



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 16, 2019

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Re: *Antonios Marios, et al. v. Virginia Electric and Power Company*, CL-2019-1068

Dear Counsel:

This matter is before the Court on Virginia Electric and Power Company's ("VEPCO") Motion Craving Oyer. VEPCO argues that the agreement that forms the basis of the Plaintiffs Antonio Marios' ("Marios" or "Plaintiffs" collectively) and Marios Tile and Marble, Inc.'s (the "Business" or "Plaintiffs" collectively) breach of warranty claim should be produced and attached to the Plaintiffs' complaint. The Court is called upon to decide two central issues:

1. Whether VEPCO may crave oyer of a document other than a deed or letter of probate administration?
2. Does the agreement between the parties form the basis of the Plaintiffs' claim, under the doctrine of oyer?

After considering the pleadings and oral arguments presented by Counsel, the Court finds that under Virginia law, a motion craving oyer may be granted as to any documents that form the basis of the complaint. The Court additionally finds that in this case, the requested agreement is a document that forms the basis of the Plaintiffs' complaint. Therefore, the Court grants the motion craving oyer as to the parties' agreement.

OPINION LETTER

I. BACKGROUND

This matter arises out of a property damage case in which Marios' business property, Mario Tire and Marble, Inc., was damaged in a fire on February 17, 2017. VEPCO supplied electric and power to the Business through an electrical meter box located on the Business' property. Plaintiffs claim that VEPCO's electrical meter box caused the fire on their property, based on an inspection report from the Fairfax County Fire Marshall. The Plaintiffs sued VEPCO on January 23, 2019 for negligence, breach of warranty, and trespass, alleging that VEPCO was the only entity that had control over or access to the meter box, that VEPCO had a duty to operate the electrical box safely, and that an express and implied warranty agreement between the parties imposed liability for the damage on VEPCO. Compl. ¶¶6-19, 39. VEPCO filed the present Motion Craving Oyer on February 26, 2019 seeking the agreement that is the basis of the Plaintiffs' express warranty claim (the "Agreement"), and any document that forms the basis of their implied warranty claim.

STANDARD OF REVIEW

A defendant may crave oyer of any documents that form the basis of the Complaint. *Culpeper National Bank v. Morris*, 168 Va. 379, 382 (1937). This includes documents sued upon or collateral documents that are necessary to the Plaintiff's claim. *Ragone v. Waldvogel*, 54 Va. Cir. 581, 582 (Roanoke 2001). Merely referencing certain documents in the Complaint does not justify incorporating those documents into the pleadings. *Id.* If oyer is granted, the document that is produced is treated as a part of the pleadings. *Sjolinder v. Am. Enter. Sols., Inc.*, 51 Va. Cir. 436 (Charlottesville 2000).

I. ARGUMENTS

A. Defendant's Argument

VEPCO states that the documents that form the basis of the Plaintiffs' breach of warranty claim should be produced and attached to the complaint. It acknowledges that the use of oyer was limited at common law, but asserts that it has since been greatly expanded by the Supreme Court of Virginia. In support of this premise, VEPCO cites cases from 2003 and 1937 in which parties' ability to crave oyer on items other than deeds and letters of probate, and specifically on agreements that formed the basis of warranty claims, was maintained. *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 522-24 (2003); *Culpeper National Bank v. Morris*, 168 Va. 379, 382 (1937).

B. Plaintiffs' Response

Plaintiffs' opposition argues that the Supreme Court of Virginia has articulated a limit on the use of motions craving oyer. Plaintiffs cite caselaw dictating that one may only crave oyer on deeds and letters of probate administration. *Grubbs v. National Life, etc., Co.*, 94 Va. 589 (1897); *Langhorne v. Richmond R. Co.*, 91 Va. 369 (1895); *Eib v. Pindall's Ex'x*, 32 Va. 109 (1834). Plaintiffs also cite recent decisions emerging from Fairfax County Circuit Court in support of

their position, including *Antigone v. Taustin*, in which Judge Oblon concluded “the Supreme Court of Virginia has not explicitly expanded the Oyer Doctrine beyond deeds or letters of probate and administration.” 98 Va. Cir. 213 (Fairfax 2018).

II. ANALYSIS

A. A Motion Craving Oyer may be Granted as to Documents other than Deeds and Letters of Probate Administration

The motion craving oyer may be granted as to the Agreement because it forms the basis of the claim.

Motions craving oyer serve a practical role for litigants and the courts. They ensure that documents which form a basis of an action – regardless of the type of action – become part of the record. From a court’s perspective, “a litigant has no right to put blinders on the Court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view.” *Culpeper National Bank v. Morris*, 168 Va. 379, 382–83 (1937). The Supreme Court of Virginia has recognized the functional purpose of such motions dating back to the nineteenth century. In *Welch v. McDonald*, plaintiffs in error assigned error to a court’s overruling of a demurrer. The case involved “an action of trespass on the case for breach of contract” – considering the proceedings, the Court opined:

The defendants did not crave oyer of the contract, but demurred to the declaration, and to each count thereof. . . . The radical difference between the contract declared on and the one really made and put in evidence did not then appear, and the demurrer was properly overruled as to these counts. *Had oyer of the contract been craved, and the true contract made known to the court, the demurrer to these counts ought to have been, and doubtless would have been, sustained.*

Welch v. McDonald, 85 Va. 500, 8 S.E. 711, 713 (1888) (emphasis added).

