

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

**GITO, INC. d/b/a NELLO
CONSTRUCTION COMPANY, for the use
and benefit of COST COMPANY,**

Plaintiff,

v.

**Civil Action No. 13-C-13
Judge Mark A. Karl**

**BOARD OF EDUCATION OF THE
COUNTY OF MARSHALL, WEST VIRGINIA,**

Defendant/Third-Party Plaintiff,

v.

**SCALISE INDUSTRIES CORPORATION,
a wholly owned subsidiary of EMCOR GROUP, INC.,**

Third-Party Defendant.

**THIRD-PARTY DEFENDANT, SCALISE INDUSTRIES CORPORATION'S
MOTION TO REFER TO THE WEST VIRGINIA BUSINESS COURT DIVISION**

COMES NOW Third-Party Defendant Scalise Industries Corporation, a wholly owned subsidiary of EMCOR Group, Inc. ("Scalise"), by and through its counsel, SPILMAN THOMAS & BATTLE, PLLC, pursuant to Rule 29.06 of the West Virginia Trial Court Rules and respectfully moves this Court to refer this case to the West Virginia Business Court Division. In support thereof, Scalise states as follows:

I. FACTS AND PROCEDURAL HISTORY

1. Plaintiff Gito, Inc., d/b/a Nello Construction Company ("Nello") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at 100 Houston Square, Suite 200, Canonsburg, Pennsylvania 15317.

2. Cost Company ("Cost"), a subcontractor to Nello, is a Pennsylvania limited liability partnership, organized and existing under the laws of the Commonwealth of

Pennsylvania, having its principal place of business at 2400 Ardmore Boulevard, Pittsburgh, Pennsylvania 15221.

3. Defendant/Third-Party Plaintiff Board of Education of the County of Marshall, West Virginia ("the Board") is a public entity created and organized pursuant to, and in accordance with, the laws of the State of West Virginia, having its principal place of business at 2700 Fourth Street, Moundsville, West Virginia. "The Board" as used in this Motion, shall mean to include its members, employees and agents.

4. Scalise is a Pennsylvania corporation, having its principal place of business at 108 Commerce Boulevard, Suite A, Lawrence, Pennsylvania 15005.

5. The underlying project at issue is the new construction of the 126,000 square foot Cameron High School in Cameron, West Virginia ("Project"). This Project is complex in terms of work scope. The Board contracted with seven (7) separate prime contractors, who in turn each contracted with multiple subcontractors and suppliers. (Nello and Scalise were two of the prime contractors.) Furthermore, the Board had separate contracts with its architect, McKinley & Associates, Inc. ("MKA"), and its construction manager, Project and Construction Services, Inc. ("PCS"). All of these entities, their work on the Project and/or their contractual relationships potentially have a bearing on this litigation.

6. On May 5, 2010, the Board and Nello entered into a contract for the general construction of the Project. Nello was to be paid in the amount of \$15,894,590.00.

7. Also on May 5, 2010, the Board and Scalise entered into a contract wherein Scalise was to serve as the prime contractor for the Project's HVAC system. Scalise was to be paid in the amount of \$3,299,000.00, and was to substantially complete the work by October 14, 2011.

8. On May 17, 2010, Nello and Cost entered into a subcontract in which Cost acted as a subcontractor for pre-cast structural concrete, concrete unit masonry, brick masonry, insulation and masonry sheet metal flashing and trim work. Cost was to be paid \$2,371,500.00 and was to complete its work within 131 days of the contract's formation.

9. Due to the Board's actions, among other things, its failure to cooperate, coordinate and communicate with the other prime contractors, its interferences with work on the Project, its failure to make prompt decisions, extensive errors and omissions in the contract documents and the design, delays, poor performance and scheduling issues, Scalise was unable to perform to the time frame as originally provided in the contract.

10. On January 25, 2013, Nello, on behalf of Cost, filed its Complaint in this action against the Board for breach of contract and breach of warranty seeking damages in excess of \$1,000,000.00, alleging that the Board failed to perform its functions in the construction of the Project in a skillful, professional, proper, accurate, competent, careful, timely and expeditious manner.

