Docket #0061 Date Filed: 2/9/2021

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al[1]., Debtors.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
EARTH PIPELINE SERVICES, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION, LLC, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS) (Consolidated)
WELDED CONSTRUCTION, L.P., Plaintiff, v. EARTH PIPELINE SERVICES, INC. Defendants.	Adv. Proc. No. 20-50612 (CSS) (Consolidated)

PLAINTIFF EARTH PIPELINE SERVICES, INC.'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANT COLUMBIA GAS TRANSMISSION'S MOTION TO DISMISS PLAINTIFF EARTH PIPELINE SERVICES, INC.'S SECOND AMENDED COMPLAINT

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Welded Construction, L.P. (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is P.O. Box 470, Perrysburg, OH 43552-0470.

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Plaintiff, Earth Pipeline Services, Inc. ("Plaintiff" or "Earth Pipeline"), by and through its undersigned counsel, hereby submits the following response and brief in opposition to the motion of defendant Columbia Gas Transmission, LLC ("CGT") to dismiss Earth Pipeline's second amended complaint.

Per Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Del. Bankr. L.R. 7012-1, Earth Pipeline does not consent to the entry of final orders in this matter by the Bankruptcy Court.

PLAINTIFF EARTH PIPELINE'S RESPONSE TO DEFENDANT CGT'S MOTION TO DISMISS PLAINTIFF EARTH PIPELINE'S SECOND AMENDED COMPLAINT

Plaintiff Earth Pipeline hereby requests that this Honorable Court deny defendant CGT's motion to dismiss Earth Pipeline's second amended complaint. In support thereof, Earth Pipeline responds as follows:

As demonstrated in Earth Pipeline's brief in opposition to CGT's motions to dismiss, *infra*, the claims in Counts II and III of Earth Pipeline's second amended complaint against CGT for unjust enrichment and *quantum meruit*, respectively, are permitted and well-pled alternative claims under the rules of West Virginia and of this Court so as to state claims under West Virginia law such that any motion to dismiss the claims for failing to state a claim must be denied[2]. Earth Pipeline's second amended complaint cure the defects in its first amended complaint, which were highlighted by Judge Sontchi in his December 1, 2020 Opinion[3], with respect to the existence of

[2] With respect to Count I of Earth Pipeline' second amended complaint for the enforcement of its mechanics' lien claims against CGT's property, Earth Pipeline acknowledges that this Court dismissed that claim with prejudice in its December 1, 2020 Order ruling on CGT's motions to dismiss Earth Pipeline' first amended complaint. Accordingly, Earth Pipeline' inclusion of the claim in Count I in its second amended complaint is not for the purpose of re-asserting that claim in this Court; rather Earth Pipeline has included that claim for the purpose of preserving that claim for appeal as the second amended complaint relates back to the initial filing of Earth Pipeline' complaint. For this reason, Earth Pipeline's response to CGT's motion to dismiss Earth Pipeline's second amended complaint will not address CGT's arguments with respect to the Count I of Earth Pipeline' second amended complaint.

[3] See December 1, 2020 Opinion, D.I. 51.

the subcontracts and the additional work that Earth Pipeline performed directly for CGT. The claims in Counts I and II of EPS' second amended complaint are supported by independent facts demonstrating that CGT requested and received the direct benefit of Earth Pipeline's additional work on CGT's pipeline project with understanding that it had to pay for such work but for which CGT failed to pay anyone, and that such additional work was disputed by the parties as not being part of the subcontracts. Furthermore, Earth Pipeline's claims in Counts II and III plead independent facts supporting each and every elements of the claims but none of which relate to or incorporate the subcontracts entered into between Earth Pipeline and defendant Welded Construction, L.P. ("Welded"). In addition, Earth Pipeline's claims in Counts II and III of its second amended complaint seek damages in an amount less than Count I because, in Counts II and III, Earth Pipeline is only claiming damages for the additional work it performed directly for CGT at CGT's request. Earth Pipeline did not include the balance of the monies ("retainage") owed on its subcontracts with Welded in its damages in Counts II and III because that work was performed for Welded and fell within the scope of the subcontracts between Earth Pipeline and Welded.

As is common in commercial construction disputes, Earth Pipeline, a subcontractor, asserts two (2) different legal theories in its second amended complaint to hold Welded, the contractor, and/or CGT, the project and property owner, liable for Earth Pipeline's damages in the form of the monies due for the additional work that Earth Pipeline performed for CGT, the first theory being based on statute and common law, and the second theory being based on equity. This alternative pleading is permitted under West Virginia law and the rules of this Court and is necessary because the decision of the fact finder with respect to certain facts will ultimately determine which legal theory the subcontractor must prove in order for one of the parties to be found liable for Earth Pipeline's damages. In the commercial construction context, the decision on which theory is

applicable comes down to whether the fact finder determines that additional work performed by the subcontractor was done not as part of the scope of the subcontractor's contract with the contractor but rather directly for the project owner, with the project owner's knowledge and appreciation of the benefit of the additional work, and for which the project owner expected to pay but failed to pay the subcontractor or the contractor. In that scenario, West Virginia equitable principles allow for the subcontractor to seek redress directly from the project and property owner that received the benefit of its additional work so that such party or parties are not unjustly enriched. Without these equitable claims, the law would have no remedy for a subcontractor in Earth Pipeline' position, especially in the position where other remedies fail as a matter of law and the contractor is in bankruptcy. Accordingly, Earth Pipeline's second amended complaint complies with the pleading rules of both West Virginia and this Court and with the legal and equitable principles of West Virginia and properly sets forth alternative claims against CGT for unjust enrichment and *quantum meruit*.

In its pending motion to dismiss Earth Pipeline's second amended complaint, CGT attempts to re-direct the Court from the preceding principles clearly favoring Earth Pipeline to legal semantics such as this Court's jurisdiction, the number of amendments to pleadings, the length of the litigation, and previous inconsistent allegations. Unfortunately for CGT, those issues are not determinative to the issue of whether Earth Pipeline's second amended complaint adequately states claims for relief and only serve to cast doubt on the veracity of its motion to dismiss. Nonetheless, as further demonstrated, *infra*, those arguments are misleading and they ultimately fail.

First, CGT parenthetically accuses Earth Pipeline of disputing this Court's authority to enter final orders in response to the Court's ruling on CGT's first motion to dismiss, in which

this Court dismissed Earth Pipeline' mechanics' lien claims. Even if this kind of *ad hominin* attack had a proper place in a motion to dismiss, it is demonstrably false. In Earth Pipeline's counsel's Notice of Appearance, filed long before the decision referenced by CGT, Earth Pipeline specifically "reserved … [its] right to have final orders in non-core matters entered only after *de novo* review by a District Judge." Pl. Notice of Appearance, D.I. 4 (July 26, 2019).

Second, Earth Pipeline has not substantively amended its complaint in this matter four (4) times and is not struggling to put forth lawful and proper claims against CGT to hold the defendants liable for their wrongful withholding of monies due and owing to Earth Pipeline. The record of this case demonstrates the contrary. Earth Pipeline filed two complaints in West Virginia state court against CGT corresponding to each of its mechanics' lien claims. Those *in rem* complaints were ultimately transferred to this Court and consolidated. Earth Pipeline was then granted leave to amend its complaint solely for the purpose of adding Welded as a nominal defendant as is required by West Virginia's mechanic's lien statute to enforce mechanics' liens. Having secured it's *in rem* action, Earth Pipeline then immediately sought to amend the complaint to include the alternative *in peronsam* claims in Counts II and III against CGT directly because, as discussed *supra* and *infra,* such claims are common, necessary and, frankly, crucial in commercial construction disputes of this nature and with these facts. Pursuant to this Court's December 1, 2020 Order, after considering CGT's motion to dismiss those claims, Earth Pipeline was given leave to amend the complaint to re-state its claims in Counts II and III. On January 13, 2021, Earth Pipeline filed its second amended complaint. Thus, despite CGT's insincere assertions to the contrary, Earth Pipeline had never amended its complaint with respect to the claims at issue (i.e. Counts II and III) until the filing of its second amended complaint that is the subject of this motion.

While misleading the Court on this issue, CGT also erratically states that "enough is enough" in an attempt to pressure the Court to dismiss Earth Pipeline' entire case solely because of CGT's frustration with the pace of the litigation. Unfortunately for CGT, the scheduling orders entered in this matter were discussed and agreed upon by all parties and the Court. Earth Pipeline respectfully requests that the Court ignore CGT's grumblings and instead consider Earth Pipeline's well-reasoned arguments herein as to the adequacy and suitability of the claims asserted in Counts II and III of Earth Pipeline' second amended complaint.

Third, after the disingenuous claims that Earth Pipeline has amended its pleading too many times, CGT then pleads to the Court to dismiss Earth Pipeline's second amended complaint because the litigation is taking too long. CGT tries to convince the Court that these claims should somehow fail because the timing of the amendment to Earth Pipeline's complaint should in some way have relevance to its contents. Frankly, such ranting deserves no response. Nonetheless, Earth Pipeline reminds the Court that the allowance of amendments to many parties' pleadings were discussed and agreed upon the parties, their counsel and the Court and placed into scheduling orders entered in this case after all parties discussed and agreed to their terms. Moreover, CGT has filed its own amended pleadings and numerous motions. In that context, Earth Pipeline agrees that the litigation is taking too long to get to the crux of the case, that being the fact that CGT directly received over $3.1 million dollars' worth of work from Earth Pipeline, has accepted, appreciated and used that work to its benefit, but has failed to pay anyone for that work.

Finally, CGT burdens the Court with a lengthy discussion regarding previous allegations that Earth Pipeline has made in its previous pleadings in this matter which CGT alleges are inconsistent with Earth Pipeline's claims in Counts II and III of its second amended complaint. GT argues that these previous allegations preclude Earth Pipeline from bringing direct equity

claims against CGT. Such argument wholly misconstrues and misinterprets the relevant case law as there is clear precedent for the allowance of such claims. Fortunately for Earth Pipeline, West Virginia law and cases interpreting the federal rules make it crystal clear that prior inconsistent statements in a party's pleadings cannot be held against that party's alternative claim. Moreover, any exceptions to this general principle with respect to judicial admissions and incorporation by reference are not applicable.

With respect to CGT's remaining arguments that the change order provisions of Earth Pipeline's subcontracts with Welded and Earth Pipeline's submission of invoices to Welded which included some of the monies that Earth Pipeline claims against CGT in Counts II and III somehow waive or otherwise preclude Earth Pipeline from bringing alternative equity claims directly against CGT, Earth Pipeline responds that such contract clauses are standard in the construction industry and, more importantly, such issues are present in cases where *unjust enrichment* and *quantum meruit* claims have been successful, or, at the very least, allowed to move forward past the pleading stage. These equitable claims at issue have been allowed by Courts to specifically address the situation where there is no subcontract at all or, if there is a subcontract, the subcontract change order procedures were wrongfully ignored or misapplied by the owner or its agent resulting in the subcontract not providing any remedy to the subcontractor for the performance of the additional work. This is especially so in cases where the contractor is also in bankruptcy. More importantly, Welded denies that it authorized the additional work and admits that the additional work was not performed as part of Welded's work for CGT or in conjunction with the subcontract between Earth Pipeline and Welded. Also, CGT has not paid Welded nor Earth Pipeline for the additional work at issue. As a result, equity steps in to require that an owner ultimately pay for the additional work of the subcontractor. In addition, as this Court has previously held, CGT is not a third beneficiary

to the subcontract between Earth Pipeline and Welded and cannot assert defenses related to Earth Pipeline' compliance to the terms and condition of such subcontract, in particular the change order provisions.

In addition to the subcontract provisions, CGT tries to convince the Court that Earth Pipeline' submission of invoices to Welded that included the monies that are due from CGT under Counts II and III somehow constitutes an admission that the work that Earth Pipeline performed for CGT was included in Earth Pipeline' original scope of its subcontract with Welded. Again, the law is clear about the effect of previous inconsistent statements in the manner of alternative claims. In addition, Earth Pipeline's decision to attempt to seek payment for its additional work through the invoicing process on the project was reasonable in light of its status as a subcontractor on the project. Passing the charge through the invoicing process doesn't change the nature of how the additional work was ordered, nor the facts that the owner expected to pay for such additional work, that the additional work was outside the scope of the subcontracts and that the additional work was directly received and appreciated by the owner. This act of invoicing is merely a procedural process for a subcontractor and does not create or eliminate liability under the law. Earth Pipeline properly placed its claim for the monies due for the additional work in the hands of Welded, the general contractor, so that the general contractor can pass the charges to the owner. Doing so does not change the substantive law, that being that the owner must pay for the additional work. More importantly, Welded disputes the invoices, a fact which supports EPS' alternative equitable theories of liability against CGT.

Accordingly, Earth Pipeline's second amended complaint has cured the defects in its first amended complaint and, as a result, Counts II and III in Earth Pipeline' second amended complaint adequately and properly plead claims for unjust enrichment and *quantum meruit*, respectively. The

arguments raised by CGT in its motion to dismiss Earth Pipeline's second amended complaint with respect to the sufficiency of such claims at the pleading stage are meritless, and CGT's motions to dismiss Earth Pipeline' second amended complaint must be denied.

PLAINTIFF EARTH PIPELINE'S BRIEF IN OPPOSITION TO DEFENDANT CGT'S MOTION TO DISMISS PLAINTIFF EARTH PIPELINE'S SECOND AMENDED COMPLAINT

For the reasons set forth in the accompanying Response and Brief, Plaintiff Earth Pipeline hereby respectfully requests that this Court deny the motion of defendant CGT to dismiss Earth Pipeline's second amended complaint. The factual and legal bases for Earth Pipeline's opposition to the motion demonstrate that the claims in Counts II and III of Earth Pipeline's second amended complaint are permitted and well-pled alternative claims under West Virginia law and the rules of this Court such that the claims must survive, at a minimum, any preliminary motion to dismiss for failure to state a claim.

I. NATURE AND STAGE OF PROCEEDING

This dispute arises out of labor and material clearing work performed by Earth Pipeline on Station Number 0+00 to Station Number 994+36 of Spread 1 of the Mountaineer Express Pipeline Project (the "Project") in West Virginia. Pl.'s Second Am. Comp. ¶4, D.I. 55. CGT is the record owner and/or has a real property interest in approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas located from Station Number 0+00 to Station Number 994+36 existing on such real property (the "Property"). Id. at ¶6. CGT is also the owner of the Project and its subject pipeline which was constructed on and incorporated into the Property. Id. In order to protect its rights to payment for its completed work on the Project, on September 12, 2018, Earth Pipeline filed two (2) separate Notices of Mechanics' Liens pursuant to West Virginia's Mechanics' Lien Law, W. Va. Code § 38-2-1 *et seq.*, as amended

(the "Lien Law"), in Marshall County and Wetzel County, West Virginia, which were the counties where the Project was located and where Earth Pipeline performed the work for which it has not yet been paid. The former being filed with the Clerk of the Marshall County Commission, at Instrument No. 1445514, Mechanic's Lien Book 11 at page 574, in the amount of $3,650,300.42, and the latter being filed with the Clerk of the Wetzel County Commission, at Instrument No. 257004, Mechanic's Lien Book 6 at page 872, in the amount of $3,650,300.42. Id. at ¶21. On October 22, 2018, the general contractor on the Project, Welded, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the "Court"). Id. at ¶22. On or about March 8, 2019, Earth Pipeline filed Complaints to Foreclose the Mechanics' Liens against CGT in the Circuit Courts for Marshall County and Wetzel County, West Virginia. Id. at ¶23. On or about April 10, 2019, the Complaints to Foreclose the Mechanics' Liens were removed to the United States Bankruptcy Court for the Northern District of West Virginia. Id. at ¶24. On June 26, 2019, the United States District Court for the Northern District of West Virginia granted CGT's motion to transfer venue of the Plaintiff's Complaints to Foreclose the Mechanics' Liens to this Court. Id. at ¶25. On July 26, 2019, Earth Pipeline's initial counsel filed its Notice of Appearance[4]. Pl. Notice of Appearance, D.I. 4. On May 6, 2020, the Court entered a Scheduling Order that, *inter alia*, consolidated the two adversary proceedings containing Plaintiff's Complaints to Foreclose the Mechanics' Liens (Adv. Proc. Nos. 19-50274 and 19-50275) into a single consolidated proceeding included in Welded's bankruptcy proceeding. Id. at ¶26; Scheduling Order, D.I. 18. The Scheduling Order required Earth Pipeline to add Welded as nominal defendant to Earth Pipeline' complaint to enforce its mechanics' liens. Scheduling Order at ¶2. The Scheduling Order also allowed Earth Pipeline and/or CGT to amend

[4] In the Notice of Appearance, Earth Pipeline specifically "reserved … [its] right to have final orders in non-core matters entered only after *de novo* review by a District Judge."

its pleadings within seven (7) days of the joinder of Welded as a nominal defendant. Scheduling Order at ¶3. On May 15, 2020, Earth Pipeline amended its complaint to include additional claims against CGT for unjust enrichment and *quantum meruit*. Pl.'s Am. Comp., D.I. 23. On June 3, 2020, CGT filed motions to dismiss Earth Pipeline' amended complaint in duplicate with respect to each adversary proceeding (Adv. Proc. Nos. 19-50274 and 19-50275). Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50275, D.I. 23; Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50274, D.I. 28. Due to the consolidation of the adversary proceedings by the Court, Earth Pipeline responded singularly to both of CGT's motions to dismiss on June 26, 2020. Pl's Response and Brief in Opposition to Mot. to Dismiss, Adv. Proc. No. 19-50275, D.I. 24; Pl's Response and Brief in Opposition to Mot. to Dismiss Adv. Proc. No. 19-50274, D.I. 36. On July 13, 2020, CGT filed a reply brief. Def.'s Reply Brief, Adv. Proc. No. 19-50275, D.I. 23; Def.'s Reply Brief, Adv. Proc. No. 19-50274, D.I. 42. On December 1, 2020, this Court entered an Order granting CGT's motion to dismiss Count I of Earth Pipeline' amended complaint with prejudice and Counts II and III without prejudice. December 1, 2020 Order, D.I. 52. Judge Sontchi's Opinion accompanying the December 1, 2020 Order gave Earth Pipeline' leave to file an amended complaint to correct deficiencies in Counts II and III of Earth Pipeline' amended complaint. December 1, 2020 Opinion, D.I. 51. On December 23, 2020, the Court entered an Amended Scheduling Order that, *inter alia*, gave Earth Pipeline twenty-one (21) days to file its second amended complaint. Amended Scheduling Order, D.I. 54. On January 13, 2021, Earth Pipeline filed its second amended complaint. Pl.'s Second Am. Comp., D.I. 55. On January 15, 2021, Earth Pipeline filed a replacement page to Earth Pipeline' second amended correcting paragraph No. 38 of Earth Pipeline' second amended complaint. See Pl.'s Replacement Page Correcting Second Am. Comp., D.I. 56. On January 26, 2021, CGT filed this motion to dismiss Earth Pipeline' second amended complaint. See Def.'s Mot. to Dismiss, D.I.

58. On January 27, 2021, Welded filed an answer to Earth Pipeline's second amended complaint. Welded Ans. to Pl. Second Am. Comp., D.I. 59.

II. SUMMARY OF ARGUMENT

As demonstrated in Earth Pipeline's brief in opposition to CGT's motion to dismiss, *infra*, Earth Pipeline's second amended complaint cures the defects in its first amended complaint and, as a result, states alternative claims of unjust enrichment and *quantum meruit* against CGT in Counts II and III that are both proper and permitted under West Virginia law and the rules of this Court. Accepting as true the allegations in the Earth Pipeline's second amended complaint, Earth Pipeline asserts causes of action for unjust enrichment and *quantum meruit* upon which it is entitled to relief as a matter of law. CGT's arguments to the contrary fail as a matter of law and, as a result, the Court must deny CGT's motion to dismiss.

1. Earth Pipeline's causes of action sounding in unjust enrichment and *quantum meruit* against CGT in Counts II and III of Earth Pipeline' second amended complaint should not be dismissed based upon the well-established standards applicable to Federal Rule of Civil Procedure 12(b)(6) motions. West Virginia law and the rules of this Court allow a plaintiff to plead alternative theories of liability in its complaint and allegations that were made by the plaintiff in previous pleadings that may be inconsistent with such alternative theories shall not be held against the plaintiff in determining the adequacy such alternative claims at the pleading stage.

2. EPS' alternative claims are proper under West Virginia law as a subcontractor on a construction project is permitted to plead equitable claims for unjust enrichment and *quantum meruit* for the value of the subcontractor's additional work on a project where, as here, independent facts exist demonstrating that such additional work was outside of the agreed-upon

scope of an existing contract to which the subcontractor was party, the owner ordered the performance of such additional work, and received and appreciated the benefits of such additional work with the understanding that it must pay for such additional work, but failed to pay for such additional work. In his December 1, 2020 Opinion, Judge Sontchi pointed to two (2) defects in Earth Pipeline's first amended complaint related to EPS' pleading of its alternative claims for unjust enrichment and *quantum meruit* against CGT. Earth Pipeline's second amended complaint cures these defects. First, the claims in Counts II and III for unjust enrichment and *quantum meruit* do not assert any legal or factual relevancy of the subcontract between Earth Pipeline and Welded nor do they incorporate by reference any previous allegations with respect to the existence of the subcontract. Moreover, the claims are supported by independent facts evidencing the extra-contractual nature of the additional work and describing in detail each of the four (4) items of work and how the contractor, Welded, disputes contractual liability for the additional work or the invoices including such work. Accepting as true the allegations in the Earth Pipeline' second amended complaint, Earth Pipeline asserts causes of action for unjust enrichment and *quantum meruit* upon which it is entitled to relief as a matter of law.

3. The change order provisions of the subcontracts between Earth Pipeline and Welded and Earth Pipeline's submission of invoices to Welded containing the monies due for the additional work due do not waive or defeat Earth Pipeline's claims for unjust enrichment and *quantum meruit* against CGT. The change order provisions found in the terms and conditions of the subcontracts between Welded and EPS are typical of the modern-day construction contracts and they provide a procedure for the ordering, documenting and approval or disapproval of changes to the original scope of work of the subcontracts. However, as here, change order clauses don't

preclude equitable claims against the owner for additional work when the change order process fails, is willfully ignored or doesn't apply to the changed work or additional work at issue. Unless the fact finder ultimately determines that the additional work was incorporated into the scope of the subcontract and CGT paid for such work, the terms of the Subcontract do not control. Moreover, Welded denies that it authorized the additional work and admits that the additional work was not performed as part of Welded's work for CGT or in conjunction with the subcontract between Earth Pipeline and Welded. In addition, CGT is not a third-party beneficiary to the subcontract between Welded and Earth Pipeline and has no standing to assert any contractual defenses to payment to Earth Pipeline.

Also, Earth Pipeline's decision to attempt to seek payment for its additional work through the invoicing process on the project was typical and reasonable in light of its status as a subcontractor on the project, is procedural only and does not create nor eliminate liability under the law; nor is it an admission that the work that Earth Pipeline performed for CGT was included in Earth Pipeline' original scope of its subcontract with Welded. In no way does the law prohibit a subcontractor from later seeking such monies directly from the party who ordered the work and received the benefit thereof without having paid for it. More importantly, Welded disputes the invoices, a fact which supports EPS' alternative equitable theories of liability against CGT.

III. COUNTER STATEMENT OF FACTS

Pursuant to Del. Bankr. L.R. 7007-2(b)(i)(E), Earth Pipeline incorporates by reference only those facts stated by CGT in its motion that do not conflict with or alter the facts as pled in Earth Pipeline' second amended complaint or in this counter statement of facts, *infra*. All conflicting or altered facts set forth by CGT in its motions are specifically denied. Furthermore, all presumptions stated by CGT in its statement of facts are also denied. Finally, all of CGT's characterizations of

the contents of the subcontract between Welded and Earth Pipeline, Earth Pipeline' Notices of Mechanic's Lien, Complaints to Enforce Mechanic's Liens, Proof of Claim, and all other pleadings in this matter are denied as those are documents that speak for themselves. Moreover, CGT's specific allegations that the change order and related provisions of the subcontract prohibit Earth Pipeline from asserting alternative claims for unjust enrichment and *quantum meruit* against CGT are legal conclusions which are wholly denied. The subcontract entered into between Welded and Earth Pipeline is a written agreement. CGT is not a party to the subcontract and had no role in its negotiation and execution. CGT's attempt to interpret the language of the subcontract or Earth Pipeline' and/or Welded's intent behind the use of language is improper, impossible and a legal conclusion that can be ignored by this Court on a motion to dismiss.

