Docket #0028 Date Filed: 6/3/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al., Debtors.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
EARTH PIPELINE SERVICES, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION, LLC, Defendant.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS) (Consolidated)
COLUMBIA GAS TRANSMISSION, LLC, Counter-Claimant, v. EARTH PIPELINE SERVICES, INC., Counter-Defendant.	

Columbia Gas Transmission's Motion to Dismiss
Earth Pipeline Services, Inc.'s Amended Complaint

Charles S. Kelley, Esq.
Andrew C. Elkhoury, Esq.
Mayer Brown LLP
700 Louisiana Street, Suite 3400
Houston, TX 77002
Phone: (713) 238-3000
Email: ckelley@mayerbrown.com
aelkhoury@mayerbrown.com

David W. Carickhoff, Esq.
Alan M. Root, Esq.
Archer & Greiner, P.C.
300 Delaware Ave., Suite 1100
Wilmington, DE 19801
Phone: (302) 777-4350
Email: dcarickhoff@archerlaw.com
aroot@archerlaw.com

Attorneys for Columbia Gas Transmission, LLC

TABLE OF CONTENTS

Page

I. NATURE AND STAGE OF THE PROCEEDING 1
II. SUMMARY OF ARGUMENT 2
III. FACTUAL BACKGROUND 2
IV. ARGUMENT 5
A. Legal Standard 5
B. EPS fails to state a claim for a Mechanic's Lien because it cannot enforce any Mechanic's Lien against CGT's property 6
C. EPS fails to state a claim for Quantum Meruit and Unjust Enrichment because it pleads the existence of its Subcontract 10
V. CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Aetna Cas. And Sur. Co. v. U.S.,
228 Ct. Cl. 146 (1981) 7

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....5

Bauer Enters., Inc. v. Frye,
382 S.E.2d 71 (W. Va. 1989).....7

Beacon Const. Co., Inc. v. Matco Elec. Co., Inc.,
521 F.2d 392 (2d Cir. 1975).....7

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....5

Bogie v. Rosenberg,
705 F.3d 603 (7th Cir. 2013) 5

Bruce McDonald Holding Co. v. Addington, Inc.,
825 S.E.2d 779 (W. Va. 2019).....7, 8

Case v. Shepherd,
84 S.E. 2d 140 (W. Va. 1954).....11

Charles Simkin & Sons, Inc. v. Massiah,
289 F.2d 26 (3d Cir. 1961).....7

Coleman v. Sopher,
459 S.E.2d 367 (W. Va. 1995).....9

Connelly v. Lane Const. Corp.,
809 F.3d 780 (3d Cir. 2016).....5, 10

First Am. Title Ins. Co. v. Bowles Rice, LLP,
No. 1:16-cv-219, 2018 WL 3763001 (N.D. W. Va. Aug. 8, 2018) 6

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009).....5, 10

Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.,
678 F. Supp. 506 (E.D. Pa. 1987) 7

Greco-Davis Contracting Co. v. Stevmier, Inc.,
162 So. 2d 285 (Fla. 2d DCA 1964) 7

Hatfield v. Wilson,
No. Civ.A. 3:12-0944, 2012 WL 2888676 (S.D. W. Va. July 13, 2012) 8

HERC Servs., *LLC v. Columbia Gas Transmission, LLC*,
No. 5:19CV000174, Order Dismissing Complaint (N.D. W. Va. June 24, 2019) 11

Jankoviak v. Butcher,
22 Ill. App. 2d 126 (2d Dist. Ill. 1959) 7

Kane & Keyser Hardware Co. v. Cobb,
79 W. Va. 587 (1917) 9

Kopf v. Lacey,
540 S.E.2d 170 (W. Va. 2000) 6

In re Lee,
356 B.R. 177 (Bankr. N.D. W. Va. 2006) 7

Mayer v. Belichick,
605 F.3d 223 (3d Cir. 2010) 5

Nw. Constr. Servs., L.P. v. Seraph Apartments, L.P.,
No. 6:08-CV-335, 2011 WL 13196507 (E.D. Tex. July 12, 2011) 6, 7, 10

Ohio Valley Health Sevices & Educ. Corp. v. Riley,
149 F. Supp. 3d 709 (N.D. W. Va. 2015) 11, 12

Pero Bldg. Co., Inc. v. Smith,
6 Conn. App. 180 (1986) 7

Reilly v. Ceridian Corp.,
664 F.3d 38 (3d Cir. 2011) 9

Richardson Eng'g Co. v. Int' Bus. Machines Corp.,
554 F. Supp. 467 (D. Vt. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982) 6, 7, 10

Ridgeview Const. Co. v. Am. Nat. Bank & Tr. Co. of Chicago,
256 Ill. App. 3d 688 (1993) 7

Schmid Pipeline Constr., Inc. v. Columbia Gas Transmission, LLC,
No. 5:19-cv-00257-JPB, Order for Partial Dismissal 10, 11, 12

