

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

SWOPE CONSTRUCTION COMPANY,

Plaintiff,

V.

McDOWELL COUNTY BOARD OF  
EDUCATION  
And

MOUNTAINEER CONTRACTORS, INC.  
And

E.T. BOGGESS, ARCHITECT, INC.  
And

ZMM, INC.  
And

POTESTA & ASSOCIATES, INC.,  
And

THE THRASHER GROUP, INC.,

Civil Action No. 16-C-87-S

RECEIVED & FILED  
CIRCUIT COURT  
McDOWELL COUNTY, W.VA.  
2016 JUL 28 PM 2:59

Defendants.

COMPLAINT

NOW COMES Plaintiff Swope Construction Company. ("Swope") and for its Complaint against Defendants McDowell County Board of Education ("McDowell BOE"), Mountaineer Contractors, Inc. ("Mountaineer"), E.T. Boggess, Architect, Inc., ("Boggess"), ZMM, Inc. ("ZMM"), Potesta & Associates, Inc. ("Potesta"), and the Thrasher Group, Inc. ("Thrasher") hereby alleges and says as follows:

1. Swope is a West Virginia Corporation and a West Virginia licensed general contractor, with offices at 1325 Bluefield Ave., Bluefield, WV 24701.

2. McDowell BOE is a body corporate, organized in and by McDowell County for the



construction, management and administration of public schools in McDowell County, West Virginia. McDowell BOE, in part by and through the West Virginia Board of Education ("WVBOE") entered into a contract with Swope for the construction of the Iaeger/Panther Elementary School (the 'School'), located in Iaeger, McDowell County, West Virginia. McDowell BOE maintains offices at 30 Central Ave., Welch, WV 24801.

3. Mountaineer is a West Virginia corporation and a West Virginia licensed contractor which performed work and actions on and concerning the School. Mountaineer maintains offices at 15237 South Preston Highway, Kingwood, West Virginia 26537.

4. Boggess is a West Virginia corporation and a licensed architect which performed work and actions on and concerning the School. Boggess maintains offices at 101 Rockledge Ave., Princeton, West Virginia 24740.

5. ZMM is a West Virginia corporation and a licensed West Virginia engineer which performed work and actions on and concerning the School. ZMM maintains offices at 222 Lee Street East, Charleston, West Virginia 25302.

6. Potesta is West Virginia corporation and a licensed West Virginia engineer which performed work and actions on and concerning the School. Potesta maintains offices at 7012 MacCorkle Ave., S.E., Charleston, West Virginia 25304.

7. Thrasher is a West Virginia corporation and a licensed West Virginia engineer which performed work and actions on and concerning the School. Thrasher maintains offices at 600 White Oaks Blvd., Bridgeport, West Virginia 26330.

8. McDowell BOE, in part by and through WV BOE entered into a contract with Swope for the construction of the School.

9. Swope fully and properly completed its duties and obligations under the contract and

its work of constructing the School.

10. Swope, however, has not been fully paid for its completion of the contract and/or for extra costs of construction suffered by Swope and owing to Swope and proximately caused by the wrongful and actionable conduct of Defendants.

11. The wrongful and actionable conduct of Defendants proximately caused extra and changed work for Swope, and extended Swope's time of performance. This imposed upon Swope additional costs of constructing the School. Under the terms of the contract, Swope is entitled to Change Orders, damages and other equitable relief increasing the compensation paid to Swope for constructing the school, and extending the contract time for Swope's performance. Alternatively and further, Swope is entitled to recover its additional costs as damages from Defendants, McDowell BOE, Mountaineer, Boggess, ZMM, Potesta and Thrasher.

12. Prior to Swope entering into its contract, Mountaineer performed a contract it entered into for the construction of an entrance road and the building site for the School. In performing its work, Mountaineer performed unworkmanlike, defective and negligent work including, but without limitation, the construction of the building site of earth materials which were larger than allowed under the specifications of its contract and which were unsuitable for use as a school building site and the following work of construction of the school building. Mountaineer also built the building site at elevations different than required by its contract.

13. Mountaineer's unworkmanlike, defective and negligent work made Swope's work of grading the site and installing foundations, utilities, seeding, pavement, sidewalks and curbing more difficult and more costly and substantially extended the time required for Swope to construct the School, thus entitling Swope to change orders to its contract and/or recovery of damages from Mountaineer.

