BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **Allan Myers MD, Inc.**	*	
	*	**Docket No. MSBCA 3153**
Under Maryland State Highway Administration **Contract No. WO6355170**	*	
	*	
Appearance for Appellant	*	Paul A. Logan, Esq. Post & Schell, P.C. Philadelphia, PA
	*	
Appearance for Respondent	*	Kerry B. Fisher, Esq. Assistant Attorney General Contract Litigation Unit
	*	Baltimore, MD

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OPINION AND ORDER BY MEMBER KREIS

Upon consideration of Respondent, Maryland State Highway Administration's ("SHA") Motion for Summary Decision and Dismissal of Appeal, Appellant Allan Myers MD, Inc.'s ("Myers") Opposition thereto, and Respondent's Reply thereto, the Board finds that there are no genuine issues of material fact and Respondent is entitled to prevail as a matter of law.[1]

INTRODUCTION

This Appeal arises from a contract entered into between SHA and Myers dated March 28, 2017 for the "design and construction of US 113 to a four lane divided highway from north of Five Mile Branch in Worcester County, Maryland" ("Contract"). This is the second claim relating to this Contract that Appellant has appealed to the Board. Previously, in the first appeal, Allan Myers MD, Inc., MSBCA No. 3143 (2020) ("*Myers I*"), this Board granted Respondent's

[1] COMAR 21.10.05.06B(5) states "[u]pon notice to all parties, the Appeals Board may schedule a hearing to consider a written motion." Although Respondent requested a hearing, the Board exercised its absolute discretion provided in this regulation and determined that a hearing was unnecessary.

Motion for Summary Decision concerning a delay claim. The underlying facts and the Board's decision in *Myers I* are critical to the Board's analysis in the present Appeal; therefore, the Board adopts and incorporates herein the undisputed facts set forth in *Myers I*.[2] For the sake of clarity, pertinent facts from *Myers I*, as well as additional undisputed facts relevant to the present Appeal, are set forth *infra*.

UNDISPUTED FACTS

On October 11, 2018 and again on November 21, 2018, Appellant requested a change order for a 187-day time extension and additional compensation in the amount of $992,268.00 claiming that Verizon's utility relocations were on the critical path and that Verizon's delay in completing its work delayed completion of the project.[3] Respondent denied these requests on December 14, 2018. On April 5, 2019, Appellant filed its first claim ("Claim 1") with the Procurement Officer ("PO"). The PO denied Claim 1 in a final decision issued on November 1, 2019. The PO found that Appellant was not entitled to any additional time or compensation for delay in utility relocations because the "no damages for delay provision" contained in General Provisions ("GP") §5.05 specifically prohibited Appellant from seeking compensation for delays associated with the utility relocations.[4]

[2] Generally, when multiple claims are filed that result in multiple appeals relating to the same contract, the parties ask the Board to consolidate the appeals so that the appeals of all claims may be heard and determined at one time. The Board usually grants such requests and encourages them in the interest of judicial economy. In fact, the Board recently revised its procedural regulations to provide the Board with discretion to consolidate appeals *sua sponte,* if and when the Board becomes aware that consolidation will be in the parties' best interests. In this case, however, the parties did not request consolidation of the appeals, and the Board did not learn that a second appeal had been filed until it became ripe for ruling by the Board, which was not until after the Board had issued its opinion in *Myers I.*

[3] Sections 3.15.01.02 and 3.15.02.03.02 of the Contract both referenced an estimated 6-12 month timeframe from right-of-way clearance to complete all required utility relocations.

[4] GP §5.05 provides: "It is understood and agreed that the Contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions and **that no additional compensation will be allowed for delays, inconvenience or damage sustained by him due to any interference from the said utility appurtenances or the operation of moving them.**" (Emphasis added.)

Appellant filed its Notice of Appeal of the PO's denial of Claim 1, as well as its Complaint, with this Board on November 26, 2019. Respondent filed a Motion for Summary Decision and Dismissal on January 23, 2020, to which Appellant filed a written opposition on February 20, 2020. Respondent's Motion for Summary Decision was granted after a hearing on September 23, 2020, and the Board issued its written Opinion and Order on October 9, 2020 (*i.e.*, *Myers I*). In *Myers I*, the Board held, in pertinent part, that it was undisputed that the Contract contained a valid no damages for delay provision relating to utility relocations and that Appellant had failed to produce any evidence generating any genuine issues of material facts regarding any wrongdoing by Respondent that might preclude enforcement of the no damages for delay provision.[5]

On November 6, 2020, Appellant filed a Motion for Reconsideration of the Board's decision in *Myers I*, which was denied on November 20, 2020.