Sierra Invs., LLC v. SHC, Inc.,
329 B.R. 438 (Bankr. D. Del. 2005) 6

In re Vill. Homes of Colo., Inc.,
405 B.R. 479 (Bankr. D. Colo. 2009) 7

Vorchheimer v. Philadelphian Owners Ass'n,
903 F.3d 100 (3d Cir. 2018).....5

Worldwide Mach. L.P. v, Columbia Gas Transmission, LLC,
No. 5:19-CV-208, 2019 WL 3558174 (N.D. W. Va. Aug. 5, 2019) 10, 12

Rules and Statutes

Federal Rule of Civil Procedure 12(b)(6) 1, 5, 6

Federal Rule of Bankruptcy Procedure Rule 7012 1

W. Va. Code § 38-2-1, *et seq*.....1

W. Va. Code § 55-8-12 8

Other Authorities

3 Bruner & O'Connor Construction Law § 8:151 n.11 7

Defendant and Counter-claimant Columbia Gas Transmission, LLC ("CGT") moves this Court to dismiss Plaintiff and Counter-defendant Earth Pipeline Services, Inc.'s ("EPS") Amended Complaint and all claims therein pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. In support thereof, CGT shows the following:

More than a year after EPS filed its original complaint to foreclose its purported mechanic's lien against CGT's real property interests, EPS now tries to give additional color to its claim by attaching and incorporating its subcontract and alleging new quasi-contractual causes of action. These amendments are fatal, and demonstrate that EPS never had a lien claim to begin with. First, as EPS's subcontract establishes, EPS expressly waived any right it had to file a lien against or otherwise burden CGT's property interests. Further, EPS is not entitled to any compensation so long as CGT's title is encumbered. Second, as a matter of West Virginia law, and as already ruled on by Judge Gross and Judge Bailey (of the Northern District of West Virginia) in other lien cases related to this project, EPS cannot assert quasi-contractual causes of action against CGT while simultaneously asserting the existence of its subcontract. Since all of EPS's claims fail, EPS's complaint should be dismissed with prejudice.

I. NATURE AND STAGE OF THE PROCEEDING

On or about March 8, 2019, EPS filed two complaints against CGT in the Circuit Courts of Wetzel County and Marshall County, West Virginia. These complaints sought *in rem* recoveries against CGT's real property interests in Spread 1 of the Mountaineer Xpress Pipeline Project ("MXP"). The complaints are essentially identical, and were filed in different West Virginia counties in accordance with West Virginia's lien statute, W. Va. Code § 38-2-1, *et seq*.

CGT removed each of the West Virginia cases and brought counterclaims against EPS for slander of title. On May 14, 2019, the West Virginia cases were transferred to this Court and re-

designated as the above-captioned adversary proceedings. CGT later amended its counterclaims to also state breach of contract, breach of warranty, and negligence causes of action against EPS.

On May 5, 2020, a Scheduling Order was entered in this case. Dkt. 18. Pursuant to the Scheduling Order, the above-captioned adversary proceedings were substantively consolidated. On May 13, 2020, EPS amended its complaint solely to name Welded Construction, L.P. ("Welded") as a nominal defendant. Dkt. 20. On May 20, 2020, EPS amended its complaint one more time, this time adding additional allegations (and incorporating exhibits) in support of its mechanics' lien cause of action, and alleging, for the first time, *in personam* claims against CGT for unjust enrichment and quantum meruit. Dkt. 23. This Motion to Dismiss follows.

II. SUMMARY OF ARGUMENT

EPS fails to state a legally cognizable claim against CGT because (1) EPS contractually waived its right to file mechanic's liens and related enforcement actions in its subcontract with Welded (the "Subcontract'), and (2) EPS's quasi-contractual causes of action are barred under West Virginia law by the existence of a written agreement (i.e., the Subcontract).

1. When EPS entered into the Subcontract, it agreed to General Terms & Conditions (found in Exhibit G to the Subcontract) which not only require EPS to discharge any lien filed against CGT's real property interests at EPS's own cost and expense, but also eliminate all payment obligations to EPS so long as a lien remains registered against CGT's real property interests. These terms and conditions are enforceable as a lien waiver under West Virginia law. In light of the lien waiver, EPS's mechanic's lien cause of action must be dismissed because EPS has contractually waived its right to enforce any lien it may have otherwise possessed.

2. In asserting quasi-contractual causes of action against CGT, EPS joins a long line of Welded subcontractors who have tried—and failed—to do the same. As a matter of West Virginia

law and as already ruled by the Northern District of West Virginia and Judges Gross,[1] EPS cannot assert unjust enrichment or quantum meruit causes of action while simultaneously asserting the existence of its Subcontract. Since EPS asserts the existence of its subcontract with Welded, its quasi-contractual causes of action fail to state a claim for which relief can be granted, and must be dismissed.

III. FACTUAL BACKGROUND

Welded, a general contractor hired by CGT to construct Spread 1 of MXP (owned by CGT), hired EPS as a subcontractor in early 2018. Am. Compl. at ¶¶7-8. Welded subcontracted work involving "mechanical clearing of the right-of-way, all work spaces, and necessary roads of ingress and egress" to EPS. *Id.* at ¶8. EPS attaches a copy of its Subcontract to its Amended Complaint as Exhibit 1 thereto. *Id.*; Dkt. 23-1, Subcontract. As EPS contends in its Amended Complaint,

> EPS' work under the Subcontract was performed as part of Welded's work for CGT under the prime contract and, therefore, for the sole benefit of CGT, and specifically for the Property and the Project. This is evidenced by, among other things, the Subcontract's language that '[t]he Work is a portion of the goods and services to be provided by [Welded] to Columbia Gas Transmission, LLC (OWNER) for Spread 1 of the Mountaineer Express[sic] Pipeline Project in Marshall and Wetzel Counties in West Virginia.

