Docket #0043 Date Filed: 5/16/2025

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

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| IN RE: | Case No. 24-90377 |
| | Chapter 11 |
| ZACHRY HOLDINGS, INC., et al., | |
| Debtors. | |
| | Adv. No. 25-03025 |
| ZACHRY HOLDINGS, INC., | |
| Plaintiff, | |
| v. | |
| | 515 Rusk Street |
| OMAHA PUBLIC POWER DISTRICT, | Houston, TX 77002 |
| Defendant. | Monday, May 12, 2025 |
| | 2:29 p.m. |

TRANSCRIPT OF DEFENDANT OMAHA PUBLIC POWER DISTRICT'S VERIFIED EMERGENCY MOTION FOR CONTINUANCE OF THE REORGANIZED DEBTORS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LIQUIDATED DAMAGES [39]
BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES CONTINUED.

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TELEPHONIC APPEARANCES (Continued):

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| For the Plaintiff: | Hicks Thomas LLP<br>By: JOHN DEIS, ESQ.<br>700 Louisiana Street, Suite 2300<br>Houston, TX 77002<br>(713) 547-9100 |
| For the Defendant: | Foley & Lardner LLP<br>By: MICHAEL THOMAS, ESQ.<br>THOMAS SCANNELL, ESQ.<br>2021 McKinney Avenue, Suite 1600<br>Dallas, TX 75201<br>(214) 999-4667 |

(Proceedings commence at 2:29 p.m.)

THE COURT: All right. We're here in adversary proceeding 25-3025, Zachry Holdings Inc. v. Omaha Public Power District. If you're in court and wish to appear, please come forward to the podium and make your appearance. If you're on the phone, please press "five star" if you wish to speak at today's hearing.

MR. DEIS: Your Honor, John Deis from Hicks Thomas, appearing as special counsel for the reorganized debtors.

THE COURT: Thank you, Mr. Deis.

From (214) 999-4734.

MR. THOMAS: Good afternoon, Your Honor. Michael Thomas and Tom Scannell on behalf of OPPD.

THE COURT: Good morning, or good afternoon. I think it's your --

MR. THOMAS: I'm sorry, I may have said morning.

THE COURT: I think it's your motion, Mr. Thomas.

MR. THOMAS: Thank you, Your Honor. Your Honor, this is a breach of contract case. We are here because Zachry agreed to build two half-a-billion-dollar power plants in Omaha, Nebraska, and guaranteed to complete that work by a date certain, in December 2024. Zachry is in breach of that contract, and now Zachry is trying to preemptively litigate this case in reverse by starting with damages and trying to work its way backwards. Before the Court has ruled on the

pending motions to transfer, before the Court -- before OPPD has filed an answer, before OPPD has set forth its own breach of contract claim for which this is an affirmative defense to, before any discovery and before Zachry's own expert can be challenged and deposed, Zachry is asking this Court to rule that the liquidated damages clause and the scope of liability is unenforceable as a matter of law.

Zachry's motion contravenes the structure of cases as outlined by the Federal Rules of Civil Procedure and undermines procedural due process, and it should be continued so that discovery can take place, OPPD can file its answer -- well, the Court can rule on its' -- on the pending motions, and if the Court keeps the case after the pending motions are heard, OPPD can file its answer and counterclaims and defenses to this affirmative defense.

Your Honor, this falls squarely within Rule 56(d), which says that a non-movement [sic] is entitled to a continuance where discovery is needed to oppose the summary judgment.

Now, during conferral, we learned this afternoon that Zachry believes that there was somehow an agreement between us that its summary judgment can go forward. But at the hearing on the status conference, Your Honor, we stated that we didn't know what we don't know, and that we would respond to the motion, but the facts are constantly shifting because these two

power plants aren't even complete as of today. As of today, damages are still accruing. That is why OPPD has yet to file its lawsuit, because the scope of its harm isn't even established as of right now.

And more importantly, Your Honor, you, yourself, said when Zachry proposed that it would file a summary judgment, you yourself said that one of the things that may happen in response is a Rule 56(d) motion, which is why we're here today on continuance.

