

In the Circuit Court of Putnam County, West Virginia

The Early Construction Co.,
Plaintiff,

v.

Case No. CC-40-2022-C-88
Judge David Hammer

**AMERICAN ELECTRIC POWER
SERVICE CORPORATION,
AEP WEST VIRGINIA
TRANSMISSION COMPANY, INC.,
AEP TRANSMISSION COMPANY,
LLC,
AMERICAN ELECTRIC POWER
COMPANY, INC.,
Joel Sigler ET AL,**
Defendants

Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Strike

The Early Construction Co. filed suit on June 30, 2022. Complaint [doc. 1-2]. A total of eight counts were alleged against the various corporate and individual Defendants including the following claims at issue here:

- Count II – Unjust Enrichment (stated in the alternative to the Breach of Contract claims asserted solely against AEP in Count I but also jointly seeking recovery against Defendants AEPTC, AEPC, and the Doe Defendants for the value of benefits alleged to have been received by these Defendants, but not seeking such recovery against Mr. Sigler).
- Count III – Promissory Estoppel (stated in the alternative to Breach of Contract claims against AEP for promises to pay alleged to have been made by AEP).
- Count IV – Fraud (asserted against AEP only).
- Count V – Mistake (seeking to declare Section C, Paragraph 5 of Change Order #1 [pertaining to “the Rock”] and corresponding terms/provisions with

AEP invalid and providing equitable reformation in relief to conform to “the parties’ mutual intent [to] determine reasonable compensation to Early for rock removal up to a certain amount”)

- Count VII – Tortious Interference with Contract/Business Relations (asserted against AEP and Mr. Sigler for allegedly interfering in Plaintiff’s contractual *and* business relationships with its subcontractors).
- Count VIII – Negligent Misrepresentation (stated solely against AEP and *expressly* in the alternative to the Breach of Contract claims against AEP alleged in Count I. See Complaint, p. 86).

On September 12, 2022, the circuit court received “Defendants American Electric Power Service Corporation, AEP West Virginia Transmission Company, Inc., AEP Transmission Company, LLC, American Electric Power Company, Inc., and Joel Sigler’s Combined Motion to Dismiss and Strike” [doc. 30-1] and Memorandum in Support [doc. 31-1]. The Plaintiff’s filed their opposition thereto on January 17, 2023 [doc.48-1], and Defendants replied on February 10, 2023 [doc. 57-1].

On March 10, 2023, the Circuit Court of Putnam County filed “Judicial Motion to Refer Case to the Business Court Division [doc. 59-1]. On April 27, 2023, the Supreme Court of Appeals of West Virginia entered “Order Granting Referral” transferring this case to the Business Court Division whereupon it was assigned to the undersigned Business Court Division judge on April 28, 2023 [doc. 72-1].

Having reviewed the court file, the pending motion to dismiss, response, and reply the Court finds the motion to be ripe for ruling without need for additional argument. After a brief discussion of the legal standard applicable to a Rule 12(b) motion, the Court then summarizes in broad strokes the grounds for the Defendants’ pending motion and the Court’s rulings thereon with reference to the parties’ briefs:

1) The Rule 12 Standard of Review

Pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a party may move for dismissal of a complaint for “failure to state a claim upon which relief can be granted.” In numerous decisions, the West Virginia Supreme Court of Appeals has

provided instruction for the interpretation and application of Rule 12(b)(6). Particularly useful guidance in this instance is found in the case of *Mountaineer Fire and Rescue Equipment, LLC v. City National Bank of West Virginia*, 854 S.E.2d 870, 883-884 (2020), in part:

In light of the purpose behind the Rules of Civil Procedure, this Court 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. Newsco Well Serv., Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986). "[A] complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is." *Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. at 776, 461 S.E.2d at 522.

It is the Court's obligation to construe the pleadings as to do substantial justice. RCP, Rule 8(f). Accordingly, this Court's mandate now is to determine if Plaintiff has alleged an occurrences or occurrences that would justify some form of relief.

2) The Court Denies Defendants' Motion to Strike the Complaint

Relying on WVRCP, Rule 8 and Rule 12(f), Defendants seek to strike the Complaint in its entirety because they say Plaintiff said too much, too soon and/or did not plead enough. The parties agree that West Virginia's procedural law applies to procedural law issues raised by the Defendants' Motion, but they disagree on the result of such analysis.

After a painstaking review of the Complaint and supporting documents, and for essentially the reasons argued by Plaintiff, the Court disagrees with the Defendants' Rule 8 and Rule 12(f) arguments. The Court need not belabor this issue; the Complaint sets forth plainly the occurrences from contract inception through alleged breach and purported tortious interference giving rise to Plaintiff's claims for relief. That various theories of recovery are asserted, some being inconsistent in fact or law, is not at issue in an RCP, Rule 12 motion and in any event, is expressly permitted. See RCP, Rule 8(e)(2) ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or both.")

Regarding Defendants' RCP, Rule 8(a) concerns about the Complaint citing to

meeting minutes or e-mail communications, and as the Court observed while reading the Complaint, such documents being sometimes quoted, and other times not quoted, the Court concludes that Plaintiff's allegations are stated without undue speculation or legal argument. The documents cited are those which the Court would expect to be equally available to those Defendants to whom they pertain and upon which those Defendants can rely in crafting their answer(s) as permitted by the Rules.

