BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **Allan Myers MD, Inc.**	*	
	*	**Docket No. MSBCA 3143**
Under Maryland State Highway Administration **Contract No. W06355170**	*	
	*	
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 CHAIRMAN BEAM

Upon consideration of Respondent, State Highway Administration's ("SHA") Motion for Summary Decision and Dismissal of Appeal, Appellant Allan Myers MD, Inc.'s Response in opposition thereto, Respondent's Reply thereto, and after hearing the oral arguments of counsel at a hearing on September 23, 2020, the Board found that there were no genuine issues of material fact and Respondent was entitled to prevail as a matter of law.[1]

BACKGROUND

This Appeal arises from a contract entered into between Respondent and Appellant 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"). The new construction required the relocation of certain utilities and their respective facilities. The Contract's Special

[1] At the conclusion of the hearing, the Board advised the parties that it was granting the Motion, but further advised them that an opinion detailing the basis for the decision would be forthcoming and that the time to file any appeal would run from the date the written opinion was issued. *See* COMAR 21.10.05.06B(6)(c).

and General Provisions repeatedly alerted Appellant that it would be solely responsible for the coordination of all needed utility relocations, both overhead and underground, during construction of the project. Section 3.15.01.02 of the Contract provided that

> [t]here is a 6-12 month relocation timeframe from right of way clearance that will encompass all of Delmarva Power, Choptank Electric, Verizon, and Comcast's relocations. The commencement of said relocation activities is contingent on the completion of the clearing and grubbing activities. The [Design Build Team] shall coordinate its design and construction activities with these utility relocations.

Section 3.15.02.03.02 of the Contract provided that "Verizon estimates a 6-12 month timeframe from right of way clearance to complete all required relocation, installation and tie-ins for its impacted facilities."

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. In support of its request, Appellant asserted that Verizon's utility relocations drove the project's critical path and that Verizon's delay in completing its work by three months delayed conclusion of the project. Respondent denied this request by letter dated December 14, 2018.

On January 11, 2019, Appellant filed a notice of Contract claim with the procurement officer ("PO"), and on April 5, 2019 Appellant filed its claim ("Claim"). Appellant reasserted in its Claim that "Verizon failed to complete its utility relocations by the time required under the contract," and that Appellant is entitled to "compensation for extended general conditions costs and other time related impacts it has and continues to incur because of excusable delay." Appellant disagreed with Respondent's prior contention that Appellant "failed to meet its contract obligations at coordination" because (i) the Contract "does not establish completion of clearing and grubbing activities as the trigger for the 12 month duration afforded to Verizon," and (ii) Appellant went "above and beyond in its efforts to coordinate with Verizon."

On November 1, 2019, the PO issued a final decision denying Appellant's April 5, 2019 Claim. The PO determined that (i) Appellant was not entitled to any additional compensation for delay in utility relocations due to the "no damages for delay provision" set forth in General Provisions ("GP") §5.05 of the Contract, which prohibits Appellant from seeking damages for delays associated with the utility relocations:

> 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.)

The PO also determined that (i) as the design-build contractor, Appellant was solely responsible for the coordination of the relocation of the Verizon utilities, (ii) Verizon relocations did not delay the project, and (iii) Appellant failed to support a number of its claimed costs.

On November 26, 2019, Appellant filed (i) a Notice of Appeal of the PO's denial of its Claim and (ii) its Complaint. Attached to the Complaint as Exhibit A was the PO's November 1, 2019 final decision letter.

On January 23, 2020, Respondent filed a Motion for Summary Decision and Dismissal of Appeal ("Motion") asserting that there were no disputes of material fact and Respondent was entitled to prevail as a matter of law because the "no damages for delay provision" precludes Appellant's recovery for delay damages caused by utility relocations.

