

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

APR 17 2021 1:20

WW CONSULTANTS, INC.,

CANONICAL COURT REPORTER
KANSAS COUNTY CIRCUIT COURT

Plaintiff,

VS.

Civil Action No.: 18-C-115

Presiding Judge: Christopher C. Wilkes

Resolution Judge: Michael D. Lorenson

POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT, et al.,
Defendants.

**ORDER GRANTING PIPE PLUS, INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court this 16th day of April 2021 upon Pipe Plus, Inc.'s Motion for Partial Summary Judgment. The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party Defendant, Pipe Plus, Inc. (hereinafter "Third-Party Defendant" or "Pipe Plus"), by counsel, Norman T. Daniels, Jr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. In 2014, Orders bid on a project to construct the consolidated wastewater treatment plant near Snowshoe Mountain in Pocahontas County, West Virginia, which was being built by Defendant/Counterclaim Plaintiff Pocahontas County Public Service District (hereinafter "PSD"). See Ord., 1/14/21. Pipe Plus is a construction company which bid on a project to construct pump stations and wastewater collection system

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on the aforementioned plant. *See* Th. Pty. Def's Mot., p. 5. Pipe Plus entered into a contract with the PSD to construct the collection system and pump stations, respectively known as Contracts #1 and #2, effective April 24, 2015 (hereinafter "Contracts")¹. *Id.* at 6. The pump stations and collection system were substantially complete on May 16, 2017². *Id.* at 7.

2. This matter was commenced with the filing of the complaint on February 6, 2018, wherein WWC sought to recover fees allegedly owed by the PSD. *Id.* The PSD was the project's owner and WWC was the engineer of record on the project, providing certain design and consulting services during the construction of the wastewater treatment plant and related facilities. *Id.* at 6; *see also* Compl., ¶8, Ord., 1/14/21.
3. On April 2, 2018, PSD filed its Answer and Counterclaim of the Pocahontas County Public Service District, alleging twenty-eight individual allegations of professional negligence. *Id.* at 7; *see also* Ctrclm, p. 26-28.
4. On August 1, 2019, the WWC filed a Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims, seeking judgment as a matter of law in its favor on 20 of the 28 counterclaims PSD asserts in paragraph 12 (professional negligence)³ of the Counterclaim because Defendant did not support those allegations with expert testimony. *See* Pl's Mot. Summ. J. This motion was fully briefed, and on November 27, 2019, this Court granted said motion and dismissed a vast majority of the design negligence claims. *See* Ord., 11/27/19; *see*

¹ The Court notes Orders also entered into its own contract with the PSD to construct the plant, effective April 19, 2015. *See* Ord., 1/14/21.

² The Court also notes the plant was also substantially complete on May 16, 2017. *See* Ord., 1/14/21.

³ These claims are set forth in paragraph 12(a) through 12(cc) of PSD's Counterclaim. *See* Pl's Mot., Ex. A.

also Th. Pty. Def's Mot., p. 8. After the entry of this Order, seven design negligence claims remained. *Id.*

5. On April 20, 2020, the PSD moved the Court for leave to permit it to amend its Counterclaim in this matter to add two additional counterclaim defendants due to newly produced evidence. The Court, finding good cause existed, and considering there was no objection from WWC, granted said motion for leave by Order entered on May 4, 2020.
6. On April 29, 2020, WWC moved the Court for leave to permit it to file a third-party complaint against three third-party defendants due to newly produced evidence. The Court, finding good cause existed, and considering there was no objection from the PSD, granted said motion for leave by Order entered on May 4, 2020.
7. On May 12, 2020, the PSD filed its First Amended Counterclaim, asserting claims against WWC for design professional negligence and breach of contract. *See* Am. Ctrclm, ¶¶53-63.
8. On May 18, 2020, WWC filed its Third-Party Complaint against Orders Construction, Inc., A3-USA, Inc., and Pipe Plus, Inc. With respect to Pipe Plus, WWC asserted it was entitled to common law contribution and implied indemnity, express contractual indemnification pursuant to Pipe Plus's contract with the PSD, and it also asserted a cause of action against Pipe Plus for breach of contract, alleging Pipe Plus breached its contract with PSD by failing to indemnify and assume WWC's defense from the design based negligence and breach of contract claims that PSD had asserted against it. *See* Th. Pty. Def's Mot., p. 9; *see also* WWC's Th. Pty. Compl., ¶¶39-55. The Court notes WWC's claims against Pipe Plus are nearly identical to WWC's claims

against Orders Construction Company, Inc., which were dismissed by this Court by Order entered January 14, 2021. *See* Th. Pty. Def's Mot., p. 9.

