

SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWOPE CONSTRUCTION COMPANY,

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.,

Plaintiff,
McDowell County
No. 16-C-87
Stephens, Judge

Defendants.

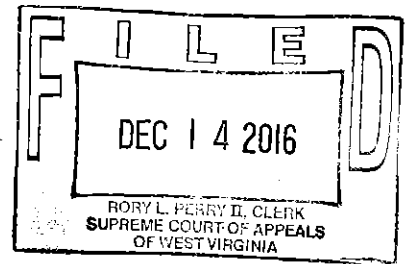
**RESPONSE TO MOTION TO REFER
TO THE BUSINESS COURT DIVISION**

To: Honorable Menis E. Ketchum, II, Chief Justice
West Virginia Supreme Court of Appeals

Comes now Plaintiff Swope Construction Co., Inc. ("Swope") and in opposition to the Joint Motion of Defendants E.T. Boggess, Architects, Inc. ("Boggess"), ZMM, Inc. ("ZMM"), Potesta & Associates, Inc. ("Potesta"), and the Thrasher Group, Inc., ("Thrasher") to Refer this action to the Business Court Division, states and alleges as follows:

The Plaintiff, Swope Construction Company, Inc. ("Swope") entered into a contract to build, for McDowell County, a new Jaeger Elementary School. Swope, however, was not responsible to build the site upon which the new school would be built.

Defendant Mountaineer Contracts, Inc. ("Mountaineer") was employed, at a cost of about \$1.5 million, to build the site and the entrance road into the site, prior to Swope's successful bid and award of the contract to construct the school building.



As admitted by the Defendants in their Joint Motion for Referral, Defendant ZMM is the consulting architect for the entire School Project. Defendant Potesta is the design engineer for the both the site work and the building phase of the project. Defendant E.T. Boggess Architects is the project architect for the School building phase of the Project. Defendant Thrasher is an engineer providing professional services during the School Construction Project. Defendant Mountaineer is the contractor retained to build the engineered site and the entrance road for the School Project, and McDowell County Board of Education ("McDowell") is the owner of the Project.

Although involving multiple parties defendant, this is not a complex case. Swope alleges that it incurred extra costs and damages because the site was not properly designed, constructed, nor was its construction professionally observed, managed or inspected. Further, Swope alleges that the school building was not properly designed, nor was the design properly coordinated or managed. The defects and failings alleged by Swope are simple and obvious in nature. The site was built, and allowed to be built in a grossly defective manner that does not even resemble the plans and specifications for the site. Plans for the site and for the new school building, too, were defective and deficient in simple, obvious ways. And so, in order to complete a working and building-code-complaint school building, Swope had to incur additional work and additional cost. All of these problems extended Swope's time on the job, and that the cost to Swope.

These defective, wrongful and negligent acts impacted the construction of Iaeager Elementary School for McDowell County, and increased the costs to construct the school.

Swope seeks to recover these simple extra costs from all parties who contributed to the cause. This action is clearly authorized in West Virginia. Eastern Steel Construction, Inc. v. City of Salem, 209 W. Va. 392, 549 S.E.2d 266 (2001).

It is true that this dispute involves businesses, and business transactions. It is also true that this action is between commercial and professional business entities (with the noted exception of Defendant McDowell County Board of Education, which is not a business entity).

However, a large proportion of every docket, of every circuit court in West Virginia involves business disputes between business entities. The mere fact that this is a business dispute is not a mandatory or even compelling reason for referral of this matter to the Business Court Division of the West Virginia Circuit Court.

Referral to the Business Court Division is intended, and indeed, appropriate, where the litigation is complex and involves highly technical commercial issues, See W. Va. Code §51-2-15, as to suggest that a specially designated Business Court Division Judge will provide materially better case management, administration and management of complex issues headed to trial.

This case does not call for, and will not benefit from, that additional expertise and management.

Furthermore, in every instance of requested referral, the Business Court must be balanced and weighed against the prejudice and negative result of denying the affected locale, and its judges and jury, from deciding matters that materially affect the locale. The necessity of that balance is amply presented here.

For example, no Business Court Division Judge sits in McDowell County, the appropriate forum and venue in which this action was filed. Indeed, there is no Business Court Division Judge resident within, or sitting within the entire Business Court Division Assignment Region to which McDowell County is assigned.