On February 20, 2020, Appellant filed its Opposition of Allan Myers MD, Inc. to the Maryland State Highway Administration's Motion for Summary Decision ("Response"), arguing, *inter alia*, that Respondent ignored the applicable facts that form the basis of its Claim (*i.e.*, that Respondent made false representations to Appellant in the Contract, which Appellant relied upon, and which resulted in damages to Appellant) and that the "no damages for delay

provision" does not apply.[2] Ten (10) exhibits were attached to the Opposition, mostly comprised of correspondence between Appellant and Respondent. Exhibit 3 to the Opposition was an Affidavit of Richard Dungan, President of Appellant, relating to a dispute between the parties regarding liquidated damages and Appellant's acceleration of performance. The Affidavit did not address any of the allegations raised by Appellant in its Claim or its Complaint, namely, Respondent's alleged misrepresentations regarding Verizon's estimated completion date or the delay damages suffered by Appellant as a result of Verizon's alleged failure to complete its utility work on time. In addition, none of the exhibits attached to Appellant's Opposition provided any admissible evidence demonstrating that Respondent misrepresented when it would obtain right-of-way clearance, Verizon's estimated start or completion date, or that Verizon failed to complete its work on time.[3]

On March 10, 2020, Respondent filed its Reply to Appellant's Opposition. The Reply identified Appellant's assertion in its Response of ten (10) misrepresentations allegedly made by Respondent and asserted that Appellant failed to present any admissible evidence that Respondent had made any misrepresentations or engaged in any misconduct.

[2] Although Appellant initially asserts in its Response that this provision does not apply, Appellant later concedes that a determination of whether the "no damages for delay provision" applies cannot be made until there has been a factual determination as to whether Respondent misrepresented the date when right-of-way clearance would be obtained, which marked the start date when Verizon could begin its work.

[3] Attached as Exhibit 10 was a letter dated January 20, 2020 from Appellant to the PO that purports to be a "claim" seeking an "equitable adjustment as a result of excusable delays." This purported claim incorporated much of what was contained in the Claim that is the subject of this Appeal, but sought damages for its acceleration costs in the amount of $1,234,759 in addition to the damages sought in its Claim. The Board was not presented with any evidence that the PO rendered a final decision on this new claim; thus, the new claim and the basis therefor (*i.e.*, damages arising from Appellant's acceleration of performance) are not properly before us in this Appeal.

To the extent that this purported 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."

On July 30, 2020, the Board held a hearing on Respondent's Motion and, after hearing oral arguments by counsel for both parties, granted Respondent's Motion on the record. This Order and Opinion sets forth in more detail the basis of the Board's decision.

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 GOV'T., §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 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

Respondent requests that this Board enter summary decision in its favor because the "no damages for delay provision" of the Contract is controlling and prohibits Appellant from recovering any damages due to utility relocation delays. Relying on *State Highway Admin. v. Greiner Eng. Assoc., Inc*., 83 Md. App. 621 (1990), Respondent argues that unambiguous "no damage 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." *Id*. at 639-41 (internal citations omitted).[4] According to Respondent, although Appellant has alleged that Respondent made ten (10) distinct misrepresentations upon

[4] In *Greiner*, the Court considered whether a "no damages for delay provision" should be enforced where neither of the parties to the contract had anticipated the delays. The Court reversed a prior Board's decision that the "not within the contemplation of the parties" exception applied and held that "the 'not contemplated by the parties' exception is not recognized by the courts of this State." *Id*. at 639-41.

which Appellant relied in preparing its bid, Appellant has failed to present any evidence to support application of any of the *Greiner* exceptions (*i.e.*, intentional wrongdoing, gross negligence, fraud, or misrepresentation) to the "no damages for delay provision."

We agree. Appellant did not attach to its Complaint or to its Response to the Motion, an affidavit containing averments under oath, or any deposition testimony under oath, stating that Respondent had made any misrepresentations, that Appellant had relied upon any such allegations to its detriment, that Respondent failed to clear the right-of-way by a date certain, that Verizon was required to begin or complete its work by a date certain, that Verizon failed to complete its work in a timely manner, or that any damages Appellant had suffered were a direct result of Respondent's wrongdoing. Likewise, Appellant did not attach to its Response any documents or offer any other admissible evidence to prove any of its allegations.

