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

ASSOCIATED SPECIALISTS, INC.
and POB, LLC,

Plaintiffs,

vs. // CIVIL ACTION NO. 12-C-475-2
(Thomas C. Evans, III, BCD
Presiding Judge)

GRANT ARCHITECTS, P.C., INC., and
CENTURY ENGINEERING, INC.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS [SECOND] AMENDED COMPLAINT

On the 26th day of November, 2013, came the Plaintiffs, by counsel, and came the Defendants, Grant Architects, P.C., Inc. ("Grant Architects") and Century Engineering, Inc., ("Century Engineering") by their respective counsel, for a telephonic hearing on "Grant Architects' Motion to Dismiss [Second] Amended Complaint" and "Defendant Century Engineering, Inc.'s Motion to Dismiss [Second] Amended Complaint," (hereafter "Motions to Dismiss"). Saad Mossallati, M.D. also attended the hearing by telephone. The Court has read both Motions to Dismiss, the Plaintiffs' "Response to Grant Architects Second Motion to Dismiss," and "Plaintiff's Response to Defendant's Century Engineering Inc. Motion to Dismiss Second Amended Complaint."

These motions are made pursuant to *Rule 12(b)(6)* and *Rule 12(c), WVRCivP. Rule 12(b)* provides as follows:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(c) provides:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The primary basis for the defenses raised by the pending motions is a certain contract, and addenda, entered into by Plaintiff Associated Specialists, Inc. and Defendant Grant Architects, P.C., Inc. While the Second Amended Complaint certainly refers to this contract, the contract was not exhibited to the Complaint. It is before the court as an exhibit to the motion to dismiss, and there has been no dispute about the fact that this exhibit is in fact the contract between Plaintiff Associated Specialists, Inc. and Grant Architects, P. C., Inc. The general rule is that consideration of matters outside of the Plaintiff's Complaint, and exhibits to it, necessarily converts the motion to one for summary judgment. Here, however, counsel for Grant Architects, in its motion to dismiss, argues that the contract is the primary basis for the Second Amended

Complaint, which refers to it and specific provisions of it as a basis for some or most of the relief sought, and that the court therefore may consider the contract and addenda appended and exhibited to the motion to dismiss and dispose of the motion under Rule 12(b)(6) and not Rule 56, relating to motions for summary judgment. This was not disputed by the attorney for the Plaintiffs either in written response or oral argument. There is also a basis for treating the motion as one to be resolved under *Rule 12(b)(6)*, even though the court must of necessity consider the contract and addenda, which is not set forth in or exhibited to the Second Amended Complaint. ***See Forshey v. Jackson,*** 222 W.Va. 743, 671 S.E.2d 748 (2008)("Notwithstanding this general rule, it has been recognized that, in ruling upon a motion to dismiss under Rule 12(b)(6),a court may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. . . ." 222 W. Va. at 752, 671 S.E.2d 747)

Findings of Fact

1. The Plaintiff's [Second] Amended Complaint is based upon a breach of contract theory and a negligence theory.

2. Paragraph 5 of the [Second] Amended Complaint states, "That on or about the 21st day of November, 2006 the Plaintiff entered into a contract with the Defendant Grant Architects, Inc."[1] "Thereafter all rights under the Contract with Grant were assigned to POB L.L.C., by Associated Specialists, Inc."

3. It was conceded by Plaintiff, during argument, that Grant Architects did not execute a written consent to any such assignment of the Contract to POB L.L.C., and

[1] The contract is dated November 14, 2006, but the last change was initialed by Saad Mossallati and Jon Grant on November 21, 2006.

that if the Contract was assigned as alleged, it was done so only under a theory of an "implied assignment."

4. Paragraph 6 of the [Second] Amended Complaint states that "POB, LLC became the assignee of the rights of Associated Specialists to this contract. Subsequent correspondence between the parties was through POB, LLC without objection by the Defendant." The rest of the paragraphs of the [Second] Amended Complaint allege the ways in which the Plaintiffs believe that Grant Architects breached its contract with Associated Specialists, Inc., (hereafter "Associated Specialists").

5. Defendant, Century Engineering, Inc., entered into a subcontract with Grant Architects, Inc., to perform certain engineering work for the project at issue as a consultant/subcontractor.

6. All damages claimed by the Plaintiffs in their [Second] Amended Complaint are in the nature of consequential, economic damages. This was conceded by Plaintiffs during argument.

7. Paragraph 7.2 of the "AIA Document B151 – 1997 Abbreviated Standard Form of Agreement Between Owner and Architect" (hereafter "Contract")[2] contains a mutual waiver of consequential damages.

