Docket #0088 Date Filed: 8/19/2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: COLUMBIA GAS'S 12(b)(6) MOTION TO DISMISS[1]

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[1] The Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. Pro. 52, applicable to this adversary proceeding by Fed. R. Bankr. Pro. 7052 and 9014. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are adopted as such.

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Dated: August 19, 2021

Sontchi, C.J.

INTRODUCTION

A general contractor who contracted with the defendant, the owner, is a debtor in chapter 11 bankruptcy proceedings. The general contractor and the plaintiff, a subcontractor, are in privity of contract under two subcontracts. The subcontracts were substantially performed before the work was cancelled. The general contractor filed for bankruptcy and the subcontractor is seeking payment from the owner for the services and materials it provided.

Before the Court is defendant Columbia Gas's 12(b)(6) motion to dismiss plaintiff Earth Pipeline's second-amended three-count complaint.[2] Count I is a claim to enforce Earth Pipeline's mechanic's liens, Count II is a claim for unjust enrichment, and Count III is for a claim of quantum meruit. This Court previously granted Columbia Gas's motion to dismiss Count I for failure to state a claim with prejudice and granted the subcontractor leave to amend Counts II and III.

[2] Terms that are capitalized and not defined in the Introduction section to this Decision are later defined in the Findings of Fact section of this Decision or in this Court's December Decision. *Earth Pipeline Services, Inc. v. Columbia Gas Transmission, LLC (In re Welded Construction, L.P.),* 623 B.R. 100 (Bankr. D. Del. 2020) (the "December Decision").

The Court, on *sua sponte* reconsideration, will vacate its December Decision dismissing Count I with prejudice and concluding that West Virginia law precludes the simultaneous *prosecution* of implied or quasi-contract claims where an express contract exists. The Court will deny Columbia Gas's motion to dismiss as to Counts I-III.

JURISDICTION & VENUE

The Court has jurisdiction over this matter, pursuant to 28 U.S.C. §§ 157(c)(1) and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1452(a) and 1409(a). Earth Pipeline does not consent to this Court's entry of a final order on this matter.[3] The Court makes proposed findings of fact and conclusions of law pursuant to Fed. R. Bankr. Pro. 7052 and 9014.[4]

FINDINGS OF FACT

The parties, events, and the relevant contractual provisions have been previously set forth in this Court's December 1, 2020, decision (the "December Decision").[5] The relevant facts and procedural history are briefly set forth below.

A. RELEVANT FACTS

i. The Parties

There are three parties discussed in this decision. Earth Pipeline Services, Inc., ("Earth Pipeline") the plaintiff and subcontractor; Welded Construction, L.P., et al.,

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[3] *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 Amended Complaint* (the "Response"), Adv. Proc. No. 19-50274 [D.I. 36], at 1.

[4] 28 U.S.C. § 157(c)(1).

[5] *Supra* note 2.

("Welded") the nominal defendant and general contractor; and Columbia Gas Transmission, LLC ("Columbia Gas") the defendant and owner.

ii. Facts Specific to Count I

Welded entered into a general contract with Columbia Gas to perform certain work.[6] Subsequently, Earth Pipeline entered into two subcontracts with Welded to provide materials and services for a portion of the general contract work.[7]

Earth Pipeline adopted the subcontracts by reference in its complaint and attached them as exhibits to the complaint.[8] Under the terms of the subcontracts, Welded agreed to pay Earth Pipeline in accordance with agreed-upon hourly rates and unit prices for services and materials provided upon receipt of Earth Pipeline's invoices for work performed.[9] Earth Pipeline alleges that it fully performed all work required under the subcontracts and additional related work, as requested by Columbia Gas through Welded.[10]

On June 22, 2018, despite Earth Pipeline's performance and over Earth Pipeline's objections, Columbia Gas, through Welded, terminated the subcontracts.[11] After the termination, Earth Pipeline invoiced Welded for work performed and materials provided in the amount of $7,342,519.62, which invoice was due within thirty days of receipt.[12]

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[6] Adv. Pro. No. 19-20574, D.I. 55 (the complaint) at p.2 ¶ 7.

[7] *Id.* at p. 2–3 ¶¶ 8-9.

[8] *Id.* at Exhibits 1 and 2 (the subcontracts).

[9] *Id.* at p. 2–3 ¶¶ 10–11.