9. The instant motion for partial summary judgment followed. On February 22, 2021, Pipe Plus filed the instant Pipe Plus, Inc.'s Motion for Partial Summary Judgment, arguing that the Third-Party Complaint against it should be dismissed because: 1) several liability statute, there is no basis in law for the implied indemnity claim, and WWC's contribution and indemnity claims are time barred by West Virginia Code §55-2-21(b); there is no basis in law for the implied indemnity claim; and common law claims for contribution are precluded by West Virginia's several liability statute; and 2) WWC's claims for express contractual indemnity and breach of contract must be dismissed because WWC is not entitled to any indemnification for claims of WWC's design negligence or WWC's in the performance of its contractual obligations to the PSD; the contractual indemnity provisions impose no obligation on Pipe Plus to defend WWC; and WWC's contractual indemnity and breach of contract claims are not yet ripe. *See* Th. Pty. Def's Mot., p. 2.
10. On April 5, 2021, WWC filed its Brief in Response to Pipe Plus, Inc.'s Motion for Partial Summary Judgment, averring that Pipe Plus's arguments seeking dismissal are not supported by West Virginia law and the instant motion should be denied. *See* WWC's Resp., p. 3.
11. On or about April 9, 2021, Pipe Plus filed its Reply of Pipe Plus, Inc. to WW Consultants' Response in Opposition to Pipe Plus, Inc.'s Motion to for Partial Summary Judgment.
12. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment. Motions for summary judgment are governed by Rule 56, which states that “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, “[a] motion for 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 the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). 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.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial

or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).” *Id.* at 60.

CONCLUSIONS OF LAW

In this matter, Pipe Plus filed the instant Pipe Plus, Inc.’s Motion for Partial Summary Judgment, arguing that the Third-Party Complaint against it should be dismissed because: 1) several liability statute, there is no basis in law for the implied indemnity claim, and WWC’s contribution and indemnity claims are time barred by West Virginia Code §55-2-21(b); there is no basis in law for the implied indemnity claim; and common law claims for contribution are precluded by West Virginia’s several liability statute; and 2) WWC’s claims for express contractual indemnity and breach of contract must be dismissed because WWC is not entitled to any indemnification for claims of WWC’s design negligence or WWC’s in the performance of its contractual obligations to the PSD; the contractual indemnity provisions impose no obligation on Pipe Plus to defend WWC; and WWC’s contractual indemnity and breach of contract claims are not yet ripe. *See* Th. Pty. Def’s Mot., p. 2.

Considering the record, the relevant law, and the briefing by the parties, the Court finds as follows:

Negligence Cause of Action

West Virginia Code §55-2-21(b) governs statutes of limitation as it applies to third-party pleadings. Pursuant to §55-2-21(b), “[a]ny defendant who desires to file a third-party complaint shall have one hundred eighty days from the date of service of process of the original complaint, or the time remaining on the applicable statute of limitations, whichever is longer, to bring any third-party complaint...”. W. Va. Code Ann. § 55-2-21.

WWC has claimed contribution and indemnity in its “Negligence” count in its Third-Party Complaint. *See* Th. Pty. Def’s Mem., p. 12; see also Th. Pty. Compl., ¶¶ 39-43. Contribution and indemnity are “personal action for which no limitation is otherwise prescribed” and are governed by a two-year statute of limitations, pursuant to §55-2-12. W. Va. Code Ann. § 55-2-12.

In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. Syl. Pt. 4, *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 708, 487 S.E.2d 901, 903 (1997).

It is undisputed that Pipe Plus entered into a contract with the PSD for the construction of the collection systems and pump stations for the project. *See* Th. Pty. Compl., ¶13. Pipe Plus has proffered that WWC was charged with preparing and evaluating the bids, and then, as the owner’s representative, with overseeing and monitoring the construction of the project. *See* Th. Pty. Def’s Mot., p. 6, 13. Because of this role, it has known since beginning of the project that Pipe Plus constructed the pump stations and collection system. *Id.* at 13. It was also proffered to the Court that WWC was even observing Pipe Plus’s work during construction and was in a position at the time the work was performed to verify compliance with the project specifications. *Id.* Substantial completion of the project was on May 16, 2017. *Id.* In fact, it was WWC who prepared, certified, and filed with the Public Service Commission a Certificate of Substantial Completion for Pipe Plus’s work on the project when substantial completion was achieved on

May 16, 2017. *Id.* The Court notes WWC did not file its Third-Party Complaint until May of 2020, nearly three years later.