Id. at ¶ 11. This subcontracted work is the subject of EPS's lien claim and *in personam* claims. *See, e.g., id.* at ¶¶31,37.[2]

As part of its lien claim, EPS alleges that it is owed, and seeks recovery of $3,650,300.42 for its work on MXP. *See id.* at ¶35. However, EPS's Subcontract contains a clear and unequivocal no-lien clause that waives EPS's rights to file and recover on any liens against CGT's property

[1] *See infra* at pp. 10-11.

[2] EPS had a separate subcontract with Welded covering a different scope of work. *See* Dkt. 11, Am. Answer and Countercl. at Countercl. ¶¶4-5. EPS makes no mention of the second subcontract in its Amended Complaint, and presumably seeks no recovery related to the work performed under it.

interests by, among other things, requiring EPS to release and discharge any such lien at its own cost and expense:

> Subcontractor shall cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of Company to be released and discharged forthwith at the cost and expense of Subcontractor. If Subcontractor fails to release or obtain the release and discharge any such Lien, then Contractor may, but shall not be obliged to, discharge, release or otherwise deal with the Lien, and Subcontractor shall pay any and all costs and expenses incurred by Contractor in so releasing, discharging or otherwise dealing with the Lien, including fees and expenses of legal counsel. Any amounts so paid by Contractor may be deducted from any amounts due Subcontractor whether under the Agreement or otherwise. No amounts are payable by Contractor to Subcontractor so long as a Lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work.

Dkt. 23-1, Subcontract at pp. 15-16 (the "No-Lien Clause"). The Subcontract also states that EPS shall be liable to CGT for "any and all Claims incurred by or suffered by" CGT or its property to the extent caused by EPS's non-compliance with "any term or provision" of the Subcontract, which necessarily includes breaches of the No-Lien Clause. *See id.* at p. 17.

The No-Lien Clause clearly prohibits EPS, as the subcontractor, from maintaining a lien action against CGT, as the Company/Owner. After all, one cannot maintain an action to enforce a lien that it has contractually agreed to release (i.e., waive). Despite the No-Lien Clause, EPS recorded two separate Notices of Mechanic's Lien against CGT's real property interests on September 12, 2018, *see* Am. Compl. ¶20, and then sued to enforce those purported liens. By failing to release or obtain a release of these liens, and then going so far as to sue CGT to enforce the very purported liens that it agreed to release, EPS violated the No-Lien Clause of its Subcontract. But more fundamentally, because the No-Lien Clause acts as a lien waiver by mandating the release of any lien filed by EPS, the purported liens upon which EPS files suit are unenforceable and must be released by EPS.

Additionally, because EPS's liens remain registered against CGT, "no amounts are payable by Contractor [Welded] to Subcontractor [EPS]." Dkt. 23-1, Subcontract at p. 15. Because no amounts are payable by Welded to EPS, no amounts can be payable by CGT to EPS either. And if no amounts are payable by CGT to EPS, EPS has no lien for unpaid work against CGT's property interests for this separate and independent reason.

IV. ARGUMENT

A. Legal Standard

"A complaint may be dismissed under Rule 12(b)(6) for 'failure to state a claim upon which relief can be granted.'" *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016); Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must . . . 'tak[e] note of the elements [the] plaintiff must plead to state a claim.'" *Connelly*, 809 F.3d at 786 (quoting *Iqbal*, 556 U.S. at 675). "[A] pleading offering only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

"In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). If the plaintiff's "exhibits contradict [its] own allegations in the complaint, the exhibits control." *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 112 (3d Cir. 2018); *see also Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) ("When an exhibit

incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss."); *Sierra Invs., LLC v. SHC, Inc.*, 329 B.R. 438, 442 (Bankr. D. Del. 2005) ("if the allegations of [the] complaint are contradicted by documents made a part thereof, the document controls and the Court need not accept as true the allegations of the complaint.").

A contractual lien waiver defeats a mechanics' lien claim on a motion to dismiss for failure to state a claim. *See, e.g., Nw. Constr. Servs., L.P. v. Seraph Apartments, L.P.*, No. 6:08-CV-335, 2011 WL 13196507, at *5 (E.D. Tex. July 12, 2011); *see also Richardson Eng'g Co. v. Int' Bus. Machines Corp.*, 554 F. Supp. 467, 471 (D. Vt. 1981) (dismissing lien claim but converting 12(b)(6) motion to summary judgment because Court considered extrinsic documents outside the pleading and contract), *aff'd*, 697 F.2d 296 (2d Cir. 1982).

B. EPS fails to state a claim for a Mechanic's Lien because it cannot enforce any Mechanic's Lien against CGT's property.

