

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

**TRITON CONSTRUCTION, INC.,
a West Virginia corporation,**

Plaintiff,

vs.

Civil Action No. 21-C-07

Presiding Judge: H. Charles Carl, III

**Resolution Judge: Michael D. Lorensen
and Jennifer P. Dent**

**GANNETT FLEMING, INC.,
a Delaware corporation, and**

**MONONGAHELA CONSERVATION DISTRICT,
a West Virginia Conservation District,**

Defendants.

**ORDER DENYING GANNETT FLEMING, INC.'S MOTION TO DISMISS AND
DENYING MONONGAHELA CONSERVATION DISTRICT'S MOTION TO DISMISS**

CAME THIS DAY January 7, 2022, the Plaintiff Triton Construction, Inc. ("Triton"), by its counsel Norman T. Daniels, Jr., Thomas S. Sweeney and the Daniels Law Firm, PLLC, and the Defendant Gannett Fleming, Inc. ("GFI"), by its counsel James A. Kirby III, and Defendant Monongahela Conservation District, ("MCD") by its counsel Hilary M. Bright, for a hearing pursuant to the Briefing Order entered on December 10, 2021. Defendant MCD filed a Motion to Dismiss on July 15, 2021. The Response of Triton to the Motion to Dismiss was filed on July 28, 2021. Pursuant to the Briefing Order entered on December 10, 2021, the defendants had until December 20, 2021 to file a rebuttal memorandum.

The Court has carefully considered the Motions, the Memoranda filed, arguments of counsel at the hearing, and pertinent legal authority. In support of its decision, the Court makes the following findings of fact and conclusions of law:

1. On December 22, 2021, GFI's Motion to Dismiss was filed. This Motion to Dismiss stated that, "GFI incorporates all arguments and grounds set forth in MCD's motion as the defendants are similarly situated for purposes of MCD's Motion to Dismiss."

2. GFI made no new or different arguments. It only asserted the arguments and grounds set forth in MCD's Motion to Dismiss.

3. On July 28, 2021, Triton filed a Response to MCD's Motion to Dismiss, alleging that the contract and Modification #7 on which MCD bases its motion to dismiss were fraudulently obtained. This Response was replete with evidence and facts.

4. On December 31, 2021, Triton also filed a Response to Gannett Fleming, Inc.'s Motion to Dismiss stating that it was not permitted to be filed under the *West Virginia Rules of Civil Procedure* as GFI had already filed a Complaint. In its Response to the GFI Motion to Dismiss, Triton also included by reference and asserted its response to the MCD Motion to Dismiss just as GFI had asserted and adopted the MCD Motion to Dismiss.

5. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "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).

6. 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).

7. Here, the MCD’s Motion to Dismiss did not address the claims of fraud. Rather, it asserts its rights under the contract and asserts that the claims of Triton are precluded by its waiver of those claims in the Modification #7. This Motion does not however, obviate the need to conduct discovery regarding the claims made by Triton that it was fraudulently induced to enter the contract and was fraudulently induced to agree to Modification #7. The Court notes it granted the pending Motion for Leave to File Second Amended Complaint, allowing the fraud/fraudulent inducement claims. If true, then the arguments and rights asserted by MCD in its Motion to Dismiss, would be a nullity.

8. The Response to the MCD Motion to Dismiss; the Motion for Leave to File Second Amended Complaint; the proposed Second Amended Complaint and the Response to Gannett Fleming, Inc.’s Motion to Dismiss, all provide extensive allegations of fraudulent behavior by both MCD and GFI, MCD’s contractual agent. The allegations made in the Motions and memoranda were replete with evidence and detailed factual assertions. The Court finds more discovery is needed to flesh out these issues.

9. Accordingly, the Court finds it would be premature to grant any Motion to Dismiss and thereby preclude any discovery to develop the evidence required to determine the facts relating to the allegations in the Second Amended Complaint.

10. Thus, the Court finds neither Motion to Dismiss addresses the allegations and argument of the Second Amended Complaint. Specifically, there are now pending in the Second Amended Complaint, allegations of Fraudulent Inducement to Contract, Fraudulent Inducement to Modification #7, First Breach and Violation of the Superior Knowledge Doctrine, among many

others. These are all allegations infused with evidentiary and factual issues, none of which has been developed through any discovery.


11. Therefore, the Motions to Dismiss are both denied due to the granting of the Motion for Leave to File Second Amended Complaint, and these Motions are rendered moot given the lack of any discovery on a diverse array of factual allegations in need of evidentiary development. Even if it were not moot, the Court finds and concludes that more discovery is needed at this point in the litigation. Defendant contends that the claims should be dismissed as they pertain to dewatering. However, at this point in the litigation, further factual development is necessary as to whether Plaintiff could have and did effectuate a knowing waiver of these claims, and whether or not the dewatering was physically impossible following the engineer's direction. At this point in the litigation, more discovery will flesh out these issues.

WHEREFORE, the Court **ORDERS** that Defendant GFI's Motion to Dismiss is **DENIED**.

WHEREFORE, the Court further **ORDERS** that Defendant MCD's Motion to Dismiss is **DENIED**.

Upon its entry, the Circuit Clerk is directed to forward a copy of this Order to all counsel of record and to the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 West South Street, Martinsburg, WV 25401.

IT IS SO ORDERED this 25 day of January, 2022.


H. Charles Carl, III, Presiding Judge
Business Court Division

Entered: January 25, 2022

Lisa Leshman, Clerk

By: Sandy Murray, Deputy

4 copies
SD
1-25-22
Business Ct.
JAC III
NTD FR.
HB