Further, the PSD filed and served its original Counterclaim on March 28, 2018, more than two years before WWC filed its Third-Party Complaint. Since WWC brings this third-party complaint in its capacity as Counterclaim Defendant, it was the service of this original Counterclaim on WWC in March of 2018 that triggered WWC's 180-day period to file a third-party complaint. Therefore, this deadline expired on September 24, 2018.

Accordingly, regardless of whether the 180-day period or the remaining time on the statute of limitations applies, WWC's Third-Party Complaint, filed more than three years after the substantial completion and more than two years after the filing of the original counterclaim, is untimely. So, its negligence claims, contained in paragraphs 15-19, of the Third-Party Complaint must be dismissed.

Indemnity Cause of Action

Further, with regard to the contractual defense and indemnity claims, contained in paragraphs 44-49 of the Third-Party Complaint, Pipe Plus argues the contractual indemnity provision is a limited indemnity obligation and it specifically excludes any obligation of Orders to indemnify WWC for design negligence or WWC's negligence in the performance of its contractual obligations to the PSD. *See Th. Pty. Def's Mot.*, p. 17.

The indemnity obligation, contained in Section 7.18 of the contract reads as follows:

7.18 Indemnification

- A. To the fullest extent permitted by Laws and Regulations, and in addition to any other obligations of Contractor under the Contract or otherwise, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, members, partners, employees, agents, consultants and

subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

See WWC's Resp., p. 14; *see also Th. Pty Compl.*, ¶21.

The exceptions to the contract's indemnity clause are enumerated in Paragraph 7.18.C, which reads as follows:

- C. The indemnification obligations of Contractor under Paragraph 7.18.A shall not extend to the liability of Engineer and Engineer's officers, directors, members, partners, employees, agents, consultants and subcontractors arising out of:
 - 1. The preparation or approval of, or the failure to prepare or approve maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or
 - 2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

See WWC's Resp., p. 14; *see also Th. Pty. Def.'s Mot.*, p. 18.

This Court's review of the relevant provisions, and the third-party complaint, reveal that the claims are related to the exceptions to indemnity contained in the exceptions to the contract's indemnity clause which are enumerated in Paragraph 7.18.C. When the indemnity provision is examined in full, it is apparent that it is limited in scope. The indemnity obligation is not broad based, and does not entitle WWC to indemnification regardless of its fault and does not impose

an obligation on Pipe Plus to defend WWC. Rather, it is clearly limited to damages and losses arising out of or related to the performance of the Work and that are attributable to bodily injury or injury to or destruction of tangible property other than the Work itself. And, such obligations are limited only to those damages or losses caused by a negligent act or omission of Pipe Plus. WWC is not entitled to indemnification for damages or losses it may suffer that are caused by its own negligence.

Further, the indemnity obligations specifically exclude indemnity for any liability imposed on WWC arising out of its design work. The PSD alleges WWC breached the standard of care applicable to engineers by: a) *designing* a wastewater treatment plant and accompanying facilities that failed to process wastewater at the designed rate due to the Headworks and screening issues thereto; b) failing to provide field locations for the collection system; c) failing to properly *design* the lagoon; d) failing to *design* a proper waste sludge pump; e) failing to properly *design* membrane racks in Train A; f) failing to properly *design* the membrane cleaning solution tank; g) failing to supervise contractors so that proper as-builts of the force mains could be made; and h) *designing* the MBR area so that valves can only be accessed by climbing over safety railings or by removing grates. *See* Th. Pty. Def's Mot., p. 8-9, 19.

The Court also examines implied indemnity. The general principle of implied indemnity arises from equitable considerations. *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 452, 693 S.E.2d 815, 817 (2010), at Syl. Pt. 6. "At the heart of the doctrine is the premise that the person seeking to assert implied indemnity--the indemnitee--has been required to pay damages caused by a third party--the indemnitor." *Id.*

The requisite elements of an implied indemnity claim in West Virginia are a showing that: "(1) an injury was sustained by a third party; (2) for which a putative indemnitee has

become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.” *Harvest Capital v. West Virginia Department of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002), Syl. Pt. 4.