8. Paragraph 7.2[3] of the Contract states:

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[2] The form, "AIA Document B151 – 1997 Abbreviated Standard Form of Agreement Between Owner and Architect", contains the waiver of consequential damages language under consideration at Paragraph 7.3. Here, in the Contract entered into between Associated Specialists, Inc. and Grant Architects, P.C., Inc., the same waiver of consequential damages language is contained in Paragraph 7.2. That language is unaltered from the original AIA form. The current version of AIA Document B151 – 1997 is AIA Document B101 – 2007.

[3] The same waiver of consequential damages is found at Paragraph 8.1.3 in current version of this contract, AIA Document B101 – 2007, which states:

> The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 8.

9. As a result, and as explained thoroughly in the Conclusions of Law section below, the Court finds that all claims asserted by Associated Specialists in its [Second] Amended Complaint are barred pursuant to Paragraph 7.2 of the very contract it claims was breached.

10. Paragraph 12 of "Addendum I Standard Terms and Conditions" of the Contract states:

> Client [Associated Specialists] releases Grant Architects and its partners, members, managers, directors, officers, employees, agents and subcontractors from and waiver [sic] all claims of any nature for any and all errors or omissions by Grant Architects, or any of its partners, employees, agents, or subcontractors, in the performance of this Agreement, as this Agreement may from time to time be amended, or in the performance of any supplementary services in any way related to this Agreement, unless Client has strictly complied with all of the following procedures for asserting a claim, as to which procedures time is of the essence.
> a) Client shall give Grant Architects written notice within ten (10) days of the date that client discovers, or should, in the exercise of ordinary care, have discovered that it has or may have a claim against LukmireGrant, Grant Architects. If Client fails to give Grant Architects written notice within such ten (1) days, then such claim shall forever be barred and extinguished.
> b) If Grant Architects accepts the claim, Grant Architects shall have a reasonable time to cure any error or omission and damage resulting there from. This shall be Client's sole remedy, and Client may not itself cause the error or omission, or any damage resulting there from to be cured if Grant Architects is ready, willing and able to do so.
> c) In the event that Grant Architects rejects the claim, it shall give Client written notice of such rejection within thirty (30) days of receipt of the notice of claim from Client. Client shall then have sixty (60) days within

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The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in § 9.7.

> which to furnish Grant Architects with an opinion from a recognize [sic] expert in the appropriate discipline, corroborating Client's claim that Grant Architects committed an error or omission, and establishing that the error or omission arose from the failure to use the degree of care ordinarily used by professionals in that discipline in the jurisdiction local to the Project. If Client fails to furnish Grant Architects such an opinion from a recognized expert within sixty (60) days from the date of notice of rejection, then such claims shall forever be barred and extinguished.
> d) Grant Architects shall have sixty (60) days from receipt of the written opinion of an expert within which to reevaluate any claim asserted by Client. IF Grant Architects again rejects such claim, or if the sixty (60) day period from receipt of the written opinion of the expert elapses without action by Grant Architects, then client may have recourse to such other remedies as may be provided under this Agreement.

11. As explained thoroughly in the Conclusions of Law section below, the Court finds that, in addition to its waiver of all consequential damages in Paragraph 7.2 of the Contract, Associated Specialists has waived any errors and omissions claims against Grant Architects and Century Engineering, Inc., that may be implied from the allegations contained in the [Second] Amended Complaint pursuant to Paragraph 12 of Addendum I of the Contract.[4]

12. POB, LLC (hereafter "POB") conceded that it is not a party to the Contract in Paragraphs 1 and 4 of "Plaintiff's Response to Defendant's Motion to Dismiss and Motion to Amend Complaint" served on January 17, 2013, in response to Grant Architect's earlier motion to dismiss the original Complaint.

13. There is no allegation in the [Second] Amended Complaint that Grant Architects provided written consent for the Contract to be assigned to POB as is required by Paragraph 9.3 of the Contract.

14. Paragraph 9.3 of the Contract states:

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[4] Associated Specialists made no argument to refute Grant Architects' and Century Engineering, Inc.'s arguments that Associated Specialists did not present a claim through the mechanism specifically set forth in Paragraph 12 of Addendum I of the Contract.

> Neither the Owner nor the Architect shall assign this Agreement or any interest or claim for any monies due or to become due arising without the written consent of the other, except that the Owner may assign this Agreement to an institutional lender providing financing for the Project.

15. Plaintiffs argue that the Contract does not prohibit implied consent to an assignment, and that implied consent can be shown because Grant Architects, subsequently to contract formation, sent letters to Dr. Mossallati at POB, because Grant accepted checks from POB, and because the project drawings has POB's name on them. The Court finds that these actions do not constitute written consent of assignment that is required by Paragraph 9.3 of the Contract.