11. On March 11, 2013, the Board filed an answer and a counterclaim against Nello/Cost. As part of that same document, the Board also filed a third-party complaint against Scalise.¹

12. In its counterclaim, the Board alleged that Cost failed to cooperate, coordinate and communicate with other contractors and severely undermanned the Project, resulting in delays that were not the Board's responsibility. As a result, the Board brought three claims against Cost: breach of contract, breach of warranty, and negligence.²

¹ Scalise was served with a copy of the Board's answer, counterclaim and the third-party complaint against it on March 19, 2013.

² Cost has filed a Rule 12(b)(6) Motion to Dismiss the negligence count in the Board's counterclaim on the basis of *Lockhart v. Airco Heating and Cooling, Inc.* 211 W. Va. 609, 567 S.E.2d 619 (2002).

13. In its third-party complaint, the Board similarly alleged that Scalise failed to cooperate, coordinate or communicate with other contractors and as a result failed to perform its HVAC work on the Project in a good and workmanlike manner. As a result, the Board brought three claims against Scalise: breach of contract, breach of warranty, and negligence.³ In addition, the Board claimed that it was entitled to common law contribution and indemnification with respect to any judgment obtained against it by Cost, because Scalise's "liability" was allegedly "active and primary."

14. On April 17, 2013, Scalise filed its answer to the Board's third-party complaint, and also asserted a counterclaim against the Board seeking damages in excess of \$2,000,000. In its counterclaim, Scalise alleged that the Board grossly undermanned the Project and failed to perform the basic functions necessary for the Project to proceed in a timely fashion. In addition, Scalise was forced to purchase materials and incur costs beyond the contract requirements, which the Board has not compensated it for. As a result, Scalise brought four claims against the Board in its counterclaim: breach of contract, breach of warranty, misrepresentation and breach of the duty of good faith and fair dealing.

15. On May 6, 2013 the Board answered Scalise's counterclaim.

II. APPLICABLE LAW

16. The West Virginia Business Court Division has jurisdiction to efficiently manage and resolve "litigation involving commercial issues" between parties engaged in business transactions. W.Va. T.C.R. 29.01. Specifically, the Business Court Division, upon proper referral and transfer by the Chief Justice of the West Virginia Supreme Court, may properly preside over and adjudicate "Business Litigation", which is defined as:

³ Scalise has also filed a Rule 12(b)(6) Motion to Dismiss the negligence count in the Board's Third-Party Complaint on the basis of *Lockhart, supra*.

one or more pending actions in circuit court in which:

1. the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
2. the dispute 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
3. the principal claim or claims do 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, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va. T.C.R. 29.04(a)(1) – (3).

17. A party may file a Motion to Refer within “three (3) months after the filing date of the action; provided, however, that a judge may file the motion at any time.” W. Va. T.C.R. 29.06(a)(2).

III. ARGUMENT

18. Nello, Cost and Scalise all qualify as “business entities” within the meaning of Rule 29.04 of the West Virginia Trial Court Rules. Additionally, litigation between corporate entities and a public entity such as the Board in the present case is sufficient to meet the

“between business entities” requirements of Rule 29.04 of the West Virginia Trial Court Rules.⁴ See, Administrative Order in *Harrison County Development Authority v. Tetrick & Bartlett, PLLC*, No. 12-C-504-3 (Harrison County) (referring a case involving a public entity to the West Virginia Business Court Division for findings of fact and a recommendation) (copy attached); see also, Administrative Order in *United Hospital Center, Inc. v. The Honorable Cheryl L. Romano, Assessor of Harrison County, West Virginia et. al.*, No. 11-C-124-1 (Harrison County) (denying the motion to refer because the tax appeal “is not particularly complex,” not because the Assessor of Harrison County does not qualify as a business entity.) (copy attached). Therefore, litigation between corporate entities and a public entity such as the Board in the present case is sufficient to meet the “between business entities” requirements of Rule 29.04 of the West Virginia Trial Court Rules.

19. The claims involved in this case are, collectively, claims for breach of contract, breach of warranty, various torts and the breach of the implied duty of good faith. These claims revolve around complex and multi-faceted business transactions, including subcontracting, as well as complex legal relationships in the context of a multi-million dollar construction project. Specifically, there are a number of contractual relationships directly involved in this case including: (1) the contract between Nello and the Board, (2) the contract between Nello and Cost, and (3) the contract between Scalise and the Board. Additionally, there are other contractual relationships that will have a bearing on this case, including but not limited to, the Board’s contracts with the architect, MKA, and its construction manager, PCS.

