Circuit Court for Harford County
Case No. C-12-CV-20-000888 & C-12-CV-20-000878

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0862 & 0744

September Term, 2021

In the Matter of Allan Myers MD, Inc.

Shaw,
Ripken,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: August 24, 2022

We are presented with two consolidated appeals relating to a contract dispute between a contractor, Allan Myers MD, Inc. ("Myers"), and the Maryland State Highway Administration ("SHA"). Myers and SHA entered into a contract for construction work on Highway 113 in Worcerster County. After work began, Myers submitted a delay claim requesting a time extension and additional compensation due to a third-party delay in relocating utility fixtures, which SHA denied. Myers subsequently requested additional compensation for a constructive acceleration claim related to that same delay. SHA denied the acceleration claim as well.

Myers appealed both denials to the Maryland State Board of Contract Appeals ("the Board"). SHA filed motions for summary decision in each appeal. The Board granted summary decision for both appeals, citing a clause in the contract that prevents Myers from recovering additional compensation due to relocation of utilities.

Myers subsequently appealed each claim to the Circuit Court for Harford County. The court consolidated the appeals and affirmed both summary decisions. Myers now appeals to this Court. For the reasons discussed below we shall affirm in part and vacate in part, and remand for further proceedings on the issue of the request for a time extension.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2017, SHA issued a request for proposals for upgrading a two-lane, undivided highway to a four-lane, divided highway. Myers' bid of $51,356,777.00 was accepted. In April 2017, SHA and Myers entered into a contract for the "design and construction of US 113 to a four lane divided highway from [n]orth of MD 365 to [n]orth of Five Mile Branch in Worcester County, Maryland."

The contract provided for all work to be completed on or before October 31, 2019. A subsequent change order extended the date to November 10, 2019. The contract further provided that, in the event the project was not completed on time, SHA would be entitled to liquidated damages in the amount of $4,040.00 for each day between the contract completion date and the actual date of completion.

The project required the relocation of several overhead and underground utilities within the right of way. The contract stated that right of way clearance was to be completed by June 20, 2017. The contract provided: "There is a 6 [to] 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." As to Verizon, the contract further provided: "Verizon estimates a 6 [to] 12 month timeframe from right of way clearance to complete all the required relocation, installation, and tie-ins for its impacted facilities."

The contract contained two delay provisions relevant to this appeal. First, pursuant to section 8.08(a) of the contract's General Provisions ("GP"), the contractor is liable for any damage to the State resulting from [a] refusal or failure to complete the work within the specified time. The contractor will not be liable for delay damages, however, if "[t]he delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor[.]" GP-8.08(d)(1). If the contractor notifies the procurement officer of such an event, the procurement officer "shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in

his [judgment], the findings of fact justify such an extension[.]" GP-8.08(d)(2).

The second provision relevant here is GP-5.05, which the parties refer to as the "No Damages For Delay" clause. That provision states:

> 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.

At some point during construction,[1] Verizon fell behind schedule. Though SHA attempted to expedite Verizon's work to meet the estimated deadline by paying Verizon extra to cover overtime, it became apparent that Verizon's relocation would not be complete by June 2018.

On June 20, 2018, Myers sent SHA a "Notice of Delay" stating that the right of way had been cleared by June 20, 2017 and, therefore, the maximum 12-month timeframe for utility relocation had ended as per the timeframe provided for in the contract. Myers advised SHA that "Verizon's concurrent utility relocations will begin impacting the above referenced project," and claimed that, as a result, Myers is "entitled to both an extension of time and additional compensation."

On October 11, 2018, Myers sent SHA another letter entitled "Request for Contract Time Extension – Verizon Delay." Therein, Myers claimed that, "[p]er the contract

[1] Although the Board accepted that it became apparent in June 2018 that Verizon was behind schedule, it is not clear from the record when the delay occurred. Myers cites notes from a February 2018 utility meeting wherein Verizon confirmed that the June 20, 2018 date was "possible," However, minutes from a utility meeting that occurred in July 2017 reflect that SHA agreed to pay overtime to Verizon to expedite the relocation process "to meet schedule."

documents, Verizon was supposed to complete their work by June 20, 2018, however they were not finished until October 5, 2018[,]" thereby delaying the project by three months. Myers requested an extension of 187 days and additional compensation, the precise amount of which Myers noted was "forthcoming."

On November 2, 2018, SHA sent a letter denying Myers' request for an extension and additional compensation. SHA noted that, per the contract terms, Myers was alerted to the presence of overhead and underground utilities within the right of way, and was required to coordinate with the utility companies, including Verizon. In the letter, SHA further indicated the required completion date for utility relocations is measured from the date that clearing and grubbing were completed. It stated that the clearing and grubbing dates were completed for all sections by November 17, 2017, and, therefore, Verizon's completion date of October 5, 2018 was "well within the time frame specified in the Contract documents."

On November 21, 2018, Myers renewed its request for a 187-day extension and for additional compensation, specifying the amount of $992,268. Myers argued that the contract provided for a 6 to 12 month timeframe from the right of way clearance, and that the contract provision stating that "commencement of [utility] relocation activities is contingent on the completion of the clearing and grubbing activities," simply means that Myers is required to clear and grub areas prior to the utility relocations.

On December 14, 2018, SHA denied Myers' renewed requests. SHA reiterated that Myers did not complete clearing and grubbing activities until November 2017, therefore, Verizon had until November 2018 to complete relocation activities. Three days later, on

December 17, 2018, Myers sent a letter notifying SHA that it viewed SHA's denial of the Delay Costs Claim as "constructive direction to accelerate our performance[,]" for which it would be seeking additional compensation "as well as all other costs incurred due to this issue."