16. As a result, and as explained thoroughly in the Conclusions of Law section below, the Court finds that POB has no standing to file a breach of contract claim, and that it should be dismissed as a Plaintiff pursuant to *Rule 12(b)(6)* of the West Virginia Rules of Civil Procedure.

17. As a result, and as explained thoroughly in the Conclusions of Law section below, the Court finds that any claim of negligence by POB should be dismissed pursuant to Rule 12(c) of the W. Va. Rules of Civil Procedure due to POB's failure to assert any duty owed by Grant Architects or Century Engineering that is independent of Grant Architects' Contract with Associated Specialists.

Standard of Law

West Virginia case law is clear that "[a] trial court may dismiss a pleading for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure." The purpose of a motion to dismiss under West Virginia Rule of Civil Procedure 12(b)(6) is to "test the formal sufficiency of the

complaint." ***Collia v. McJunkin***, 358 S.E.2d 242, 243 (W. Va. 1987) (*per curiam*). "A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." ***Harrison v. Davis***, 478 S.E.2d 104, 111 n.17 (W. Va. 1996). Although a trial court is to construe the complaint in the light most favorable to the plaintiff, and its allegations are to be taken as true, ***John W. Lodge Distrib. Co. v. Texaco***, 245 S.E.2d 157, 158 (W. Va. 1978), the court should dismiss "the complaint [if] it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ***Napier v. Napier***, 564 S.E.2d 418, 421 (W. Va. 2002).

In considering the Defendants' Motions to Dismiss, the Court has assumed that all of the Plaintiffs' allegations set forth in the [Second] Amended Complaint are true, but still finds that the Plaintiffs cannot state a cause of action against Grant Architects or against Century Engineering upon which relief can be granted. Thus, the Court finds that both Defendants are entitled to be dismissed from this lawsuit, with prejudice.

Conclusions Of Law

A. The Two Year Statute of Limitations for Negligence Claims in West Virginia is Not Extended by the "Architects and Builders Statute," W. Va. Code §55-2-6a.

1. In the "Plaintiff's Response to Defendant's Motion to Dismiss and Motion to Amend Complaint," which was originally filed on January 17, 2013, and attached to Plaintiffs' [Second] Amended Complaint, the Plaintiffs rely on *W. Va. Code § 55-2-6a*, and argue that the applicable statute of limitations is ten years, not two years. This Court finds that the Plaintiffs' reliance on this statute commonly referred to as the "Architects and Builders Statute" is erroneous.

2. *West Virginia Code § 55-2-6a* states in part:

> No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction . . . to real property . . . may be brought more than ten years after the performance or furnishing of such services or construction . . . .The period of limitation provided in this section shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of real property, whichever occurs first.

3. In ***Shirkey v. Mackey***, 184 W. Va. 157, 399 S.E.2d 868 (1990), application of this statute was before the West Virginia Supreme Court of Appeals. The specific issue in that case was whether the discovery rule applied to the facts of that case. In holding that it did not, the Court stated:

> *West Virginia Code § 55-2-6a (1983)* sets an arbitrary time period after which no actions, whether contract or tort, may be initiated against architects and builders. Pre-existing statutes of limitation for both contract and tort actions continue to operate within this outside limit.[5]

Syllabus.

4. West Virginia law is clear. *W. Va. Code § 55-2-6a* is not a statute of limitation - - it is a statute of repose.

5. The difference between a statute of limitation and a statute of repose is discussed in ***Gibson v. West Virginia Department of Highways***, 406 S.E.2d 440 (W. Va. 1991):

> The time period [in W. Va. Code § 55-2-6a] operates independently of when the injury actually occurs. Some courts refer to this type of statute as one of repose, as distinguished from a statute of limitations. A statute of limitations ordinarily begins to run on the date of the injury; whereas, under a statute of repose, a cause of action is foreclosed after a stated time period regardless of when the injury occurred.

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[5] The Court specifically noted that such pre-existing statutes of limitations would include W. Va. Code §55-2-12 (1981), which sets a maximum two-year statute of limitations for tort actions.

404 S.E.2d at 443. ***See also Thomas v. Gray Lumber Co.***, 199 W. Va. 556, 486 S.E.2d 142 (1997) (recognizing the holding in *Shirkey v. Mackey* that pre-existing statute of limitation for both contract and tort actions continue to operate within the outside limits set by W. Va. Code § 55-2-6a and upholding the circuit court's finding that there was no continuing tort and the plaintiffs' action was barred by the two year statute of limitations).

