1/2/2021

DTCWV Friends,

Happy New Year to all! As we continue through the holiday weekend and the start of 2021, we include a group of recent opinions from the Federal District Court for the Northern District of West Virginia for your review.

Weirton Area Water Board and City of Weirton v. 3M, et al.

Judge Bailey issued two recent opinions related to motions to dismiss. We have focused on only one of the opinions because the analysis is largely duplicative. Plaintiffs' complaint alleged that various defendants had contaminated the Weirton water system with per- and poly-fluoroalkyl substances (PFSA's). A group of defendants comprising the "manufacturing defendants" filed a motion to dismiss asserting that Plaintiffs' complaint failed to state a claim. In addressing the standard of review for the motion, while citing *Twombly*, the Court also noted that matters outside the pleadings may be considered at the Rule 12(b) phase "*if the documents are central to a plaintiff's claim* or are sufficiently referred to in the Complaint." See, *Witthohn v. Fed. Ins. Co*., 164 Fed. Appx. 395 (4th Cir. 2006).

The manufacturing defendants' motions to dismiss for failure to state a claim was premised on the argument that plaintiffs could not set forth any facts establishing a nexus between the defendants' alleged activity and the injuries claimed by the plaintiffs. The Court's opinion addressed the product liability, negligence, nuisance and trespass claims. The motion also asserted that the type of damages sought by plaintiffs were not recoverable because voluntary water system upgrades completed by plaintiffs are not recognized in law as damages and the plaintiffs could not recover on behalf of Weirton residents and/or for damage to natural resources. The Court's resolution of the requested dismissal of the products liability and negligence claims was relatively straightforward. The Court's analysis of the negligence per se/prima facie negligence claim for alleged violations of the West Virginia Water Pollution Control Act, the West Virginia Ground Water Protection Act, and the Solid Waste Disposal Act deserve a read. The Court initially clarified that a violation of a West Virginia statute is *prima facie* negligence and not negligence *per se*, citing *Spurlin v. Nardo*, 145 W. Va. 408 (1960). The Court examined not only the statutes referenced, but also applicable regulations. Defendants argued that the statutes were designed to regulate entities that actually placed contaminants into the environment that cause alleged harm, not the manufacturers. The Court found that the term "person" used in the statute was worded broadly enough to encompass the manufacturing defendants, despite defendants' argument that there was a lack of case law supporting the application of these statutes in the context of seeking recovery for the types of claims asserted against this group of defendants.

The Court's analysis of the motion to dismiss applied to the public nuisance argument is also worth a read. Remembering that the plaintiffs are the City of Weirton and the Weirton Area Water Board, and not a proposed class of individuals, the Court found that the public nuisance claim could survive the Rule 12(b) motion. The opinion noted "[i]n this case, when the water company provides water to the general public, the right to clean water from that company, is a right common to all customers." It would be interesting to see how the statutory based claims and public nuisance claims could be treated at the dispositive motion phase of this case.

Finally, concerning Defendants attempts to dismiss certain damages, the Court noted that it was not proper to consider a dismissal of damages at the Rule 12(b) phase, citing a case out of Maryland ("It is

simply premature to rule on the issue of damages in the context of a motion to dismiss stage where there has been as there has been no discovery or development of a record in this case."). A really interesting opinion from the Court that covered a lot of ground and touched on a multitude of areas of law.

Erie Insurance Property & Casualty Company v. Dolly, et al

This is a Judge Groh opinion arising from an insurer's declaratory judgment action seeking a judicial declaration that the insurer did not have to defend or indemnify respondent in an underlying state court suit. The state court suit alleged that the respondent/underlying defendant sexually abused a student assistant while teaching at the Mineral County Technical Center. The opinion provides a good overview of West Virginia law concerning the coverage obligations of an insurer when its insured is alleged to have committed sexual misconduct. The Court's opinion walks through the law related to the application of intention act exclusions and their interplay with a complaint that technically alleges negligent conduct, in this instance, negligent infliction of emotional distress. While recognizing that the duty to defend is broader than the duty to indemnify, the Court found there was no duty to defend or indemnify the respondent in the underlying suit. Even recognizing that the definition of personal injury in the policy includes false arrest, wrongful detention or imprisonment and invasion of privacy, the Court still concluded there was no coverage under the policy, citing to *Erie Property & Casualty Co., Inc. v. Edmond*, 785 F. Supp. 2d 561, 564 (S.D. W. Va. 2011). It held that where claims of false imprisonment and invasion of privacy are predicated on instances of sexual misconduct or harassment, the intentional acts exclusion applies and extinguishes the insurer's duty to defend. The Court granted the insurer's motion, finding that there was no duty to defend or indemnify the insured.

