

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 GRANTING PSD'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR
BREACH OF CONTRACT FOR COUNT II, PARAGRAPH 61, SUBPARTS (A)
THROUGH (D) OF PLAINTIFF'S FIRST AMENDED COUNTERCLAIM**

This matter came before the Court this 10th day of June, 2025. The Plaintiff, the Pocahontas County Public Service District, by counsel, has filed Plaintiff's Motion for Partial Summary Judgment for Breach of Contract for Count II, Paragraph 61, Subparts (A) Through (D) of Plaintiff's First Amended Counterclaim. The Plaintiff, Pocahontas County Public Service District (hereinafter "Plaintiff"), by counsel, Christopher C. Negley, 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 *a/so* Pl's Mem., p. 1. Plaintiff is the owner of the plant and WW Consultants was the consulting engineer for the project. See Pl's Mem., p. 1. The Court notes that former Third-Party Defendant Orders Construction Company, Inc. was selected as the General Contractor for the plant. See Ord. 9/24/24.

2. At the heart of this motion is the fact that Plaintiff and Defendant entered into a contract for professional services, wherein Defendant was selected as the consulting engineer for the project at the heart of this litigation. See Pl's Mem., p. 2; see *a/so* Def's Resp., p. 6 (discussing Section 6.05 of the January 11, 2011 Agreement and stating that Plaintiff doesn't contest that the January 7, 2011 [*sic*] agreement is valid). On or about January 11, 2011, the PSD as owner, and WWC as engineer entered into a Standard Form Agreement Between Owner and Engineer for Professional Services (the "Agreement" or the "Contract"). See Pl's Mem., p. 2; see *a/so* Pl's Mot., Ex. A. The Court notes on February 18, 2014, the parties amended this Agreement by adopting the First Amended Letter of Agreement. See Pl's Mem., p. 3; see *a/so* Pl's Mot., Ex. B. Then, on November 25, 2014, the parties entered into a Third Amended Letter of Agreement. See Pl's Mem., p. 4; see *a/so* Pl's Mot., Ex. C.

3. Also relevant to this motion, on June 12, 2017, the Defendant provided its Notice of Termination of the Agreement with the Owner. See Pl's Mem., p. 4; see *a/so* Pl's Mot., Ex. D and Def's Resp., p. 2. Pursuant to the terms of the Agreement, the contract was terminated thirty (30) days after this notice. See Pl's Mem., p. 4; see *a/so* Def's Resp., p. 3.

4. Then, on June 21, 2017, Defendant submitted its Certification of Substantial Completion to the Owner and Contractor charged with erecting the plant. See

Pl's Mem., p. 4; *see also* Pl's Mot., Ex. E and Def's Resp., p. 2-3.

5. 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* Pl's Mem., p. 5. The PSD filed a Counterclaim^[2], wherein allegations included WWC failed to complete an operations and management manual, provide as-built drawings, prepare an asset management plan, provide one year of engineering support for the operation of the plant, sign off on a payment to a contractor when its punch list was not complete, and submit invoices that exceeded allowable hourly reimbursements without District approval. *Id.*; *see also* Am. Ctrclm, ¶18(a) through (f).

6. 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* Pl's Mem., p. 5; *see also* Partial Dismissal Ord.

7. 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 coarse 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.

8. 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. 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.*

9. Subsequently, WWC and the PSD sought and received permission to file new, amended claims. *Id.* Thereafter, the PSD filed an Amended Counterclaim^[4] on May 12, 2020. See Pl's Mem., p. 5. The second count asserted was breach of contract and included the same six counts as set forth in its original Counterclaim, to-wit WWC's alleged failure to complete an operations and management manual, provide as-built drawings, prepare an asset management plan, provide one year of engineering support for the operation of the plant, sign off on a payment to a contractor when its punch list was not complete, and submit invoices that exceeded allowable hourly reimbursements without District approval. *Id.*; see also First Am. Ctrclm. ¶¶61(a) through (f).

10. On April 28, 2025, Plaintiff PSD filed the instant motion, seeking summary judgment in its favor as to its claim that WWC breached its contract with the PSD by failing to complete the post-construction contractual responsibilities set forth in subparts (A) through (D) of Paragraph 61 of the Amended Counterclaim. See Pl's Mem., p. 6. Further, PSD requests an Order granting it \$128,000.00, the amount it paid to have these matters completed by another consulting engineer, and interest on the amount from June 21, 2017, the date that WWC terminated the Agreement. See Reply, p. 7.

11. On May 16, 2025, WWC filed WW Consultants, Inc.'s Response to Plaintiff's Motion for Partial Summary Judgment for Count II Paragraph 61, Subparts (A)

Through (D) of Plaintiff's Complaint, arguing the record shows that issues of fact remain. See Def's Resp., p. 2, 5-6. Additionally, WWC argues it was impracticability for it to provide certain of the post-construction items described above because it had to wait to receive them from Orders Construction, so it could provide them to the PSD. See Def's Resp., p. 8.

12. On May 23, 2025, PSD filed its Reply, arguing no fact issues remain because it is undisputed that WWC terminated the contract prior to completing the post-construction items of preparing an operations and maintenance manual, providing as-built drawings, preparing an asset management plan, and providing one year of post-construction engineering support. See Reply, p. 1, 5-6. Further, the Reply argues that the Response's discussion of WWC's December 28, 2017 letter regarding obtaining items from Orders Construction is immaterial to the analysis before this Court at this time. *Id.* at 3.

13. 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

Plaintiff argues summary judgment should be awarded in its favor because it is undisputed that WWC terminated the contract prior to completing the post-construction items of preparing an operations and maintenance manual, providing as-built drawings, preparing an asset management plan, and providing one year of post-construction engineering support. See Reply, p. 1, 5-6. Plaintiff further requests an Order granting it \$128,000.00, the amount it paid to have these matters completed by another consulting engineer, and interest on the amount from June 21, 2017, the date that WWC terminated the Agreement. See Reply, p. 7.

A claim for breach of contract requires proof of the formation of a contract, a

breach of the terms of that contract, and resulting damages. Syl. Pt. 1, *State ex rel. Thornhill Group, Inc. v. King*, 233 W.Va.564, 759 S.E.2d 795 (2014); see also *Wetzel County Savings & Loan Co. v. Stern Bros., Inc.*, 156 W.Va.693, 698, 195 S.E.2d 732, 736 (1973).

Here, first, it is not disputed that the parties entered into a contract, the Standard Form Agreement Between Owner and Engineer for Professional Services. See PI's Mem., p. 2, 8.

Next, the Court finds it is undisputed that WWC terminated the contract prior to completing the post-construction items of preparing an operations and maintenance manual, providing as-built drawings, preparing an asset management plan, and providing one year of post-construction engineering support. See Reply, p. 1, 5-6. The Court considers that WWC admits this: In the Response, WWC avers that it submitted its June 12, 2017 Notice of Termination letter providing notice of its intent to terminate the contract 30 days from the date of the letter. See Def's Resp., p. 2. Then, WWC avers it provided "engineering support to the project, issuing the Certificate of Substantial Completion on June 21, 2017...and participating in the final inspection for the project on July 20, 2017". *Id.* at 2-3. WWC avers the contract terminated on July 12, 2017 and "WWC personnel wound down their activities following the final inspection" which occurred on July 20, 2017. *Id.* at 3.

The Court considers the fact that WWC continued to provide post-construction work past the termination date of July 12, 2017, deciding to "wind down" its involvement after July 20, 2017. Further, in its December 2017 letter, in response to PSD's December 2017 letter alleging WWC had abandoned the contract and had been absent from the project, WWC stated that its reasoning for not providing the as-built drawings and operations manuals were not because the contract was terminated or because it

somehow did not have an obligation to provide those items, but because it needed to receive those items from Orders Construction. See Def's Resp., p. 3; see *also* Def's Resp., Ex. 2.

Further, contained in the record, a review of the contract reveals that it plainly required the Engineer to provide the post-construction items discussed in the instant motion. The Construction Administration provision, contained at Part 1, Paragraph E, § E101, stated as follows:

Once a Contract has been awarded for a specific task, the Engineer will attend a preconstruction meeting and provide Construction Administration Services to consist of the follow: receive and review equipment submittals, respond to Requests for Information (RFIs), conduct site inspections, document work progress and provide inspection reports. Near the completion of the work, the Engineer will conduct a substantial completion inspection of the facilities, provide a punch-list for contract closeout and attend facilities start-up. Upon completion of the facilities construction, the Engineer will provide as-built drawings to the Owner, prepare Operation & Maintenance Manuals and submit Letters of Completion to the necessary Agencies in order for the Owner to obtain the necessary operation permits for all facilities.

The Court notes that on February 18, 2014, when the parties amended the Contract through the adoption of the First Amended Letter of Agreement (*see, supra*, ¶2), the First Amended Letter of Agreement made the following amendments regarding this provision: it formalized the responsibility of the consulting engineer regarding the development of an Asset Management Plan (new section E102), added new sections for the preparation and submittal of record drawings and Maintenance Manual (new section E103), and Post Construction Engineering Services (new section E104). See Pl's Mem., p. 3; see *also* Pl's Mot., Ex. B. Specifically, the new section for post-construction engineering services required the engineer to "be available and provide such professional engineering, consulting and operations support for a period of one year after the completion of construction to assist the Owner with the project certification". *Id.*

For these reasons, the Court finds the second element of breach of contract has been satisfied. WWC did not, upon completion of the facilities construction, “provide as-built drawings to the Owner, prepare Operation & Maintenance Manuals and submit Letters of Completion to the necessary Agencies in order for the Owner to obtain the necessary operation permits for all facilities”. The obligation to provide these post-construction items was not relieved.

Third, the Court analyzes resulting damages. Regarding payments for these items, the Court considers payments for the Engineer were adjusted as follows:

Construction Phase

- 1) Engineering Services during a 24 month construction period including project management, supervision, shop drawing review, response to contractor requests for information, review of pay requests, engineering inspections, preparation of an asset management plan, preparation of operation and maintenance manuals for the treatment plant, all the pump stations and the collection system, preparation of as-built drawings and assistance with project start-up.

\$1,049,965.40

See Pl’s Mem., p. 4; see *also* Pl’s Mot., Ex. B (page 7).

The Court also notes that on November 25, 2014, when the parties entered into a Third Amended Letter of Agreement (*see, supra*, ¶2), the Third Amended Letter of Agreement required the Engineer to complete the Asset Management Plan within 60 days of project completion. See Pl’s Mem., p. 4; see *also* Pl’s Mot., Ex. C.

The record reflects that after the termination of the contract, Plaintiff had to re-advertise for a consulting engineer to complete the post-construction tasks to complete the project, and on March 27, 2018, Plaintiff selected engineering firm E.L. Robinson Company to complete said activities. See Pl’s Mem., p. 4. Those entities entered into their own contract, and the agreement included costs to prepare the post-construction materials and construction project management. The costs were as follows:

•	O & M (“operations and maintenance”) manual	\$38,000
•	System as-builts	\$27,000
•	Asset Management Plan	\$28,000
•	Construction Project Management	\$35,000
	Total	\$128,000

The record further supports these amounts. Those entities’ contract and these specific costs were subsequently approved by the West Virginia Department of Environmental Protection. See Pl’s Mem., p. 8; see *also* Pl’s Mot., Ex. G. The Court also considers that the invoices and payment approval were submitted, as well as the Affidavit of David Dragan, Board Member and Treasurer of the PSD. See Pl’s Mem., p. 8; see *also* Pl’s Mot., Exs. H and I.

The Court notes that the grounds for the termination of the contract at the heart of this litigation, included, at least in part, allegations of delays by the PSD in making payments to WWC and the PSD’s failure to timely respond to WWC’s requests for contractual modifications to the original January 2011 agreement. See Def’s Resp., p. 2; see *also* Pl’s Mem., p. 8. However, relevant to payment and this motion, the PSD has averred that WWC was compensated for all of its design-related work. See Pl’s Mem., p. 8. The work that WWC did not complete through termination was not a part of PSD’s suit and had to be completed by the PSD. *Id.* The Court addresses WWC’s argument that Orders Construction was responsible for providing the O & M Manual and as-built drawings. See Def’s Resp., p. 3-4. The Court does not find this to be persuasive. While the Contractor may prepare the first draft of such documents, as the Reply points out, as the Engineer, it is on WWC to be responsible for providing a final design of as-built drawings and O & M Manuals that ensure the constructed plant meets the design criteria. See Reply. This would be in the purview of the engineer’s specialized knowledge. For this reason, the Court does not find that this argument is persuasive against the record evidence of the fees incurred by E.L. Robinson, and notes again that

these charges were approved by the WVDEP. See Pl's Mem., p. 8. Accordingly, this Court concludes that the PSD has exhibited a sum certain supported by the record, including an Affidavit.

Finally, the Court addresses the Response argument regarding issues of fact via the December 2017 letters between the parties. After the July 12, 2017 termination date, PSD sent a letter on or about December 4, 2017 stating the instant contract was being terminated, citing "general abandonment" of the work by WWC, that it had been "noticeably absent" from the worksite since the June 12, 2017 letter, that it performed only the "barest of work", and has failed to respond to inquiries from the general manager. See Def's Resp., p. 3; see *also* Pl's Mot., Ex. F. The letter goes onto recognize that "arguably" WWC's actions previously terminated the contract on July 12, 2017, and that the PSD was now sending the December 2017 letter as "affirmative action" to secure the engineering work WWC was contracted to do in the post-construction period. See Pl's Mot., Ex. F. Given its review of the letter, attached as Exhibit F, and the record, this Court does not find the argument that this letter creates genuine issues of material fact to be persuasive.

Instead, the Court finds the record shows plainly and unequivocally that on June 12, 2017, WWC provided a notice of termination letter, wherein it advised the PSD that it was providing a thirty day notice of termination of the parties' contract, as provided for in the relevant contract provisions. See Def's Resp., p. 2. WWC admits this in its Response. *Id.* Accordingly, the Court does not find the Response argument regarding the December 2017 letters to be material to its analysis above.

For all of these reasons, this Court finds the instant motion shall be granted.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for

Partial Summary Judgment for Breach of Contract for Count II, Paragraph 61, Subparts (A) Through (D) of Plaintiff's First Amended Counterclaim is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that this Court grants the PSD \$128,000.00, the amount it paid to have these matters completed by another consulting engineer, and pre-judgment interest on the amount from date these monies were expended to the date of the entry of this Order, at the applicable rate.

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: June 10, 2025

[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

8th 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.