The Delay Claim

On April 5, 2019, Myers filed a formal claim (the "Delay Claim") with SHA, requesting a 187-day extension and additional compensation of $992,268. On November 1, 2019, the procurement officer issued a final decision denying the Delay Claim finding: (1) Verizon's relocations did not delay the project, and (2) even if the project was delayed by the relocation of Verizon utilities, the contract's No Damages for Delay clause barred Myers from claiming additional compensation due to that delay.

On November 26, 2019, Myers appealed the denial of the Delay Claim to the Board. On January 23, 2020, SHA filed a motion for summary decision arguing that there were no material facts in dispute, and that it was entitled to prevail as a matter of law because all damages and other relief sought by Myers in its Delay Claim were precluded by the contract's No Damages for Delay clause.

Myers filed a response, arguing that its claims were not based on a utility delay but on Myers' reliance on SHA's "erroneous representations in its plans and specifications" and, therefore, the No Damages for Delay clause was unenforceable. Myers alleged various misrepresentations by SHA related to Verizon's completion date of utility relocation, including that SHA "represented that its clearance of all rights-of-way would be completed by June 20, 2017." Myers alleged that SHA failed to achieve right-of-way clearance by

that date, and, therefore, "the commencement of the 'utility relocation' was delayed by [SHA], [and] not by any utility."[2] Myers attached to its response numerous exhibits consisting of correspondence between Myers and SHA. Myers further asserted that summary decision was not appropriate because SHA did not address its "claim for acceleration."

The Board held a hearing on the motion on September 23, 2020, where it heard oral argument from each side. It issued its written Opinion and Order (*Myers I*) on October 9, 2020. The Board granted SHA's motion for summary decision and dismissal.

The Board noted that in the nine-month period between the filing of SHA's motion and the hearing, Myers had not conducted any discovery, but instead offered its complaint and response as evidence supporting its allegations. The Board found that (1) it was undisputed that the Contract contained a valid no damages for delay provision relating to utility relocations, and (2) that Myers had failed to produce any evidence generating a genuine dispute of material fact regarding any misrepresentations by SHA that might preclude enforcement of the no damages for delay provision.[3] The Board granted SHA's motion for summary decision as to the entirety of the Delay Claim.

[2] This assertion was subsequently contradicted by Richard Dungan, the president of Myers, who, in an affidavit dated November 10, 2020, stated that SHA had "cleared the Project's right of way on or before June 20, 2017."

[3] Myers filed a Motion for Reconsideration on November 6, 2020. In that motion, it requested an opportunity to conduct discovery and stated that its failure to do so was part of its strategy to conduct discovery once both of its appeals were before the Board. The Board denied that request on November 20, 2020.

The Acceleration Claim

On January 20, 2020, during the time that the Delay Claim was pending appeal before the Board, Myers submitted a second claim with SHA, asserting that, as a result of Verizon's delay and SHA's subsequent denial of a time extension, Myers incurred "acceleration costs" in the amount of $1,234,759 (the "Acceleration Claim"). Myers stated that the claimed costs were in addition to the costs submitted in the Delay Claim, but that "the cause of this claim is the same event that resulted in our [Delay Claim] submission and pending appeal before [the Board]." Because the procurement officer did not issue a written decision within 180 days, Myers deemed the Acceleration Claim "denied" pursuant to COMAR 21.10.04.04E(3) and appealed to the Board on August 19, 2020.

In that appeal, Myers claimed that, in March 2019, it entered into an oral agreement with SHA to "work towards substantial completion of the work by [the] end of 2019 . . . and to complete the balance of the work in the summer of 2020" (the "March Agreement"). Myers further stated that, in October 2019, SHA sent Myers correspondence "unilateral[ly] revo[king] the March Agreement," which Myers interpreted as further direction for acceleration.[4] Myers reiterated that it was entitled to additional compensation for acceleration.

[4] Myers completed the project on January 3, 2020, and the road was opened to traffic. On January 29, 2020, SHA sent Myers a letter stating that Myers had satisfactorily met the requirements for substantial completion, but that, due to the delay, MSHA was pursuing liquidated damages in the amount of $218,160 pursuant to the contract's GP-8.09. Myers has appealed the liquidated damages claim to the Board.

SHA filed a motion for summary decision on October 21, 2020. SHA argued that, in *Myers I*, the Board had ruled that acceleration costs were not recoverable. SHA pointed to a footnote in the Board's decision in *Myers I*, where the Board noted that, to the extent that Myers' claim for acceleration costs was part of the Delay Claim, "damages associated with the acceleration of [Myers'] performance relate to the utility relocations and would be covered by the same 'no damages for delay provision.'" It therefore argued that the material facts were not in dispute, and it was entitled to prevail as a matter of law based on the contract's No Damages for Delay clause.

Myers filed a response to the motion for summary decision, asserting that the No Damages for Delay clause was not applicable to the Acceleration Claim, because that claim was based on SHA's denial of the requested 187-day time extension and/or revocation of the March Agreement, "both of which forced Myers to accelerate its work to avoid liquidated damages." Attached to the response was an affidavit from Myers' president, Richard Dungan ("Dungan") and 17 exhibits. One exhibit was a press release which Myers claimed memorialized the March Agreement. The press release stated that the SHA was "looking to have . . . traffic running on base asphalt by the end of 2019," and was expecting final pavement by Spring of 2020.

