NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 9, 2021

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Re: *Kashish Parikh-Chopra vs. Strategic Management Services, LLC,*
Case No. CL 2021-0003051

Dear Counsel,

The parties presented an issue of first impression addressing the statutory prerequisite to the filing of a discrimination lawsuit in a Virginia state court. The issue presented is whether a plaintiff who files a discrimination lawsuit under the Virginia Human Rights Act ("VHRA") - Va. Code § 2.2-3905 – must include as a part of her pleadings a copy of the administrative complaint she files with the Virginia Attorney General's Office of Civil Rights of the Department of Law.

Background

Plaintiff Kashish Parikh-Chopra ("Chopra") filed a two-count complaint against Defendant Strategic Management Services, LLC ("SMS"). In Count One, Chopra alleges that SMS violated the VHRA by discriminating against her in the terms and conditions of employment because of her national origin (South Asian/Indian). In Count Two, she alleges SMS violated the VHRA a

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second time by retaliating against her after she complained of discriminatory treatment in the workplace.

In response, SMS filed a motion craving oyer, demurrer and plea-in-bar. SMS argues that including the prior the contents of the administrative complaint is necessary for the court to consider the demurrer fully and fairly. SMS explains that the court must consider the content in the prior administrative complaint because discrimination lawsuits are limited to the allegations presented at the administrative level. SMS presented persuasive, but non-binding, decisions from the United States Court of Appeals for the Fourth Circuit in support of this principle.[1]

For purposes of this decision, the court accepts the argument that claims asserted in the lawsuit must first have been alleged before the proper administrative agency as a precondition to bringing the same claims in court.

Prior to filing the lawsuit, Chopra had filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), a federal agency, under Title VII. She also filed a charge of discrimination with the Virginia Attorney General's Office of Civil Rights.

SMS motion for craving oyer sought the production of only the EEOC complaint. SMS explained that it did not know that Chopra filed a separate complaint with the Office of Civil Rights before it filed its motion for craving oyer, demurrer and plea-in-bar and that is why the motion to crave oyer sought only the EEOC charges. Notably, the complaint alleges that Chopra had filed a complaint with the state agency although identified as the "Virginia Division of Human Rights". ¶ 15 of the Complaint.

Preliminary, the EEOC complaint is dispensed with as irrelevant to this action. EEOC complaints are pursued under federal law. A plaintiff who exhausts her administrative appeals in the EEOC is entitled to bring a lawsuit in federal court. The Virginia statutory scheme does not recognize the exhaustion of a complaint before a federal agency as a precondition to bringing a civil action in a Virginia state court.

Instead, Va. Code § 2.2-3907 provides, in pertinent parts, that:

> (A) Any person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint in writing under affirmation with the Office of Civil Rights of the Department of Law (the Office). The Office itself or the Attorney General may in a like manner file such a complaint. The complaint shall be in such detail

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[1] *See, Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 306 (4th Cir. 2019)(when claims in [a] court complaint are broader than 'the allegation of a discrete act or act in [the] administrative charge,' they are procedurally barred."; *Chacko v. Patuxent Inst.*, 429 F.3d 505, 506 (4th Cir. 2005)("a plaintiff fails to exhaust his administrative remedies where [his] administrative charges reference different time frames, actors, and discriminatory conduct than the central factual allegations in his formal suit.")

as to substantially apprise any party properly concerned as to the time, place, and facts surrounding the alleged unlawful discrimination.

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(E) If the report on a charge of discrimination concludes there is no reasonable cause to believe the alleged unlawful discrimination has been committed, the charge shall be dismissed and the complainant shall be given notice of his right to commence a civil action.

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(H) Upon receipt of a written request from the complainant, the Office shall promptly issue a notice of the right to file a civil action to the complainant after (i) 180 days have passed from the date the complaint was filed or (ii) the Office determines that it will be unable to complete its investigation within 180 days from the date the complaint was filed.

It is only when a complainant's administrative remedies have been exhausted under Va. Code § 2.2-3907 before a state agency that a lawsuit can filed following the issuance of a notice of the right to file a civil action. The critical procedural fact is receipt of the notice of a right to sue.

Va. Code § 2.2-3908 expressly states that:

A. An aggrieved person who has been provided a notice of his right to file a civil action pursuant to § 2.2-3907 may commence a timely civil action in an appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully discriminated against such person in violation of this chapter.

Virginia law does not recognize the exhaustion of administrative remedies with the EEOC as a precondition to filing a discrimination lawsuit in state court under Va. Code § 2.2-3908. Consequently, SMS's argument that ". . . a plaintiff must exhaust his or her administrative remedies prior to filing an action in circuit court by submitting a charge of discrimination to the Virginia Attorney General's Office of Civil Rights or the United States Equal Employment Opportunity Commission . . " is only half correct.