[10] *Id.* at p. 3 ¶¶ 12–13, 16.

[11] *Id.* at p. 3–4 ¶ 14–16.

[12] *Id.* at p. 4 ¶ 17–18.

Copies of unpaid invoices are attached to the complaint and are also adopted by reference in the complaint.[13] To date, Earth Pipeline has not recovered the $3,650,300.42 including retainage.[14] Seeking the unpaid balance, Earth Pipeline filed two valid mechanic's liens in the unrecovered amount in the proper counties.[15] Less than two months after Earth Pipeline filed the mechanic's liens, Welded filed for chapter 11 bankruptcy protection in this court.[16]

The subcontracts contain two relevant provisions:

The Lien Clause.

> Subcontractor shall cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of Company to be released and discharged forthwith at the cost and expense of Subcontractor if Subcontractor fails to release or obtain the release and discharge of any such Lien, then Contractor may, but shall not be obliged to, discharge, release or otherwise deal with the Lien, and Subcontractor shall pay any and all costs and expenses incurred by Contractor in so releasing, discharging, or otherwise dealing with the Lien, including fees and expenses of legal counsel. Any amounts so paid by Contractor may be deducted from any amounts due Subcontractor whether under the Agreement or otherwise. No amounts are payable by Contractor to Subcontractor so long as a Lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work.[17]

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[13] *Id.* at p. 4 ¶ 17, 19.

[14] *Id.* at p. 4 ¶ 19.

[15] *Id.* at p. 4 ¶ 20–21; *see also* December Decision at p. 11 (finding Earth Pipeline's mechanic's liens to be valid).

[16] *Id.* at p. 4–5 ¶ 22.

[17] *Id.*, at Exhibit 2, page 15–16 of 25. This is Exhibit G (the general terms of the subcontract) that is included with Exhibit 2. The complaint and the subcontracts attached as Exhibits 1 and 2 indicate that general terms are the same for both subcontracts. This Decision will treat them as such.

The SLI Clause.

> Subcontractor shall defend, indemnify and hold harmless Contractor . . . from and against any and all Claims of whatever nature . . . which may be brought against Contractor. . . to the extent caused by:
>
> ***
>
> (F) all Liens and claims made or liability incurred by Contractor on account of the Work performed or materials supplied by Subcontractor, including fees and expenses of legal counsel, ***but only to the extent Subcontractor has been paid by Contractor all amounts due under this Agreement*** . . . .[18]

iii. Facts Specific to Counts II and III

Earth Pipeline asserts that it is entitled to recover from four instances of disputed (meaning performed but unpaid for) work: (i) $69,960 for the hauling of 1166 feet of timber logs;[19] (ii) $223,938.12 in lost production of manpower and equipment rental for three days after Columbia Gas changed the usage designation of an access road to "Foot Traffic Only," which change was for a cultural survey that benefited Columbia Gas;[20] (iii) $597,396.00 in lost production of manpower and equipment rental over a four day period after Columbia Gas ordered a safety stand-down;[21] and (iv) $2,250,627.00 in additional manpower and equipment to meet Columbia Gas's repeated, requested changes to the steep slope plan.[22] These uncompensated claims total to $3,141,921.12.[23]

[18] *Id.* at Exhibit 2, page 9 of 25. Likewise, this comes from Exhibit 2's Exhibit G, the general terms.

[19] *Id.* at p. 7 ¶ 42.

[20] *Id.* at p. 7–8 ¶ 43.

[21] *Id.* at p. 8 ¶ 44.

[22] *Id.* at p. 8 ¶ 45–46; *see also*

[23] *Id.* at p. 9 ¶ 58.

For items (i) and (iii) above, Earth Pipeline specifically asserts that Columbia Gas made the request through Welded's Mett Carroll.[24] For items (i) through (iv), Earth Pipeline plausibly alleges that: (i) Welded was Columbia Gas's direct representative responsible for conveying the instructions of Columbia Gas to Welded;[25] (ii) Columbia Gas directed Welded to have Earth Pipeline provide certain services and materials that fell outside the scope of the subject matter of the subcontracts;[26] (iii) Welded requested Earth Pipeline to do so under Columbia Gas's directions;[27] (iv) Earth Pipeline provided the requested services and materials related to the construction of a pipeline including clearing land and other work;[28] (v) the requested services aided the construction of a pipeline and otherwise improved and increased the value of the property worked on;[29] (vi) Columbia Gas owned the improved land and the related pipeline;[30] (vii) because Columbia Gas owned the land, it directly benefited from the services and materials Earth Pipeline provided;[31] (viii) despite authorizing and accepting these improvements,