6. Thus, pursuant to the West Virginia Supreme Court's holding in *Shirkey v. Mackey* and subsequent cases affirming the same, the two year statute of limitations set forth in *W. Va. Code § 55-2-12* applies in this case for any negligence claim.

7. Insofar as the "Order Denying Defendants' Motion to Dismiss and Granting Plaintiff's Motion to Amend Complaint and Scheduling Pre-Trial/Scheduling Conference," entered on February 5, 2013, holds differently, this Order AMENDS that prior Order as set forth herein.

B. <u>All Claims Asserted by Associated Specialists Are Dismissed, With Prejudice, Because of Associated Specialists' Contractual Waiver of All Consequential Damages and Contractual Waiver of All Errors and Omissions Claims Against Grant Architects and its Consultant, Century Engineering.</u>

8. On or about November 14, 2006, Grant Architects entered into a Contract with Associated Specialists whereby Grant Architects would provide architectural design services for a 100,000 square foot medical office building to be connected to United Hospital Center in Harrison County, West Virginia. Paragraph 7.2 of the Contract states:

> The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this

> Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 8.

9. Basic contract law states that contracts containing unambiguous language must be construed according to their plain meaning. ***See Fraternal Order of Police, Lodge No. 69 v. City of Fairmont,*** 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996).

10. The Defendants argue that the above-quoted language of Paragraph 7.2 is unambiguous, because the first sentence clearly sets forth that both Grant Architects and Associates Specialists agree to "waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement."

11. It is not disputed that matters relating to the Agreement include the architectural design and engineering services for the medical office building at issue performed by Grant Architects, and its consultant or sub-contractor, Century Engineering. Furthermore, the second sentence of Paragraph 7.2 states that the mutual waiver applies not only to all of the architectural design and engineering services for the medical office building, but also applies if either party terminates or suspends the Contract (which did not happen in this case). On the other hand, the Plaintiffs argue that the second sentence of Paragraph 7.2 should be interpreted to mean <u>that the only instance</u> in which consequential damages are waived is in the event of a termination of the Contract pursuant to Article 8.

12. The Court and counsel have conducted thorough research to ascertain whether any court has ever interpreted the AIA contract language that waives consequential damages and found no case precisely on point. However, in the *Legal Guide to AIA*

Documents, Werner Sabo, Esq. has interpreted this language consistent with the Defendants' position.

Specifically on point is Werner Sabo's interpretation of Paragraph 8.1.3 of the B201 – 2007 AIA contract, which has language that is identical to the B151-1997 AIA contract that was entered between Plaintiff Associated Specialists and Defendant Grant Architects in this case other than the change in article/section number referenced at the end of the paragraph. Therein, Werner Sabo states:

> This paragraph is a waiver of certain damages known as consequential damages. **If either the owner or architect is damaged, they waive any recovery for any consequential damages.** In A201, a list specified in ¶¶ 15.1.6.1 and 15.1.6.2 provides some examples of consequential damages[6]. Note that this list is not exclusive, so that if other damages are incurred that are deemed by a court to be consequential damages, those will also be waived. This is a way of limiting damages, and courts have generally upheld such provisions. **The provision that the waiver is applicable to termination is not a limitation, because the opening language of "arising out of or relating to" is considered to be very broadly inclusive** (see discussion as to broad form arbitration clauses at ¶ 8.3.1). If the contract documents contain a liquidated damages clause, this provision does not waive such damages.

Werner Sabo, Esq., *Legal Guide to AIA Documents,* § 2.24 Article 8: Claims and Disputes, (5th Ed., 07/26/2013) (emphasis added; citations and footnotes omitted).

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[6] ¶ 15.1.6 of AIA Document A201 – 2007 states:

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the service of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit expect anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall

13. Along with several cases from other jurisdictions that have upheld the limitation of consequential damages, there is a recent West Virginia Supreme Court of Appeals case holding that such a limitation on consequential damages is not commercially unreasonable. In ***SER Johnson Controls, Inc. v. Tucker***, 229 W. Va. 486, 729 S.E.2d 808 (2012), the West Virginia Supreme Court of Appeals considered the existence of unconscionability relating to the arbitration clause in an AIA contract, finding that the clause was not procedurally unconscionable. The Court also discussed briefly the mutual waiver of consequential damages because the circuit court had "found that because the [General Contractor's] agreement limited [the Owner's] right to recover consequential damages, the agreement precluded the plaintiff [Owner] from effectively vindicating its rights." *Id.* at 498, 820. The West Virginia Supreme Court of Appeals reversed the circuit court's decision on this issue, stating: "we see nothing in the record to indicate that the limitation on consequential damages is, in the context of this commercial construction agreement, commercially unreasonable."[7] *Id.*

14. The AIA contract at issue in ***Johnson Controls*** is AIA Document A101 – 1997, Standard Form of Agreement Between Owner and Contractor, which incorporated by reference the "General Conditions of the Contract for Construction," also known as AIA Document A201 – 1997.