Given the scope of the issues presented extending over a prolonged time, involving several actors, on balance and given the issues presented, the Court does not find that answering the Complaint places an undue burden upon the Defendants as may necessitate a dismissal without prejudice with leave to re-file and denies their motion to strike the Complaint in whole or in part per Rule 12(f). Obviously, construction law itself is complex and facts matter in the application of the law to a particular dispute. Indeed, AEP "acknowledges that the issues in this case may be complex." *Memo*, p. 7.

In this case, occurrences giving rise to claims and defenses need to be explored through discovery, tested at summary judgment, and, if viable, proven at trial.

3) The Court Grants in Part and Denies in Part Defendants' 12(b)(6) and Rule 9(b) Motions

Relying on Rule 12(b)(6) and Rule 9(b), Defendants seek the dismissal with prejudice of Counts II through V, VII and VIII based on Ohio's substantive law. For purposes of the Court's analysis, Defendants' Rule 12(b)(6) motion is further subdivided and analyzed below.

a. Counts II, III, and VIII – Alternative Theories of Recovery to Breach of Contract

Plaintiff makes several claims *in the alternative* to Count I (Breach of Contract) should the Court determine that there was no contract. Counts II and III are quasi-theories of recovery, *e.g.*, unjust enrichment, promissory estoppel. Count VIII, negligent misrepresentation, was also plead, as Early expressly stated, as an alternative to Breach of Contract against AEP.

Plaintiff did not know at the time it filed its Complaint that AEPSC / AEP would unequivocally admit "[i]t is undisputed that the parties had an express contract for the work that Early performed in furtherance of the Project." *Memo*, p. 11 [boldface added]; *Reply Memo*, p. 8 (conceding valid and enforceable contract). See also Project

Requirements for the AEP Hurricane Service Center, [doc. 1 – 3] at .pdf pp. 153 - 154/156 (DocuSign signatures of representatives from AEP, AEPSC, and Early). Now, having made this admission, AEPSC / AEP is hereby bound that *all work* performed by Early in *furtherance* of the Project *is governed by the Contract* and Defendants are hereby stopped from subsequently asserting any claim inconsistent therewith.^[1] Thus and in reliance upon this admission, the Court dismisses with prejudice Plaintiff's alternative theories of recovery asserted against AEPSC / AEP set forth in Counts II, III, and VIII.

Early sought relief against other Defendants named in Count II “as an alternative theory of recovery against AEP, AEPTC, AEPC and the Doe Defendants, should the Contract, EWOs, change orders, and/or corresponding Contract documents be found to be invalid and/or non-binding on AEP.” Complaint, ¶ 363. But now, the Contract, in its entirety, having been admitted by AEPSC / AEP, this quasi-contract theory of recovery is dismissed with prejudice against AEPTC, AEPC and the Doe Defendants.

b. Count IV, Fraud by AEP

The Court agrees with the Plaintiff's argument that it has particularly plead fraud as required by RCP, Rule 9(b) bearing in mind that “malice, intent, knowledge and other condition of mind of a person may be averred generally.” *Id.* And accepting the facts plead as true, it is subject to proof that AEP and its agents were aware of a massive underground rock about which Plaintiff was kept ignorant because AEP wanted to induce Plaintiff to continue removing the rock so as to avoid delay and to do so, it lead Plaintiff to believe that CO #1's dollar amount was only a place holder until the actual cost of rock removal could be determined. Some or all of which facts may be true or untrue, but sufficient facts having been plead, it's not the Court role on a Rule 12(b) motion to decide what is true.

c. Count V, Mistake, and Corresponding Equitable Reformation in Relief

In the Court's view, this claim is particularly plead and, moreover, must survive Rule 12 given a) discovery of a massive underground rock, the dimensions of which were either understood by AEP and/or its agents but not disclosed to Early, or its dimensions later collectively understood as excavation proceeded, and b) the contract admission by AEPSC / AEP. Defendant's Rule 12(b)(6) motion is denied.

d. Count VII, Tortious Interference

Accepting as true the facts plead in the Complaint as well as all reasonable inferences arising therefrom, the Court denies AEP and Mr. Sigler's motion to dismiss Count VII. The parties' arguments regarding Ohio's law of tortious interference make clear that 1) Mr. Sigler, even as a disclosed agent, can be liable for tortious conduct outside the scope of the Contract, and consequently 2) Mr. Sigler and AEP may be liable for tortious interference with Early's business relationships, as plead by Early.

The Court has no doubt that beyond denying any tortious interference in the first instance, AEP and/or Mr. Sigler may seek to negate tortious interference claims by proof of justification or privilege to speak to Plaintiff's subcontractors for reasons that go well beyond ascertaining whether a particular subcontractor's invoices had been paid in full or whether a subcontractor possessed a mechanic's lien. But the parties' evidence must await, at a minimum, summary judgment as the Court cannot, as a matter of law, say it is beyond doubt that there is no set of facts upon which there is a claim for relief for tortious interference, and dismiss this claim.

Therefore, Defendants' Motion to Strike and Motion to Dismiss is granted in part and denied in part.

Court staff will soon reach out to counsel to set a conference date for all purposes permissible under RCP, Rule 16. Counsel are **ORDERED** to confer regarding those matters set forth in Rule 16(c) and to file a joint report of their conference not later than three business days in advance of the date that will be set for the conference.

It is so ORDERED.

/s/ David M. Hammer
Circuit Court Judge
29th Judicial Circuit

[1] "An admission made during the course of judicial proceedings, whether it be direct or by inference from the position taken, the relief sought, or defense set up, will stop the one who makes it from subsequently asserting any claim inconsistent therewith." Clark v. Clark, 70 W. Va. 428, 74 S.E. 234, 236 (1912).

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsv.gov/e-file/ for more details.