Alternatively, Myers argued that, even if the No Damages for Delay clause was applicable, SHA was not entitled to summary decision because there was evidence of intentional wrongdoing, gross negligence, fraud, or misrepresentation by SHA. Specifically, Myers maintained that the evidence supported the following findings: (1) that SHA "made representations regarding the timing and the requirements for Substantial

Completion that it never intended to honor[,]" (2) that SHA "did not intend to honor" its representation related to the 6 to 12 month timeframe for Verizon's completion of utility relocation; and (3) that SHA acknowledged that the Verizon delay was outside of Myers' control "but did not intend to honor that acknowledgment." Myers requested the Board deny SHA's motion, or alternatively, consider the motion after the completion of discovery.

The Board issued an Opinion and Order on December 7, 2020 (*Myers II*).[5] The Board again granted SHA's motion for summary decision and dismissal. The Board found that the only relevant new evidence was Dungan's affidavit.[6] The Board indicated that the question was whether the affidavit and attached exhibits generated a genuine issue of material fact concerning whether there was wrongdoing by SHA sufficient to allow the issue of enforceability of the No Damages for Delay clause to survive summary decision.

Accepting the uncontradicted statements in the affidavit as true, the Board found that it was undisputed that: (1) there was an estimated 6 to 12 month timeframe to relocate utilities; (2) Myers submitted, and SHA accepted, a project schedule affording Verizon the full 12 months to do so; (3) Verizon confirmed in February 2018 that the relocation date was achievable; (4) by June 2018, it became apparent the relocation deadline was at risk;

[5] In its written opinion, the Board noted that it was exercising its discretion pursuant to COMAR 21.10.05.06B(5) in declining Myers' request for a hearing because it determined that "a hearing was unnecessary."

[6] In *Myers I*, Myers had submitted an affidavit from Dungan, but that affidavit related to liquidated damages and acceleration of performance. The Board also noted in *Myers II* that, though the second affidavit from Dungan was new evidence, all 17 exhibits attached to the affidavit were before the Board in *Myers I*.

(5) SHA agreed to pay Verizon overtime to expedite the relocation process; and (6) Verizon missed the relocation deadline by 187 days.[7]

The Board concluded that nothing in the Affidavit or attached exhibits generated a genuine issue of material fact with respect to the allegations of misrepresentation by SHA. As to the purported March Agreement, the Board noted that, although the agreement was mentioned in the affidavit, there was "no written document or change order attached setting forth the March Agreement." In addition the Board found that, "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, was not evidence of misrepresentations relating to the timeframe of utility relocation.

The Board concluded:

> The entire foundation of [Myers'] 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, [Myers] leaps to the unsupported conclusion that [SHA] must have either misrepresented the timeframe up front or done something wrong during the project. However, like in *Myers I*, [Myers] has again failed to present even a scintilla of evidence that generates a genuine issue of material fact supporting its bald allegations of such wrongdoing.

Petitions for Judicial Review

Myers filed timely petitions for judicial review of the Board's decisions in *Myers I* and *Myers II* in the Circuit Court for Harford County. The court consolidated the actions

[7] Myers explains in its brief that Verizon missed the "scheduled June 20, 2018 utility relocation completion date" by 107 days, which "pushed work" into "a winter 'non-work' period, resulting in a total time extension request of 187 days.

and, after hearing oral argument from both parties, affirmed the Board's decisions. Myers filed this timely appeal.

ISSUES PRESENTED

Myers presents three issues for our review:

I. *For the acceleration claim only*, whether the Board erred as a matter of law by concluding the narrow NDFD clause prevents Myers from demonstrating excusable delay required to prove a constructive acceleration claim where the claim results from the SHA's refusal to grant a time extension, the SHA's unilateral revocation of the March Agreement (as defined below), and the SHA's threats of liquidated damages, and where the damages would not have been incurred had SHA granted a time extension.

II. *For both the delay and acceleration claims*, whether the Board erred as a matter of law by concluding, without reviewing the entire record, that even when construing the facts in the light most favorable to Myers, a reasonable factfinder could not conclude that the SHA made misrepresentations that render the narrow NDFD clause unenforceable.

III. *For both the delay and acceleration claims*, whether the Board acted arbitrarily or capriciously by granting summary decision on both claims before the close of discovery, and in the case of the acceleration claim, depriving Myers of an opportunity to conduct any discovery, where the Board acknowledged that further discovery may have uncovered information that would have precluded summary decision.

Though Myers pursues a number of claims in support of its contention that the Board erred in granting summary decision, we summarize those contentions into two overarching issues: 1) whether the Board erred in granting summary decision as to the Delay Claim; and 2) whether the Board erred in granting summary decision as to the Acceleration Claim.

As we shall explain, with respect to the Delay Claim, the Board did not err in concluding that Myers' request for delay-related compensation was precluded by the No Damages for Delay clause and granting summary decision on that issue. Because the Board

did not consider whether Myers should have received a time extension, we shall remand to the Board to decide that narrow issue in so far as it may pertain to Myers' pending claim concerning the assessed liquidated damages. With respect to the Acceleration Claim, we explain that regardless of whether Myers was entitled to a time extension, the Board did not err in concluding that Myers' request for acceleration-related compensation was precluded by the No Damages for Delay clause and granting summary decision on that issue.