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be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

[7] "The limitation on consequential damages was added to the AIA documents as a result of *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, (1992). In *Perini*, a construction manager was paid $600,000 to oversee renovation of a hotel casino. When completion of the project was delayed for four months, the casino filed an arbitration proceeding seeking consequential damages in the form of lost profits. A panel of arbitrators awarded the casino $14.5 million. Following *Perini*, the AIA amended its form documents to provide for a waiver of the parties' consequential damages. *See* Werner Sabo, *Legal Guide to AIA Documents*, § 4.85 at 521 (5th Ed.2008)." *Id.* at Footnote 41.

Paragraph 4.3.10 of AIA Document A201 – 1997 contains identical "consequential damages" limitation language as is found in §15.1.6 of the 2007 version of the contract that is set forth in its entirety in footnote 7 above. The consequential damages paragraph in the AIA Document A201 - 1997 contains the same language as the AIA Document B151 - 1997, but A201 has added more to the language. Importantly, both contracts contain a mutual waiver of consequential damages between the contracting parties and both clarify that the "waiver is applicable, without limitation, to all consequential damages due to either party's termination."

15. This Court finds that the language quoted above makes clear that the West Virginia Supreme Court of Appeals does not question the broad and inclusive mutual waiver of consequential damages provided by the paragraph at issue. In fact, the Court's inclusion of footnote 41 in the opinion (as fully set forth in footnote 8 above) provides some history for the AIA's inclusion of the waiver of consequential damages paragraph in its contracts. If the West Virginia Supreme Court believed that the waiver of consequential damages paragraph in the AIA contract at issue were limited only to matters relating to termination, this discussion would have been pointless since the *Johnson Controls* case did not involve the termination of the contract.

16. For all of these reasons, and as explained by the recognized authority on AIA contracts, Werner Sabo, in the *Legal Guide to AIA Documents*, this Court finds that the waiver of consequential damages language contained in Paragraph 7.2 of the Contract in this case is not limited to claims relating to the termination of contracts, but instead is broad and inclusive of all claims for consequential damages.

17. The only damages claimed by the Plaintiffs in the [Second] Amended Complaint are in the nature of consequential damages. In Paragraph 10 of the [Second] Amended Complaint, the Plaintiffs set forth eight different issues with the building that they allege cost them extra money to correct. In Paragraph 11, the Plaintiffs state that they are "entitled to judgment against the Defendants for [their] costs in remedying and repairing the defects as set forth above." The *ad damnum* clause states, in part, "the Plaintiff demands a judgment against the Defendant Grant in this matter in an amount that will compensate it for its out of pocket expenses as caused by the actions of the Defendants as set forth above." Costs spent to repair defects and out of pocket expenses are consequential damages that Associated Specialists waived pursuant to Paragraph 7.2 of the Contract.

18. In addition, Paragraph 12 of "Addendum I Standard Terms and Conditions" of the Contract (set forth in full at Paragraph 10 of the "Findings of Fact" section above), provides a clear waiver of "all claims of any nature for any and all errors or omissions by Grant Architects and its ... agents and subcontractors." As set forth at Paragraph 5 of the "Findings of Fact," Century Engineering, Inc. was a consultant/subcontractor of Grant Architects. If Associated Specialists had desired to assert such a claim against Grant Architects, or against Century Engineering, the mechanism for doing so was set forth specifically in Paragraph 12. It is undisputed that Associated Specialists did not assert any claim pursuant to the mechanism set forth in Paragraph 12. Therefore, insofar as the [Second] Amended Complaint may be read to imply a claim for errors or omissions against Grant Architects or against its consultant/subcontractor, Century Engineering, Inc., that claim must be dismissed because Associated Specialists waived

any such as set forth by the clear language of Paragraph 12 of Addendum I of the Contract.

19. Either Paragraph 7.2 or Paragraph 12 of Addendum I of the Contract independently would bar Associated Specialists' claims in this case. If POB had been a proper assignee to the Contract, as argued by the Plaintiffs, those paragraphs also would bar POB from raising any claims in this case.

