

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

TOWN OF STEPHENS CITY, VIRGINIA,

Plaintiff,

v.

FREDERICK COUNTY SANITATION AUTHORITY,

Defendant.

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Case No. CL15-591

**PLAINTIFF TOWN OF STEPHENS CITY, VIRGINIA'S
REBUTTAL TO DEFENDANT FREDERICK COUNTY SANITATION AUTHORITY'S
VARIOUS PLEADINGS**

COMES NOW Plaintiff Town of Stephens City, Virginia (“Stephens City”), by counsel, and submits the following Rebuttal to Defendant Frederick County Sanitation Authority’s (“Defendant”) Various Pleadings, including Frederick County Sanitation Authority’s Brief in Opposition to Plaintiff Town of Stephens City, Virginia’s Motion for Leave to File Second Amended Complaint to Allege Actual Fraud and Constructive Fraud (“Opposition to Motion for Leave”), Frederick County Sanitation Authority’s Opposition to Town’s Motion to Overrule Objections (“Opposition to Motion to Overrule”) and Frederick County Sanitation Authority’s Motion for Dismissal of Certain Claims, To Compel a Proper Response and For Other Discovery Sanctions (“Motion for Sanctions”).

Introduction

Stephens City and Defendant have been engaged in litigation since August 28, 2015; however, despite this fact, the parties are not at issue through a responsive pleading. Instead, the only pleadings Defendant has filed are dispositive motions: two (2) Demurrers and one (1) Plea

in Bar relating to the statutes of limitations for Stephens City's claims. To date, Defendant still has not yet filed an Answer, a Counterclaim and/or any other form of responsive pleading to Stephens City's Amended Complaint. As such, the only matters at issue are the claims made in Stephens City's Amended Complaint.

On January 5, 2018, Stephens City supplemented its discovery responses to three (3) of Defendant's interrogatories as ordered by this Court. On January 8, 2018, Defendant filed two (2) oppositions to two (2) of Stephens City's Motions filed in this matter: (1) Frederick County Sanitation Authority's Brief in Opposition to Plaintiff Town of Stephens City, Virginia's Motion for Leave to File Second Amended Complaint to Allege Actual Fraud and Constructive Fraud and (2) Frederick County Sanitation Authority's Opposition to Town's Motion to Overrule Objections. Finally, on January 11, 2018, Defendant filed a Motion titled Frederick County Sanitation Authority's Motion for Dismissal of Certain Claims, To Compel a Proper Response and For Other Discovery Sanctions ("Motion for Sanctions").

Defendant's clear strategy throughout the course of the present litigation is to cut off Stephens City's claims by pushing forward without providing adequate support for its billing. Defendant also makes inconsistent arguments: depending on the particular pleading, Defendant might argue either that it did *not* breach the contract or conversely, that even if it did, Stephens City would be barred from a claim of damages because Defendant's breach was continuous.

This above strategy is actually fatally flawed because, despite Defendant's repeated assurances, there is no support for the amounts and/or line items billed to Stephens City. Through discovery, Stephens City has learned that Defendant did not base its bills to Stephens City on the various agreements between the parties. Indeed, Defendant concedes that there is no provable support for the bills (through its claims that it has "no institutional memory" of how

such items were billed) and leads to the conclusion that Defendant sent these bills for one reason and one reason only: to see how much money it could collect from Stephens City above and beyond the amounts specified in the agreements.

Meet and Confer

On January 12, 2018, counsel for the parties met and conferred via a telephone conference to discuss the factual issues related to Defendant's Plea in Bar. After a quick discussion and agreement, counsel concluded the call. Minutes later, counsel for Stephens City received an additional phone call from Defendant's counsel. After a review of an Order signed by counsel and sent to the Court for entry, Defendant's counsel saw that it must confer with Stephens City's counsel regarding "the adequacy of the Town's supplemental answers to the Discovery Requests." Counsel for Defendant sought to comply with the Order the day after it filed its Motion for Sanctions.¹

Defendant's Motion for Sanctions

Despite the untimeliness of Defendant's Motion for Sanctions, Stephens City feels obliged to restate that the parties are not currently at issue in the present matter; therefore, any attempt by Defendant to strike Stephens City's claim for "deficient" discovery responses is improper. Contrary to Defendant's assertions, Stephens City fully responded to each discovery

1. Counsel for Defendant called counsel for Stephens City to discuss the requirements of the Order and to attempt to meet and confer regarding the discovery issues, as well, despite having already filed its Motion for Sanctions. This was then memorialized (rather disingenuously) in a letter from Dale Mullen dated January 12, 2018, the day after the Motion for Sanctions was filed and after the parties' meet and confer(s), which stated:

"In response to the Authority's suggestion that the parties meet and confer about the adequacy of the Town's January 5, 2018, responses to the Authority's discovery requests, you said that you will review Defendant's Motion for Dismissal of Certain Claims, To Compel a Proper Response and For Other Discovery Sanctions and contact me to discuss the Motion if you deem it appropriate."