Accordingly, a referral of this case to even the nearest and most convenient Business Court Judge would likely result in the action being transferred to, and heard in another county (presumably Mercer County) in the Business Court Division Assignment Region. The assumed, but in truth merely marginal benefits of referral to the Business Court must be weighed and assessed against the fundamental judicial precept that matters should be heard in the forum most relevant to, and material to the dispute. Here, that forum is McDowell County.

Here, the dispute involves the construction, for McDowell County, of their Iaeger Elementary School. It is difficult to imagine an enterprise or set of disputes more intensely local in nature than the construction, within a West Virginia County, of its own elementary school for its own children. This is not a bare commercial dispute, between private commercial business entities, properly filed in McDowell County just because the contract was entered into, or the events concerning a private commercial dispute, occurred in McDowell County, divorced from any local, societal connection and importance. McDowell County, and its jury and judges, have a material and compelling reason to be the ones who decide claims whether the professionals and others who designed, constructed and inspected its elementary school acted rightly, or failed to do their job.

Further, although the joint motion of Defendants did not bother to describe the nature of this dispute, but chose merely to allege the naked rubric of Trial Court Rule 29, in fact, this dispute is not complex at all, and is easily understood by any jury, particularly a McDowell County jury.

For example, the Plaintiff's claims in this action were recently summarized for the Defendants in answers to discovery. These claims are among the most basic, simple, and easily understood of any claims arising on a construction project:

1. Category 1 states that the Project site on which Plaintiff Swope was to build the Iaeger School was promised to consist of material no larger than 2 inches in diameter. The site specifications for the building site clearly states that the site is to be constructed of material that does not exceed 2 inches in diameter. However, in fact Swope encountered many boulders in the site, significantly increasing its cost and difficulty of installing foundations and site utilities for the project. This is a simple and easily understood claim against the parties who designed the site; were responsible to monitor the construction of the site;

constructed the site, and who made representations upon which Swope relied about the site. Those parties are the defendants in this action.

2. Category 2 states that the site was promised and represented to have been constructed to a particular elevation, consistent with the plans to build the school building. But, in fact, the site was built to elevations materially higher than specified; requiring Swope to engage in excess excavation that was not part of Swope's scope of work to perform. Thus, Swope was required to perform additional work and to incur additional cost, just in order to correct the site and to build the Iaeger Elementary School at the elevation required in the plans and specifications. This, too, is an obvious and easily understood claim against the parties who designed the site, built the site improperly, failed to observe and inspect the construction of the site, and who promised and represented to Swope that the site had been built to proper elevations.
3. Category 3 is a very simple claim -- Swope's plans and specifications promised that topsoil would be available on site to dress and complete the grades around the school building. In fact, there was no topsoil at all available on site. This claim is for the extra cost of bringing necessary topsoil from off site, to the site, in order to complete Swope's work.
4. Category 4 is among the most basic and easily understood construction claims. The plans were defective and deficient. The building would not "work" as designed. Further, as designed, it would not comply with simple building codes. Changes were required to correct the plans and to satisfy building codes. This extra work imposed extra work on Swope. This is an obvious and easily understood claim against the architects and engineers, and the owner who provided, defective and deficient plans and specifications. In West Virginia, architects and engineers are held to impliedly warrant the accuracy and adequacy of their plans and specifications. The benefit of that implied warranty extends to contractors, like Swope, who build to the architect's and engineer's plans. Eastern Steel, 209 W.Va. at 402-03, 549 S.E.2d at 36-37.
5. Category 5 is easily understood construction claims. The project owner desired to make additions to the work. Swope performed them and is entitled to payment for this extra work.
6. Category 6 is also easily understood. Upon completion by Swope of construction, the building was inspected by Building Code Enforcement Officials. Officials found the design deficient and inadequate under the Code, requiring additional work. This is a simple claim against the architects and engineers, and the owner, for defective and deficient design.
7. Category 7 is also straightforward. The impact of all of categories 1 through 6 caused delay in the project and required Swope to be mobilized and working on the site for a substantially greater time period. This cost extra cost to Swope and is an additional claim against Defendants.

The simplicity of claims in this action is easily demonstrated for the Court for purposes of consideration of a motion for referral to the Business Court Division. For example, this action alleges claims against Defendant ZMM Engineering. In the joint motion to refer, ZMM admits: "ZMM was a consulting architect for the entire School Construction Project."

In an email, in its Project management role, ZMM, asks about, warns against, and seeks additional information from Defendant Thrasher as to the size of soil materials being installed in the new Project site.

The reason and portent to ZMM's concern is evident from the plain language of the e-mail -- if oversized material is allowed to be installed in project site, it will cause problems (and extra expense) for the following contractor (Swope) who will build the school building on the new site.