20. Thus, as a result of the unambiguous language of Paragraphs 7.2 and 12 of the Contract, this Court finds that Associated Specialists cannot state a claim against Grant Architects or its consultant/subcontractor, Century Engineering, upon which relief can be granted and all claims raised by Associated Specialists are hereby DISMISSED, WITH PREJUDICE, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

C. **POB Has No Standing to Assert a Claim for Breach of Contract Because it is Not a Party to the Contract Between Associated Specialists and Grant Architects and Because Grant Architects Did Not Give Written Consent to Associated Specialists to Assign the Contract to POB as Required by Paragraph 9.3 of the Contract.**

21. It is basic hornbook contract law that "where a defendant in a case involving a contract dispute is not a party to the contract, that defendant may be dismissed." ***Green v. Select Portfolio Servicing,*** 2008 WL 2622917, at *2 (S.D.W.Va. June 30, 2008)' ***cf. Booker T. Washington Constr. & Design Co. v. Huntington Urban Renewal Auth.***, 383 S.E.2d 41, 43 (W. Va. 1989) (noting that, as the claims asserted were for breach of contract, the City of Huntington had been dismissed by the court below because the City of Huntington was not a party to the contract).

22. Under settled West Virginia law, the only situation that allows a non-party to a contract to bring a cause of action under the contract is if the contract was entered for the sole benefit of that party. ***See Eastern Steel Constructors, Inc. v. City of Salem***, 549 S.E.2d 266, 277 (W. Va. 2001). In ***Eastern Steel***, a contractor filed a lawsuit against the design professional on a construction project arguing, in part, that the contractor was a third-party beneficiary under the design contract between the design professional and the property owner such that the contractor could raise a cause of action under the contract.

West Virginia Code § 55–8–12 provides as follows:

> If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

The foregoing statute expressly allows a person who is not a party to a contract to maintain a cause of action arising from that contract only if it was made for his or her "sole benefit."

With regard to making a determination of whether Plaintiff POB L.L.C. is a third-party beneficiary of this particular contract, the Supreme Court of Appeals holds that:

> [i]In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration.

Syl. pt. 2, ***Ison v. Daniel Crisp Corp.***, 146 W.Va. 786, 122 S.E.2d 553 (1961).

In ***Eastern Steel, supra***, the Supreme Court of Appeals of West Virginia affirmed the circuit court's order granting summary judgment by holding that the contractor was not a third-party beneficiary under the contract because there was no language in the contract between the design professional and the property owner that either expressly or impliedly declared an intent that the contract was for the contractor's sole benefit. ***Id.*** at 277-278.

23. POB is not a party to the Contract entered into by Grant Architects for design work on the medical office building at issue. In addition, there is no language in the Contract that expressly or impliedly declares an intent that the Contract was for POB's sole benefit or that POB is an intended third-party beneficiary.

There also are no circumstances surrounding the formation of the contract relied on by the Plaintiff POB to establish that the contract was entered into for the sole benefit of POB. As a matter of fact, the holding company, POB, LLC, was not in existence at the time of contract formation, according to the representations made by Plaintiffs' attorney at argument on these motions. (See Oral Argument Tr., 11-26-2013, p. 20). Therefore, because the Contract was not entered for the sole benefit of POB and POB is not listed as an intended third-party beneficiary, POB is barred from bringing this lawsuit under a third-party beneficiary basis, pursuant to the holding of ***Eastern Steel***.

24. In Paragraph 5 of the [Second] Amended Complaint, the Plaintiffs state that "all rights under the Contract with Grant were assigned to POB L.L.C., by Associated Specialists, Inc." The Plaintiffs go on in Paragraph 6 to state that POB became the

assignee under the Contract because subsequent correspondence between "the parties" was through POB without objection by Grant Architects.

25. The Plaintiffs' position is that that Grant Architects ratified the alleged assignment by not objecting to the correspondence involving POB, by accepting checks from POB, and by placing POB's name on the drawings for the medical office building at issue. When asked by the Court during the hearing on November 26, 2013, Plaintiffs' counsel admitted that he does not have any writing whereby Grant Architects specifically consented to an assignment of the Contract from Associated Specialists to POB. Grant Architects has stated that no such document exists.

26. Paragraph 9.3 states in relevant part:

> Neither the Owner nor the Architect shall assign this Agreement or any interest or claim for any monies due or to become due arising without the written consent of the other, except that the Owner may assign this Agreement to an institutional lender providing financing for the Project.

27. This Court finds that correspondence between Grant Architects and POB, the fact that Grant Architects accepted checks from POB, and the fact that POB's name is on the drawings prepared by Grant Architects is not sufficient to satisfy the written consent of assignment requirement set forth in Paragraph 9.3 of the Contract.