STANDARD OF REVIEW

We review decisions of administrative agencies directly, looking "through" the circuit court's decision. *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451 Md. 401, 409 (2017) (quoting *People's Couns. for Balt. Cnty. v. Surina*, 400 Md. 662, 681 (2007)). "Our primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious. In other words, [w]e apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists." *Long Green Valley Ass'n v. Prigel Fam. Creamery*, 206 Md. App. 264, 274 (2012) (citations and internal quotation marks omitted). "When the agency decision being judicially reviewed is a mixed question of law and fact, the reviewing court applies the substantial evidence test, that is, the same standard of review it would apply to an agency factual finding." *Charles Cnty. Dep't of Soc. Servs. v. Vann*, 382 Md. 286, 296 (2004).

DISCUSSION

"The Board's two-step process in deciding a motion for summary decision begins with the determination of whether there is any 'genuine issue of material fact.'" *Manekin Constr., Inc. v. Md. Dep't of Gen. Servs.*, 233 Md. App. 156, 174 (2017) (quoting COMAR 21.10.05.06D(2)(a)). "Only after resolving all inferences in favor of the party against whom the motion is asserted and finding that there is no genuine issue of material fact should the Board determine whether the moving party is entitled to prevail as a matter of law." *Id.* (internal quotation marks and citations omitted).

To defeat a motion for summary decision, "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, 243 (1992) (quoting *King v. Bankerd*, 303 Md. 98, 112 (1985)). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *King*, 303 Md. at 111. The opposing party must identify "with particularity" each material fact in dispute and "'identify and attach' the supporting evidentiary materials." *Gurbani v. Johns Hopkins Health Sys. Corp.*, 237 Md. App. 261, 290 (2018) (quoting Md. Rule 2-501(b)). "[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.* (quoting *Educ. Testing Serv. v. Hildebrant*, 399 Md. 128, 139 (2007)).

I. THE BOARD DID NOT ERR IN GRANTING SUMMARY DECISION ON MYERS' APRIL 5, 2019 CLAIM FOR ADDITIONAL COMPENSATION, BUT FAILED TO SEPARATELY CONSIDER MYERS' REQUEST FOR A TIME EXTENSION.

Myers first argues that the Board erred in granting summary decision as to the Delay Claim. Myers specifically contends that the No Damages for Delay clause did not bar the request for a time extension,[8] and that the clause is inapplicable in any event because SHA made numerous misrepresentations to Myers. SHA responds that the Board properly granted summary decision because, first, as Myers concedes, the No Damages for Delay clause, if enforceable, precludes a claim for delay damages, and second, there was no evidence of misrepresentation that would render the clause unenforceable.

No damages for delay clauses are "conceived in the public interest in protecting public agencies contracting for large improvements on the basis of fixed appropriations or loan commitments against the vexatious litigation based on claims, real or fancied, that the agency has been responsible for unreasonable delays[.]" *State Hwy. Admin. v. Greiner Eng'g Scis., Inc.*, 83 Md. App. 621, 639 (1990) (citation and italics omitted). Such provisions are generally enforceable in Maryland unless there is intentional wrongdoing, gross negligence, fraud, or misrepresentation on the part of the public agency. *Id.*

Based on the record before the Board at the Delay Claim hearing, we conclude that

[8] Although in its brief, Myers conceded that the No Damages for Delay clause was applicable to the Delay Claim, it argued elsewhere in the brief, as well as during oral argument, that the No Damages for Delay clause applied solely to requests for damages, but was silent as to a time extension. Therefore, we understand Myers to argue that the No Damages for Delay clause could preclude additional compensation, but not a time extension that did not seek any additional compensation.

the Board did not err in finding there to be no genuine dispute of material fact regarding the claim for additional compensation. The No Damages for Delay clause expressly precluded additional compensation in the event of utility relocation delay. As the undisputed facts demonstrated, Verizon was delayed in utility relocation, and Myers sought additional compensation based on that utility relocation delay.

Moreover, the Board did not err in its determination that there was no evidence of misrepresentation from which it could conclude that the No Damages for Delay clause was unenforceable. Myers did not present any admissible evidence that would generate a dispute of material fact as to its allegations of misrepresentation but instead relied, improperly, on the allegations and documents attached to its complaint. *See* Md. Rule 2-501(b) ("A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath."); *Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 334 (1986) ("[T]he facts alleged in pleadings are not, by that means alone, before the court as facts for the purposes of summary disposition."); *Woodfield v. West River Improvement Ass'n*, 165 Md. App. 700, 734 (2005) (Eldridge, J., dissenting) ("A 'claim' or allegation [ ] is not evidence."), *rev'd* 395 Md. 377 (2006). Similarly, Myers' contention that discovery might reveal factual disputes was insufficient to prevent summary decision. *See Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373, 392–95 (2000) (holding that an affidavit claiming that discovery could uncover certain facts was insufficient to prevent summary judgment). Absent a genuine dispute of fact regarding the alleged misrepresentations, we cannot conclude that the Board erred in finding that the No Damages for Delay clause was enforceable as applied to Myers'

request for additional compensation. Thus, SHA was entitled to partial summary decision in the Delay Claim on the issue of additional compensation.

In addition to Myers' claim for additional compensation, however, the Delay Claim included a second issue, that is, the issue of Myers' request for an extension of time due to utility relocation delays. The Board did not discuss whether Myers' time extension request was barred by the No Damages for Delay clause, nor did the Board discuss other provisions in the contract in determining whether Myers was contractually permitted a time extension for relocation delays.

