

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

MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,

Plaintiff/Counterclaim Defendant/Crossclaimant,

vs.

Civil Action No.: 20-C-350

Presiding Judge Akers

Resolution Judge Farrell

**SMITH/PACKETT MED-COM, LLC,
a Virginia limited liability company, and
sole Manager-Member of Defendants SP WV, LLC,**

Defendant/Counterclaimant; and

**SP WV, LLC,
a Virginia Manager-Managed Limited Liability Company, and
“Pass Through Entity” acting as the Sole Member of
Defendant WV IL-AL Investors, LLC,**

Defendant/Counterclaimant; and

**WV IL-AL INVESTORS, LLC,
a Virginia Manager-Managed Limited Liability Company,**

Defendant/Counterclaimant; and

**JARRETT CONSTRUCTION SERVICES, INC.,
a West Virginia limited liability company,
as Construction Manager at Risk,**

Defendant/Counterclaimant; and

CARTER BANK & TRUST,

Defendant; and

JARRETT CONSTRUCTION SERVICES, INC.,

Third-Party Plaintiff,

vs.

ECS MID-ATLANTIC, LLC,

Third-Party Defendant/Crossclaim Defendant.

**ORDER DENYING MOUNTAIN STATE PIPELINE & EXCAVATING, LLC'S
MOTION FOR SUMMARY JUDGMENT OR MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO LIABILITY AND DAMAGES ON MPSE'S COMPLAINT AND
CROSS-CLAIM**

This matter came before the Court upon Mountain State Pipeline & Excavating, LLC's Motion for Summary Judgment, And, In the Alternative, for Partial Summary Judgment as to Liability and Damages on Mountain State Pipeline & Excavating, LLC's Complaint and Cross-Claim. The parties, by counsel, have fully briefed the issues necessary. The Court heard oral argument on a prior day. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds a dispute arising from a construction project of an assisted living facility known as The Crossings, located in Kanawha County, West Virginia. *See* Def ECS's Resp., p. 2; *see also* Def Jarrett's Resp., p. 2. The Owner(s) of this project are Defendants Smith/Packett Med-Com, LLC, SP WV, LLC, and WV IL-AL Investors, LLC (hereinafter the "Owner"). The Owner hired Plaintiff, Mountain State Pipeline & Excavating, LLC (hereinafter "Plaintiff" or "MSPE") as a civil contractor. *See* Def ECS's Resp., p. 2. The Owner also hired Defendant Jarrett Construction Services, Inc. as a construction manager/contractor to perform work on the project. *Id.*; *see also* Def Jarrett's Resp., p. 2. Third-Party Defendant Terradon Corporation was hired to perform quality control/quality assurance work and design work on the project. *Id.* A lender for the project, Defendant Carter Bank & Trust was added to this litigation due to lien rights. *Id.* Defendant ECS Mid-Atlantic, LLC (hereinafter "Defendant" or "ECS") and the Owner entered into a Master Services Agreement on November 7, 2016 with established

terms for work performed between the two companies. *Id.* Specifically, ECS was hired to evaluate the property prior to construction. *See* Def Jarrett's Resp., p. 3.

2. On or about January 8, 2019, a slope failure occurred in the slope below the project's A wing. *Id.*; *see also* Def Jarrett's Resp., p. 2. Delays occurred and the facility reached substantial completion in November 2020. *See* Def Jarrett's Resp., p. 2.

3. On June 18, 2020, Defendant Jarrett filed a Counterclaim against Plaintiff and a Third-Party Complaint against Defendant ECS. *See* Def Jarrett's Resp., p. 3.

4. On or about February 7, 2022, Plaintiff filed the instant Mountain State Pipeline & Excavating, LLC's Motion for Summary Judgment, And, In the Alternative, for Partial Summary Judgment as to Liability and Damages on Mountain State Pipeline & Excavating, LLC's Complaint and Cross-Claim, seeking summary judgment in its favor as to its Complaint and Cross-Claim and damages in the "amount of \$1,121,340.98, exclusive of interest, and costs, including the enforcement of MSPE's Notice of Mechanic's Lien in the amount of \$44,98[0].00". *See* Pl's Mot., p. 1-2, 18. Plaintiff points to evidence in the record, mainly Affidavit testimony of witnesses and expert witnesses to support its contention that no genuine issue of material fact remains. *Id.* at 2.