First, the letter from Grant Architects that was referenced and attached to "Plaintiff's Response to Defendant's Motion to Dismiss and Motion to Amend Complaint,"[8] was written in response to a letter from POB and was addressed accordingly.[9] Grant

[8] Plaintiff's Response was served on January 17, 2013 and was also attached to its [Second] Amended Complaint served on September 30, 2013.

[9] The March 31, 2011, letter was attached as Exhibit 2 to "Grant Architects' Motion to Dismiss [Second] Amended Complaint."

Architects did not receive a letter from Associated Specialists; it received a letter from POB. Logically, the return correspondence would be to POB. Second, a letter responding to construction issues raised by Dr. Saad Mossallati on behalf of POB is not tantamount to written consent to an assignment of the Contract. There is no mention whatsoever of assignment of the Contract in the March 31, 2011 letter. In addition, there is no language in the contract that expressly or impliedly declares an intent that the contract was for POB's sole benefit.

Thus, this Court finds that POB has no standing to assert a breach of contract claim against Grant Architects or its consultant, Century Engineering, because there was no written consent for assignment provided by Grant Architects as required by Paragraph 9.3 of the Contract. As a result, POB's breach of contract claim against Grant Architects and Century Engineering is hereby DISMISSED, WITH PREJUDICE, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.[10]

D. **Because POB Has Failed to Assert Any Facts or Allegations to Establish a Duty by Grant Architects or Century Engineering in the Absence of a Contractual Relationship, Any Negligence Claim by POB is Dismissed, With Prejudice, Pursuant to Rules 12(b)(6) and 12(c) of the West Virginia Rules of Civil Procedure.**

28. The Plaintiffs have set forth no facts or allegations suggesting that Grant Architects or Century Engineering had any duty to POB independent of the contractual relationship between Associated Specialists and POB.

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[10] As explained in section B above, even if this Court had found that a proper assignment of the contract to POB had occurred in this case, the claims raised by POB still would be dismissed, with prejudice, pursuant to Paragraph 7.2 and Paragraph 12 of Addendum I of the Contract.

29. West Virginia law is clear that no claim for actionable negligence can lie without a duty, and that duty is a question of law. *See* Syl. Pt. 5, ***Aikens v. Debow***, 541 S.E.2d 576, 578 (W. Va. 2000); Syl. Pt. 4, ***Parkette, Inc., v. Micro Outdoors Advertising, LLC.***, 617 S.E.2d 501, 502 (W.Va. 2005).

"The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syl. Pt. 8, ***Id.*** 579 (quoting Syl. Pt. 3, *Sewell v. Gregory*, 371 S.E.2d 82 (W.Va. 1988)).

"A person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinarily prudent person." Syl. Pt. 7, ***Aikens***, 541 S.E.2d at 502.

30. While the West Virginia Supreme Court of Appeals has held that a design professional that actually prepares plans and specifications may, in some circumstances, owe a duty of care to contractors because it is reasonably foreseeable that the contractor would rely on the plans, such is not the case here. ***See Eastern Steel Contractors, Inc., v. City of Salem***, 549 S.E.2d 226 (W.Va. 2001). In this case, Grant Architects' work was performed pursuant to its Contract with Associated Specialists. Likewise, Grant Architects' consultant, Century Engineering's work, was performed pursuant to its contract with Grant Architects, which references the Contract between Associated Specialists and Grant Architects.

All allegations against the Defendants in the [Second] Amended Complaint relate to their contractual duties. There are no allegations in the [Second] Amended Complaint

that assert an independent negligence cause of action against either Defendant. Specifically, Paragraph 10 of the [Second] Amended Complaint alleges that "The Defendants *negligently breached their contractual obligations* and duty of care as follows: . . ." (emphasis added).

Even if POB were a party to the Contract, which this Court has previously found it is not, POB cannot maintain an action in tort for an alleged breach of a contractual duty. In ***Lockhart v. Airco Heating & Cooling, Inc.***, 567 S.E.2d 619 (W. Va. 2002), the West Virginia Supreme Court of Appeals considered whether a contractor had a duty to a homeowner not to do anything during its installation of a heat pump that would adversely affect the homeowner's lung condition. The contractor allegedly left doors and windows open, failed to screen rooms which allowed dust to circulate in the house, and supplied an incorrect electrical appliance that resulted in electrical power being shut off for the better part of a day. The homeowner eventually died of pneumonia and his widow brought a wrongful death suit against the contractor. The circuit court granted the contractor's motion for summary judgment finding that the contractor owed no legal duty of care regarding the homeowner's death. The West Virginia Supreme Court of Appeals affirmed the circuit court's decision, finding that there was no duty on the part of the contractor with respect to the homeowner's health. In its opinion, the Court adopted two new syllabus points that are relevant in this case.