Counsel for Stephens City later replied to this letter. True and accurate copies of Stephens City's reply and Defendant's letter are attached hereto as "Exhibit A." Note that this letter was not timely under the Rules of the Supreme Court of Virginia *or* the Order signed by counsel for both parties.

request and supplemented with enough information to support its claims. A true and accurate copy of Stephens City's discovery responses are attached hereto and incorporated herein as "Exhibit B." Defendant constantly seeks to strike Stephens City's claims, all the while claiming that it reserves its right to supplement its discovery responses. Defendant must not be allowed to seek dismissal of Stephens City's claims when it continues to reserve (and invoke) its "right to supplement."²

Further, Defendant's Motion for Sanctions misconstrues Stephens City's supplemental discovery responses. Stephens City fully complied with this Court's Order, whether by providing narrative responses or by invoking the business records rule. Stephens City provided a complete expert witness disclosure for Martin Jansons ("Mr. Jansons"), subject to the right to supplement throughout litigation and respond to any expert disclosure by Defendant.

Rule 4:1(b)(4)(a)(i) of the Rules of the Supreme Court of Virginia states that:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

This disclosure complied with both Rule 4:1 and the Frederick County Discovery Memo, which clarifies that "the answers to interrogatories about experts should be detailed, so that the opposing side knows what your expert will be testifying about from reading your answer." *See* Discovery Memorandum at 9 (December 2, 2014). Stephens City also provided Preliminary Expert Witness Disclosures for both Mr. Jansons and Jason Early on December 5, 2017, filing

2. In fact, Defendant provided additional supplemental discovery on Friday, January 12, 2018, which consisted of sixty-one (61) new pages of information.

the same with this Court on December 6, 2017, which provided background information complying with these requirements.

Not only does Mr. Jansons' disclosure satisfy this aim, but Defendant has already deposed Mr. Jansons in this matter. This deposition covered all aspects of Mr. Jansons' expected testimony, which was again plainly stated in Stephens City's supplemental answer to Defendant's Interrogatory No. 6. *See* Exhibit B (narrative response to Interrogatory No. 6).

Further, Stephens City provided copies of all bills in its files from Defendant to supplement its answer to Defendant's Interrogatory No. 8. *See* Exhibit B and its enclosures at SC015390–SC016005 and SC016021–SC016046. Ironically, Stephens City was only able to supplement the bills it has received from Defendant; Defendant continues to withhold information regarding how Stephens City's bills are calculated. While Stephens City cannot detail (to the fullest extent possible) how Defendant has misbilled Stephens City (because Defendant itself has “no institutional memory”), it has provided more than enough support through its bills, its narrative response(s) and Mr. Jansons' expert disclosure. In fact, to date, Defendant still has not produced any information that would support its vague and generalized claims that billing was done in accordance with the parties' agreements (likely because they do not have such information and the bills were calculated to ensure that Defendant received as much money as possible from Stephens City). Indeed, when Stephens City requested this information, counsel for Defendant stated that Defendant had “no institutional memory” to support the bills sent out.

Finally, Stephens City fully responded to Interrogatory No. 23 by providing financial information from the Utility Fund in the form in which it is stored. The Utility Fund for Stephens City is the fund that holds the water and wastewater funds received from Stephens City

residents. Stephens City relied upon the business records rule and produced the information and documents in the form in which they are reported (and therefore, these documents fall under best evidence) because it was the best way to respond to this Interrogatory while showing where the funds were held and in what amounts. *See* Exhibit B and its enclosures at SC016006–SC016020 and SC016059–SC016080.

Defendant’s Opposition to Stephens City’s Motion for Leave

As stated previously, the parties are not at issue in the present matter. As a result, Stephens City’s request for Leave to File a Second Amended Complaint should be granted “in furtherance of the ends of justice.” The parties are the same as they have been throughout this litigation and the claims that Stephens City seeks to make in the Second Amended Complaint are related to the initial claims filed in this action. Defendant would not be prejudiced by any amendment (particularly based upon similar causes of action); therefore, Stephens City must be granted leave to amend. *See Mortarino v. Consultant Eng’g Servs., Inc.*, 251 Va. 289, 296, 467 S.E.2d 778, 782 (1996). Mortarino involved an attempt by Mortarino to develop tracts of land that led to an action for constructive fraud based upon representations by Consultant Engineering Services, Inc., who had agreed to conduct a wetlands survey on the property. While the Court found that Consultant Engineering Services, Inc.’s demurrers could be sustained on Mortarino’s constructive fraud claims, the Court found that the trial court engaged in an abuse of discretion by failing to allow Mortarino to amend his Complaint. The Court found that nothing in the record would prejudice the defendants in that matter, similar to the present matter.