14. Defendant Bogges provided the architectural and engineering design of the School. In so doing, Bogges provided unworkmanlike, defective and negligent work by, for example and without limitation: failing to investigate and to discover the unworkmanlike, defective and negligent work of Mountaineer, stating and representing in direct response to Swope's specific inquiry that the building site had been construed of proper materials; providing defective and incomplete plans that required additional work to complete a working school building and in order to satisfy applicable building codes and local McDowell County building inspection officials; and failing and refusing to process Swope's requests for change orders in a timely manner, or at all.

15. Bogges's unworkmanlike, defective and negligent work made Swope's work of constructing the school more costly and substantially extended the time required for Swope to complete construction, thus entitling Swope to change orders to its contract and/or recovery of damages from Bogges.

16 Defendant ZMM, provided engineering and project management and oversight for both the work by Mountaineer to construct the entrance road and building site, and Swope's work of constructing the school building. In so doing, ZMM provided unworkmanlike, defective and negligent work by, for example and without limitation, failing to require that Mountaineer not use unspecified and unsuitable site building material and that it construct the site to proper elevations; failing to require Mountaineer to correct its use of unspecified and unsuitable materials and its improper elevations; and failing to require the prompt issuance of change orders to Swope.

17. ZMM's unworkmanlike, defective and negligent work made Swope's work of constructing the school more costly and substantially extended the time required for Swope to complete construction, thus entitling Swope to change orders to its contract and/or recovery of damages from ZMM.

18. Defendant Potesta provided the design and engineering for the work performed by Mountaineer of constructing the entrance road and the building site. In so doing, Potesta provided unworkmanlike, defective and negligent work by, for example and without limitation, failing to properly specify the materials for construction of the building site and failing to properly specify and detail the elevations for the building site. Potesta also failed to properly inspect, observe or assure that Mountaineer performed its work with proper material and at proper elevations.

19. Defendant Potesta also provided engineering services as a subconsultant to Bogges. In so doing, Potesta provided unworkmanlike, defective and negligent work by, for example and without limitation, specifying and representing in site specifications for Swope's work that the building site was composed of small materials when, in fact, it was composed of many large stones and boulders. Potesta also improperly provided foundation design that was unsuitable for the site conditions constructed by Mountaineer. Potesta's contributions to the plans and specifications for Swope's work also contained elevation errors.

20. Potesta's unworkmanlike, defective and negligent work made Swope's work of constructing the school more costly and substantially extended the time required for Swope to complete construction, thus entitling Swope to change orders to its contract and/or recovery of damages from Potesta.

21. Defendant Thrasher, upon information and belief provided engineering and construction inspection and observation of the work of Mountaineer. Thrasher undertook the duties and responsibilities to assure that Mountaineer properly performed its work, including that Mountaineer use proper materials and build to proper elevations. In so doing, Thrasher provided unworkmanlike, defective and negligent work by, for example and without limitation, failing to prevent, or to give notice of, Mountaineer's use of unspecified and unsuitable materials and its

installation of improper elevations.

22. Thrasher's unworkmanlike, defective and negligent work made Swope's work of constructing the school more costly and substantially extended the time required for Swope to complete construction, thus entitling Swope to change orders to its contract and/or recovery of damages from Thrasher.

#### COUNT ONE

(Breach of Contract against McDowell BOE)

23. Plaintiff hereby incorporates paragraphs 1 through 22, above.

24. The unspecified and unsuitable site materials and improper site elevations constitute site conditions different than specified and represented in the plans and specifications provided to Swope by or on behalf of McDowell BOE.

25. The plans and specifications provided to Swope by or on behalf of McDowell BOE were incomplete and defective.

26. McDowell BOE directed and instructed Swope to perform additional and extra work not part of Swope's contract plans and specifications.

27. The differing site conditions, the incomplete and defective plans, and the extra work directed by McDowell BOE imposed upon Swope additional costs to construct the School and substantially extended the time required for Swope to construct the School.

28. The additional costs incurred by Swope are no less than \$ 1,600,000.

29. Under the terms of its contract, Swope is entitled to change orders for its additional costs and for an extension of the contract time for completion of the project.