EPS has no viable mechanic's lien claim against CGT's property interests because the No-Liens Clause waives EPS's right to maintain and enforce a mechanic's lien against CGT's property interests. *See* Dkt. 23-1, Subcontract at pp. 15-16.[3]

Under West Virginia law, the law governing the Subcontract, "[a] valid written instrument which expresses the intent of the party in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *First Am. Title Ins. Co. v. Bowles Rice, LLP*, No. 1:16-cv-219, 2018 WL 3763001, at *10 (N.D. W. Va. Aug. 8, 2018) (citing *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000)). This principle of contract

[3] CGT has numerous other defenses to EPS's claims. For example, the invoices constituting EPS's lien claim seek improper amounts because they relate, in whole or in part, to untimely submitted Change Order Requests, submitted not only well after any claimed basis for a Change Order could have arisen, but also well after EPS was terminated from further work by Welded for serious safety violations.

construction extends to contractual waivers of statutory mechanic's liens—"Undoubtedly, a contractor may waive his right to file a mechanic's lien." *Id.* (citing *Bauer Enters., Inc. v. Frye*, 382 S.E.2d 71, 74 (W. Va. 1989)); *see also Bruce McDonald Holding Co. v. Addington, Inc.*, 825 S.E.2d 779, 787-88 (W. Va. 2019) (Under West Virginia law, waiver is "the voluntary, intentional relinquishment of a known right . . . whether [the right is] conferred by law or by contract." (quotations and citations omitted)*; In re Lee*, 356 B.R. 177, 182 (Bankr. N.D. W. Va. 2006) ("as a general rule, '[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.'" (citations omitted)). Indeed, No-Lien provisions are routinely enforced because parties enjoy the freedom of contract to waive any statutory mechanic's lien claims as part of the consideration for entering the agreement.[4]

Here, the No-Lien Clause is unambiguous, and must be applied and enforced according to its own language. The No-Lien Clause requires EPS to "releas[e] and discharge[e]" "***any*** Lien" filed against CGT's property "at the cost and expense of" EPS. "***Any*** Lien" naturally includes

[4] *See, e.g., Ridgeview Const. Co. v. Am. Nat. Bank & Tr. Co. of Chicago*, 256 Ill. App. 3d 688, 692 (1993) ("[S]ubcontractors are held accountable for knowing, absent fraud or deception, the realities and implications of any agreements they sign with a general contractor and must learn to protect themselves from 'no-lien' contractual provisions."); *see also Nw. Constr. Servs.*, 2011 WL 13196507; *Richardson Eng'g Co.,* 554 F. Supp. at 471; *Charles Simkin & Sons, Inc. v. Massiah*, 289 F.2d 26, 28 (3d Cir. 1961) (holding lien waiver valid, and reversing and remanding for district court to "enter an interlocutory injunction requiring the defendant to waive and release the Notice of Lien claim[.]"); *In re Vill. Homes of Colo., Inc.*, 405 B.R. 479, 484-85 (Bankr. D. Colo. 2009) (mechanic's lien waiver was not "void as against public policy" and "not an invalid exculpatory clause under Colorado law"); *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506, 514 (E.D. Pa. 1987) (Mechanic's lien waiver language "slightly tortured," but "clear and unambiguous to the extent that it required BMT to discharge any lien that it did file. . ."); 3 Bruner & O'Connor Construction Law § 8:151 n.11 (citing *Pero Bldg. Co., Inc. v. Smith*, 6 Conn. App. 180 (1986) (unambiguous "no lien" language enforced)); *Greco-Davis Contracting Co. v. Stevmier, Inc.*, 162 So. 2d 285 (Fla. 2d DCA 1964) (same); *Jankoviak v. Butcher*, 22 Ill. App. 2d 126, (2d Dist. Ill. 1959) (same); *Aetna Cas. And Sur. Co. v. U.S.*, 228 Ct. Cl. 146 (1981) (contractor could waive its lien rights in advance of construction); *Beacon Const. Co., Inc. v. Matco Elec. Co., Inc.*, 521 F.2d 392, 400 (2d Cir. 1975).

liens filed by EPS itself. Thus, EPS is contractually required to discharge the purported liens at the heart of its claims at its own cost and expense. This amounts to a lien waiver, and is enforceable as such under West Virginia law. *See id.*[5] After all, any right to enforce a lien is meaningless if the party seeking enforcement of the lien must release and discharge that lien at its own expense. *See Fuller,* 678 F. Supp. at 514 (finding lien waiver when contract was "clear and unambiguous to the extent it required [lien claimant] to discharge any lien that it did file or to furnish . . . a bond against any such mechanic's lien."); *see also Bruce McDonald Holding Co.*, 825 S.E.2d 779 (waiver occurs where a party in possession of a right "forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it." (citations omitted)).

Moreover, as Owner of MXP, CGT has standing as a third-party beneficiary to raise the No-Lien Clause in the Subcontract as a defense to a mechanic's lien claim by EPS. West Virginia recognizes that a third party has standing to assert a breach of contract claim or defense when it is the intended beneficiary of a specific provision in a contract. *See* W. Va. Code § 55-8-12. The West Virginia Code states:

> If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

Id. A party's "status as a third-party beneficiary can be determined with regard to a specific provision, covenant, or promise, and not necessarily the contract as a whole." *Hatfield v. Wilson*, No. Civ.A. 3:12-0944, 2012 WL 2888676, at *2-3 (S.D. W. Va. July 13, 2012). Indeed, CGT's third-party beneficiary status cannot be disputed here, as even EPS alleges that the work that is the

[5] "[T]he mere fact that" the parties "could have drafted the [lien waiver] provision in a better way does not render the clause unclear and unambiguous." *Fuller*, 678 F. Supp. at 514.

subject of its Subcontract and its mechanic's lien claim was performed "***for the sole benefit of CGT.***" Am Compl. at ¶11 (emphasis added).