5. On or about October 14, 2022, ECS filed its Response, arguing the motion is "rife with issues material fact" and should be denied. *See* Def ECS's Resp., p. 2, 4. Specially, ECS argues certain of the affidavit testimony is offered without context, contains conflicting statements with each other and with deposition testimony. *Id.* at 5.

6. On or about October 17, 2022, Defendant Jarrett filed its Response, arguing "multiple issues of material fact exist as to MSPE's claims against [Jarrett] and [Jarrett's] claims

against MSPE.” *See* Def Jarrett’s Resp., p. 3. Specifically, Jarrett points to examples from the record to illustrate its argument that alternative positions and testimony exist. *Id.* at 6.

7. On a prior day, Plaintiff filed Replies to the various Defendants’ Responses, reiterating its position that no genuine issue of material fact remains.

8. On or about May 2, 2023, Plaintiff filed Mountain State Pipeline & Excavating, LLC’s Supplemental Motion for Summary Judgment, and, in the Alternative, for Partial Summary Judgment as to Liability and Damages on MSPE’s Complaint and Crossclaim – with Evidence Generated after 2/7/22, using record evidence, including depositions taken on March 27, 2023, December 5, 2022, January 16, 2022, and December 2, 2022, and written discovery dated March 2, 2023, and March 14, 2023, to support its position that no genuine issue of material fact remains.

9. On a prior day, a hearing was heard before the undersigned.

10. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for 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

Here, Plaintiff seeks a summary judgment ruling in its favor upon the claims in the Complaint and Cross-Claim, including damages amounts, arguing no genuine issues of material fact remain. Plaintiff argues the Defendants’ “liability for their breach of duty, negligence, breach of warranty, and the negligent supply of information (made actionable in W. Va.) for their utterly negligent Crossings Project design and the Crossings Project site is undisputed”. *See* Pl’s Mot., p. 14. Plaintiff seeks damages in the “amount of \$1,121,340.98, exclusive of interest, and costs, including the enforcement of MSPE’s Notice of Mechanic’s Lien in the amount of

\$44,98[0].00”. *See* Pl’s Mot., p. 18. The Court notes that Plaintiff did not explain which party it seeks to recover against its various theories.

As an initial matter, the Court lays out the claims at issue in the Complaint. Plaintiff’s Complaint, naming Jarrett, the Owner and several owner-related entities and the Owner’s lender, contained the following counts:

1. Count 1 – Breach of Contract against Owner
2. Count 2 – Breach of Warranty of Buildability against Owner
3. Count 3 – Fraud, Deceit, Inducement and Misrepresentation against Owner
4. Count 4 – Professional Negligence against Jarrett as Construction Manager
5. Count 5 – Tortious Interference against Jarrett
6. Count 6 – Oral Modification, Implied in Fact Contract against Owner
7. Count 7 – Quantum Meruit/Implied Contract/Unjust Enrichment against Owner
8. Count 8 – Declaratory Relief against Owner and Jarrett
9. Count 9 – Joint Venture and Civil Conspiracy against Owner and Jarrett
10. Count 10 – Mechanic’s Lien Enforcement
11. Count 11 – Punitive Damages and Attorney’s Fees and Costs

Plaintiff argues no genuine issues of fact remain; however, the Court finds the Defendants have pointed to multiple issues of fact in the record. The Court does not find Plaintiff’s recitation of undisputed facts as persuasive given the conflicting testimony and record evidence. Furthermore, the motion seeks judgment against all parties without any delineation between parties as to causes of action and facts. Plaintiff seeks judgment against all Defendants on all 11 counts, and damages in the “amount of \$1,121,340.98, exclusive of interest, and costs, including the enforcement of MSPE’s Notice of Mechanic’s Lien in the amount of

\$44,98[0].00”. This amount is comprised of sums it alleges are due under its contract with the Owner, as well as alleged change orders and delay damages. See Def Jarrett’s Resp., p. 4.