> 9. Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.

10. A tort, although growing out of a contract, must nevertheless possess all of the essential elements of tort.

Id. at Syl. Pts. 9 & 10.

31. This Court finds that any negligence claim by POB against Grant Architects and/or Century Engineering must be dismissed because POB failed to include any of the essential elements required to establish a prima facie case of negligence in its [Second] Amended Complaint. Similarly, the Plaintiffs have asserted no facts to support a finding that there is a special relationship between POB and Century Engineering. As a result, POB failed to establish even the first element of a negligence claim.

Thus, this Court finds that because POB failed to plead any facts or allegations asserting a duty on the part of either Defendant that is independent of the Contract between Associated Specialists and Grant Architects, any negligence cause of action asserted by POB is DISMISSED, WITH PREJUDICE, pursuant to Rules 12(b)(6) and 12(c) of the West Virginia Rules of Civil Procedure.

E. <u>The Economic Loss Rule Also Prevents POB from Asserting an Actionable Claim in this Case.</u>

32. POB seeks to recover damages from the Defendants for its "costs in remedying and repairing the defects" set forth in Paragraph 11 of the [Second] Amended Complaint. The damages sought by POB are purely economic.

West Virginia law states that "[a]n individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient

to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor." Syl. Pt. 9, ***Aikens v. Debow***, 208 W.Va. 486, 541 S.E.2d 576 (2001).

As explained in section C above, POB has no contractual relationship with Grant Architects or Century Engineering. The Contract at issue is between Associated Specialists and Grant Architects and no written consent was obtained from Grant Architects for the Contract to be assigned to POB.

In addition, the Court finds that there is no special relationship that exists between POB and Grant Architects or between POB and Century Engineering that would create a duty on the part of Grant Architects or Century Engineering as contemplated by ***Aikens v. Debow.***

While ***Eastern Steel*** does hold a special relationship creating a duty can exist between a contractor and a design professional where the contractor is relying on plans drafted by the design professional, this is not the case here. *See* Syl. Pt. 6, ***Eastern Steel***, 549 S.E.2d 266, 268 (W.Va. 2001). Here, POB is alleged to be a holding company that "owns and manages the Physician Office Building subject to this litigation." *See* [Second] Amended Complaint at ¶2.

In "Plaintiff's Response to Defendant's Motion to Dismiss and Motion to Amend Complaint," POB argued at Paragraph 4 that it had been newly formed and was not sufficiently developed to enter into the Contract.

It is undisputed that, throughout the project, Dr. Saad Mossallati was the main point of contact and sometimes he would send communications from POB to which Grant Architects would respond in kind. It is also undisputed that POB's name is

located on the drawings for the medical office building at issue. However, the Court finds that the fact that POB's name sometimes showed up in correspondence or other documents is not sufficient to establish a special relationship between Grant Architects and POB that would compel the conclusion that Grant Architects had a duty to POB or that POB's alleged damages were foreseeable by Grant Architects since its contract was with Associated Specialists. There has been no proffer of a special relationship between POB and Century Engineering, and even less to suggest any degree of foreseeability of any claim of damages by POB against Century Engineering.

33. Thus, the Court finds that, in addition to the other reasons set forth in this Order, the Economic Loss Rule prevents POB from asserting any actionable claim against Grant Architects and Century Engineering in this case. As a result, POB is DISMISSED, WITH PREJUDICE, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure because it fails to state a claim upon which relief can be granted.

It is therefore ORDERED as follows:

A. The two year statute of limitations for negligence claims is not extended by the *Architects and Builders Statute, W. Va. Code § 55-2-6a.* Insofar as the "Order Denying Defendants' Motion to Dismiss and Granting Plaintiff's Motion to Amend Complaint and Scheduling Pre-Trial/Scheduling Conference," entered on February 5, 2013, holds differently, it is AMENDED accordingly.

B. "Grant Architects' Motion to Dismiss [Second] Amended Complaint" and "Defendant Century Engineering, Inc.'s Motion to Dismiss [Second] Amended Complaint," are hereby GRANTED such that all claims asserted by Associated

Specialists, Inc., and POB, LLC are DISMISSED, WITH PREJUDICE for the reasons set forth herein.

C. Each party is responsible for paying its own attorney's fees and costs.

D. The Circuit Clerk of Harrison County is directed to submit a certified copy of this Order to all counsel of record.

E. This is a final order, and this civil action is dismissed from the active docket.

ENTER:

Thomas C. Evans III

THOMAS C. EVANS, III, CIRCUIT JUDGE
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 7th day of April, 2014.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Court this 9th day of April, 2014.

Donald L. Kopp II

Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia