

In the Circuit Court of Kanawha County, West Virginia

WW CONSULTANTS, INC.,
Plaintiff,

v.

Case No. CC-20-2018-C-115
Judge Christopher C. Wilkes

**POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT,**
Defendant

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND MOTION FOR FEES
FOR VEXATIOUS LITIGATION CONDUCT**

This matter came before the Court this 20th day of December, 2024. The Third-Party Defendant, Orders Construction Company, Inc., (hereinafter “Orders” or “Third-Party Defendant”), by counsel, has filed its Motion and Memorandum of Law in Support of Orders Construction Company, Inc.’s Motion for Summary Judgment and Motion for Fees and Costs for Vexatious and Bad Faith Litigation Conduct. The Third-Party Defendant, Orders Construction Company, Inc., by counsel, John D. Hoblitzell, III, Esq., and Defendant, WW Consultants, Inc., (hereinafter “Defendant” or “WWC”), by counsel, Robert H. Sweeney, 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. This matter surrounds the construction of a \$27 million wastewater treatment plant in Pocahontas County, West Virginia, that was constructed to treat current wastewater emanating from the Snowshoe Mountain Resort while providing new

wastewater treatment capability for residences and businesses located in the Linwood Valley area of the base of Snowshoe Mountain. See Compl.; see *also* Orders' Mot., p. 3. Plaintiff Pocahontas County Public Service District (hereinafter "the PSD") is the owner of the plant and WW Consultants was the design engineer for the project. *Id.*; see *also* court file. Third-Party Defendant Orders Construction Company, Inc. was the contractor that built the treatment plant. *Id.* Orders entered into a contract with the PSD to construct the plant, known as Contract #3. *Id.* at 5.

2. Now-dismissed Third-Party Defendant Pipe Plus, Inc. was the contractor that constructed (under separate contract(s)) the force mains and pump stations that comprise the collection system. *Id.* at 3.

3. As stated, WWC was selected by the PSD to be the engineer of record for the design of the project. *Id.* at 4. The project (as designed by WWC) consisted of a centralized wastewater treatment plant utilizing a membrane bioreactor located near the center of the service area and the collection system to collect and transport wastewater to the plant. *Id.* Additionally, a Headworks was designed to screen and remove debris from wastewater as it entered the plant. *Id.* at 4-5.

4. The Complaint was filed February 6, 2018, wherein WWC filed suit[\[1\]](#) against the PSD, its three board members in their official capacities, the DEP, and the West Virginia Water Development Authority. See Compl.; see *also* Orders' Mot., p. 6. Central to WWC's claims were allegations it had not been properly paid for its work on the project. *Id.* The PSD filed a Counterclaim[\[2\]](#), alleging breach of the standard of care and professional negligence and breach of contract. See Ctrclm, 3/28/19; see *also* Orders' Mot., p. 6.

5. On August 28, 2019, this case was mediated before Judge Lorensen, Resolution Judge in this case, and at mediation all the claims of WWC were resolved and

subsequently dismissed. *See court file.*

6. On November 27, 2019, this Court entered its Order Granting Plaintiff's^[3] Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims, dismissing certain claims, leaving only the following claims: that WWC's design did not (1) provide any method to field locate the collection system; (2) provide access to the course screen; (3) provide for the system to take the wastewater from the lagoon and to the wastewater treatment plant; (4) properly size waste sludge pumps necessitating their replacement; (5) allow membrane racks in Train "A" to be picked up by the crane for repair and/or replacement; (6) properly size a membrane cleaning solution; (7) properly designed the MBR area resulting in that valves can only be accessed by climbing over safety railings and/or removal of grates, and (8) that WWC failed to supervise contractors so that proper as-built drawings for the force mains could be made. *See court file.*

7. On October 19, 2019, the PSD filed its Third Supplemental Responses to WWC's Request for Production of Documents, which included design drawings to replace the "Headworks" section of the Snowshoe Regional Wastewater Plant. *See* Ord., 9/24/24, p. 3. The headworks area of the wastewater treatment plant comprises the initial stage of the wastewater process and is designed to reduce the level of pollutants in the incoming domestic and industrial wastewater to allow for treatment and discharge. *Id.* Following a motion to strike, this Court reopened discovery on the Headworks claim. *Id.*