Your Honor, this motion is premature. Factual -- facts need to be developed, and you need to look no further than the expert's own report. In the expert's report, in Footnote 54, in Paragraph 52, in Paragraph 53, in Paragraph 60, Footnote 63, Paragraph 68, Paragraph 71, Paragraph 72, and Paragraph 86, the expert, time and time again, says that if she had additional facts, her opinion might change, and she reserves the right. For example, she says, "Such transactions would be available in OPPD's workbook submitted to SPP to confirm that it has sufficient capacity resources." She doesn't have that because discovery hasn't taken place. She says, "Ideally, I would be able to review the projections that OPPD performed to understand the anticipated net revenue for ancillary services.: She doesn't have that, Your Honor, because discovery hasn't taken place. She makes comments like this throughout her report. This report would have to be

struck under Daubert because the expert doesn't have all the information she needs to even offer the opinions that she offers.

Your Honor, motion targets --

THE COURT: So, Mr. Thomas, one of the things we did at the last hearing was, although we didn't compel discovery, we did allow voluntary discovery. Did you request any voluntary discovery by the debtors that they refused to provide to you?

MR. THOMAS: Your Honor, no. And the primary reason why we didn't engage in voluntary discovery was because we have pending Rule 12 motions before you. By subjecting ourselves to the jurisdiction of the Court, we risk waiving those motions. And so those motions have to be ruled upon before we can voluntarily or involuntarily respond. In fairness, Zachry did request voluntary discovery. We declined because of the pending Rule 12 motions. But we would risk waiving our challenge (indiscernible) the case.

THE COURT: I don't quite understand this. This all starts when y'all filed an application for an administrative claim here before us.

MR. THOMAS: Right, Your Honor.

THE COURT: No reservation of rights, other than you might want to assert more. But, I mean, you filed an outright application for an administrative claim. How can you do that

but say that you can't try your administrative claim here when you filed it here?

MR. THOMAS: Because the contracts govern, Your Honor. And you'll see in our Rule 12 motion --

THE COURT: I got -- I understand your contract's argument. You filed the claim here, right?

MR. THOMAS: Yes, Your Honor. And you yourself have dealt with a similar issue. I don't have the case cite before me. But when a contract has a venue selection clause like the one here, in a similar case, Your Honor, you compelled the case to be transferred up to Southern District of New York. And so the Southern District of New York has a rule on the case and the adversary proceeding, and it said -- we sent back down for handling of the bankruptcy proceeding. So the Court has dealt with something very similar to this, which is teed up in our current motion to transfer.

THE COURT: Where someone asked for an admin claim and it wouldn't determine their allowance of their admin claim?

MR. THOMAS: No, Your Honor. When there was an adversary proceeding that had to be decided, meaning this breach of contract and the affirmative defenses, you transferred that case up to the Southern District of New York and had that adversary proceeding ruled upon before it was sent back down to you to be dealt with as part of the admin process.

THE COURT: Yeah, I'm just trying to figure out when

a party files an application for an administrative claim before me and asks me to rule on it, but now you won't do discovery on that. I'm puzzled by that.

Mr. Scannell, you wanted to add to that?

MR. SCANNELL: Yes, Your Honor. Just a brief correction. The adversary case was actually filed before the administrative expense application was filed. It was filed simply out of compulsion of the upcoming confirmation hearing as a point of just not waiving a right to seek administrative expense priority or any liability if and when it's determined. That's why it was filed when it was filed. But, indeed, this adversary was filed before the administrative expense application.

THE COURT: I know, but before the discovery was requested, you filed your request for an admin claim. I don't understand how you can request an admin claim. I got it that they can't compel discovery, but you're telling me that you might waive something by doing discovery, but you filed an admin claim before us. It just -- it's a puzzling timeline to think that there might be a waiver for you to cooperate in discovery.

MR. SCANNELL: Well, I think -- so the stipulation that's been ordered by Your Honor in the bankruptcy case is exactly on this point. So you've got the placeholder administrative expense application that's on file. There's a

pin in that. If and when any liability is determined on behalf of Zachry, then the administrative expense application would resume for purposes of determining what priority, if any, that claim has. The litigation itself -- the liquidation of Zachry's liability should happen in Nebraska. That's why the stipulation was done, so that that determination of the merits can be had in the appropriate court.

