

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

In re:

SWOPE CONSTRUCTION COMPANY,

Plaintiff

v.

**Circuit Court of McDowell County, WV
Civil Action No. 16-C-87-S
The Hon. Booker T. Stephens, Judge**

**McDOWELL COUNTY BOARD OF
EDUCATION;
MOUNTAINEER CONTRACTORS, INC.;
E.T. BOGGESE, ARCHITECT, INC.;
ZMM, INC.;
POTESTA & ASSOCIATES, INC.; and
THE THRASHER GROUP, INC.,**

Defendants.

JOINT MOTION ON BEHALF OF DEFENDANTS

**E.T. BOGGESE, ARCHITECT, INC.,
ZMM, INC., POTESTA & ASSOCIATES, INC. AND THE THRASHER GROUP, INC.
TO REFER ACTION TO BUSINESS COURT DIVISION**

Come now Defendants E.T. Boggess, Architect, Inc. ("Boggess"), ZMM, Inc. ("ZMM"), Potesta & Associates, Inc. ("Potesta") and The Thrasher Group, Inc. ("Thrasher"), by and through their undersigned counsel, and respectfully move that Civil Action No. 16-C-87-S, pending in the Circuit Court of McDowell County, West Virginia ("the Action"), be referred to the Business Court Division, pursuant to West Virginia Trial Court Rule 29. In support of this Motion, Boggess, ZMM, Potesta and Thrasher state the following:

1. Plaintiff Swope Construction Company ("Swope") filed its Complaint in the Action on or about July 28, 2016. (A true and correct copy of the Complaint is attached as Exhibit 1.)

2. The Action arises from the construction of the Iaeger/Panther Elementary School in Iaeger, McDowell County, West Virginia (the "School"), a construction project partially funded through the United States Army Corp of Engineers as part of a flood remediation and school consolidation project.
3. More specifically, Defendant McDowell County Board of Education (the "BOE") entered into separate contracts with Defendants ZMM, Boggess, and Mountaineer Contractors, Inc. ("Mountaineer"), as well as Plaintiff Swope Construction Co. ("Swope") to perform specific duties relating to or concerning the construction of the School ("the School Construction Project"). The contracts included detailed engineering specifications and design drawings for each phase of the School Construction Project.
4. Defendant ZMM was a consulting architect for the entire School Construction Project.
5. Defendant Boggess was the project architect for the School Construction Project. Boggess prepared construction documents for Phase II of the School Construction Project.
6. Defendant Potesta was the site engineer for Phases I and II for the School Construction Project.
7. Defendant Mountaineer Contractors, Inc. ("Mountaineer") was the general contractor in Phase I of the School Construction Project with responsibilities related to roadway construction to the School and site preparation.
8. Defendant Thrasher provided services during the School Construction Project, including compaction testing services to Mountaineer during Phase I.

9. Plaintiff Swope was the general contractor in Phase II of the School Construction Project with responsibilities related to the School construction, including, without limitation construction of the building foundations and parking lot.
10. In its Complaint, Swope alleges that Defendant Mountaineer Contractors, Inc. ("Mountaineer") failed to properly ~~prepare the School site to meet~~ engineering specifications for the School Construction Project and that, as a consequence, Swope allegedly incurred additional costs and expenses related to the School construction, for which Swope alleges it was not compensated.
11. Swope seeks recovery from the BOE for breach of contract for allegedly denying change orders arising from Mountaineer's alleged failure to meet specifications for Phase I in the preparation of the School site. (Complaint, Count I)
12. Swope also seeks recovery from Mountaineer, Boggess, ZMM, Potesta and Thrasher under negligence theories for allegedly failing to perform their duties in "accurate, proper, workmanlike" fashion, "free from negligence and material defects." (Complaint, Count II)
13. Finally, Swope seeks recovery from the BOE and Boggess for negligent and/or intentional misrepresentation with respect to information, pertaining to the condition of the building site and soil materials, upon which Swope allegedly relied for its bid to perform the School construction. (Complaint, Count III)
14. This Action involves commercial issues between businesses. Issues of law pertaining to commercial contracts must be resolved and much of the evidence pertains to technical engineering specifications and construction performance. It involves claims that can be

efficiently managed and resolved through the processes provided under Rule 29, West Virginia Trial Court Rules, for the Business Court Division.