By way of counter statement of facts, CGT is the owner of the property and the project that is the subject of this matter. Pl.'s Second Am. Comp. ¶38; CGT's First Am. Ans. and Cntrclm. ¶52, D.I. 10. The project consisted of the construction of a pipeline and associated work performed and materials supplied in conjunction therewith. Pl.'s Second Am. Comp. ¶38. Earth Pipeline performed certain scopes of work on the project in accordance with two (2) subcontracts entered into with Welded. Id. at ¶¶8, 9. On or about June 22, 2018, very close to the completion of the project, Welded was directed by CGT to terminate Earth Pipeline from the project. Welded Adv. Comp. ¶23, Adv. Proc. No. 20-50612, D.I. 1; Pl.'s Second Am. Comp. ¶14. Earth Pipeline disputed the termination, but still demobilized from the project. Pl.'s Second Am. Comp. ¶15. Prior to such termination, Earth Pipeline performed certain mechanical clearing and hand felling work, the delivery of certain materials, and associated work by Earth Pipeline which CGT authorized and/or ordered directly to Earth Pipeline through its Project representative, Welded, which was separate from the scopes of work that Earth Pipeline performed for Welded under their

direct contracts, and for which Earth Pipeline expected to be paid and CGT expected to pay Earth Pipeline. Id. at ¶39. Such certain labor and material were furnished by Earth Pipeline with expectation of payment and not as a volunteer. Id. ¶63. The additional work was not authorized by Welded. Welded Ans. to Pl.'s Second Am. Comp. ¶12. The additional work was not performed as part of Welded's work for CGT. Id. at ¶11. The additional work was not performed in conjunction with the subcontract between Earth Pipeline and Welded. Id. at ¶16. Despite Earth Pipeline' performance of this work and the furnishing of these materials to the Property, Project and/or pipeline, and CGT's enjoyment and use of same, Earth Pipeline has still not been paid for such work; nor has CGT paid anyone else for this work. Pl.'s Second Am. Comp. ¶40. The first item of work that Earth Pipeline performed directly for the benefit of CGT occurred during the time period of May 31 through June 2 of 2018 after Earth Pipeline was directed by CGT, through the communication of Mett Carroll of Welded on May 26, 2018, who indicated to Earth Pipeline that the work was ordered by CGT, to haul eleven hundred and sixty-six (1,166) feet of timber logs from a certain part of the Property. The value of such work was $69,960.00 ($60 per foot x 1,166 feet) and such work was not part of any of scope of work included in the contracts between Welded and Earth Pipeline. Id. at ¶42. Second, on May 14, 2018, for the purpose of a cultural survey benefiting CGT, CGT changed the usage designation of Access Road 7.8 to "Foot Traffic Only" which prevented Earth Pipeline from being able to utilize the road for the transportation of its equipment, fuel, water, trucks and materials needed to perform certain mechanical clearing and PM burning work for three (3) days (May 15-17, 2018). The cost to Earth Pipeline in lost production of manpower and equipment rental for this idle stand-by time was $223,938.12. Id. at ¶43. Third, just prior to CGT's ordering of termination of Earth Pipeline from the Project, from June 15 through June 18 of 2018, CGT ordered a safety stand-down and Earth Pipeline was

directed by CGT, through the communication of Mett Carroll of Welded, to place its equipment and laborers on stand-by so that the crews would be ready to return to work once the safety stand down was lifted. The cost to Earth Pipeline in lost production of manpower and equipment rental for this idle stand down was $597,396.00. Id. at ¶44. Finally, due to CGT's change in the steep slope plan for the Project, Earth Pipeline utilized additional manpower and equipment to perform certain mechanical clearing and hand felling work for CGT that was separate and independent from the work that was included in Earth Pipeline' contracts with Welded on the Project. Id. at ¶45. More specifically, this additional manpower and equipment was necessary to meet the stringent work requirements related to the revised steep slope plan for the Project which was not included in the construction specifications for the Project provided to Earth Pipeline prior to Earth Pipeline' initial engagement on the project , but rather which was provided to Earth Pipeline subsequent to the start of its work on the Project and, after undergoing several revisions, was finally titled "Steep Slope Work Plan MX00981-WEL-CO-PLN-0002" (the "Steep Slope Plan"). Earth Pipeline performed this work in direct response to CGT's directives under the new Steep Slope Plan, which was provided to Earth Pipeline through CGT's Project representative, Welded. Welded Adv. Comp. ¶10; Pl.'s Second Am. Comp. ¶46. The total value of this work was $2,250,627.00. Pl.'s Second Am. Comp. ¶46. Earth Pipeline invoiced CGT for all four (4) of these items of extra work through CGT's Project representative, Welded. Id. at ¶47. Welded disputes the invoices. Welded Adv. Comp. ¶37. Earth Pipeline had a special relationship with CGT. CGT's First Amn. Ans. and Cntrclm. ¶52. As the owner of the project and the property, CGT continuously observed the benefits of Earth Pipeline' work on the Project. Pl.'s Second Am. Comp. ¶53. CGT accepted all of this work performed and completed by Earth Pipeline on the

Project. Id. at ¶54. The reasonable value of the benefits conferred upon CGT by reason of this work is equal to or greater than $3,141,921.12. Id. at ¶58.

III. ARGUMENT

A. Legal standard of review on a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6)

CGT's motion to dismiss Earth Pipeline's second amended complaint is purportedly made under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failing to state a claim. Motions to dismiss for failure to state a claim are "viewed with disfavor, and are rarely granted." Lormand v. US Unwired, Inc., 565 F.3d 228, 232 (5th Cir. 2009) (internal quotation omitted). Under Federal Rule of Civil Procedure 12(b)(6), a court may only dismiss a case for failure to state a claim where "accepting all allegations in [the] Amended Complaint as true and viewing them in the light most favorable to the Plaintiff[], the Plaintiff[] [is] not entitled to relief as a matter of law." In re Fruehauf Trailer Corp., 250 B.R. 168, 183 (Bankr. D. Del. 2000). Moreover, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). Rather, while accepting all facts alleged in the complaint as true, the court must not dismiss a complaint where "under any reasonable reading of the complaint, the plaintiff may be entitled to relief." See In re Lipitor Antitrust Litig., 868 F.3d 231, 249 (3d Cir. 2017) (quoting Bronowicz v. Allegheny Cnty., 804 F.3d 338, 344 (3d Cir. 2015) (internal citations omitted)).

B. Earth Pipeline's second amended complaint states well-pled alternative claims for unjust enrichment and *quantum meruit* against CGT in Counts II and III that are both proper and permitted under the procedural rules and law of West Virginia and the Federal Rules of Civil Procedure, and, in determining the adequacy of the alternative claims under a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6), the Court must ignore Earth Pipeline's inconsistent allegations in its previous pleadings

Earth Pipeline's second amended complaint[5] cures the defects referenced in Judge Sontchi's December 1, 2020 Opinion and, as a result, states alternative claims of unjust enrichment and *quantum meruit* against CGT in Counts II and III that are both proper and permitted under West Virginia law and the rules of this Court. Both the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure allow a plaintiff to plead alternative theories of liability in its complaint that are inconsistent with one another. In determining the adequacy of such alternative claims at the pleading stage, plaintiff's allegations in previous pleadings that may be inconsistent with such alternative theories shall not be held against the plaintiff.

1. Both the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure allow a plaintiff to plead alternative theories of liability in its complaint that are inconsistent with one another

The Federal Rules of Civil Procedure and the West Virginia Rules of Civil Procedure allow for the pleading of alternative statements of a claim in a complaint that are inconsistent with one another.

West Virginia's Rule of Civil Procedure 8(e) states:

> (e) Pleading to Be Concise and Direct; Consistency.
> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.
> (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.

[5] CGT insincerely leads the Court to believe that Earth Pipeline has now substantively amended its complaint four (4) times. As discussed in Earth Pipeline's response to CGT's motion to dismiss Earth Pipeline's second amended complaint, *supra*, Earth Pipeline's second amended complaint, which is the pleading that is the subject of this motion, is only the first amendment to Counts II and III of its complaint.

> When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

W.V.R.C.P. 8(e). Subsection 8(f) also states that "[a]ll pleadings shall be so construed as to do substantial justice." WV R.C.P. 8(f). This language of Subsection 8(f) is identical to the language in subsection 8(e) of the Federal Rules of Civil Procedure. The federal courts, including this Court in the In re Integrated Health Services, Inc.[6] case, have interpreted this language to allow for alternative pleading under the federal rules as well especially where the state rule of civil procedure expressly allows for it. *See e.g.* ThunderWave, Inc. v. Carnival Corp., 954 F.Supp. 1562 (S.D.Fla.1997) (when inconsistent or alternative theories are available under substantive state law, inconsistent or alternative pleading is permitted under federal rules); In re Integrated Health Services, Inc. at 463 (party was not precluded from seeking damages for breach of contract simply because it also was asserting a claim for rescission; party was free to argue in the alternative). In addition, the fact a party does not title its alternative claims as "alternative claims" doesn't affect their status as alternative claims. TSC Research, LLC v. Bayer Chemicals Corp., 552 F.Supp.2d 534 (M.D.N.C.2008)(plaintiff asserting claims for breach of contract and *quantum meruit* was not required to use any specific words to indicate that it was pleading claim in the alternative). Accordingly, Earth Pipeline is permitted to plead alternative theories of liability against CGT under both the Federal Rules of Civil Procedure and the West Virginia Rules of Civil Procedure.

In addition to Earth Pipeline's alternative equitable claims of unjust enrichment and *quantum meruit* against CGT being permitted under the rules, such claims are also proper under

[6] In re Integrated Health Services, Inc., 344 B.R. 262 (Bkrtcy.D.Del.2006)

West Virginia law, and are commonly pled alternative claims in cases, such as this one, where genuine issues of fact exist as to whether or not services were performed by a subcontractor as part of a contract for one party or whether the services were performed outside of any contractual agreement and for direct the benefit of a certain other party instead. *See infra* Span Construction & Engineering, Inc. v. Uwharrie Builders, LLC, 2019 WL 1574233 (N.D. W. Va. 2019); U.S. ex rel. Asphalt Contractors, & Site Work, Inc. v. KAR Contracting, LLC, 2015 WL 3651279 (S.D. W. Va. 2015); U.S. ex rel. Master Masonry, LLC v. Travelers Casualty and Surety Co., 2016 WL 7156587 (N. D. W. Va. 2016).

Federal cases have also allowed such claims. In Manicini Enterprises, Inc. v. American Exp. Co., 236 F.R.D. 695 (S.D.Fla.2006), the Plaintiff asserted a claim for breach of express contract, and the U.S. District Court for the Southern District of Florida held that the plaintiff was not precluded from also pleading claims of *quantum meruit* and unjust enrichment as the plaintiff could plead inconsistent or alternative theories of relief. Id. The court noted that the Federal Rules of Civil Procedure allow pleading in the alternative and that the plaintiff need not elect which remedy it seeks before trial unless the failure to elect would be prejudicial to the defendant. Id. By way of further example, the U.S. District Court for the Southern District of New York held that the fact that a plaintiff could not recover on both breach of contract and unjust enrichment claims under New York law did not preclude him from pleading both. If the parties' agreement regarding development of a website amounted to a contract, then remedy would be for breach, but if the agreement did not rise to the level of a contract, then remedy would be for unjust enrichment. Astroworks, Inc. v. Astroexhibit, Inc., 257 F.Supp.2d 609 (S.D.N.Y.2003).

Accordingly, under West Virginia law and the rules of this Court, Earth Pipeline's claims in its second amended complaint for unjust enrichment and *quantum meruit* against CGT are proper and permitted alternative claims.

2. In determining the adequacy of the alternative claims under a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6), Earth Pipeline's allegations in its previous pleadings must be ignored by the Court

CGT argues in its motion to dismiss that certain assertions made by Earth Pipeline in previous pleadings[7] with respect to the additional work that Earth Pipeline performed for CGT and for which Earth Pipeline is claiming damages from CGT are inconsistent with the assertions made by Earth Pipeline in its second amended complaint in support of such claims, and therefore Earth Pipeline can't assert the alterative claims because the allegations are inconsistent. CGT's argument however actually states the exact opposite to what the general rule under West Virginia and Federal law actually requires. Both West Virginia law and the Federal courts mandate that any prior inconsistent statements that would deem the alternative theories insufficient be ignored, and that the inconsistent allegations shall not be used against that party. *See* Arnold Agency v. West Virginia Lottery Com'n, 526 S.E.2d 814 (1999) (while discussing West Virginia Rule of Civil Procedure 8(e)(2) states that a factual assertion pertaining to one claim set forth in a pleading will not be construed as an admission with respect to an alternative or inconsistent claim in the same pleading.); *see also* Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F.Supp. 49 (S.D.Ohio 1986) (utilities that claimed breach of contract by firm which provided design and architectural services for nuclear power plant were not barred from seeking rescission

[7] CGT also points to language contained in exhibits to Earth Pipeline's pleadings. While the Court may also consider language included in the exhibits to a complaint in its analysis of a motion to dismiss for failure to state a claim, the plaintiff should have an opportunity to contradict any contradictions: "That is not to say that a plaintiff cannot contradict the apparent meaning or significance of a document or other exhibit." Bogie v. Rosenberg, 705 F.3d 603, 609 (7th Cir. 2013). Accordingly, the analysis of this issue does not change whether the prior inconsistent statement is an allegation in the pleading or is included in the exhibit attached to the pleading.

by their recognition of existence of contract, as a party is allowed to plead inconsistent theories of recovery); Seiden Associates, Inc. v. ANC Holdings, Inc., 754 F.Supp. 37 (S.D.N.Y.1991) (pleading could allege contradictory claims for breach of contract and for recovery under theories of *quantum meruit* and unjust enrichment).

The purpose of this general rule is clear. A plaintiff does not have all of the facts at its disposal at the time of pleading. A plaintiff may have "information and belief" about a certain fact such that it can assert a fact to be true in support of its claim, but if, after the case proceeds and discovery is conducted, it is later determined by the fact finder that the plaintiff's assertion of that fact was incorrect, a plaintiff must have the right to pursue its case under an alternative legal theory that is supported by the actual facts as found by the fact finder. That is how alternative pleadings work. Their purpose is to preserve the Plaintiff's legal theories so that the Plaintiff does not have to pick and choose its theories before having all of the evidence and having a finding on all of the disputed facts.

Thus, as Earth Pipeline did in its second amended complaint, Earth Pipeline is entitled to allege, on the one hand, that the monies owed to Earth Pipeline for the additional work that it performed on the project directly for the benefit of GCT should be paid for as part of Earth Pipeline's mechanics' lien claim because Welded should have assured that such additional work got processed through the change order provisions of the subcontract between Welded and Earth Pipeline, and, on the other hand and in the alternative, that the monies for the additional work performed by Earth Pipeline should be paid by CGT under the theories of unjust enrichment and *quantum meruit* because liability for the additional work under the subcontract was disputed by Welded, such additional work was performed for the fulfillment of a direct obligation to CGT, and such additional work was never paid for by CGT. As such, Earth Pipeline' second amended

complaint contains alternate legal theories that hinge on what the finder of fact ultimately finds with respect to the additional work.

In attempt to get around the general rule, CGT argues that Earth Pipeline's allegations in its previous pleadings regarding the additional work aren't just inconsistent allegations but rather judicial admissions and/or admissions incorporated by reference which forever preclude Earth Pipeline from stating alternative claims for unjust enrichment and *quantum meruit* against that CGT because Earth Pipeline cannot plead facts inconsistent with the admissions. This argument fails as a matter of law because a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case. Stuart Moldaw Trust v. XE L.I.F.E., LLC, 642 F.Supp.2d 226, affirmed 374 Fed.Appx. 78, 2010 WL 915866 (S.D.N.Y.2009); *see also* Henry v. Daytop Village, Inc., 42 F.3d 89 (C.A.2 (N.Y.) 1994) (court could not construe employment discrimination plaintiff's claim as admission against another alternative or inconsistent claim).

Materials outside of the pleadings generally are not to be considered when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedures, as made applicable to adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure. *See,* Lee v. City of Los Angeles*,* 250 F.3d 668, 688 (9th Cir. 2001). "When 'matters outside the pleadings are presented to and not excluded by the court,' the 12(b)(6) motion converts into a motion for summary judgment under Rule 56, Fed. R. Civ. P. 12(d). Then, both parties must have the opportunity 'to present all the material that is pertinent to the Motion.'" Khoja v. Orexigen Therapeutics, 899 F.3d 988 (9th Cir. 2018), *quoting,* Lee*,* 250 F.3d at 688. There are two narrowly construed exceptions to this rule: the incorporation-by-reference doctrine and judicial notice under Federal Rule of Evidence 201. Neither of these exceptions apply in the instant case.

As the Ninth Circuit has noted, "judicial notice and incorporation-by-reference do have roles to play at the pleading stage. The overuse and improper application of the judicial notice and the incorporation-by-reference doctrine, however, can lead to unintended and harmful results….[T]he unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." Khoja, 899 F.3d at 998. "If defendants are permitted to present their own version of the facts at the pleading stage – and … courts accept those facts as uncontroverted and true – to becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently 'plausible' claim for relief." Id.

This Court may take judicial notice of facts not subject to reasonable dispute that are generally known or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)-(2). Not all pleadings constitute judicial admissions of which a court may take judicial notice at the pleading stage. Pillars v. General Motors LLC (In re: Motors Liquidation Company), 957 F.3d 375 (2nd Cir. 2019) (reversing Bankruptcy Court's determination that a statement in a pleading constituted a judicial admission). In order for a statement in a pleading to constitute a judicial admission of which this Court may take judicial notice, this Court "should consider whether the proposed admission was an admission of fact and the extent to which it was 'unequivocal, deliberate, clear, or unambiguous.'" Pillars, 957 F.3d at 360 (citations omitted). The allegations on which CGT seeks to have this Court take judicial notice are allegations pled in the alternative, and are not "unequivocal, deliberate, clear, or unambiguous."

Notwithstanding the clarity of the law on this issue, CGT's argument will still fail even if it is persuasive because CGT and Welded have made their own prior inconsistent allegations

and/or admissions that will in fact support Earth Pipeline's alternative claims for unjust enrichment and *quantum meruit* against CGT. For example, Welded disputes the invoices. Welded Adv. Comp. ¶37. Earth Pipeline had a special relationship with CGT. CGT's First Am. Ans. and Cntrclm. ¶52. The additional work was not authorized by Welded. Welded Ans. to Pl.'s Second Am. Comp. ¶12. The additional work was not performed as part of Welded's work for CGT. Id. at ¶11. The additional work was not performed in conjunction with the subcontract between Earth Pipeline and Welded. Id. at ¶16. Should the Court decide in favor of CGT on this argument, then the Court must find that those inconsistent statements in fact support Earth Pipeline's unjust enrichment and *quantum meruit* claims.

Accordingly, viewing all assertions of fact by Earth Pipeline as true and with the understanding that Earth Pipeline' alternative claims for unjust enrichment and *quantum meruit* against CGT in Counts II and III of its second amended complaint shall not be dismissed based on the fact that Earth Pipeline has made previous allegations that are inconsistent, this Court must find that Earth Pipeline is permitted to allege, and has sufficiently alleged, proper alternative *in personam* equitable causes of action against CGT in Counts II and III of its second amended complaint. Moreover, at this early stage in the litigation before additional discovery and fact-finding has occurred, there is a substantial expectation that such discovery will lead to additional facts supporting Earth Pipeline's various claims against CGT one way or another. For these reasons and those that follow, CGT's motion to dismiss should be denied.

C. Earth Pipeline's claims for unjust enrichment and *quantum meruit* against CGT in Counts II and III of Earth Pipeline' second amended complaint should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because they do not allege the existence of the subcontract but they do aver independent facts which demonstrate that the additional work at issue is disputed by the contractor and was performed directly for the benefit of the owner who has not paid for such work

In his December 1, 2020 Opinion, Judge Sontchi pointed to two (2) defects in Earth Pipeline's first amended complaint. December 1, 2020 Opinion at p. 21. First, Judge Sontchi noted that "[b]ecause Earth repeats and realleges the existence of the Subcontract in its Claims in Equity, neither unjust enrichment nor quantum meruit are independently supported by the facts." Id. Second, Judge Sontchi pointed out that "Earth failed, in its Amended Complaint to mention that any of Earth's work was disputed as extra-contractual." Id.

Earth Pipeline' second amended complaint cures these defects. First, the claims in Counts II and III for unjust enrichment and *quantum meruit* do not assert any legal or factual relevancy of the subcontract between Earth Pipeline and Welded nor do they incorporate by reference any previous allegations with respect to the existence of the subcontract. Moreover, the claims are supported by independent facts evidencing the extra-contractual nature of the additional work and describing in detail each of the four (4) items of work and how the contractor, Welded, disputes contractual liability for the additional work or the invoices including such work. Pl. Second Amen. Comp. ¶¶39, 42-47, 66-67. Finally, the damages claimed in Counts II and III do not include the retainage monies that are owed to Earth Pipeline by Welded under the subcontract but which are included in Count I of Earth Pipeline's second amended complaint. Pl. Second Amen. Comp. ¶¶58, 67.

The elements of an unjust enrichment claim under West Virginia law are as follows:

1. A benefit is conferred upon the defendant;

2. An appreciation or knowledge by the defendant of such benefit; and

3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. CSS, Inc. v. Herrington, 306 F. Supp. 3d 857, 882 (S.D. W. Va. 2018).[8] The benefits that may be subject to an unjust enrichment action include services or interests in personal property that are rendered to the defendant. Id.

Accepting as true the allegations in Earth Pipeline's second amended complaint, it is readily apparent that Earth Pipeline pleads cognizable alternative causes of action against CGT sounding in unjust enrichment and *quantum meruit*. As owner of the project and the property, the construction of the pipeline and the associated work performed and materials supplied in conjunction therewith on the property, including the mechanical clearing and hand felling work that is the subject of Earth Pipeline's claims in Counts II and III of its second amended complaint, resulted in an improvement to the property and, therefore, an increase to the value of the Property, which is a direct benefit to CGT. Pl. Second Am. Comp. ¶38. CGT never paid Earth Pipeline, Welded or any other entity for any of this certain mechanical clearing and hand felling work despite CGT having knowledge of the benefit of this work and accepting and appreciating the benefit of this work. Pl. Second Am. Comp. ¶¶40, 54. Finally, CGT requested that Earth Pipeline furnish or provide all of the certain mechanical clearing and hand felling work for incorporation into the Property, and into the construction of the Project and/or the pipeline with the understanding that Earth Pipeline expected payment for such work and materials by CGT. Pl. Second Am. Comp. ¶48.

[8] West Virginia has never defined the legal distinction, if any, among claims for unjust enrichment, quantum meruit, and breach of implied contract. All three causes of action sound in equity, however. Rich v. Simoni, No. 12-12, 2014 WL 4978442, at *10 (N.D. W. Va. 2014).

Given that CGT received the benefit of these improvements, it is manifestly inequitable that it receive the value of Earth Pipeline' work ($3,141,921.12) without compensating Earth Pipeline for the goods and services that Earth Pipeline rendered in order for CGT to construct its pipeline. Pl. Second Am. Comp. ¶56. Accordingly, Earth Pipeline properly and adequately asserts causes of action sounding in unjust enrichment and *quantum meruit* in Counts II and III of the Earth Pipeline's second amended complaint.

CGT nevertheless argues that the unjust enrichment and *quantum meruit* claims should be dismissed for failing to state a claim. CGT grounds its argument on the rationale that similar claims were dismissed in a handful of unreported decisions relating to other subcontractors retained by Welded on this project. A review of the decisions relied upon by CGT demonstrates that its contentions are meritless. The circumstances under which other subcontractors' claims for unjust enrichment or *quantum meruit* were dismissed do not dictate that Earth Pipeline's well founded causes of action deserve a similar fate.

The first unpublished decision relied upon by CGT is HERC Services, LLC v. Columbia Gas Transmission, LLC, No. 5:19-CV-173, (N.D. W. Va. June 24, 2012). Def.'s Mot. to Dismiss, Attachment. It is notable that the District Court's dismissal was without prejudice and not because the plaintiff asserted an unviable claim but because of a defect in its complaint. The District Court summarized its ruling with respect to the unjust enrichment claim as follows:

> Under the law of unjust enrichment, if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value.
>
> The flaw in plaintiff's complaint is the lack of an allegation that the defendant has not paid for the benefit that it received. Obviously, if Columbia Gas has paid its contractor in full for the benefits that it received, then it has not been unjustly enriched.

Id. at 5. The District Court gave the plaintiff in HERC Services leave to amend its complaint to make the requisite allegation.

Earth Pipeline' second amended complaint in the instant matter does not suffer from the deficiency that led the District Court to sustain CGT's motion in HERC Services. Earth Pipeline alleges that CGT has not paid Earth Pipeline nor any other party for the value of the goods and services that were furnished directly to CGT by Earth Pipeline in connection with the construction of the pipeline. Pl. Second Am. Comp. ¶¶50, 64-65. Accordingly, the decision in HERC Services does not support dismissing the unjust enrichment and *quantum meruit* claims in Earth Pipeline's second amended complaint.

The second unreported decision that CGT relies upon is Schmid Pipeline Construction, Inc. v. Columbia Gas Transmission, LLC, No. 19-257, (N.D. W. Va. 2019). Def.'s Mot. to Dismiss, Attachment. In that case, the District Court determined that the plaintiff's claims are based in contract "according to the Complaint's own allegations and exhibits." Id. at 6. The allegations in the complaint at issue in Schmid Pipeline Construction are not the allegations at issue in this lawsuit nor are the allegations in Counts II and III of Earth Pipeline's second amended complaint in any way "based in contract". Earth Pipeline' causes of action for unjust enrichment and *quantum meruit* are properly founded under West Virginia law as equity claims that may be raised irrespective of the subcontracts between Earth Pipeline and Welded.

CGT's contention that the existence of the Earth Pipeline-Welded subcontracts renders it impossible for Earth Pipeline to raise the unjust enrichment and *quantum meruit* claims is not a correct statement of West Virginia law. The District Court for the Southern District of West Virginia held, in a decision no doubt familiar to CGT, that "while no implied contract may conflict with terms of an express contract, where the express contract between the parties does not apply

or subsequent conduct not covered by the express contract may support an implied agreement, unjust enrichment may be asserted." Stand Energy Corp. v. Columbia Gas Transmission Corp., 373 F. Supp. 2d 631, 644 (S.D. W. Va. 2005). Earth Pipeline's unjust enrichment and *quantum meruit* claims are, by CGT's own admission, founded upon work that is outside of the original scope of the subcontract. CGT's First Amended Answer and Counterclaim ¶¶ 27-28, 52.

Courts in West Virginia have repeatedly addressed this exact issue in the context of commercial construction projects. In Span Construction & Engineering, Inc. v. Uwharrie Builders, LLC, No. 18-178, 2019 WL 1574233, at *2 (N.D. W. Va. 2019), the Northern District of West Virginia denied the project owner's motion to dismiss a subcontractor's unjust enrichment claim because issues of fact existed as to whether the owner was unjustly enriched by the work performed by the subcontractor that was outside scope of its subcontract. Id. at *3. More specifically, Span Construction & Engineering, Inc. ("Span") entered into a subcontract with a general contractor to provide work related to the construction of a production facility for Proctor and Gamble Manufacturing Co. ("P&G"), the owner of the construction project. Id. at *1. Span alleged that it had invoiced the general contractor for all of its work, including invoices related to "additional work performed by Span and delays endured by Span as part of the Project." Id. at *1-3. However, Span alleged the general contractor did not pay Span for all invoices submitted, prompting Span to bring an action against the general contractor and the owner for breach of contract and unjust enrichment, respectively. Id. at *3. The general contractor and P&G contended that full payment of all sums under the subcontract were tendered to the subcontract. The general contractor and P&G moved to dismiss Span's unjust enrichment action, arguing that Span could not bring such a claim because there was a subcontract between Span and the general contractor. The District Court declined to dismiss the unjust enrichment claim, holding:

> It appears that the terms of the contract, and whether payment has been tendered thereunder, is in dispute. Accordingly, while [subcontractor] cannot recover under both breach of contract and unjust enrichment, [the subcontractor] is permitted to plead in the alternative.

Id. at *2. In fact, the District Court explicitly determined that where Span sufficiently alleged that P&G was unjustly enriched, an issue of fact existed that could not be resolved at the pleading stage. Id. at *3. Span is directly applicable to the instant case as it presents precisely the same circumstance present in the instant matter. Earth Pipeline performed additional work directly for CGT that was not within the scope of its subcontract with Welded. Earth Pipeline submitted invoices to Welded that contained, *inter alia*, the amounts due for the additional work that Earth Pipeline performed directly for CGT, Welded disputes those invoices, and Earth Pipeline alleges that CGT is unjustly enriched by receiving the benefit of that work but failing to make payment therefor. This is a disputed issue of fact that this Court is not capable of resolving with the record before it.