And what I believe Mr. Thomas is getting at here is that we don't want to take too much fact discovery by de facto padding the file to, by default, deny the motion to transfer the venue because, well, look at all the discovery that's already been conducted, we might as well just keep it here.

THE COURT: Yeah, but --

MR. SCANNELL: That's what we were trying to avoid.

THE COURT: -- I guess my concern is your motion today is a 56(d) motion that says that you need discovery in order to proceed with their summary judgment, which is set for still, what, three weeks from now. But where they offered you discovery and you would not offer them discovery, I'm not sure what to do with the 56(d), because it's like you're unilaterally now creating a situation where you can't respond when you could have, and you could have gotten the data. And I'm puzzled by why we're here without some attempt to get to discovery. It may very well be that you need this extension, but you filed this on an emergency basis. You set it on two or

three days' notice, but no attempt by y'all to get or give discovery is a puzzling event in light especially of the fact that you're seeking an admin claim here.

MR. SCANNELL: Well, to be clear, Your Honor, we are seeking a continuance of a summary judgment on whether or not a liquidated damages clause is enforceable under Nebraska law. And what that claim requires is for the Court to analyze issues such as what was the forecast, what did the parties reasonably anticipate as of the time that they negotiated the agreement. That's an fact-intensive issue that has to be developed. Whether or not the actual damages are proportional to the liquidated damages. Your Honor, that's an issue that is continuing to develop because the plants haven't been delivered, and the damages continue to accrue on a daily basis. So you're being asked to weigh whether or not this is proportional, but we don't even know what the end result is going to be on the actual damages because that hasn't been set yet.

Your --

THE COURT: So it's not that you need more discovery. Your summary judgment is premature, period. You don't need discovery to tell me the project isn't ended.

MR. SCANNELL: I think it's --

THE COURT: You know the project isn't ended. Your argument to me is you need discovery. That 56(d) says you need

discovery, right?

MR. SCANNELL: Right. It's a continuance that the summary judgment is premature. I would agree with you that we need discovery, and that discovery should take place in the appropriate court. But, Your Honor, I would also say that the summary judgment in and of itself is premature. The size and scope of these projects you have to remember, Your Honor, they're -- the debtor -- excuse me, Zachry's themselves designated 28 different witnesses. There is a substantial amount of discovery that would have to take place, and doing it on a ten-day notice effectively from the time they teed up their summary judgment to the time you'd have to respond to it, that's a deprivation of due -- procedural due process as well, Your Honor. The discovery that has to take place isn't just, hey, I need four or five documents in order to respond to your summary judgment. It is the heart of the case that they seek summary judgment on, because if the liquidated damages clause prevails, then it sets what the damages are in this case. If it doesn't prevail, then we have a whole host of other issues we have to deal with, like actual damages.

But it's premature, not only from a discovery standpoint, but from a procedural standpoint, too, because, as we noted, the projects aren't done, and you don't even have a full set of pleadings before you, Your Honor. You don't have our answer and our counterplay to which this is an affirmative

defense to. So the very posture in which this case is being presented to the Court is premature.

And so we -- now, if the case was, Your Honor, that we had a summary judgment issue, like we had a minor enter into a contract, and the guy was a minor at the time of contracting, that's a really simple, straightforward legal issue that you wouldn't need to engage in substantial discovery on. What does the birth certificate say? Was he under the age of 18 at the time of contracting? I can rule that the contract's void.

That's not what's before you, Your Honor. What's before you is an expert report. Experts are designed to help the fact-finder. Experts, that's their whole point, is to have the fact-finder decide factual issues. The fact that they put an expert report before you shows that there are factual issues the Court's going to have to wrestle with. But the factual narrative, the factual record has to be fully developed. Even if we were to take the Court at its word and we should try to develop it, there wouldn't be enough time between now and June 2nd to do that.

So I would argue discovery is necessary. The Court must -- or the Court should let this case proceed as the federal rules contemplate, that there would be an answer, a counterclaim, discovery, and then summary judgment. And then once the factual record is fully developed, the Court can rule with the benefit of knowing that it has the complete record

before it.

THE COURT: All right. Let me hear a response, Mr. Deis.