Commercial Builders, Inc. of West Virginia v. McKinney Romeo Properties, LLC

This is a Judge Keeley opinion that deserves a review for its extensive analysis of a motion to dismiss a counter-claim asserting fraud. Plaintiff Commercial Builders, Inc. ("Commercial") originally sued McKinney Romeo Properties, LLC ("McKinney") in Circuit Court in Monongalia County. The suit arose from the construction of an automobile dealership in Morgantown. McKinney removed the matter and asserted a counter-claim for fraud, among other contract based claims. Commercial moved to dismiss the fraud claim. The parties subsequently stipulated that McKinney could amend the answer and counterclaim, which it did. Again, McKinney asserted a counter-claim for fraud. Again, Commercial moved to dismiss. The Court heard argument on the motion and McKinney was again granted leave to amend its answer and counter-claim. McKinney re-asserted its counter-claim including its claim for fraud against Commercial. Similar to the two previous filings, Commercial moved to dismiss the claims sounding in fraud.

The Court began its analysis by noting that the basis of the counter-claim was a standard AIA contract that had been executed between Commercial and McKinney. Under the contract, Commercial had agreed to construct the building to be used as the car dealership. The fraud claim alleged that Commercial "knowingly and deliberately misrepresented to Mills Group", a third-party retained by McKinney to evaluate and approve Commercial's application for payment under the AIA, that work had been completed under certain portions of the contract. McKinney alleged the work had not been performed or it had not been performed in a workmanlike manner. In a footnote, the Court noted that Mills had approved the payment applications even though it did not conduct required on-site observations. McKinney alleged that Commercial made the misrepresentations throughout the pendency of the project for the purpose of obtaining unearned payments. McKinney also alleged that it

relied on Commercial's representations that it had paid subcontractors and materialmen, even though payment allegedly had not been made. McKinney also accused Commercial of committing bank and wire fraud within its fraud counter-claim, in violation of 18 U.S.C. 1344 and 1343, respectively.

Commercial filed its motion to dismiss the 2nd amended counter-claim 11 days after the deadline set for the Court for filing. The Court disregarded the timeliness issue on grounds that the serious, criminal allegations in the counter-claim warranted consideration. Acknowledging that the fraud claim implicated the heightened pleading standard of Rule 9, the Court first looked to the gist of the action doctrine and its impact on the fraud claim. The Court noted that under West Virginia law, the gist of action doctrine would bar a claim sounding in tort when it was actually based on contract when any one of the following four factors was met: (1) where liability arises solely based on the contractual relationship of the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; or (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. See, *Covol Fuels No. 4, LLC v. Pinnacle Mining Co., LLC*, 785 F.3d 104, 115 (4th Cir. 2015). Because the allegations in the fraud count of the counter-claim specifically referenced the contract between Commercial and McKinney, the Court found that the gist of the action doctrine was applicable and required dismissal of the fraud claim.

Going further in the analysis, the Court also found that McKinney could meet the heightened pleading requirements imposed by Rule 9 because McKinney failed to allege the specific content of the allegedly fraudulent communications made by Commercial. The Court noted that the time, place, contents and identity of the individual making the false representations needed to be included in the pleading pursuant to Rule 9, citing *Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 784 (4th Cir. 1999). The Court undertook an overview of West Virginia jurisprudence related to fraud in light of the contract language at issue and allegations, relying on the holding that a promise not performed cannot be the predicate for a fraud claim. See, *Love v. Teeter*, 24 W. Va. 741 (1884) and Syl. Pt. 3 of *Croston v. Emax Oil Co.*, 195 W. Va. 86, 464 S.E.2d 728 (1995). The Court specifically quoted the holding in *Croston*:

> [A]ctionable fraud must ordinarily be predicated upon an intentional misrepresentation of a past or existing fact and not upon a misrepresentation as to a future occurrence. Somewhat similarly, it cannot be based on statements which are promissory in nature or which constitute expressions of intention, unless the non-existence of the intention to fulfill the promise at the time it was made is shown.