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[24] *Id.* at p. 7 ¶ 42; *Id.* at p. 8 ¶ 44; *see also id.* at page 103 of 109 (Earth Pipeline's document reflecting Mr. Carroll verbally requested 1,166 feet of timber removed); *id.* at Exhibit 3, page 104 of 109 (An Earth Pipeline letter to Ms. Conn of Welded stating: "Mett Carroll verbally instructed Kevin Bennett to remove all timber from [location "A"], which represents 1,166 linear feet . . . ." and further indicating that the request was from Columbia Gas and that Mr. Carroll agreed to Earth Pipeline's cost of $60 per linear foot); *id.* at page 105 of 109 (stating that the reason for the change in work was "Landowner directed"); and *id* at Exhibit 3 page 73 of 109 (letter from Earth Pipeline to Mr. Mett Carroll detailing the sleep slope work it was directed to perform, which work fell outside the scope of the subcontracts).

[25] *Id.* at p. 7 ¶¶ 39, 42; p. 8–9 at ¶¶ 44, 46–48, 51; *see also id.* at Exhibit 3 pages 39, 73, and 105 of 109.

[26] *See supra* notes 24–25.

[27] *See supra* notes 25.

[28] *See* D.I. 55 (the complaint) at p. 9 ¶¶ 51, 54.

[29] *Id.* at p. 7 ¶¶ 38–39, p, 9 ¶ 58, p. 10–11 ¶¶ 65, 67.

[30] *Id.* at p. 2 ¶ 6, p. 7 ¶ 38, p. 9 ¶ 53, and p. 10 ¶ 62.

[31] *See supra* note 29.

Columbia Gas has not compensated Earth Pipeline;[32] (ix) Earth Pipeline expected compensation for these services and Columbia Gas expected, or should have expected, to pay Earth Pipeline for these services;[33] (x) Welded, Earth Pipeline's contractual counterparty, has rejected the four work items as work performed outside of the subcontracts;[34] and (xi) Earth Pipeline has no remedy at law for the work it performed as (a) Welded refusal to recognize the requested services as contractually required, and (b) even if Earth Pipeline asserted a breach of contract claim against Welded, Earth Pipeline's recovery is uncertain as Welded has filed for bankruptcy proceedings.[35]

Finally, upon review of the Earth Pipeline's complaint and the attached exhibits, the Court finds that there exists no express or written contract between Earth Pipeline and Columbia Gas.

B. **PROCEDURAL BACKGROUND**

In its December Decision, this Court granted leave to Earth Pipeline to amend its amended complaint as to its unjust enrichment and quantum meruit claims and dismissed its mechanics' lien claim with prejudice.[36] Accordingly, Earth Pipeline amended its complaint and filed this second amended complaint (the "complaint").[37] Columbia Gas filed its motion to dismiss the complaint[38] to which Earth Pipeline filed its

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[32] D.I. 55 (the complaint) at p. 9 ¶ 50; p. 11 ¶ 68.

[33] *Id.* at p. 8–9 ¶¶ 48, 51–54, p. 10 ¶¶ 62–63.

[34] *Id.* at p. 8 ¶ 47, p. 10–11 ¶¶ 66–67.

[35] *See id.*; *see also id.* at p. 4–5 ¶ 22.

[36] December Decision at p. 22.

[37] D.I. 55, filed on January 13, 2021.

[38] D.I. 58 (the motion to dismiss), filed on January 26, 2021.

objection.[39] Following Earth Pipeline's objection, Columbia Gas filed its reply in support of its motion to dismiss.[40] On April 29, 2021, the Court heard oral argument.[41] The issues are fully briefed and ripe for a decision.

CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

A motion to dismiss under Federal Rules of Civil Procedure 12(b)(6)—made applicable in bankruptcy adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b)—challenges the sufficiency of the factual allegations in the complaint.[42] Under Federal Rule of Civil Procedure 10(c) and Third Circuit precedent, "complaint" is defined as "only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents."[43]

"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 . . . ."[44] The Third Circuit has formulated three steps lower courts must follow in "reviewing the sufficiency of a complaint" under 12(b)(6).[45] Courts must: (1) identify the elements of a

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[39] D.I. 61 (Earth Pipeline's objection to Columbia Gas's motion to dismiss) filed on February 9, 2021.