8. Subsequently, WWC and the PSD sought and received permission to file new, amended claims. *Id.* Thereafter, the PSD filed an Amended Counterclaim^[4] against WWC and new defendants Pipe Plus, Inc. and A3 USA, Inc., seeking relief for issues related to the Headworks section of the wastewater plant. *See* Orders' Mot., p. 6;

see *also* Am. Ctrclm. WWC, as counterclaim defendant, filed a Third-Party Claim against Orders Construction Co., Inc., Pipe Plus, Inc., and A3 USA, Inc. See Orders' Mot., p. 7. Thereafter, the PSD dismissed its claims against A3 USA, Inc. and settled with Pipe Plus, Inc. On September 10, 2024, the Court entered an Agreed Order of Partial Dismissal, finding that WWC had resolved all its disputes with Pipe Plus, Inc.

9. On September 12, 2024, Orders filed the instant motion, seeking summary judgment in its favor because Third-Party Plaintiff cannot maintain contractual indemnity claims against Orders because the PSD's claims in this case against WWC do not trigger the contractual indemnity provision in Orders' contract with the PSD as they do not involve the damage or destruction of tangible property other than the Work, solely implicate WWC's own acts or omissions and alleged violations of its professional duty of care as an engineer, and do not implicate any acts or omissions of Orders. See Orders' Mot., p. 1. Further, Orders argues because WWC has persisted in holding this case, it seeks an award of fees for vexatious and oppressive litigation conduct. *Id.* at 2.

10. On October 8, 2024, WW Consultants, Inc. filed WW Consultants, Inc.'s Response to Orders Construction Company's Motion for Summary Judgment, arguing the WVSCA's opinion supports its good faith basis for contractual indemnity claims, as it "refused to agree with Orders' argument that WWC was not entitled to contractual indemnity from Orders. Instead, the WVSCA remanded WWC's claims for contractual indemnity to this Court for further development". See WWC's Resp., p. 1-2. WWC further argues that discovery is ongoing. *Id.* at 2. WWC argues the PSD's claims also include claims that the treatment plant does not function as efficiently as expected, and that it has had a loss of use of the plant as constructed by Orders, including a claim regarding an overhead crane purchased and installed by Orders not reaching all of the membranes in the A Train of the plant causing inability to access all membranes and

therefore inefficiencies and loss of use. *Id.* Finally, WWC argues sanctions are not merited in this matter as WWC has been pursuing its rights pursuant to the West Virginia Rules of Civil Procedure and this Court's Scheduling Orders, which is not in bad faith or vexatious. *Id.* at 3.

11. On October 21, 2024, Orders filed Orders Construction Company, Inc.'s Reply Brief in Support of Motion for Summary Judgment, arguing the motion should be granted as the Response failed to show any genuine issues of material fact. See Pl's Reply, p. 2. Further, Plaintiff argues the Response "fails to address the fact that damage to tangible property (to include loss of use) – that is the Work itself – is categorically excluded from any indemnity obligation". *Id.* at 3.

12. The Court finds the issue 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

Orders argues summary judgment is appropriate here because the PSD’s claims in this case against WWC do not involve the damage or destruction of tangible property other than the Work, solely implicate WWC’s own acts or omissions and alleged violations of its professional duty of care as an engineer, and do not implicate any acts or omissions of Orders, so the claims do not trigger the contractual indemnity provision in Orders’ contract with the PSD. See Orders’ Mot., p. 1. Further, Orders argues that “because WWC has known for months and months it has no legally cognizable claims against Orders, yet has persisted in holding it in this case, Orders is entitled to an equitable award of fees and costs arising from WWC’s vexatious and oppressive litigation conduct”. *Id.* at 2.

On the other hand, WWC argues that the motion should be denied because the PSD’s claims also include claims that the treatment plant does not function as efficiently

as expected, and that it has had a loss of use of the plant as constructed by Orders, including a claim regarding an overhead crane purchased and installed by Orders not reaching all of the membranes in the A Train of the plant causing inability to access all membranes and therefore inefficiencies and loss of use. See WWC's Resp., p. 3. Additionally, WWC argues sanctions are not merited in this matter as WWC has been pursuing its rights pursuant to the West Virginia Rules of Civil Procedure and this Court's Scheduling Orders, which is not in bad faith or vexatious. *Id.* at 3. The Court will take the issues in turn.