West Virginia law contemplates that a subcontractor may establish claims for *quantum meruit* or unjust enrichment where there is a dispute between the subcontractor, the general contractor and owner with respect to whether the express contract governs the dispute. All of Earth Pipeline's claims in Counts II and III of its second amended complaint are related to the additional work that it was required to perform that is outside of the original scope of the subcontracts. In U.S. ex rel. Asphalt Contractors, & Site Work, Inc. v. KAR Contracting, LLC, No. 14-27451, 2015 WL 3651279 (S.D. W. Va. 2015), the Court held that "Plaintiff may not recover for both breach of contract and *quantum meruit* for the same exact work. Plaintiff could, however, recover for *quantum meruit* instead of breach of contract in the event that there is no express contract covering the extra services and materials." Id. at *4 (S.D. W. Va. June 11, 2015). Similarly, where the prime contractor denied that the work performed by the subcontractor was

work performed under the subcontract, then the subcontractor's work is done in the absence of an agreement, "which is precisely the circumstances where quantum meruit applies." U.S. ex rel. Master Masonry, LLC v. Travelers Casualty and Surety Co., No. 16-50, 2016 WL 7156587, at *2 (N. D. W. Va. 2016). By way of further example, *see* Lemartec Corp. v. Entsorga West Virginia, LLC, No. 3-22, 2018 WL 9988269, at *5 (N.D. W. Va. Sep. 14, 2018) (denying motion for summary judgment by owner on subcontractor's claim for unjust enrichment/*quantum meruit* as alternative count to enforcement of mechanics' lien claim).

Many other jurisdictions have also recognized the availability of an unjust enrichment claim to a subcontractor (or other entity) for the recovery on an equitable basis from a party, such as a construction project owner, with whom they do not have an express contract, but for whom they provided services for which the other party benefitted but did not pay fair value. *See* Intelect Corp. v. Cellco P'ship GP, 160 F. Supp. 3d 157, 191-92 (D.D.C. 2016) ("[o]ther courts outside of this jurisdiction have similarly held, in comparable circumstances [of a subcontractor attempting to recover under unjust enrichment theory against owner], that a party may recover in unjust enrichment against the owner of a project with whom they did not directly contract."); *see also* Midcoast Aviation, Inc. v. Gen. Elec. Credit Corp., 907 F.2d 732, 736-41 (7th Cir. 1990) (affirming under Illinois law district court's denial of judgment notwithstanding jury verdict finding in favor of aviation refurbishment subcontractor's claim of unjust enrichment against plane owner); Commerce P'Ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So. 2d 383, 387-88 (Fla. Dist. Ct. App. 1997) (holding subcontractor could recover under unjust enrichment theory against project owner).

Even the Restatement (Third) of Restitution and Unjust Enrichment in discussing claims for uncompensated performance to a third person expressly illustrates how the common scenario

at issue in the matter before this Court specifically meets the requirements of an unjust enrichment claim. Illus. No. 2, Restatement (Third) of Restitution and Unjust Enrichment § 25 (2011). The Restatement points out that the second illustration meets the requirements of an unjust enrichment claims because the owner received a benefit from the subcontractor's work without paying for it.

> Illustrations:
>
> 1. Owner hires Builder to renovate an office building. Builder hires Subcontractor to do the necessary painting. Owner's representatives at the site approve all aspects of the work as it is performed, including the labor and materials supplied by Subcontractor. Builder defaults before the project is completed; Owner hires another firm to complete the project. Builder files for bankruptcy without paying Subcontractor. Subcontractor seeks to recover from Owner the reasonable value of its labor and materials. Owner can show that its aggregate payments to Builder and the other firms with which it dealt following Builder's default equal or exceed the original contract price for the work performed. Subcontractor has no claim against Owner under this section.
>
> 2. Same facts as Illustration 1, except that Owner's original contract with Builder failed to cover significant aspects of the project as ultimately completed at Owner's direction. A direct comparison of Owner's overall expenditures with the original contract price is therefore inconclusive. Reviewing the evolution of the work and the sequence of Owner's payments, the court finds as a fact that Owner has obtained the benefit of Subcontractor's work without paying anyone for it. Subcontractor has a claim against Owner under this section to recover the reasonable value of its labor and materials or the price fixed by its contract with Builder, whichever is less.

Id. at *2.

Accordingly, Earth Pipeline is entitled to allege the cognizable alternative causes of action sounding in unjust enrichment and *quantum meruit* against CGT, as a matter of law. These principles are well established under West Virginia law, including reported decisions in which CGT was a party, and other jurisdictions.

As a final point, the Court can also consider the financial weakness of Welded as an entity now in bankruptcy as an additional factor favoring the allowance of Earth Pipeline' alternative claims for unjust enrichment and *quantum meruit* against CGT because an otherwise viable legal

remedy against one party may be inadequate where the financial weakness of that party would render a judgment uncollectible. *See e.g.,* Deanna Constr. Co., Inc. v. Sarasota Entertainment Corp., 563 So. 2d 150 (Fla. 2d DCA 1990). In the matter before the Court, the availability of the alternative equitable claims are especially critical to Earth Pipeline because of Welded's financial weakness as an entity in bankruptcy. Any judgment that Earth Pipeline is awarded against Welded will be substantially diminished due to Welded's financial status and Earth Pipeline will not receive the full value of the benefit it provided to CGT and for which CGT never paid. Having set forth cognizable alternative claims for unjust enrichment and *quantum meruit* against CGT, it is therefore imperative that the Court overrule CGT's motion to dismiss such claims.

D. The change order provisions of the subcontracts between Earth Pipeline and Welded and Earth Pipeline's submission of invoices to Welded containing the monies due for the additional work due do not waive or defeat Earth Pipeline's claims for unjust enrichment and *quantum meruit* against CGT

As a last gasp, CGT argues that the change order provisions of the subcontracts between Welded and Earth Pipeline, and the submission of invoices by Earth Pipeline to Welded for the value of the additional work, operate to waive or defeat Earth Pipeline's right to plead alternative claims for unjust enrichment and *quantum meruit* against CGT. The fact that the subcontracts between Earth Pipeline and Welded contain change order procedures and that Earth Pipeline submitted invoices to Welded that included the monies due for the additional work that Earth Pipeline performed directly for CGT does not change the adequacy of Earth Pipeline's claims for unjust enrichment and *quantum meruit* against CGT. Although CGT would have the Court believe that these facts somehow make this commercial construction project unique, or at the very least, different from the cases that have allowed such alternative claims to move forward, the reality is there is nothing unique about these particular facts.

The change order provisions found in the terms and conditions of the subcontracts are typical of the modern-day construction contracts and they provide a procedure for the ordering, documenting and approval or disapproval of changes to the original scope of work of the subcontracts. Under such clauses, a subcontractor can request that changes ordered by the contractor to the scope of work of the original subcontracts be documented and approved through the change order process that is part of the subcontracts. However, in the typical scenario, the subcontractor is expected to perform the changed work immediately after its ordered with promises from the contractor that the changed work will later be approved through the change order process, or a subcontractor performs changed work or additional work directed by the owner and then tries to obtain payment for that work through the change order process in the subcontract. Often times that change order process fails, is wrongfully ignored by the contractor and/or the owner, or the contractor and/or owner disputes the change order, and the subcontractor is left with no redress under the subcontract to receive payment for the changed and/or additional work.

CGT's attempt to interpret the language in the change order clauses of the subcontracts as somehow precluding or waiving Earth Pipeline' equitable right to bring claims of unjust enrichment and *quantum meruit* against CGT must be ignored by the Court as such an argument is not sufficient to grant a motion a dismiss because "[t]he mere presence of a potential affirmative defense does not render the claim for relief invalid." Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012) (emphasis added). Moreover, "[p]rovisions of a contract, effecting a forfeiture or exacting a penalty, are strictly construed against the party for whose benefit they were incorporated in the instrument." Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 614 S.E. 2d 680, 688 (2005) (citation omitted). Doubts as to the scope of the terms should

be resolved in favor of the plaintiff and against [the owner]." G. R. Sponaugle & Sons, Inc. v. McKnight Const. Co., 304 A.2d 339, 345 (Del. Sup. Ct. 1973).

In addition, in the recent case of State Farm Fire & Casualty Co. v. PECO Energy Company, No. 19-3288, 2020 WL 757857 (E.D. Pa. 2020), the court held that the interpretation of a clause had to be decided on summary judgment and not on a motion to dismiss and offered the following reasoning for that proposition:

> Regardless, "[i]t is not clear that the ... provisions critical here are so unambiguous that the interpretation of the [Tariff] exclusively is a matter for the Court and not for a jury.... Hence it would be improper for this court to interpret the [Tariff] finally in ruling upon a motion to dismiss made pursuant to Rule 12(b)(6)." See Operative Bricklayer's Union No. 64 of Pennsylvania Welfare Fund v. Bricklayer's Local Union No. 1 of Pennsylvania Welfare Fund, 45 F.R.D. 429, 431 (E.D. Pa. 1968); accord Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC, No. 16-1237, 2016 WL 3763024, at *7 (E.D. Pa. July 13, 2016) (collecting cases); cf. Lomma v. Ohio Nat'l Life Ass. Corp., 283 F. Supp. 3d 240, 260 (M.D. Pa. 2017) (holding that "even if the Defendants' [contract] interpretation may be the more reasonable one, this does not permit the Court to resolve this issue in Defendants' favor on their motion to dismiss"); (citation omitted); This is not to say that we are concluding as a matter of law that the limitation of liability in § 12.1 is inapplicable. We are not. We are concluding only that because we are unable to decide Defendant's argument on a motion to dismiss, Plaintiff's claims for breach of contract, breach of warranties, and strict liability may proceed. See Eid, 740 F.3d at 122. Our determination here is without prejudice to the parties' rights to make whatever arguments they deem appropriate in the later stages of this litigation.

Id. at *3.

In the matter before the Court, the Plaintiff Earth Pipeline has offered a reasonable interpretation of the effect of the change order clauses in the subcontracts, *viz.* that, among other reasons, the change order clauses don't preclude equitable claims against the owner for additional work when the change order process fails, is willfully ignored or doesn't apply to the changed work or additional work at issue. Accordingly, CGT's interpretation is not the only reasonable interpretation and therefore, construing the language of the change order provisions against CGT and resolving all doubts in favor of Earth Pipeline, the Court cannot grant CGT's motion to dismiss as a matter of law.

More importantly, unless the fact finder ultimately determines that the additional work was incorporated into the scope of the subcontract and CGT paid for such work, the terms of the Subcontract do not control. Moreover, Welded denies that it authorized the additional work and admits that the additional work was not performed as part of Welded's work for CGT or in conjunction with the subcontract between Earth Pipeline and Welded.

Finally, as this Court has already held, CGT is not a third party beneficiary to the subcontracts between Welded and EPS and has no standing to assert any defenses related to the language of the contract. December 1, 2020 Opinion at p. 13.

In addition to the subcontract provisions, CGT tries to convince the Court that Earth Pipeline' submission of invoices to Welded that included the monies that are due from CGT under Counts II and III somehow constitutes an admission that the work that Earth Pipeline performed for CGT was included in Earth Pipeline' original scope of its subcontract with Welded. Again, the law is clear about the effect of previous inconsistent statements in the manner of alternative claims. In addition, the act of invoicing the general contractor for additional work that was ordered by the owner is not unique in the commercial construction context; to the contrary, it is common. It is typical for a subcontractor to submit invoices to the contractor with whom it has its subcontract that include the monies due for the changed work or additional work as a way to keep their claim for those monies in writing. In addition, subcontracts often prohibit a subcontractor from communicating directly with the project owner anyhow. Earth Pipeline's decision to attempt to seek payment for its additional work through the invoicing process on the project was reasonable in light of its status as a subcontractor on the project. Passing the charge through the invoicing process doesn't change the nature of how the additional work was ordered, nor the facts that the owner expected to pay for such additional work, that the additional work was outside the scope of

the subcontracts and that the additional work was directly received and appreciated by the owner. This act of invoicing is merely a procedural process for a subcontractor and does not create or eliminate liability under the law. Earth Pipeline properly placed its claim for the monies due for the additional work in the hands of Welded, the general contractor, so that the general contractor can pass the charges to the owner. Doing so does not change the substantive law, that being that the owner must pay for the additional work. In no way does the law prohibit a subcontractor from later seeking such monies directly from the party who ordered the work and received the benefit thereof without having paid for it. More importantly, Welded disputes the invoices, a fact which supports EPS' alternative equitable theories of liability against CGT.

Having learned nothing from the settled law in West Virginia governing unjust enrichment and *quantum meruit* claims associated with commercial construction contracts, CGT wastes both Earth Pipeline's and this Court's time. The extensive, detailed pleadings generated in this proceeding between the claims and counterclaims raised by Earth Pipeline, and Welded and CGT, respectively, and the claims raised by Welded in its consolidated adversary action recognize this case for what it is, a complex construction dispute where significant amounts are at issue. As treated at length in this response, the motion to dismiss, in a similar vein, should be recognized for what it is, CGT's desperate and ill-conceived attempt to evade its responsibility to pay the value for the additional work it received from Earth Pipeline that was necessary in order for CGT to have its pipeline constructed. CGT's motion to dismiss Counts II and III of Earth Pipeline' second amended complaint is utterly meritless and should be dismissed. To the extent, however, that the Court determines that there is a deficiency in Earth Pipeline's seconded amended complaint, such deficiency involves genuine issues of material fact with respect to the additional work that Earth Pipeline was ordered to perform for CGT, and the Court must deny CGT's motion to dismiss on

that basis alone and allow the parties to continue to conduct discovery so that all genuine issues of material fact can be finally determined by the fact finder and the adequacy of Earth Pipeline's claims can be evaluated.

IV. CONCLUSION

For all of the foregoing reasons, Earth Pipeline respectfully requests that CGT's motions to dismiss Earth Pipeline' second amended complaint be denied.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C.

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DATED: February 9, 2021

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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS) (Consolidated)
WELDED CONSTRUCTION, L.P., Plaintiff, v. EARTH PIPELINE SERVICES, INC. Defendants.	Adv. Proc. No. 20-50612 (CSS) (Consolidated)

CERTIFICATE OF SERVICE

I, Stephen A. Venzie, hereby certify that on this 9th day of February, 2021, I caused a true and correct copy of ***Plaintiff Earth Pipeline Services, Inc.'s Response and Brief in Opposition to Defendant Columbia Gas Transmissions' Motion to Dismiss Plaintiff Earth Pipeline Services, Inc.'s Second Amended Complaint*** to be served upon the parties identified below via email and by the Court's CM/ECF System:

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ATTACHMENTS

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SPAN CONSTRUCTION & ENGINEERING, INC., Plaintiff,
v.
UWHARRIE BUILDERS, LLC, The Procter and Gamble Manufacturing Company, and West Virginia Economic Development Authority, Defendants.
Uwharrie Builders, LLC, Counter Claimant,
v.
Span Construction & Engineering, Inc., Counter Defendant.

Civil Action No.: 3:18-CV-178
|
Signed 01/30/2019

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ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

GINA M. GROH, CHIEF UNITED STATES DISTRICT JUDGE

***1** Now before the Court is Defendant Uwharrie Builders, LLC's Motion for Partial Summary Judgment [ECF No. 15] filed on December 10, 2018. The Plaintiff, Span Construction & Engineering, Inc., filed a response in opposition [ECF No. 18] on December 31, 2018. Uwharrie Builders, LLC ("Uwharrie") filed a reply [ECF No. 21] on January 11, 2019. Accordingly, the matter has been fully briefed and is now ripe for review. For the following reasons, the motion is granted.

I. Factual and Procedural Background

This lawsuit arises from the construction of Defendant Procter and Gamble Manufacturing Company's ("P&G") Tabler Station, Talladega Ridges Production Facility ("the Project"). P&G hired Uwharrie as the general contractor on the Project, and Uwharrie hired Plaintiff Span Construction & Engineering, Inc. ("Span") as a subcontractor. Span avers that it performed all of the labor required by the subcontract and invoiced Uwharrie accordingly. Span avers that Uwharrie failed to make payment for all of the invoices submitted.

Accordingly, on October 31, 2018, Span brought the instant action against P&G, Uwharrie, and the West Virginia Economic Development Authority ("the Authority"). The complaint charges: (1) breach of contract; (2) quantum meruit; (3) unjust enrichment; and (4) enforcement of mechanic's lien. ECF No. 1. On December 10, 2018, Uwharrie filed the instant motion for partial summary judgment, arguing that it is entitled to summary judgment on Count IV charging enforcement of mechanic's lien. ECF No. 15.

II. Applicable Legal Standards

Summary judgment is appropriate "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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250.

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. That is, once the movant has met its burden to show an absence of material fact, the party opposing summary judgment must then come forward with affidavits or other

evidence establishing there is indeed a genuine issue for trial. Fed. R. Civ. P. 56; Celotex Corp., 477 U.S. at 323-25; Anderson, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249 (citations omitted). A motion for summary judgment should be denied "if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions." Phoenix Savs. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967); see also id. at 253 (noting that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

III. Discussion

***2** Uwharrie argues that it is entitled to summary judgment on Count IV charging enforcement of mechanic's lien because the lien was recorded and noticed more than 100 days after the completion of Span's subcontract. ECF No. 15-1 at 3. Uwharrie requests that the Court grant it compensatory damages, attorney's fees, and costs because Span knew its mechanic's lien was invalid yet included it in its October 31, 2018 complaint. Id. at 5.

A. Applicable Law

A mechanic's lien is a "statutory creation" and mechanic's lien statutes must be "strictly construed with reference to those requirements upon which the right depends." Syl. pt. 1, Mayes v. Ruffners, 8 W. Va. 384, 384 (1875); Syl. pt. 1, Scott Lumber co. v. Wheeling Cemetery Ass'n, 186 S.E. 117, 117 (W. Va. 1936). West Virginia's mechanic's lien statute is codified in West Virginia Code § 38-2-1, et seq.

West Virginia Code § 38-2-2 provides that a subcontractor is entitled to a lien for the labor, services, materials, supplies, or equipment it provides pursuant to a contract with a general contractor. W. Va. Code § 38-2-2. However, any lien created and authorized by the statute "shall be discharged from and after one hundred days from the completion of the subcontract." W. Va. Code § 38-2-7. Thus, in order to preserve the lien, "every subcontractor ... shall, within one hundred days after the completion of his or her subcontract, give to the owner or his or her authorized agent ... a notice of lien." W. Va. Code § 38-2-9. The failure to give or record notice, "in the manner and within the time specified," or the failure "to comply substantially with all of the requirements of this article," operates as "a complete discharge ... from all liens." W. Va. Code § 38-2-14.

B. Discussion

The following facts are undisputed. On January 24, 2017, Uwharrie entered into a subcontract with Span. ECF No. 15-3. On April 20, 2018, Span billed Uwharrie for "work completed through 4/9/18." ECF No. 15-6. The invoices sought a total of $1,608,146.17—an amount that included "100% completion of the contract work and change orders." Id. By the letter included with the invoices, Span averred that it had completed 100% of the contract work and change orders. Id. On August 6, 2018, Span recorded a notice of mechanic's lien on the property. ECF No. 15-4. On August 15, 2018, Span served Uwharrie with notice of the lien. ECF No. 15-5.

Now, Uwharrie argues that the lien is invalid because it was not recorded within 100 days of completion of the subcontract. Span maintains that it billed in advance for work not yet completed under the contract. Thus, Span argues that, despite billing for 100% of the contract on April 9, 2018, Span had not actually completed 100% of the work. Span asserts that its last day of work on the Project was June 2, 2018, which was "well within 100 days prior to the filing of the Notice of Mechanic's Lien." ECF No. 18 at 5.

Specifically, Span avers that "Jody Weeks, an employee of Span, performed work on the Project at the request of Uwharrie on June 1 and June 2, 2018." ECF No. 18-1 at 3. Span asserts that "Mr. Weeks retrieved safety equipment Span had installed on the Project's roof at Uwharrie's direction. The safety system consisted of stanchions with fixed lines and flags." Id. It appears that no work occurred between the final invoice, dated April 9, 2018, and June 1, 2018, when Mr. Weeks returned to retrieve the safety equipment. ECF No. 21 at 2.

***3** In light of the undisputed facts, the Court is not persuaded that Span's return to the Project constituted additional work performed under the subcontract. Span cannot bill Uwharrie for a contract that was 100% complete as of April 9, 2018, and then subsequently argue—for the first time in its response to the motion for summary judgment—that the contract was not complete until it retrieved its safety equipment approximately two months later. "Span's return was not due to any request by Uwharrie for further work or further materials ... [i]t was a gratuitous, inconsequential act benefitting only Span." ECF

No. 21 at 3. Moreover, Span never billed Uwharrie for the "work performed" on June 1, 2018, and June 2, 2018, lending itself to the conclusion that this "work performed" did not actually arise under the subcontract between Uwharrie and Span. Based on these facts, no reasonable juror could find that Span's retrieval of their equipment constituted work under the subcontract.

Accordingly, based on the undisputed facts as summarized herein, the Court finds that the subcontract between Uwharrie and Span was completed on April 9, 2018. The lien was not recorded until August 6, 2018. Because the lien was not recorded within 100 days of completion of the subcontract, the lien must be discharged. The Court declines to award attorney's fees and costs at this time, as the Court finds that Span had a reasonable and good faith belief that its lien was valid under West Virginia law.

IV. Conclusion

For the aforementioned reasons, the Court **ORDERS** that the Defendant's Motion for Partial Summary Judgment [ECF No. 15] is **GRANTED** and Count IV of the Plaintiff's Complaint [ECF No. 1] is **DISMISSED WITH PREJUDICE**. Uwharrie's request for attorney's fees and costs is **DENIED**.

All Citations

Not Reported in Fed. Supp., 2019 WL 1571284

End of Document

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2015 WL 3651279
Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

UNITED STATES of America, for the use of Asphalt Contractors, & Site Work, Inc., a Kentucky corporation, Plaintiff,
v.
KAR CONTRACTING, LLC, a West Virginia limited liability company and Great American Insurance Company, an Ohio corporation, Defendant.

Civil Action No. 3:14–27451.
|
Signed June 11, 2015.

Attorneys and Law Firms

Charles M. Johnstone, II, Johnson W. Gabhart, Johnstone & Gabhart, Charleston, WV, for Plaintiff.

Ancil G. Ramey, Steptoe & Johnson, Charleston, WV, Anders W. Lindberg, Steptoe & Johnson, Huntington, WV, for Defendant.

MEMORANDUM OPINION AND ORDER

ROBERT C. CHAMBERS, Chief Judge.

***1** Pending before the Court is Defendants' Motion to Dismiss Complaint (ECF No. 8). For the reasons set forth below, Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART.**

I. Background

Defendant KAR Contracting, LLC ("KAR") was the prime contractor on a project completed in Huntington, WV for the United States Department of Veterans Affairs ("VA"). ECF No. 1. Defendant Great American Insurance Company ("Great American") is the surety on the prime contract between KAR and the government. *Id.* According to the Complaint, KAR subcontracted with Plaintiff Asphalt Contractors & Site Work, Inc. ("Asphalt") "to perform, among other things, asphalt resurfacing, construction of a new haul road, concrete steps, and demolition of an existing pump station." *Id.* Asphalt alleges that it fully performed all obligations under the subcontract but that KAR has failed to pay for some of the work, labor, and materials provided by Asphalt under the contract. *Id.* Specifically, Asphalt states that more asphalt was required than was initially estimated and included in the subcontract. *Id.* Asphalt claims that KAR and the VA agreed to additional amounts of asphalt and labor, but KAR has refused to pay for these additional amounts under the altered subcontract. *Id.* Asphalt alleges that it billed KAR $118,274.05, which KAR has refused to pay. *Id.* As a result, Asphalt sued KAR and Great American for breach of contract, breach of payment bond pursuant to the Miller Act, *quantum meruit,* and violation of the Prompt Payment Act. *Id.* KAR and Great American moved to dismiss the complaint. ECF No. 8.

II. Standard of Review

To overcome a motion to dismiss under Rule 12(b)(6), a complaint must be plausible. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 546 (2007). This standard requires a plaintiff to set forth the "grounds" for an "entitle[ment] to relief" that is more than mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotation marks and citations omitted). 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) (quoting *Twombly,* 550 U.S. at 570). Facial plausibility exists when a claim contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

Accepting the factual allegations in the complaint as true (even when doubtful), the allegations "must be enough to raise a right to relief above the speculative level...." *Id.* (citations omitted). If the allegations in the complaint, assuming their truth, do "not raise a claim of entitlement to relief, this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558 (internal quotation marks and citations omitted). "Finally, "[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.' " *Id.* (quoting *Twombly,* 550 U.S. at 555).

III. Discussion

A. Statute of Limitations

***2** Defendants first argue that Plaintiff failed to file its complaint within the applicable statute of limitations for claims arising under the Miller Act. ECF No. 9. "[T]he statute of limitations as a bar to plaintiffs' cause of action constitutes an affirmative defense and may be raised by motion pursuant to Fed.R.Civ.P. 12(b)(6), if the time bar is apparent on the face of the complaint." *Dean v. Pilgrim's Pride Corp.,* 395 F.3d 471, 474 (4th Cir.2005). If it is not clear from the complaint itself that the statute of limitations has run, the Court may not properly dismiss the case on this ground. *See* *Goodman v. Praxair, Inc.,* 494 F.3d 458, 466 (4th Cir.2007) ("[W]e conclude that the face of the complaint does not allege facts sufficiently clear to conclude that the statute of limitations had run, and the district court therefore erred in dismissing the complaint on that basis under Rule 12(b)(6).").

The Miller Act is a statute that provides a cause of action for a subcontractor who supplies labor and materials for a project but is not timely paid under its contract. *See* 40 U.S.C. § 3133 (2012). The Miller Act provides: "An action brought under this subsection must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action." *Id.* § 3133(b)(4). The statute of limitations begins to run after the last day on which any material or labor was provided for the project, not the last day on which the material or labor in dispute was provided. *See* *GE Supply v. C & G Enterprises, Inc.,* 212 F.3d 14, 18 (1st Cir.2000).

Defendants argue that Plaintiff filed the instant suit outside of the one year statute of limitations. ECF No. 9. According to Defendants, the invoice for services and materials attached to Plaintiff's complaint, dated September 10, 2013, represents the last day that labor was performed or material was supplied for the project. *Id.* The instant suit was filed on October 31, 2014, over a year after the September 10 invoice was created. ECF No. 1. It is not clear from the face of the complaint, however, that the date on this invoice represents the last day that Plaintiff provided labor or materials for the project. The complaint does not indicate as much. Rather, the complaint refers to the invoice only as evidence of the principal sum that Plaintiff billed to Defendant KAR. ECF No. 1. Thus it is not clear from the face of the complaint that the statute of limitations ran before Plaintiff filed its complaint. Defendants' motion is **DENIED** as to the statute of limitations defense.

B. Count I: Breach of Contract

Defendants next maintain that Plaintiff's claim for breach of contract should be dismissed because Defendant KAR paid Plaintiff $461,873.00, the entire amount due under the contract. ECF No. 9. Defendants argue that Plaintiff's complaint does not allege that the written contract was altered to increase the amount of paving required or the amount due to Plaintiff. ECF No. 12. Thus, Defendants conclude, they do not owe Plaintiff any additional amount under the contract. Plaintiff responds that, in its complaint, it alleges that KAR and the VA acknowledged the need for more asphalt and labor and agreed to pay for the extra materials and services. ECF No. 11.