At the hearing, the Board repeatedly asked Appellant to identify any facts or admissible evidence that would tend to support its allegations of Respondent's wrongdoing. In each instance, Appellant's response was that they were either attached to the Response, or that the facts were in the Complaint. By way of example, the following exchange occurred:

> CHAIRMAN BEAM: You can't just throw out a bald allegation, and say they misrepresented without giving us some proof of that. So that's what we're asking for is where is the proof? We're not saying it doesn't exist, but we're just saying it's not in front of us that we have been able to find.
>
> MR. LOGAN: But this is they need to come forward and demonstrate to this Board there are no issues of material fact. The issues of material fact are created by the complaint and the answer where they denied everything. They need to show that there are no issues of material fact, not us. They're the moving party. They need to demonstrate that the allegations that are in the complaint are not disputed or that if they are disputed were in the wrong -- were at the wrong timeframe. They've denied all of the allegations, which is what my response even pointed out; that they've created the very issue that forecloses a Motion for Summary Decision at this point in time.

(Motion Hr'g Tr. 24:11-25—25:1-4). Despite the Board's repeated efforts to solicit any evidence that Appellant could offer to support its allegations, Appellant offered nothing more than its Complaint and its Response.

When asked about whether any discovery had been conducted during the nine-month period between when the Motion had been filed and the hearing, Appellant acknowledged that it had not issued any interrogatories, requests for admissions, or requests for production of documents, nor had it taken or scheduled any depositions. Appellant continued to assert that "[Respondent has] created by their pleading, by their straight up denial of the complaint the issues of material fact."

In this case, it is undisputed that the Contract contains a "no damages for delay provision" concerning delays associated with the relocation of utilities and that all of Appellant's claims relate directly to the utilities and/or the relocation of the utilities. Respondent asserts that given these undisputed facts, the "no damages for delay provision" of the Contract is controlling as a matter of law and prohibits Appellant from recovering any damages relating to the relocation of the utilities.

Appellant counters, arguing that the "no damages for delay provision" does *not* apply because Respondent made misrepresentations[5] in the Contract upon which Appellant relied causing Appellant to suffer damages, which the *Greiner* court acknowledges is an exception to the enforceability of "no damages for delay provisions."[6]

[5] 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 true, with the intent to deceive the insurers, or which he states positively as true without knowing it to be true…." *Sun Ins. Office, Limited, of London v. Mallick*, 160 Md. 71, 88 (1931).

[6] In its Complaint, Appellant alleged that the delays were caused by Verizon's failure to complete its work within the time represented by Respondent in the Contract. At the hearing, Appellant shifted its focus and argued that the delays were caused by Respondent when it failed to obtain right-of-way clearance by June 20, 2017 as had been represented in the Contract. Either way, the alleged misrepresentations by Respondent relate to delays associated with the timing and completion of the utility relocations.

In order to defeat Respondent's assertion that the "no damages for delay provision" should be enforced, Appellant must show a genuine issue of material fact supported by admissible evidence. Thus, the question for this Board is whether Appellant has sufficiently demonstrated that there is a genuine issue of material fact that precludes enforcement of the "no damages for delay provision." Although Appellant has alleged facts suggesting that Respondent made misrepresentations upon which Appellant relied causing it to suffer damages, Appellant has failed to produce any admissible evidence supporting any of these allegations. Absent an affidavit, deposition testimony, or some other admissible evidence to support its allegations, Appellant has failed to show that there is a genuine issue of material fact.

Maryland courts have routinely held: "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). Here, Appellant has failed to offer even a scintilla of evidence supporting its bald allegations, all of which, if proven, would preclude enforcement of the "no damages for delay provision." *See Barber v. Eastern Karting Co.*, 108 Md. App. 659, 751 (1996)(citing *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993)). Absent any such admissible evidence, Appellant's unsupported allegations cannot defeat Respondent's Motion. Respondent is thus entitled to prevail as a matter of law.

Accordingly, based on the foregoing it is this 9th day of October 2020 hereby: ORDERED that Respondent's Motion for Summary Decision is GRANTED.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

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

/s/
Lawrence F. Kreis, 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. 3143, Appeal of Allan Myers MD, Inc., under Maryland State Highway Administration Contract No. WO6355170.

Dated: October 9, 2020

/s/
Ruth W. Foy
Deputy Clerk