Separately and independently, even if the Subcontract did not categorically waive EPS's right to file any lien on MXP, the Subcontract ensures that EPS cannot ***pursue*** a lien claim by denying EPS the right to compensation so long as any lien remains filed on CGT's property interests. The Subcontract is clear: "No amounts are payable by Contractor to Subcontractor so long as a Lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work." Dkt. 23-1, Subcontract at pp. 15-16. It is black letter law that a subcontractor's recovery for a lien claim is capped by its potential recovery against the general contractor. *See, e.g., Kane & Keyser Hardware Co. v. Cobb*, 79 W. Va. 587 (1917) ("The effect of our mechanic's lien laws is to give to a party doing work or furnishing material for the construction of a building, when such party is a subcontractor, the same right to subject the building to ***the satisfaction of his claim as he has against the principal contractor . . .***" (emphasis added)). Thus, since EPS is not entitled to payment from Welded so long as a lien exists on CGT's property, EPS has not suffered any injury, and it does not have standing to pursue a mechanic's lien enforcement action.[6]

Welded's purported breaches of contract and alleged failures to pay EPS cannot save EPS from the No-Lien Clause. As the District of Vermont has aptly explained, a breach of contract can

[6] EPS has no standing under Article III of the Constitution if it has no injury-in-fact. "Constitutional standing requires an 'injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Reilly v. Ceridian Corp*., 664 F.3d 38, 41 (3d Cir. 2011) (citations omitted). West Virginia law also requires injury-in-fact for standing to bring a claim. *See, e.g., Coleman v. Sopher,* 459 S.E.2d 367, 372 n.6 (W. Va. 1995). A $0 lien claim is not an injury-in-fact.

have no effect on a mechanic's lien waiver, because the existence of the lien waiver contemplates and determines the rights of the claimant ***in the event of a contractual breach***:

> Surely, in waiving its statutory right to a lien on defendant's property, plaintiff contemplated a contractual breach . . . were there no breach, the lien likely would never come into play. By waiving its lien plaintiff acknowledged that if it was injured by a breach of contract, it could assert no lien on defendant's property but must instead rely on defendant's general credit. Thus the validity of the waiver is unaffected by IBM's and Crow's alleged breaches of contract.

Richardson Eng'g Co., 554 F. Supp at 471 (collecting cases under several states' laws), *aff'd* 697 F.2d 296.

In sum, the Subcontract dismantles EPS's ability to pursue any lien claim. Under its express terms, EPS's liens are either waived or worthless. Since neither CGT nor its property could ever be liable to EPS for a mechanic's lien claim, EPS fails to state a viable mechanic's lien claim, and Count I of EPS's Amended Complaint must be dismissed. *Connelly*, 809 F.3d at 786; *Fowler,* 578 F.3d at 210; *Nw. Constr. Servs.,* 2011 WL 13196507, at *5; *Richardson Eng'g Co.*, 554 F. Supp. at 471.

C. EPS fails to state a claim for Quantum Meruit and Unjust Enrichment because it pleads the existence of its Subcontract.

Time and time again, Welded's subcontractors and materialmen have tried—and failed—to assert quantum meruit and unjust enrichment causes of action against CGT. *See Schmid Pipeline Constr., Inc. v. Columbia Gas Transmission, LLC*, No. 5:19-cv-00257-JPB, Order for Partial Dismissal[7] (N.D. W. Va., Oct. 21, 2019), *aff'd on mot. for reconsid.,* Adv. Pro. No. 19-50886-CSS, Mem. Order (Br. D. Del. Dec. 20, 2019) (Hon. Gross, U.S.B.J.); *Worldwide Mach. L.P. v, Columbia Gas Transmission, LLC,* No. 5:19-CV-208, 2019 WL 3558174 (N.D. W. Va. Aug. 5,

[7]The complete name of this Order is "Order Denying Schmid Pipeline Construction, Inc's Motion to Remand and Abstain [Doc. 10], and Granting Columbia Gas Transmission's Motion for Partial Dismissal [Doc. 17], and Columbia Gas Transmission's Motion to Transfer Venue."

2019); *HERC Servs.*, *LLC v. Columbia Gas Transmission, LLC*, No. 5:19CV000174, Order Dismissing Complaint (N.D. W. Va. June 24, 2019). Having learned nothing from these subcontractors' examples, EPS repeats their mistakes, wasting both CGT's and this Court's time.

As a matter of West Virginia law, quasi-contractual causes of action such as unjust enrichment and quantum meruit cannot exist in the face of an express contract. *See Schmid Pipeline*, Adv. Pro. No. 19-50886-CSS, Mem. Order at pp. 5-6. EPS's claims for unjust enrichment and quantum meruit—Counts II and III, respectively—fail as a matter of law since they allege by incorporation that EPS performed its work pursuant to an express contract. *See id.*; *Worldwide Mach*, 2019 WL 3558174, at *2.