Because the Board appeared to consider the request for time extension as inseparable from the request for delay damages, as evidenced from its lack of mention of the time extension in its grant of summary decision, we shall remand to the Board to decide whether Myers was contractually entitled to a time extension as a result of Verizon's utility relocation delay. *See Mayor & City Council of Baltimore v. ProVen Mgmt., Inc*., 472 Md. 642, 669 (2021) ("[W]here the administrative decision or order fails to supply detailed findings of fact or conclusions of law, the appropriate disposition is for the reviewing court to remand the matter to the administrative agency for further proceedings.") Although the project has been completed and the costs associated with the delay and Myers' decision to accelerate have already been incurred, whether Myers' should have been granted a time extension will likely be relevant to Myers' pending challenge to SHA's assessment of liquidated damages. Because the outcome on the remaining issues here would not change whether Myers was entitled to a time extension, we proceed to address them.

II. THE BOARD DID NOT ERR IN GRANTING SUMMARY DECISION AS TO THE ACCELERATION CLAIM.

Myers characterizes its claim as one for constructive acceleration, which occurs "when the government demands compliance with an original contract deadline, despite excusable delay by the contractor*." Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1362 (Fed. Cir. 2016). We initially note that although neither party cites any case law from Maryland recognizing a claim for constructive acceleration, the Board has previously recognized claims for constructive acceleration and did so here as well.

We adopt the elements for constructive acceleration, as recognized in other jurisdictions. Those elements generally include:

> (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.

Fraser Construction Co. v. United States, 384 F.3d 1354, 1361 (Fed. Cir. 2004) (citations omitted).[9]

[9] Claims for constructive acceleration originated as a form of equitable adjustment in federal procurement law but "can be based as successfully on basic principles of contract law" without regard to the judicially recognized elements. Barry B. Bramble and Michael T. Callahan, Construction Delay Claims § 6.05 (7th ed. 2022); *see e.g. C. Norman Peterson Co. v. Container Corp.*, 172 Cal. App. 3d 628 (Cal. App. 1 Dist. 1985) (holding that owner's refusal to grant time extension resulted in abandonment of contract permitting

Here, the Board concluded that SHA was entitled to prevail as a matter of law because Myers could not prove that it was entitled to additional compensation. It reasoned that the delay was related to Verizon's failure to relocate utilities in the estimated timeframe, and that, as the Board had previously discussed in depth in *Myers I*, any claim for additional compensation related to Verizon's relocation was barred by the No Damages for Delay clause. The Board found: "It logically follows that if [the] 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." We conclude that the No Damages for Delay clause bars Myers' claim for additional compensation related to the relocation of utilities.

Myers argues that the Board erred in granting summary decision on the Acceleration Claim because the No Damages for Delay clause was inapplicable. Specifically, Myers contends that the claim for acceleration damages was based on SHA's refusal to grant a time extension, not its refusal to compensate Myers for the delay. In other words, Myers argues that the Board "conflate[d] excusable delay (the right to a time extension) with compensable delay (the right to additional compensation for the delay period)." Myers argues that, even if the No Damages for Delay clause applies to its Acceleration Claim, the

contractor to recover its total costs under quantum meruit). "In many instances, late completion is considered a minor breach of the contract with relatively minor legal penalties, and contractors cannot be forced to accelerate. Therefore, before a court can award a contractor additional performance for 'forced' acceleration, the court must be sure that something changed in the agreement between the parties to make delayed completion a substantial breach of contract[.]" Construction Delay Claims § 6.05.

evidence in the record supported a finding that the clause is unenforceable based on SHA's misrepresentations, and, therefore, summary decision was improperly granted.

SHA maintains that Myers' Acceleration Claim is "simply a delay claim by another name." SHA also argues that the contract provisions put Myers on notice that it would take Verizon 6 to 12 months to relocate its utilities and that Myers bore the risk of delays with utility relocation. SHA suggests that Myers' argument, if accepted, would "allow contractors to circumvent a no-damages-for-delay provision simply by demanding a time-extension request corresponding to the length of the delay."

The parties have not identified, and we have not found, any Maryland cases discussing the distinction of acceleration and delay in construction contracts. Myers asks that we recognize the distinction set out in *Contracting & Material Co. v. City of Chicago*, 20 Ill. App. 3d 684 (1974), *rev'd* 64 Ill. 2d 21 (1976). The court in *Contracting & Material* explained that acceleration and delay are "opposite sides of the same coin" that "are frequently and inappropriately interchanged." *Id.* at 691–92. According to the court:

> Acceleration is the process by which the natural or ordinary progress of events is quickened. In the case of a contract, acceleration occurs when the contractor speeds up [its] work so that [it] is performing the job at a faster rate than prescribed in the original contract. Commonly, acceleration is achieved by working overtime or working double shifts. . . . Delay, on the otherhand, occurs when there is a slowdown in work.
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> When a contractor is delayed, [it] incurs additional costs. Some costs are directly related to stopping and starting up again, such as, protective maintenance of vital equipment. Other costs are so-called 'stand-by' costs, such as maintaining a field office, holding equipment on the site, and keeping salaried supervisors on the payroll. There are also costs which result purely from the passage of time, such as, increases in wages and prices.

Id. at 692. In that case, the court interpreted competing contractual provisions and concluded that the contractor was entitled to time extensions for work stoppages caused by a labor strike and a city-ordered suspension. *Id.* at 690. The city did not grant the contractor's requested time extensions until after the project's original completion date, effectively denying the extensions. *Id.* at 686–87. The court held that the denial of the time extensions was tantamount to an acceleration order, and that the contractor could recover its costs of acceleration. *Id.* at 691.

