NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 6, 2022

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Re: *Abacus Technology Corp. v. Science Applications Int'l Corp.*, Case No. CL–2021–13809

Dear Counsel:

In 2019 the General Assembly expanded Virginia summary judgment procedure when it permitted certain business litigants to use affidavits and depositions to support their summary judgment motions. Va. Code Ann. § 8.01-420(C). The key question raised before this Court is how much has summary judgment procedure expanded in the Commonwealth. The legal

[1] After oral argument in this matter, the Court granted Alexander Ginsberg's motion for leave to withdraw as counsel.

OPINION LETTER

question is whether the Court should grant Plaintiff Abacus Technology Corp.'s ("Abacus'") Motion for Partial Summary Judgment.

Procedurally, the Court holds that the 2019 amendment did not morph Virginia summary judgment procedure into its federal court analogue. Rather, the amendment slightly liberalized civil procedure to permit the use of affidavits and depositions to support summary judgment motions. On the merits under Virginia procedure, the Court concludes that material facts are in dispute and that Abacus' Motion for Partial Summary Judgment should be denied.

I. FACTUAL OVERVIEW.

Defendant Science Applications International Corporation ("SAIC"), a primary government contractor, subcontracted with Plaintiff Abacus to help SAIC with its work for NASA under SAIC's government contract with the agency. SAIC terminated the subcontract and Abacus alleges breach of contract for nonpayment of its full indirect cost reimbursement adjustments to its 2018 invoices. Abacus alleges $450,775.09 in damages. (Compl. ¶ 45; Pl. Mem. 1.) SAIC denies the allegations. (Ans. ¶ 45; Def. Mem. 1.) Abacus supports its Complaint with attached exhibits. It also filed a Motion for Partial Summary Judgement with more exhibits. It includes a Declaration of Sharon Church, its Chief Financial Officer, supporting its motion. SAIC responds with appropriate pleadings and includes a Declaration of Bruce G. Emerson, its Senior Manager.

Briefly stated, Abacus alleges its subcontract with SAIC was a cost-plus-award-fee contract, meaning Abacus would be paid its costs of performance in addition to a calculated award fee. (Pl. Mem 1.) Its indirect costs ("G&A Expenses")[2] are subject to after-action government audits, resulting in Abacus adjusting the due reimbursement for its G&A Expenses either upward or downward. (*Id.*) The government audit did adjust the G&A Expense rate upward for Abacus. (*Id.* at 3.) Abacus now complains that SAIC refused to reimburse its G&A Expenses. (*Id.*) It asserts that SAIC is behaving like this for no reason—SAIC refused to even ask NASA to give it the funds to pass through to Abacus. (*Id.* at 2.)

SAIC responds that Abacus is to blame for a cost overrun where Abacus exceeded the maximum funding allowed under a cost-reimbursement subcontract and failed to provide timely notice to SAIC of this overrun. (Def. Mem. 1.) More specifically, SAIC argues that (1) Abacus' prior material breaches preclude it from enforcing the subcontract against SAIC; (2) Abacus failed to provide notices required by the subcontract related to available funding; and (3) Abacus exceeded the funded amount of the contract and SAIC need not compensate Abacus above that funded amount. (*Id.* at 1, 13-14.)

[2] G&A is an abbreviation of "general/administrative" expenses. (Id.)

II. THE GENERAL ASSEMBLY DID NOT FEDERALIZE VIRGINIA SUMMARY JUDGMENT PROCEDURE.

As a threshold matter, Abacus argues that Virginia's summary judgment procedure dramatically changed in 2019 when the General Assembly permitted discovery depositions and affidavits to be used in support of or opposition to a motion for summary judgement in cases involving business entities with claims of $50,000 or more. Va. Code Ann. § 8.01-420(C). As a result, Abacus argues, once it filed its Motion for Summary Judgment, and offered its declaration, SAIC's failure to file responsive affidavits, offer contrary deposition testimony, or otherwise put on evidence, negates any general denials of Abacus' claims in pleadings. Stated differently, Abacus argues for a motion for summary judgment default judgment rule.

Abacus stakes a very familiar position—to this Court's federal court half-sibling. Federal Rule of Civil Procedure 56(c)(1) requires a party to support or defend a factual assertion in a motion for summary judgment. In fact, failure by a party to do so may lead a court to deem the non-presented fact undisputed for purposes of the motion. Fed. R. Civ. Proc. 56(e)(2). However, Virginia does not have a corresponding provision in its summary judgment standard to Rule 56(c) or (e). Virginia's controlling law is Virginia Code § 8.01-420. The Code is silent compared to the federal rule language requiring factual support at the summary judgment stage and permitting default treatment against a party who fails to bring such support. In 2019 Virginia cracked the door on broadening summary judgment practice in the Commonwealth. By a new amendment, Virginia now permits parties to use depositions and affidavits to support or oppose a motion for summary judgment. Va. Code Ann. § 8.01-420(C). However, it did not require the use of depositions and affidavits as the federal courts do. The General Assembly must have been advised about how the federal courts behave and could have modeled Virginia's summary judgment standard exactly like the federal standard, but it did not do so.