Proceedings before the EEOC are irrelevant to this court. SMS conflates the federal statute – 42 U.S.C. § 2000e-5 – authorizing the filing of administrative proceedings before either the EEOC or a state or local government authority with the limited procedures recognized under Virginia law. Only the presentment of claims and the exhaustion of the administrative remedies before the Virginia Attorney General's Office of Civil Rights satisfy the prerequisite to filing a discrimination lawsuit in Virginia's state courts.

At the hearing, SMS orally amended its motion to crave oyer by asking for the state administrative complaint to be craved oyer and made a part of the record.

For judicial economy, the oral motion to amend the motion to crave oyer is granted and the relevant document for this civil action, the administrative complaint filed with the Virginia Attorney General's Office of the Civil Rights will be considered and addressed below.

Motion Craving Oyer

A motion craving oyer seeks to incorporate and make a part of the complaint the document sued upon, or a collateral document that forms the basis of Plaintiff's claims. *See*, *Burton v. F .R. Seifert & Co.*,108 Va. 338, 350 (1908) and 14B Michie's Jurisprudence, *Profert and Oyer,* §§ 1–5.

In *Byrne v. City of Alexandria,* 298 Va. 694, 700-01 (2020), the Virginia Supreme Court resolved a conflict between some circuit courts that limited motions to crave oyer to deeds and letters of probate and administration and other circuit courts that granted a more expansive production of documents. The question presented in *Byrne* was whether the trial court had erred when it granted a motion to crave oyer the entirety of a legislative record.

In *Byrne,* a homeowner had contended that the Board of Architectural Review and the City Council acted "arbitrarily, capriciously, and contrary to the law" in applying a particular zoning ordinance. The homeowner appealed the trial court decision to crave oyer the entire legislative record of that ordinance when deciding a demurrer. The Virginia Supreme Court affirmed the trial court's decision and took the opportunity to explain that the language in *Langhorne v. Richmond Ry. Co.,* 91 Va. 369, 372 (1895) limiting documents subject to a motion to crave oyer to deeds and letters of probate was purely dictum. *Id.* at 700.

The *Byrne* decision confirmed the controlling principles announced in *Culpeper National Bank v. Morris,* 168 Va. 379, 382-83 (1937) that a document or set of documents may be subject to a motion to crave oyer if the trial court is required to consider those documents in order to render an intelligent decision on demurrer.

Guided by *Byrne,* in considering whether the motion to crave oyer should be granted, the court considers the cause of action and responsive pleadings and decides whether certain documents are necessary to support the initial pleadings while other documents are merely discoverable but equally useful beyond the initial responsive pleadings. SMS argues that the contents of the administrative complaint is necessary for the court to decide the demurrer filed in response to Chopra's complaint.

Standards of a Demurrer

The purpose of a demurrer is to test the legal sufficiency of a pleading with respect to whether a cause of action has been stated. *See RECP IV WG Land Investors, LLC v. Capital One Bank, USA, NA,* 295 Va. 268, 279 (2018). A demurrer admits the truth of material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the alleged facts. A demurrer must be sustained if a complaint fails to state a cause of action upon which relief can be granted. *See Dunn, McCormack & MacPherson v. Connolly,* 281 Va. 553, 557 (2011).

The issue of whether the Plaintiff has satisfied a condition precedent prior to filing the lawsuit or has committed a procedural default differs from the issue of whether a cause of action has been sufficiently stated under properly pled facts. There is a material legal distinction between the complaint's failure to state a cause of action and the bar against commencing a lawsuit until certain preconditions are met.

A demurrer does not consider whether Chopra exhausted her administrative remedies. A demurrer challenges the sufficiency of her claims of discrimination and retaliation taking all facts alleged and fair inferences from those allegations in the light most favorable to the complaint. A procedural default does not affect the merits of a claim of discrimination, it simply precludes the plaintiff from suing on a claim that had not been previously disclosed.

Although SMS did not concede but accepted as true only for purposes of the motion to crave oyer that Chopra was issued the notice of a right to sue, the unrefuted fact pled in the complaint was that Chopra had received the right to sue notice. The receipt of the right to sue notice standing alone is a sufficient allegation of Chopra's exhaustion of her administrative remedies and satisfaction of the statutory prerequisite to filing a lawsuit. *See Wojcicki v. Aiken Tech. College*, 360 Fed. Appx. 484, 488 (4th Cir. 2010) (issuance of a Right to Sue Notice is evidence the plaintiff exhausted administrative remedies).