When contract terms are clear and unambiguous, “[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.” Syl. Pt. 3, *Citynet v. Toney*, 235 W. Va. 79, 772 S.E.2d 36 (2015); Syl. Pt. 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626, 628 (1962). Further, the West Virginia Supreme Court has held that defective construction can be deemed to be “property damage” and can result in “loss of use”. *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E. 2d 508 (W. Va. 2013). In *Cherrington*, the Plaintiff entered into an agreement with a general contractor for the construction of a home. When the home was completed, the Plaintiff determined that aspects of the construction were defective. The defects included elements constructed or installed by the contractor, including an uneven concrete floor on the lower level of the home, a leaking roof with ceiling damage, a sagging support beam causing settlement, wood components in direct contact with the ground, and various other items. Plaintiff sued the general contractor, and the general contractor filed a Third-Party Complaint against its insurer seeking indemnity under its insuring agreement for the Plaintiff's claims.

The insurer moved to dismiss the Third-Party Complaint on the grounds that the

Plaintiff's claims for defective workmanship did not trigger the insurer's indemnification obligations under the policy with the general contractor, and the lower Court agreed and dismissed the claim. On appeal, the West Virginia Supreme Court of Appeals reversed the lower Court and held that the items of defective construction can constitute property damage:

We find that, under either of these definitions, Ms. Cherrington has demonstrated that she has sustained "property damage" as a result of the allegedly defective construction and completion of her home. As either allegedly defective work, itself, or as a direct consequence thereof, Ms. Cherrington has identified the following defects for which she seeks repair and recompense: an uneven concrete floor on the home's lower level; roof leaking that has damaged the ceiling, walls, and chimney joint; wood components that directly touch the soil; settlement that allegedly has produced a sagging support beam and numerous cracks in the home's walls and partitions; and various other items requiring repair, including systems for water diversion, roof seams, flashing, caulking, and paint. Given this extensive list of damaged items in her home resulting from the allegedly defective construction and completion work, we find that Ms. Cherrington has asserted a claim for "property damage'...

Id. at 522.

Next, the Court examines the contract. The relevant indemnity provision in said Contract between Orders and the PSD states 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.

...

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 Orders' Mot., Ex. 1; see *also* Orders' Mot., p. 7-8, Reply, p. 2.

Further, Work is defined in the Contract as follows:

Work – The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary [*sic*] produce such construction; furnishing, installing, and incorporating all materials and equipment into such construction; and may include related services such as testing, start-up, and commissioning, all as required by the Contract Documents.

See Orders Mot., p. 9, 18; see *also* Orders Mot., Ex. 1, ¶ 1.01.47.

Orders argues this indemnity provision is not broad-based, rather, any indemnity obligation is limited only to damages and losses arising out of or related to the performance of the Work and only those that are attributable to bodily injury or injury to or destruction of tangible third-party property. See Orders' Mot., p. 8. Further, Orders avers such obligations are limited only to those damages or losses caused by a negligent act or omission of Orders. *Id.* In other words, Orders avers WWC is not entitled to indemnification for any damages or losses it may suffer that are caused by its own negligence. *Id.* at 8-9.

And, in seeking summary judgment in its favor, Orders argues discovery has made clear that it is the design work conducted by parties other than Orders that is at issue and these claims do not involve claims of damage or destruction of tangible property other than the Work. *Id.* at 9, 12. Orders argues this is supported by the record, citing requests for admission and the deposition of the PSD's expert, Jack Ramsey. *Id.* at 12-13.

As an initial matter, this Court discusses the remand in this matter. The WVSCA held that the indemnity provision in Contract between Orders and the PSD does not require Orders to defend WWC. See WWC's Resp., p. 3, 8. In making its findings, the WVSCA specifically held that the WWC's claims for contractual indemnification against Orders (and now-dismissed Pipe Plus, as described above) could proceed, but that neither had an obligation to defend WWC. *Id.*; see also *WW Consultants v. Pocahontas Cnty. Pub. Serv. Dist.*, 833 S.E.2d at 834, 845-36 (2024). Therefore, this Court considers that the WVSCA declined to render a decision on whether the facts of this matter (which are still being developed through discovery) requires Orders to indemnify WWC, but remanded it for further development.