30. Swope has made complete and proper demand for change orders, but McDowell BOE has failed and refused to execute and pay said change orders.

31. The failure of McDowell BOE to issue and pay said change orders constitutes breaches of contract, by which Swope has been damaged.

WHEREFORE, Swope prays for a judgment against McDowell BOE:

- a. Awarding Swope economic recovery of \$ 1,600,000, together with pre-judgment and post judgment interest,
- b. Awarding Swope its costs incurred in this action,
- c. Awarding Swope its attorney's fees and expenses to the extent recoverable as a matter of law, and
- d. Such other and further relief as is just and equitable.

#### COUNT TWO

(Negligence claim against Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher)

32. Plaintiff hereby incorporates paragraphs I through 31, above.

33. Swope is a party foreseeably damaged by negligence, wrongful acts or misconduct by the Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher while providing work and acts on and concerning the School.

34. The Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher knew that their work and acts would impact and affect the work of Swope in constructing the School.

35. Swope relied on Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher to perform their work and acts properly and without negligence.

36. Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher knew that Swope was relying upon Defendants' Mountaineer, Boggess, ZMM, Potesta and Thrasher work and actions to be accurate, proper, workmanlike and free from negligence and material defects.

37. Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher owed Swope duties and obligations to perform their work and acts properly and without negligence.

38. Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher are individually and/or jointly negligent in their performance of work and acts and are in breach of their duties and obligations aforesaid to Swope.

39. As a direct and proximate result of Defendants' Mountaineer, Boggess, ZMM, Potesta and Thrasher negligence and breaches of duties and obligations, Swope has been damaged.

WHEREFORE, Swope prays for a judgment, individually and jointly and severally, against Defendants Mountaineer, Boggess, ZMM, Potesta and Thrasher:

- a. Awarding Swope economic recovery of \$1,600,000, together with pre-judgment and post judgment interest,
- b. Awarding Swope its costs incurred in this action,
- c. Awarding Swope its attorney's fees and expenses to the extent recoverable as a matter of law, and
- d. Such other and further relief as is just and equitable.

### COUNT THREE

(Negligent and/or intentional misrepresentation against Boggess and McDowell BOE)

40. Swope hereby incorporates paragraphs 1 through 39, above.

41. Prior to ever submitting its bid for award of the contract to build the School, Swope specifically requested of Defendant McDowell BOE and Defendant Boggess, material and detailed information and representations describing the condition of the building site and the soil materials of which it was constructed.



42. Swope requested this information and representations in order to understand, and to plan and price, its work of constructing the School. in particular but without limitation, the work of excavating and installing foundations and underground utilities and the work of grading and paving the site.

43. In response, Defendant McDowell BOE, by and through its architect Boggess, informed and represented to Swope that the building site had been built in accordance with the specifications for the site and soils contained in the plans and specifications provided by the owner to Swope for bidding purposes.

44. Swope materially relied upon this information and representation by Defendants Boggess and McDowell BOE in establishing its bid price and schedule for the construction of the School, and for performance of the construction work. Such information and representations to Swope were specifically known and intended by Defendants Boggess and McDowell BOE to be relied upon by Swope in establishing the bid price and schedule, and in performing the work for the Project.

45. In obtaining and furnishing said material information and representations, Defendants Boggess and McDowell BOE owed Swope duties and obligations to do so accurately and without negligence.

46. Defendants Boggess and McDowell BOE negligently and/or knowingly obtained, created and furnished incorrect building site information to Swope, constituting negligent and/or intentional misrepresentation.

47. As a direct and proximate result of Defendants' Boggess and McDowell negligent and/or intentional misrepresentation, Swope has been damaged; such damages were at all times, foreseeable to Defendants.

WHEREFORE, Swope prays for a judgment against Boggess and McDowell BOE:

- a. Awarding Swope economic recovery of \$1,600,000, together with pre-judgment and post judgment interest,
- b. Awarding Swope its costs incurred in this action,
- c. Awarding Swope its attorney's fees and expenses to the extent recoverable as a matter of law, and
- d. Such other and further relief as is just and equitable.

Plaintiff requests a trial by jury.

This the 28th day of July, 2016.



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