***3** Although the complaint does not precisely state the manner in which the contract was altered, Plaintiff does allege that KAR and the VA acknowledged that the contract did not cover all of the asphalt needed and agreed to pay for the amount of asphalt and paving that was actually necessary to complete the job. ECF No. 1. Plaintiff also alleges that KAR owes Plaintiff an additional $118,274.05 "[i]n accord with the subcontract." Plaintiff's complaint concludes that "KAR's refusal to pay the amounts due and owing under the subcontract constitutes a material breach of contract." ECF No. 1. Plaintiff has sufficiently alleged that the contract between itself and KAR was amended and that under the current contract, KAR is obligated to pay Plaintiff $118,274.05, which it has refused to do. ECF No. 1. Plaintiff has thus alleged enough facts to survive a motion to dismiss. Defendant's motion is **DENIED** as to Plaintiff's claim for breach of contract.

C. Count II: Breach of Payment Bond

Defendants have also moved to dismiss Plaintiff's claim under the Miller Act for breach of the payment bond. ECF No. 8. The Miller Act requires any contractor that has a construction contract with the federal government of more than $100,000 to insure that contract with a payment bond. 40 U.S.C. § 3131 (2012). The Act further provides that any subcontractor who has furnished labor or materials under such a contract and has not been paid within ninety days after its work is complete may bring a civil action on the payment bond to recover the amount due. 40 U.S.C. § 3133 (2012). Thus "a plaintiff

properly pleads a Miller Act claim where it alleges (1) it has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131; and (2) it has not been paid in full within 90 days." *Oldcastle APG Northeast, Inc. v. Suffolk Const. Co.,* No. 1:12cv148, 2012 WL 5868897 (E.D.Va. Oct. 21, 2012) (internal quotations omitted).

Defendants claim that Plaintiff has no cause of action under the Miller Act. They again argue that the original subcontract was not amended to include any additional materials or services that Plaintiff provided beyond those initially agreed upon in the contract. ECF No. 9. Defendant KAR also maintains that it timely paid Plaintiff the entire amount owed under the contract and does not owe Plaintiff the extra $118,274.05, thus the defendants have not breached the payment bond. ECF No. 9. As explained in the preceding section, Plaintiff has adduced sufficient facts to allege that the subcontract was amended to include additional services and materials, and thus additional compensation to Plaintiff. Plaintiff has also alleged that it was not paid this additional compensation, in the amount of $118,274.05, within ninety days of performing the work and still has not been paid. *See* ECF No. 1; ECF No.1, Ex. B. Plaintiff has thus properly pleaded a claim for breach of the payment bond under the Miller Act. Defendants' motion to dismiss is **DENIED** as to Plaintiff's claim for breach of payment bond.

D. Count III: Quantum Meruit

***4** Plaintiff's complaint also sets out a claim for *quantum meruit* to recoup the reasonable value of the materials and services it provided to KAR and the VA. ECF No. 1. Defendants argue that Plaintiff cannot state a claim for *quantum meruit* for two reasons. First, Defendants argue that KAR has not retained any of Plaintiff's materials and services. Rather, the VA, the owner of the property, received the benefit of Plaintiff's work. The VA is not a party to this case. Thus, Defendants conclude, they are not responsible for any money that may be owed to Plaintiff beyond what was owed under the contract. ECF No. 9. This argument is without merit. Defendant KAR contracted with Plaintiff for Plaintiff's materials and services. KAR was responsible for paying Plaintiff for its work. Although the VA is the ultimate beneficiary of this work, Plaintiffs extra labor and materials allowed KAR to complete its project for the VA. KAR thus received the benefit of Plaintiff's services and materials. These facts are sufficient to set out a claim for *quantum meruit* against Defendants.

Second, Defendants maintain that Plaintiff cannot claim both breach of contract and *quantum meruit,* because an express contract and implied contract covering identical work cannot coexist. ECF No. 9. Although the Court agrees with this proposition, Defendant's conclusion is incorrect. Plaintiff may not recover for both breach of contract and *quantum meruit* for the same exact work. Plaintiff could, however, recover for *quantum meruit* instead of breach of contract in the event that there is no express contract covering the extra services and materials. *U.S. v. Algernon Blair,* 479 F.2d 638, 641 (4th Cir.1973) ("A plaintiff may join a claim for *quantum meruit* with a claim for damages from breach of contract."). Thus, as an alternative theory to breach of contract, Plaintiff's claim for *quantum meruit* is permissible. Defendants' motion to dismiss is **DENIED** as to Plaintiff's claim for quantum meruit.

E. Count IV: Prompt Payment Act

In its fourth cause of action, Plaintiff claims that the Prompt Payment Act ("PPA") requires a contractor to "make prompt payment to its subcontractors on Federal Construction Projects." ECF No. 1. Defendants move to dismiss this claim, arguing that the PPA does not provide a private cause of action. ECF No. 9. Furthermore, Defendants note that the PPA governs government agencies, not private companies. ECF No. 9.

The PPA is a federal statute governing the payment of vendors and contractors by federal agencies. *See* 31 U.S.C. §§ 3901–3907 (2012). Although the Act generally applies only to federal agencies, Section 3905 of the PPA does set out several indirect requirements for any private contractor awarded a contract by a federal agency. Specifically, Section 3905 requires federal agencies to include in their contracts with prime contractors a clause that requires such contractors to insert language from the statute into their subcontracts. 31 U.S.C. § 3905(b). The required subcontract language sets out the time for contractors to pay subcontractors and creates an interest penalty for failure to make timely payments. *Id.*

***5** Nothing in the PPA states that subcontractors have a separate cause of action, beyond common law breach of contract, for violations of the required subcontract language. *See id.* Moreover, the statute directs federal agencies to include specific clauses in their contracts, and only indirectly requires action on the part of contractors. Plaintiff did not respond to these arguments in its response to Defendants' motion to dismiss and has not provided the Court with

any authority for the proposition that the PPA creates a private cause of action. Although authority is scant, courts that have faced the issue have generally held that the PPA does not create a private cause of action for subcontractors. *See W & W Steel, LLC v. BSC Steel, Inc.,* 944 F.Supp.2d 1066, 1080 (D.Kan.) ("Courts ... have repeatedly rejected the argument that the FPPA contains either an explicit or implied private cause of action in favor of unpaid subcontractors."). Accordingly, Plaintiff does not have a separate cause of action for payment under the PPA. Defendants' motion to dismiss is **GRANTED** as to Plaintiff's claim under the Prompt Payment Act.

F. Attorneys' Fees

Finally, Defendants move to dismiss Plaintiff's claim for attorneys' fees. Defendants argue that attorneys' fees are not recoverable under the Miller Act or any other cause of action in the complaint. ECF No. 9. As a general rule, parties bear their own fees absent a fee-shifting statute. *F.D. Rich Co. v. U.S. ex rel. Indus. Lumber Co.,* 417 U.S. 116, 128–29 (1974); *Sally–Mike Properties v. Yokum,* 365 S.E.2d 246, 246 (W.Va.1986). Defendants are correct that neither the Miller Act nor applicable West Virginia law have created fee-shifting provisions applicable to Plaintiff's causes of action. Plaintiff may, however, argue that the bad-faith exception to the general rule of attorneys' fees applies. Both federal and West Virginia law permit courts to award attorneys' fees to a successful plaintiff who proves that the defendant "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D.* Rich, 417 U.S. at 129; *Sally–Mike,* 365 S.E.2d at 246. Whether this exception applies in present case cannot be determined at this stage of litigation. Accordingly, Defendants' motion to dismiss is **DENIED** as to Plaintiff's claims for attorneys' fees.

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss Complaint (ECF No. 8) is **GRANTED IN PART,** as to Count IV, and **DENIED IN PART,** as to Counts I, II, and III, the statute of limitations defense, and Plaintiffs' claims for attorneys' fees. The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

All Citations

Not Reported in F.Supp.3d, 2015 WL 3651279

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2016 WL 7156587
Only the Westlaw citation is currently available.
United States District Court, N.D. West Virginia, at Martinsburg.

UNITED STATES FOR THE USE AND BENEFIT OF MASTER MASONRY, LLC, a West Virginia Limited Liability Company, Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a Connecticut corporation, Greenland Enterprises, Inc., a Virginia corporation, and First Colonial Builders, Inc., a Virginia corporation, Defendants.

CIVIL ACTION NO.: 3:16-CV-50 (GROH)

Signed 12/07/2016

Attorneys and Law Firms

Christian Mathers, Christopher R. Moore, Martin & Seibert, LC, Dale A. Buck, Martinsburg, WV, for Plaintiff.

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ORDER DENYING DEFENDANT GREENLAND'S MOTION TO DISMISS

GINA M. GROH, CHIEF UNITED STATES DISTRICT JUDGE

***1** Currently pending before the Court is Defendant Greenland Enterprises, Inc.'s Motion to Dismiss [ECF No. 26], filed on September 26, 2016. For the following reasons, the Court **DENIES** the motion.

I. Background

This case arises out of an alleged failure to pay pursuant to a sub-subcontract between First Colonial Builders, Inc. ("First Colonial"), and the Plaintiff. In early 2014, Greenland Enterprises, Inc. ("Greenland"), contracted with the United States Department of Veterans Affairs to complete a federal boiler plant upgrade project ("the project"). On January 2, 2014, Greenland executed a Miller Act payment bond [1] with Travelers Casualty and Surety Company of America ("Travelers") in the amount of $7,343,489.00. Greenland then entered into a subcontract with First Colonial to provide labor, materials, equipment and other services required to complete the project. Thereafter, on January 7, 2015, First Colonial entered into a sub-subcontract with the Plaintiff to perform masonry work and construction of a boiler plant control room, which was required to complete the project. When the Plaintiff completed its work on the sub-subcontract, First Colonial refused to pay. On July 9, 2015, the Plaintiff notified Greenland of First Colonial's failure to pay the $23,269.53 outstanding balance. The Plaintiff also submitted a claim to Travelers for payment under the bond, but it was denied.

Based on the aforementioned, on April 18, 2016, the Plaintiff filed a complaint with this Court alleging breach of contract against First Colonial, quantum meruit against First Colonial and Greenland and a Miller Act violation against Travelers. On September 26, 2016, Greenland filed its motion to dismiss. The Plaintiff filed its response on October 10, 2016, and one week later Greenland filed its reply. This matter is now ripe for consideration.

II. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a defendant to challenge the sufficiency of a complaint by moving to dismiss it for failing "to state a claim upon which relief can be granted." When reviewing a 12(b)(6) motion, the Court must assume all of the allegations contained within the complaint to be true, resolve all doubts and inferences in favor of the plaintiff and view the allegations in a light most favorable to the plaintiff. Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999). If a complaint fails to allege "enough facts to state a claim to relief that is plausible on its face," it must be dismissed. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Even though "detailed factual allegations" are not required, a complaint must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotations and citation omitted). For example, a complaint that provides "labels and conclusions or a formulaic recitation of the

elements of a cause of action will not do." Id. (internal quotations and citation omitted). Likewise, a complaint that tenders only "naked assertion[s] devoid of further factual enhancement" does not suffice. Id. (alteration in original) (internal quotations and citation omitted). A plaintiff is required to articulate facts that, when accepted as true, "show" he is plausibly entitled to relief. Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (citing Iqbal, 556 U.S. at 678). In reviewing a Rule 12(b)(6) motion, courts may consider facts derived from sources beyond the four corners of the complaint, including documents attached to the complaint and the motion to dismiss, "so long as they are integral to the complaint and authentic." Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

III. Discussion

***2** Greenland argues that the express contractual agreement between the Plaintiff and First Colonial Builders precludes the Plaintiff's quantum meruit claim against it. In its response, the Plaintiff contends that it is disputed whether the work it performed on the project was within or outside the scope of the sub-subcontract with First Colonial. The Plaintiff contends that if the work it performed is determined to be outside the scope of the sub-subcontract with First Colonial, then a viable claim of quantum meruit exists against Greenland based upon unjust enrichment. The Plaintiff requests, pursuant to Rule 8(a)(3) of the Federal Rules of Civil Procedure, that it be permitted to plead this alternative theory of relief until it is determined whether the work performed was within or outside the scope of the sub-subcontract.

In actions under the Miller Act, unless there is a conflict between federal and state law, state substantive law applies. United States ex rel. Coastal Steel Erectors, Inc. v. Algernon Blair, Inc., 479 F.2d 638, 640 n.2 (4th Cir. 1973). Under West Virginia law, the theory of quantum meruit "is based on an implied contract," which "cannot arise, as against one benefited by work performed, when such work was done under a special contract with other persons." Rosenbaum v. Price Constr. Co., 184 S.E. 261, 263-64 (W. Va. 1936) (internal quotations and citation omitted). Simply put, quantum meruit is inapplicable where an express contract covering the issue exists. See Ohio Valley Health Servs. & Educ. Corp. v. Riley, 149 F. Supp. 3d 709, 720-21 (N.D. W. Va. 2015) ("[Q]uasi-contract claims, like unjust enrichment or quantum meruit, are unavailable when an express agreement exists because such claims only exist in the absence of an agreement." (emphasis in original)); Fed. Sav. & Loan Ins. Corp. v. Quality Hotels and Resorts, Inc., 928 F.2d 399, at *4 (4th Cir. 1991) (unpublished table decision).

Here, First Colonial denies that the Plaintiff performed work under their sub-subcontract.[2] The Plaintiff contends that if this is true, then it performed work that "was outside the scope of the express contract," and thus the rule announced in Rosenbaum would not apply to prohibit its quantum meruit claim. In other words, the Plaintiff maintains that any work done by it outside of the express sub-subcontract is considered work performed "in the absence of an agreement," Ohio Valley Health, 149 F. Supp. 3d at 721, which is precisely the circumstance where quantum meruit applies, see United States ex rel. Kogok Corp. v. Travelers Cas. & Sur. Co. of Am., Civil Action No. 1:13CV240, 2015 WL 5634607, at *11 (N.D. W. Va. Sept. 24, 2015) (collecting cases). The Plaintiff avers that its quantum meruit claim is pled in the alternative; that is, the quantum meruit claim exists only insofar as the Plaintiff provided work on the project that did not arise under the sub-subcontract with First Colonial. Insofar as the Plaintiff provided work on the project that arose under the sub-subcontract, its claim for breach of contract—not quantum meruit—applies.

Under federal law, a plaintiff is permitted to plead quantum meruit as an alternative to contract recovery. See FMW/MJH at 2604 Hillsborough, LLC v. WSA Constr., LLC, No. 3:13-CV-703-GCM, 2014 WL 6476187, at *2 (W.D.N.C. Nov. 19, 2014) ("[A] party may plead breach of contract and unjust enrichment in the alternative." (internal quotations and citation omitted)); United States ex rel. All State Constr., Inc. v. SEI Grp., Inc., Civil Action No. DKC 14-0131, 2014 WL 3571980, at *3 (D. Md. July 18, 2014) ("While [the plaintiff] may not recover under both breach of contract and *quantum meruit*, it is entitled to plead these theories in the alternative."); Ford v. Torres, No. 1:08cv1153, 2009 WL 537563, at *4 (E.D. Va. Mar. 3, 2009) ("Even though Plaintiffs will not be able to recover under both contract and quasi-contract doctrines ... they are not barred from pleading alternative theories of recovery where the existence of a contract concerning the subject matter is in dispute." (internal quotations and citations omitted)). Accordingly, because the Plaintiff's quantum meruit claim is pled in the alternative, it may remain.

IV. Conclusion

***3** Upon consideration, the Court **ORDERS** that Defendant Greenland's Motion to Dismiss [ECF No. 26] is **DENIED**.

The Clerk is **DIRECTED** to transmit copies of this Order to all counsel of record herein.

All Citations

Not Reported in Fed. Supp., 2016 WL 7156587

Footnotes

1 The Miller Act, 40 U.S.C. §§ 3131-3134, requires contractors to post bond on any government construction contract exceeding $100,000.00. 40 U.S.C. § 3131(b)(2).

2 In its answer, First Colonial "denies that Master Masonry LLC did work pursuant to their subcontract agreement." ECF No. 12 at 5.

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374 Fed.Appx. 78
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals, Second Circuit.

The 2004 STUART MOLDAW TRUST, Norman Ferber Trustee, Susan Moldaw, Special Administrator of the Estate of Stuart Moldaw, Phyllis Moldaw, as an individual, Plaintiffs–Appellants,
v.
XE L.I.F.E., LLC, a limited liability company, XE Capital Management, LLC, a limited liability company, Defendants–Appellees,
XE–R, LLC, a limited liability company, Mark Ross & Co., a corporation, Archie Master Fund, L.P., Defendants.

No. 09–3639–cv.
|
March 16, 2010.

Synopsis

Background: Insured's estate, his widow, and trust sued investors, who had paid the insured and the widow a sum in exchange for becoming beneficiaries on multiple life insurance policies, seeking to recover life insurance proceeds paid to the investors upon insured's death. The United States District Court for the Southern District of New York, P. Kevin Castel, J., 642 F.Supp.2d 226, dismissed the action. Plaintiffs appealed.

Holdings: The Court of Appeals held that:

[1] California law, rather than New York law, applied to action, and

[2] widow's claim that insured disposed of beneficial interest in the policies for less than fair and reasonable value without her consent was time-barred.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (2)

[1] Insurance Life insurance

Under New York choice of law rules, applying a grouping of contacts analysis, California law, rather than New York law, governed the issue of whether a California insured's estate and widow had a right to bring an action to recover the proceeds of life insurance policies paid to New York investors with no insurable interest, and thus, estate and widow had no substantive cause of action to recover proceeds; the initial policy negotiations occurred in California, two of the policies contained a California choice-of-law provisions, insured and widow were domiciled in California, and California had legitimate interest in regulating the conduct of insurers and insureds within the state. N.Y.McKinney's Insurance Law §§ 3205(b), 3205(b)(4); West's Ann.Cal.Ins.Code § 280.

8 Cases that cite this headnote

[2] Limitation of Actions Liabilities Created by Statute

Claim by insured's widow that life insurance premiums for policies covering the insured were paid with community funds, and that the insured transferred the policies for less than fair and reasonable value without the widow's consent, in violation of a California statute, accrued, for limitations purposes, when the insured first transferred the policies to irrevocable trusts. West's Ann.Cal.Fam.Code § 1100(b); West's Ann.Cal.C.C.P. § 338(c).

***79** Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, J.).
UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED.

Attorneys and Law Firms

Joseph W. Cotchett, Nancy L. Fineman, Stuart G. Gross, Cotchett, Pitre & McCarthy, Burlingame, CA; Stanley M. Grossman, Robert J. Axelrod, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY, for Appellants.

Kevin Samuel Reed, Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York, NY, for Appellees.

PRESENT: DEBRA ANN LIVINGSTON, Circuit Judge, and KIMBA M. WOOD, * District Judge. **

SUMMARY ORDER

****1** Plaintiffs–Appellants The 2004 Stuart Moldaw Trust, Phyllis Moldaw, and Susan Moldaw, the executor of the estate of Stuart Moldaw (collectively "Appellants"), appeal from a July 30, 2009 judgment of the United States District Court for the Southern District of New York (Castel, *J.*) dismissing their complaint alleging claims related to several "stranger-owned life insurance" policies created by Defendants–Appellees and beneficially owned by Defendants XE L.I.F.E., LLC, and XE Capital Management (collectively "XE Life" or "Appellees"). We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal.

In brief, the Second Amended Complaint ("complaint") alleges that Stuart Moldaw and his wife Phyllis Moldaw were approached in 2004 by Mark Ross, the principal owner of the insurance brokerage company Mark Ross & Co., for the purpose of creating life insurance policies (the "policies") on their own lives for sale to investors. Compl. ¶¶ 18–19, 26–28. The Moldaws would receive $4 million in exchange for consenting to the creation of these policies, and would not be required to pay any premiums associated with them or any other costs involved in the transaction. *Id.* ¶¶ 29–34. Defendants, knowing that life insurance contracts on the life of another are illegal, allegedly devised a complex scheme to disguise the nature of the overall transaction through the use of various trusts and limited liability companies, which would hold the policies, and the execution of various sham "loan" agreements ***80** between Appellees and the trusts or companies through which the Appellees would pay the premiums necessary for the entities to acquire the policies. *Id.* ¶¶ 35–36. The "loans" would then "expire," and Appellees would assume beneficial ownership of the policies. *Id.* ¶ 38. After a series of transactions, Appellees allegedly did acquire the policies. *Id.* ¶ 49.

Appellants brought claims (Claims 1 and 2) seeking the disgorgement of any proceeds of the policies paid or payable to Appellees pursuant to New York Insurance Law § 3205(b)(4), which provides a right of action for "the person insured or his executor or administrator" against any person receiving benefits under any policy made in violation of New York Insurance Law § 3205(b)(2). Section 3205(b)(2) in turn forbids any person from "procur[ing] ... any contract of insurance upon the person of another unless the benefits under such contract are payable to the person insured or his personal representatives, or to a person having ... an insurable interest in the person insured." N.Y. Ins. Law § 3205(b)(2). Appellants also sought a declaration that The 2004 Stuart Moldaw Trust was the "rightful beneficiary" of the policies. Appellant Phyllis Moldaw also asserted a claim under California Family Code § 1100(b) (Claim 3), which forbids a spouse from disposing of marital community property for less than fair value without the other spouse's consent, *see* Cal. Fam.Code § 1100(b), alleging that Stuart Moldaw had disposed of his beneficial interest in the policies without her consent. The district court dismissed the § 3205(b)(4) claims on the ground that California law, rather than New York law, governed Appellants' claims relating to the validity of the policies, and that Appellants lacked the right to sue under California law. The court dismissed the community property claim because it was time-barred.

****2** "We review *de novo* the district court's decision to grant a motion to dismiss" pursuant to Rule 12(b)(6). *Arar v. Ashcroft,* 585 F.3d 559, 567 (2d Cir.2009) (en banc). "In so doing, we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff." *Id.* Our review of the grant of a motion to dismiss is limited to "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 191 (2d Cir.2007).

1. Appellants' Claims Under New York Insurance Law

[1] Appellants' first two claims are in substance that the insurance policies on the lives of Stuart and Phyllis Moldaw are illegal "[w]agers on the life of another," Compl. ¶ 1, and

that Appellants are the rightful owners of the policies and any proceeds that have been paid therefrom. We first conclude that these claims are governed by California law. Under New York choice-of-law principles, which we apply as the law of the forum, *see* *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496–97, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), "the first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co. (Stolarz),* 81 N.Y.2d 219, 223, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993). There does not appear to be a conflict between California and New York insurance law with regard to the validity of the policies, as the law of both states indicates that insurance ***81** policies on a person's life procured by one without an "insurable interest" are void. *See* N.Y. Ins. Law § 3205(b)(2); Cal. Ins.Code § 280 ("If the insured has no insurable interest, the contract is void."); *id.* § 252 ("A policy executed by way of gaming or wagering, is void."). A conflict does exist, however, concerning who has a right to bring an action to enforce the substantive prohibition against such policies. New York law expressly provides that:

> If the beneficiary, assignee or other payee under any contract made in violation of [N.Y. Ins. Law § 3205(b)] receives from the insurer any benefits thereunder accruing upon the death, disablement or injury of the person insured, *the person insured or his executor or administrator* may maintain an action to recover such benefits from the person receiving them.

N.Y. Ins. Law § 3205(b)(4) (emphasis added). By contrast, California courts have long held that *"the insurer* is the only party who can raise the question of insurable interest, and ... if the insurer waives the question of interest and pays the money to the named beneficiary, or into court, neither the personal representative nor the creditors can claim the proceeds on that ground." *Jenkins v. Hill,* 35 Cal.App.2d 521, 524, 96 P.2d 168 (Cal.Dist.Ct.App.1939) (emphasis added); *see also N. Am. Co. For Life & Health Ins. v. Dzina,* 64 Fed.Appx. 15, 18 (9th Cir.2003) (unpublished) ("Under California law the insurance carrier ... is the only party with standing to challenge the lack of insurable interest."); *In re Marriage of Bratton,* 28 Cal.App.4th 791, 794, 34 Cal.Rptr.2d 86 (Cal.App.1994) (rejecting the argument that "an individual should have the right to question the legality of the ownership of a policy which has been taken out on his life since the beneficiary stands to realize a significant financial gain upon his death," citing *Jenkins* (internal quotation marks omitted)); John K. DeMugno and Paul E.B. Glad, *California Insurance Law Handbook* § 43:2 (2010) ("The insurer is the only party who may challenge whether the insured has an insurable interest. The insured's creditors or heirs may not claim the proceeds on that ground."). [1]

****3** In contract cases, New York courts apply a "grouping of contacts" analysis in cases of conflicting laws to determine which to apply. *Allstate,* 81 N.Y.2d at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936. This test requires us to analyze the traditional factors looked to in choice-of-law analysis, *id.,* including "the place of the contracting," the "place of negotiation of the contract," the "place of performance," the "location of the subject matter of the contract," and the domicile of the parties. Restatement (2d) of Conflict of Laws § 188(2)(a)-(e), *cited in* *Allstate,* 81 N.Y.2d at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936. Applying these factors, we easily conclude that California has the "contacts that obtain significance" in this dispute, *Allstate,* 81 N.Y.2d at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936, and therefore its law should be applied. According to the complaint, the initial negotiations between Stuart Moldaw and Ross took place in California and Stuart Moldaw agreed to enter into the transaction creating the policies in California. Compl. ¶¶ 26–34. The insureds, ***82** Stuart and Phyllis Moldaw, were California residents during the time of the relevant events. *Id.* ¶¶ 13–14. All of the Appellants are California domiciliaries. *Id.* ¶¶ 12–14. Finally, two of the insurance policies in the record here issued on the life of Stuart Moldaw contain express language designating California's law as governing the policy. These facts indicate that all of the contacts of significance in this case are with California, and therefore that state's law should apply.

Appellants' arguments to the contrary are unpersuasive. The fact that the various financing and assignment transactions were finalized in New York, and that the documents evidencing these transactions contain New York choice of law clauses, is less significant than the initial decision to obtain

and the steps taken to procure the unlawful insurance policies. Moreover, this is not a case in which "the interests of only one state are truly involved," *Norlin Corp. v. Rooney, Pace, Inc.,* 744 F.2d 255, 264 (2d Cir.1984); the laws of both states at issue regulate "stranger-owned life insurance" policies, but differ in terms of which parties can challenge the validity of such policies. Thus California has a "legitimate interest" in regulating who can challenge the insurability of a party under a policy issued on the life of a California insured; this interest is sufficient to warrant the application of its law. *Intercontinental Planning, Ltd. v. Daystrom, Inc.,* 24 N.Y.2d 372, 385, 300 N.Y.S.2d 817, 248 N.E.2d 576 (1969). *Cf. Krauss v. Manhattan Life Ins. Co. of N.Y.,* 643 F.2d 98, 101 (2d Cir.1981) ("New York has expressed no interest in protecting nondomiciliaries with its restriction on insurance companies' available defenses...."). Because Appellants do not have a right of action to enforce Cal. Ins.Code §§ 252 or 280, we affirm the district court's dismissal of Claims 1 and 2.