While Claim 1 was working its way through the SHA's administrative review process, Appellant filed a second claim relating to acceleration ("Claim 2") that started working its way through the process on a parallel, but slightly-delayed path. Claim 2 started its journey in a December 17, 2019 Notice of Acceleration letter sent to Respondent three (3) days after the PO denied Appellant's change order requests in Claim 1. Appellant claimed: "Since you have wrongfully refused to recognize our right to a compensable time extension, we have no choice but to view your decision as constructive direction to accelerate our performance . . . and [we] are entitled to additional compensation associated with these acceleration efforts . . . ."

[5] Maryland courts have held that unambiguous "no damages for delay" provisions are generally enforceable, except where there is "intentional wrongdoing or gross negligence...fraud or misrepresentation…on the part of the agency asserting the clause." *State Highway Admin. V. Greiner Eng. Assoc., Inc.,* 83 Md. App. 621, 639-641 (1990). The *Greiner* decision further held that the "not contemplated by the parties" exception is not recognized in Maryland. *Id.*

On January 20, 2020, Appellant officially submitted Claim 2 to the PO requesting an Equitable Adjustment – Delay Mitigation Damages for acceleration costs of $1,234,759.00. Appellant claimed the acceleration costs were incurred as a result of excusable delays caused by Verizon's failure to relocate the utilities within the 6-12 month estimate provided in the Contract. In Claim 2, Appellant admits that "the cause of this claim is the same event that resulted in our April 5, 2019 submission and pending appeal before the Maryland State Board of Contract Appeals" (*i.e.*, *Myers I*).

When the PO failed to issue a written decision regarding Claim 2 within 180 days, Appellant exercised its right under COMAR 21.10.04.04E(3) to consider Claim 2 as "deemed denied" and, on August 19, 2020, Appellant filed the present Appeal requesting acceleration costs of $1,234,759.00 that were incurred as a result of the PO's denying the compensable time extension requested in *Myers I*.[6]

On October 21, 2020, shortly after the Board granted Respondent's Motion for Summary Decision in *Myers I*, Respondent filed this Motion for Summary Decision and Dismissal of Appeal. Appellant filed its Response in opposition to Respondent's Motion on November 12, 2020, and Respondent filed its Reply on November 17, 2020.

Respondent's Motion asserted that in *Myers I*, the Board specifically addressed Appellant's claim for acceleration costs by confirming they were prohibited by GP 5.05:

> To the extent that this purported [acceleration] claim is somehow encompassed within the initial claim, our decision would be the same: the damages associated with the acceleration of Appellant's performance relate to the utility relocations and would be covered by the same "no damages for delay provision."

[6] This Complaint also requested the recoupment of liquidated damages; however, that portion of the Complaint was dismissed without prejudice by the Board on October 7, 2020. Liquidated damages had also been appealed as a "deemed denied" claim; however, it was undisputed that the 180-day period that the PO had to issue a written decision had not yet run.

Allan Myers, Inc., MSBCA No. 3143 at 4, n.3 (2020).[7] Attached to Appellant's Response in opposition was an affidavit from Richard Dungan containing 17 exhibits ("Affidavit"). Appellant requested that the Board deny the Motion or, alternatively, deny it without prejudice to be considered again after discovery had been completed. Respondent's Reply asserted that neither the Response nor the Affidavit added anything new to the record and just repeated many of the same allegations from the Complaints filed in *Myers I* and in this Appeal.

STANDARD OF REVIEW FOR SUMMARY DECISION

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2):

> The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), *superseded by statute on other grounds*, MD. CODE ANN., STATE GOVT., §12-101(a).

To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Beatty*, 330 Md. at 737-38. *See also*, *Shaffer v. Lohr,* 264 Md. at 404 (1972). A material fact is a fact the

[7] Due to how Appellant referenced its alleged acceleration damages within the appeal of the denial of its delay claim in *Myers I*, the Board inserted this footnote. However, since the appeal of the denial of the acceleration claim was not properly before the Board for decision in *Myers I*, the statement was only *dicta* based on the undisputed facts before the Board at that time.

resolution of which will somehow affect the outcome of a case. *King v. Bankerd,* 303 Md. 98, 111 (1985). "When a moving party has set forth sufficient grounds for summary judgment, the party opposing the motion must show with 'some precision' that there is a genuine dispute as to a material fact." *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md. App. 236 (1992)(citing *King*, 303 Md. at 112). *See also*, *Washington Homes, Inc. v. Inter Land Dev.*, 281 Md. 712, 717 (1978)). "The party opposing a summary judgment motion must 'identify with particularity' each factual dispute and must 'identify and attach' the supporting evidentiary materials." *Gurbani v. Johns Hopkins Health Systems Corp*., 237 Md. App. 261 (2018).