The Court considers that Orders entered into a contract with the PSD to construct the plant, known as Contract #3. *Id.* at 5; see also *Id.* at Ex. 1. The Court notes that this contract was detailed, containing General Conditions, as well as additional documents, including contract specifications contained in the Project Manual. See Orders Mot., p. 5; see also Orders' Mot., Ex. 2. The Court also notes that the Project Manual was prepared by WWC. See Orders Mot., p. 5. Further, the Court notes that with respect to the Headworks area, WWC's design specified the screens to be used: (1) an ECO MAT series rotating belt filter screen system manufactured by Blue Water Technologies, and (2) a Flo-MultiRake Coarse Bar Screen Model FMY manufactured by Enviro-Care. See

Orders' Mot., p. 5; see *also* Orders' Mot., Ex. 2.

Therefore, the Court recognizes that per the contract, certain decisions were specified by the design engineer, WWC. However, the Court also considers that the PSD's claims seeking damages from WWC comprise issues with specific components purchased and installed in the plant by Orders. See WWC's Resp., p. 2. Specifically, one of the PSD's complaints is that the overhead crane which was purchased and installed by Orders does not reach all of the membranes in the A Train of the plant, leading to inability to access all membranes for cleaning and maintenance, and therefore, inefficiencies and loss of use. *Id.* The record reflects that Orders purchased the crane, which was installed by it or its supplier/subcontractor Tri-State Tool and Hoist. *Id.* at 7; see *also Id.*, Ex. B.

Also specifically, there is an issue with two pipes in the membrane area installed by Orders. *Id.* at 2. The PSD's expert, Jack Ramsey, has testified that two pipes in the membrane area installed by Orders will prevent the membrane units from being easily removed from the membrane tank for cleaning and maintenance and that the locations of those pipes is not consistent with the plans for the membrane tanks. *Id.* at 2-3, 7-8. With regard to design versus construction, the drawings depict the pipes as free and clear the edges of the tank, but pictures of the plant as-built produced in Ramsey's deposition show the pipes affixed to the railings which run along the edge of the tank. *Id.* at 7-8; see *also Id.*, Ex. C. The Court finds this evidence in the record that the pipes are not in conformity with the drawings creates genuine issue of material fact with regard to Orders' indemnity. Further, with regard to *Cherrington*, this Court finds evidence related to construction, including the crane and pipes as discussed above, can constitute defective workmanship and therefore property damage, precluding summary judgment in Orders' favor as to contractual indemnity at this juncture. Further, the Court considers that

discovery is ongoing. See WWC's Resp., p. 2. For all of these reasons, the Court finds Orders' motion must be denied.

Finding summary judgment must be precluded, the Court next examines Orders' Motion for Fees and Costs for Vexatious and Bad Faith Litigation Conduct, contained in the instant motion. As the motion for summary judgment was denied, this Court finds the motion for fees for vexatious litigation conduct must also be denied. The motion for fees was predicated on the argument that it was vexatious and in bad faith for WWC to maintain its claim. In finding summary judgment cannot be awarded in Orders' favor, and that genuine issue of material fact exists, this Court must also find that it was not in bad faith for WWC to maintain its claims, proceeding in accordance with the WVSCA's remand, this Court's scheduling orders, and the Rules of Civil Procedure. For this reason, Orders Construction Company, Inc.'s Motion for Fees and Costs for Vexatious and Bad Faith Litigation Conduct must be DENIED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Orders Construction Company, Inc.'s Motion for Summary Judgment and Motion for Fees and Costs for Vexatious and Bad Faith Litigation Conduct 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, electronically.

Enter: December 20, 2024

[1] At this time, WW Consultants was the Plaintiff in this matter. After WW Consultants's claims were resolved, on September 13, 2023, the Court entered an Order realigning the parties to their present positions left on the claims remaining.

- [2] At this time, the PSD was a Defendant in this matter. After WW Consultants's claims were resolved, on September 13, 2023, the Court entered an Order realigning the parties to their present positions left on the claims remaining.
- [3] The Plaintiff at this time was WW Consultants.
- [4] At this time, the PSD was a Defendant/Counterclaim Plaintiff.

/s/ Christopher C. Wilkes

Circuit Court Judge

13th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.