Other courts considering the issue have held that a no damages for delay clause precludes a claim for acceleration costs that arise from a delay claim. In *Siefford v. Housing Authority of City of Humboldt*, the Supreme Court of Nebraska rejected a contractor's attempt to distinguish acceleration claims and delay claims. 192 Neb. 643, 650 (1974). The contractor there argued that the refusal to grant certain extensions of time that it claims it was contractually entitled to resulted in "undue acceleration." *Id.* at 649. The court reasoned that although there are instances in which there is a distinction between acceleration damages and delay damages, in most cases, "the alleged 'acceleration' is in fact the result of 'delay,' and a no damages for delay clause would preclude recovery of delay damages. *Id.* at 649–50.

Similarly, a Massachusetts appellate court held that a claim for delay damages was not distinct from a claim for increased cost of performing due to hinderance, in *B.J. Harland Electrical Co., Inc v. Granger Brothers, Inc.*, 24 Mass. App. Ct. 506, 510 (1987). Throughout construction, a subcontractor incurred increased expenses due to the general contractor's decision to change the construction sequence. *Id.* at 508. After the

subcontractor brought suit to recover damages including costs for additional labor and materials, the general contractor argued such damages were precluded by the contract's no damages for delay clause. *Id.* at 509. The subcontractor responded that its claims were not due to delays, but rather were for "increased cost of performing its work piecemeal, out of sequence and in winter weather[.]" *Id.* at 510. The court relied on contractual language expressly barring damages "on account of any hinderance or delays[.]" *Id.* at 509. It therefore rejected the subcontractor's claim, reasoning that "any distinction between delay and hinderance damages is one without a difference." *Id.* at 510.

This Court in *Greiner* briefly addressed a similar argument that damages incurred were not delay damages, but were impact damages. 83 Md. App. at 630 n.4. There, we reversed the Board's award of delay damages, holding that a no damages for delay clause "clearly and unambiguously precludes the recovery of delay damages[.]" *Id.* at 639. We rejected the contractor's argument that the damages in question were shielded from the clause because they were impact damages rather than delay damages. *Id.* at 630 n.4. In doing so, we recognized that we may not substitute our assessment of the facts for that of the Board, and we held that the Board's conclusion that the damages were delay damages was supported by the record. *Id.*

A number of the cases that allow for recovery of additional performance costs despite a no damages for delay clause do so because those damages were not incurred as a consequence of the delay, and thus were in fact distinct from delay damages. For example, in *Paul Hardeman, Inc. v. United States*, the court found that because damages for which a contractor sought compensation would have been incurred even if performance were not

delayed, the damages were not attributable to delay. 406 F.2d 1357, 1362 (Ct. Cl. 1969). Courts have disallowed contractors from invoking a no damages for delay clause where the contractor is in material breach of the contract. In *Central Ceilings, Inc. v. Suffolk Construction Co.*, a no damages for delay clause provided that there would be no additional compensation for delay and the sole remedy would be a time extension. 91 Mass. App. Ct. 231, 236 (2017). However, the undisputed evidence demonstrated that the contractor informed the subcontractors that no time extensions would be granted. *Id.* at 237. Because the contractor deprived the subcontractor of its sole contractual remedy, the contractor was in material breach of the contract and thus was precluded from demanding performance. *Id.*

From our review of these cases, it is clear that each outcome turns upon a careful examination of the contractual language. We conclude that the No Damages for Delay provision here bars Myers' claim for additional performance costs, whether classified as delay or acceleration. That clause expressly provides that "no additional compensation will be allowed for delays, inconvenience, or damage sustained by [the contractor] due to any interference from the said utility appurtenances or the operation of moving them."[10] Myers'

[10] Myers describes the applicable provision as a "narrow" no damages for delay clause. Although the provision may be narrow in the sense that it pertains to a specific cause for delay (utility relocation) its bar for additional compensation is phrased more broadly than, for example, the "form" no damages for delay clause examined in *Siefford*, 192 Neb. at 653. The form no damages for delay clause in *Siefford* stated "No payment or compensation of any kind shall be made to the Contractor of *damages because of hinderance or delay* from any cause in the progress of the work, whether such hinderances or delays be avoidable or unavoidable." The provision here pertains to "delay, inconvenience, or damage" due to the utilities or their relocation, without limitation to a particular category of damages.

claim for acceleration damages falls within the purview of damages sustained for "any interference" from utility relocation. Although Myers attempts to distinguish its Acceleration Claim from its Delay Claim, Myers does not dispute that both are predicated on Verizon's untimely utility relocation. Myers indicated as much in its initial letter stating: "the cause of this claim is the same event that resulted in our April 5, 2019 submission and pending appeal . . . (i.e., Verizon's failure to complete its work consistent with the timeline represented by [SHA] in the contract documents, the [SHA's] wrongful refusal to recognize Myers' entitlement to a corresponding time extension, and Myers' continuing efforts to mitigate the impact of these issues)." The relevant contractual language expressly precludes the recovery of additional costs related to utility relocation, whether those are characterized as costs of delay or acceleration. Accordingly, the Board did not err in concluding that SHA was entitled to prevail as a matter of law as to the Acceleration Claim.

Myers next argues that GP-8.08 precludes the Board from relying on the No Damages for Delay clause. According to Myers, because GP-8.08 states that Myers could not be penalized for delays that "arise[] from unforeseeable causes beyond the control and without the fault or negligence of [Myers]," SHA was required to grant a time extension notwithstanding the No Damages for Delay clause.