As the Honorable Judge Gross explained in denying Schmid Pipeline's Motion for Reconsideration of the Northern District of West Virginia's dismissal of Schmid Pipeline's unjust enrichment and quantum meruit claims,

> This precise issue was presented and decided in *Ohio Valley Health Sevices & Educ. Corp. v. Riley*, 149 F. Supp. 3d 709 (N.D. W. Va. 2015). In *Ohio Valley*, plaintiff brought suit alleging a breach of contract and, in the alternative, a claim of unjust enrichment. The court rejected the unjust enrichment claim, holding that "quasi-contract claims, like unjust enrichment or quantum meruit, are unavailable when an express agreement exists because such claims only exist in the absence of agreement." *Id.* at 721. The court derived its holding from a decision of the Supreme Court of Appeals of West Virginia, the state's highest court, in *Case v. Shepherd*, 84 S.E. 2d 140, 144, in which the court held once again that "[a]n express contract and an implied contract, relating to the same subject matter, cannot co-exist."

Id. at pp. 5-6.

According to EPS's own allegations and exhibits, EPS's claims for unjust enrichment and quantum meruit are based in contract. Count II, the cause of action for Unjust Enrichment, begins by "repeat[ing] and realleg[ing] the allegations contained in paragraphs 1 through 35 [] as if set forth fully herein." Am. Compl. at ¶ 36. These allegations include allegations that EPS performed

its allegedly uncompensated work under its Subcontract. *See, e.g., id.* at ¶¶8,9,11,12,16,18. EPS further alleges, in support of its Unjust Enrichment cause of action, that CGT requested EPS's work through CGT's contract with Welded, and Welded's Subcontract with EPS. *Id.* at ¶37. Count III, the cause of action for Quantum Meruit, fares no better. It also "repeats and realleges the allegations contained in paragraphs 1 through 50 [] as if set forth fully herein," *id.* at ¶51, which, as just discussed, include allegations that EPS performed its allegedly uncompensated work under its Subcontract, *see, e.g., id.* at ¶¶8,9,11,12,16,18,37.

Because EPS's claims for unjust enrichment and quantum meruit are based in contract, and because EPS affirmatively asserts the existence of its Subcontract, Counts II and III of EPS's Amended Complaint must be dismissed. *Schmid Pipeline*, Adv. Pro. No. 19-50886-CSS, Mem. Order at p. 6 ("unjust enrichment and quantum meruit [were] not independently supported by the facts" when Schmid pled the existence of its subcontract with Welded); *Worldwide Mach*, 2019 WL 3558174, at *3 (Allegations that "Worldwide was performing work for Welded in furtherance of Welded's contract with Columbia" mandated dismissal of unjust enrichment and quantum meruit claims.); *Ohio Valley,* 149 F. Supp. 3d at 721.

V. CONCLUSION

EPS is not entitled to any relief from CGT. The Subcontract precludes quasi-contractual recovery, and denies EPS the ability to pursue a mechanic's lien action. Indeed, the flaws with EPS's mechanic's lien claim underscores CGT's counterclaim for slander of title: EPS waived its mechanic's lien rights long ago, and is now forcing CGT to expend valuable time, effort, and money to defend its title against meritless claims.

EPS negotiated the Subcontract with Welded, and accordingly made its bed when it accepted and executed the Subcontract. The Court should now make EPS lie in it, and dismiss EPS's claims.

WHEREAS, Defendant and Counter-claimant Columbia Gas Transmission, LLC respectfully asks the Court to dismiss Plaintiff and Counter-defendant Earth Pipeline Services, Inc.'s Amended Complaint with prejudice, and for all other relief to which it is justly entitled.

Date: June 3, 2020

ARCHER & GREINER, P.C.

/s/ David W. Carickhoff
David W. Carickhoff (No. 3715)
Alan M. Root (No. 5427)
300 Delaware Avenue, Suite 1100
Wilmington, Delaware 19801
Phone: (302) 777-4350
Fax: (302) 777-4352
E-mail: dcarickhoff@archerlaw.com
aroot@archerlaw.com

-and-

MAYER BROWN LLP
Charles S. Kelley, Esq.
Andrew C. Elkhoury, Esq.
700 Louisiana Street, Suite 3400
Houston, TX 77002
Phone: (713) 238-3000
Email: ckelley@mayerbrown.com
aelkhoury@mayerbrown.com

Attorneys for Columbia Gas Transmission, LLC

218634513v3

Facts

1. On or about August 6, 2018, Schmid entered into a certain Construction Subcontract (the "Subcontract") with Welded Construction, L.P. ("Welded"). Order at ¶ 1. The Subcontract pertained to Columbia Gas's Mountaineer Express Pipeline Project (the "Project"). Order at ¶ 1.

2. Schmid performed work on the Project from August 10, 2018 until October 19, 2018. Order at ¶ 2.

3. On October 22, 2018, Welded and its affiliated debtors filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (the "Code") in this Court. *Chapter 11 Voluntary Petition* (D.I. 1.)