Oyer motions are appropriate whenever “a court is asked to make a ruling upon any paper or record” *Culpeper National Bank v. Morris*, 168 Va. 379, 383 (1937). The *Culpeper* case is particularly instructive – it involved a will dispute in which Culpeper National Bank (the “Bank”) sought to reinstate a jury verdict that had been subsequently set aside. *Id.* at 382. The Bank’s complaint heavily relied on the proceedings and documents from the previous case that had resulted in the set aside verdict. *Id.* As such, the Defendants craved oyer of the complete court record of that prior case, and the trial court granted oyer as to the all of the documents that comprised the entire court record. *Id.* On appeal, the Supreme Court of Virginia upheld the trial court’s granting of oyer, noting that the Bank had described all of the proceedings in the first will dispute and described many of the documents involved in it, but filed only small portions of the court record with its complaint. *Id.* The Court noted that “[n]o intelligent construction of *any writing or record* can be made unless all of the essential parts of such paper or record are produced. . . . When a court is asked to make a ruling upon *any paper or record*, it is its duty to require the pleader to produce all material parts.” *Id.* at 383 (emphasis added).

Subsequent cases decided in the Supreme Court of Virginia have implicitly followed the holding in *Culpeper National Bank*. See, e.g., *Riverside Healthcare Association v. Forbes*, 281 Va. 522, 534 (2011) (reversing a demurrer sustained in the trial court because the Defendant had not craved oyer as to an accounting document demonstrating that Plaintiff's relief had been satisfied, and the trial court considered the document without it being "an exhibit accompanying the pleading nor a document produced in response to a motion craving oyer"). In *Dodge v. Trustees of Randolph-Macon Woman's College*, 276 Va. 1, 6 (2008), the Supreme Court of Virginia affirmed a trial court's decision to sustain a demurrer in a breach of contract action. There, after the Defendant craved oyer as to the contract relied upon, the trial court granted the motion craving oyer, and the documents produced by the Plaintiff failed to show a breach of contract. Likewise, in *Pulte Home Corp. v. Parax, Inc.*, 265 Va. 518, 522-24 (2003), the Supreme Court of Virginia upheld the trial court's sustaining of a demurrer after the Defendant craved oyer on a contract in a breach of warranty case and the Plaintiff could not produce any documents in support of its claim. In *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 383 (1997), the Supreme Court of Virginia found no error when a trial court admitted and considered a contract under a motion craving oyer. Considering the appellant's contention that the trial court erred in sustaining a demurrer "by considering questions of fact not in the record", the Supreme Court of Virginia affirmed, stating, "[w]hen a demurrant's motion craving oyer has been granted, the court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion", including the contract that had been produced in response to the motion craving oyer. *Id.* at 382-83. The motion has additionally been used to admit appraisals in an action for breach of contract and fraud without objection – "[p]ursuant to SunTrust's motion craving oyer, the circuit court admitted into the record four appraisals that SunTrust had obtained" *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 372 (2018). In following the *Culpeper National Bank* decision and subsequent Virginia case law, this Court concludes that oyer may be granted over documents whenever "a court is asked to make a ruling upon any paper or record . . ." *Culpeper National Bank*, 168 Va. at 383.¹

B. The Requested Agreement Forms the Basis of the Complaint

Oyer may be granted as to the Agreement because it forms the basis for the claim. *Culpeper National Bank v. Morris*, 168 Va. 379, 382 (1937) (applying oyer to "any paper or record" that is the basis for a claim). In *Sjolinder v. Am. Enter. Sols., Inc.*, 51 Va. Cir. 436 (2000), the Circuit Court for the City of Charlottesville considered whether a Stock Exchange


¹ Plaintiffs argue that craving oyer's use is limited in scope. This Court is aware that some Virginia Circuit Court cases express as much. See, e.g., *Setian Holdings, LLC v. The Unit Owners Association of the Midtown at Reston Town Center*, __ Va. Cir. __ (Fairfax 2019); *Antigone v. Taustin*, 98 Va. Cir. 213 (Fairfax 2018). The rationale behind the argument relies largely on dictum from *Langhorne v. Richmond R. Co.*, a case in which the Supreme Court of Virginia decided that oyer could not be granted on certain documents because they did not form the basis of the claim. See 91 Va. 369 (1895) (commenting that the right to crave oyer exists "as a general rule, only to deeds and letters of probate and administration, not to other writings."); see also Nancy F. Reynolds, *Current News on Oyer Motions: A New Wrinkle for an Old Tool*, 30 J. Civil Litigation 477, 481-83 (2018) (discussing *Langhorne's* dictum and its successors in arguing that oyer motions are not limited to matters of probate and administration). This Court finds the Supreme Court of Virginia's ongoing treatment of the motion controlling in deciding this issue.

Agreement upon which oyer was craved formed the basis of the Plaintiffs' claim, which largely centered around a breach of implied contract claim. The court stated that although the Stock Exchange Agreement was mentioned in the complaint, it was not relied upon, as the complaint alleged injury based on an implied, rather than express, contract. *Id.* The *Sjolinder* court noted that the Plaintiffs could have made additional claims based on the Stock Exchange Agreement in question but chose not to. *Id.* Thus, there was no reasonable basis for granting oyer of it. The present case differs from *Sjolinder* in that the complaint alleges claims of both breach of express and implied warranties. In alleging an express warranty claim, Plaintiffs here rely on those documents that created the express warranty, and the documents thus form the basis of the claim. As such, and in keeping with established oyer motion practice, this Court grants the motion craving oyer because the requested Agreement forms the basis of the Plaintiffs' claim.

CONCLUSION

For the foregoing reasons, the Court finds that a motion craving oyer may be granted as to an agreement that forms the basis of the complaint. The Court also finds that the requested Agreement forms the basis of the Plaintiffs' complaint, and the Court thus grants the motion craving oyer.

Sincerely,

A solid black rectangular redaction box covering the signature of Daniel E. Ortiz.

Daniel E. Ortiz
Circuit Court Judge