[40] D.I. 62 (Columbia Gas's reply), filed on February 16, 2021.

[41] D.I. 75 (Court sign-in sheet for hearing held April 29, 2021); *see also* D.I. 76 (transcript of hearing).

[42] *In re Aspect Software Parent, Inc.*, 578 B.R. 718, 722 (Bankr. D. Del. 2017) (citing *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993)).

[43] *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993)); Fed. R. Civ. Pro. 10(c).

[44] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[45] *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786–87 (3d Cir. 2016).

claim, (2) identify conclusory allegations, and (3) accept factual allegations as true and "view them and reasonable inferences drawn from them in the light most favorable to [the complainant] to decide whether they plausibly give rise to an entitlement to relief."[46] A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[47] "But detailed pleading is not generally required."[48]

B. **ANALYSIS**

i. Count I—Enforcement of Mechanic's Liens

In the December Decision, the Court determined that Earth Pipeline pled a plausible claim for the creation of its mechanic's liens and looked to determine whether the mechanic's liens were enforceable. In determining the enforceability of the liens, the Court discussed two provisions in the subcontracts to consider whether (i) Earth Pipeline waived its right to file the mechanic's liens, and (ii) under the terms of the subcontracts, Earth Pipeline's filing of the mechanic's liens prevented it from recovering any damages from Columbia Gas at all. The Court concluded that under the terms of the subcontracts, Earth Pipeline's recovery in an action to enforce a mechanic's lien was reduced to nothing as the subcontracts prohibited recovery so long as a lien was filed against the Project, Property, or Work. Due to this holding, the Court dismissed Earth Pipeline's Count I with prejudice. The Court now reconsiders.

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[46] *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 326 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020) (internal citations and quotations omitted).

[47] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[48] *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786–87 (3d Cir. 2016).

Under West Virginia mechanic's lien statute, someone (a subcontractor) who has a contract with a general contractor to provide services or materials to improve an owner's land "for an agreed contract price . . . shall have a lien for his or her compensation . . . ,"[49] valid "against the owner's improved realty."[50] Under the statute, owner's can limit the amount required to discharge a subcontractor's lien "to the contract price by recording the general contract."[51]

In its complaint, Earth Pipeline alleges that the materials and services were properly invoiced pursuant to the terms of the subcontracts or were otherwise necessary or required to perform the subcontracts. Earth Pipeline includes the subcontracts, invoices, and other letters indicating potential modifications (or waivers) to the scope and extent of the work required by the subcontracts sufficiently supporting its claim for compensation for work done in the amount of $3,650,300.42.

In its prior motion to dismiss, Columbia Gas argued that because the Lien Clause states: "No amounts are payable by Contractor to Subcontractor so long as a Lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work,"[52] and Earth Pipeline has two liens registered, Earth Pipeline's claim for compensation is effectively nothing. Additionally, Columbia Gas

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[49] W. Va. Code Ann. § 38-2-1 (West).

[50] A subcontractor's lien is against the owner's interest in an improved structure or property and the real property where it rests. W. Va. Code Ann. § 38-2-1 (West); *Waco Equip. Co. v. B.C. Hale Const. Co.*, 387 S.E.2d 848, 852 n.8 (W. Va. 1989).

[51] W. Va. Code Ann. § 38-2-22 (West). No facts alleged allow a finding that Columbia Gas did so.

[52] D.I. 55 (the complaint) at Exhibit 2, page 15–16 of 25. This is Exhibit G (the general terms of the subcontract) that is included with Exhibit 2.

argues that Earth Pipeline waived its right to register liens against the Property under the Lien Clause of the subcontracts. In its December Decision, this Court found for Columbia Gas.[53] Upon a closer examination, the Court vacates that finding.

