Construction Law and Public Contracts NEWS

Published by the Virginia State Bar's Construction Law and Public Contracts Section for its members

Spring 2011 **NEWSLETTER** **ISSUE NO. 58**

CHAIR'S COLUMN

Dear Section Members:

As this will be my last Chair's column before I pass the gavel to Chair-Elect Kristan Burch, I would like to highlight some upcoming events and reflect on some accomplishments of the past year.

With respect to upcoming events, the Section will be co-sponsoring a 1.5 hour CLE seminar at the 73rd Annual Meeting of the Virginia State Bar in Virginia Beach. On Friday, June 17, 2011 at 11:00 a.m., a Panel, including Andrew McRoberts of Sands Anderson and Guy Horsley of the Virginia Attorney General's Office, will speak on "*Prosecuting and Defending Claims Under the Virginia Fraud Against Taxpayers Act.*" Thanks again to Michael Branca, Chair of the Summer Program Committee, and our nominee for Section Treasurer, for organizing this effort.

Immediately following our Summer Program, we will host our annual Section meeting. We have a full, working agenda, including Board elections, and we invite you to join us to participate and to see first hand how our Board works for you.

Regarding accomplishments of the past year, we have focused on increasing our membership ranks. The Membership Committee, which is chaired by Sean Howley, has developed a list of action items and strategies and is getting underway with its plan. Our Section has always been strong because of the participation of its members, and that involvement has translated into a cohesive professional network among construction law and public contract practitioners. Please encourage colleagues and friends to join our Section and to seek involvement in the Committees and Programs.

I would like to offer a special thanks to Derrick Rosser, Greg St. Ours, Sean Howley, Richard McGrath and Hobie Andrews for their hard work in pulling together our 2010 Fall program. Based upon a review of the comments, the Program was well received. We will be returning to the Boar's Head Inn in Charlottesville again for our 2011 Fall Program, which will take place on November 4-5, 2011. Information regarding speakers, topics, and lodging will follow. I encourage you to make your reservations early.

Another highlight this year was the October 2010 issue of the Virginia Lawyer magazine with its focus on construction law issues. A special thanks to Webb Moore for making this happen.

The Newsletter Committee, co-chaired by Jennifer Mahar and Mike Branca, also deserve a special thank you for its efforts in compiling and editing all of the material which you will find in this edition of the Newsletter. In order to reduce expenses, we are mailing this abbreviated Newsletter containing case and legislative summaries and an article "*When the King Makes a Contract: Sovereign Immunity and Contracts in Virginia*" by Matthew Haws and Mary Pat Buckenmeyer. A copy of the newsletter with all of the cases and legislation will be available at the Section's website at http://www.vsb.org/site/sections/construction/view/Newsletter. To access NEWSLETTER enter your user name and password. If you are a Section member and you need the password to access the website, contact barservices@vsb.org.

Our Publications Committee, headed by Shannon Briglia, is in the process of updating our handbook to include recent court decisions relating to construction or public contracts. The handbook is available on the Section's website. Shannon has worked untold hours to make the Handbook a much more complete and "user-friendly" research tool. She deserves our hearty thanks.

Finally, since this will be my last column, some additional thanks are in order. First, I would like to extend my sincere thanks to Kristan Burch, Chair-Elect, and Greg St. Ours, Immediate Past Chair, for their enthusiastic support and assistance. It has been an honor to serve as the Chair of this Section. I have had the opportunity to work with and meet many outstanding individuals since I joined the Board in 2003. The current and in-coming officers are good lawyers and even better people. This Section is in excellent hands for many years to come.

I hope to see you at the Summer Program.

Todd Metz
WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.

I. ARTICLE:

II. CASES: (Note: Copies of the following decisions are available on the Section's website located at http://www.vsb.org/site/sections/construction/view/Newsletter)

PAY-WHEN-PAID CLAUSE / PREVENTION DOCTRINE

MERGER DOCTRINE / ECONOMIC LOSS DOCTRINE

PREJUDGMENT INTEREST / SURETY

MILLER ACT / STATUTE OF LIMITATIONS

MECHANIC'S LIENS / FIXTURES

TWP Enter., Inc. v. Dressel, Loudoun Circuit Court, Civil Docket No. 61335 (February 8, 2011) (Overruling a demurrer, the court determined building materials incorporated into the structure could be the subject of a mechanic's lien despite contract provision providing "title for all goods and/or materials remains with supplier until paid for in full by the purchaser".) ..... Page 70

CARDINAL CHANGE

P.W. Campbell Contracting Co. v. Arlington Cmty. Fed. Credit Union, No. 1:11cv00141 (E.D. Va. Apr. 15, 2011) (Granting defendant's motion to dismiss Count II of the Complaint which alleged a claim for cardinal change/abandonment of contract on grounds the court found no instance where a Virginia state court has applied the doctrine of cardinal change to a private, non-governmental contract and the court cannot conclude that the Virginia Supreme Court would find the doctrine applicable to the contract issue if given the occasion to do so.) ..... Page 74

III. LEGISLATION:

H1859
Virginia Public Procurement Act; E-Verify Program
Adds Va. Code § 2.2-4308.2 to require an employer with more than 50 employees for the previous 12 months entering into a contract in excess of $50,000 with any agency of the Commonwealth to perform work or provide services to register and participate in the E-Verify program. The E-Verify program is the electronic verification of work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1986 operated by the U.S. Department of Homeland Security. A contractor who fails to comply with this requirement shall be debarred from contracting with any agency of the Commonwealth for a period of up to one year. The debarment would cease upon the contractor's registration and participation in the E-Verify program. The provision also amends Va. Code § 2.2-4317 to deny prequalification to any contractor who fails to register and participate in the E-Verify program as required by § 2.2-4308.2. These amendments to the Virginia Public Procurement Act become effective on December 1, 2013.

H1951
Virginia Public Procurement Act; Bid, Performance and Payment Bonds
Amends Va. Code §§ 2.2-1839, 2.2-4336 and 2.2-4337 to increase the threshold contract amount requiring bid, performance and payment bonds for construction contracts for nontransportation-related projects from $100,000 to $500,000. This amendment becomes effective on July 1, 2011.

The Editors welcome the submission of articles, opinions and other items of interest. Such materials may be sent to either of the newsletter co-editors:

Michael A. Branca, Esq.
Peckar & Abramson
Suite 500
1133 21st Street NW
Washington, DC 20036
202-293-8815
FAX:293-7994
mbranca@pecklaw.com

Jennifer A. Mahar, Esq.
Smith Pachter McWhorter PLC
Suite 900
8000 Towers Crescent Drive
Vienna, VA 22182-2700
703-847-6300
FAX: 847-6312
jmahar@smithpachter.com

When the King Makes a Contract: Sovereign Immunity and Contracts in Virginia

By Matthew Haws and Mary Pat Buckenmeyer
Smith Pachter McWhorter PLC

Sovereign immunity is in the background of every claim brought against the government under a government contract. It is a legal concept stretching back before the founding of this country that has changed in important ways—but in piecemeal fashion—over the centuries. The result has been called a "sorrowful backwater" of the law—often unexplored and difficult to map.[1] Although we often think about the specific procedural rules that govern our claims, we may not specifically understand the relationship of sovereign immunity to our claim. The result may be only a small nagging voice during contract negotiations with a state entity or when considering a claim against a municipality asking "do I need to worry about sovereign immunity?", but it also could be something worse.

Fortunately for lawyers dealing with contractual relationships and claims in Virginia, the starting point is simple—there is no sovereign immunity for contract claims. But, as we see in this discussion, there is still a "sorrowful backwater" to be found once you paddle deeper into the realm of contract-related claims.

I. Background: "The King can do no wrong"

Many legal systems contain some concept of sovereign immunity. It is variously said to have resulted from the divine right of kings and the idea of *rex non potest peccar*, "the King can do no wrong,"[2] or the argument that because the King created and bestowed the right to sue upon his citizens, it could not be used against him without his permission. In more modern times, the concept has been justified by arguing that government exercises public functions for the benefit of the citizenry and public monies should be protected.[3]

Following independence, the young states of the United States of America quickly reaffirmed sovereign immunity as applicable to their own state governments. It was first expressly adopted by the Commonwealth of Massachusetts in 1812.[4] The Supreme Court of Virginia discussed the existence and early limitations on sovereign immunity extensively in an 1890 case, *Fry v. County of Albemarle*:

> [T]he sovereign cannot be sued except by its own consent, as may be provided by law; and that in the exercise of its sovereign power, it is liable neither for misuse nor nonuser; and that a county in this state is a political subdivision of the state for governmental purposes as prescribed by public law, and is no more than the state liable to be sued for its public acts, and that it cannot be held

---

[1] *See* RALPH C. NASH & JOHN CIBINIC, *Specific Relief vs. Money Damages: Subcontractors Caught in the Web of Sovereign Immunity*, 13 No. 5 NASH & CIBINIC REP. ¶ 25 (1999).

[2] *See* PHILLIP L. BRUNNER AND PATRICK J. O'CONNER, JR., BRUNNER & O'CONNER ON CONSTRUCTION LAW § 8.77 (citing 1 William Blackstone, Commentaries 246, "The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing.")

[3] *See Hinchey v. Ogden*, 226 Va. 234, 240 (1982)

[4] *See Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812).

> chargeable for the acts of an officer whose duties are prescribed by law.
>
> Suits against the state are allowed by law under certain regulations. And in certain specified and enumerated cases counties in this state are authorized to sue and are suable in the circuit court held for such county in their own names, but these are limited. The thirteenth section of chapter 45 of the Code of 1873, provides that: "Counties may sue in their own names for forfeitures, fines, or penalties given by law to such counties, or upon contracts made with them, and may be sued in their own names, in the circuit court of such county."[5]

It was also quickly recognized that unwavering application of sovereign immunity can yield harsh results. As a result, a number of exceptions to the general rule have arisen. Unfortunately for practitioners, these exceptions have been created in a piecemeal fashion over the last two hundred-plus years. Today, exceptions to sovereign immunity may be found in case law or statute; may depend of the type of claim (ex., tort vs. contract); type of transaction (ex., governmental acts vs. "proprietary"acts); type of governmental entity (ex., counties vs. cities), and may be subject to specific limitations and procedures (ex., limits on damages or specific notice requirements). To further complicate matters for practitioners, waivers of sovereign immunity are construed narrowly. The net result is that, when it comes to sovereign immunity, the devil is truly in the details.

II. General Rule in Virginia: No Sovereign Immunity for Contract Actions

In Virginia, those seeking to bring a contract claim against the state caught an early break—Virginia always distinguished between tort claims and contract claims when applying sovereign immunity. While Virginia vigorously maintained sovereign immunity against tort claims until relatively recently,[6] it never asserted sovereign immunity against claims based on an express contract. This early waiver of sovereign immunity has been described as a point of honor for Virginia:

> With respect to the remedy, we have construed Code § 8.01-192 and its statutory predecessors as the Commonwealth's general consent to be subjected to suit in its own courts in contract cases. In *Higginbotham's ex'x v. The Commonwealth*, 66 Va. (25 Gratt.) 627, 637 (1874), Judge Bouldin, writing for the Court, observed that it has been, since 1778, the 'cherished policy of Virginia' to allow to citizens 'the largest liberty of suit against herself' in contract cases.
> Accordingly, we hold that the doctrine of sovereign immunity has no application in actions based upon valid contracts entered into by duly authorized agents of the government. The sovereign is as

[5] 86 Va. 195, 197 (1890).

[6] "The doctrine of sovereign immunity is 'alive and well' in Virginia, as a defense to actions in tort...." *Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 551 (1990). The Virginia Tort Claims Act, VA Code §8.01-195.1 et seq., passed in 1981 provided a limited waiver. We will limit our discussion of sovereign immunity in this article to the types of claims most likely to be faced by those representing government contractors—contract and contract-related claims.

> liable for its contractual debts as any citizen would be, and that liability may be enforced by suit in the "appropriate circuit court," Code §8.01-192, if proper and timely proceedings are taken.[7]

III. Complications: Express Contracts vs. Quasi-Contractual Claims

Despite the straightforward basic rule for sovereign immunity and contract claims against the state, real world situations can quickly become more complicated. What if you only have an oral agreement with the state? What about quasi-contractual claims? What about suing local governmental entities? Does it matter that the state has enacted legislation governing public procurement and containing specific notice requirements for claims?

A. Express, Oral, and Implied-in-Fact Contracts

The basic rule in Virginia for contract claims extends to any express agreement, but the private party and governmental entity must have had an express agreement. It need not necessarily be a written agreement, but there must at least be a manifestation of assent sufficient to create an implied-in-fact contract.