Joint Venture

Specifically, regarding the claim for joint venture, the Court considers that under West Virginia law, a joint venture is “an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.” Syl. Pt. 2, *Price v. Halstead*, 177 W. Va. 592 (1987). Whether or not a joint venture exists is normally a question to be answered by a trier of fact. *Dailey v. Ayers Land Dev., LLC*, 825 S.E. 2d 351, 359 (W. Va. 2019) citing *Armor v. Lantz*, 535 S.E.2d 737, 743 (W. Va. 2000).

Plaintiff’s motion describes a joint venture on the project consisting of all other parties to this civil action that Plaintiff named (which would be all except Terradon). The Court considers the fact each entity had its own contract with the Owner. For instance, Defendant ECS did not have a contract with any other entity other than the Owner. Likewise, Jarrett had its own contracts with the Owner wherein it performed its services for an agreed upon price.

Further, the Master Services Agreement identifies ECS as an independent professional consultant to the Owner. This is all record evidence against Plaintiff’s claim of a joint venture. The Court cannot conclude that Plaintiff has met its burden to show that no issues of fact remain, and the motion must be denied as to this claim.

Civil Conspiracy

The motion merely states in its heading under civil conspiracy that the joint venture group’s civil conspiracy is actionable and undisputed. See Pl’s Mot., p. 17.

The Court recognizes the well-settled law that a “civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff. Syl. Pt. 8, *Dunn v. Rockwell*, 689 S.E.2d 255 (2009). A “civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who also shared a common plan for its commission with the actual perpetrator(s).” *Id.*

The Court finds Plaintiff has not met its burden under Rule 56 regarding summary judgment in its favor on any claims for civil conspiracy. The Court refers to the analysis above, wherein it considers the Owner had individual contracts with Defendants in carrying out the construction project. The motion must be denied as to civil conspiracy.

Slope Slip/Negligence

Next, the Court addresses the portions of the motion that discussed the slope slip and negligence causes of action. Plaintiff contends that ECS failed to detect a pre-existing subsurface slip. Plaintiff relies on a report of Mr. Tim Cart. But the Court also considers that Mr. Cart’s report also attributes fault to the toe drain installed by Plaintiff, as well as heavy rainfall as a potential cause. The Court finds simply that, issues of fact clearly remain.

Further, Plaintiff alleges it does not have a rule in the cause of the slope failure, and in support of the instant motion, it submits affidavits of three professional engineers and one other retained expert. However, clearly, alternative positions and testimony exist in the record. For example, Defendant ECS’s March 4, 2019 report implicates site preparation contributing the cause of slope failure. Also, Bryan Wyatt, P.E., one of the principals in ECS, has testified that

the toe drain, a rock channel at the base or “toe” of the slope which is designed to allow subsurface water to drain out of the slope, was not properly constructed and played a role in the slope failure. The rock channel or toe drain was constructed by Plaintiff. *See* Def Jarrett’s Resp., p. 6. The dispute between the witnesses is record evidence of issues of material fact existing as to this issue. The Court must deny the request for summary judgment as to these claims.

Contract Claims

Next, the Court addresses contract issues. As an initial matter, the record makes clear there is dispute as to what exactly constitutes Plaintiff’s contract with the Owner. *See* Def Jarrett’s Resp., p. 4. The April 27, 2018 contract between Plaintiff and Owner was produced in this litigation, bearing the signature of James E. Cooper, principal in Plaintiff, as well as the signature of Owner. *Id.* In a May 4, 2022 deposition, Mr. Cooper denied that the April 27, 2018 document constitutes the contract with the owner, and instead classifies it as a proposal to modify his contract, which he claimed was a November 30, 2017 Schedule of Values submitted as part of the bid process. *Id.* at 4-5.

For all of these reasons, the Court finds that Plaintiff has not met its burden of showing that no genuine issues of material fact remain as to its claims, including its damages demand. While Plaintiff’s motion reiterated its claims, the Court finds that the evidence cited is not, in fact, undisputed, and that record evidence shows alternate theories exist.

Therefore, the Court finds the instant motion must be DENIED.


CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Mountain State Pipeline & Excavating, LLC’s Motion for Summary Judgment, And, In the Alternative, for Partial Summary

Judgment as to Liability and Damages on Mountain State Pipeline & Excavating, LLC's Complaint and Cross-Claim is hereby DENIED. 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 of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 17 day of September, 2024.



JUDGE MARYCLAIRE AKERS
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION