

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 WWC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON
PLAINTIFF'S CLAIM FOR DAMAGES**

This matter came before the Court this 11th day of June, 2025. The Defendant, WW Consultants, Inc., (hereinafter "WWC" or "Defendant"), by counsel, has filed WW Consultants, Inc.'s Motion for Partial Summary Judgment on Plaintiff's Claim for Damages^[1]. The Plaintiff, the Pocahontas County Public Service District (hereinafter "Plaintiff" or "the PSD"), has filed a Response. The Plaintiff, Pocahontas County Public Service District, by counsel, Christopher C. Negley, Esq., and Defendant, WW Consultants, Inc., 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 Def's Mot., p. 2. Plaintiff is the owner of the plant and WW Consultants was the consulting engineer for the project. See Def's Mot., p. 2-3. 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; see also *Id.* at 3.

2. The Complaint was filed February 6, 2018, wherein WWC filed suit[2] against the PSD, its three board members in their official capacities, the DEP, and the West Virginia Water Development Authority. See Ord., 6/10/25. The PSD filed a Counterclaim[3]. *Id.*

3. 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 Partial Dismissal Ord; see also Ord., 6/10/25.

4. On November 27, 2019, this Court entered its Order Granting Plaintiff's[4] 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.

5. 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 area (hereinafter "Headworks Improvement Project" or "HIP") claim. *Id.*

6. Subsequently, WWC and the PSD sought and received permission to file new, amended claims. *Id.* Thereafter, the PSD filed an Amended Counterclaim^[5] on May 12, 2020. See court file.

7. On April 29, 2025, Defendant WWC filed the instant motion, seeking partial summary judgment in its favor on "Plaintiff's claims for damages, and to further preclude Plaintiff from introducing the cost of the HIP at trial". See Def's Mot., p. 15. Specifically, WWC argues it is entitled to partial summary judgment in its favor "against Plaintiff on Plaintiff's claims that seek to recoup the costs of the HIP", because the costs represent betterment and do not meet the definition of damages under West Virginia law. *Id.*

8. On May 14, 2025, the PSD filed Plaintiff's Response in Opposition to WW Consultants, Inc.'s Motion for Partial Summary Judgment on Plaintiff's Claim for Damages, arguing the record shows that issues of fact remain as to whether the construction of the HIP was a windfall for the Plaintiff. See Def's Resp., p. 2, 5-6. Instead, Plaintiff's position is that because Defendant's engineering failed to properly process promised wastewater, and so construction of the HIP was necessary in order for Plaintiff to receive the wastewater treatment plant it bargained for. *Id.* at 4.

9. On May 28, 2025, WWC filed its Reply, reiterating its position that the costs for constructing the HIP do not constitute damages, and arguing no fact issues prevent

the Court from ruling on the issue. See Reply, p. 1. WWC argues the record shows that the HIP was an improvement and not a repair. *Id.* at 2.

10. 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

Defendant argues summary judgment should be awarded in its favor as to the costs incurred to construct the Headworks area because these costs do not constitute damages, as the Headworks area was an elective construction, and thus is better than what was contracted for. Plaintiff argues the construction of the Headworks area was necessary in order for it to obtain the wastewater treatment plant it paid and contracted for. Further, Plaintiff argues the Headworks Improvement Project was also designed to correct an engineering design issue that has plagued the plant, the ability to process wastewater at design standards by Defendant. See Pl's Resp., p. 2.

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).

Under long standing West Virginia law, the measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have been prevented. *Ohio Valley Builder's Supply Co. v. Witzel Constr. Co.*, 108 W. Va. 354, 151 S.E. 1 (1929). In other words, the person injured is to be placed in the same position he would have been in if the contract had been performed. *Id.* at 15-16. A plaintiff in a contract action is only entitled to be put in the same economic position that it would have been in had the contract not been

breached. *C & O Motors, Inc. v. GMC*, 323 Fed. Appx. 193, 197-198 (4th Cir.2009), *citing Ohio Valley Builders Supply Co. v. Witzel Constr. Co.* and 22 Am. Jur. 2d Damages § 28 (2003) ("The sole object of compensatory damages is to make the injured party whole for losses actually suffered; the plaintiff cannot be made more than whole, make a profit, or receive more than one recovery for the same harm. . . . The plaintiff is not entitled to a windfall, and the law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken."). *C & O Motors*, 323 Fed. Appx. at 197-98.

Here, of course, the issue is whether the costs incurred to construct the HIP are upgrades that were outside of what was contracted for. See Def's Mot., p. 9. The Court considers that Defendant avers the PSD's expert testified the charges related to the HIP go far beyond addressing losses actually suffered. *Id.*

The Court also considers that the record shows that the plant was designed by WWC to provide treatment for 550,000 gallons of wastewater per day with a peaking factor of three, for a daily maximum treatment of 1.65 million gallons per day. See Pl's Resp., p. 2-3. A peaking factor is the ratio of maximum flow to the average daily flow ensuring the plant can handle the highest anticipated flow rates. *Id.* at 3. Further, the record reflects that the plant could not process this designed wastewater. *Id.* Specifically, Lloyd Coleman, Chief Wastewater Operator, testified that that the plant could not process this designed wastewater. *Id.*

Defendant argues the cost of a grit removal chamber is a windfall for the PSD, as it was absent from the original design and was not required by the WVDEP/funding regulations. See Def's Mot., p. 14; see also Pl's Resp., p. 7. Plaintiff, on the other hand, argues the redesigned HIP used different screening equipment from the ones previously designed by WWC that did not work and the redesign was to enhance the entire plant so

it could process the amount of wastewater promised by WWC while meeting all environmental laws. See Pl's Resp., p. 7.

Assuming arguendo, a breach of contract related to the construction occurred, this Court finds, considering the foregoing, that genuine issues of material fact remain regarding: 1) the remedial steps necessary to place Plaintiff in the position it would have been in had the contract been performed; or 2) if the HIP exceeded what would have been necessary for performance under the contract. Additionally, WWC argues that there were three options prepared by the engineering company, and the PSD chose the third option, an upgrade-combination Headworks unit, and that the second option, plant upgrade – add grit chamber and relocate coarse screen, could be construed as repairing the defects of the original. See Reply, p. 4-5. This is a fact issue and is appropriate for jury consideration and determination.

Accordingly, the Court, after reviewing the arguments of the parties and the items in the record at this time, finds genuine issues of material fact remain. For all of these reasons, this Court finds the instant motion shall be denied.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that WW Consultants, Inc.'s Motion for Partial Summary Judgment on Plaintiff's Claim for Damages 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: June 11, 2025

- [1] The instant motion was filed April 29, 2025. The Court notes there was previously a motion filed with this same name.
- [2] 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.
- [3] 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.
- [4] The Plaintiff at this time was WW Consultants.
- [5] 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.