In *Wiecking v. Allied Medical Supply*, the Court discussed the application of sovereign immunity for contract claims to an oral—or implied-in-fact—agreement to transfer dead bodies to the Richmond morgue. The Court held that sovereign immunity "has no application in actions based upon valid contracts entered into by duly authorized agents of the government."[8] The Court summarized "compelling reasons" found by other states for refusing to grant sovereign immunity for contract claims:

> When the state contracts for goods or services, receives the benefit of the contract, and then refuses to honor its obligations, the contractor's property is subject to an unconstitutional taking without just compensation . . .; a denial of liability under such circumstances also violates state and due-process guarantees . . .; to hold that the state may enter into a valid contract and yet retain the power to avoid its obligation would entail an obvious contradiction; neither the state nor the contractor can be bound, yet not bound, by a single contract . . .; the courts will not attribute to the legislature any intention to permit the government to exercise "bad faith and shoddy dealing,"...[9]

B. Quasi-Contractual Claims

While the rule remains simple for express contracts, we begin to enter the backwater when we move beyond pure contractual claims into quasi-contract. Unlike implied-in-fact contracts, quasi-contractual claims (also known as implied-in-law contracts) do not require actual intent of the parties to form an agreement. Instead, the court in quasi-contract uses contractual mechanisms to fashion a remedy for the actions of the parties which resulted in some harm or unjust enrichment. Virginia courts clearly distinguish quasi-contractual claims from contract claims when it comes to sovereign immunity.[10]

---

[7] *Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 552-3 (1990) (citations omitted).
[8] *Id.* at 553.
[9] *Id.* at 551-52.
[10] In *Commonwealth Biotechnologies v. Va. Commonwealth Univ.*, the court focused on the difference between a contract implied in fact, where the agreement is inferred from the circumstances, versus a contract implied in law,

Quasi-contractual claims do not fall squarely within the straightforward exception for contract claims, and require a more complicated analysis of the scope of sovereign immunity held by different governmental bodies.

1. Quasi-Contractual Claims against the Commonwealth

In *Flory Small Bus. Dev. Ctr. v. Commonwealth*, the court considered whether the Commonwealth could be held liable for claims based on quasi-contractual theories of recovery. The Flory Business Development Center provided various services to small businesses in Prince William County and the surrounding area through a federal grant program administered in Virginia by the Virginia Department of Business Assistance (VDBA). The VDBA reimbursed the Center through Memoranda of Agreement executed annually. In December 1998, the VDBA informed the Center that funding for January and February 1999 was approved but reimbursement of expenses would not be disbursed until the latest Memorandum of Agreement was signed and returned. A dispute then arose between the Center and the VDBA regarding the Center's management, and the Center refused to execute the Memorandum of Agreement unless certain provisions were renegotiated. Nonetheless, the Center continued to provide services and submitted invoices for those services, which VDBA refused to pay.

On appeal, the Center argued that its quasi-contractual claims for relief did not fall within the scope of the Virginia Public Procurement Act and its notice requirements. But the Court focused on the more fundamental issue of sovereign immunity and found that the waiver of sovereign immunity for contracts does not extend to quasi-contractual claims against the Commonwealth:

> Under the common law, sovereign immunity did not shield the sovereign from liability for its valid contracts. However, quasi-contractual doctrines are premised on the absence of a valid contract. The Commonwealth's common law liability for its contracts does not encompass quasi-contractual claims, and any relief based on such claims must be authorized through a statute abrogating the Commonwealth's sovereign immunity.

The Court found that neither the common law nor any statute provides the right to make quasi-contractual claims against the Commonwealth.[11]

2. Quasi-Contractual Claims against Counties vs. against Municipalities

While the Virginia Supreme Court's application of sovereign immunity to quasi-contractual claims against the Commonwealth is simple and clear, quasi-contractual claims against local governmental entities push us further into one of the backwaters of sovereign immunity analysis—the distinction between sovereign immunity held by state entities, counties, and municipalities. As hinted at in *Fry v. County of Albemarle*, above, Virginia courts have traditionally held that the broadest sovereign immunity is held by the Commonwealth. Because

---

where the duty is imposed by law and treated as a contract only for purposes of remedy. It held that sovereign immunity cannot bar a breach of contract claim for a contract implied in fact, but the same is not true for contracts implied in law. *Commonwealth Biotechnologies v. Va. Commonwealth Univ.*, 59 Va. Cir. 98, 103-04 (2002).

[11] *Flory*, 261 Va. at 236-37.

counties in Virginia are merely administrative units of the state, established as political subdivisions for the state's convenience, they share the same broad sovereign immunity as the state.

But Virginia law treats municipalities and other incorporated local government entities differently—providing them with more limited sovereign immunity. While this distinction is irrelevant for express contract claims—because the state has no sovereign immunity, neither do any other governmental entities in Virginia—it becomes important for quasi-contractual claims. While *Flory* establishes that sovereign immunity has not been waived for quasi-contractual claims against the Commonwealth and Virginia counties, it does not govern claims against municipalities.

For municipalities, sovereign immunity is limited to governmental activities, such as the design and maintenance of roads and operation of police and firefighting forces. Municipalities do not enjoy sovereign immunity when engaged in "proprietary" activities, which are generally defined as those carried out for the benefit of the municipality and not the public (or sometimes those tasks also carried out by private corporations, such as operating utilities). The exact line between governmental and proprietary activities is not always clear or intuitive.

The basic point for practitioners attempting to bring a quasi-contract claim is that you must consider the nature of the governmental entity against which you are bringing the claim. You may succeed in avoiding sovereign immunity if you are bringing the claim against a municipality or other incorporated local governmental entity and can argue that the entity was engaged in a proprietary activity, but the nature of the activity is irrelevant in contract claims against the Commonwealth itself and numerous attempts at applying the "governmental" vs. "proprietary" distinction to state entities for contract-type claims have been expressly rejected.

For example, in *MCI Constructors v. Spotsylvania County*, MCI entered into a contract for the construction of Motts Run Water Treatment Plant.[12] Numerous problems plagued the project, resulting in MCI filing suit for breach of contract and quantum meruit. In response to Spotsylvania County's demurrer on the quantum meruit claim, MCI argued that the *Flory* bar on quasi-contractual claims did not apply because the County "is a quasi-corporate body, acting sometimes in a proprietary capacity and other times in a governmental capacity [and w]here, as here, the County engages in a proprietary function, it is divested of its immunity...."[13] The court responded:

> MCI's argument confuses counties and municipalities in Virginia. Admittedly, the liability or immunity of a municipality - - city - - is usually determined by whether the activity giving rise to the cause of action was proprietary or governmental.
> However, the liability or immunity of a county is not subject to the same analysis. A county in Virginia, territorially and politically, is an integral part of the Commonwealth. Counties share the immunities of the Commonwealth. (The Commonwealth, and thus counties, may be sued in contract. The doctrine of sovereign immunity has never applied to express promises made by the sovereign for goods or services.)[14]

---

[12] *MCI Constructors v. Spotsylvania County*, 60 Va. Cir. 290, 291-2 (2002) (internal citations omitted).
[13] *Id.* at 291.
[14] *Id.* at 292.

In contrast, quasi-contractual claims have succeeded against municipal governmental bodies, including some quasi-corporate entities such as school boards. In *ACM Constr. Mgmt. Corp. v. Chesterfield County Sch. Bd,* a quantum meruit claim was allowed to proceed against a school board.[15] Under Virginia statute, a school board is both corporate and governmental and thus considered a quasi-corporate body, meaning the Virginia legislature intended for school boards to contract, be contracted with and to sue and be sued.[16] The court interpreted this to mean that the legislature intended for school boards to be subject to the theories and remedies of contract law, including the theory of quantum meruit. The court stated: "a quasi-corporate body such as a school board should be divested of its immunity as to suits arising out of the contract and contract law, but it is not divested of its immunity as to actions arising out of tort."[17]

IV. Statutory Notice Requirements and the Virginia Public Procurement Act

But what is the impact of statutory procedural schemes for contract claims against the government in light of the common law position that sovereign immunity does not exist for contract claims?

Virginia has long required notice of potential claims against the Commonwealth. VA Code § 2.2-814 and its predecessor statutes require that "[a]ny person having any pecuniary claim against the Commonwealth upon any legal ground shall present the same to the head of the department, division, institution or agency of the Commonwealth responsible for the alleged act or omission which, if proved, gives rise to the claim." VA Code § 8.01-192 then provides that if the agency head denies the claim "the person presenting such claim may petition an appropriate court for redress."[18]

More recently, Virginia enacted the Virginia Public Procurement Act[19] (VPPA), which provides policies "pertaining to governmental procurement from nongovernmental sources, to include governmental procurement that may or may not result in monetary consideration for either party."[20] The VPPA applies to the acquisition of goods, services, construction and insurance. The VPPA requires that "[e]ach public body shall include in its contracts a procedure for consideration of contractual claims."[21] It also contains specific procedures for bringing contract claims against the Commonwealth, including stringent notice requirements.[22]

Courts have not clearly addressed the relationship between the traditional common law exemption of contract claims from sovereign immunity and the statutory provisions for contract claims, including those in the VPPA. While they have hinted that these procedural statutes are

---

[15] *ACM Constr. Mgmt. Corp. v. Chesterfield County Sch. Bd.*, 21 Va. Cir. 125, 126-27 (1990).
[16] *Id.* at 126.
[17] *Id.*
[18] Va. Code Ann. § 8.01-192 (2011).
[19] Va. Code Ann. §§ 2.2-4300 *et seq.* (2011). Other procurement statutes and regulations include, but are not limited to the Virginia Highway Corporation Act of 1988, the Public-Private Transportation Act of 1995 and the Public-Private Education Facilities and Infrastructure Act of 2002.
[20] *Id.*, § 2.2-4300(B).
[21] *Id.*, § 2.2-4363(B).
[22] Va. Code Ann. §§ 2.2-4363 et seq. (2011).

distinct from the substantive right to sue the Commonwealth in contract,[23] they have also described the procedural requirements of the VPPA as mandatory before the court can reach the merits of the case: "The General Assembly has imposed certain procedures and limitations on the processing and enforcement of contract claims which are subject to the Procurement Act. These are mandatory, procedural requirements which must be met in order for a court to reach the merits of a case."[24]

Regardless of technical distinctions between sovereign immunity and procedural limitations on access to a remedy, the practical result is the same—without following the strict procedural requirements of statute, the claimant is kicked out of court. Thus, the only safe rule for a potential contract claimant is to adhere strictly to the notice provisions and other procedural requirements of the VPPA.

V. Conclusion

The doctrine of sovereign immunity for contract claims in Virginia begins simple and clear but becomes murkier as you travel deeper into it. The practical result is that practitioners must not become complacent. Quasi-contract claims require careful analysis, and even claims under express contracts likely require careful adherence to the procedural requirements of the Virginia Public Procurement Act or other notice statutes. Practitioners must be diligent in structuring and pursing claims in order to avoid veering into one of the remaining sorrowful backwaters of sovereign immunity jurisprudence.

---

[23] "Like the earlier legislation, the current statutes contain procedural requirements setting out the manner in which a claim is presented. Neither section establishes the claimant's right to lodge a claim against the sovereign or the sovereign's liability for such a claim." *Flory*, 261 Va. at 237.

[24] *Id. at* 238.

Construction Law and Public Contracts Section
2010-11 Board of Governors

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1375

AAROW EQUIPMENT & SERVICES, INCORPORATED, United States of America for the use and benefit of,

Plaintiff - Appellant,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:09-cv-00861-AJT-TCB)

Argued: January 27, 2011 Decided: March 18, 2011

Before NIEMEYER, DAVIS, and KEENAN, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

ARGUED: Michael Jacob Kalish, WALSH COLUCCI LUBELEY EMRICH & WALSH, PC, Prince William, Virginia, for Appellant. James Dennis Coleman, WATT, TIEDER, HOFFAR & FITZGERALD, LLP, McLean, Virginia, for Appellee. **ON BRIEF:** Eugene Andrew Burcher, WALSH COLUCCI LUBELEY EMRICH & WALSH, PC, Prince William, Virginia, for Appellant.

PER CURIAM:

This appeal concerns an action brought by a subcontractor against a surety under the Miller Act (the Act), 40 U.S.C. §§ 3131 through -3134. Under the Act, before a general contractor is awarded a contract by the federal government in an amount greater than $100,000, the general contractor is required to obtain a "payment bond" "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract." 40 U.S.C. § 3131(b)(2). The Act provides a cause of action, such as the one asserted here, permitting a subcontractor to file suit seeking payment from a surety on a payment bond when the subcontractor has not been paid by the general contractor within 90 days of completing the subcontractor's work. 40 U.S.C. § 3133(b)(1). For the reasons that follow, we vacate the district court's award of summary judgment in favor of the surety and remand the case for further proceedings.

I.

We review the facts in the light most favorable to Aarow, the non-moving party in the district court. Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir. 2001). In 2007, Syska Hennessy Group Construction, Inc. (Syska) was awarded a contract (the prime contract) by the United States government (the

government) to construct a training facility for the District of Columbia Army National Guard at Fort Belvoir, Virginia (the project). Syska served as the general contractor on the project and obtained a payment bond, as required by the Miller Act, from Travelers Casualty and Surety Company of America (Travelers). Syska awarded Aarow Equipment & Services, Inc. (Aarow) a subcontract, which set forth the "work" that Aarow was required to perform on the project.