MR. DEIS: Good afternoon, Your Honor. John Deis. We still haven't heard why there is an emergency. I would direct the Court to the hearing and the transcript where we came up with this process that they agreed to. On Page 10, starting at Line 16, Your Honor sets forth a proposed schedule in which, and I quote, "If you did that by the 28th," meaning filing a summary judgment in Zachry, then they would have, if my calendar is right, until March 19th, or I'm sorry, until the 19th of May to file their response, which would indicate, I'm assuming, a 54(g) in-part response. I think you were referring to Rule 56 there, Your Honor.

THE COURT: I was.

MR. DEIS: And so the idea is that by May 19th, they would respond to our motion for summary judgment and raise these issues, the issues contemplated by (d) of Rule 56 and (g), because they work hand in hand, and then Your Honor would evaluate what to do with the case. And what was interesting is on Page 11, after Mr. Scannell introduced himself on Line 10, Mr. Scannell says, what Your Honor is proposing is what OPPD would support. What we're seeking is a traditional scheduling order that may be entered after the motions have been decided because we'll know where we are. We'll know where we're going

to be, which direction this case is going. And so we don't see any emergency reason to deviate from that path. Also, I would direct, Your Honor, to Page 8 and 9, where you explicitly discuss --

THE COURT: Just for any appellate record, we're looking at a transcript filed in the main case at ECF 2759.

Go ahead.

MR. DEIS: Yes, Your Honor, I apologize.

THE COURT: That's okay. Just want people to follow along.

MR. DEIS: Now, on Page 8, what Your Honor said at Line 14 is that we're all going to be speculating about what these factual disputes are until it's joined. And that's what we understand -- we understood would happen on May 19th. They would join the factual issues, sort the wheat from the chaff, say this is disputed, this is undisputed, as contemplated under Rule 56. Then on Page 9, starting at Line 7 to 9, you say, "In the meantime, you -- being Zachry -- "can be filing. I wouldn't prevent you from filing your motion for summary judgment, make them answer it."

And so it's clear what we were expecting on the 19th is a joinder of issues where they answer our motion, and then on June 2nd, Your Honor decides what to do with it based upon what the pleadings say. This is exactly the process that they agreed to, and that's what we think needs to take place. If

they think they've got a Rule 56(d) issue, they can raise it. I'm not sure that what they filed meets that, but that's for consideration and discussion on June 2nd.

And so they haven't come up with anything new. They just don't like what they agreed to before, Your Honor. That's our position.

And then on the issue of the experts, I think it's very clear from both the transcript where Mr. Zakia was talking about the motion and the expert's declaration that we think they probably went out and mitigated their damages. They went out and bought electricity to cover the capacity for this peak demand that these plants were contemplating to meet. And so if we had that, it would probably be a very cut-through, easy question to analyze. But our experts said, you know, you can actually project that. And yeah, if they give me what their actual mitigation was and when and what they bought to cover, it might be less than this. It might be a little more. But in any event, the economic realities of how the market worked are what she testified to, and she had to estimate some of it. And some of that wouldn't need to be estimated had they produced what we asked for voluntarily, but that's within their right to say no, I guess. And I do find it interesting that the discovery they say needs to take place is what we asked for, which is what they did to mitigate their harm because we think that they actually did. And that's where the whole issue with

the reservation of rights by our expert took place.

THE COURT: All right. Mr. Thomas.

MR. THOMAS: Yes, Your Honor. I would highlight a few things. I'd ask the Court if we're going to look at the record to look at Page 15, in which it says Mr. Koster, but I believe that's the typo. It's supposed to be Mr. Scannell. He says, "Thank you. That early date in June works for us. I would be remiss if I didn't at least mention to the Court that it's a bit of a moving target here because both of these projects are still ongoing. So whatever discovery we're doing, it's likely going to change. It's going to be hard to pin down because this whole dispute really centers on the cause of delay of the project that are still ongoing. So material facts that are relevant to really the heart of this dispute are still developing each day."

I don't read that as us saying we will stipulate that we are waiving our ability to move under 56(d) for a continuance. 56(d) is a motion for continuance, and that's what's before the Court.