4. On January 14, 2019, Schmid executed a Mechanic's Lien (the "Lien") on Columbia Gas's interest in the Project, in the amount of $2,361,914.00. Order at ¶ 4.

5. On January 18, 2019, Schmid recorded a Notice of the Lien at the appropriate state office in Wetzel County, West Virginia. Order at ¶ 4.

6. On April 10, 2019, Schmid filed a motion with this Court for relief from the automatic stay—pursuant to § 362(d)(1) of the Code—to commence an action to enforce and/or foreclose its rights and remedies on the Lien. *Motion of Schmid Pipeline Construction, Inc. for Relief from the Automatic Stay* (D.I. 629 at ¶¶ 10–11.)

7. On April 26, 2019, the Court issued an Order granting Schmid relief from the stay. *Order Granting Motion for Schmid Pipeline Construction, Inc. for Relief from the Automatic Stay* (the "Stay Relief Order") (D.I. 671.) The Stay Relief Order granted Schmid relief from the automatic stay and thereby name Welded as a nominal defendant and pursue any necessary mechanic's lien action with respect to the Project.

(D.I. 671 at ¶ 2.)

8. On May 8, 2019, Schmid filed its Complaint against Columbia Gas in the Circuit Court of Wetzel County, West Virginia. Schmid's Complaint included three claims: Count I, which requested enforcement of the Lien; Count II, which asserted unjust enrichment; and Count III, which requested compensation under quantum meruit. Order at ¶ 8. Schmid named Welded as a nominal defendant, but no relief was sought against Welded. Order at ¶ 9. Thereafter, Schmid filed an amended complaint.

9. On August 7, 2019, Columbia Gas filed a Notice of Removal with the United States Bankruptcy Court for the Northern District of West Virginia (the "W.Va. Bankruptcy Court"), asserting the court had jurisdiction to decide Schmid's claims pursuant to 28 U.S.C. § 1334(b) because of Welded's chapter 11 cases before this Court. Order at ¶ 10.

10. On September 4, 2019, the District Court ordered the withdrawal of its reference of Schmid's case to the W.Va. Bankruptcy Court. Order at ¶ 11. The District Court assumed jurisdiction. Order at ¶ 11.

11. On October 21, 2019, the District Court issued the Order, which, *inter alia*, granted Columbia Gas's Motion for Partial Dismissal of Counts II (unjust enrichment) and III (quantum meruit) of Schmid's Complaint. Order at pp. 6–7.

12. Also on October 21, 2019, the District Court transferred the case to the United States District Court for the District of Delaware (the "Delaware District Court").

13. On November 4, 2019, Schmid filed the Motion to Reconsider the Order in the Delaware District Court.

14. On November 20, 2019, the Delaware District Court transferred the case to this Court.

The Motion to Reconsider

Schmid contends that the Court should grant its Motion to Reconsider because the District Court committed a clear error of law when it dismissed Counts II (unjust enrichment) and III (quantum meruit). Specifically, Schmid argues that it is entitled to plead claims for unjust enrichment and quantum meruit in the alternative despite alleging that the Subcontract existed.

Legal Standard

Schmid brings the Motion to Reconsider under (i) the District Court's Local Rule 7.1.5, which is applicable in the Bankruptcy Court pursuant to our Local Rule 1001-1(f) (2019); and (ii) Federal Rule of Civil Procedure 59(e), which is applicable through Federal Rule of Bankruptcy Procedure 9023. "A motion for reconsideration under [the District Court's] Local Rule 7.1.5 which is timely filed and challenges the correctness of a previously entered order is considered the 'functional equivalent' of a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e)." *In re DaimlerChrysler AG Securities Lit.*, 200 F. Supp. 2d 439, 442 (D. Del. 2002). The purpose of a motion to reconsider is "to correct manifest errors of law or fact or to present newly discovered evidence." *Johnson v. Diamond State Port Corp.*, 50 Fed. Appx. 554, 559 (3d. Cir 2002); *Honeywell Intern. Inc. v. Universal Avionics Systems Corp.*, 585 F. Supp. 2d 623, 634 (D. Del. 2008). The Court may grant such a motion "if the party seeking reconsideration shows . . . the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Notably, a court should grant motions for reconsideration "sparingly." *See* D. Del. R. 7.1.5(a); *see also Intellectual Ventures I LLC v. Check Point Software Technologies Ltd.*, 215 F. Supp. 3d 314, 321 (D. Del. 2014).

Analysis

Schmid argues the District Court erred in dismissing its claims for alternative relief. Schmid claims that it is entitled to plead claims in the alternative at the motion to dismiss stage because (1) alternative pleading is permissible and (2) this is especially true when there is disagreement over the parties' respective contractual liabilities.

Columbia Gas, in turn, argues that under West Virginia law unjust enrichment and quantum meruit are not available claims if an express contract exists which specifies the parties' obligations. In its Amended Complaint, Schmid claims that it performed its work pursuant to the Subcontract and attached a copy of the Subcontract. Amended Complaint, ¶ 6. Columbia Gas answered that it "believes that Schmid entered into a contract with Welded" but could not state that the Subcontract attached to the Amended Complaint was a true and correct copy. Answer, ¶ 6.