Section 11.1 of the subcontract stated that Syska may "make changes in the [w]ork covered by this [s]ubcontract," and that any changes must be made in writing. The subcontract also provided that Aarow must submit in writing to Syska any claims for changes in the price or payment due under the contract. According to the subcontract, any such change in price or payment to Arrow "shall be made" "only to the extent that" Syska is entitled to relief from the government, and payment to Aarow shall be equal to Aarow's share of any adjustment to the prime contract.

When changes to the "work" under the subcontract were made, Aarow generally submitted the proposed cost of the change to Syska, and Syska issued a "change order" to the subcontract. Aarow's "work" described in the subcontract included several categories of responsibilities, including "earthwork" relating to water distribution and drainage. During Aarow's performance

of this "earthwork," the government determined that the "erosion control plan" Aarow was implementing was "not up to standard[s]." Aarow ceased working until it received new erosion plan "drawings," which required the construction of sedimentary ponds and other water management measures (the pond work).

Aarow and Syska agreed that the pond work was not included in the "work" defined in the subcontract. In September 2007, Aarow submitted a proposal of $402,500 to Syska for the pond work. Syska directed Aarow to perform the pond work, but did not issue a "change order" for the pond work at that time. Aarow completed the pond work, with the understanding that Syska would issue a "change order" at some point in the future.

Upon Syska's determination that the pond work was not included in the scope of the prime contract,[1] Syska asked that the government agree to a "modification" of the prime contract.[2] Syska requested that Aarow wait to submit its invoice for the

---

[1] The record does not contain a copy of the prime contract, and there were no depositions taken during discovery in this case of the government officials involved with the prime contract.

[2] According to deposition testimony provided by a Syska employee, a "modification" is essentially the same as a "change order," except that the prime contract was amended by a "modification," while the subcontract was amended by a "change order."

pond work until after the government issued a "modification" to the prime contract and Syska issued a "change order" to the subcontract.

Several months later, neither a "modification" nor a "change order" had been issued. Nevertheless, Aarow submitted an invoice to Syska for the completed pond work. Syska instructed Aarow to use a billing procedure that would allow Syska to pay Aarow for the pond work even though a "change order" had not been issued. This billing procedure required Aarow to list the pond work under a "line item" designated for certain "finishing" work on the project that had not yet been completed.[3] According to Syska, the government had authorized this billing procedure while Syska's "modification" request was pending.

After Aarow complied with this different billing procedure in accordance with Syska's directions, Syska submitted a similar invoice to the government identifying the pond work as "finishing" for a "three-story building." The government paid Syska $484,980, which included the invoice in the amount of $402,500 submitted by Aarow, plus a fee representing Syska's "normal markup." Syska, in turn, paid Aarow $402,500 for the

[3] The "finishing" work was included in the "work" described by the subcontract.

pond work. Syska advised Aarow that after Syska received a "modification" and issued a "change order," Aarow could reallocate the funds received for the pond work to the proper "line item." Shortly after the government paid Syska the requested amount of $484,980, the government determined that the pond work was included in the prime contract. Accordingly, the government denied Syska's request for a "modification" of the prime contract based on the government's construction of the prime contract's terms.

The government later withheld several payments to Syska to recover the funds previously paid for the pond work. In response, Syska withheld payment from Aarow for other work completed by Aarow between May 2009 and June 2009.

On July 1, 2009, Aarow sent Syska a letter stating that Syska had a "significant outstanding and past balance due," and that Aarow would stop work on the project at the end of the week unless payment was made. When Syska did not submit payment to Aarow under the terms of the demand, Aarow ceased work on the project.

On July 17, 2009, Syska sent Aarow a letter notifying Aarow that it was in default of the subcontract for failing "to proceed with the work" according to the project schedule. In that letter, Syska instructed Aarow to correct and complete specific alleged defaults. Aarow did not return to work on the

project or otherwise attempt to cure the alleged defaults. On July 23, 2009, Syska sent another letter to Aarow stating that because Aarow had not cured the defaults, Syska was terminating the subcontract as provided in Section 12.1 of that agreement.

Section 12.1 of the subcontract stated, in relevant part:

> If, in the opinion of [Syska], [Aarow] shall at any time . . . fail in any respect to prosecute the Work according to the current schedule. . . then, after serving three (3) days written notice, unless the condition specified in such notice shall have been eliminated within such three (3) days, [Syska] may at its option . . . terminate the Subcontract for default . . . . [Aarow] shall not be entitled to receive any further payment until the Work shall be fully completed and accepted by [the government].

Under Section 12.2 of the subcontract, however, if Syska wrongfully terminated the subcontract, Syska would be liable for "the reasonable value of [the] Work performed by [Aarow] prior to [Syska's] wrongful action."

With regard to payment, the subcontract required that Syska pay Aarow monthly, provided that Syska already had received payment from the government. This "pay-when-paid" provision stated, in relevant part:

> Conditioned upon the satisfactory progress of [Aarow], compliance with the documentation requirements of this Subcontract, and [Syska] has received payment from the [government] THEN [Syska] will make monthly payments to [Aarow]. [Aarow] acknowledges and agrees that in the event payment is not made to [Syska] for any reason . . . [Aarow] shall look exclusively to [the government] for payment of any and all funds due under this Contract. [Aarow] further agrees that the delay in payment or nonpayment by the [government] does not

> create any separate obligation of [Syska] to pay regardless of the extent of the delay.

In its complaint filed against Travelers, the surety on Syska's payment bond, Aarow asserted that Syska breached the subcontract by failing to pay Aarow for several months. Aarow sought from Travelers the sum of Aarow's past-due invoices to Syska, in the amount of $484,870.71.

In response, Travelers filed an answer and a motion for summary judgment. Aarow opposed the motion, and the parties filed a series of briefs addressing numerous issues. In December 2009, the district court held a hearing on the motion for summary judgment.

In its pleadings and during the hearing, Travelers asserted two primary arguments in support of its motion. Travelers first maintained that because the terms of the "pay-when-paid" provision in the subcontract were clear and the government did not pay Syska for several months, Syska did not breach its payment obligation to Aarow under the subcontract. Travelers thus contended that Syska properly terminated the subcontract under Section 12.1 based on Aarow's failure to perform, and that Aarow was not entitled to payment under the terms of Section 12.1. Travelers argued alternatively that even if Syska wrongfully had terminated the subcontract, Syska paid Aarow more

than Aarow was due under the subcontract and, therefore, Aarow was not entitled to additional payment.

Two months after the hearing, but before the district court entered its judgment, Travelers requested leave to supplement its motion for summary judgment to discuss a new decision issued by this Court. In that supplemental pleading, Travelers argued that under this Court's decision in Universal Concrete v. Turner Construction Co., 595 F.3d 527 (4th Cir. 2010), "pay-when-paid" provisions are valid defenses in a breach of contract action when the terms of such provisions are unambiguous.

Aarow filed a brief in response, arguing that the holding in Universal Concrete did not establish a new principle of law. (J.A. 649.) Aarow also cited in its supplemental brief the "prevention doctrine," a principle of contract law establishing that one who prevents the performance or the happening of a condition to his performance may not take advantage of that condition. See Barnhill v. Veneman, 524 F.3d 458, 474 (4th Cir. 2008). Aarow contended that this doctrine barred Syska from relying on the "pay-when-paid" provision of the contract because Syska was partially at fault for the government's failure to make the requested payment to Syska. Aarow argued that Syska's fault was demonstrated by its failure to obtain the appropriate "modification" to the prime contract, and by its failure to issue a "change order" to the subcontract for the pond work.

The district court entered an order permitting both parties to supplement the record with these pleadings.

Three weeks later, the district court entered an order granting summary judgment in favor of Travelers. In its memorandum opinion, the district court held that because the subcontract contained an enforceable "pay-when-paid" provision, and because it was undisputed that the government failed to pay Syska for several months, Aarow was unable to "justify its [w]ork stoppage based on Syska's failure to pay Aarow." Notably, the district court did not address Aarow's prevention doctrine argument.

The district court concluded that Syska's "termination for default" was proper under Section 12.1 of the subcontract based on Aarow's failure to complete its work under the subcontract. Accordingly, the district court held that Aarow was not owed payment under the subcontract and that, therefore, Travelers had "no payment obligation to Aarow." Aarow filed a timely appeal in this court.

II.

We review the district court's award of summary judgment de novo. See S.C. Green Party v. S.C. State Election Comm'n, 612 F.3d 752, 755 (4th Cir. 2010). Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate when

the moving party "shows that there is no genuine dispute as to any material fact" and when the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986) (construing former Rule 56(c) of the Federal Rules of Civil Procedure).

A.

Aarow argues on appeal that the district court erred in failing to apply the prevention doctrine in determining whether Travelers was entitled to judgment as a matter of law. Aarow asserts that Syska was responsible for the government's failure to make the requested payment under the prime contract. Therefore, according to Aarow, a jury should determine whether Syska breached the terms of the subcontract by failing to pay Aarow for the work it had completed.

In response, Travelers argues that the district court properly granted summary judgment in its favor. Initially, Travelers contends that Aarow's prevention doctrine argument was not asserted timely and should not be considered in the resolution of this appeal. Addressing the merits of Aarow's argument, Travelers asserts that because the government withheld payment from Syska, the terms of Syska's subcontract with Aarow permitted Syska to withhold the requested payment to Aarow.

Travelers therefore maintains that, as a matter of law, Travelers did not owe any payment to Aarow under the bond because Syska complied with the terms of the subcontract and Aarow wrongfully abandoned the project. We disagree with Travelers' arguments.

We find no merit in Travelers' assertion that Aarow failed to preserve its prevention doctrine argument in the district court. Although Aarow used the term "prevention doctrine" for the first time in a later-filed supplemental pleading, the district court accepted that supplemental pleading and included it in the record three weeks before the court rendered its judgment. Furthermore, in Aarow's initial brief opposing summary judgment, Aarow set forth the factual predicate for its prevention doctrine argument by asserting that Syska directed Aarow to complete the pond work before issuing a "change order" for that work, and that Syska acted in bad faith by attempting to "back charge" Aarow for the pond work. Thus, we conclude that Aarow's prevention doctrine argument was presented adequately to the district court and was not, as Travelers argues, articulated for the first time on appeal. See Evans v. Metro. Life Ins. Co., 358 F.3d 307, 310 n.2 (4th Cir. 2004) (explaining that although appellant's argument was not raised in district court until oral argument on the motion for summary judgment, the argument was preserved for appellate review).

B.

We turn to examine the present record to determine whether Travelers was entitled to judgment as a matter of law at the summary judgment stage of the proceedings. Based on Aarow's argument before the district court, we give particular consideration to the evidence before the district court bearing on the issue of the prevention doctrine.

Under the prevention doctrine, when a general contractor materially contributes to the failure of a condition limiting the duty to perform under a contract, the general contractor may not rely on that failure as a defense to its performance of its contractual obligations. See Moore Bros. Co. v. Brown & Root, Inc., 207 F.3d 717, 725 (4th Cir. 2000). In Moore Brothers, we applied the prevention doctrine in a dispute involving a "pay-when-paid" provision in a subcontract. There, in response to two subcontractors seeking payment for completed work, the general contractor asserted as a defense the "pay-when-paid" condition in the subcontract and the owner's failure to pay the general contractor. Id. at 724-25.

We affirmed the district court's award of summary judgment in favor of the subcontractors because the record established that the general contractor materially contributed to the owner's failure to pay. Id. at 725-26. Thus, we concluded that the general contractor was liable to its subcontractors for

payment notwithstanding the "pay-when-paid" provision in the subcontract. Id. at 725. Applying our analysis in Moore Brothers to the present case, we consider whether a jury reasonably could find that Syska's actions materially contributed to the government's failure to pay Syska under the prime contract, thereby preventing Travelers from relying on the "pay-when-paid" condition in the subcontract in defense of Syska's failure to pay Aarow.

Travelers maintains that the government directed the method of billing for the pond work and that, therefore, Syska was not responsible for the government's refusal to pay Syska when the government later determined that the billing for the pond work was improper. In support of its position, Travelers relies on the deposition testimony of Robert F. Geremia, Syska's vice president in charge of construction, who stated that the government had "instructed my people in the field to bill for some [finishing] work that actually wasn't done."

Aarow, however, asserts that Syska's actions materially contributed to the government's failure to make the payment at issue. Aarow points to evidence in the record that Syska directed Aarow to perform the pond work even though Syska had not issued a "change order" or received a "modification" to the prime contract. The record also contains evidence that Aarow completed the pond work, relying on Syska's promise that a

"change order" was forthcoming. However, when Syska did not obtain a "change order," Syska directed Aarow to remove its invoice references to "sediment ponds and associated work," and to categorize the pond work as "finishes" for a "three-story building," which had not yet been constructed.

Based on these facts, a jury reasonably could return a verdict for Aarow if the jury concluded that Syska's actions, in directing Aarow to perform the pond work before issuing a "change order," and in agreeing to employ an arguably improper billing procedure that obscured the expanded scope of the "work" under the subcontract, materially contributed to the government's later decision to withhold certain payments to Syska. If Syska's actions materially contributed to the government's decision, Travelers could not rely on the "pay-when-paid" provision of the subcontract to excuse Syska's failure to pay Aarow for its work performed under the subcontract. See Moore Bros., 207 F.3d at 725.