15. More specifically, referral of the Action to the Business Court Division is proper under West Virginia Trial Court Rule 29.06, because it meets each requisite criterion for referral under Rule 29.04(a)(1-3):

- a. Each claim in the Action “involves matters of significance to the transactions, operations and/or governance between the business entities” involved;
- b. The Action, involving engineering, architectural design and specifications, as well as environmental and construction issues, “presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable;” and,
- c. The Action, with claims of breach of contract, professional negligence (in different disciplines) and misrepresentation, “do[es] not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent

domain or condemnation; and administrative disputes with government organizations and regulatory agencies....”

16. Upon information and belief, no other related actions are pending. Rule 29.06(a)(1), W.Va.T.C.R. The Movants, Boggess, ZMM, Potesta and Thrasher, also do not anticipate any related actions being filed in the future.

17. This Motion is timely. The time for each defendant to answer or otherwise respond to the Complaint has expired. Rule 29.06(a)(2), W.Va. T.C.R. (A true and correct copy of the BOE’s Answer is attached as Exhibit 2. A true and correct copy of Mountaineer’s Answer is attached hereto as Exhibit 3. A true and correct copy of Boggess’s Answer and Motion to Dismiss is attached hereto as Exhibit 4. A true and correct copy of ZMM’s Answer to the Complaint and Cross-Claims is attached hereto as Exhibit 5. A true and correct copy of Potesta’s Answer is attached hereto as Exhibit 6. A true and correct copy of Thrasher’s Answer to Complaint and Cross-Claims is attached hereto as Exhibit 7.) Rule 29.06(a)(1), W.Va. T.C.R.

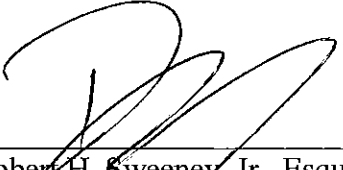
18. The Action also remains in its earliest stages, without a Rule 16 Scheduling Order in place. (A true and correct copy of the Docket Sheet is attached hereto as Exhibit 8.) *Id.*

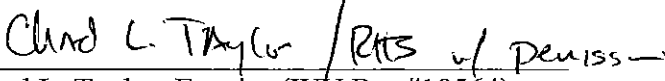
WHEREFORE, for the foregoing reasons and others which may be evident to this Honorable Court, Defendants E.T. Boggess, Architect, Inc., ZMM, Inc., Potesta & Associates, Inc. and The Thrasher Group, Inc. respectfully move that Civil Action No. 16-C-87-S, pending in the Circuit Court of McDowell County, West Virginia be referred to the Business Court Division for management and resolution.

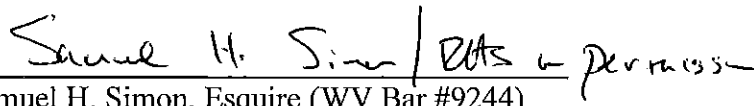
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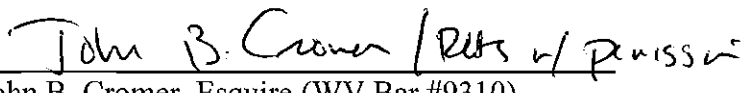
Defendants/Movants,

By counsel,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **JOINT MOTION ON BEHALF OF DEFENDANTS E.T. BOGGESS, ARCHITECT, INC., ZMM, INC., POTESA & ASSOCIATES, INC. AND THE THRASHER GROUP, INC.**

TO REFER ACTION TO BUSINESS COURT DIVISION was served upon the following individual(s) by depositing the same in the U.S. Mail, postage prepaid, this 4th day of November, 2016:

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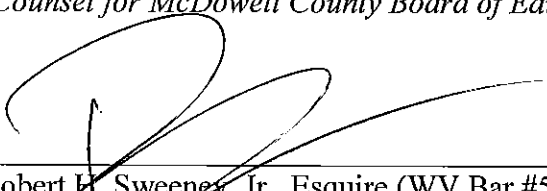
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