Columbia Gas concedes, in the Court's view, that a subcontract existed without agreeing that the Subcontract was in the form attached to the Amended Complaint. Because a subcontract existed and Counts II and III of the Amended Complaint incorporate the allegation of the Subcontract, the alternative claims for relief are not independently supported by the Amended Complaint's factual allegations. The alternative claims therefore fail as a matter of law since they allege by incorporation that Schmid performed its work pursuant to an express contract.

This precise issue was presented and decided in *Ohio Valley Health Services & Educ. Corp. v. Riley*, 149 F.Supp.3d 709 (N.D. W.Va. 2015). In *Ohio Valley*, plaintiff brought suit alleging a breach of contract and, in the alternative, a claim of unjust enrichment. The court rejected the unjust enrichment claim, holding that "quasi-contract claims, like unjust enrichment or quantum meruit, are unavailable when an express agreement exists because such claims only exist in the absence of agreement." *Id.* At 721. The court derived its holding from a decision of the Supreme

Court of Appeals of West Virginia, the state's highest court, in *Case v. Shepherd*, 84 S.E. 2d 140, 144, in which the court held once again that "[a]n express contract and an implied contract, relating to the same subject matter, cannot co-exist."

Plaintiffs may bring claims for alternative relief only when independently supported by the facts. *Marina One, Inc. v. Jones*, 22 F.Supp. 3d 604,609 (E.D. Va. 2014. *See also Tolliver v. Christina Sch. Dist.*, 564 F. Supp. 2d 312, 316 (D.Del. 2008) (express contract causes unjust enrichment claim to fail). Schmid "repeats and realleges" in Counts II and III all preceding allegations in the Amended Complaint. Amended Complaint, ¶¶ 25, 32. One such allegation is the existence of the Subcontract. Amended Complaint, ¶¶ 6–8, 12. As such, unjust enrichment and quantum meruit are not independently supported by the facts.

Conclusion

For the foregoing reasons, the Court finds that the District Court did not commit clear error in granting Columbia Gas's Motion for Partial Dismissal and that Schmid's Motion to Reconsider is therefore DENIED.

SO ORDERED.

Dated: December 20, 2019
Wilmington, Delaware

KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al., Debtors.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
EARTH PIPELINE SERVICES, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION, LLC, Defendant.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS) (Consolidated)
COLUMBIA GAS TRANSMISSION, LLC, Counter-Claimant, v. EARTH PIPELINE SERVICES, INC., Counter-Defendant.	

CERTIFICATE OF SERVICE

I David W. Carickhoff, hereby certify that on June 3, 2020, I caused true and correct copies of the *Columbia Gas Transmission's Motion to Dismiss Earth Pipeline Services, Inc.'s Amended Complaint* to be served on all parties named in the attached service list in the manner indicated.

Date: June 3, 2020

ARCHER & GREINER, P.C.

By: */s/ David W. Carickhoff*
David W. Carickhoff (No. 3715)
Alan M. Root (No. 5427)
300 Delaware Avenue, Suite 1100
Wilmington, Delaware 19801
Phone: (302) 777-4350
Fax: (302) 777-4352
E-mail: dcarickhoff@archerlaw.com
aroot@archerlaw.com

-and-

MAYER BROWN LLP
Charles S. Kelley, Esq.
Andrew C. Elkhoury, Esq.
700 Louisiana Street, Suite 3400
Houston, TX 77002
Phone: (713) 238-3000
Email: ckelley@mayerbrown.com
aelkhoury@mayerbrown.com

Attorneys for Columbia Gas Transmission, LLC

SERVICE LIST

VIA REGULAR MAIL AND ELECTRONIC MAIL

Welded Construction, L.P.
c/o Young, Conaway, Stargatt & Taylor
Attn: Sean M. Beach
Robert F. Poppiti, Jr.
Allison S. Mielke
Betsy L. Feldman
Rodney Square
1000 North King Street
Wilmington, DE 19801
sbeach@ycst.com
rpoppiti@ycst.com
amielke@ycst.com
bfeldman@ycst.com

Welded Construction, L.P.
c/o Landis Rath & Cobb LLP
Attn: Jennifer L. Cree
Matthew B. McGuire
P.O. Box 2087
919 Market Street, Suite 1800
Wilmington, DE 19899
Cree@lrclaw.com
mcguire@lrclaw.com

Earth Pipeline Services, Inc.
c/o Cohen, Seglias, Pallas,
Greenhall & Furman, P.C.
Attn: Stephen A. Venzie, Esquire
Sally J. Daugherty, Esquire
500 Delaware Avenue, Suite 730
Wilmington, DE 19801
svenzie@cohenseglias.com
sdaughertv@cohenseglias.com

Mersino Dewatering, Inc.
c/o Bayard, P.A.
Attn: Gregory J. Flasser
GianClaudio Finizio
600 North King Street, Suite 400
Wilmington, Delaware 19801
gflasser@bayardlaw.com
gfinizio@bayardlaw.com

Mersino Dewatering, Inc.
c/o BUTZEL LONG PC
Attn: Max J. Newman
Michael Griffie
Stoneridge West
41000 Woodard Ave
Bloomfield Hills, MI 48304
newman@butzel.com
griffie@butzel.com