⁴ The West Virginia Code also supports treating the Board no differently than other corporate business entities. For example, the Board is expressly authorized to enter into business contracts with outside corporate entities for construction projects such as Cameron High School. See, W. Va. Code §§ 5-22-1(b)(2), 5-22A-2(1), 5-22A-3. Further, the West Virginia Code expressly excludes the Board’s contractual liability in this matter from immunity under the Tort Claims Act. See, W. Va. Code §§ 29-12A-3(c), 29-12A-18(a) (“This article does not apply to...(a) Civil actions that seek to recover damages from a political subdivision...for contractual liability;”).

20. To successfully adjudicate these claims, the court must not only interpret the terms of each individual contract, but also interpret how each contract impacts the others. The Board's claims for contribution and indemnification against Scalise only enhance this complexity. Furthermore, the underlying claims in the litigation involve, among other things, delays, interferences, productivity impacts, architectural design issues, construction management and scheduling issues, and other construction specific matters. As such, the claims in this case will benefit from specialized knowledge on commercial and business litigation, specifically including, but not limited to, the interpretation and application of contractual provisions in the specific context of construction litigation and significant experience with multiple claims on a complex construction project. Finally, the claims in this case do not involve any of the types of claims excluded from the Business Court Division by Rule 29.04(a)(3). Therefore, this action meets the definition of "Business Litigation" as defined in Rule 29.04 of the West Virginia Trial Court Rules.

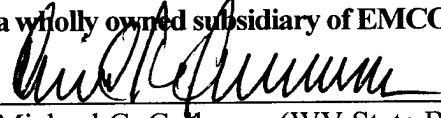
21. Further, this Motion was filed within three months of the filing date of the action as it pertains to Scalise. Though Rule 29.06 does not clarify what is meant by "the filing date of the action", where, as here, a third-party complaint is filed, holding a third-party defendant to the filing date of the original complaint would make no sense. Were this to be the rule, defendants could wait until the time period for filing a Motion to Refer has elapsed, and then simply amend their answers to include third-party complaints, effectively precluding the third-party defendant's access to the Business Court Division. Such a result would fly against the purpose of the Business Court Division, which is to resolve "litigation involving commercial issues and disputes between businesses" as such litigation could be effectively removed from the Business Court Division at the whim of the third-party plaintiff. W. Va. T.C.R. 29.01. In the present case, Scalise was joined as a party via the Board's third-party complaint filed March 11, 2013, and

was served with the third-party complaint on March 19, 2013. Thus, Scalise has timely filed this Motion to Refer to West Virginia Business Court Division within 90 days of having been served with the third-party complaint.

WHEREFORE, because this lawsuit meets the definition of "Business Litigation" within the meaning of Rule 29.04(a) of the West Virginia Trial Court Rules, Third-Party Defendant, Scalise Industries Corporation moves this Court to refer this case, in its entirety, to the West Virginia Business Court Division.

Respectfully submitted,

SCALISE INDUSTRIES CORPORATION,
a wholly owned subsidiary of EMCOR GROUP, INC.


Michael G. Gallaway (WV State Bar No. 5071)
Ronald M. Musser (WV State Bar No. 2697)
SPILMAN THOMAS & BATTLE, PLLC
1233 Main Street – Suite 4000
P. O. Box 831
Wheeling, WV 26003
304.230.6950
304.230.6951 Fax
mgallaway@spilmanlaw.com
rmusser@spilmanlaw.com

DAVID R. EATY

2013 MAY 20 PM 4:21

FILED

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Harrison County Development Authority, Plaintiffvs) **No. 12-C-504-3 (Harrison County)****Tetrick & Bartlett, PLLC, Defendant**

The Honorable James A. Matish, Chief Judge of the Fifteenth Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals that Defendant Tetrick & Bartlett, PLLC, by counsel, John F. McCuskey, Esq., Jennifer L. Tampoya, Esq., and the law firm of Shuman, McCuskey & Slicer, PLLC, filed a motion to refer the above-styled case to the Business Court Division pursuant to Rule 29 of the West Virginia Trial Court Rules ("TCR"). The motion and all responsive memoranda were carefully reviewed by the Chief Justice for his consideration.


