

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

THE VELOTTA COMPANY,
an Ohio Corporation,

Plaintiff,

v.

STANTEC CONSULTING SERVICES,
INC., a New York Corporation,

Defendant/Third-Party Plaintiff,

v.

CTL ENGINEERING OF WEST VIRGINIA, INC.,
a West Virginia Corporation,

Third-Party Defendant.

Civil Action No.: 13-C-122

Presiding Judge: Christopher C. Wilkes

Resolution Judge: James J. Rowe

**ORDER GRANTING DEFENDANT STANTEC CONSULTING SERVICE, INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter comes before the Court pursuant to Defendant Stantec Consulting Service, Inc.'s Motion for Partial Summary Judgment on Count I of Velotta's Complaint. A briefing schedule entered on July 23, 2015, provided all parties an opportunity for reply and rebuttal. The Court has reviewed the Motion along with Plaintiff's Reply and Defendant's Rebuttal and now finds the matter ripe for adjudication.

In the instant motion, Defendant Stantec requests the Court to grant it summary judgment in regards to Count I of the Plaintiff's Complaint on the grounds that Velotta has failed to offer any evidence that Stantec failed to complete the design services for the Westmoreland project under the subcontract or that its performance fell below the applicable standard of care. Furthermore, the Defendant asserts that substantive Pennsylvanian law should be applied to this case because the bridge for which it provided design services is located in Pennsylvania.

Velotta responds that West Virginia substantive law should apply because the contracts were executed through Stantec's Buckhannon, West Virginia office and because the design work was performed by Stantec's staff at that office. Furthermore, a choice of law provision within the contract provides that substantive law would be where the majority of the contracted services were performed.

Velotta admits that it did not incur substantial damages on the Westmoreland project but asserts that it may seek setoff in Count I from the three other projects at the center of this litigation under West Virginia Code §56-5-4.¹

Summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. *San Francisco v. Wendy's Int'l Inc.*, 221 W.Va. 734, 750, 656 S.E.2d 485 (2007). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 9, *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). When considering a motion for summary judgment, the court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.* However, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.*

First, this Court finds that West Virginia law is the appropriate substantive law to apply to the instant case due to the location of the work performed. Stantec's duty consisted only of performance

¹ Velotta still owes Stantec more than \$144,600.00 for the Westmoreland project.

of design services and did not include any onsite monitoring or inspections. Those design services were performed in Upshur County. The contract between the parties stated, "GOVERNING LAW: This AGREEMENT shall be governed, construed and enforced in accordance with the laws of the jurisdiction in which the majority of the SERVICES are performed." As such, the law of West Virginia governs the right of the parties under the contract, not the law of Pennsylvania.

Even still, the Court is not persuaded that §56-5-4 saves Count I of the Complaint from summary judgment.

In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or setoff which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the setoff be of a debt, not to all, but only to a part of them, this section shall extend to such setoff, if it appear that the persons against whom such claim is, stand in the relation of principal and surety, and that the person entitled to the setoff is the principal. And when the defendant is allowed to file and prove an account of setoff to the plaintiff's demand, the plaintiff shall be allowed to file and prove an account of counter setoff, and make such other defense as he might have made had an original action been brought upon such setoff, and, in the issue, the jury or judge shall ascertain the true state of indebtedness between the parties, and judgment shall be rendered accordingly.

W. Va. Code §56-5-4. Plaintiff misapplies §56-5-4. Velotta did not bring a suit for debt. Velotta is not a Defendant in relation to Count I. §56-5-4 could be used in Velotta's answer to Defendant's counterclaim, but it does not support a complaint for setoff.² Accordingly, §56-5-4 does not support a claim for setoff of a debt not pursued in litigation.

² See page 5 of Defendant Stantec's Answer, Counterclaims, and Third-Party Complaint. Incidentally, Plaintiff's Response to Defendant's Counterclaim fails to raise setoff. "4. In response to Paragraph 4 of the Defendant's Counterclaim, the Plaintiff admits that it entered into a professional services agreement with the Defendant to provide services relating to the design of a bridge over Jacobs Fork in Westmoreland County, Pennsylvania. Otherwise, the Plaintiff states that the Contract speaks for itself.

"5. In response to Paragraphs 5 and 6 of the Defendant's Counterclaim the Plaintiff states that the Contract speaks for itself but denies an obligation to pay for design services that failed to conform to the requirements of the Contract."

More importantly, however, a review of the Complaint reveals that Count I never sought a setoff. The *reply* to the instant motion states that "The Velotta Company does not appear to have sustained a significant loss with respect to Stantec's delayed performance of the Westmoreland County, PA project, any amount claimed or alleged to be due by Stantec with respect to that project should be setoff against, and is far outweighed by, amounts due to Velotta as a result of Stantec's breach of its obligations with respect to the other, related projects." However, as the Defendant points out, Velotta's position that Count I serves as a vehicle to withhold payment to obtain a setoff is a new position and contradicts the allegations within the Complaint. Count I of the Complaint alleges that

11. On or about March 2, 2011 The Velotta Company entered into a subcontract with Stantec whereby Stantec agreed to provide design services for the Westmoreland County, Pennsylvania project.

12. The majority of Stantec's services under its subcontract were performed at its office located at One Moore Avenue, Buckhannon, West Virginia.

13. Stantec failed to exercise the reasonable skill and diligence required by customarily accepted professional practices and procedures at the time and location where the services were performed and failed to perform its services within the contract time and thereby breached its subcontract with The Velotta Company.

14. As a direct, proximate and foreseeable result of Stantec's breach of its contractual duties owed to The Velotta Company under its subcontract relative to the Fayette County Project, the Plaintiff has suffered financial loss in the form of additional costs resulting from additional work, extended project performance, extended general conditions and extended, unabsorbed home-office overhead, alteration of The Velotta Company's planned sequence of work, disruption in its planned manner and method of performance.

While paragraph 14 mentions the Fayette County project, the Fayette contract was executed on November 15, 2010, so there can be no argument that paragraph 13 is referring to the Fayette project. Both the Complaint and the Plaintiff's Response to the Defendant's Counterclaims fail to mention any

prayer for set off. Regardless of whether W. Va. Code §56-5-4 could be applied to support a cause of action for setoff before a judgment on a debt is sought, the Complaint did not seek it.

Count I alleged that Stantec's design of the Westmoreland project fell below the applicable standard of care but admits in briefing that it did not sustain damages on the project. Plaintiff has failed to make a sufficient showing that Stantec breached its duty or the contract in any way and has failed to demonstrate any damages. On this matter, there are no genuine issues of material fact for trial. Accordingly, the record shows that summary judgment is appropriate.

THEREFORE, upon the record and pertinent legal authorities, the Court rules that the Defendant Stantec Consulting Services, Inc.'s Motion is GRANTED. THEREFORE, it is hereby ADJUDGED and ORDERED that Count I of the Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

The Clerk of the Circuit Court of Upshur County, West Virginia, is directed to forward an attested copy of this Order to Resolution Judge, the Honorable James J. Rowe, Greenbrier County Courthouse, P.O. Box 751, 200 North Court Street, Lewisburg, WV 24901; the Business Court Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia, 25401; and all counsel of record.

cc 9/3/15
Jd. Rowe
Bus Ct
J. Gabhart
A. Catanzarite
P. Petty

ENTER this 3 day of September, 2015.

CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION

BRIAN
GAUDET
CLERK

2015 SEP 3 P 2:24

UPSHUR COUNTY, W.V.
FILED

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand 9/3/15
BRIAN P. GAUDET, CLERK

By

Melissa Stumeling
Deputy Clerk