"[M]ere general allegations or conclusory assertions which do not show facts in detail and with precision will not suffice to overcome a motion for summary judgment." *Id.* at 261 (2018)(quoting *Educ. Testing Serv. v. Hildebrant*, 399 Md. 128, 139 (2007)). *See also*, *Barber v. Eastern Karting Co.*, 108 Md. App. 659 (1996)(stating that "[c]onclusory denials or bald allegations will not defeat a motion for summary judgment."); *Seaboard Sur. Co.*, 91 Md. App. at 243)(stating that "[f]ormal denials or general allegations are insufficient to prevent the award of summary judgment."); *Davis v. Montgomery County,* 267 Md. 456, 472 (1972). "Similarly, a mere scintilla of evidence in support of the non-moving party's claim is insufficient to avoid the grant of summary judgment." *Barber*, 108 Md. App. at 751 (citing *Beatty,* 330 Md. at 738).

DECISION

Appellant argues that its claim for constructive acceleration accrued when the PO denied its request for a change order resulting from what it alleged was excusable delay in relocating the utilities on this project. For a contractor to prevail on a claim for constructive acceleration, the contractor must prove the following elements:

> (1) that the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the

> contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

Frazier Cont. Co. v. U.S., 384 F.3d 1354, 1361 (2004).[8]

It is axiomatic that the foundation of any constructive acceleration claim starts with proving excusable delay. Here, the delay alleged relates to Verizon's failure to relocate the utilities in the estimated timeframe set forth in the Contract. However, as previously discussed in detail in *Myers I*, this Contract contains a no damages for delay provision preventing Appellant from claiming any additional compensation due to interference from the utilities or the operation of moving them. In *Myers I*, this Board held that Appellant failed to provide any admissible evidence that generated any genuine issues of material facts showing intentional wrongdoing, gross negligence, fraud or misrepresentation by Respondent, which, if proven at a later hearing on the merits, would have precluded enforcement of the provision. It logically follows that if a no damages for delay provision is enforceable, and the alleged damages arising from delays are based solely on utility issues, then there can be no excusable delay.

Put simply, if there is no excusable delay, then there can be no enforceable claim for acceleration because excusable delay is the first element of an acceleration claim. Accordingly, the Board inserted as a footnote in *Myers I* that any acceleration claim would be defeated for the same reason as the utility delay claim. Respondent now attempts to use this footnote to raise

[8] This Board has previously held that to recover the increased costs of acceleration under a changes clause, a claimant must establish that the delays giving rise to the acceleration were excusable, that the contractor was ordered to accelerate, and that the contractor, in fact accelerated and incurred extra costs. *See Hensel Phelps Constr. Co.,* MSBCA Nos. 1080 & 1167 (1992) at 60 (*citing Norair Eng'g Corp. v. United States,* 666 F.2d 546 (Ct. Cl. 1981)).

what is, in essence, a collateral estoppel defense in its Motion. Maryland law does recognize the use of issue preclusion or collateral estoppel in administrative proceedings. *See Garrity v. Board of Plumbing,* 447 Md. 359 (2016). Nevertheless, because both appeals came before the Board on dispositive motions based on substantially similar, but not identical, evidence, the Board will consider the present Motion for Summary Decision on its own merits.

The only potentially relevant additional information presented in this Appeal that was not before the Board in *Myers 1* is Appellant's Response in opposition to the Motion for Summary Decision and the attached Affidavit. Appellant's Response is strikingly similar to an answer to a complaint, doing little more than admitting and denying statements made in Respondent's Motion. However, the Affidavit provides sworn testimony from Appellant's President, who has personal knowledge of events relating to this Contract and the current Appeal. Accordingly, the question for our consideration is whether the Affidavit, including the attached exhibits, generates a genuine issue of material fact concerning whether there has been any "intentional wrongdoing, gross negligence, fraud or misrepresentation" by Respondent, sufficient to allow the issue concerning the enforceability of the no damages for delay provision to survive summary decision and proceed to a merits hearing for fact-finding.[9]

Accepting the uncontradicted statements in the Affidavit as true, and providing Appellant all reasonable inferences arising therefrom, it is undisputed that there was an estimated 6-12 month timeframe to move utilities and that Appellant submitted, and Respondent accepted, a Project Critical Path Method Schedule ("CPM") affording Verizon the full 12 months, plus float, to relocate the utilities. *Affidavit* at ¶¶10, 11, 16, 17, 18, & 19. It is further undisputed that

[9] All 17 Exhibits attached to the Affidavit were previously before the Board in *Myers I* (14 were attached to Appellant's Opposition to Respondent's Motion for Summary Decision, one was attached to Appellant's Motion for Reconsideration, and two were included in the Rule 4 File).

Appellant had no reasonable basis to foresee any delays related to utility relocation, that Appellant reminded Respondent of the completion date in November 2017, and that Verizon confirmed the relocation date was achievable in February 2018. *Affidavit* at ¶¶20, 21, & 22. Finally, in June 2018, when it became apparent that that the relocation deadline was at risk, it is undisputed that Respondent did not blame Appellant or Verizon for the delays, but instead encouraged Verizon to expedite matters and even agreed to pay Verizon overtime to do so. *Affidavit* at ¶¶23, 24, & 25. Despite these efforts, it is undisputed that Verizon missed the relocation deadline by 187 days. *Affidavit* at ¶27.