The General Assembly also knew the Supreme Court of Virginia directly held that a party has no duty to develop a factual record in time for an opposing party's summary judgment motion, and these opinions have never been overruled. *Owens v. Redd*, 215 Va. 13, 14 (1974); *see also Stone v. Alley*, 240 Va. 162, 163 (1990) (reversing a trial court's grant of summary judgment where a material question of fact was "drawn in issue by the pleadings."); *McNew v. Dunn*, 233 Va. 11, 14-15 (1987) (denial of a claim in a pleading defeats summary judgment). The legislature did not overturn those opinions by statute while it was under the hood of Virginia Code § 8.01-420, amending it in 2019.

Nonetheless, during the initial summary judgment hearing before this Court, Abacus principally relied upon *Condo Services* to claim the summary judgment standard in Virginia has fundamentally changed. *Condo. Servs. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561 (2011). Understandably, Abacus abandoned this case in its Supplemental Brief Regarding Summary Judgment Procedure because it is easily distinguishable. *Condo Services* involved claims for breach of a management agreement and wrongful conversion. At the conclusion of all the evidence at a full trial, the trial court concluded there were no material facts

in dispute that could be sent to the jury. *Id.* at 570. This is very different than the present case where the Court has not yet had the benefit of a trial.

Abacus now principally relies on *AlBritton v. Commonwealth*, 299 Va. 392, 403 (2021) as mandating that a party bring evidence to defend a motion for summary judgment. However, the Supreme Court of Virginia made no such ruling. Rather, it restated the familiar principle that a court may grant summary judgment when no material fact is genuinely in dispute. *Id.* In the context of that case, where there was evidence in the record sufficient to resolve the case, the high court wrote: "[a] factual issue is genuinely in dispute when reasonable factfinders could draw different conclusions from the evidence not only from the facts asserted but also from the reasonable inferences arising from those facts." *Id.* (internal quotations and citations omitted). However, use of the word "evidence" in that quotation is dicta specific to that case. It was not a subtle revolutionary change to Virginia summary judgment procedure mandating that one defending a summary judgment motion bring evidence to the hearing. Instead, in that case, where there was sufficient evidence in the record to conclude that no material fact remained in dispute, the Supreme Court permitted the trial court to resolve the question of law. There is no requirement that one bring evidence to support a general denial of a claim.[3]

Abacus largely relies on other cases decided in the 1970s and earlier, before the use of depositions supporting summary judgment was banned prior to the recent 2019 reintroduction of their permitted use. For example, it cites *Leslie v. Nitz,* 212 Va. 480, 482 (1971) which, of course, was and remains superseded by Rule 3:20 as to non-business parties. Va. Sup. Ct. R. 3:20. Abacus offers this case for a glimpse of how summary judgment was adjudicated in Virginia before supporting depositions were disallowed. However, *Leslie* did not mandate that a party bring evidence to a summary judgment hearing. Rather, it addressed a case with obviously undisputed facts. In *Leslie*, a visibly drunk defendant caused a motor vehicle accident, injuring a passenger. *Id.* at 481. The legal issue in that case was whether plaintiff passenger assumed the risk of being injured while a passenger of the drunk driver. *Id.* From depositions, it was undisputed that the defendant driver was visibly intoxicated, and that plaintiff passenger knew it. *Id.* at 482. The plaintiff passenger watched him drink 8 1/2 beers and, initially, was driving him. *Id.* at 483. However, the defendant driver demanded he take the wheel, and the plaintiff passenger acceded. *Id.* at 484. When switching seats, she saw him staggering, even falling against the back of the car. *Id.* at 483. Nonetheless, she let him drive her. The trial court granted summary judgment because of the discovery depositions establishing these facts.