The specifications mandated that no material larger than 2 inches be placed in the site, yet many large boulders were placed and allowed to be placed, in direct contravention of the notice and warning by ZMM.

Obviously the site was not built to specifications, and Swope is entitle to make the simple claim for the extra costs incurred against: the architects and engineers designing, managing, and testing the construction of the site, the owner, and the contractor who built the site with complete disregard for required specifications.

The foregoing is a claim Swope also makes, against Defendant Thrasher because, as Swope understands, Thrasher was the professional engineer specifically hired to assure that Defendant Mountaineer Contracting built the site to specifications. Obviously, the site was not built to specifications and obviously, Thrasher did not properly perform its duties to assure that it was.

Moreover, In the Defendants' joint motion, Thrasher specifically admits: "Thrasher provided services during the School Construction Project, including compaction testing services to Mountaineer during phase I."

This is inconsistent with the owner's requirements that the work of building the project site must be accompanied by compaction testing of the building site.

It is imminently simple and understandable, and not complex at all, to realize: where McDowell County was spending \$1.5 million for the construction of the site upon which its new Jaeger elementary school would be built, certainly compaction tests would be required to assure that the site was adequate to support the new school.

Contrary to this admission, Thrasher in fact did not perform those compaction services. Attached hereto as Exhibit E is an e-mail from Thrasher to Swope admitting that NO compaction tests were performed of the building pad area of the Project site.

No discovery has been completed in this case. Simple discovery will illuminate why this project suffered from the most fundamental and easily understood failings of performance: The site was required to be built of small, properly compacted soil materials. In fact, it was constructed of boulders, and was not compaction tested at all. Swope's project plans and specifications instructed it to assume and rely that there would be topsoil available on site to finish the site. In fact there was none. The project plans and specifications were, reasonably, assumed to be adequate to build a working, a code-complaint building. In fact, they were not. And all of these problems significantly impacted and extended Swope's costly time on site completing the project.

These are not complex, scientific or obtuse issues. They are simple, easily understood by any lay jury. And these issues are of particular importance and impact to the people of McDowell County because they represent fundamental and material failures of the professionals and contractor they hired to prepare the site and building plans for their new elementary school.

This case simple case should not be referred to the Business Court Division and should remain with the people and judges of McDowell County for decision, verdict and judgment.

Therefore, Plaintiff Swope object to the Defendants' Joint Motion to Refer this Action to the Business Court Division, respectfully requests the Court to deny that motion, and to enter an order that this action remain in the Circuit Court of McDowell County.

Respectfully submitted this 13th day of December, 2016.



C. William Davis
Richardson & Davis, PLLC
Post Office Box 1778
Bluefield, West Virginia 24701
304-327-7158
West Virginia Bar No.: 946

Attorneys for Swope Construction Company

CERTIFICATE OF SERVICE

I, C. William Davis, attorney for defendant United Bank, Inc., hereby certify that on the 13th day of December, 2016, I served the foregoing RESPONSE TO MOTION TO REFER TO THE BUSINESS COURT DIVISION upon the following by depositing true copies thereof in envelopes, postage prepaid, in the United States mail, addressed to each of them as follows:

Judge:

Honorable Booker T. Stephens, Judge
McDowell County Courthouse
P. O. Box 310
Welch, West Virginia 24801

Counsel for E.T. Boggess, Architect, Inc.:

Robert H. Sweeney, Jr.
Jenkins Fenstermaker
P.O. Box 2688
Huntington, West Virginia 25726-2688

Counsel for The Thrasher Group:

Chad L. Taylor
Simmerman Law Office, PLLC
254 E. Main
Clarksburg, West Virginia 26301

Counsel for Potesta & Associates:

Samuel H. Simon
Houston Harbaugh, PC
Three Gateway Center
401 Liberty Avenue, 22nd Floor
Pittsburgh, Pennsylvania 15222-1005

Counsel for ZMM, Inc.:

John B. Cromer
Burke Cromer Cremonese, LLC
517 Court Place
Pittsburgh, Pennsylvania 15219

Counsel for Mountaineer Contractors, Inc.:

Debra A. Bowers
Kay Casto & Chaney, PLLC
1085 Van Voorhis Road, Suite 100
Morgantown, West Virginia 26505

Counsel for McDowell County BOE:

Chip E. Williams
Pullin, Fowler, Flanagan, Brown & Poe
600 Neville Street, Suite 201
Beckley, West Virginia 25801



C. William Davis