Notwithstanding the foregoing, nothing in the Affidavit generates a genuine issue of material fact that there was any "intentional wrongdoing or gross negligence… fraud or misrepresentation" by Respondent.[10] In fact, the undisputed facts support just the opposite. When completing the utility relocation within the estimated timeframe was ultimately recognized to be at risk, it is undisputed that Respondent made efforts to expedite Verizon's relocation work by agreeing to pay it overtime to do so.

The entire foundation of Appellant's argument seems to rest on the undisputed fact that the Contract set forth an estimated utility relocation timeframe that ultimately was not achieved. Based solely on this undisputed fact, Appellant leaps to the unsupported conclusion that Respondent must have either misrepresented the timeframe up front or done something wrong during the project. However, like in *Myers I*, Appellant has again failed to present even a scintilla of evidence that generates a genuine issue of material fact supporting its bald allegations

[10] The Affidavit does mention a March 2019 Agreement with Respondent regarding changing how Substantial Completion will be defined, which Appellant contends Respondent later ignored. Appellant asserts that this repudiation was further direction by Respondent to accelerate. However, there is no written document or change order attached setting forth the March Agreement. Even more importantly, even if this alleged Agreement were to generate a factual dispute, it is not material to the issue at hand because it takes place after the utility relocation was completed in October 2018 and, therefore, it is not admissible evidence of wrongdoing, gross negligence, fraud or misrepresentations by Respondent relating to the 6-12 month timeframe to relocate the utilities.

of such wrongdoing.[11] Although Appellant has alleged throughout its pleadings in *Myers I* that Respondent made misrepresentations regarding when the utility relocation work would be completed, Appellant has offered no admissible evidence to show that Respondent knew at the time it made such representations, that these representations were false. The Court of Appeals has defined "misrepresentation" as "the statement of something as fact which is untrue in fact, and which the insured states knowing it to be untrue, with the intent to deceive the insurers, or states positively as true without knowing it to be true…." *Sun Ins. Office, Limited, of London v. Mallick,* 160 Md. 71, 88 (1931). Even if Respondent represented that the utility work would be completed by June 20, 2018, Appellant has offered nothing to indicate that Respondent knew, or even that it should have known, that the work would not be completed by this date when Respondent made such representations, or that Respondent did not believe that this completion date was achievable. Based on the undisputed facts contained in Appellant's Affidavit, Respondent's knowledge regarding the slippage of the schedule was not obtained until June 2018 when it became apparent that Verizon was not going to meet its estimated completion date.

Absent such admissible evidence, Appellant has failed to generate any genuine issues of material fact necessary to defeat Respondent's Motion and Respondent is entitled to prevail as a matter of law.[12]

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[11] It is undisputed that the Appeal in *Myers 1* was filed November 25, 2019 and that the present Appeal was filed August 19, 2020. At the September 23, 2020 hearing in *Myers 1*, Appellant admitted that it had failed to conduct any discovery. In its Motion for Reconsideration filed November 6, 2020, Appellant reiterated its request for an opportunity to conduct discovery, asserting that its strategy was to conduct discovery once, after both of its Appeals were before the Board, to avoid duplicative efforts. As pointed out *infra* at n.2, Appellant never moved to consolidate the appeals, so the appeals followed separate paths. Thus, this strategy has come back to hurt Appellant in both cases. There is no reason, even during a pandemic, that some discovery could not have been undertaken during the year that the appeal in *Myers 1* was pending. Some simple discovery responses may have filled in some of the gaps in Appellant's misrepresentation argument.

[12] The Board appreciates the harsh impact that an enforceable no damages for delay provision can have on a contractor. However, it also acknowledges that a sophisticated contractor, like Appellant, understands the potential impact of such a provision on its bottom line and can make an informed decision in deciding whether to compete for a Contract that includes one. Additionally, if it decides to compete, it can then decide how much risk it wants to assume and adjust its bid/proposal accordingly.

Accordingly, based on the foregoing it is this 7th day of December 2020 hereby:

ORDERED that Respondent's Motion for Summary Decision is GRANTED.

/s/
Lawrence F. Kreis, Jr., Esq.
Member

I concur:

/s/
Bethamy N. Beam, Esq.
Chairman

/s/
Michael J. Stewart Jr., Esq.
Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeal Opinion and Order in MSBCA No. 3153, Appeal of Allan Myers MD, Inc., under Maryland State Highway Administration Contract No. WO6355170.

Dated: December 7, 2020

/s/
Ruth W. Foy
Deputy Clerk