We are not persuaded by Travelers' assertion that it was entitled to summary judgment based on Geremia's testimony that the government instructed Syska to employ the questionable billing procedure. In essence, Travelers seeks to absolve Syska of any responsibility for the arguably improper billing procedure because "the project owner told us to do it." The allocation of responsibility for the billing practices, however,

raises credibility issues and other issues of fact that are matters for a jury's consideration. Therefore, we hold that Travelers was not entitled to summary judgment on the issues whether Syska breached the subcontract and whether Aarow was entitled to payment from Travelers under the bond.[4]

For these reasons, we conclude that the district court erred in granting summary judgment in favor of Travelers. Accordingly, we vacate the district court's judgment and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED

[4] Based on our holding, we do not address Aarow's remaining argument regarding the issue whether the district court erred in relying on letters from Syska's counsel to Aarow relating to Syska's termination of the subcontract. We also need not address Aarow's contention that the district court's judgment violated the policy underlying the Miller Act.

Present: Koontz, Kinser, Lemons, Goodwyn, Millette, and Mims JJ., and Russell, S.J.

PHILLIP ABI-NAJM, ET AL.

v. Record No. 091546 OPINION BY JUSTICE DONALD W. LEMONS
September 16, 2010

CONCORD CONDOMINIUM, LLC

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Benjamin N.A. Kendrick, Judge

In this appeal from the dismissal of an action alleging breach of contract, fraud in the inducement, and violation of the Virginia Consumer Protection Act, Code §§ 59.1-196 et seq. ("VCPA" or "the Act"), we consider whether the trial court erred when it sustained the demurrers of Concord Condominium, LLC ("Concord") to the complaints of Phillip Abi-Najm ("Abi-Najm") and other purchasers of residential condominiums (collectively, "the Purchasers") from Concord on the grounds that the Purchasers' breach of contract claims were barred by the merger doctrine, and their fraud in the inducement and VCPA claims were barred by the economic loss doctrine.

I. Facts and Proceedings Below

This appeal is comprised of two civil actions filed against Concord in the Circuit Court of Arlington County.[1] The first action was brought by Laura and Bradford Reed, and the

[1] Pursuant to Rule 5:9, the two actions were consolidated in this appeal.

second action was brought by Abi-Najm and 24 co-plaintiffs ("the Abi-Najm Complaint," collectively "the Complaints"). The substantially similar suits contain three counts: (i) breach of contract, (ii) violation of the VCPA, and (iii) fraud in the inducement.[2] The following factual recitation is taken from the Abi-Najm Complaint.

The Purchasers alleged that they were interested in purchasing a condominium and met with sales agents for the West Village of Shirlington in Arlington County in 2005 and 2006. The Purchasers entered into separate purchase agreements ("Contracts"), each containing a schedule of standard finishes ("Schedule A") and various addenda. In pertinent part, Schedule A provided that the flooring of each condominium would be "Bruce Oak hardwood, 3/4"." Schedule A also contained the following language: Concord "may substitute substantially equivalent materials and finishes for those specified herein."

Paragraph 22(a) of the Contract, entitled "MISCELLANEOUS," contained the following provision pertinent to this appeal:

> Notwithstanding anything to the contrary herein, acceptance of the deed at settlement shall

---

[2] In the Complaints, the fraud in the inducement count is labeled "Common Law Fraud," but the facts alleged are more accurately characterized as a claim for fraud in the inducement. At oral argument, counsel for the Purchasers referred to this count as fraud in the inducement, and we will do the same herein. Abi-Najm and certain of his co-plaintiffs also alleged counts for breach of contract and trespass in the Abi-Najm Complaint. Those counts are not part of this appeal.

> constitute Purchaser's acknowledgment of full compliance by [Concord] with the terms of this Agreement. The terms hereof shall be merged into and extinguished by delivery of the deed at settlement except for Sections 4(b), 5, 17, 18, 21, 22 and 23 which shall survive delivery of the deed and shall not be merged therein.

At the center of this litigation is the Purchasers' allegation that instead of the three-quarter-inch Bruce Oak hardwood flooring set forth in Schedule A, Concord delivered "prefabricated engineered hardwood, 3/8" [flooring]," and this substitution was "not substantially equivalent to Bruce Oak hardwood, 3/4"." The Purchasers alleged that they did not learn of this substitution until after closing on the condominiums, nor would a "normal visual inspection" reveal the substitution. The Purchasers alleged that this substitution constituted a material breach of the contract for which they sought damages in the amount of at least $50,000 per condominium, in addition to prejudgment interest and costs.

In their VCPA count, the Purchasers alleged that their purchase of the condominiums was a consumer transaction as defined by the Act, and Concord's intentionally false and misleading information concerning the flooring constituted misrepresentations of a material fact, and fraudulent acts in violation of the VCPA. The Purchasers also alleged that Concord had knowledge that the information concerning the flooring was untrue, that Concord acted with the intent to

deceive the Purchasers, and that Concord willfully concealed the flooring substitution. Finally, the Purchasers alleged that Concord "knew or reasonably should have known that its disclosure of [the actual flooring material] would have caused the [Purchasers] to reconsider or renegotiate the Contracts." As in their breach of contract count, the Purchasers claimed damages of $50,000 per condominium, treble damages pursuant to Code § 59.1-204(A), and $350,000 in punitive damages, in addition to prejudgment interest and costs including attorney's fees.

In their fraud in the inducement count, the Purchasers set forth substantially similar allegations as were made in the VCPA count, particularly that Concord knowingly misrepresented the quality of the flooring it would deliver and that this misrepresentation involved a material fact. The Purchasers further alleged that they relied upon those misrepresentations, and absent those misrepresentations they would not have entered into the Contracts. They further alleged that in the alternative, they would have renegotiated the Contracts. The Purchasers alleged damages of $50,000, and they sought punitive damages of $350,000 per condominium, prejudgment interest, costs and attorney's fees under this count.

In response Concord filed demurrers to the Complaints, arguing that the breach of contract claims were barred by

merger, and the VCPA and fraud in the inducement claims were barred by the economic loss rule. The trial court held a hearing on Concord's demurrers, at the conclusion of which it held: "With respect to the merger clause, if you look at paragraph 22(a) of the [Contract], it is pretty clear that the merger clause applies. And claims that merge into the deed can, in fact, and do exist in this case. And as such, there is no breach of contract." With respect to the Purchasers' fraud in the inducement and VCPA claims, the trial court held that "a separate tort . . . does not exist," and therefore the "economic [loss doctrine] as [stated] in Sensenbrenner" precludes those causes of action. Accordingly, the trial court entered orders sustaining Concord's demurrers to the Complaints.

The Purchasers timely filed their notice of appeal and we granted an appeal on the following assignments of error:

1. The trial court erred when it granted respondent's demurrer and dismissed petitioners' breach of contract claim on the grounds that the claim was barred by the merger doctrine.

2. The trial court erred when it granted respondent's demurrer and dismissed petitioners' claims under the Virginia Consumer Protection Act and for fraud in the inducement on the grounds that the claims were barred by the economic loss doctrine.

II. Analysis

A. Standard of Review

We apply well-established principles guiding our review of a trial court's judgment sustaining a demurrer.

> "The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 712, 636 S.E.2d 447, 449 (2006) (citing Welding, Inc. v. Bland County Serv. Auth., 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001)). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." Glazebrook v. Board of Supervisors, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts. Id. "Because the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo." Dreher v. Budget Rent-A-Car Sys., 272 Va. 390, 395, 634 S.E.2d 324, 326-27 (2006) (citing Glazebrook, 266 Va. at 554, 587 S.E.2d at 591.)

Augusta Mutual Ins. Co. v. Mason, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007).

B. The Merger Doctrine

The trial court sustained Concord's demurrer to the Purchasers' breach of contract action, holding that Section 22(a), the Contracts' merger clause, caused Concord's obligations under Schedule A to be merged into and extinguished by the deed. The Purchasers argue that the merger doctrine is inapplicable to this case. For the reasons stated herein, we agree with the Purchasers.

The merger doctrine has been long-recognized by this Court. See Woodson v. Smith, 128 Va. 652, 104 S.E. 794 (1920). "The merger doctrine deals with extinguishing a previous contract by an instrument of higher dignity," the deed. Empire Mgmt. & Dev. Co. v. Greenville Assocs., 255 Va. 49, 52, 496 S.E.2d 440, 442 (1998). "However, provisions which are collateral to the passage of title and not covered by the deed are not merged into the deed and survive its execution." Beck v. Smith, 260 Va. 452, 455, 538 S.E.2d 312, 314 (2000) (citing Empire Mgmt., 255 Va. at 54, 496 S.E.2d at 443; Davis v. Tazewell Place Assocs., 254 Va. 257, 262-63, 492 S.E.2d 162, 165 (1997); Miller v. Reynolds, 216 Va. 852, 854-55, 223 S.E.2d 883, 885 (1976); and Woodson, 128 Va. at 656, 104 S.E.2d at 795).

> In discussing the doctrine of merger, we have explained that a deed "is a mere transfer of title." Miller, 216 Va. at 855, 223 S.E.2d at 885. The deed is the final expression of the agreements between the parties as to "every subject which it undertakes to deal with," and any conflicts between the terms of prior agreements and the terms of the deed are resolved by the deed. Woodson, 128 Va. at 656, 104 S.E. at 795.

Id. at 456, 538 S.E.2d at 314-15.

In Woodson, one of our earliest cases addressing the merger doctrine, a seller of two parcels of real estate entered into two separate contracts of sale, each of which reserved in

the seller a right of possession until November 15, 1919. 128 Va. at 653-54, 104 S.E. at 794. On February 27, 1919, the seller delivered the deeds, which "contain[ed] no reference to the antecedent contracts" of sale. Id. at 654, 104 S.E. at 794. The trial court held that the contracts of sale merged into the deeds, thereby entitling the grantees to immediate possession of the property. Id. at 655, 104 S.E. at 795.

We affirmed, observing that the deeds in Woodson "contained covenants which by statute in Virginia . . . meant that the grantee 'might at any and all times thereafter, peaceably and quietly enter upon and have, hold, and enjoy the land conveyed by the deed,'" and therefore "[t]he stipulations in the contracts and the covenants in the deeds, as related to the question of possession, [were] in patent and irreconcilable conflict." Id. (quotation marks omitted). Despite the outcome in Woodson, we noted, "[d]oubtless many cases may arise in which distinct and unperformed stipulations contained in a contract for sale will not be merged in or discharged by deed where that instrument is silent upon the subject of such stipulations." Id. at 656, 104 S.E. at 795.

Since our decision to uphold the doctrine of merger in Woodson, its narrow scope and disfavored status are evident in our repeated refusal to apply it to extinguish agreements that are not addressed in the deed and collateral to the passage of

title. See Empire Mgmt., 255 Va. at 53-54, 496 S.E.2d at 442-43 (reversing the trial court's application of the merger doctrine to a rent guarantee in a sales contract, holding that the rent guarantee was not covered in the deed and was collateral to the passage of title); Davis, 254 Va. at 263, 492 S.E.2d at 165 (an express warranty contained in a contract for sale did not merge with the deed and was enforceable); and Miller, 216 Va. at 854, 223 S.E.2d at 884-85 (a condition in the purchase contract making the sale contingent upon the land's suitability for percolation and its qualification for a building permit did not merge into the deed).

Our most recent case examining the merger doctrine, Beck, concerned a "contract for sale [that] provided that any utility easement would 'not materially and adversely [affect the buyers'] intended use of the Property.' " 260 Va. at 455, 538 S.E.2d at 314. The contract for sale also provided that "the representations and warranties of the seller contained in the contract 'SHALL BE DEEMED MERGED INTO THE DEED DELIVERED AT SETTLEMENT AND SHALL NOT SURVIVE SETTLEMENT.' " Id. None of the quoted language was repeated in the deed. Id.

In Beck, we observed, "not all agreements between the parties regarding the purchase and sale of . . . property are contained in the deed." Id. at 456, 538 S.E.2d at 315. "Such agreements are considered collateral to the sale if they are

distinct agreements made in connection with the sale of the property, if they do not affect the title to the property, if they are not addressed in the deed, and if they do not conflict with the deed." Id. Notwithstanding the language of the purchase agreement calling for representations and warranties to be merged into the deed, we held, "the agreement in the contract for sale regarding the impact of utility easements on the [buyers'] intended use of the property was collateral to the transfer of title, was not merged into the deed, and survived the execution of the deed." Id.

In the case before us, the deeds are simply instruments intended to convey title to the condominiums to the Purchasers. The deeds are silent as to Schedule A. Therefore, unlike in Woodson, in this case there is no "patent and irreconcilable conflict" between the Contracts and the deeds. 128 Va. at 655, 104 S.E. at 795.