2. Phyllis Moldaw's Community Property Claim

[2] We also agree with the district court that Appellant Phyllis Moldaw's claim under Cal. Fam.Code § 1100(b) should be dismissed. Cal. Fam.Code § 1100(b) provides in relevant part:

> ****4** A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse....

Cal. Fam.Code § 1100(b). The complaint alleges, in flat contradiction of the theory of the stranger-owned life insurance claims, that the premiums on the policies were "fully paid with the community funds of Stuart and ... Phyllis [Moldaw]," Compl. ¶ 148, and thus that the disposition of Stuart's beneficial interest in these policies without Phyllis's written consent constituted a violation of § 1100(b). *Id.* ¶¶ 149, 152. Even assuming the truth of the fact alleged in paragraph 148, we agree with the district court that any claim Phyllis had under § 1100(b) is time-barred. The parties agree that the claim is governed by a three-year statute of limitations. *See* Cal.Civ.Proc.Code § 338(c). The complaint alleges that ownership of the policies was transferred to limited liability companies associated with life insurance trusts for the Moldaws in October 2004. *Id.* ¶¶ 37, 43. Then in December 2004, "new irrevocable trusts were created ... including Plaintiff The 2004 Stuart Moldaw Trust.... Ownership of the limited liability companies was then transferred to the 2004 Trusts." *Id.* ¶ 44.

Appellants' contentions that the October 2004 transfer of the policies was not a disposition of community property because the October 2004 trusts were revocable and that the December 2004 transfer to ***83** the irrevocable trust did not alter the trusts' beneficiaries were not raised before the district court, and are therefore waived. *See, e.g., Allianz Ins. Co. v. Lerner,* 416 F.3d 109, 114 (2d Cir.2005). Even if we were to consider these arguments, however, and even assuming the policies were "community property," their transfer to the December 2004 *irrevocable* trusts (via the transfer of the ownership of the limited liability companies that were the beneficiaries of the policies) constituted a disposition of community property regardless of the identity of the trusts' beneficiary. *See* Cal. Fam.Code § 761(a) (community property transferred in trust remains community property *if* the trust is "revocable as to that property during the marriage and the power ... to modify the trust as to the rights and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses." (emphasis added)); *see also* William Bassett, *California Community Property Law* § 3:40 (2010 ed.) ("Irrevocable inter vivos and testamentary trusts are not included in the provisions of Family Code § 761."). That the beneficiaries of the trusts did not change is irrelevant because the transfer from a revocable to an irrevocable trust moved the property out of the community by eliminating Phyllis Moldaw's right to revoke as to that property. *See* Cal. Fam.Code § 761(b). Because this action was brought over three years after December 2004, the claim is time-barred.

****5** We have considered Appellants' remaining arguments on appeal and conclude that they are without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

All Citations

374 Fed.Appx. 78, 2010 WL 915866

Footnotes

* The Hon. Kimba M. Wood, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

** The Hon. Rosemary S. Pooler, originally assigned to this panel, did not participate in the consideration of this appeal. The remaining two members of the panel, who are in agreement, have determined this matter. *See* Second Circuit Internal Operating Procedure E(b); 28 U.S.C. § 46(d); *United States v. Desimone,* 140 F.3d 457 (2d Cir.1998).

1 Appellants rely on a supposed distinction between "standing" and the substantive "right to bring an action" in California law, citing *Jasmine Networks, Inc. v. Superior Court,* 180 Cal.App.4th 980, 993, 103 Cal.Rptr.3d 426 (Cal.App.2009). The distinction does not matter in this case, however, because we take *Jenkins* and the later cases relying on it to hold that no private third party other than the insurer itself has a substantive right of action to enforce California's prohibitions against policies procured by those without "insurable interests."

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United States District Court,
N.D. West Virginia.

Gary W. RICH and Law Office of Gary W. Rich, L.C., Plaintiffs/Counter–Defendants/Third–Party Plaintiffs,
v.
Joseph SIMONI, Defendant/Counter–Claimant,
v.
Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C., Third–Party Defendant/Counter–Claimant,
v.
Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A., Third–Party Defendant/Counter–Claimant,
v.
Baron and Budd, P.C., Third–Party Defendant/Counter–Claimant.

Civil Action No. 1:12CV12.
|
Signed Sept. 30, 2014.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER DISMISSING WITH PREJUDICE COUNTS IV–VI OF COUNTERCLAIM [DKT. NO. 35]; ADOPTING THE RECOMMENDATION TO CERTIFY QUESTION [DKT. NO. 213]; OVERRULING OBJECTIONS [DKT. NO. 216]; AND STAYING CASE

IRENE M. KEELEY, District Judge.

***1** Before the Court are the Proposed Findings of Fact and Recommendation for Disposition ("R & R") of the Honorable John S. Kaull, United States Magistrate Judge (dkt. no. 213). Also pending for consideration are cross-motions for summary judgment filed by (i) the plaintiffs, Gary W. Rich ("Rich") and the Law Office of Gary W. Rich, L.C. ("Rich Law") (collectively, the "Rich Parties") (dkt. no. 193); (ii) the defendant, Joseph Simoni, Ph. D. ("Simoni") (dkt. no. 194); and (iii) the third-party defendants, Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A. ("Levin"), Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C. ("Cochran"), and Baron & Budd, P.C. ("Baron") (dkt. no. 200).

The Rich Parties initiated this lawsuit in January 2012 by filing a complaint for declaratory judgment. Simoni responded by filing a counterclaim against the Rich Parties that since has become the focus of the litigation. The Rich Parties then sued the third-party defendant law firms.

Recognizing that several of the legal issues between Rich and Simoni could dispose of the entire litigation, the magistrate judge ordered the parties to file early summary judgment motions limited to the issues raised by Simoni's counterclaims against Rich. (Dkt. No. 187 at 3). The magistrate judge also bifurcated the issues between Rich and the third-party defendants from the issues involving Rich and Simoni, and stayed further discovery with respect to the claims between Rich and the third-party defendants. *Id.* at 4.

As between Rich and Simoni, the parties briefed the following issues:

- Whether Simoni's claims against Rich are time-barred, either by the statute of limitations or laches;
- Whether any compensation agreement between Rich and Simoni is enforceable in light of the West Virginia Rules of Professional Conduct (the "WVPRC");
- Whether estoppel precludes Simoni's claims against Rich;
- Whether Simoni had a reasonable expectation to compensation from Rich; and
- Whether Simoni can maintain independent claims against Rich for negligent misrepresentation, conversion, and estoppel.

For the reasons discussed in this memorandum opinion, the Court **DISMISSES WITH PREJUDICE** Counts IV–VI of Simoni's counterclaim, **ADOPTS** the recommendation to certify a question to the West Virginia Supreme Court

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of Appeals, **OVERRULES** the third-party defendants' objections to the R & R, and **STAYS** the case pending resolution of the certified question.

I. FACTUAL BACKGROUND

This case follows on a longstanding dispute between Rich, a lawyer, and Simoni, a former university professor and law school graduate who never passed the bar examination. Simoni alleges that Rich is obligated to compensate him for work he performed on two lawsuits filed in West Virginia. Although many of the facts involved in the case are hotly disputed, only those relevant to the issues addressed in the magistrate judge's R & R and the pending dispositive motions are discussed in this memorandum opinion.

A. The Parties

***2** Beginning in the 1990s and continuing until 2011, Rich practiced law in Morgantown, West Virginia. [1] For several years, his firm, Rich Law, focused on immigration issues. (Dkt. Nos. 1 at 1; 35 at 17). In 1999, however, Rich learned of a potential asbestos case involving West Virginia University ("WVU"), and a class of plaintiffs who claimed to have been exposed to asbestos fibers in buildings on the WVU campus (the "WVU Litigation"). (Dkt. No. 35 at 5). Aware that Rich lacked the experience and resources to prosecute such a challenging case, his friend and fellow lawyer, Larry Harless, put him in contact with Simoni to provide assistance. (Dkt. Nos. 200–1 at 5; 210 at 2).

Simoni was a longtime professor of sociology and anthropology at WVU, and a well-known community organizer and activist in Morgantown. (Dkt. No. 1 at 2). Although a graduate of the WVU College of Law, Simoni never passed the bar exam, despite four attempts. (Dkt. Nos. 35 at 4; 193–1 at 3).

Teamed with Rich in the WVU Litigation, Simoni's responsibilities included recruiting plaintiffs for the class. According to Simoni, "[he] and a WVU faculty colleague were the driving force behind the organization of University employees and the investigation of asbestos exposure in many University buildings." (Dkt. No. 35 at 6).

As a consequence of their involvement in the WVU Litigation, as well as through Simoni's communications with the West Virginia Department of Environmental Protection, Rich and Simoni learned of other potential environmental and toxic tort mass actions, including the Fairmont and Spelter Litigations. Because Rich Law's experience and resources were inadequate to prosecute those cases alone, however, Rich and Simoni found it necessary to "associate with one or more out-of-state firms." *Id.* at 7. Simoni contends that he "researched several out-of-state law firms, contacted the firms, organized and scheduled visits of the firms to Fairmont, West Virginia, and through a binder of documents that he alone prepared, provided to the firms information about the class of plaintiffs and their potential liability and damage claims." *Id.* at 8–9.

In 2002, Rich Law partnered with Baron, a Texas-based law firm, on the Fairmont Litigation. *Id.* at 10. In 2003, it partnered with Levin, a Florida-based law firm, and Cochran, an Alabama-based law firm, on the Spelter Litigation. *Id.* at 18.

B. The Fairmont Litigation

The Fairmont Litigation involved lawsuits brought by former employees of the Philips/Westinghouse lighting plant in Fairmont, West Virginia, who allegedly suffered illnesses from contact with chemicals used at the plant. *Id.* at 7. These employees filed suits in 2001 and 2003 in the Circuit Court of Marion County, West Virginia. Their cases were later transferred to the Circuit Court of Monongalia County (dkt. no. 36 at 27), where, eventually, they settled in the plaintiffs' favor in 2007. The circuit court awarded attorneys' fees and expenses to the plaintiffs in January 2008. (Dkt. No. 1 at 3). The Rich Parties received 25% of the total fees awarded. (Dkt. No. 210 at 11).

***3** Simoni claims that he played an important role in developing and coordinating the Fairmont Litigation. Allegedly, he engaged the lead plaintiffs, urged them to become involved in the litigation, investigated the factual basis for their claims, and arranged meetings between them and the lawyers. (Dkt. No. 35 at 6–8). He further claims to have played a critical role in brokering the partnership between Rich Law and Baron. *Id.* at 8–10.

C. The Spelter Litigation

The Spelter Litigation involved environmental contamination resulting from the long-term operation of a zinc-smelting plant in Spelter, West Virginia. (Dkt. No. 35 at 15). The plaintiffs, who resided in the area around the plant, filed a class action in 2004 in the Circuit Court of Harrison

County, West Virginia, alleging harm and the need for medical monitoring as a consequence of the plant's decades-long negligent disposal of hazardous materials. (Dkt. No. 1 at 3–4). Although the case was tried to a successful conclusion before a jury in 2007, the West Virginia Supreme Court of Appeals later remanded the case to the circuit court for further proceedings regarding the proper calculation of punitive damages. (Dkt. No. 200–1 at 14). Following remand, the parties ultimately resolved the punitive damages issue in November 2010, and the trial court awarded the plaintiffs' attorneys compensation for fees and expenses in early 2011. (Dkt. No. 1 at 4). The Rich Parties' portion of the total fees awarded was 22.5%. (Dkt. No. 210 at 12).

Simoni alleges that his work on the Spelter Litigation was crucial to its ultimate success. (Dkt. No. 35 at 16). He emphasizes that it was only through his knowledge of the longstanding environmental issues existing in Spelter that Rich was able to identify and engage the lead plaintiff. *Id.* at 15. He also emphasizes his strategic role in researching the factual issues and brokering the partnership between Rich Law and Levin. *Id.* at 17–18.

D. The Agreement

At the center of the parties' dispute is their understanding of the terms of a purported agreement between Rich and Simoni concerning Simoni's compensation. At the time Rich and Simoni first worked together in 1999 on the WVU Litigation, Simoni's understanding was that they would "share the benefits half/half, 50/50." (Dkt. No. 213 at 1138). According to Simoni's deposition testimony, his understanding of a 50/50 split continued until April 2002, when he and Rich met outside Rich's Morgantown office to discuss their arrangement, and Rich informed Simoni that "he was reducing [Simoni's] share from 50 percent to 20 percent." *Id.* at 1200–02. Simoni understood this reduction to apply to all cases in which he was involved, including the Fairmont and Spelter Litigations. *Id.* at 1202. He also understood that his professional relationship with Rich was in the nature of a "joint venture." *Id.* at 1213.

Following this meeting, Simoni met with his nephew, an attorney, in New York to review his compensation arrangement with Rich. *Id.* at 1223. Simoni's notes reflect that, at the meeting, his nephew proposed several tactical ideas for Simoni to broach with Rich. *Id.* at 1223–24. He recommended that Rich re-negotiate his share of the fee award from the Fairmont Litigation to 20% or 30%, and pay taxes on that amount, and that Rich then split the after-tax amount of his fee award with Simoni as a "payoff for consulting, investigation, organizing, client rapport, et cetera, not for practice of law." *Id.* at 1224–25. Significantly, in his notes, Simoni underlined "*not for practice of law.* " *Id.* Several months later, Rich allegedly agreed to reinstate the 50/50 split between Simoni and him. *Id.* at 133.

***4** Simoni again discussed his compensation arrangement with Rich in December 2003, at a coffee shop in Waynesburg, Pennsylvania. *Id.* at 1250. As Simoni later recalled, "[Rich] raised the issue, and he said he was changing the agreement again from the 50/50 that we had gotten to, back to in late fall of 2002, that he was changing it back to the 80/20." *Id.* at 1252. Simoni became "visibly upset," and left the coffee shop in tears. *Id.* at 1253.

Simoni and Rich next discussed their arrangement in June 2005 at a picnic shelter along the Rail–Trail path in Morgantown. *Id.* at 1254–55. At that meeting, Rich suggested that the two write notes to one another, rather than communicate verbally. *Id.* Simoni's notes from the meeting reflect that Rich confirmed his intention to pay Simoni 20% of the total compensation Rich received from the Fairmont and Spelter Litigations. *Id.* at 1255–56.

At his deposition, Simoni described his understanding of the timing of his compensation:

> Q. So your understanding was that you would not be paid any compensation on the WVU case, the Fairmont case or the Spelter case until all three cases had resolved?
>
> A. Had resolved, and if they didn't resolve in favor of the plaintiffs, I would receive nothing. That was my expectation.
>
> Q. Did they all three have to resolve in favor of the plaintiff for you to be compensated?
>
> A. No, not all three of them, but any one that I had worked on.... But, you know, the understanding, agreement that I had with him was, with the changing percentages, whether it was 50/50, 80/20, you know, whatever time frame you want to look at, that that would be at the end when the cases settled and the benefits were received.... But whatever cases got resolved, what got settled, there wasn't any expectation of compensation until the settlements.... I believe that our understanding was that when one case settled out, then there would be an expectation of sharing of benefits.
>
> ...

> Q. So the basis of your 50/50 or later 80/20 deal was based on the contingency of whether there was any success in the case, correct?
>
> A. Well, my compensation definitely would be—my understanding would be based on whether there was success, meaning I wouldn't get anything if there wasn't success. I wasn't exactly sure how this was all going to —I mean, if you just trace these communications through the years, I wasn't sure exactly how my compensation was going to come, but I had the understanding that I was making substantial contributions, and I had the hope and expectation that the value of my contributions would be taken into account, but only after these cases were settled. There was no expectation of anything before.
>
> Q. And so you didn't have an expectation of being reasonably compensated if there were bad results in the case?
>
> A. No. Get zero.

Id. at 1260–75.

During the summer of 2007, Simoni raised his expectation of compensation from the Spelter Litigation with an attorney from the Cochran firm. *Id.* at 1304. He recalls that he "shared with him that I was really feeling uncomfortable, that I was feeling like I was being left out, you know, the term left out to dry." *Id.* at 1305. He added, "I have this agreement, okay, and I'm concerned about whether I'm actually going to be—whether the agreement's going to be held up in two-thousand —in summer of 2007." *Id.* Simoni requested that the Cochran attorney notify him when the Spelter Litigation concluded. *Id.* at 1309. Accordingly, that attorney called Simoni in 2007 to advise him that the plaintiffs had prevailed at trial. *Id.* at 1309–10.

***5** Shortly thereafter, the Cochran law firm emailed Simoni to "make sure you have submitted all final invoices to our office concerning [the Spelter Litigation]." *Id.* at 1313. When asked what response he provided, Simoni replied: "I didn't send any invoices." *Id.* He further explained: "[S]ince my compensation, as I understood, would come from the agreement that I had with Rich, you know, not until the cases were settled and based on my contributions and the value of my contributions, never had the thought or expectation of having to keep hours of work or anything like that." *Id.* at 1314.

Finally, concerning the nature of the compensation he expected to receive from Rich, Simoni testified:

> Q. Well, I thought you were testifying yesterday that you thought the compensation was going to come as a portion of the fees that Gary Rich received. Is that not correct?
>
> A. That the—well, that the compensation might come from that—from that amount of money.
>
> Q. Okay. And so when you were talking about 20 percent, 80 percent, 50 percent, 50 percent, what were you talking about? 50 percent of what?
>
> A. Of the amount of money that he received.
>
> Q. And you understood the money he would be receiving would be fees, correct?
>
> A. Yes.
>
> Q. So was your—what you were trying to tell us yesterday was that you expected to get a percentage of his fees, correct?
>
> A. Yes.
>
> Q. And you knew that, did you not, that ethically he could not share his fees with you if you were—unless you were a licensed attorney? You understood that, did you not?
>
> A. I had the general understanding of a lawyer not being able to split fees—

(Dkt. No. 193–4 at 40–41). Simoni acknowledges that "[i]t is undisputed that most, if not all, of the discussions regarding compensation between Mr. Rich and Dr. Simoni were underscored by the prospect of 'percentage split of attorney fees earned by Rich.' " (Dkt. No. 211 at 8).

Rich disputes this contention, arguing that any fee-splitting agreement with Simoni was contingent on Simoni's becoming a licensed attorney. (Dkt. No. 193–10 at 7). In fact, when Rich realized that Simoni was not licensed, he sought advice about whether he could ethically compensate him from Sherri Goodwin ("Goodwin"), an attorney knowledgeable in the field of legal ethics. (Dkt. No. 200–3 at 17). Allegedly, Goodwin's opinion was that Simoni "might not be able to get paid ethically." *Id.* at 18–19. In one of his briefs, Rich summarizes his current position as follows:

> To be clear, Plaintiffs do not dispute that Dr. Simoni contributed to the Fairmont and Spelter litigations. How much he contributed and the value of that contribution are another matter, but we do not deny that he made *some* contribution. Nor do Plaintiffs object to Dr. Simoni being compensated, *if* there is an ethical and lawful way of doing so and the compensation is reasonable.

(Dkt. No. 204 at 2) (emphasis in original).

II. PROCEDURAL BACKGROUND

A. Pleadings

***6** Rich preemptively initiated this litigation on January 13, 2012, seeking a declaratory judgment that Simoni is not entitled to compensation in connection with either the Fairmont or the Spelter Litigations, and that any sharing of legal fees with Simoni would violate West Virginia Rule of Professional Conduct ("WVRPC") 5.4. Simoni filed a counterclaim on April 16, 2012, which he later amended on October 5, 2012. In his amended counterclaim, Simoni alleges that Rich is obligated to compensate him for work related to the Fairmont and Spelter Litigations under theories of quantum meruit ("Count I"), unjust enrichment ("Count II"), and breach of implied contract ("Count III"). He further asserts claims of negligent misrepresentation ("Count IV") and conversion ("Count V") with respect to the Spelter Litigation. Finally, he alleges an independent cause of action based on estoppel ("Count VI"), and seeks the following declaratory relief:

- That the Rich Parties, jointly and severally, are required to pay Simoni such sum as the jury shall determine to fully and justly compensate him for his work in furtherance of the Fairmont and Spelter Litigations;
- That the Rich Parties are required to pay Simoni prejudgment interest on all sums which have not been paid to Simoni; and
- That the Rich Parties must hold the attorneys' fees and expenses awarded or to be awarded to them by the courts in the Fairmont and Spelter Litigations in a constructive trust for the benefit of Simoni.

(Dkt. No. 35 at 29).

Rich answered the amended counterclaim and, based on purported indemnity agreements with each of the defendant law firms, also filed a third-party complaint against Levin, Cochran, and Baron for indemnity, contribution, and unjust enrichment. The law firms, in turn, counterclaimed against Rich on December 4, 2012. Cochran alleged breach of contract, fraud, and unjust enrichment, and Levin and Baron alleged breach of contract, indemnity, and contribution.

B. Dispositive Motions

On summary judgment, the third-party defendants and the Rich Parties challenge Simoni's claim to compensation.[2] Their legal arguments include the defenses of estoppel, statute of limitations, and laches, as well as violation of the WVRPC, lack of reasonable expectation, and duplication and abandonment of claims.

Simoni's summary judgment motion seeks dismissal of the Rich Parties' declaratory judgment action on the basis that they have conceded their willingness to compensate him in a lawful manner for his contributions to the Fairmont and Spelter Litigations, and that this concession should resolve any dispute of material fact. He further contends that there should be no concern about the legality of his compensation arrangement with Rich.

C. Report and Recommendations of the Magistrate Judge

In his R & R, Magistrate Judge Kaull first analyzed the statute of limitations defense raised by the third-party defendants. Under applicable West Virginia law,

> ***7** [e]very action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: ... if it be upon any other contract, express or implied, within five years, unless it be an action by one party against

> his copartner for a settlement of the partnership accounts, ... [in which case] the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after.

W. Va.Code § 55–2–6.

Before the magistrate judge, the parties disputed what event triggered the five-year limitations period. The third-party law firms asserted that the date on which Simoni last rendered services controlled; Simoni countered that, because he and Rich had formed a joint venture, a type of partnership, the five-year time bar began to run only after their dealings ceased.

After determining that joint ventures and partnerships are sufficiently similar, Judge Kaull considered whether the relationship between Rich and Simoni constituted a joint venture under West Virginia law. He observed that the primary characteristic of a joint venture is an agreement to share in the profits and losses of an enterprise. He then focused on "whether such a joint venture, if it existed, is void as against public policy." (Dkt. No. 213 at 22). He observed that, under WVRPC 5.4(a), "[a] lawyer or law firm shall not share legal fees with a nonlawyer," unless one of four exceptions, all inapplicable here, applied. Additionally, because WVRPC 5.4(b) explicitly prohibits lawyers from "form[ing] a partnership with a nonlawyer if any of the activities of the partnership consists of the practice of law," he concluded that any joint venture between Simoni and Rich violated WVRPC 5.4.

Because an agreement violative of public policy is unenforceable, *see* Syl. Pt. 3, *Wellington Power Corp. v. CNA Sur. Corp.,* 614 S.E.2d 680, 682 (W.Va.2005), Judge Kaull attempted to determine whether, under West Virginia law, the WVRPC constitute statements of public policy. He noted that, if they do, any fee-splitting agreement between Rich and Simoni would be void. After surveying a number of jurisdictions that do not enforce agreements violative of their Rules of Professional Conduct, *see, e.g., Cruse v. O'Quinn,* 273 S.W.3d 766, 776 (Tex.App.2008) ("[A] court may deem these rules [of professional conduct] to be an expression of public policy, so that a contract violating them is unenforceable as against public policy."), Judge Kaull concluded that West Virginia has not resolved this issue.[3] (Dkt. No. 213 at 25–29).

Given the legal uncertainty of any joint venture agreement between Rich and Simoni, Judge Kaull analyzed whether Simoni's quantum meruit and unjust enrichment claims might, in any event, be time-barred under West Virginia law. Because West Virginia has not determined whether the discovery rule applies to claims of quantum meruit and unjust enrichment, however, he was unable to decide which of four potential dates—(i) the date of the cessation of dealings between Rich and Simoni, (ii) the date of Simoni's last rendition of services, (iii) the date on which Simoni reasonably should have known that Rich would not compensate him, or (iv) the date on which Simoni actually knew Rich would not compensate him—triggered the five-year limitations period.

***8** Nevertheless, from the evidence in the record, he did conclude that the following dates were undisputed:

- "[T]he 'cessation of dealings' between Rich and Simoni dates to January 27, 2011." *Id.* at 34.
- "As to the Spelter case, Simoni[ ] ... last rendered services on June 14, 2005." *Id.*
- "As to the [Fairmont] case, Simoni[ ] ... last rendered services on July 27, 2005." *Id.*
- "[I]f the discovery rule applies to Simoni's quantum meruit and unjust enrichment claims, then the five-year limitations period began to run on June 27, 2007, the date when Simoni reasonably should have known that he would receive no compensation from Rich." *Id.* at 36.

Because issues of state law determinative of the parties' statute of limitations argument were unresolved, Judge Kaull recommended that the Court certify the following questions to the West Virginia Supreme Court of Appeals:

1. "Are the West Virginia Rules of Professional Conduct statements of public policy with the force of law equal to that given to statutes enacted by the West Virginia State Legislature?" (Dkt. No. 213 at 37).
2. "Do claims for quantum meruit and unjust enrichment accrue: (a) on the date that services are last rendered or (b) when the provider of services knew or reasonably should have known that he would not be receiving compensation?" *Id.*

He further recommended that the Court stay the case until the state court answered these questions.

Although neither the Rich Parties nor Simoni objected to the R & R, the third-party law firms disputed Judge Kaull's finding that June 27, 2007 was the date by which Simoni reasonably should have known he would not receive any compensation from Rich.[4] They also objected to Judge Kaull's findings that the cessation of dealings between Rich and Simoni occurred on January 27, 2011, and that Simoni last rendered services in the Fairmont Litigation on July 27, 2005. (Dkt. No. 216).

III. STANDARDS OF REVIEW

A. Report and Recommendations Standard

The Court "shall make a de novo determination of *those portions* of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636 (emphasis added); *see also* *Farmer v. McBride,* 177 Fed. App'x 327, 330–31 (4th Cir.2006) ("The district court is only required to review *de novo* those portions of the report to which specific objections have been made...."). "As to those portions of a recommendation to which no objection is made, a magistrate judge's findings and recommendation will be upheld unless they are 'clearly erroneous.' " *Clark v. United States,* No. 5:05CV147, 2008 WL 2704514, at *3 (N.D.W.Va. July 3, 2008). Finally, "[t]he district judge may accept, reject, or modify the recommended disposition." Fed.R.Civ.P. 72(b)(3).