Compare *Leslie* with the present case. The defendant driver in *Leslie* took the deposition of the plaintiff driver. He obtained sworn admissions from her in that deposition concerning his intoxicated state and her knowledge of it. All that was left was for the judge to decide whether

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[3] Abacus argues that there are two types of summary judgment motions: those based on the pleadings and those based on evidence brought to the summary judgment hearing. It claims only the former may be defended without evidence. It cites *Payne v. City of Charlottesville*, 102 Va. Cir. 399E (2019), *rev'd on other grounds*, 299 Va. 515 (2021) as an example of the former proposition. However, the Court does not see controlling authority for the latter one and *McNew*, 233 Va. at 14-15 and *Stone*, 240 Va. at 163 implicitly reject this premise.

those undisputed facts supported the affirmative defense of assumption of risk. This is the proper way to establish facts for a summary judgment motion. In the present case, Abacus does not use a deposition of SAIC. Instead, Abacus uses a declaration of its own CFO, plus the contract in dispute and supporting documents. Then, it demands that SAIC prove its case at the summary judgment hearing by bringing its own evidence. To borrow the facts of *Leslie*, this is the equivalent of the defendant driver bringing a motion for summary judgment, attaching a self-serving declaration from himself swearing that the plaintiff passenger knew he was drunk and assumed the risk of being his passenger and, if the plaintiff passenger did not come forward with evidence supporting her complaint, demanding summary judgment. In *Leslie* the moving party obtained concessions from the non-moving party in a deposition. In the present case the moving party is merely reinforcing its own position and is not proving the absence of a material factual dispute.

Exploring the extent of Abacus' interpretation of the expansion of Virginia summary judgment procedure, the Court presented Abacus with a hypothetical: a plaintiff driver alleged in his complaint that he had a green light, but that a defendant driver answered that the plaintiff really had a red light—a clear material fact in dispute. However, the plaintiff then filed a motion for summary judgment with an attached affidavit swearing that he had a green light. The defendant did not file any contrary affidavit. The question was whether the plaintiff would be entitled to summary judgment, even though the defendant categorically denied the key material fact in his answer. Abacus responded that the plaintiff of this hypothetical would be entitled to summary judgment because the defendant was required to bring proof and could not rest on his general denial in his answer.

However, the Court finds no authority for this position or a principled reason to justify it. A sworn allegation in an affidavit is better than an unsworn allegation in a complaint—but barely. The affidavit is subject to perjury—a crime, but one prosecuted as rarely as adultery. While not subject to criminal penalties, a false allegation in a complaint is subject to sanctions. Va. Code Ann. §8.01-271.1. Thus, both make one subject to penalties for dishonesty, begging the question who cares if a party makes an assertion in an affidavit or in a pleading?[4] If Abacus wishes to rebut SAIC's general denial of Abacus' claims, it would be better suited to skip the self-serving affidavit of its own employee. *See Town of Ashland v. Ashland Inv. Co, Inc.*, 235 Va. 150, 154 (1988) (criticizing self-serving affidavits). Abacus needed deposition testimony or affidavits from SAIC rebutting its pleaded claims, not itself. Or, Abacus needed other evidence showing that SAIC does not really dispute Abacus' claims despite its denials in the pleadings. However, it has neither.

If this motion was presented in a federal court, the treatment of the motion could have been different. However, the motion is in a Virginia court under summary judgment procedures unique to the Commonwealth, which was not nearly as transformed by the 2019 amendments as Abacus hoped.

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[4] The law could use fewer legal traps for the unwary. *See, e.g.,* Va. Sup. Ct. R. 3:11 and 1:4(e) (if an affirmative defense sets up a new matter and requests a reply, the failure to reply within 21 days is deemed admitted).

III. MATERIAL FACTS ARE IN DISPUTE.

In the present case there are material facts in dispute, which the Court gleans from the Complaint, Answer, attached documents, and competing declarations. Key disputed facts, as to fiscal year 2018, include: (1) Did Abacus commit a prior material breach of the subcontract? (2) Did Abacus provide proper notice that its costs were nearing the limit of the funded amount? (Whether notice was timely and adequate are in dispute). (3) Were the costs Abacus incurred unforeseen and unavoidable? The parties clearly have factual disputes when answering these questions. It is true that SAIC has not yet proven its case with evidence to support its general denials of Abacus' claims or its affirmative defenses, but it is not required to do so at this stage of the litigation. *See Owen*, 215 Va. at 14.

First, SAIC alleges that Abacus committed a prior material breach of the subcontract by (a) failing to adjust allowable indirect costs following the final submission of Abacus' cost rate proposal and (b) failing to credit SAIC in FY 2016 and FY 2017. (Ans. ¶ 11, 12, 16.) SAIC alleges Abacus' failure to adjust its indirect costs simultaneously with its final indirect cost rate proposal for FY 2014-2017 was a breach of Subcontract Section 9.0. (Ans. ¶ 5, Def. Mem. 4.) Thus, SAIC alleges a prior material breach under the subcontract. (Ans. ¶ 13.) A prior material breach may preclude Abacus' recovery.