TCR 29.06(c)(1) provides that the Chief Justice may act directly upon the motion or may direct the Division to conduct a hearing and make recommendations concerning coordinated or consolidated proceedings under this rule.

The Chief Justice has determined that such motion requires a hearing to receive evidence and to entertain arguments relative to the issue of whether this case should be referred to the Business Court Division.

It is therefore ORDERED that the Business Court Division or a designated member thereof is directed to conduct a hearing, in order to receive evidence and to entertain arguments by the parties or any judge, and submit findings of fact and a recommendation to the Chief Justice.

It is further ORDERED that a copy of this ORDER be transmitted to the Honorable Christopher C. Wilkes, Chair of the Business Court Division; to the Central Office of the Business Court Division; to the Honorable James A. Matish; and to the Clerk of the Circuit Court of Harrison County, who is to provide copies of the same to all parties of record or their counsel.

ENTERED: APRIL 22, 2013


BRENT D. BENJAMIN
Chief Justice

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

United Hospital Center, Inc., Plaintiff

vs) No. 11-C-124-1 (Harrison County)

The Honorable Cheryl L. Romano,
Assessor of Harrison County, West Virginia,
and the Honorable Craig A. Griffith, State
Tax Commissioner


AMENDED OPINION AND ORDER

The Plaintiff in this tax appeal filed a motion with the Harrison County Circuit Court requesting that this case be transferred to the Business Court Division of the Circuit Courts. A hearing was held on the motion by the Circuit Court. Thereafter, the motion, all memoranda, and the Circuit Judge's finding of facts and recommendation were filed with the Clerk of the West Virginia Supreme Court. These documents were given to the Chief Justice for his consideration in ruling on the motion.

Although complex tax appeals are eligible to be referred to the Business Court Division, this tax appeal is not particularly complex. Moreover, Trial Court Rule 29.04(a)(2) requires eligible cases to contain "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." None of those requirements are present in this case. Therefore, I am denying the motion to refer this case to the Business Court Division. This amended order supersedes the previous order entered December 7, 2012.

It is ordered that the motion to refer this case to the Business Court Division is denied and this case shall remain with Judge Marks in the Circuit Court of Harrison County.

DATED: DECEMBER 19, 2012


MENIS E. KETCHUM
Chief Justice

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

**GITO, INC. d/b/a NELLO
CONSTRUCTION COMPANY, for the use
and benefit of COST COMPANY,**

Plaintiff,

v.

**Civil Action No. 13-C-13
Judge Mark A. Karl**

**BOARD OF EDUCATION OF THE
COUNTY OF MARSHALL, WEST VIRGINIA,**

Defendant/Third-Party Plaintiff,

v.

**SCALISE INDUSTRIES CORPORATION,
a wholly owned subsidiary of EMCOR GROUP, INC.,**

Third-Party Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2013, the Third-Party Defendant, Scalise Industries Corporation's Motion to Refer to the West Virginia Business Court Division was served upon the following counsel of record by regular United States Mail, postage pre-paid as follows:

Lawrence P. Lutz, Esquire
Michael J. Pawk, Esquire
The Morgan Center Building – Suite 102
101 E. Diamond Street
Butler, PA 16001

and

Ross A. Giorgianni, Esquire
BLUMLING & GUSKY, LLP
1200 Koppers Building
Pittsburgh, PA 15219

and

George J. Anetakis, Esquire
Kevin M. Pearl, Esquire
FRANKOVITCH, ANETAKIS, COLANTONIO & SIMON
337 Penco Road
Weirton, West Virginia 26062
Counsel for Plaintiff

Carl L. Fletcher, Jr., Esquire
Jared T. Moore, Esquire
BOWLES RICE MCDAVID GRAFF & LOVE
600 Quarrier Street
Charleston, WV 25301

Counsel for the Board of Education of The County of Marshall

A handwritten signature in black ink, appearing to read "Michael G. Gallaway", written over a horizontal line.

Michael G. Gallaway (W. Va. #5071)