Croston, 195 W. Va. at 90, 464 S.E.2d at 732. The Court also undertook an independent assessment of the claimed violations of 18 U.S.C. 1344 and 1343 in conjunction with the provisions contained in W. Va. Code 55-7-9 (providing that a violation of a West Virginia statute may give rise to a private cause of action). The Court noted that significant case law had previously held that 18 U.S.C. 1344 and 1343 did not create a private cause of action because of their nature as purely criminal statutes and there was no Congressional intent to create a civil remedy for violating them. The Court then pivoted to an analysis of the *Hurley* factors (*Hurley v. Allied Chem. Corp*., 164 W. Va. 268, 262 S.E.2d 757, 758 (1980)) which are to be considered when an attempt is made to utilize a *West Virginia* statute to create a private cause of action, as permitted pursuant to W. Va. Code 55-7-9 The Court found that because the statutes exclusively related to federal criminal law, McKinney could not pursue a violation of the statutes in an attempt to obtain civil relief.

Nana's Landing, LLC v. Murray American River Towing, Inc., et al

We close with a good read. This recent Judge Bailey opinion deserves our attention for some clever, tongue-in-cheek writing. It is also interesting because we get a slight glimpse into admiralty law. We open with the Court's background of the case:

This case comes ashore as a result of a barge breakaway incident. According to the Complaint, plaintiff operates a restaurant located in Glen Dale, West Virginia, along the Ohio River; the restaurant "maintained 260 feet of docks, which permitted water traffic on the Ohio River to park and utilize the restaurant and bar facilities owned and operated" by plaintiff. On the morning of January 13, 2018, a number of barges broke free from a fleeting facility; one of those barges, Barge No. 1023, drifted uncontrolled downstream and crashed into Plaintiff's docks, resulting in their total destruction. Plaintiff now brings suit against defendants, the operator of the fleeting facility, a tugboat operator, and the owner and operator of the barge.

The instant Motions, however, are not anchored in the facts of the breakaway incident itself, but instead set a course into the realm of admiralty law . . .

The Court then described that three cases were consolidated arising from the same incident and all three parties had filed motions/actions for limitation of liability under Federal Rule of Civil Procedure Supp. F. The Court then continued:

In the instant Motions, [Defendants] raise essentially the same argument in their attempt to sink the Complaint; that in their respective cases, this Court's prior orders required claims related to the breakaway to be filed within a specified period ending on August 31, 2018 . . .

After the various quips to start its opinion, the Court got down to the business of the motion, which was premised on whether the claimant had timely made its claim by filing its complaint. The Court had entered restraining orders, which restrained suits against several defendants and required claims to be asserted within a specified time period. Nana's Landing did not make a claim within the time frame provided in the restraining orders and Nana's Landing had notice via publication of the incident and the deadline for filing. In response to the filing of the motion to dismiss, Nana's Landing filed a response urging the Court to follow a previous ruling on a similar issue in an opinion by Judge Goodwin styled *In the Matter of the Complaint of B&H Towing*, 2005 WL 8159555 (S.D. W. Va. Nov. 1, 2005). In that matter, Judge Goodwin entered an order requiring all claimants to file claims by June 15, 2005. A claimant filed a claim six days after the deadline. Judge Goodwin, relying on 4th Circuit case law, found that the claim could proceed, despite it being filed after the Court's deadline. The 4th Circuit had previously held that late claims were permitted if the action was still pending and unresolved and the late filings would not prejudice the rights of the parties. See, *Buie v. Naviera Chilena Del Pacifico, S.A.*, 823 F.2d 546 (4th Cir. 1987) (per curiam). The Court's considerations under this scenario included: (1) whether the proceeding is pending and unresolved; (2) whether granting the motion will prejudice the rights of others; and (3) whether the movants have provided a reason for the late filing. The first two factors were given greater weight than the third factor under *Buie*.

After analyzing the technical requirements of Supplement F, the Court found that the claims survived the motion to dismiss. The Court agreed with defendant that this case differed from *B&H* insomuch as it was a separate standalone complaint and not a claim filed within the limitation action. However, the Court further found that fact alone would not prejudice the defendants. The Court further noted that "[a]lthough this case involves a significantly longer period of time than in *B&H,* the early stage of the

proceedings, combined with the period of stay which left the case adrift, leads this Court to conclude that, like *B&H*, this case remains in its infancy. This is further buoyed by *Buie,* in which the Court found that in cases which involve claims which were asserted after the expiration of the monition period but before the court enters final judgment," late claims are generally permitted.

The Court concluded, "[a]ccordingly, the motions to dismiss will be denied and the plaintiff's claims remain afloat."

Looking forward to hopefully seeing all our DTCWV friends again in 2021! Until then, take care and be safe.

Jeff Van Volkenburg