Stephens City discovered that it had been fraudulently billed on or about December 1, 2017, when Defendant *further* amended its discovery responses (an opportunity it seeks to foreclose for Stephens City). In response, Stephens City filed its Motion for Leave on December

6, 2017, while providing a courtesy copy to Defendant's counsel on December 5, 2017. Nothing in the record, therefore, shows any delay or bad faith on the part of Stephens City.

Instead, Defendant seeks to cut off Stephens City's fraud claim by opposing it so vigorously. In fact, Defendant's attempt is akin to filing and arguing a demurrer without actually doing a pleading; a demurrer cannot be filed because there is no fraud claim yet. However, the parties agree that there is no support for Defendant's bills: Defendant does not have the support and, therefore, Defendant lied to Stephens City when it represented that its bills were done in accordance with the parties' agreements. Instead, should Defendant wish to oppose Stephens City's fraud claims, the proper procedure would be for the Town to file its Second Amended Complaint prior to Defendant opposing the same. Defendant should not be given two (or more) opportunities to oppose the same claims.

Defendant's Opposition to Stephens City's Motion to Overrule

Defendant also filed its Opposition to Stephens City's Motion to Overrule. This Motion to Overrule was filed after Defendant failed to respond to Stephens City's discovery requests regarding Defendant's expert witness; an expert witness Defendant had mentioned in open court as such.

In its Opposition to Motion to Overrule, Defendant concedes that Stephens City cannot receive the information held by the expert unless Defendant provides it, but Defendant misses its import. Despite Defendant's claims that Stephens City can obtain this information through discovery, Defendant claimed that its expert (a forensic accountant) had been given the support for Stephens City's bills. This is precisely what Stephens City has requested all along, which requests were as broad as possible to encompass every part of its billing. If this information has truly been provided to this expert, Stephens City was entitled to this information from the

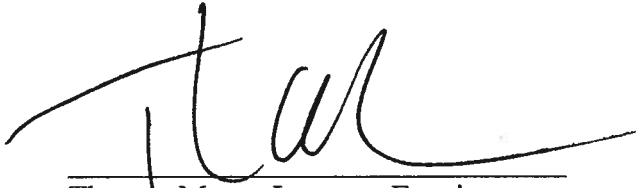
beginning of litigation. Defendant must be compelled to provide this information, particularly after naming this forensic accountant as its expert in the October 27, 2017 hearing and stating that “the expert is asking for things [Stephens City] didn’t ask for.” *See* Stephens City v FCSA October 27, 2017 Transcript at 244:3–7. A true and accurate copy of this portion of the transcript is attached hereto as “Exhibit C.”

Conclusion

Defendant’s most recent pleadings must be overruled and/or denied by this Court. Defendant’s Motion for Sanctions was not made in good faith, and it violated both the Rules of the Supreme Court of Virginia and this Court’s Order (regarding meet and confers). The Court must overrule Defendant’s Objections and allow Stephens City to file a Second Amended Complaint and to compel a proper response to Stephens City’s expert witness discovery requests. This will ensure that this litigation continues “in furtherance of the ends of justice” and that the parties follow this Court’s desire to “get this case moving. It’s time. It’s long overdue.” *See* December 6, 2017 Motions Transcript at 134:18–19. A true and accurate copy of this portion of the transcript is attached hereto and incorporated herein as “Exhibit D.”

WHEREFORE, Plaintiff Town of Stephens City, Virginia respectfully requests that this Honorable Court enter appropriate orders (1) denying Defendant Frederick County Sanitation Authority’s Motion for Sanctions, (2) overrule Defendant’s Opposition to Stephens City’s Motion for Leave, (3) overrule Defendant’s Opposition to Stephens City’s Motion to Overrule and (4) for such other relief as this Honorable Court deems appropriate.

Respectfully submitted,
TOWN OF STEPHENS CITY, VIRGINIA
By Counsel



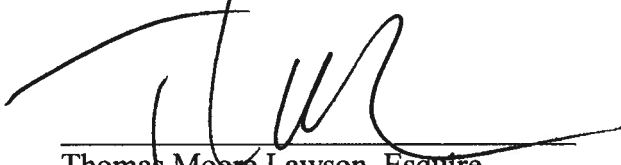
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Counsel for Plaintiff Town of Stephens City, Virginia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January, 2018 a true copy of the foregoing Plaintiff Town of Stephens City, Virginia's Rebuttal to Defendant Frederick County Sanitation Authority's Various Pleadings was sent via e-mail by agreement of counsel to:

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