Regardless of whether Columbia Gas has standing to raise the contractual lien waiver defense, the Lien Clause is not "certain, definite, and unequivocal,"[54] which it must be to be valid. Instead, the Lien Waiver is equivocal as it butts against the SLI Clause. The SLI Clause explicitly refuses to indemnify Welded or Columbia Gas from filing liens if Earth Pipeline has not been paid in full. To read the Lien Clause as entirely waiving Earth Pipeline's ability to waive would nullify the meaning of the SLI Clause carveout.[55] Instead the two clauses, when read together, provide that the Earth Pipeline will pay the cost of releasing and discharging a mechanic's lien for the materials and services it has provided after (and only after) it has been paid all amounts due under the subcontracts. Once Earth Pipeline has been paid the full, contractual amount owed to it, it must indemnify Welded against any additional liens, claims or liabilities.

Earth Pipeline was not paid in full. Under the terms of the subcontracts, Welded was to pay Earth Pipeline "for payment of the Work performed, including demobilization."[56] Earth Pipeline has plausibly alleged facts supporting its assertion that:

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[53] December Decision at p. 16–17.

[54] Unless a lien waiver is certain, definite, and unequivocal, it will not be valid. *See, e.g.*, *Wellington Power Corp. v. CAN Sur. Corp.*, 614 S.E.2d 680, 687 (W. Va. 2005).

[55] *Berry v. Humphreys*, 86 S.E. 568, 568 (W. Va. 1915) ("These apparently conflicting provisions must be reconciled, if possible, and the reconciliation must be made in such manner as to give effect to all the language, if that can be done.").

[56] D.I. 55 (the complaint) at Exhibit 2, page 10 of 25.

(i) Welded owed it compensation in the amount of $3,650,300.42; (ii) it has an enforceable mechanics' lien; and (iii) it can recover more than nothing.

Accordingly, the Court vacates its prior dismissal of Count I with prejudice and denies Columbia Gas's motion to dismiss Count I.

ii. Counts II and III

In its December Decision, the Court found that because West Virginia law prohibits a party from recovering under the theory of unjust enrichment or quantum meruit when a written contract governs the same subject matter, Earth Pipeline's Counts II and III failed.[57] This finding was incorrect at the motion to dismiss stage.[58] Indeed, West Virginia, consistent with the Federal Rules of Civil Procedure, "recognize[s] that [a] party claiming an alternative [quasi-contract] claim may assert and prosecute both [the alternative claim and the breach of contract claim] in the same action, leaving it to the court and jury to determine which he is entitled to, if either, and *proof of one of them*

[57] December Decision at p. 20 ("[a]n implied contract and an express one covering the identical subject-matter cannot exist at the same time.") (quoting *Rosenbaum v. Price Const. Co.*, 184 S.E. 261, 263–64 (W. Va. 1936)).

[58] For substantive state law issues, this Court must apply West Virginia state law. *See, e.g.*, *Schmigel v. Uchal*, 800 F.3d 113, 119 (3d Cir. 2015). For procedural issues, this Court must apply the federal law of the circuit in which it sits. *Id.* Inconsistent, hypothetical, and alternative claims are allowed under both the Federal Rules of Civil Procedure and West Virginia procedural laws. *See, e.g.*, *W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171–73 (3d Cir. 2013) (finding that admissions made in pleadings may be withdrawn by amendment) (citations omitted); and Fed. R. Civ. Pro. 8(d); *see also Cochran v. Craig*, 106 S.E. 633 (W. Va. 1921) (finding that the existence of a contract does not prohibit pleading alternative quasi-contract claims). Plaintiff can, with clear conscience, argue that it is owed money for work performed under a contract theory *and* quasi-contract theory. There is no disingenuity here.

constitutes no abandonment of the other,"[59] but maintains that "a plaintiff cannot recover damages under both theories."[60]

Accordingly, Earth Pipeline is not prevented from alleging both facts supporting the existence of an enforceable contract in Count I and facts supporting implied or quasi-contractual recoveries in Counts II and III. The issue of determining the extent to which Earth Pipeline's disputed work fell within the scope of the subject matter of the subcontracts is better disposed of at a latter stage of these proceedings.[61]

At present, the Court need only determine whether the factual allegations contained in the complaint are sufficiently plausible to support the elements for unjust enrichment and quantum meruit.

a. Count II – Unjust Enrichment

In *Realmark*, the West Virginia Supreme Court stated that "[t]he law of unjust enrichment indicates that if one person improves the land of another either through the direction of services to the land, or through the affixation of chattels to the land, that person is entitled to restitution for the improvements if certain other circumstances are

[59] *Gulfport Energy Corp. v. Harbert Priv. Equity Partners, LP*, 851 S.E.2d 817, 823 n.8 (W. Va. 2020) (quoting *Cochran v. Craig*, 106 S.E. 633, syl. pt. 5 (W. Va. 1921) (emphasis added)).