Second, Abacus and SAIC take opposing views on their obligations under the subcontract. Abacus alleges it complied with all obligations pursuant to the subcontract which SAIC denies. (Compl. ¶ 77, Ans. ¶ 77.) Chiefly, SAIC alleges that Abacus failed to provide notice it was nearing the limit of the funded amount as required by the subcontract. (Def. Mem 5.) The subcontract obligates Abacus to submit written notice with estimated additional funds necessary whenever Abacus believes costs incurred will exceed 75% of the allotted amount. (*Id.*) SAIC notified Abacus that the cost overrun was not timely, as required by the Federal Acquisition Regulation Limitation/Costs Clauses in Subcontract Section 9.0. (Compl. ¶ 55(c), Ex. 10 at 1.) For its part, Abacus responds that SAIC "was continually on notice of ongoing costs from a plethora of financial notices transmitted with each invoice, including Financial Load Sheets that projected the cost of continued performance and Financial Management Reports that projected the cost of completion[,]" and combining these with the invoices, (Church Decl. ¶ 10, Partial Mot. Sum. Judg. at 5.) SAIC disputes the adequacy and timeliness of this notice. (Op. Mem. 6.) Therefore, these facts are in dispute.

Third, Abacus claims any cost overruns were unforeseeable and unavoidable and due to SAIC's own actions in terminating its subcontract. (Pl. Mem 7-10.) SAIC denies this. (Def. Mem. 9-12.) SAIC provides the Emerson Declaration which alleges that Abacus' costs were foreseeable and avoidable. SAIC points to the fact that it provided negative feedback to Abacus regarding performance of the subcontract in late 2017 and early 2018. (Emerson Decl. ¶ 6.) It is a reasonable inference that negative feedback would lead to SAIC's choice not to exercise the options in the subcontract. Whether or not the overruns were foreseeable and avoidable are clearly disputed facts.

Rule 3:20 disallows a court from awarding summary judgement when material facts are genuinely in dispute. Because the case presents material disputed facts, to grant summary judgment at this point in the litigation would be premature and therefore improper. The dispute must be resolved at trial.

As an alternative holding, the Motion for Summary Judgment will be denied because, technically, Abacus did not submit a valid affidavit to support its motion. Instead, Abacus offered a declaration of Sharon Church, which lacks proof that she took an oath before a person authorized by law to administer oaths. SAIC did the same thing with its declaration of Bruce G. Emerson. The distinction between an affidavit and a declaration is important because Virginia's expanded summary judgment procedure permits supporting "affidavits" and "discovery depositions." It does not expressly permit "declarations." Va. Code Ann. §8.01-460(C). "An affidavit is a declaration in writing made by a person under oath *and administered before a person authorized by law*." *Evans v. Commonwealth*, 39 Va. App. 229, 238 (2002) (emphasis added); *See* Va. Code Ann. §§ 49-4 and 49-5. Therefore, neither the Declaration of Sharon Church nor the Declaration of Bruce G. Emerson are affidavits, and neither can lawfully support or oppose a motion for summary judgment. Without affidavits, Abacus cannot prevail on summary judgment even if Virginia summary judgment procedure expanded to the degree Abacus imagines.

IV. CONCLUSION.

The Court holds that Virginia's summary judgment procedure is not as broad as Abacus asserts. The recent 2019 statutory amendments permitting use of affidavits and depositions to support summary judgment motions in cases involving businesses with disputes exceeding $50,000 did not create a rule mandating that a party bring evidence to defend a motion for summary judgment. A party may deny a material fact without proving the factual support of its denial pre-trial.

Virginia summary judgment procedure is little changed by the 2019 amendments to Virginia Code § 8.01-460(C). Before the change, parties routinely took depositions, obtained undisputed facts, and then memorialized them in a targeted request for admission which could be used to support a summary judgment motion. Va. Sup. Ct. R. 4:11. Now, a party obtaining favorable deposition testimony can skip the step of the formal request for admission by directly using depositions and affidavits to support its motion. However, Virginia's summary judgement procedure remains otherwise distinct from federal summary judgment procedure.

In the present case, the Court finds significant material facts in dispute making summary judgment inappropriate. Plaintiff Abacus' Motion for Partial Summary Judgment will be denied.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ABACUS TECHNOLOGY CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL–2021–13809
	)	
SCIENCE APPLICATIONS INT'L CORP.,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER came before the Court March 25, 2022, on Plaintiff Abacus Technology Corp.'s Motion for Partial Summary Judgment. And, for reasons set forth in the accompanying Opinion Letter dated April 6, 2022, which is incorporated into this Order by reference, it is

ADJUDGED the Motion for Partial Summary Judgment should be denied; and

ORDERED the Motion for Partial Summary Judgment is DENIED.

THIS CAUSE CONTINUES.

[redacted]

Judge David A. Oblon

APR 0 6 2022

Entered

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN 10 DAYS.