In support, Myers urges us to find *Watson Electrical Construction Co. v. Winston-Salem*, 109 N.C. App. 194 (1993), persuasive. There, a contractor entered a contract with the City of Winston-Salem that contained a no damages for delay clause. *Id.* at 197–98. The clause prohibited the contractor from recovering costs for delays caused by the city or its architect and provided that the "[c]ontractor's sole and exclusive remedy for the delay

shall be the right to a time extension[.]" *Id.* at 198. Moreover, the contract provided that if delays are caused by "changes ordered in the Work" or other acts of the city, "then the time of completion shall be extended for such reasonable time as the Architect may decide." *Id.* at 198–99. Following city-caused delays, the contractor requested a time extension that the architect denied, and the contractor brought a breach of contract claim to recover acceleration costs. *Id.* at 198. The Court of Appeals of North Carolina held that whether the city breached the contract by failing to grant a time extension to which the contractor was entitled and whether the parties intended to permit acceleration damages were questions to be resolved by the finder of fact. *Id.* at 199–200. The court reversed the trial court's grant of summary judgment against the contractor. *Id.* at 200.

We conclude *Watson* is distinguishable. The contract in that case specifically stated that the exclusive remedy for delay was a time extension, but the contract was ambiguous as to whether acceleration costs could be recovered in the event of an unreasonable denial of a time extension. Here, as previously noted, the No Damages For Delay clause unambiguously and specifically prohibits any additional compensation related to utility relocation. GP § 8.08(d) provides that Myers may not be held liable for delay caused by unforeseeable events beyond the control and without the fault or negligence of the contractor, and that in the event of unforeseeable delays a procurement officer has the discretion to grant a time extension if "in his judgment, the findings of fact justify such an extension." GP § 8.08(d)(2). Another provision stated "[i]t is the responsibility of the [contractor] to coordinate Verizon's relocations with the [contractor's] design, schedule

and sequence of construction so that there are no delays to the utility relocations or SHA's project."

We read the provisions of the contract harmoniously to allocate the risks associated with utility relocation to Myers. As noted above, the Board did not consider whether Myers was entitled to a time extension. Either way, the utility-related bar to additional compensation makes clear that Myers may not recover for acceleration related to utility work, including following the denial of a time extension to complete such work. *See Contracting & Material Co. v. City of Chicago*, 64 Ill.2d 21, 34 (1976) (reversing an award of constructive acceleration and finding "nothing inherently unreasonable in a contract provision which places the risk of labor strikes on the contractor."). Or, put differently, requiring Myers to adhere to the timeline, despite unfortuitous utility relocation delays, did not result in a "constructive change" in the contract.

Finally, Myers argues, as it did before the Board in the Acceleration Claim, that even if the No Damages for Delay clause is applicable to the Acceleration Claim, SHA was not entitled to prevail as a matter of law because there was evidence of misrepresentations by SHA that negated the provision. Myers contends that: (1) SHA intentionally misrepresented that it would consider additional compensation for delays not caused by Myers; (2) SHA made statements in the March Agreement, in connection with Substantial Completion, without knowing if they were true or knew were false; (3) SHA made intentional misrepresentations regarding the June 20, 2018 utility relocation deadline; and (4) SHA made intentional misrepresentations regarding its own responsibility for the

Verizon delay. SHA responds that the Board correctly rejected each of Myers' claims of misrepresentation.

As we have stated previously, although no damages for delay clauses are generally enforceable in Maryland, such provisions are unenforceable where there is "intentional wrongdoing[,] gross negligence, . . . fraud[,] or misrepresentation . . . on the part of the agency asserting the clause." *Greiner*, 83 Md. App. at 639 (citations and internal quotation marks omitted).

Based on our review of the record, we perceive no error in the Board's determination that there was no dispute of material fact relating to Myers' claims of misrepresentation. First, in its opposition to the motion for summary decision, Myers argued that the evidence supported a finding that SHA made representations for substantial completion in the purported March 2019 Agreement that it "never intended to honor." The Board concluded:

> [T]here 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 [SHA] relating to the 6 [to] 12 month timeframe to relocate the utilities.

We discern no error in that conclusion.

Second, Myers argued that SHA made misrepresentations as to the completion dates for Verizon's utility relocation, citing numerous provisions in the contract as well as correspondence between the parties regarding the timeframe. The Board found Myers had offered no admissible evidence that would support a finding that SHA knew that the work would not be completed within the 6 to 12 month timeframe when it made such

representations. As the Board concluded:

> The entire foundation of [Myers'] 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, [Myers] leaps to the unsupported conclusion that [SHA] must have either misrepresented the timeframe up front or done something wrong during the project. However, like in *Myers I*, [Myers] has again failed to present even a scintilla of evidence that generates a genuine issue of material fact supporting its bald allegations of such wrongdoing. [Vol 2 Re 556-57]

We hold that the Board's finding as to this purported misrepresentation was not in error.