Turning to the Contracts themselves, the flooring agreement set forth in Schedule A "is a distinct agreement, does not affect the validity or nature of the title conveyed, is not addressed in the deed, and does not conflict with the terms of the deed." Beck, 260 Va. at 456, 538 S.E.2d at 315. Accordingly, we hold that the representations in Schedule A are collateral to the transfer of title, they are not merged into the deed, and therefore they survive delivery of the deed.

Based on the foregoing, the trial court erred when it sustained Concord's demurrer to the Complaints on the ground that the merger doctrine precluded enforcement of the Contracts.[3]

C. The Economic Loss Doctrine

The trial court sustained Concord's demurrers to the Purchasers' VCPA and fraud in the inducement claims on the ground that the economic loss doctrine precluded such claims. In determining whether the economic loss doctrine precludes an action in tort, we have observed:

> The law of torts is well equipped to offer redress for losses suffered by reason of a "breach of some duty imposed by law to protect the broad interests of social policy." Kamlar [Corp. v. Haley, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983).] Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts. See id.

---

[3] In the trial court and on appeal to this Court, Concord asserts that the language in Schedule A permitting it to "substitute substantially equivalent materials and finishes" precludes the Purchasers' breach of contract action, and that the flooring substitution was not material to the contract. However, in reviewing a circuit court's ruling sustaining a demurrer, "we accept as true all properly pled facts and all inferences fairly drawn from those facts." Augusta Mutual, 274 Va. at 204, 645 S.E.2d at 293. The Purchasers alleged that the actual flooring installed by Concord was "not substantially equivalent," and that the substitution was material to the Contracts. Therefore, at this stage of the litigation, a court is required to accept the truth of the pleadings, notwithstanding what a fact-finder ultimately may determine.

Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988).

More recently we observed, "[t]he law of torts provides redress only for the violation of certain common law and statutory duties involving the safety of persons and property, which are imposed to protect the broad interests of society." Filak v. George, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004). "[L]osses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts." Id.

Based on the foregoing, the question whether the economic loss doctrine applies requires a court first to determine "whether a cause of action sounds in contract or tort," ultimately by ascertaining "the source of the duty violated." Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998).

Notwithstanding the limitations on certain tort actions created by the economic loss doctrine, it is well-established that

> a single act or occurrence can, in certain circumstances, support causes of action both for breach of contract and for breach of a duty arising in tort, thus permitting a plaintiff to recover both for the loss suffered as a result of the breach and traditional tort damages, including, where appropriate, punitive damages.

Foreign Mission Bd. v. Wade, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991).

Dunn Construction Co., Inc. v. Cloney, 278 Va. 260, 266-67, 682 S.E.2d 943, 946 (2009).

As this recapitulation of the law reveals, the question before this Court is whether the Purchasers alleged that Concord breached a duty owing to them independent of any duties assumed by Concord pursuant to the Contracts. We turn now to the Purchasers' respective claims.

i. The Virginia Consumer Protection Act

Concord argues that any statutory duties arising under the Act "are duties that arise solely by virtue of the [Contracts] entered into between the [Purchasers] and Concord." We disagree.

The VCPA was enacted with "the intent of the General Assembly that [it] shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public." Code § 59.1-197. Pursuant to Code § 59.1-200(A)(6), the VCPA makes it unlawful for "a supplier in connection with a consumer transaction" to "[m]isrepresent[] that goods or services are of a particular standard, quality, grade, style, or model." In pertinent part, Code § 59.1-198 defines a "[c]onsumer transaction" as "[t]he advertisement, sale, lease, license or offering for sale, lease

or license, of goods or services to be used primarily for personal, family or household purposes." "Goods" are defined as "all real, personal or mixed property, tangible or intangible." Id. (emphasis added). Lastly, a "[s]upplier" is defined as "a seller, lessor or licensor who advertises, solicits or engages in consumer transactions." Id.

Based on the plain language of the VCPA, it is unlawful to misrepresent that goods are of "a particular standard, quality, grade, style, or model." Code § 59.1-200(A)(6). This duty not to misrepresent the quality, grade, or style of goods is a statutory duty that exists independent of the Contracts entered into between the parties to this litigation, viz., the duty is "not one existing between the parties solely by virtue of the contract." Dunn Construction, 278 Va. at 267, 682 S.E.2d at 946. Because the Purchasers have alleged that Concord breached a duty existing independent of the Contracts, we hold that the trial court erred when it sustained Concord's demurrers to the Purchasers' VCPA claims.

ii. Fraud in the Inducement

" '[A] false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely, is always ground for rescission of the contract.' " George Robberecht Seafood, Inc. v. Maitland Bros. Co., 220 Va. 109, 111-12, 255 S.E.2d 682, 683

(1979) (quoting Wilson v. Carpenter, 91 Va. 183, 187, 21 S.E. 243, 244 (1895)). "Fraud in the inducement of a contract is also ground for an action for damages." Id. at 112, 255 S.E.2d at 683; see also Augusta Mutual, 274 Va. at 204, 645 S.E.2d at 293.

In Lloyd v. Smith, 150 Va. 132, 145, 142 S.E. 363, 365 (1928), we said that "an action based upon fraud must aver the misrepresentation of present pre-existing facts, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. Were the general rule otherwise, every breach of contract could be made the basis of an action in tort for fraud." See also Boykin v. Hermitage Realty, 234 Va. 26, 29, 360 S.E.2d 177, 178 (1987). However, "Lloyd placed [qualifications] upon the general rule." Boykin, 234 Va. at 29, 360 S.E.2d at 178.

> "[A]n action in tort for deceit and fraud may sometimes be predicated on promises which are made with a present intention not to perform them . . . . [T]he gist of fraud in such case is not the breach of the agreement to perform, but the fraudulent intent . . . . [T]he fraudulent purposes of the promisor and his false representation of an existing intention to perform . . . is the misrepresentation of a fact . . . . [T]he state of the promisor's mind at the time he makes the promise is a fact, and . . . if he represents his state of mind . . . as being one thing when in fact his purpose is just the contrary, he misrepresents a then existing fact."

Id. at 29, 360 S.E.2d at 178-79 (quoting Lloyd, 150 Va. at 145-46, 142 S.E. at 365-66).

In support of its position, Concord cites to a number of this Court's cases where we concluded that the allegations were legally insufficient to support an actionable tort claim because a contract or an agreement was the source of the duty allegedly breached. See Dunn Construction, 278 Va. at 268, 682 S.E.2d at 947 ("The fact that the representation was made in order to obtain payment . . . does not take the fraud outside of the contract relationship."); Augusta Mutual, 274 Va. at 206, 645 S.E.2d at 294 ("The duties that [the agent for the insurance company] allegedly violated by making fraudulent representations . . . arose solely by virtue of the Agency Agreement."); Filak, 267 Va. at 618, 594 S.E.2d at 613 ("[T]he plaintiffs' claim . . . merely sought recovery for losses allegedly suffered as a result of [the defendant's] failure to fulfill her oral contract."); and Richmond Metro. Auth., 256 Va. at 560, 507 S.E.2d at 348 ("Nothing in the record suggests that [the defendant] did not intend to fulfill its contractual duties at the time it entered into the [contract].").

Unlike these cases, in the instant case the Purchasers alleged that Concord had knowledge that its representations concerning the flooring were untrue, that Concord acted with the intent to deceive the Purchasers, and that Concord

willfully concealed the flooring substitution. The Purchasers also alleged that Concord "knew or reasonably should have known that its disclosure of [the actual flooring material] would have caused the [Purchasers] to reconsider or renegotiate the Contracts." In short, the Purchasers alleged that Concord made misrepresentations of the flooring it promised to install "with a present intention not to perform" its obligations. Boykin, 234 Va. at 29, 360 S.E.2d at 178. The fraud alleged by the Purchasers was perpetrated by Concord before a contract between the two parties came into existence, therefore it cannot logically follow that the duty Concord allegedly breached was one that finds its source in the Contracts. Based on the plain language of the Complaints, we hold that the Purchasers have alleged an actionable claim for fraud in the inducement.

III. Conclusion

We hold that the trial court erred when it sustained Concord's demurrers. Accordingly, we will reverse the judgments of the trial court in each case and remand these cases for further proceedings consistent with this opinion.

Reversed and remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ATTARD INDUSTRIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:10cv121 (AJT/TRJ)
	)	
UNITED STATES FIRE INSURANCE CO.	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

On August 27, 2010, following a four day trial, a jury returned a verdict in favor of Plaintiff Attard Industries, Inc. ("Attard") against Defendant United States Fire Insurance Co. ("USFIC") in the amount of $1,872,430 plus prejudgment interest running from January 18, 2007. Judgment in that amount was entered on September 15, 2010 (Doc. No. 163). In response, USFIC filed a (1) Renewed Motion for Judgment as a Matter of Law; (2) Motion for a New Trial; and (3) Motion to Alter or Amend the Judgment (Doc. No. 168), in which it challenges the legal sufficiency of the verdict and the date from which the jury awarded prejudgment interest. For the reasons discussed below, the Court concludes that as a matter of law prejudgment interest against a surety, such as USFIC, cannot accrue before a beneficiary, such as Attard, makes its first demand for payment under a surety bond, which occurred in this case on October 20, 2009. The Court will accordingly amend the judgment entered on the verdict but otherwise denies USFIC's motions.

I. BACKGROUND

Turner Construction, Inc. ("Turner") received a prime contract on a construction project at the Washington Dulles International Airport known as the Dulles Airport Package 6 Main Termination People Mover Station (the "Project"). On December 16, 2002, Turner entered into a subcontract with Jett Mechanical, Inc. ("Jett") to provide all mechanical and plumbing work on the Project (the "Principal Contract"). On January 21, 2003, Jett, in turn, entered into a sub-subcontract with Attard for Attard to provide labor and materials on the Project (the "Subcontract"). Following the execution of the Subcontract, Jett arranged for USFIC to issue, as surety, payment bonds with respect to Jett's performance under the Subcontract (the "Bonds"). In June 2008, after disputes over unpaid invoices went unresolved, Jett terminated Attard under the Subcontract. On October 20, 2009, Attard filed with USFIC a formal claim and demand under the Bonds for payment of certain outstanding invoices that Attard had issued to Jett. USFIC refused payment and on February 12, 2010, Attard filed this action against USFIC alleging USFIC breached its payment obligations under the Bonds.

The case was tried before a jury from August 23, 2010 to August 27, 2010. A total of approximately $3.4 million in damages was submitted to the jury for its consideration, $1.7 million of which related to a change order known as Change Notice 331 ("CN 331").[1] On August 27, 2010, the jury returned a general verdict in favor of Attard and against USFIC in the amount of $1,872,430 plus prejudgment interest running from January 18, 2007 (Doc. No. 146). Judgment was subsequently entered in that

[1] More specifically, total claims in the amount of $3,468,598 were submitted to the jury, of which CN 331 comprised $1,667,485. During trial, the Court granted USFIC's motion for entry of judgment as a matter of law as to Attard's claim based on Change Notice 489 ("CN 489"); and denied its motion as to Attard's claim based on CN 331.

amount with prejudgment interest at the rate of 6% per annum running from January 18, 2007 to the entry date of judgment (Doc. No. 163). Specifically at issue in USFIC's post-trial motions is the Court's submission to the jury of CN 331 and the date from which the jury awarded prejudgment interest.

II. STANDARD OF REVIEW

Jury verdicts are entitled to the "utmost respect." *Szedlock v. Tenet*, 139 F. Supp. 2d 725, 729 (E.D. Va. 2001), *aff'd* 61 F. App'x 88 (4th Cir. 2003). Nevertheless, the Court must grant judgment as a matter of law if there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue. Fed. R. Civ. P. 50(a)(1); *see also Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996). The Court must view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001). Courts may not substitute their judgment for that of the jury or make credibility determinations. *Price*, 93 F.3d at 1249. If there is evidence on which a reasonable jury could return a verdict in favor of the nonmoving party, that verdict must be upheld. *Id.* at 1249-50.

The standard governing motions for a new trial under Rule 59 is significantly different. On a Rule 59(a) motion, a district court may set aside the jury's verdict and grant a new trial only if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. & Servs. Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir.

1996). On a Rule 59 motion, courts may make credibility judgments in determining the clear weight of the evidence. *Knussman v. Maryland*, 272 F.3d 625, 647 (4th Cir. 2001).

Rule 59(e), pursuant to which USIFC challenges the date from which the jury awarded prejudgment interest, does not itself provide a standard for relief. The Fourth Circuit, however, has recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). "[T]he rule permits a court to correct its own errors, 'sparing the parties and the appellate courts the burden of unnecessary appellate proceedings.'" *Id.* (quoting *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 479 (7th Cir. 1995)).