[60] *Id. See also* Fed. R. Civ. Pro. 8(d).

[61] *See, Cochran supra* note 58. Where an express, written contract exists, West Virginia courts have allowed plaintiffs to recover quasi-contract claims despite facts evidencing a valid written contract where there is a question of fact as to whether the disputed work fell under the services defined in the written contract. *See, e.g.*, *Marshall v. Elmo Greer & Sons, Inc.*, 456 S.E.2d 554, 557–58 (W. Va. 1995) (allowing the issue of whether the disputed work performed fell within the scope of a grubbing contract to proceed to trial). Here, at a motion to dismiss, and not summary judgment stage, the facts plausibly support the idea that the disputed work fell outside the scope of the subject matter of the subcontracts.

present."[62] The *Realmark* court further stated that "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."[63] Three elements arise:

(i) the plaintiff must have conferred a benefit upon the defendant;

(ii) the defendant must have had some knowledge or appreciation of that benefit; and

(iii) under the circumstances, the defendant's retention or acceptance of that benefit must be inequitable and unconscionable unless the defendant pays the value of the benefit to the plaintiff.[64]

Whether the plaintiff can recover under the unjust enrichment or quantum meruit claims is an issue for a later stage in the proceedings. At this time, the Court only considers whether Earth Pipeline has plausibly alleged facts to support the elements of the claims.

The facts asserted by Earth Pipeline, read in the light most favorable to it, satisfy the elements of an unjust enrichment claim.[65] Earth Pipeline's provided services and materials on Columbia Gas's land under Columbia Gas's direct or indirect direction.

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[62] *Realmark Devs., Inc. v. Ranson*, 542 S.E.2d 880, 884 (2000) (citing Restatement (First) Restitution § 53 (1937)) (in footnote 2, the court quotes the full text of § 53 less the comments—seemingly indicating that courts should look to § 53 to determine the elements for an unjust enrichment claim).

[63] *Id.* at p. 884–85.

[64] *See, e.g.*, *In re Auto. Parts Antitrust Litig*, 29 F. Supp. 3d 982, 1028 (E.D. Mich. 2014) (citing *Veolia Es Special Servs., Inc. v. Techsol Chem. Co.*, 2007 WL 4255280, at *9 (S.D. W. Va. Apr. 11, 2011) (applying West Virginia law)).

[65] To review the facts, *see supra* p. 6–8 (Facts Specific to Counts II and III).

Where Welded is insolvent, Earth Pipeline is unpaid, and Columbia Gas plausibly benefited from Earth Pipeline's services, it would be inequitable and unconscionable to allow Columbia Gas to retain the value of Earth Pipeline's services without paying for them when it asked Earth Pipeline to perform them.[66] Columbia Gas's motion to dismiss Count II is denied.

b. Count III – Quantum Meruit

To plead a claim for quantum meruit, a plaintiff must assert that she performed services that she reasonably expected the defendant to pay for.[67] Here, Earth Pipeline has plausibly alleged that it performed the disputed services at Columbia Gas's request with the expectation that it would be compensated for the services performed.[68] Columbia Gas's motion to dismiss Count III is denied.

CONCLUSION

For the reasons set forth above, the Court vacates its prior decision dismissing Count I with prejudice and DENIES Columbia Gas's motion to dismiss Counts I–III. An order will be issued.

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[66] As the Court must determine whether the *circumstances* are unconscionable as opposed to the contract itself, the Court will not apply a contract-specific analysis of unconscionability. Instead, looking to Black's Law Dictionary, an unconscionable agreement is "[a]n agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept." Agreement, Black's Law Dictionary (11th ed. 2019). The facts pled above plausibly allege that there was an agreement and that it was unconscionable.

[67] *Offutt v. ELSS Exec. Reporting, LLC*, No. 19-0194, 2020 WL 1487817, at *3 (W. Va. Mar. 23, 2020).

[68] *See supra* Count II and note 66. The Court vacates its interpretation of W. Va. imposing too stringent of a pleading requirement in relation to implied, or quasi-contractual claims in the December Decision.