I would also highlight that they don't really challenge the fact that the factual record they put before this court is underdeveloped. What they ask the Court to do is accept an expert witness's speculation as to what a mitigation number would be when counsel has just conceded that that information is discoverable and can be obtained. And so they

want you to go about -- first of all, Your Honor, an expert opinion in the context of a summary judgment when you are trying to decide issues as a matter of law is improper because experts are there to assist a fact-finder, not the Court. But be that as it may, counsel has already conceded that what he's asking you to do is to rule based on expert speculation, not based on facts that he can discover in discovery when the case is fully ripe for discovery.

And so, again, we would ask that this Court not try this case in reverse like Zachry is asking you to do. Let the case develop as the federal rules contemplate. Rule 12 motions are ruled upon. The transfer motions are ruled upon. If the Court denies those motions for the issues you've raised, then the Court would order us at that point to assert our answer and any counterclaims. The Court would need that to know what claims it's ruling upon because this is an affirmative defense to our breach of contract claim, a claim that's not even fully ripe yet because the damages continue to accrue.

For these reasons, Your Honor, we would ask --

THE COURT: I thought we dealt with those issues, though, and set those hearings for June 2nd, right?

MR. THOMAS: That's right. You're going to decide the Rule 12 motions on June 2nd, Your Honor.

THE COURT: So why do we have an emergency today that didn't exist when we had the last hearing? What's the new

emergency?

MR. THOMAS: Because today, now that we -- I apologize for interrupting, Your Honor. Because today we actually know what the summary judgment is that they are asking the court to rule upon, a very fact-intensive summary judgment as opposed to, like, a straightforward legal issue like the hypothetical I gave you before. If there's a straightforward legal issue that the court could rule upon and just say, yes, this contract is void because a minor entered into it, and as a matter of law, we don't let minors enter into contracts, then that would potentially narrow the issues and put the issue right before the court. That's not what you have before you, Your Honor. You have a very fact-intensive summary judgment that's going to require a very factual-intensive discovery effort to respond to, and anything that we provide is going to be not fully developed, just like Zachry's expert's opinion is not fully developed because she doesn't even have all the discovery she needs to fully form that opinion.

THE COURT: All right. Thank you. I'm denying emergency relief. I don't, frankly, know why we're here. There have not been -- the only changes that have occurred from what we did before is that Omaha has made a decision, which is just fine with me, not to do voluntary discovery, and therefore they say there are facts that aren't available and learned. That's an emergency they created, and I'm not going to let them

create an emergency and then come and get relief from it.

The argument that it is a complex factual question on facts not yet developed, you know what? Ninety-nine times out of 100, that's the reason why people lose motions for summary judgment. That's simply an argument that Omaha's going to win, not that we need to terminate things or change anything.

I don't see it. I'm going to leave in place what we did. I don't see a reason to change it. I'm definitely not changing it when the defendant has been offered discovery, has been offered to solve the problem, and has chosen for its own strategic and tactical reasons, which are, again, fine with me. I'm not even a little bit upset about that. I gave them those rights. They're using those rights, but you can't use those rights and then complain that you're using them. I don't think I have an emergency. I'm simply not taking this up today.

It gets taken up, as we had previously said, on June 2nd. So emergency relief is denied. Thank you.

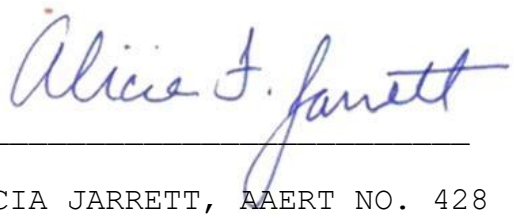
We're in recess.

(Proceedings concluded at 2:57 p.m.)

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**C E R T I F I C A T I O N**

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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ALICIA JARRETT, AAERT NO. 428 DATE: May 15, 2025

ACCESS TRANSCRIPTS, LLC

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF TEXAS**

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| In Re: | Zachry Holdings, Inc. and Statutory Unsecured Claimholders' Committee<br>Debtor | Case No.: 24−90377<br><br>Chapter: 11 |

Zachry Holdings, Inc.,
Plaintiff(s),
vs.
Omaha Public Power District,
Defendant(s).

Adversary No.: 25−03025

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Nathan Ochsner
Clerk of Court