III. ANALYSIS

A. Change Notice 331

USFIC argues that the Court must grant its Motion for Judgment as a Matter of Law because it demonstrated, through cross examination of Attard's witnesses and otherwise, the existence of discrepancies, falsities, or inflation in Attard's CN 331 claim for $1.7 million. In light of this evidence, USFIC argues that no reasonable jury could have concluded that Attard was entitled to recover on the entire amount claimed for CN 331. In the alternative, USFIC asks the Court to grant a new trial because even if there were legally sufficient evidence to allow the jury to consider CN 331 as part of Attard's damages, Attard's claim for the full amount of CN 331 was against the clear weight of the evidence, and the jury's $1.8 million verdict must have included a portion of what was claimed for CN 331. Attard argues that the verdict must be viewed as a whole and

the evidence was clearly legally sufficient to support a verdict of only approximately $1.8 million of the $3.4 million in claimed damages, particularly since out of the entire $3.4 million, USFIC challenged only the legal sufficiency of a portion of the $1.7 million in damages claimed for CN 331. For these same reasons, Attard also argues that the verdict cannot be deemed to be against the clear weight of the evidence.

The plaintiff has the burden of proving damages "with reasonable, but not absolute, certainty." *Oden v. Salch*, 237 Va. 525, 535 (1989).[2] Furthermore, "absolute certainty as to the amount of the damages is not essential when the existence of a loss has been established." *Pebble Bldg. Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 191 (1982) (quoting *Wyckoff Pipe & Creosoting Co. Inc., v. Saunders*, 175 Va. 512, 518-19 (1940)). The trier of fact may fix the amount of damages when the facts and circumstances permit an intelligent and probable estimate of damages. *See Nelson v. Commonwealth of Virginia*, 235 Va. 228, 251-52 (1988) (finding sufficient evidence for jury to draw inference of quantum based on the testimony of an employee charged with budgeting the project and the testimony of the company's principle in charge of the project).

The evidence presented at trial included expert and other testimony as well as exhibits, admitted without objection, that supported Attard's position that it was due the full amount it was claiming for CN 331. It was within the province of the jury to consider and weigh all of the evidence presented regarding Attard's claims with respect to CN 331, including the credibility of witnesses and the weight to be given to evidence of inflated or inaccurate calculations or claims. *See Nelson*, 235 Va. at 249-51 (finding

[2]Because this Court's jurisdiction is based on diversity of citizenship, the burden of proof with respect to damages is determined by Virginia law. *See Stewart Title Guar. Co. v. Virginia Commonwealth Title Co.*, 64 F.3d 659 (4th Cir. 1995) (applying Virginia burden of proof rules for damages in a contract action).

trial court correctly submitted claims to the jury for determination of quantum of damages where there was conflicting evidence regarding the proper multiplier used to calculate fees, evidence that certain labor estimates were based on faulty premises and assumptions, and evidence that certain hours were improperly included in the actual hours worked); *Fruit Growers Exp. Co. v. Hulfish*, 173 Va. 27, 32 (1939) ("juries are the triers of facts and determine the credibility of witnesses and the weight to be given their testimony. Their findings of fact are entitled to great respect when supported by credible evidence.").

Viewing the evidence in the light most favorable to Attard, the Court concludes that there was sufficient facts and circumstances to permit the jury to determine the quantum of damages with reasonable certainty; and USFIC's Rule 50 motion must be denied. In addition, the Court concludes based on all the evidence that a new trial is not warranted in this case; and USFIC's Rule 59(a) motion will be denied.

B. Prejudgment Interest

USFIC contends that the evidence at trial was insufficient to support the award of prejudgment interest from January 18, 2007 and that, in any event, prejudgment interest should not begin to run against a surety until at least an initial demand for payment is made on the surety. For these reasons, USFIC claims that the jury's award of prejudgment interest against USFIC running from January 18, 2007 must be vacated and a new trial ordered on this issue, or alternatively, that the Court must amend the judgment to reflect an appropriate date on which prejudgment interest may begin to run. Attard argues that the jury's award of prejudgment interest comports with Virginia law and is supported by the evidence presented at trial.

In an action based on diversity, as in this case, Virginia law governs a party's entitlement to prejudgment interest. *Continental Ins. Co. v. City of Virginia Beach*, 908 F. Supp. 341, 349 (E.D. Va. 1995) (citing *United States v. Dollar Rent A Car Sys., Inc.*, 702 F.2d 938, 940-41 (4th Cir. 1983)). Virginia law provides that "[i]n any ... action at law ... the verdict of the jury ... may provide for interest on any principle sum awarded, or any part thereof, and fix the period at which interest shall commence." Va. Code § 8.01-382. The award of prejudgment interest is, therefore, generally a matter within the discretion of the jury. *See Al-Abood v. Elshamari*, 217 F.3d 225, 236 n. 7 (4th Cir. 2000). In this case, the issue of prejudgment interest was properly submitted to the jury, which was authorized to find, and did find, that prejudgment interest should be awarded to Attard. There is sufficient evidence to support that judgment; and the Court concludes that the jury's decision to find liability for prejudgment interest, aside from the accrual date, should not be set aside. The more difficult issue is whether as a matter of law, prejudgment interest can be awarded against a surety before demand for payment was made against it, as the jury concluded here; and if not, whether there should be a new trial in order to allow the jury to set the date from which prejudgment interest runs based on appropriate jury instructions or whether the Court can set the accrual date.

Although Virginia state courts and the Fourth Circuit have not yet addressed these prejudgment interest issues, other federal courts have found that a surety may only be liable for prejudgment interest from the date it receives demand for payment from the beneficiary.[3] For example, the Second Circuit concluded that "in general, interest, as

[3] Attard argues that the decision of the Supreme Court of Appeals of Virginia in *Burton v. Frank A. Seifert Plaintiff Relief Co.*, 108 Va. 338 (1908), requires this Court to affirm the jury's award of prejudgment interest. In *Burton*, the jury returned a verdict in favor of

against the surety, begins to run... only from the time of a demand upon the surety, or notice to him to pay, or by suit, or by something equivalent to demand or notice." *United States v. Quinn*, 122 F.65, 66 (2d Cir. 1903) (*per curiam*). Other courts since *Quinn* have also concluded that a surety must receive demand before the surety becomes liable for prejudgment interest. *American Auto Ins. Co. v. United States*, 269 F.2d 406, 412 (1st Cir. 1959) ("[I]nterest can be charged against the surety only from the date of demand on it, because until then the surety is not in default."); *Golden West Constr. Co. v. United States*, 304 F.2d 753, 757 (10th Cir. 1962) ("[T]he prevailing rule require[es] a demand for payment upon the surety in order to activate interest liability."); *United States v. Casle Corp.*, 895 F. Supp. 420, 429 (D. Conn. 1995) (same). Although some of the cases cited arose under federal law, the courts were guided by state law on the question of prejudgment interest. *See also United States for Use of Baltimore Cooperage Co. v. McCay*, 28 F.2d 777, 781 (D. Md. 1928) (finding under the federal Materialmen's Act that a "surety on a contractor's bond for such work as is here involved is not in default until demand for payment is made upon him, and hence until that time is not chargeable with interest"); *United States to Use of Forsberg v. Fleischmann Const. Co.*, 298 F. 320 (E.D. Va. 1923) ("it is not unfair [in an action against a contractor and its surety] to fix the commencement of the interest as of the date of the filing of the original suit").

The Court concludes that the rule described above, prohibiting an award of prejudgment interest against a surety before a demand for payment is made, is also the

---

the subcontractor that included an award of prejudgment interest from the time of the general contractor's breach, not from the time the subcontractor made demand upon or brought suit under the bond. However, the Supreme Court of Appeals of Virginia did not consider or decide the proper accrual date for prejudgment interest. The case, therefore, does not provide any binding precedent or even guidance on the issue of prejudgment interest.

most appropriate under Virginia's prejudgment interest statute. Under Virginia law, an award of prejudgment interest rests on notions of fairness arising from the plaintiff's loss and the defendant's obligation for that loss. In that connection, it is intended to compensate the plaintiff, not penalize the defendant. *Hardey v. Metzger*, 2008 WL 3895686, *9 (No. 2628-07-4) (Va. App. Aug. 26, 2008) (quoting *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 197 (1995)) ("Prejudgment interest 'is not awarded as a penalty; it is merely an element of just compensation'"). It is also to be awarded against a defendant relative to the time from which that defendant caused or failed to act to prevent the loss, that is, from the time the obligation arose. *Marks v. Sanzo*, 231 Va. 350, 356 (1986) ("award of prejudgment interest is to compensate Plaintiff for the loss sustained by not receiving the amount to which he was entitled at the time he was entitled to receive it"). When applying these notions to a claim against a surety, the Court concludes that as a matter of law an award of prejudgment interest cannot be assessed earlier than the date on which a demand for payment has been made against the surety.

As Attard has repeatedly pointed out, its claim against USFIC is premised, not on the Subcontract, but rather, on USFIC's independent obligations created by the Bonds. *See* Attard Industries, Inc's Opposition to United States Fire Insurance Company's Motion to Strike Demand for a Jury Trial 9, June 4, 2010 (Doc. No. 36) ("The present matter is a suit arising under the two payment bonds issued by US Fire. . . There is a debt due to Attard under the terms of the payment bonds (the amount of payment bond claim submitted by Attard to US Fire) ... Attard's pending lawsuit against US Fire is an independent action from Attard's claim against Jett for breach of the Subcontract"). In

such a circumstance, to impose prejudgment interest on a surety before it has incurred an obligation to pay a beneficiary would essentially penalize the surety who has had no opportunity to discharge its obligation. *See American Auto*, 269 F.2d at 412 (finding that a plaintiff who choose to look to the principal rather than notify the surety precluded the surety from stopping the accumulation of interest). This is particularly the case within the context of suretyship, where a surety issuing a bond, such as USFIC, is typically "not charged with the duty of ascertaining whether the contractor has been paying for material and labor as furnished, unless and until requested to see to it that such claims are paid." *McCay*, 28 F.2d at 781; *see also London & Lancashire Indemnity Co. of America v. Smoot*, 287 F.952, 957 (C.A.D.C. 1923) ("We do not think it became the duty of the surety to ascertain whether or not the contractor was paying for material and labor as it was furnished from time to time").[4]

Other considerations also weigh in favor of such a rule. While the surety has no control over when a demand is made, a beneficiary does. In this case, the record is that Attard did not make formal demand for payment on USFIC until October 20, 2009. But as Attard claimed at trial, certain payments were "due and payable" under the Subcontract to Attard long before that date.[5] Until Attard made a demand on USFIC, USFIC had no contractual duty to satisfy any obligations on its part under the Bonds. *See*

[4] The Court has found nothing under Virginia law that would impose such a duty on sureties.

[5] While Attard may have had good reasons to delay making a demand on USFIC, Attard's ability to make a demand on USFIC is underscored by the rule, recognized under Virginia law in this Circuit, that a payment bond surety is not entitled to assert against a subcontractor making a claim under that bond a "pay when paid" defense based on the terms of an underlying construction contract. *See Moore Bros. Co. v. Brown & Root*, 207 F.3d 717, 723-24 (4th Cir. 2000).

American Auto, 269 F.2d at 412 (finding plaintiff's three month delay in notifying the surety, while reasonable, was at plaintiff's own risk and foreclosed the possibility of the surety being charged with interest before the date of notification). Permitting the assessment of prejudgment interest against a surety before demand for payment is made would amount to the imposition of a penalty because it would be based on conduct over which the surety had no control or losses it had no opportunity to prevent. In effect, such a rule would require a surety, in order to minimize its exposure for prejudgment interest under a payment bond, to monitor its principal's obligations to a beneficiary and volunteer payments in the absence of a demand. For the above reasons, the Court concludes that as a matter of law, prejudgment interest may not be assessed against USFIC with respect to its payment obligations under the Bonds until the date of Attard's demand, October 20, 2009, at the earliest. In this regard, the jury clearly was of the view that an award of interest at a relatively early point in time was appropriate; and the Court, respecting that judgment, concludes that an amendment to the judgment to accrue interest as of October 20, 2009, rather than a new trial, is the most appropriate resolution of this issue, particularly given that it is consistent with USFIC's alternative request for relief. [6]

IV. CONCLUSION

For the above stated reasons, Defendant United States Fire Insurance Company's Motion to Alter or Amend the Judgment (Doc. No. 168) is GRANTED, and the judgment entered in this case will be amended to accrue prejudgment interest as of October 20,

[6] During the hearing on October 22, 2010, USFIC conceded that the Court was authorized to set an accrual date for prejudgment interest supported by the evidence, rather than order a new trial on that issue.

2009; and Defendant United States Fire Insurance Company's Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial (Doc. No. 168) are DENIED.

An appropriate Order will issue.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
November 9, 2010

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES f/u/b/o ALLSITE CONTRACTING, LLC,	)	
Plaintiff,	)	
v.	)	
	)	1:10cv1068
HARTFORD FIRE INSURANCE CO.,	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Hartford Fire Insurance Company's ("Defendant" or "Hartford") Motion to Dismiss or for Summary Judgment ("MSJ"). [Dkt. 7.] For the following reasons, the Court will grant summary judgment in favor of Defendant.