B. Summary Judgment Standard

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials" show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a), (c)(1)(A). When ruling on a motion for summary judgment, the Court reviews all the evidence "in the light most favorable" to the nonmoving party. *Providence Square Assocs., L.L.C. v. G.D.F., Inc.,* 211 F.3d 846, 850 (4th Cir.2000). The Court must avoid weighing the evidence or determining the truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

***9** The moving party bears the initial burden of informing the Court of the basis for the motion and of establishing the nonexistence of genuine issues of fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party has made the necessary showing, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 256 (internal quotation marks and citation omitted). The "mere existence of a scintilla of evidence" favoring the nonmoving party will not prevent the entry of summary judgment; the evidence must be such that a rational trier of fact could reasonably find for the nonmoving party. *Id.* at 248–52.

IV. LEGAL ANALYSIS

A. Simoni's Counts I–III: Quantum Meruit, Unjust Enrichment, and Breach of Implied Contract

Simoni asserts that his "claim to reasonable compensation in this matter is primarily expressed ... as a claim for quantum meruit relief," as alleged in Count I of his counterclaim. (Dkt. No. 202 at 19). Nevertheless, he also maintains that all of his claims remain viable. (Dkt. No. 211 at 16–18). The third-party defendants, on the other hand, contend that "Simoni's Counts II through VI are not viable because they are duplicative, fail as a matter of law, or have been abandoned." (Dkt. No. 200–1 at 25).

There is widespread disagreement among the states regarding any legal distinctions involving claims of quantum meruit, unjust enrichment, and implied (or quasi) contract. *See generally* Candace Saari Kovacic–Fleischer, *Quantum Meruit and The Restatement (Third) of Restitution and Unjust Enrichment,* 27 Rev. Litig. 127 (2007). For example, under Illinois law, "[q]uasi-contract claims include unjust enrichment and *quantum meruit* actions." *Hayes Mech., Inc. v. First Indus., L.P.,* 812 N.E.2d 419, 426 (Ill.App.Ct.2004) (italics in original); *see also Bennett v. Artus,* 20 P.3d 560, 563 n. 2 (Alaska 2001) ("Courts generally treat actions brought upon theories of unjust enrichment, quasi-contract, contracts implied in law, and *quantum meruit* as essentially the same.") (internal quotation marks and citations omitted) (italics in original). The Supreme Judicial Court of Maine, on the other hand, has held that

> the distinction between "unjust enrichment" and "quantum meruit" is legally significant. *Quantum meruit* involves recovery for services or materials provided under an implied contract. Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay. In an unjust enrichment case the court must decide what constitutes the inequitable retention of a benefit by the defendant. The damages analysis is based on principles of equity, not contract.

Aladdin Elec. Assocs. v. Town of Old Orchard Beach, 645 A.2d 1142, 1145 (Me.1994) (internal quotation marks and citation omitted).

***10** West Virginia has never defined the legal distinctions, if any, among claims of unjust enrichment, quantum meruit, and breach of implied contract. A review of the relevant case law, however, suggests that all three causes of action sound in equity. For instance, the West Virginia Supreme Court of Appeals has explained that "[t]he principle underlying quantum meruit recovery 'is a contract implied in law ... based on the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another.' " *Copley v. Mingo Cnty. Bd. of Educ.,* 466 S.E.2d 139, 145 n. 17 (W.Va.1995) (quoting *Associated Wrecking & Salvage Co. v. Wiekhorst Bros. Excavating & Equip. Co.,* 424 N.W.2d 343, 348 (Neb.1988)). Moreover, "[a]n implied contract arises from the principle of equity that one person may not enrich himself unjustly at the expense of another." *Marshall v. Elmo Greer & Sons, Inc.,* 456 S.E.2d 554, 557 (W.Va.1995) (citing *Lockard v. City of Salem,* 43 S.E.2d 239, 242 (W.Va.1947)).

In the view of the third-party defendants, the significance of grouping such claims lies in their "duplicativeness." Simoni, however, points out that recent case law does not support the notion that duplication of claims ought to result in their dismissal.

Although state law may conflate these claims to some extent, federal courts within West Virginia have applied different limitations principles to a claim for unjust enrichment, depending on its nature. In *HSBC Bank USA, Nat'l Ass'n v. Resh,* No. 3:12CV668, 2013 WL 312871, at *6 (S.D.W.Va. Jan. 25, 2013), the court held that "because the unjust enrichment claim is quasi-contractual, it is in fact subject to a five-year statute of limitations," pursuant to W. Va.Code § 55–2–6. Later, however, in another case, the court determined that, "as the unjust enrichment claim is an equitable claim, the doctrine of laches controls the timeliness of the action." *CUMIS Ins. Soc., Inc. v. Raines,* No. 3:12CV6277, 2013 WL 500305, at *2 (S.D.W.Va. Feb. 11, 2013).

Before the decisions in *HSBC Bank* and *CUMIS,* the West Virginia Supreme Court of Appeals addressed the nature of an unjust enrichment claim in determining the applicable limitations period. In *Absure, Inc. v. Huffman,* 584 S.E.2d 507, 511 (W.Va.2003), the court held that the claim for unjust enrichment "was equitable in nature, and thus principles of laches rather than the Statute of Limitations govern the bringing of it."

Here, the parties have argued both laches and the statute of limitations as defenses to Simoni's claims. The Rich Parties rely on the equitable doctrine of laches to bar Simoni's claims, while the third-party defendants assert that W. Va.Code § 55–2–6 provides the applicable limitations period. Simoni contends that, under either doctrine, his claims for breach of implied contract, quantum meruit, and unjust enrichment are not time-barred. Simoni has the better argument.

1. Laches

***11** "Laches is delay which operates prejudicially to another person's rights." *Brand v. Lowther,* 285 S.E.2d 474, 482 (W.Va.1981) (citations omitted). "The equitable doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." *Maynard v. Bd. of Educ.,* 357 S.E .2d 246, 253 (W.Va.1987). Unlike a statute of limitations defense, "the controlling element of the equitable defense of laches is prejudice, rather than the amount of time which has elapsed without asserting a known right or claim." *Id.* Indeed, "laches is sustainable only on proof of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *West Virginia v. Abbot,* 418 S.E.2d 575, 578 (W.Va.1992) (citations omitted). "The burden of proving unreasonable delay and prejudice is upon the litigant

seeking relief." *Province v. Province,* 473 S.E.2d 894, 905 (W.Va.1996).

In an effort to sustain their burden as to Simoni's lack of diligence, the Rich Parties point out that "Simoni waited to assert his claims for compensation until *after* both the Fairmont litigation and the Spelter litigation had concluded and *after* [the Rich Parties] and the other attorneys involved in the lawsuits had reached a settlement agreement." (Dkt. No. 193–1 at 12) (emphasis in original). Indeed, as the Rich Parties suggest, Simoni failed to file his counterclaim until April 2012—seventeen months after the Spelter Litigation settled in November 2010.

This, however, is consistent with Simoni's understanding of the timing within which he expected to receive compensation from Rich. He testified that he did not expect to be compensated until the conclusion of the litigations. (Dkt. No. 213 at 1260–75). "[T]here wasn't any expectation of compensation until the settlements." *Id.* at 1261. Moreover, although he never filed a counterclaim for payment until April 2012, Simoni did demand payment from the Rich Parties in March 2010, when his attorney sent a letter stating: "It is the purpose of this letter to provide notice that Dr. Simoni believes he has a claim for compensation for professional services rendered [in the Spelter Litigation] and is prepared to pursue appropriate remedies to ensure that he obtains adequate compensation ." (Dkt. No. 202–9 at 2). Thus, the Rich Parties cannot demonstrate lack of diligence by Simoni.

Even if Simoni was dilatory in asserting his claims, the Rich Parties still could not establish any prejudice as a result of such delay. Although they contend "Simoni's delay prejudiced [the Rich Parties] and the other attorneys by denying them knowledge of the expenses they would need to account for in settling the cases and/or preparing a fee petition" (dkt. no. 193–1 at 12), this argument makes little sense in light of the purported fee-splitting arrangement between Rich and Simoni, pursuant to which Simoni was to receive either 50% or 20% of Rich's fees. In other words, the amount of the Rich Parties' compensation in no way depended on the portion of fees claimed by Simoni. Moreover, the Rich Parties had actual notice months before the settlement of the Spelter Litigation that Simoni intended to pursue his claim for compensation. Their laches argument therefore fails.

2. Statute of Limitations

***12** W. Va.Code § 55–2–6 provides a five-year limitations period for the filing of a breach of implied contract claim. [5] Judge Kaull addressed the applicability of the statute and concluded that, when the claim arises from a joint venture, the limitation period does not expire until five years after the cessation of dealings between the venturers.

a.

A lawful agreement between the parties is an essential element of a joint venture. *See Cunningham v. Herbert J. Thomas Mem. Hosp. Ass'n,* 737 S.E.2d 270, 280–81 (W.Va.2012); *Armor v. Lantz,* 535 S.E.2d 737, 743–44 (W.Va.2000). Indisputably, agreements violative of West Virginia's public policy are unenforceable. *See* Syl. Pt. 3, *Wellington Power Corp. v. CNA Sur. Corp.,* 614 S.E.2d 680, 682 (W.Va.2005); ***see also*** *Finch v. Inspectech, LLC,* 727 S.E.2d 823, 835 (W.Va.2012); *Dalton v. Childress Svc. Corp.,* 432 S.E.2d 98, 102 (W.Va.1993) (" 'We are committed to the view that parties may contract as they choose so long as what they agree to is not forbidden by law or against public policy.' ") (quoting *Chesapeake & Potomac Tel. v. Sisson & Ryan,* 362 S.E.2d 723, 729 (Va.1987)). Therefore, for an enforceable joint venture between Rich and Simoni to have existed as a matter of law, their fee-splitting agreement, which Judge Kaull determined to be violative of WVRPC 5.4, had to be lawful under West Virginia public policy. However, as Judge Kaull explained, West Virginia has not resolved whether WVRPC 5.4 expresses the public policy of the state.

Despite this unresolved question of state law, Judge Kaull did find, as an undisputed fact, that Rich and Simoni ceased their dealings on January 27, 2011. [6] He based this finding on the fact that Rich collected his attorney's fee from the Spelter Litigation on that date.

Although the third-party defendants agree that January 27, 2011 is the date on which Rich received his fee, they dispute whether "the 'cessation of dealings' between Rich and Simoni also occurred on January 27, 2011, because there was no evidence of any dealings between Rich and Simoni that late in time." (Dkt. No. 216 at 10–11). They contend that June 27, 2007 is the date on which Rich ceased dealing with Simoni, because that was "the last time Simoni could say that he and Rich had any communications." *Id.* at 11.

This argument raises a legal question about whether a cessation of dealings in a joint venture occurs on the date when one of the venturers receives payment for the enterprise's efforts, or on the date when the venturers last communicated. West Virginia has answered this question, and the case law points to the former.

In *Sandy v. Randall,* 20 W. Va. 244, 247 (1882), the West Virginia Supreme Court of Appeals adopted the Commonwealth of Virginia's interpretation of "dealings" as "embrac[ing] an act done after the dissolution of the partnership in winding it up; such as the collection or payment of debts due to or by the firm." From there, the court concluded that, "in order to subject the suit to the bar of the statute, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the suit, but that there were no valid claims or debit or credit against or in favor of the firm, paid or received, or outstanding within that time." *Id.*

***13** The court followed *Sandy's* reasoning in *Barker v. Smith & Barker Oil & Gas Co.,* 294 S.E.2d 919, 925 (W.Va.1982), where it concluded that the cessation of dealings between the parties had not occurred until 1971. It based this finding, in part, on the fact that profits continued to be deposited into the corporate account and distributed to the partners until that time. *Id.*

Applying similar reasoning here, if a joint venture did exist between Rich and Simoni, under West Virginia law their dealings ceased when Rich received his attorney's fee from the Spelter Litigation on January 27, 2011, not the last time he spoke with Simoni on June 27, 2007. Accordingly, the Court overrules the third-party defendants' objection to the finding in the R & R that Rich and Simoni ceased their dealings on January 27, 2011.

b.

Despite the legal uncertainty regarding the enforceability of a joint venture agreement between Rich and Simoni, the question remains whether a joint venture between them existed at all. In *Pownall v. Cearfoss,* the West Virginia Supreme Court of Appeals outlined "the distinguishing elements or features" of a joint venture:

> As between the parties, a contract, written or verbal, is essential to create the relation of joint adventurers. To constitute a joint adventure the parties must combine their property, money, efforts, skill, or knowledge, in some common undertaking of a special or particular nature, but the contributions of the respective parties need not be equal or of the same character. There must, however, be some contribution by each party of something promotive of the enterprise. An agreement, express or implied, for the sharing of profits is generally considered essential to the creation of a joint adventure, and it has been held that, at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses. It has also been held, however, that the sharing of losses is not essential, or at least that there need not be a specific agreement to share the losses, and that, if the nature of the undertaking is such that no losses, other than those of time and labor in carrying out the enterprise, are likely to occur, an agreement to divide the profits may suffice to make it a joint adventure, even in the absence of a provision to share the losses.

40 S.E.2d 886, 893–94 (W.Va.1946) (internal citations omitted) (cited by *Cunningham,* 737 S.E.2d at 281).

Here, it is undisputed that Simoni contributed his efforts, skill, and knowledge to many aspects of the Fairmont and Spelter Litigations. (Dkt. No. 204 at 2) ("To be clear, Plaintiffs do not dispute that Dr. Simoni contributed to the Fairmont and Spelter litigations."). As to the existence of an agreement, the Rich Parties have explained that "the only agreement that Gary Rich discussed with Dr. Simoni regarding fee-splitting was based upon the condition that Dr. Simoni become a licensed attorney." (Dkt. No. 193–1 at 13).

***14** In his deposition, Rich testified that "we had talked about what might—what might be as far as, you know, if money was made on these cases, if he became licensed, if he—if he got something, a fee or maybe was compensated." (Dkt. No. 213 at 579). The following exchange also took place:

> Q. Was it—was it your thought at that time that you would share the fees from those cases?
>
> A. Share the fees with them?
>
> Q. With Simoni.
>
> A. If they became—if he—if he became a licensed attorney or if Harless became involved, yes.
>
> ...
>
> Q. So all—as to all the work you were going to do together in partnership you discussed splitting the fees?
>
> A. Uh-huh.

Id. at 583–84, 587.

Based on the undisputed facts, Rich and Simoni clearly had an agreement to share the profits earned from the cases on which they both worked. Although the parties hotly contest the agreement's terms (especially the alleged condition precedent that Simoni would become a licensed attorney), it is clear that there was an agreement, that Simoni contributed toward that agreement, and that Rich and Simoni were engaged in some form of a joint venture. Thus, because their dealings did not cease until Rich received his fee from the Spelter Litigation on January 27, 2011, and because Simoni filed his initial counterclaim in April 2012, Simoni's claims are not barred by the five-year statute of limitations at W. Va.Code § 55–2–6.[7]

The Court therefore denies the third-party defendants' motion for summary judgment based on the defense of the statute of limitations, overrules their objections to the R & R regarding when Simoni reasonably should have known that he would not receive any compensation from Rich, as well as when he last rendered services in the Fairmont Litigation, and finds it unnecessary to determine whether the discovery rule applies to the accrual of Simoni's claims.

3. Violation of the WVRPC

Recognizing that the viability of his compensation claim depends on a legally enforceable agreement, Simoni denies the agreement contemplated the sharing of legal fees earned by Rich. He asserts that all he seeks is "the reasonable and equitable compensation to which he is entitled by virtue of his substantial and valuable contributions." (Dkt. No. 194–1 at 12). According to Simoni, he has "no claim to any portion of a 'percentage fee split,' contingency fee, or similar agreement to share any legal fees." *Id.* at 11. The Rich Parties, on the other hand, contend that Simoni's claims "in effect seek to enforce what he claims was an unconditional agreement between him and Mr. Rich to split any attorney's fees received in the case." (Dkt. No. 193–1 at 13).

a.

The evidence adduced during discovery unequivocally establishes that the agreement described by Simoni contemplated that he would split the fees Rich earned from his work on the Fairmont and Spelter Litigations. During his deposition, Simoni was asked: "[W]hen you were talking about the 20 percent, 80 percent, 50 percent, 50 percent, what were you talking about? 50 percent of what?" (Dkt. No. 193–4 at 40). He responded: "Of the amount of money that [Rich] received." *Id.* The examiner then followed up: "And you understood the money he would be receiving would be fees, correct?" *Id.* Simoni responded: "Yes." *Id.* Then he was asked: "[Y]ou expected to get a percentage of his fees, correct?" *Id.* Simoni replied: "Yes." *Id.* Simoni concedes the same in one of his briefs: "It is undisputed that most, if not all, of the discussions regarding compensation between Mr. Rich and Dr. Simoni were underscored by the prospect of 'percentage split of attorney fees earned by Rich.' " (Dkt. No. 211 at 8).

***15** Simoni also testified that he did not expect to be paid wages: "[S]ince my compensation, as I understood, would come from the agreement that I had with Rich, you know, not until the cases were settled and based on my contributions and the value of my contributions, never had the thought or expectation of having to keep hours of work or anything like that." (Dkt. No. 213 at 1314). Also, when Cochran requested a summary of the hours he worked on the Spelter Litigation, Simoni never sent one. *Id.* at 1313.

Simoni argues that the Court's June 20, 2012 Order, which dismissed as moot any claims "predicated on a fee-splitting agreement" based on Simoni's "disavowal" of any such claim, resolved this issue. (Dkt. No. 29 at 2). However, after

entry of that Order, Simoni filed an amended counterclaim which again sought compensation based on the fee-splitting agreement. Moreover, the evidence adduced in discovery undercuts his argument and reinforces that his compensation claim remains based entirely on a fee-splitting agreement with Rich.

As an element of his primary claim, quantum meruit, Simoni must demonstrate a reasonable expectation to compensation. *See* *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP,* 746 S.E.2d 568, 579 (W.Va.2013). He alleges that he reasonably relied on his discussions with Rich concerning their "mutual understanding" of the fee-splitting agreement. (Dkt. No. 35 at 24). He also testified in his deposition that he expected to "[g]et zero" if the lawsuits were unsuccessful. (Dkt. No. 213 at 1275). Furthermore, as to his theory of compensation, his brief explains that

> [i]t is undisputed that most, if not all, of the discussions regarding compensation between Mr. Rich and Dr. Simoni were underscored by the prospect of "percentage split of attorney fees earned by [Mr.] Rich." ... And, it is this understanding and expectation which forms the basis for Dr. Simoni's claims made in this matter.

(Dkt. No. 211 at 8) (internal citations omitted) (alteration in original). From all this, the Court concludes that Simoni's agreement with Rich contemplated sharing a portion of Rich's legal fees from the Fairmont and Spelter Litigations.

b.

The overarching question in the case is whether the WVRPC's ethical bar to the fee-splitting agreement between Rich and Simoni also constitutes a legal bar to its enforceability. The case most closely on point in West Virginia is *Gaddy Engineering,* which Judge Kaull thoroughly analyzed in his R & R.

Gaddy Engineering Company ("Gaddy") had provided claim evaluation services to the law firm of Bowles Rice McDavid Graff & Love, LLP ("Bowles Rice") in connection with a lawsuit against an oil and gas company ("Columbia") for underpayment of royalties. *See* *Gaddy Engineering,* 746 S.E.2d at 571. According to Gaddy, Bowles Rice had agreed to pay it "one third of any recovery [Bowles Rice] received for pursuing claims against Columbia." *Id.* at 572. After this agreement was reached, however, the plaintiffs in the underlying royalties case refused to opt out of an ongoing class action, which relegated Bowles Rice to the role of nominal counsel, in lieu of lead class counsel, in the Columbia litigation. *Id.*

***16** Following the settlement of the class action, Gaddy submitted an invoice to Bowles Rice for $367,225, reflecting all the work Gaddy had performed from before the case was filed until it settled. *Id* . at 572–73. After receiving its attorneys' fees and expenses from the settlement, Bowles Rice only tendered $74,275 to Gaddy. *Id.* Gaddy rejected that amount and sued Bowles Rice for its portion of the fee, claiming breach of contract, various forms of negligence, fraud, conversion, promissory estoppel, unjust enrichment, and quantum meruit. *Id.*

Bowles Rice moved to dismiss Gaddy's complaint, arguing that the doctrine of illegality barred the enforcement of the alleged fee-sharing agreement. *Id.* In ruling on the motion, the circuit court noted that the West Virginia Supreme Court of Appeals "had never addressed the precise question of whether the ethical violation that results from a fee-sharing agreement between a lawyer and a nonlawyer would render the agreement void and unenforceable as a matter of public policy." *Id.* It denied the motion to dismiss based on "the hortative introductory language of the [WVRPC] and the lack of governing precedent." *Id.* Furthermore, as later recounted by Justice Loughry in his concurring opinion, the circuit court also observed that

> the *W. Va. Rules of Professional Conduct* do not amount to positive statements of the law or public policy sufficient to render the alleged fee-sharing agreement between Gaddy and Defendants void and unenforceable. In other words, these words do not define 'illegal conduct' but do define 'unethical conduct' for which an attorney may be disciplined or sanctioned by the Supreme Court of Appeals.

Id. at 580 (Loughry, J., concurring) (italics in original).

Rather than appeal the denial of its motion to dismiss, Bowles Rice moved for summary judgment on all of Gaddy's claims. *Id.* at 573. The trial court granted the motion, [8] which Gaddy then appealed. *Id.*

On appeal, the West Virginia Supreme Court of Appeals affirmed the trial court's dismissal of Gaddy's claims. But in doing so, it failed to decide whether a fee-sharing agreement violative of WVRPC 5.4 is contrary to the state's public policy. Because of that, Justice Loughry, joined by Justice Davis, "fault[ed] the majority for its absolute failure to recognize the critical need ... to address the illegality of a fee-sharing agreement between a lawyer and a nonlawyer." *Id.* at 579 (Loughry, J., concurring). Taking the point even further, he explained that, "[d]espite the clear invitation from the trial court to resolve this previously unaddressed issue, the majority opted not to decide that a fee-sharing agreement between a lawyer and a nonlawyer that is in violation of Rule 5.4 of the Rules of Professional Conduct is unenforceable as being contrary to public policy." *Id.* at 579–80 (Loughry, J., concurring).

Justice Loughry noted that "[n]umerous other courts ... have resoundingly determined that rules of professional conduct contain explicit declarations of a state's public policy." *Id.* at 580 (Loughry, J., concurring) (collecting cases). He also acknowledged that, in a number of cases, " 'a party to a contract which is contrary to public policy is not precluded from raising its illegality as a defense.' " *Id.* at 582–83 (Loughry, J., concurring) (quoting *O'Hara v. Ahlgren, Blumenfeld and Kempster,* 537 N.E.2d 730, 738 (Ill.1989)). Indeed, "[t]he fact that one party may benefit from an illegal fee-sharing agreement does not tip the proverbial scales of justice in favor of enforcement." *Id.* at 582 (Loughry, J., concurring).

***17** Justice Loughry's concurrence makes clear that the question of the enforceability of a fee-splitting agreement between an attorney and a non-attorney is unresolved under West Virginia law. This question, of course, lies at the heart of Simoni's claim for a portion of Rich's fee award. Since any claim to compensation by Simoni is based on a fee-splitting agreement, if the agreement was void *ab initio* because it violated West Virginia public policy, Simoni could not reasonably have relied on Rich's promise, and therefore could not have any reasonable expectation of receiving compensation, whether under a theory of unjust enrichment, quantum meruit, or breach of implied contract.

Because the answer to this issue will determine the outcome of these three claims, the Court adopts Judge Kaull's recommendation to certify to the West Virginia Supreme Court of Appeals the question whether the WVRPC expresses the public policy of West Virginia. Adopting the recommendation to certify, however, does not dispose of the remaining challenges to Simoni's counterclaim, to which the Court now turns.

4. Estoppel as a Bar to Compensation

The Rich Parties attack Simoni's compensation claim based on the doctrines of equitable and judicial estoppel. They rely on his testimony in the Spelter Litigation, where they contend he disavowed any promise of compensation. Accordingly, they urge the Court to apply estoppel as a bar to Simoni's counterclaim.

In his 2006 deposition in the Spelter Litigation, Simoni testified as follows:

> Q. Have you ever received any money or gift from any of the plaintiffs' firms in this litigation?
>
> A. No.
>
> Q. Have you ever received the promise of any money or gift from any of these plaintiffs' firms concerning this litigation?
>
> A. Well, as I'm understanding your question, that's an area that would involve communications with the law firms; and if I'm following this whole thing correctly, that would be part of my relationship—working relationship, and, therefore, would be a privileged area. I mean, unless I'm mistaken about that; but I think that's correct.
>
> Q. Were there any promises of any money or gifts made to you concerning this litigation prior to the late summer of 2003?
>
> A. No.

(Dkt. No. 202–7 at 9). According to the Rich Parties, "[b]ecause any [claims to compensation] are directly refuted by Dr. Simoni's sworn testimony in a prior proceeding, he should be estopped from advancing those claims before this Court." (Dkt. No. 193–1 at 8).

Simoni disputes that he understood the phrase "plaintiffs' firms" to include Rich Law. He argues that, in responding

"no" to the questions, he was merely stating that neither Levin nor Cochran (nor the firms of Kennedy & Madonna and West & Jones, for that matter) had promised to compensate him. (Dkt. No. 202 at 8).

In support of this interpretation, Simoni highlights the prior context of his deposition, where he had been asked specifically about the third-party defendant law firms, not including Rich Law. Simoni also underscores a later portion of the testimony, where he was asked, "Mr. Rich is a plaintiffs' lawyer, is he not?" (Dkt. No. 202–7 at 14). Simoni's reply was, "I wouldn't term Mr. Rich a plaintiffs' lawyer." *Id.*

***18** Equitable estoppel requires "a false representation or a concealment of material facts." Syl Pt. 3, *Cleaver v. Big Arm Bar & Grill, Inc.,* 502 S.E.2d 438, 438 (W.Va.1998). Similarly, judicial estoppel requires that "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation." *Lowery v. Stovall,* 92 F.3d 219, 224 (4th Cir.1996). Here, application of either doctrine turns on whether Simoni testified at his deposition in 2006 that he was never promised compensation. This question clearly involves a material factual dispute that cannot be resolved on summary judgment.

5. Lack of Reasonable Expectation to Compensation

The third-party law firms contend that "Simoni cannot have any reasonable expectation of compensation, and his claims should be barred as a matter of law." (Dkt. No. 200–1 at 22). More specifically, they assert that a claim for quantum meruit cannot lie where the claimant lacked "any reasonable expectation of receiving remuneration for his services." *Id.* (quoting *Copley,* 466 S.E.2d at 146). They advance three bases for their argument.

First, they argue that the fee-splitting agreement between Rich and Simoni was illegal and unenforceable; Simoni always knew it was unenforceable, and therefore he cannot now reasonably expect to be compensated pursuant to the agreement. Plainly, this argument encompasses the question to be certified regarding the legality of the agreement between Rich and Simoni.

Second, they argue that Simoni lacked a reasonable expectation to payment because, as a consultant or service provider, he failed to document his hours worked. (Dkt. No. 200–1 at 24). This argument contains a faulty premise, namely, that Simoni was seeking hourly compensation. Simoni has testified that he "never had the thought or expectation of having to keep hours of work or anything like that ." (Dkt. No. 213 at 1314).