Virginia civil procedure does not require either the allegations or attachment of documents sufficient to prove that condition precedents have been satisfied. The absence of such allegations or proof does not omit an essential element of the pleadings and unlike Rule 8(a)(1) of the Federal Rules of Civil Procedure, Virginia pleadings do not have to plead the jurisdiction of the court.

Under Virginia civil procedure, questions of jurisdiction, standing or a procedural default are addressed by pleadings other than a demurrer. For example, the failure to meet a precondition to the commencement of a lawsuit may be addressed by a plea-in-bar. *See, Bragg Hill Corporation v. City of Fredericksburg,* 297 Va. 566, 576 (2019)(failure to exhaust administrative remedies challenged by special plea); *Primov v. Serco, Inc.,* 296 Va. 59 (2018)(failure to comply with condition precedent requiring mediation before filing a lawsuit challenged by a plea-in-bar). There are, however, also limits to the use of pleas-in-bar.

Standards of a Plea-in-Bar

A plea in bar asserts a single issue, that, if proved, creates a bar to the action and plaintiff's right of recovery. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008). The bar is to the plaintiff's right of recovery even if a wrong has been adequately shown. *Tomlin v. McKenzie,* 251 Va. 478, 480 (1996). The plea-in-bar is appropriate when an action or claim is opposed and not portions of an action.

As explained in *Nelms v. Nelms,* 236 Va. 281, 289 (1988)(quoting E. Meade, Lile's Equity Pleading and Practice, § 199, p. 114 (3d ed. 1952)):

> [f]amiliar illustrations of the use of a plea would be: [t]he statute of limitations; absence of proper parties (where this does not appear from the

> bill itself); *res judicata;* usuary; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; **denial of an essential jurisdictional fact alleged in the bill,** etc. (emphasis added).

Therefore, whether Chopra exhausted her administrative remedies prior to filing her lawsuit is relevant under a plea-in-bar but only if SMS seeks to have the entire complaint or an entire count dismissed. Whether Chopra may be later barred from presenting certain evidence or arguments touching upon the means and methods of discrimination and retaliation claims not previously disclosed do not bar her complaint or claims unless the omitted means and methods are the sole support of those claims.

Here, SMS did not argue that the contents of the administrative complaint are necessary for this court to consider whether to bar the complaint in its entirety or any of the two counts of the complaint. Therefore, the contents of Chopra's administrative complaint are unnecessary to enable the court to consider a plea-in-bar fully and fairly.[2]

Conclusion

Upon consideration of the pleadings and arguments presented, Chopra's argument is persuasive as applied to the motion to crave oyer of the Virginia administrative complaint and the court concludes that (1) Plaintiff's administrative filing will not assist the Court in deciding Defendant's Demurrer to her state law claims; (2) the contents of the Virginia administrative filing, as opposed to receipt of the notice of the right to sue, is not mentioned in the Complaint, and thus, the contents are not a proper subject of oyer; (3) Defendant improperly seeks oyer of the administrative record in support of an affirmative defense (or a defense akin to an affirmative defense) that should also be raised by a plea-in-bar and not demurrer; and (4) the cases Defendant cited are inapposite.

For reasons as stated, Defendant Strategic Management Services, LLC's motion craving oyer the administrative complaint filed with the Virginia Attorney General's Office of Civil Rights is DENIED. A separate order will be entered adopting and incorporating this letter decision into the order.

Sincerely,

[redacted]

John M. Tran
Judge, Fairfax Circuit Court

[2] The Supreme Court of the United States recently held in *Fort Bend County, Texas v. Davis,* 139 S.Ct. 1843, 1850 (2019) that the failure to exhaust administrative remedies before pursuing a discrimination lawsuit in federal court is not jurisdictional and a pre-filing prerequisite can be waived in the absence of timely objection.

V I R G I N I A:

IN THE FAIRFAX CIRCUIT COURT

KASHISH PARIKH CHOPRA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 2021-0003051**
	)	
STRATEGIC MANAGEMENT SERVICES LLC,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION CRAVING OYER

THIS MATTER came before the Court on December 3, 2021 upon Defendant's Motion Craving Oyer.

FOR REASONS STATED set forth in the letter opinion, dated December 9, 2021, adopted and incorporated as part of this Order, the Defendant's Motion Craving Oyer is DENIED.

The Clerk of the Court will kindly send a copy of this decision to all counsel of record.

AND IT IS SO ORDERED.

ENTERED this 9th day of December, 2021.

[redacted]

JUDGE, Fairfax Circuit Court

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court dispenses with the endorsement of this Orde