I. Background

Plaintiff is suing Defendant for recovery under a performance bond--set pursuant to the Miller Act, 40 U.S.C. § 3131-34--for its work on the Marine Corps Base at Quantico, Virginia. That work was precipitated by a contract between John C. Grimberg Co. and the United States for the construction of the Marine Corps D/B SNCO Academic Facility (Contract No. N62477-04-D-0012 Task Order 0020) (the "Project"). (Compl. ¶ 7.) As required by the Miller Act, Grimberg, as principal, and

Hartford, as surety, furnished a payment bond "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract." 40 U.S.C. § 3131(b)(2). (Compl. ¶ 8.) Grimberg then entered into a subcontract with Plaintiff AllSite Contracting, LLC, which was formerly known as Wise Guys Contracting ("Plaintiff" or "AllSite"). (Compl. ¶¶ 2, 9.)

Between the formation of this subcontract and July 28, 2009, Grimberg issued 25 "change orders" to AllSite, each adjusting the work to be performed and the amount to be paid, and each agreed to by both parties. (Compl. ¶ 10; MSJ Ex. A.) Then, on July 28, 2009, AllSite signed and submitted an "Application and Certificate for Payment" (the "Certificate"), which Grimberg claims it received on August 17, 2009. (MSJ ¶ 6.) In it, AllSite certified that "the work covered by this Application for payment has been completed in accordance with the contract documents." (MSJ Ex. A.) It included all 25 "change orders." *Id.* Further, AllSite's last certified payroll record for the Project indicates that the last date on which it performed work for Grimberg was August 26, 2009. (MSJ at ¶ 7, MSJ Ex. B.)

AllSite argues that these documents merely requested compensation for work performed *thus far*, as opposed to the total work on the contract. (Opp. ¶ 9.) Defendant claims,

however, that these documents signify AllSite's last work on the Project besides "warranty work" on a collapsed sidewalk performed in June 2010. (MSJ ¶ 8.) AllSite disagrees with the characterization of this latter work as "warranty work," arguing that it was requested by Grimberg and that it was not necessitated by any defects in AllState's earlier work. (Opp. ¶¶ 2, 4.) This disagreement over whether or not AllState's June 2010 work was "warranty work" is at the heart of the instant motion.

Plaintiff filed its complaint on September 24, 2010, alleging that Grimberg wrongfully failed and refused to pay a sum of $108,469.80 for work performed on the Project. [Dkt. 1 ¶ 11.] Plaintiff filed an Amended Complaint ("Am. Compl.") on October 7, 2010, stating that $105,474.57 remained wrongfully unpaid. (Am. Compl. ¶ 12.) Exhibit B to the Amended Complaint broke down this sum into a series of unpaid invoices, the last of which was allegedly submitted on July 28, 2009. AllSite is therefore not attempting to recover funds for the disputed "warranty work"--all the funds it seeks to recover are for its earlier work for Grimberg.

Defendant moves to dismiss or for summary judgment, arguing that Plaintiff's claims are barred by the Miller Act's 1-year statute of limitations, because Plaintiff last performed work no later than August 26, 2009, and did not file its

Complaint until September 24, 2010. Plaintiff responds that it performed work until June 2010, at which point the Statute of Limitations began to run. Defendant's motion is before the Court.

II. Standard of Review

A. Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). In deciding such a motion, a court must first be mindful of the liberal pleading standards under Rule 8, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. A court must take "the material allegations of the complaint" as admitted and liberally construe the complaint in favor of a plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

While Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions" because "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citation omitted). Indeed, the legal framework of the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Id.* at 1965. In its recent decision,

Ashcroft v. Iqbal, 129 S. Ct 1937 (2009), the Supreme Court expanded upon *Twombly* by articulating a two-pronged analytical approach to be followed in any Rule 12(b)(6) test. First, a court must identify and reject legal conclusions unsupported by factual allegations because they are not entitled to the presumption of truth. *Id.* at 1951. "[B]are assertions" that amount to nothing more than a "formulaic recitation of the elements" do not suffice. *Id.* (citations omitted). Second, assuming the veracity of "well-pleaded factual allegations," a court must conduct a "context-specific" analysis drawing on "its judicial experience and common sense" and determine whether the factual allegations "plausibly suggest an entitlement to relief." *Id.* at 1950-51. The plausibility standard requires more than a showing of "a sheer possibility that a defendant has acted unlawfully". *Id.* at 1949. In other words, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

B. Summary Judgment

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Evans v. Techs. Apps.*

& Serv. Co., 80 F.3d 954, 958-59 (4th Cir. 1996) (citations omitted). The party seeking summary judgment has the initial burden of showing the absence of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The party opposing summary judgment may not rest upon mere allegations or denials. Rather, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (quotation omitted).

Unsupported speculation is not enough to withstand a motion for summary judgment. *See Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. In reviewing the record on summary judgment, "the court must draw any inferences in the light most favorable to the non-

movant" and "determine whether the record taken as a whole could lead a reasonable trier of fact to find for the non-movant." *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1259 (4th Cir. 1991) (citations omitted).

III. Analysis

The instant dispute involves the question of whether Plaintiff's claim is barred by the Miller Act's one-year statute of limitations. *See* 40 U.S.C. 3133(b)(4). The applicable statue reads: "An action brought under this subsection must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action." *Id.* And the Fourth Circuit's test under this statute is: "whether the work was performed and the material supplied as part of the original contract or for the purpose of correcting defects, or making repairs following inspection of the project." *United States f/b/o Magna Masonry, Inc. v. R.T. Woodfield, Inc.*, 709 F.2d 249, 251 (4th Cir. 1983). Correction or repair materials and labor do not toll the statue, but labor or materials furnished pursuant to the original subcontract do. *United States v. Fidelity and Deposit Co. of Maryland*, 999 F. Supp. 734, 742-43 (D.N.J. 1998).

The parties here dispute whether AllSite's June 2010 work is properly considered "part of the original contract" or work "for the purpose of correcting defects, or making repairs."

See id. Plaintiff argues that "[t]he last work performed by AllSite on the Project occurred when AllSite *was instructed by Grimberg* to perform labor at the work site." (Opp. at 3 (emphasis added).) In support of this, Plaintiff submits an affidavit from its CEO, John Forster, stating that "[t]he work done in June 2010 was not warranty work." (Opp. Ex. A, ¶ 2.) Forster goes on to state, "In June 2010, *at Grimberg's request*, AllSite dug up the portions of the sidewalk that had subsided." (Opp. Ex. A, ¶ 8 (emphasis added).)

Grimberg's request took the form a letter to AllSite, sent May 4, 2010, which stated the following:

> The warranty period for SNCO Academic Facility is near expiration but there are still some outstanding punch list items and other warranty issues that need to be addressed.
>
> . . . .
>
> 3. Sidewalk: Collapsed sidewalk near storm outfall inlet. See attached pictures for reference.
>
> . . . .
>
> Please provide the government with course of action for repairs or correction of the items mentioned above and an estimated time period for execution of each action.

(MSJ Ex. C.)

This letter makes clear that, *in Grimberg's view*, it was requesting warranty work. AllSite, however, claims that the work requested was not warranty work because it was necessitated

by flaws in the Navy and Grimberg's design specifications as opposed to problems with AllSite's execution of its contract. (Opp. ¶ 4.) That dispute--over whether the work requested actually *should have been* required by warranty--is now beside the point.

The instant dispute turns on whether the work requested was (a) correction or repair materials or (b) labor or materials furnished pursuant to a requirement of the original subcontract. *See Fidelity*, 999 F. Supp. at 742-43. Of course, the original subcontract would have been useful for answering this question, but the Court is without one. Still, common sense places the work at issue here firmly in category (a). No original subcontract would call for a sidewalk to be built, dug up, and rebuilt. If a subcontract called for the building of a sidewalk, the only way it would also call for that sidewalk to be dug up and rebuilt would be under a warranty. The work here therefore may or may not have been *deserved* under a warranty, but it could not have been part of the original subcontract.

This is true despite AllSite's contention that, because 25 change orders were issued during the course of its activity on the Project, "ambiguity and disorganization . . . plagued the project," making it unclear "when or if further construction would be needed from it, or what the nature of that activity would be." (Opp. at 4-5.) This argument is unavailing

because the Certificate for Payment, signed by AllSite on July 28, 2009, which accounts for *all* of these change orders, certified that all of the work required under those change orders was complete. (MSJ Ex. A.) Thus, as of July 28, 2009, there should not have been any further confusion resulting from the change orders. The Court also notes that Grimberg requested that the sidewalk repairs be done as "warranty" work (MSJ. Ex. 3), and AllSite, without protest, began fulfilling that request (Opp. Ex. A, ¶ 8). Not until this lawsuit did AllSite actually dispute the characterization of its work as "warranty work."

It is therefore this Court's conclusion that no reasonable jury could find that the sidewalk work was not performed under warranty--whether or not it *should have been*--meaning that it does not bring this case within the applicable limitations period. *See Anderson*, 477 U.S. at 248 (genuine issue of fact only exists where "a reasonable jury" could find for the non-moving party).

IV. Conclusion

For the reasons stated above, the Court will grant Defendant's Motion for Summary Judgment.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

December 3, 2010
Alexandria, Virginia

VLW 011-8-019

TWENTIETH JUDICIAL CIRCUIT OF VIRGINIA

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 20178

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 20178

BURKE F. MCCAHILL, JUDGE
POST OFFICE BOX 9
LEESBURG, VIRGINIA 20178

JEFFREY W. PARKER, JUDGE
40 CULPEPER STREET
WARRENTON, VIRGINIA 22186

LOUDOUN, FAUQUIER AND
RAPPAHANNOCK COUNTIES

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED
W. SHORE ROBERTSON, JUDGE RETIRED
POST OFFICE BOX 727
LEESBURG, VIRGINIA 20178

February 8, 2011

Warren R. Stein, Esquire
210 Wirt Street, SW, Suite B4
Leesburg, VA 20175

James R. Hart, Esquire
10505 Judicial Drive, Suite 101
Fairfax, VA 22030

In Re: TWP Enterprises, Inc., t/a TW Perry v. James Bruce Dressel, et al.
Civil No. 61335

Dear Counsel:

The case is before the court on the defendant's motion to reconsider my ruling that overruled the defendant's demurrer. This is a suit to enforce a mechanic's lien against homeowners by TWP, a supplier of construction materials. The plaintiff supplied building materials to Foster, a builder for the defendants. Foster had a written agreement (commercial account application) with the builder that contains the following provision that is at issue:

> 9. TITLE FOR ALL GOODS AND\OR MATERIALS REMAINS WITH TWP ENTERPRISES UNTIL PAID FOR IN FULL BY THE PURCHASER. Should any purchaser take any action until Title 11 of the United States Code, or any state insolvency law, purchaser agrees to promptly return any goods and\or materials not paid for in full. Purchaser agrees to keep the goods and\or materials fully insured until paid for in full. Risk of loss is on the purchaser.

I have already ruled that the homeowners are not third party beneficiaries of this agreement entered into years before their builder began their project. Obviously the homeowners are not in privity with the plaintiff as supplier of construction materials. There is no dispute that the building materials (windows, etc.) have been incorporated into the homeowner's structure.

Because this is a demurrer, the truth of the facts alleged in the complaint as well as any facts that may be reasonably implied and inferred from the allegations are admitted. The correctness of the conclusion of law are not admitted. The demurrer tests the legal sufficiency of the facts alleged in the pleadings and the court is to determine whether the complaint states a cause of action upon which the request for relief can be granted.

The defendant acknowledges "the uncontroverted general proposition" that permanent improvements such as these placed upon a structure become part of the realty. *Nixdorf v. Blount,* 111 Va. 127, 129 (1910). The plaintiff has alleged that these items have been incorporated into the structure. These factual allegations are deemed to be true. However the court is not bound by the legal conclusions of the plaintiff that they have become fixtures.

While accepting the general proposition, the defendants argue that the contract between the plaintiff and supplier controls:

> "... It is well settled that by agreement the parties may fix the character and control the disposition of property, which, in the absence of such a contract, would be held to be a fixture, where no absurdity or general inconvenience would result from the transaction." *Tunis Co. v. Dennis Co.,* 97 Va. 682, 686 (1899).
>
> It follows, then, that since the parties to this controversy agreed upon the classifications of property which should remain upon, or could be removed from, the leased premises upon expiration of the lease, their rights are to be determined, not by the law relating to fixtures, but by the law of contracts (emphasis added). *Bolin v. Laderburg,* 207 Va. 795, 800-801 (1967).

Having reconsidered this matter, the demurrer is again overruled for the following reasons:

First, defendant's reliance on *Massie v. Firmstone,* 134 Va. 450 (1922) is misplaced. There has been no sworn testimony by the plaintiff. This case is being heard on the defendant's demurrer. Nor do I feel the plaintiff is estopped by their factual allegations of the existence of this contractual provision in the complaint. There is nothing that suggests the defendants were induced by this contractual provision between

the plaintiff and the builder to enter into their agreement with the builder nor is there a suggestion of any reliance or any damages as a result.