Finally, even if the agreement is enforceable, they argue that Rich's "pattern of volatile, erratic conduct" eroded any reasonable expectation to compensation Simoni might have had. (Dkt. No. 200–1 at 23). The record does in fact contain occasional instances of bizarre behavior by Rich. For example, Simoni testified that, when he met with Rich in April of 2002, they discussed their agreement outdoors because "Gary was concerned about his office area being under some kind of surveillance." (Dkt. No. 213 at 1200). Simoni further testified that, at the same meeting, Rich threatened to "come at me physically." *Id.* at 1199.

Despite these encounters, the Court cannot find as a matter of law that Simoni's expectation of compensation from Rich was unreasonable. While the record documents that he expressed doubts at times about whether or not Rich would pay him, *id.* at 1159 ("I got to thinking I don't know that I'm going to get anything."), he likewise "always believed" he would receive some compensation. *Id.* at 1428. Thus, there are material facts in dispute regarding the reasonableness of Simoni's expectation to compensation.

B. Simoni's Count IV: Negligent Misrepresentation

***19** The third-party law firms next argue that Simoni's negligent misrepresentation claim is "duplicative" of his breach of implied contract claim, and should be considered abandoned. (Dkt. No. 200–1 at 25). As discussed earlier, duplication alone is not a basis for dismissing a claim. More importantly, a claim for negligent misrepresentation is legally distinct from a claim for breach of implied contract. *See, e.g., Dickens v. Sahley Realty Co.,* 756 S.E.2d 484, 487 (W.Va.2014) (involving claims for both negligence and breach of implied contract).

Nevertheless, the third-party defendants' argument does prompt an analysis as to whether Simoni's allegations of negligent misrepresentation are legally sufficient; nowhere does he allege that Rich owed him any duty beyond the purported fee-split. In *Gaddy Engineering,* the West Virginia Supreme Court of Appeals affirmed the circuit court's grant of summary judgment on the plaintiff's negligent misrepresentation claim based in part on "the lack of any duty owed." 746 S.E.2d at 578; *see also Folio v. City of Clarksburg,* 655 S.E.2d 143, 151 (W.Va.2007) (reiterating

that, for negligent misrepresentation to lie, the alleged tortfeasor must be "under a duty to give information to another"); *Kidd v. Mull,* 595 S.E.2d 308, 317 (W.Va.2004) ("[A] successful claim for negligent misrepresentation would require a finding that Ms. Markwas was a real estate broker and thereby maintained a special relationship or duty to the Appellants."). Because Simoni has not articulated any duty the Rich Parties owed him beyond the fee-splitting agreement, his claim of negligent misrepresentation fails as a matter of law.

C. Simoni's Count V: Conversion

Simoni's counterclaim alleges that the Rich Parties' "exercise of purported ownership over the proceeds of the Spelter litigation constitutes a conversion thereof." (Dkt. No. 35 at 27). Under West Virginia law, " '[a]n action for conversion of personal property cannot be maintained by one without title or right of possession.' " Syl. Pt. 3, *Thompson Dev., Inc. v. Kroger Co.,* 413 S.E.2d 137, 142 (W.Va.1991) (quoting Syl., *Kisner v. Commercial Credit Co.,* 174 S.E.2d 330, 330 (W.Va.1934)).

With respect to the Spelter Litigation, Rich received his portion of the total attorneys' fees pursuant to an uncontested order of the Harrison County Circuit Court. (Dkt. No. 200–1 at 25). As Simoni never held title to or possession of the fees, he cannot maintain a claim for conversion under West Virginia law.

D. Simoni's Count VI: Estoppel

Finally, the third-party defendants urge that Simoni cannot plead estoppel as an independent cause of action. *Id.* An analysis of this issue, however, is not as clear-cut as their argument suggests. One federal district court in West Virginia dismissed a claim for estoppel for lack of case law supporting it as an independent claim, and because the plaintiffs pleaded it as an equitable defense. *See Warden v. PHH Mortg. Corp.,* No. 3:10CV75, 2010 WL 3720128, at *7 (N.D.W.Va. Sept. 16, 2010). However, another district court determined that "[t]he Supreme Court of Appeals of West Virginia has treated equitable estoppel as a viable cause of action." *Holtzapfel v. Wells Fargo Bank, N.A.,* No. 2:12CV937, 2013 WL 1337283, at *5 (S.D.W.Va. Mar. 29, 2013) (citing *Folio,* 655 S.E.2d at 148). Fully aware that its ruling conflicted with the holding in *Warden,* the court in *Holtzapfel* distinguished its decision on the ground that the estoppel claim in *Warden* had been pleaded as an equitable defense. *Holtzapfel,* 2013 WL 1337283, at *5 n. 9.

***20** Here, Simoni's estoppel claim is limited specifically to his failure to record hours worked:

> 145. In reliance on the discussions that occurred between the Counter–Defendants and Dr. Simoni regarding the arrangement under which he would be compensated, Dr. Simoni did not keep contemporaneous time records of his substantial and valuable hourly contributions;
>
> 146. The Counter–Defendants are now estopped from denying Dr. Simoni compensation for his work based on the absence of contemporaneous time records or the inability of Dr. Simoni to reconstruct, on a hourly basis, the extent of his contributions[.]

(Dkt. No. 35 at 28). These allegations clearly amount to a preemptive effort to rebut the Rich Parties' anticipated argument that he is not entitled to compensation since he never recorded the hours he worked. As such, they do not create an independent basis for liability. Moreover, in his answer to the Rich Parties' complaint, Simoni specifically pleaded estoppel as an affirmative defense. *Id.* at 3. Thus, because Simoni's estoppel claim in actuality is an equitable defense, it is comparable to the claim dismissed in *Warden,* and does not survive as an independent cause of action.

For the reasons discussed, the Court dismisses with prejudice Counts IV–VI of Simoni's counterclaim, leaving only Counts I–III, which depend entirely on whether the fee-splitting agreement between Rich and Simoni is legally enforceable.

V. CERTIFICATION

Under the West Virginia Uniform Certification of Questions of Law Act ("UCQLA"), § 51–1A–1, *et seq.,* federal courts may petition the state's highest court for an answer to a question of state law so long as (i) it is "determinative of an issue in a pending cause in the certifying court," and (ii) "there is no controlling appellate decision, constitutional provision or statute of this state." § 51–1A–3. Fourth Circuit standards add no prerequisites beyond those in the statute. *See, e.g., State Auto Prop. & Cas. Ins. Co. v. E. Data Sys., Inc.,* 587 F.3d 226, 227 (4th Cir.2009) (finding it appropriate to certify a question through the UCQLA because the answer would be outcome-determinative and there was no controlling precedent, statute, or constitutional provision).

Here, whether an agreement that violates the WVRPC is legally enforceable will determine if Counts I–III of Simoni's counterclaim survive. Without the underlying agreement supporting Simoni's expectation of compensation in the form of a fee-split, his remaining claims for breach of implied contract, quantum meruit, and unjust enrichment would fail as a matter of law. Additionally, *Gaddy Engineering* makes clear that there is no controlling appellate decision, statute, or constitutional provision addressing this issue.

Therefore, the Court will certify the following question to the West Virginia Supreme Court of Appeals:

> Are the West Virginia Rules of Professional Conduct statements of public policy with the force of law equal to that given to statutes enacted by the West Virginia State Legislature?

***21** (Dkt. No. 213 at 37). It intends to enter a separate order of certification.

VI. CONCLUSION

In conclusion, the Court:

- **OVERRULES** the third-party defendants' objections to the R & R;
- **ADOPTS** the recommendation in the R & R to certify the question whether the WVRPC constitute statements of public policy;
- **DISMISSES WITH PREJUDICE** Counts IV–VI of Simoni's counterclaim;
- **STAYS** this case pending resolution of a certified question by the West Virginia Supreme Court of Appeals; and
- **DIRECTS** the parties to file a joint motion to lift the stay following receipt of the answer to the certified question.

It is so **ORDERED.**

The Court directs the Clerk to transmit copies of this Memorandum Opinion and Order to counsel of record.

PROPOSED FINDINGS OF FACT AND RECOMMENDATION FOR DISPOSITION

JOHN S. KAULL, United States Magistrate Judge.

This case arises out of claims for compensation by Joseph Simoni, Ph.D., hereinafter referred to as Simoni, a non-licensed graduate of the West Virginia University College of Law, against Gary W. Rich, a licensed attorney at law, allegedly due as a result of work done over a number of years by Simoni on two successful civil litigations hereinafter referred to as the Philips case and the Spelter case.

Pending before the Court for decision are the thoroughly briefed cross motions for summary judgment filed by the parties. The motions are dispositive within the meaning of 28 U.S.C. § 636(b)(1)(A) and are therefor subject to being decided by Proposed Findings of Fact and Recommendation For Disposition pursuant to 28 U .S.C. § 636(b)(1)(B) and (C).

I.

Plaintiffs' [Rich] Motion For Summary Judgment DE 193

A. Plaintiffs' Contentions

1. Estoppel: Simoni is estopped from asserting claims that are inconsistent with his own prior sworn testimony that he had not been promised any compensation for his services.

2. Laches: Simoni's claims are barred by the doctrine of laches because:

a. he did not present his claimed hours in a timely manner so Plaintiffs could seek to have them paid by the lead law firms in accordance with Plaintiffs' agreements with those firms or

b. he did not present his claimed hours in a timely manner so they could be included in fee petitions to the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

HERC SERVICES, LLC,

Plaintiff,

v,

Civil Action No. 5:19-CV-173
Judge Bailey

COLUMBIA GAS TRANSMISSION, LLC,

Defendant.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Pending before this Court are defendant's Motion to Dismiss [Doc. 8] and defendant's Motion to Transfer Venue [Doc. 13]. This Court, having jurisdiction, will address the motion to dismiss first. In that motion, the defendant asserts that the plaintiff did not properly perfect its mechanics lien on the subject property in that it did not serve notice upon the owner as required by West Virginia law.

Count One of the Complaint for Enforcement of Mechanic's Lien [Doc. 1] seeks to enforce a mechanic's lien on property owned by the defendant. According to the plaintiff, Herc ceased operations on the project on or about October 21, 2018. On October 22, 2018, the plaintiff caused to be recorded in the Office of the Clerk of Wetzel County, West Virginia, a Notice of Mechanic's Lien against Columbia's property.

According to West Virginia Code § 38-2-9, the plaintiff was required to provide notice to the owner "by any of the methods provided by law for the service of a legal notice or summons," within one hundred days of the cessation of work on the project. In this

case, 100 days after October 21, 2018, would be January 29, 2019, yet service was not provided to the owner until February 20, 2019. This flaw is fatal to plaintiff's mechanic's lien claim.

The plaintiff argues that recordation of the notice of lien is sufficient notice to the owner, citing ***Doss v. Gulf Smokeless Coal Co.***, 102 W.Va. 470, 135 S.E. 575 (1926).

This Court finds plaintiff's arguments to be unpersuasive. The statute, § 38-2-9, requires **both** recordation and notice. In addition notice is to be by "any of the methods provided by law for the service of a legal notice or summons." If recordation were sufficient, the language concerning notice would be surplusage.

"'It is our duty "to give effect, if possible, to every clause and word of a statute."' ***United States v. Menasche***, 348 U.S. 528, 538–539 (1955) (quoting ***Montclair v. Ramsdell***, 107 U.S. 147, 152 (1883)); *see also* ***Williams v. Taylor***, 529 U.S. 362, 404, (2000) (describing this rule as a 'cardinal principle of statutory construction'); ***Market Co. v. Hoffman***, 101 U.S. 112, 115 (1879) ('As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"'). We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting. ***Babbitt v. Sweet Home Chapter, Communities for Great Ore.***, 515 U.S. 687, 698 (1995); *see also* ***Ratzlaf v. United States***, 510 U.S. 135, 140 (1994)." ***Duncan v. Walker***, 533 U.S. 167, 174 (2001).

The ***Doss*** case provides no sanctuary. ***Doss*** dealt with the predecessor of W.Va. Code § 38-2-31, which dealt with claims by laborers and workmen. In contrast to § 38-2-9, that statute did not then nor does it now require notice to the owner.

The consequence for failing to "perfect and preserve" a mechanic's lien is re-iterated in (s) 14:

> The failure of any person claiming a lien under this article to give such notice as is required . . . in the manner and within the time specified in such sections, or the failure of any such claimant of any such lien to comply substantially with all of the requirements of this article for the perfecting and preservation of such lien, within the time provided therefor in this article, shall, except as provided in section twenty of this article, operate as a complete discharge of such owner and of such property from all liens for claims and charges of any such . . . subcontractor . . . for any work claimed to have been performed and for any materials, machinery or other necessary equipment claimed to have been furnished in connection with such work.

W. Va. Code § 38-2-14.

In West Virginia "[m]echanic's lien statutes must be strictly construed with reference to those requirements upon which the right depends and liberally construed with reference to the manner in which the right is perfected." Syl. Pt. 3, ***Badger Lumber Co. v. Redd***, 213 W. Va. 453, 583 S.E.2d 76 (2003) (quoting Syl. Pt. 1, ***Earp v. Vanderpool***, 160 W. Va. 113, 232 S.E.2d 513 (1976)).

Discharge of a lien is required when a party misses the deadline for providing notice by even as little as one day. In ***Means v. Kidd***, 136 W. Va. 514, 67 S.E.2d 740 (1951), the Court affirmed the dismissal (by demurrer) of a mechanic's lien lawsuit where a materialman miscalculated by one day the statutory deadline to give a notice of mechanic's

lien to the property owner. The deadline, then sixty days, passed on Sunday, November 2, 1949, but notice was not given until Monday, November 3, 1949. In Syllabus Point 2, the Court held, "When the notice . . . is not given to such owner until the next day after the last day of the sixty day period, and the last day of such period is a legal holiday, but not a Sunday, the failure to give such notice on or before the last day of the sixty day period renders it void and of no force or effect, terminates the right of such person to perfect and preserve such lien, and discharges the owner and the property from the lien claimed by such person." Syl. Pt. 2, ***Means***, *supra*. *See also,* ***Fisher v. Reamer***, 146 W. Va. 83, 92-93, 118 S.E.2d 76, 81 (1961) (citing ***Means***, *supra*).

In ***Amick v. C & T Development Co.***, the claimant's mechanic's lien was recorded just five days late, ninety-five days after completion of work on the project. The Court explained:

> The record of the present case shows that Michael Vandal last performed work in conjunction with the present matter on May 12, 1989, and that he did not file a notice of his lien until August 16, 1989, more than ninety days after the work was performed. Given this fact, given the language of W.Va. Code, 38–2–32, and given the holding in the ***Sturgill*** case, this Court believes that the failure of Michael Vandal to file the appropriate notice of his lien within the time provided by law resulted in a discharge of that lien and that, under the circumstances, the appellant is correct in asserting that the trial court erred . . ..

Amick v. C & T Dev. Co., 187 W. Va. 115, 119, 416 S.E.2d 73, 77 (1992).

For the above reasons, Count One of the Complaint is dismissed with prejudice.

Count Two of the Complaint seeks to recover from the defendant under the theory of unjust enrichment. Under the law of unjust enrichment, if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value.

The flaw in plaintiff's complaint is the lack of an allegation that the defendant has not paid for the benefit that it received. Obviously, if Columbia Gas has paid its contractor in full for the benefits that it received, then it has not been unjustly enriched. Accordingly, Count Two will be dismissed without prejudice and with leave to amend the complaint within twenty-eight days from the entry of this Order.

The Motion to Transfer Venue will be denied as moot.

For the reasons stated above, the defendant's Motion to Dismiss [**Doc. 8**] is **GRANTED** and defendant's Motion to Transfer Venue [**Doc. 13**] is **DENIED AS MOOT**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: June 24, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FORT THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

SCHMID PIPELINE CONSTRUCTION, INC.,

Plaintiff,

v.

Civil Action No. 5:19-CV-257
Judge Bailey

COLUMBIA GAS TRANSMISSION, LLC, and **WELDED CONSTRUCTION, L.P.**,

Defendants.

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 [DOC. 20]

Pending before this Court are Schmid Pipeline Construction, Inc.'s Motion to Remand and Abstain [Doc. 10], Columbia Gas Transmission's Motion for Partial Dismissal [Doc. 17], and Columbia Gas Transmission's Motion to Transfer Venue [Doc. 20]. This Court will consider the Motions in the order in which they were filed.

Background

1. On or about August 6, 2018, Welded Construction, L.P. ("Welded"), as general contractor, entered into a certain Construction Subcontract (the "Subcontract") with Schmid Pipeline Construction, Inc. ("Schmid" or "Plaintiff") for labor, materials, equipment, and services to be provided and/or performed in connection with the construction of the Mountaineer Express Pipeline Project (the "Project").

2. Between August 10, 2018, and October 19, 2018, Schmid performed work

on the Project. Schmid last performed work on the Project on October 19, 2018.

3. On October 22, 2018, Welded and its affiliated debtors filed petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

4. On January 18, 2019, having not been paid for its work on the Project, Schmid recorded a Notice of Mechanic's Lien dated January 14, 2019, in the Office of the Clerk of the County Commission of Wetzel County, West Virginia at Mechanics Lien Book 7, at page 96, claiming a lien upon Columbia Gas' interest in the Project in the amount of $2,361,914.00.

5. On April 10, 2019, Schmid filed the Motion of Schmid Pipeline Construction, Inc. for Relief from the Automatic Stay in the Bankruptcy Case, requesting relief from the automatic stay of § 362(a) of the Bankruptcy Code, to commence an action to enforce and/or foreclose Schmid's mechanic's lien rights and remedies.

6. In its Motion for Relief from Automatic Stay, Schmid stated that it would not take any action against property of the Debtor's estate, and that Schmid sought to name Welded only as a nominal defendant in the lien action it planned to commence because, under West Virginia state law, when a subcontractor commences an action to enforce and/or foreclose a mechanic's lien, it must name the general contractor as a defendant.

7. On April 26, 2019, the Delaware Bankruptcy Court issued its Order Granting Motion of Schmid Pipeline Construction, Inc. for Relief from the Automatic Stay (the "Relief from Stay Order"), providing that:

> Schmid Pipeline is hereby granted relief from the automatic stay of 11 U.S.C. § 362(a) only to the extent required to permit Schmid Pipeline to commence

any action, and name debtor Welded Construction, L.P. (the "Debtor") as a nominal defendant, to enforce and/or foreclose Schmid Pipeline's mechanic's lien rights and remedies, including, but not limited to, commencing and pursuing to completion any necessary mechanic's lien action, with respect to the Columbia Gas Mountaineer Express Pipeline Project . . . , located in the county of Wetzel, in the State of West Virginia, provided that, once an action is filed to enforce and/or foreclose Schmid Pipeline's mechanic's lien rights and remedies ("Action"), the Action shall be stayed for 90 days immediately after the commencement of the Action. At the conclusion of such 90 day period, the automatic stay will be finally and irrevocably modified solely to the extent required to permit the parties to prosecute and defend the Action to completion.

8. On August 13, 2019, Schmid initiated an action to, inter alia, enforce and/or foreclose its Mechanic's Lien by filing a Complaint in the Circuit Court of Wetzel County, West Virginia (the "State Court") asserting solely state-law claims against Columbia Gas for (a) the enforcement and/or foreclosure of Schmid Pipeline's Mechanic's Lien pursuant to West Virginia's mechanic's lien statutes, (b) unjust enrichment and (c) quantum meruit.

9. Welded was named as a nominal defendant in the Complaint, but only as to the Mechanic's Lien claim, and no relief was sought against Welded.

10. On August 7, 2019, Columbia Gas filed a Notice of Removal [Doc. 1] with the United States Bankruptcy Court for the Northern District of West Virginia (the "Northern District of West Virginia Bankruptcy Court") asserting that the Northern District of West Virginia Bankruptcy Court had jurisdiction to decide Schmid's claims "pursuant to 28 U.S.C.

§ 1334(b), because this civil action arises in and/or is related to a pending case filed under Title 11, ***In re Welded Construction, L.P.***, Case No. 18-12378 (KG) (Bankr. D. Del.) (Jointly Administered)."

11. By Order entered September 4, 2019, this Court withdrew the reference of this proceeding to the bankruptcy court and assumed jurisdiction of the matter [Doc. 7].

Motion to Remand and Abstain

In seeking remand, Schmid argues (1) there is a question as to whether diversity jurisdiction exists; (2) that the bankruptcy court cannot exercise diversity jurisdiction; and (3) that this matter is not "related to" the action pending in bankruptcy court in Delaware.

This Court finds that none of the arguments should prevail. First, with respect to the issue of diversity jurisdiction, Schmid has pled that is it a Wisconsin corporation with its principal place of business in Wisconsin. Columbia is a limited liability company, organized and existing under the laws of the State of Delaware, having its principal place of business in Texas, and not being a citizen of Wisconsin or West Virginia. As a nominal party, the citizenship of Welded is not relevant. ***Navarro Sav. Ass'n v. Lee***, 446 U.S. 458, 461 (1980); ***Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.***, 736 F.3d 255 (4th Cir. 2015); ***Ryan Environmental, Inc. v. Hess Oil Co., Inc.***, 718 F.Supp.2d 719, 723 (N.D. W.Va. 2010) (Keeley, J.). *See* ***Brown v. Jevic***, 575 F.3d 322, 327 (3rd Cir. 2009).

The amount in controversy is clearly met. Accordingly, there is no reason to believe that this Court lacks diversity jurisdiction.

With respect to the argument that a bankruptcy court cannot exercise diversity jurisdiction, the reference has been withdrawn. There is no doubt that the district court has

jurisdiction.

This Court also finds that this matter is "related to" the Welded bankruptcy court. "The Fourth Circuit has adopted the test set forth in ***Pacor, Inc. v. Higgins***, 743 F.2d 984 (3d Cir. 1984), for determining whether a civil proceeding 'relates to' a bankruptcy case. *See* ***Owens–Illinois, Inc. v. Rapid American Corp***. (***In re Celotex Corp.***), 124 F.3d 619, 625 (4th Cir. 1997). According to that test:

> [W]hether a civil proceeding is related to bankruptcy is [determined by] **whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy**. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

Pacor, 743 F.2d at 994 (emphasis in original) (citations omitted). The Fourth Circuit has construed the ***Pacor*** test broadly, stating that the test 'does not require certain or likely alteration of the debtor's rights, liabilities, options or freedom of action, nor does it require certain or likely impact upon the handling and administration of the bankruptcy estate. The possibility of such alteration or impact is sufficient to confer jurisdiction.' ***In re Celotex Corp.***, 124 F.3d at 626; *see also* ***Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)***, 837 F.2d 325, 330 (8th Cir. 1988) ('[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad

jurisdictional test articulated in ***Pacor***.')." ***Blanton v. IMN Financial Corp.***, 260 B.R. 257, 261-62 (M.D. N.C. 2001).

This Court finds that this case is related to the Welded Construction bankruptcy. A determination of the amount owed to the plaintiff in the mechanics lien proceeding could have an effect on the proof of claim filed by the plaintiff in the bankruptcy. *See* ***Siskin Steel & Supply Co., Inc. v. Highland North, LLC***, 2013 WL 23906, *7 (W.D. Pa. Jan. 2, 2013) ("Any recovery by Siskin in the mechanic's lien claim would necessarily reduce Siskin's claim against SIAG in the bankruptcy estate for contribution by the same amount, thus altering the liability of the SIAG bankruptcy estate.") and ***Longchamps Elec., Inc. v. Rothenberg (In re: Wrenn Assoc., Inc.)***, 2004 WL 1746117, *4 (D.N.H. July 26, 2004) (bankruptcy court exercised subject-matter jurisdiction over a subcontractor's action to recover under a mechanic's lien statute against a property owner, reasoning that it would "impact [the general contractor's] bankruptcy case because ... a subcontractor's mechanic's lien is only valid to the extent that monies are owed the general contractor," which was the debtor in the bankruptcy case.).

For the reasons stated above, Schmid Pipeline Construction, Inc.'s Motion to Remand and Abstain [**Doc. 10**] is **DENIED**.

Motion for Partial Dismissal

In this Motion, Columbia Gas seeks an order dismissing Counts II (unjust enrichment) and III (*quantum meruit*) of the Amended Complaint [Doc. 12]. Schmid's claims for "unjust enrichment" and "quantum meruit" - according to the Complaint's own allegations and exhibits - are based in contract. This Court has made clear that "there can

be no recovery for unjust enrichment if there is an express contract covering the same subject matter." ***Worldwide Machinery L.P. v. Columbia Gas Transmission, LLC***, Civil Action No. 5:19-cv-208, Order Dismissing Compl., Doc. No. 8 (citing ***Case v. Shepherd***, 84 S.E.2d 140, 144 (W. Va. 1954); ***Ohio Valley Health Servs. & Educ. Corp. v. Riley***, 149 F.Supp.3d 709, 720–22 (N.D. W. Va. 2015). Therefore, Counts II and III must be dismissed.

Motion to Transfer Venue

According to 28 U.S.C. § 1412, "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. The court recognizes that change of venue to the District of Delaware may prove less convenient to plaintiff than proceeding in this court, but the interest of justice weighs in favor of such a transfer. *See* ***Irwin v. Beloit Corp. (In re Harnischfeger Indus., Inc.)***, 246 B.R. 421, 435 (Bankr. N.D. Ala. 2000) ("Because the criteria under § 1412 is phrased in the disjunctive, the bankruptcy case or proceeding is transferable upon a sufficient showing of either the interest of justice or the convenience of the parties."). Factors cited by courts in determining whether transfer of venue will serve the interests of justice include: (a) the economic administration of the bankruptcy estate; (b) the presumption in favor of trying cases "related to" a bankruptcy case in the court in which the bankruptcy is pending; (c) judicial efficiency; (d) ability to receive a fair trial; (e) the state's interest in having local controversies decided within its borders; (f) enforceability of any judgment rendered; and (g) the plaintiff's original choice of forum. ***Id.*** at 435–37. Although the state's interest in deciding local controversies and

the plaintiff's original choice of forum favor retaining venue, these factors are outweighed by considerations of consistency, judicial economy, and economic administration of the bankruptcy estate. Requiring the debtor to defend or participate in an action in West Virginia would serve to diminish the bankruptcy estate.

In addition, "many courts presume that the proper venue for a proceeding related to a bankruptcy case is in the district hearing the bankruptcy case. *See* ***Sudbury, Inc. v. Dlott (In re Sudbury)***, 149 B.R. 489, 493 (Bankr. N.D. Ohio 1993) (noting the 'general presumption that all matters involving a bankruptcy should be tried in the court in which the bankruptcy is pending.'); ***Nixon Mach. Co. v. Roy Energy, Inc. (In re Nixon Machinery Co.)***, 27 B.R. 871, 873 (Bankr. E.D. Tenn. 1983) (stating that the 'general rule' is that 'the court where the bankruptcy case is pending is the proper venue for all related proceedings within the court's jurisdiction.')." ***Blanton***, supra at 267.