Third and finally,[11] Myers argued that SHA misrepresented that it, and not Myers, was responsible for Verizon's delay. According to Myers, those representations included SHA's notification that it would be paying Verizon overtime to meet the deadline, and representations made in the purported March 2019 Agreement. Again, we discern no error in the Board's finding that there was no evidence of misrepresentation. As the Board noted, there was no evidence of a written document or change order that altered the terms of the parties' contract. Moreover, the fact that that SHA paid additional compensation to Verizon

[11] Myers also argues a fourth basis of misrepresentation in its brief regarding SHA's promise of additional compensation. Myers cites a contract provision and correspondence from SHA indicating that delays not caused by Myers were compensable: "Myers reserves the right to complete the project early and any owner impact or delays that extend the project will require compensation." According to Myers, SHA's denial of additional compensation due to Verizon's delay indicates that SHA never intended to honor that representation. Myers failed to raise this argument in its opposition to the motion for summary decision, hence it is not preserved for our review. Md. Rule 8-131 ("[T]he appellate court will not decided any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

to expedite the work does not prove that SHA had misrepresented utility relocation timeframes.[12]

We find no fault with the Board's conclusion that there was no genuine issue of material fact as to any alleged misrepresentation by SHA. The Board did not err in concluding that SHA was entitled to prevail as a matter of law on the Acceleration Claim based on the No Damages for Delay clause.

III. THE BOARD DID NOT ABUSE ITS DISCRETION IN GRANTING SUMMARY DECISION PRIOR TO THE COMPLETION OF DISCOVERY.

Myers finally argues that the Board erred in finding SHA was entitled to prevail as a matter of law on both the Delay Claim and the Acceleration Claim because discovery had not yet been completed. Myers argues that the Board's grant of summary decision prior to the close of discovery was intended to penalize Myers for its "strategy" in delaying discovery, and that it was denied its full and fair opportunity to conduct discovery as part of that penalty. In support of this allegation, Myers cites a single sentence taken from a footnote in the Board's decision mentioning that some discovery could have filled in some gaps in the misrepresentation argument. That footnote reads in full:

> It is undisputed that the Appeal in *Myers I* was filed November 25, 2019 and that the present Appeal was filed August 19, 2020. At the

[12] Myers argues that the Board erred in failing to consider evidence in the record, pursuant to COMAR 21.10.06.04(E). COMAR 21.10.06.04(E) provides: "Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Appeals Board will render its decision[.]" We disagree with Myers' contention. The Board specifically referred to the exhibits attached to Myers' opposition, stating that the same exhibits were also before the Board in its grant of summary decision as to the Delay Claim. The Board stated that it accepted the uncontradicted statements in the affidavit as true and provided Myers with all reasonable inferences arising therefrom.

> September 23, 2020 hearing in *Myers I*, 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* [], 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 I* was pending. Some simple discovery responses may have filled in some of the gaps in Appellant's misrepresentation argument.

Myers contends that discovery would have revealed sufficient factual disputes regarding the alleged misrepresentations on the part of SHA, demonstrating SHA was not entitled to prevail as a matter of law. Therefore, according to Myers, it was erroneous for the Board to have granted summary decision on either claim prior to completion of discovery.

"The timing of a summary judgment ruling, i.e., whether it is to be postponed pending completion of discovery or denied in favor of submission to the fact-finder, falls within the trial court's discretion and will be reviewed only for abuse." *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 88 (2000) (quoting Paul Niemeyer & Linda Schuett, *Maryland Rules Commentary*, Rule 2-501, at 95 (2d ed. 1992 & Supp. 1998)). We discern no such abuse in the timing of the Board's ruling on SHA's motions for summary decision. SHA filed its motion in the Delay Claim on January 23, 2020. Myers filed a substantive opposition to the motion on February 20, 2020, but did not request that the court defer ruling on the motion until after the discovery deadline. At the September 2020 motions hearing, the Board asked Myers to point to any evidence in the record demonstrating the misrepresentations, at which point Myers indicated that the only thing it could point to

were the factual allegations set forth in its complaint. Myers confirmed that in the almost-year that the Delay Claim had been pending, it had not taken depositions, sent out interrogatories, or sent out requests for documents or for admissions. Myers now informs us that the decision not to conduct any discovery was a strategic decision and that it was planning to consolidate the appeals before the Board at the time of the Delay Claim hearing. However, at that point, the Acceleration Claim had been appealed the month prior, but Myers did not move to consolidate the appeals.

Nor did Myers conduct any discovery concerning the Acceleration Claim, even after the Board granted summary decision on the Delay Claim. At the time of the motions hearing on the Acceleration Claim, the Board had sufficient information before it to conclude that the delay predicating the Acceleration Claim was Verizon's failure to relocate the utilities in the estimated timeframe, and that additional compensation for that delay was precluded under the contract. *See Chaires*, 131 Md. App. at 88–89 ("The trial court had sufficient information before it to rule on the legal issues presented, and therefore it was not an abuse of discretion to deny a continuance pending further discovery.").

In sum, we hold that the Board did not err in concluding that Myers' requests for damages, whether labeled as delay costs or acceleration costs, were precluded by the No Damages for Delay clause that expressly disallows additional compensation related to "any" utility relocation delays. We hold that the Board did not err in concluding that Myers failed to demonstrate a dispute of material fact regarding any purported misrepresentation by SHA that would otherwise render the No Damages for Delay clause inapplicable to either claim. We furthermore hold that the Board did not abuse its discretion in granting

summary decision prior to the deadline for discovery. Accordingly, we conclude that the Board did not err in granting partial summary decision on the Delay Claim or in granting summary decision on the Acceleration Claim. We remand for the limited purpose of determining whether Myers was entitled to a time extension.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED WITH INSTRUCTIONS TO VACATE THE MARYLAND STATE BOARD OF CONTRACT APPEALS' DECISION AND REMAND TO THE MARYLAND STATE BOARD OF CONTRACT APPEALS FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.