Second, the defendant's argument that the case should be determined "not by the law relating to fixtures but by the law of contracts" does not allow examination of all the law that may relate to this topic. I cannot ignore the general law of fixtures conceded by the defendant. In addition having already decided the defendant is neither a party to this contract or a third party beneficiary I do not believe they can now ask the court to enforce this provision against the plaintiff. The plaintiff is a party to the contract and unlike the defendant, has the right to waive enforcement of this provision. This is a contractual provision for the benefit of the plaintiff, not this defendant. None of the cases cited extend this proposition advanced by the defendant to a non-party. The language of the cases seems to suggest that this proposition relates to the ability of a party to a contract to insist upon enforcement. Just as stated in *Bolin*, "their rights" (meaning the parties to the contract) are determined by the law of contracts. All of the cases that have adopted this principal of the law have involved disputes between the parties to an agreement, typically a lease between a landlord and tenant.

Third, even between parties to a contract, the rule is not absolute. It is not applied if it creates an "absurdity" or "general inconvenience". Applying the rule in the *Tunis* case to this case does create an "absurdity". It would allow the defendant to require the plaintiff to be bound by a contractual provision with another party yet I have already determined the defendant is not a third party beneficiary. The plaintiff would be precluded from electing, for example, not to enforce its contractual rights. The contract language does not expressly waive the plaintiff's right to a mechanic's lien. Applying the rule in *Tunis* would result in an implied waiver of plaintiff's statutory rights to a mechanic's lien. "Either a waiver must be expressed, or, if it is to be implied, it must be established by clear and convincing evidence." *McMerit Const. Co. v. Knightsbridge Devel. Co.*, 235 Va. 368, 373 (1988). It is an "absurdity" that when the agreement between the plaintiff and Foster was signed in 2001 that plaintiff intended that an unknown homeowner that subsequently had plaintiff's material incorporated nine years later would be able to claim that plaintiff had expressly or impliedly waived it's statutory rights to a mechanic's lien.

Fourth, it also creates an absurdity that materials that may lose their separate identity and which cannot be severed remain titled to the plaintiff after their incorporation under the circumstances of this case. The defendants correctly argued in their original brief:

> A mechanic's lien is a creature of statute. It is found on the notion that a workmen or a materialman mixes his labor and/or materials into the freehold such that it cannot be readily separated from the freehold, because the labor and/or materials have become part of the freehold. To protect him, mechanic's lien statutes give him a security interest in the improvements, to protect the value of the

labor and materials which have not inextricably become part of the freehold. Title to the freehold, now including the labor and/or materials, remains in the homeowner, which is of course why the lien is a security interest and not an ownership interest.

There is a line of cases that allows a party to vary this by contract, but it does create an absurdity under the facts of this case.

Therefore the demurrer is overruled. Mr. Hart may prepare a suitable order to which the defendant's may note their objection.

Very truly yours,

Burke F. McCahill
Judge

BFM/gpt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

P.W. CAMPBELL CONTRACTING CO., Plaintiff,	)	
v.	)	No. 1:11-cv-141 (AJT/TRJ)
ARLINGTON COMMUNITY FEDERAL CREDIT UNION, Defendant.	)	

ORDER

This matter is before the Court on Defendant's Motion to Dismiss (Doc. No. 9) pursuant to Fed. R. Civ. P. 12(b)(6). On April 1, 2011, the Court heard oral argument on the motion, following which the Court denied without prejudice the motion as to Count V of the Complaint, alleging a claim for quantum meruit, and took under advisement the motion as to Count II, alleging a claim for "cardinal change /abandonment of contract."

The parties are in agreement that the contract at issue in this case is governed by Virginia law. The Court has found no instance where a Virginia state court has applied the doctrine of cardinal change to a private, non-governmental contract such as that involved in this case; and the Court cannot conclude that the Virginia Supreme Court would find that doctrine applicable to the contract at issue in this case were it given the occasion to do so. For these reasons, the Court concludes that Count II fails to state a claim. Accordingly, it is hereby

ORDERED that Defendant's Motion to Dismiss (Doc. No. 9) be, and the same hereby is, GRANTED as to Count II for cardinal change/abandonment of contract; and Count II of the

complaint for cardinal change/abandonment of contract be, the same hereby is, DISMISSED; and it is further

ORDERED that Defendant's Motion to Dismiss (Doc. No. 9) be, and the same hereby is, DENIED without prejudice as to Count V for quantum meruit.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
April 15, 2011

2011 SESSION

CHAPTER 573

*An Act to amend and reenact § **2.2-4317** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **2.2-4308.2**, relating to the Virginia Public Procurement Act; verification of eligibility for employment in the United States.*

[H 1859]
Approved March 25, 2011

Be it enacted by the General Assembly of Virginia:

1. That § **2.2-4317** of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered **2.2-4308.2** as follows:

*§ **2.2-4308.2**. Registration and use of federal employment eligibility verification program required; debarment.*

*A. For purposes of this section, "E-Verify program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. **104-208**), Division C, Title IV, § 403(a), as amended, operated by the U.S. Department of Homeland Security, or a successor work authorization program designated by the U.S. Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees under the Immigration Reform and Control Act of 1986 (P.L. **99-603**).*

B. Any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of $50,000 with any agency of the Commonwealth to perform work or provide services pursuant to such contract shall register and participate in the E-Verify program to verify information and work authorization of its newly hired employees performing work pursuant to such public contract.

C. Any such employer who fails to comply with the provisions of subsection B shall be debarred from contracting with any agency of the Commonwealth for a period up to one year. Such debarment shall cease upon the employer's registration and participation in the E-Verify program.

§ **2.2-4317**. Prequalification generally; prequalification for construction.

A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

B. Any prequalification of prospective contractors for construction by a public body shall be pursuant to a prequalification process for construction projects adopted by the public body. The process shall be consistent with the provisions of this section.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § **2.2-4342**.

In all instances in which the public body requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

At least ~~thirty~~ *30* days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the public body shall advise in writing each contractor who submitted an application

whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by a public body denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § **2.2-4357**.

C. A public body may deny prequalification to any contractor only if the public body finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ **2.2-4367** et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ **18.2-498.1** et seq.), (iii) Chapter 4.2 (§ **59.1-68.6** et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the public body in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection.

D. If a public body has a prequalification ordinance that provides for minority participation in municipal construction contracts, that public body may also deny prequalification based on minority participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

E. *A state public body shall deny prequalification to any contractor who fails to register and participate in the E-Verify program as required by § 2.2-4308.2.*

F. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let under § **33.1-12**.

2. That the provisions of this act shall become effective on December 1, 2013.

2011 SESSION

CHAPTER 789

*An Act to amend and reenact §§ **2.2-1839**, **2.2-4336**, and **2.2-4337** of the Code of Virginia, relating to the Virginia Public Procurement Act; bid, performance, and payment bonds.*

[H 1951]

Approved April 6, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ **2.2-1839**, **2.2-4336**, and **2.2-4337** of the Code of Virginia are amended and reenacted as follows:

§ **2.2-1839**. Risk management plans administered by the Department of the Treasury's Risk Management Division for political subdivisions, constitutional officers, etc.

A. The Division shall establish one or more risk management plans specifying the terms and conditions for coverage, subject to the approval of the Governor, and which plans may be purchased insurance, self-insurance or a combination of self-insurance and purchased insurance to provide protection against liability imposed by law for damages and against incidental medical payments resulting from any claim made against any county, city or town; authority, board, or commission; sanitation, soil and water, planning or other district; public service corporation owned, operated or controlled by a locality or local government authority; constitutional officer; state court-appointed attorney; any attorney for any claim arising out of the provision of pro bono legal services for custody and visitation to an eligible indigent person under a program approved by the Supreme Court of Virginia or the Virginia State Bar; any receiver for an attorney's practice appointed under § **54.1-3900.01** or **54.1-3936**; affiliate or foundation of a state department, agency or institution; any clinic that is organized in whole or primarily for the delivery of health care services without charge; volunteer drivers for any nonprofit organization providing transportation for persons who are elderly, disabled, or indigent to medical treatment and services, provided the volunteer driver has successfully completed training approved by the Division; any local chapter or program of the Meals on Wheels Association of America or any area agency on aging, providing meal and nutritional services to persons who are elderly, homebound, or disabled, and volunteer drivers for such entities who have successfully completed training approved by the Division; any individual serving as a guardian or limited guardian as defined in § **37.2-1000** for any consumer of a community services board or behavioral health authority or any patient or resident of a state facility operated by the Department of Behavioral Health and Developmental Services; *for nontransportation-related state construction contracts less than $500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317;* or the officers, agents or employees of any of the foregoing for acts or omissions of any nature while in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.

For the purposes of this section, "delivery of health care services without charge" shall be deemed to include the delivery of dental, medical or other health services when a reasonable minimum fee is charged to cover administrative costs.

For purposes of this section, a sheriff or deputy sheriff shall be considered to be acting in the scope of employment or authorization when performing any law-enforcement-related services authorized by the sheriff, and coverage for such service by the Division shall not be subject to any prior notification to or authorization by the Division.

B. Participation in the risk management plan shall be voluntary and shall be approved by the participant's respective governing body or by the State Compensation Board in the case of constitutional officers, by the office of the Executive Secretary of the Virginia Supreme Court in the case of state court-appointed attorneys, including attorneys appointed to serve as receivers under § **54.1-3900.01** or **54.1-3936**, or attorneys under Virginia Supreme Court or Virginia State Bar approved programs, by the Commissioner of the Department of Behavioral Health and Developmental Services for any individual serving as a guardian or limited guardian for any patient or resident of a state facility operated by such Department or by the executive director of a community services board or behavioral health authority for any individual serving as a guardian or limited guardian for a consumer of such board or authority, and by the Division. Upon such approval, the Division shall assume sole responsibility for plan management, compliance, or removal. The Virginia Supreme Court shall pay the cost for coverage of eligible persons performing services in approved programs of the Virginia Supreme Court or the Virginia State Bar. The Department of Behavioral Health and Developmental Services shall be responsible for paying the cost of coverage for eligible persons

performing services as a guardian or limited guardian for any patient or resident of a state facility operated by the Department. The applicable community services board or behavioral health authority shall be responsible for paying the cost of coverage for eligible persons performing services as a guardian or limited guardian for consumers of such board or authority.

C. The Division shall provide for the legal defense of participating entities and shall reserve the right to settle or defend claims presented under the plan. All prejudgment settlements shall be approved in advance by the Division.

D. The risk management plan established pursuant to this section shall provide for the establishment of a trust fund for the payment of claims covered under such plan. The funds shall be invested in the manner provided in § **2.2-1806** and interest shall be added to the fund as earned.

The trust fund shall also provide for payment of legal defense costs, actuarial costs, administrative costs, contractual costs and all other expenses related to the administration of such plan.

E. The Division shall, in its sole discretion, set the premium and administrative cost to be paid to it for providing a risk management plan established pursuant to this section. The premiums and administrative costs set by the Division shall be payable in the amounts at the time and in the manner that the Division in its sole discretion shall require. The premiums and administrative costs need not be uniform among participants, but shall be set so as to best ensure the financial stability of the plan.

F. Notwithstanding any provision to the contrary, a sheriff's department of any city or county, or a regional jail shall not be precluded from securing excess liability insurance coverage beyond the coverage provided by the Division pursuant to this section.

§ **2.2-4336**. Bid bonds.

A. Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of ~~$100,000~~ *$500,000* or transportation-related projects authorized under § **33.1-12** that are in excess of $250,000 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

B. *For nontransportation-related construction contracts in excess of $100,000 but less than $500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317.*

C. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

~~C.~~ *D.* Nothing in this section shall preclude a public body from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than ~~$100,000~~ *$500,000* for nontransportation-related projects or $250,000 for transportation-related projects authorized under § **33.1-12** and partially or wholly funded by the Commonwealth.

§ **2.2-4337**. Performance and payment bonds.

A. Upon the award of any (i) public construction contract exceeding ~~$100,000~~ *$500,000* awarded to any prime contractor; (ii) construction contract exceeding ~~$100,000~~ *$500,000* awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned or leased by a public body; (iii) construction contract exceeding ~~$100,000~~ *$500,000* in which the performance of labor or the furnishing of materials will be paid with public funds; or (iv) transportation-related projects exceeding $250,000 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the public body the following bonds:

1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under § **33.1-12**, such bond shall be in a form and amount satisfactory to the public body.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in

furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under § **33.1-12** and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the public body.

"Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. *For nontransportation-related construction contracts in excess of $100,000 but less than $500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317.*

C. Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.

~~C.~~ *D.* If the public body is the Commonwealth, or any agency or institution thereof, the bonds shall be payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds required for the contracts of other public bodies shall be payable to such public body.

~~D.~~ *E.* Each of the bonds shall be filed with the public body that awarded the contract, or a designated office or official thereof.

~~E.~~ *F.* Nothing in this section shall preclude a public body from requiring payment or performance bonds for construction contracts below ~~$100,000~~ *$500,000* for nontransportation-related projects or $250,000 for transportation-related projects authorized under § **33.1-12** and partially or wholly funded by the Commonwealth.

~~F.~~ *G.* Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

2. That, on or before December 31, 2012, the Secretary of Administration shall report to the chairs of the House Committee on General Laws and the Senate Committee on General Laws and Technology on the efficacy of the program for nontransportation-related construction projects established pursuant to this act.