This last factor also supports the decision to transfer venue to the District of Delaware. There is no reason to believe that the ability to receive a fair trial or the enforceability of any judgment rendered would be affected by transferring venue. Consequently, the court finds that in the interest of justice the present action should be transferred to the District of Delaware, from which it can be referred to the bankruptcy court.

For the reasons stated above, Schmid Pipeline Construction, Inc.'s Motion to Remand and Abstain [**Doc. 10**] is **DENIED**; Columbia Gas Transmission's Motion for Partial Dismissal [**Doc. 17**] is **GRANTED**, and Columbia Gas Transmission's Motion to Transfer Venue [**Doc. 20**] is **GRANTED**. As a result, this matter is hereby **ORDERED**

TRANSFERRED to the District of Delaware.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and to take all necessary action to execute the transfer.

DATED: October 21, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

2018 WL 9988269
Only the Westlaw citation is currently available.
United States District Court, N.D. West Virginia, Martinsburg.

LEMARTEC CORPORATION, a Florida corporation, Plaintiff,
v.
ENTSORGA WEST VIRGINIA, LLC, a Delaware limited liability company, Berkeley County Solid Waste Authority, a West Virginia municipal corporation, Entsorga USA, Inc., a Delaware corporation, and Philadelphia Indemnity Insurance Company, Defendants.
Berkeley County Solid Waste Authority, a West Virginia municipal corporation, Counter Claimant,
v.
Lemartec Corporation, a Florida corporation, Counter Defendant.
Entsorga USA, Inc., a Delaware corporation, and Entsorga West Virginia, LLC, a Delaware limited liability company, Cross Claimants,
v.
Philadelphia Indemnity Insurance Company, Cross Defendant.
Entsorga USA, Inc., a Delaware corporation, and Entsorga West Virginia, LLC, a Delaware limited liability company, Counter Claimants,
v.
Lemartec Corporation, a Florida corporation, Counter Defendant.

Civil Action No.: 3:18-CV-22
|
Signed 09/14/2018

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ORDER GRANTING IN PART DEFENDANT BERKELEY COUNTY SOLID WASTE AUTHORITY'S MOTION FOR SUMMARY JUDGMENT UPON THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANT BERKELEY COUNTY SOLID WASTE AUTHORITY

GINA M. GROH, CHIEF UNITED STATES DISTRICT JUDGE

***1** Currently before the Court is Defendant Berkeley County Solid Waste Authority's Motion for Summary Judgment upon the Plaintiff's Claims against the Defendant Berkeley County Solid Waste Authority [ECF No. 12], filed on April 5, 2018. Plaintiff Lemartec Corporation ("Lemartec") filed a Response in Opposition [ECF No. 27] on April 26, 2018. Defendant Berkeley County Solid Waste Authority ("Solid Waste Authority") filed a Reply in Support of Its Motion [ECF No. 28] on May 8, 2018. Accordingly, the matter has been fully briefed and is now ripe for review. For the reasons provided below, the motion must be granted in part.

I. Procedural and Factual Background

This lawsuit arises from the construction of a waste-to-fuel processing plant in Martinsburg, West Virginia (the "Project"). ECF No. 1, 18. The background of the Project is as follows. In 2010, the Solid Waste Authority entered into a long term lease with Defendant Entsorga WV, LLC ("Entsorga WV"). Under the lease, Entsorga WV was tasked with developing a processing plant that could turn solid waste into fuel. In March 2016, Entsorga WV appointed Chemtex International, Inc. ("Chemtex") to serve as the

general contractor on the Project. Chemtex entered into a subcontract with Lemartec. Shortly thereafter, Chemtex assigned its interest in the subcontract to its wholly-owned subsidiary, Biochemtex S.p.A. ("Biochemtex"). Lemartec alleges that Biochemtex failed to pay Lemartec for the services and materials it provided to the Project. Lemartec further alleges that the financial situation with Biochemtex caused Lemartec to consider terminating its relationship with the Project.

However, in June 2017, Entsorga WV terminated the contract with Biochemtex and began direct negotiations with Lemartec to complete the work on the Project. Lemartec asserts that Entsorga WV promised to pay Lemartec for all the work performed on the Project, including the work performed as a subcontractor for Biochemtex. Thereafter, the parties reached an agreement and executed a Memorandum of Understanding and Limited Notice to Proceed ("MOU"). Lemartec recommenced construction in August 2017. Lemartec alleges that Entsorga WV failed to pay Lemartec, and so, Lemartec stopped work on the Project. On February 7, 2018, Lemartec filed a mechanic's lien against the Project, claiming that Entsorga WV owes it $1,694,192.60.

On the same day, Lemartec filed the complaint in this action seeking enforcement of the mechanic's lien and alleging breach of contract, or in the alternative, unjust enrichment against Entsorga WV and the Solid Waste Authority. The Solid Waste Authority filed this motion for summary judgment arguing that West Virginia law does not authorize a mechanic's lien against public property, and even if it did, Lemartec would not be entitled to a lien in this case. ECF No. 13 at 5-15. Additionally, the Solid Waste Authority asserts that the alternative claim for unjust enrichment must fail because the materials and services provided by Lemartec have not enriched the Solid Waste Authority. ECF No. 13 at 15.

***2** Although Lemartec has since filed an Amended Complaint [ECF No. 54], the issues presented in the instant motion for summary judgment are unaffected. Accordingly, the Court will review the motion for summary judgment as to the Amended Complaint.

II. Standard of Review

Summary judgment is appropriate "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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250.

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. That is, once the movant has met its burden to show an absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence establishing there is indeed a genuine issue for trial. Fed. R. Civ. P. 56; Celotex Corp., 477 U.S. at 323-25; Anderson, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249 (citations omitted). A motion for summary judgment should be denied "if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions." Phoenix Savs. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967); see also id. at 253 (noting that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

III. Claim for Enforcement of Mechanic's Lien

First, the Solid Waste Authority argues that the claim for enforcement of the mechanic's lien must fail because West Virginia law does not authorize liens against public property. Even if it did, the Solid Waste Authority argues that a lien would not be available here because Lemartec did not contract with the Solid Waste Authority, who is the "owner" of the property.

A. Applicable Law

A mechanic's lien is "statutory creation" and mechanic's lien statutes must be "strictly construed with reference to those requirements upon which the right depends." Syl. pt. 1, Mayes v. Ruffners, 8 W. Va. 384, 384 (1875); Syl. pt. 1, Scott Lumber co. v. Wheeling Cemetery Ass'n, 186 S.E. 117, 117 (W. Va. 1936). West Virginia's mechanic's liens statutes are codified in West Virginia Code § 38-2-1, et seq. The statute at issue provides:

> Every person, firm or corporation who erects, builds, constructs, alters, removes or repairs any building or other structure, or other improvement appurtenant to any such building or other structure, or who alters or improves the real property whereon the same stands, or to which it may have been removed, or who provides services for any of the foregoing, under and by virtue of a contract with the owner for such erection, building, construction, alternation, removal, or repair, either for an agreed lump sum or upon any other basis of settlement and payment, shall have a lien upon such building or other structure or improvement appurtenant thereto, and upon the interest of the owner thereof in the real property whereon the same stands, or to which it may have been removed, to secure the payment of such contact price or other compensation therefor.

***3** W. Va. Code § 38-2-1. Subsequent sections provide liens for subcontractors and materialmen. See W. Va. Code § 38-2-2, W. Va. Code § 38-2-3, W. Va. Code § 38-2-4.

Therefore, under West Virginia law, an individual may file a mechanic's lien for supplies and labor used in the improvement of property, when the improvement is based on a contract with the owner of the property or his duly authorized agent. See Syl. pt. 1, Lilly v. Munsey, 63 S.E.2d 519, 519 (W. Va. 1951). However, the mechanic's lien statute is limited by a subsequent provision which states that "nothing in this article shall be construed to give a lien upon such a public building or improvement [or any other building or other structure used or to be used for public purposes] or upon the land upon which such a public building or improvement is situated." W. Va. Code § 38-2-39.

From this, West Virginia courts have routinely held that "as a general rule, public property is not subject to liens" because "such incumbrances [are] contrary to public policy." Syl. pt. 1, J.E. Moss Iron Works v. Jackson County Court, 109 S.E. 343, 343 (W. Va. 1921). While the Legislature may, in a mechanic's lien statute, authorize the creation of and mode of perfecting liens on public buildings, "it must clearly express its purpose to do so in unmistakable and specific terms." Id. at Syl. pt. 4. It is not enough that the lien statute "may be broad enough" to include public buildings, and "inclusion by reference or interpretation is not sufficient." Id. at 346. "[T]he authority must be specific, positive, and unmistakable in its meaning and terms," and it must "leave open no room for construction or interpretation." Id.; see also Syl. pt. 1, Hall's Safe & Lock Co. v. Scites, 18 S.E. 895, 895 (1984) (holding that "[t]he public buildings of a county are wholly exempt from the operations of the mechanic's lien law").

B. Discussion

The Court will not decide whether Entsorga is a "duly authorized agent" of the Solid Waste Authority because West Virginia law does not authorize the filing of a lien against public property. The Legislature has not "in unmistakable and specific terms" conveyed its intent to authorize the filing of liens against public property. In fact, the Legislature did just the opposite when it stated that "[n]othing in this article shall be construed to give a lien upon such a public building or improvement [or any building or structure used or to be used for public purposes], or upon the land upon which such public building or improvement is situated." W Va. Code § 38-2-39.

Lemartec does not contest that the Solid Waste Authority is a public entity or that the property upon which they have filed the lien belongs to the Solid Waste Authority. Instead, the Plaintiff urges the Court to look to West Virginia Code §§ 22C-4-20 and 22C-4-23 as abrogating the Solid Waste Authority's immunity to mechanic's liens. ECF No. 27 at 7. West Virginia Code § 22C-4-20 states, in part, that the rights of creditors are "solely against the authority as a corporate body and shall be satisfied only out of property held by it in its corporate capacity." W. Va. Code § 22-C-4-20. West Virginia Code § 22C-4-23 provides, in part, that the Solid

Waste Authority may "sue and be sued." W. Va. Code § 22C-4-23.

***4** Lemartec argues that, in these sections, the Legislature has authorized the imposition of liens against the Solid Waste Authority specifically. Lemartec cites a Delaware Supreme Court case in which the court held that a similar provision in Delaware law "reveals an apparent intent on the part of the General Assembly that the Department waive[s] its immunity to suit, without exception to mechanics' lien actions." Dep't of Cmty. Affairs & Econ. Dev. V. M. Davis & Sons, Inc., 412 A.2d 939, 943 (Del. 1980). The court held that "[w]e see no reason ... to give the term 'sue or be sued' any meaning other than the usual and ordinary one it conveys, which is that the Department may sue or be sued, without restriction as to the kind of liability sought to be imposed." Id.

That said, the West Virginia Supreme Court has made it clear that, if the Legislature intends to authorize liens on public property, it must say so "in unmistakable and specific terms," leaving open "no room for construction or interpretation." Here, the Legislature has not done so. The mechanic's liens statute codified in § 38-2-39 can coexist with the statute regarding the powers of the Solid Waste Authority codified in § 22C-4-23. The Solid Waste Authority can sue and be sued without imposing a lien upon the Solid Waste Authority's property. Further, there is no other language in either § 38-2-1 et seq. or § 22C-4-23 that "specifically, positively, and unmistakably" states that parties may file liens against the Solid Waste Authority. As stated previously, the only explicit language in either statute regarding the imposition of liens on public property does just the opposite—it expressly prohibits filing liens on public property. Therefore, the Legislature has not abrogated the Solid Waste Authority's immunity as to liens and no lien can be enforced against it.

C. Conclusion

Accordingly, West Virginia law does not authorize liens against public property, and the motion for summary judgment as to Count One ("Enforcement of Mechanic's Lien") must be granted.

IV. Claim for Unjust Enrichment/Quantum Meruit

Next, the Solid Waste Authority argues that the claim for unjust enrichment/quantum meruit against must fail because the Solid Waste Authority did not contract with Lemartec and there is no basis for a contract to be implied. Further, the Solid Waste Authority argues that Lemartec has conferred no benefit upon it.

A. Applicable Law

"It is generally recognized in the law of restitution that if one party pays money to another party (the payee) because of a mistake of fact that a contract or other obligation required such payment, the party making the payment is entitled to repayment of the money from the payee." Prudential Ins. Co. of America v. Couch, 376 S.E.2d 104, 108 (W. Va. 1988). Moreover, a person may be unjustly enriched "not only where he receives money or property, but also where he otherwise receives a benefit." Id. at 109. Thus, the elements of an unjust enrichment claim in West Virginia are (1) a benefit conferred upon the defendant; (2) an appreciation or knowledge by the defendant of such a benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. Employer Teamsters-Local Nos. 175/505 Health & Welfare Trust Fund v. Bristol Myers Squibb Co., 969 F. Supp. 2d 463, 471 (S.D.W. Va. 2013) (internal citations omitted).

Similarly, quantum meruit recovery is "based on the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another. If benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving and retaining the benefits to pay their reasonable value." Copley v. Mingo County Bd. Of Educ., 466 S.E.2d 139, 145 (W. Va. 1995).

B. Discussion

***5** Here, Lemartec argues that the Solid Waste Authority will retain a building that it constructed on the Solid Waste Authority's property following the termination of the 30-year lease with Entsorga WV. ECF No. 27 at 17. Thus, Lemartec argues that it conferred a benefit upon the Solid Waste Authority and that it would be unjust to permit the Solid Waste Authority to keep the benefit without payment for its value. The Solid Waste Authority argues that it *may* receive a benefit, some thirty years from now, but that the claim is speculative and insufficient to support a claim for unjust enrichment.

The lease between Entsorga WV and the Solid Waste Authority is clear. Entsorga WV will remove "all above ground improvements, with the exception of the broom swept concrete building structure that shall host the mixed waste processing equipment." ECF No. 13-3 at 19. Lemartec claims that it constructed the "concrete building structure" that will revert to the Solid Waste Authority at the termination of the lease. Accordingly, Lemartec's claim is not speculative —by their argument, the Solid Waste Authority will retain a benefit conferred by Lemartec. The Solid Waste Authority's fee simple interest in the property has presumably grown in value because of the construction of the concrete building structure. Moreover, permitting the Solid Waste Authority to retain that benefit without payment would be unjust.

C. Conclusion

Accordingly, Lemartec appears to have conferred a benefit upon the Solid Waste Authority for which it has not received payment. Therefore, the motion for summary judgment as to Count Three ("In the Alternative, Unjust Enrichment/ Quantum Meruit") must be denied.

V. Conclusion

Accordingly, the Court **ORDERS** that Defendant Berkeley County Solid Waste Authority's Motion for Summary Judgment upon the Plaintiff's Claims against the Defendant Berkeley County Solid Waste Authority [ECF No. 12] is **GRANTED IN PART**. Specifically, the Motion for Summary Judgment as to Count One is **GRANTED**. The Motion for Summary Judgment as to Count Three is **DENIED**.

All Citations

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United States District Court, E.D. Pennsylvania.

STATE FARM FIRE & CASUALTY CO. a/s/o Dianne Jeckovich
v.
PECO ENERGY COMPANY

CIVIL ACTION NO. 19-3288
|
Filed 02/13/2020

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MEMORANDUM

SURRICK, J.

***1** Presently before the Court is Defendant's Motion to Dismiss Counts II, III and IV of Plaintiff's Complaint (ECF No. 7). For the following reasons, Plaintiff's Motion will be denied.

I. BACKGROUND

Defendant is an electric utility company. (Compl. ¶ 5, ECF No. 1.) On October 26, 2018, certain vegetation in close proximity to one of Defendant's electric service cables fell onto the cable and caused an electrical surge. The surge, in turn, caused a fire that damaged property owned by Dianne Jeckovich ("Jeckovich"). (*Id.* ¶¶ 2, 8.) At the time, Plaintiff provided homeowners insurance to Jeckovich. (*Id.* ¶ 2.) As a result of the damage, Jeckovich filed an insurance claim with Plaintiff. Plaintiff paid the claim and assumed Jeckovich's right to sue Defendant in connection with the October 26, 2018 incident. (*Id.* ¶¶ 3, 9.)

Plaintiff filed suit against Defendant on July 26, 2019, asserting four counts: (1) negligence; (2) breach of contract; (3) breach of warranties; and (4) strict liability. (*Id.* at 3-7.) In support of its claims, Plaintiff alleges that Defendant failed to comply with its common law and contractual duties to manage the vegetation surrounding its electric service cables. (*Id.* ¶¶ 11-13.) On August 14, 2019, Defendant filed this Motion to Dismiss. (ECF No. 7.) On August 28, 2019, Plaintiff filed a response in opposition. (ECF No. 8.) On August 30, 2019, Defendant filed a Reply. (ECF No. 9.)

II. DISCUSSION

A. Standard of Review

Defendant moves to dismiss Counts II, III, and IV of the Complaint for failure to state a claim under Rule 12(b)(6). On a 12(b)(6) motion, "courts 'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.' " *Eid v. Thompson*, 740 F.3d 118, 122 (3d Cir. 2014) (quoting *Phillips v. Cnty. Of Allegheny*, 515 F.3d 223, 233 (3d Cir. 2008)). "In order to defeat a Rule 12(b)(6) motion, plaintiffs' '[f]actual allegations must be enough to raise a right to relief above the speculative level....' " *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Thus, 'only a complaint that states a plausible claim for relief survives a motion to dismiss' " under Rule 12(b)(6). *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

B. Plaintiff's Claims Are Plausible

"[T]he standard of care imposed upon a supplier of electric power, particularly when that power is supplied at high voltage, is among the highest recognized in the law of negligence ... One maintaining a high voltage electric wire line is required to exercise the highest degree of care practicable." *Greely v. West Penn Power Co.*, 156 A.3d 276, 281 (Pa. Super. Ct. 2017) (quoting *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1131 (Pa. Super. Ct. 1985)); *see also* *Estate of Zimmerman v. SEPTA*, 168 F.3d 680, 687 (3d Cir. 1999) (recognizing that under Pennsylvania law, "the supplier of electricity or the possessor of land site owes a heightened, rather than an ordinary, degree of care to an entrant on land with high-voltage electrical transmission lines"). That duty of care includes "install[ing] (such) lines in a safe and proper manner and thenceforth to maintain them in a safe condition upon 'reasonable inspection from time to time.' " *Stark v. Lehigh Foundries, Inc.*, 130 A.2d 123, 130 (Pa. 1957) (quoting *Durinzi v. West Penn Power Co.*, 55 A.2d 316, 317-18 (Pa. 1947)).

***2** Moreover, Pennsylvania courts recognize that an electric company has a duty to maintain the vegetation surrounding its electric service cables. For example, in *Yoffee v. Pennsylvania Power & Light Co.*, 123 A.2d 636, 642, 647 (Pa. 1956), the court held that it was for the jury to determine whether a power company's failure to remove vegetation near an electric tower was the proximate cause of an accident in which a plane flew into an inconspicuous transmission line. In *Kitner v. Claverack Rural Elec. Co-op., Inc.*, 478 A.2d 858, 860 (Pa. Super. Ct. 1984), the court held similarly that a jury could conclude that the power company failed to take the "feasible precaution" of trimming a tree that fell onto a power line, in turn causing the electrocution of several cows. *See also USAA Cas. Ins. Co. v. Metropolitan Edison Co.*, No. 12-1178, 2014 WL 3534946, at *14 (M.D. Pa. July 16, 2014) (denying motion for summary judgment on claim that electric company failed to perform necessary vegetation management).

Defendant's only argument in support of its Motion is that the Electric Service Tariff ("Tariff") governing its relationship with Jeckovich operates as a limitation of liability precluding Counts II, III, and IV of the Complaint. [1] The Tariff language on which Defendant relies provides in relevant part:

> **12. SERVICE *CONTINUITY***
>
> **12.1 LIMITATION ON LIABILITY FOR SERVICE *INTERRUPTIONS AND VARIATIONS***. The Company does not guarantee continuous, regular and uninterrupted *supply of service.* The Company may, without liability, interrupt or limit the *supply of service* for the purpose of making repairs, changes, or improvements in any part of its system for the general good of the service or the safety of the public or for the purpose of preventing or limiting any actual or threatened instability or disturbance of the system. The Company is also not liable for any damages due to *accident*, strike, storm, riot, fire, flood, legal process, state or municipal interference, or any other cause *beyond the Company's control.*
>
> ...
>
> The Company makes no warranty as to merchantability or fitness for a particular purpose, express or implied, by operation of law or otherwise. To the extent applicable under the Uniform Commercial Code or on any theory of contract or products liability, the Company *limits its liability in accordance with the previous paragraph* to any Customer or third party for claims involving and including, but not limited to, *strict products liability, breach of contract, and breach of actual or implied warranties of merchantability or fitness for an intended purpose.*

(Tariff ¶ 12.1, ECF No. 7-2) (emphasis added). [2]

***3** A cursory review of the Tariff language reveals that the language cited by Defendant may not apply here. For example, one could interpret the limitation of liability imposed by this provision to apply only to "service continuity" issues and "accident[s] ... beyond the Company's control." *Accord State Farm Fire & Cas. Co. v. PECO Energy Co.*, No. 19-2884, 2020 WL 424763, at *4 (E.D. Pa. Jan. 27, 2020) (agreeing with Pennsylvania Superior Court's determination that "accident" clause in Tariff § 12.1 does not preclude recovery for "foreseeable" events) (quoting *State Farm Fire & Cas. Co. v. PECO*, 54 A.3d 921, 929 (Pa. Super. Ct. 2012)). However, Plaintiff is not complaining about a service interruption or damages arising from circumstances beyond Defendant's control. Plaintiff is alleging that Defendant's failure to maintain the vegetation near its power lines (an issue that the Complaint suggests is in Defendant's control) led to property damage (not a service interruption).

Regardless, "[i]t is not clear that the ... provisions critical here are so unambiguous that the interpretation of the [Tariff] exclusively is a matter for the Court and not for a jury.... Hence it would be improper for this court to interpret the [Tariff] finally in ruling upon a motion to dismiss made pursuant to Rule 12(b)(6)." *See Operative Bricklayer's Union No. 64 of Pennsylvania Welfare Fund v. Bricklayer's Local Union No. 1 of Pennsylvania Welfare Fund*, 45 F.R.D. 429, 431 (E.D. Pa. 1968); *accord Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC*, No. 16-1237, 2016 WL 3763024, at *7 (E.D. Pa. July 13, 2016) (collecting cases); *cf. Lomma v. Ohio Nat'l Life Ass. Corp.*, 283 F. Supp. 3d 240, 260 (M.D. Pa. 2017) (holding that "even if the Defendants' [contract] interpretation may be the more reasonable one, this does not permit the Court to resolve this issue in Defendants' favor on their motion to dismiss"); *Masciantonio v. SWEPI LP*, No. 13-797, 2014 WL 4441214, at *6 n.5 (M.D. Pa. Sept. 9, 2014) ("If a writing is not ambiguous, it is appropriate for a district court to resolve the issue of contract interpretation as a matter of law, but typically on summary judgment rather than a motion to dismiss."). This is not to say that we are concluding as

a matter of law that the limitation of liability in § 12.1 is inapplicable. We are not. We are concluding only that because we are unable to decide Defendant's argument on a motion to dismiss, Plaintiff's claims for breach of contract, breach of warranties, and strict liability may proceed. *See Eid*, 740 F.3d at 122. Our determination here is without prejudice to the parties' rights to make whatever arguments they deem appropriate in the later stages of this litigation.

Finally, we note that Plaintiff asserts additional arguments regarding the Tariff, including that the limitation of liability in § 12.1 is void as a matter of public policy and does not otherwise apply to willful and wanton conduct. Since we have determined that Plaintiff's claims are plausible, we decline to address these additional issues at this time. *See L.A. v. Hoffman*, 144 F. Supp. 3d 649, 672 n.13 (D.N.J. 2015) (declining to address additional basis for plaintiff's claim when court had already determined that plaintiff stated a plausible claim); *cf. Wharf, Inc. v. Dist. of Columbia*, 232 F. Supp. 3d 9, 22 (D.D.C. 2017) (holding that "the Court need not address what remedies are appropriate [on a 12(b)(6) motion] given that it has only determined that the parties have pled sufficient claims and counterclaims to survive a motion to dismiss").

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Counts II, III and IV of Plaintiff's Complaint will be denied.

An appropriate order follows.

All Citations

Slip Copy, 2020 WL 757857

Footnotes

1 "A tariff is a set of operating rules imposed by the State that a public utility must follow if it wishes to provide services to customers." *USAA Cas. Ins. Co. v. Metropolitan Edison Co.*, No. 12-1178, 2012 WL 6838951, at *4 (M.D. Pa. Dec. 17, 2012) (citing *PPL Elec. Utils. Corp. v. Pennsylvania Pub. Util. Comm'n*, 912 A.2d 386, 402 (Pa. Commw. Ct. 2006)), *report and recommendation adopted by* No. 12-1178, 2013 WL 132510 (M.D. Pa. Jan. 10, 2013). "Public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility." *Id.* (citing *PPL Elec. Utils. Corp.*, 912 A.2d at 402). "The terms of a tariff essentially replace private contracts." *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 877 (Iowa 2007).

2 The Complaint does not attach or refer to the Tariff. Defendant asserts that we may nevertheless consider the Tariff on a 12(b)(6) motion because it is a public record. *See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) ("To resolve a 12(b)(6) motion, a court may properly look at public records."). Pursuant to statute, every public utility, such as Defendant, is required to file its tariffs with the Pennsylvania Public Utility Commission. *See* 66 Pa. Cons. Stat. Ann. § 1302. Based on its website, Defendant appears to have complied with this requirement. *See* https://www.peco.com/MyAccount/MyBillUsage/Pages/CurrentElectric.aspx. In addition, Plaintiff does not object to the Court's consideration of the Tariff. Accordingly, we will consider it. *See also Imperial Irrigation Dist. v. California Independent Sys. Operator Corp.*, 146 F. Supp. 3d 1217, 1230 n.7 (S.D. Cal. 2015) (taking judicial notice of public utility tariff on motion to dismiss since terms of tariff could be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned") (quoting Fed. R. Evid. 201(b)).

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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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS) (Consolidated)
WELDED CONSTRUCTION, L.P., Plaintiff, v. EARTH PIPELINE SERVICES, INC. Defendants.	Adv. Proc. No. 20-50612 (CSS) (Consolidated)

ORDER

Upon consideration of *Defendant Columbia Gas Transmission, LLC's Motion to Dismiss Plaintiff Earth Pipeline Services, Inc.'s Second Amended Complaint* (the "Motion"), and *Plaintiff Earth Pipeline Services, Inc.'s Response and Brief in Opposition thereto,* and *Defendant Columbia Gas Transmission, LLC's Reply thereto, if any,* it is hereby **ORDERED** that the Motion is **DENIED**.

Sontchi, J.