Here, WWC has no legally viable claim for implied indemnity against Pipe Plus. The Court also considers there have been no special relationships proffered between WWC and Pipe Plus upon which a claim for implied indemnity can be based. *See* Th. Pty. Def’s Mot., p. 14. With regard to WWC’s fault, PSD has affirmatively alleged WWC’s design negligence caused its injuries and damages. *Id.* at 15, 19. The jury could find WWC is liable and was negligent in its design and supervision of the project, thus rendering the doctrine of implied indemnity inapplicable. For all of these reasons, no legal claim of implied indemnity may exist between these parties. *Id.* at 15. Because of the plain language of the indemnity provision, it is apparent on the face of the pleading that the claimant has no legal right that can be asserted. *See Fass w. Nowasco Well Service, Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986)(internal citations omitted).

Contribution Cause of Action

The Court next examines contribution. Syllabus Point 4 of *Sydenstricker v. Unipunch Prod., Inc.* states as follows:

The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can

only be obtained for the excess that such party has paid over his own share.

169 W. Va. 440, 441, 288 S.E.2d 511, 513 (1982).

The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages? *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit.

Id.

As an initial matter, here, a review of the Third-Party Complaint reveals the claim for contribution is contained within the negligence count. *See* Th. Pty Compl., ¶¶ 39-43. Specifically, WWC alleges in the Third-Party Complaint's negligence count that Pipe Plus had a duty to exercise a reasonable degree of care ordinarily employed by contractors, and that in the event that the PSD proves its allegations and causes of action at trial, PSD's damages "were caused by the negligence and carelessness of Pipe Plus, including but not limited to the alleged defects in the collection station or pump stations and related work listed in paragraphs 8 and 0 above". *Id.* at ¶¶41-42.

Wherefore, WWC pleads in the Third-Party Complaint's negligence count that it demands "that judgment be entered in its favor and against Pipe Plus and that Pipe Plus be adjudged solely liable to [the PSD] and/or liable to WWC for contribution and common law indemnity and otherwise liable for any for and all damages proven by [the PSD] and that the Court award such other relief as may be deemed just and appropriate". *Id.* at ¶43.

As an initial matter, the Court notes that WWC's negligence claims, contained in paragraphs 39-43 of the Third-Party Complaint, were dismissed by this Order.

Further, with regard to the paragraphs, including the "Wherefore" paragraph, asserting contribution by Pipe Plus, the Court finds this activity was the type of activity that was specifically contracted between to the parties to be deemed not to be indemnifiable, via the indemnity exceptions contained in Paragraph 7.18.C. The Court concludes Pipe Plus is expressly excluded from being held liable from this type of action, as specifically contemplated by the parties at the time of the contract. An indemnity exclusion, such as the one contained in Paragraph 7.18.C, would not have any force or effect if a party could still be sued for contribution. For all of these reasons, the Court finds and concludes that the contribution claim must be dismissed.

Further, even if the Court were not to find the contribution claim should be dismissed for this reason, the Court also finds and concludes that West Virginia's several liability statute precludes any claim of contribution by WWC against Pipe Plus.

For the reasons stated in the Court's Order Granting A-3 USA, Inc.'s Motion to Dismiss Third Party Complaint, entered March 30, 2021, the Court concludes that pursuant to West Virginia Code § 55-7-13c, none of the exceptions to West Virginia's several liability law apply in this matter, and West Virginia's several liability statute, as amended in 2015, precludes any claim of contribution by WWC in this instance, and therefore, the Court must find that the contribution claim must be dismissed. *See* Ord., 3/30/21, p. 5-9.

For all of the foregoing reasons, the Court finds the instant Pipe Plus, Inc.'s Motion for Partial Summary Judgment must be granted. Therefore, there being no remaining causes of

action against it, Third-Party Defendant Pipe Plus, Inc. must be dismissed with prejudice from this civil action.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Pipe Plus, Inc.'s Motion for Partial Summary Judgment should be GRANTED. Third-Party Defendant Pipe Plus, Inc. is hereby DISMISSED WITH PREJUDICE from this action. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel and *pro se* parties of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 16
DAY OF Apr 2021
C. S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 4/16/21
Copies sent to:
 counsel of record C. Negler
 parties P. Mannix
 other (please indicate) M. Daniels / T. Spence
By: certified / 1st class mail M. Fisher
 fax C. Bunker
 hand delivery Bus Ct.
 interdepartmental S. Reiner
Order/recipient accomplished: C. Gatson
Deputy Circuit Clerk