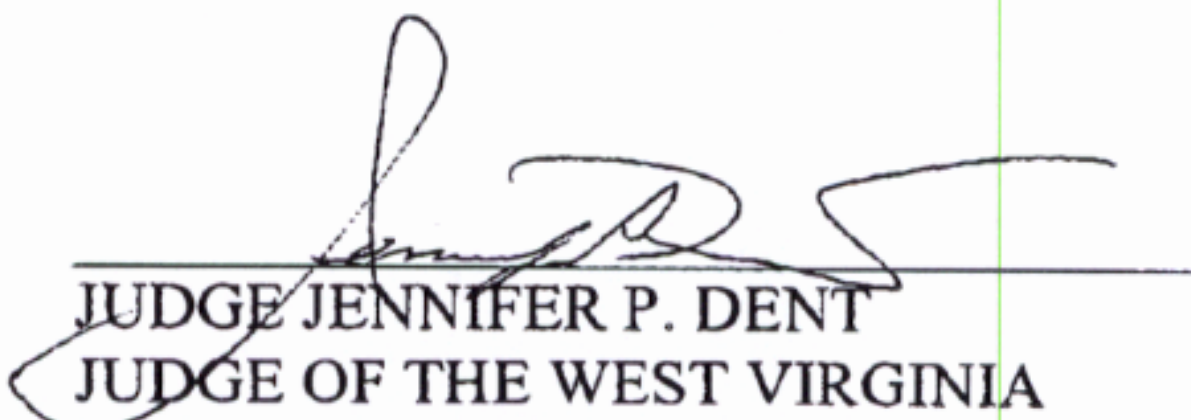
CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Pocahontas Land, LLC and Pocahontas Surface Interests, LLC’s Motion to Dismiss Frasure Creek’s “Counterclaim to the Counterclaim” is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Frasure Creek’s “Counterclaim to the Counterclaim” is hereby DISMISSED WITHOUT PREJUDICE. The Court does hereby ORDER Frasure Creek’s Amended Complaint to be filed within 20 days of the entry of this Order.

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