UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 2, 2015

CBCA 2621

JOSEPH GRASSER t/a GRASSER LOGGING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joseph L. Luciana III of Dingess, Foster, Luciana, Davidson & Chleboski LLP, Pittsburgh, PA, counsel for Appellant.

Vincent Vukelich, Office of the General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman),[1] **GOODMAN**, and **KULLBERG**.

DANIELS, Board Judge.

Joseph Grasser t/a Grasser Logging (Grasser) entered into a timber sale contract with the United States Forest Service (FS), an entity within the Department of Agriculture. Grasser claims that it is entitled to a rate redetermination under the contract or monetary damages under common law in an amount of either $1,021,815 or $1,651,357 because of the

[1] The previous presiding judge has been replaced on the panel because of her upcoming retirement.

defective condition of some of the timber (black cherry trees) which was to be cut. A FS contracting officer denied the claim, and Grasser appealed his decision.

In its complaint, Grasser pleads four separate counts as justification for relief. Each of them is based on the fact that the black cherry trees suffered from insect damage. In count I, Grasser says that this damage was an unexpected event which entitles the contractor to a rate adjustment under contract clause BT8.12. In count II, Grasser asserts that the damage was catastrophic, entitling the contractor to a rate adjustment under contract clause BT3.32. In count III, Grasser maintains that "both parties expected that the black cherry saw timber . . . would produce a reasonable percentage of high-grade logs for resale," and that the insect damage was a "hidden condition" which entitles the contractor to a rate adjustment. In count IV, Grasser contends that the FS misrepresented the condition of the timber by failing to disclose its "institutional knowledge" of the damage, and that the misrepresentation "materially and wrongfully induced Appellant to submit his bid and enter into the contract." (Grasser recognizes that counts III and IV are alternative bases for relief; both cannot be correct.)

Earlier this year, we denied a motion for summary relief submitted by Grasser on the issue of catastrophic damage to black cherry trees. *Joseph Grasser v. Department of Agriculture*, CBCA 2621, 15-1 BCA ¶ 35,896. The FS now moves for summary relief in the entire case, relying on the same uncontested facts and much of the same reasoning we expressed in denying Grasser's motion. In ruling on the FS's motion, we incorporate by reference the "Background" section of our earlier decision and note certain portions of that section which are especially pertinent to our analysis.

The FS advertisement of the sale estimated that in the designated area, 3003 hundred cubic feet (CCF) of timber would be available for cutting and that the value of that timber would be $931,743.58. Of the six species for which estimates were provided, the one with the greatest quantity and value was black cherry sawtimber (an estimated 1357 CCF, which at a rate of $654.31 per CCF, would be worth $887,898.67).

The FS's invitation for bids included a clause entitled "Disclaimer of Estimates and Bidder's Warranty of Inspection." This clause stated:

> Before submitting this bid, the Bidder is advised and cautioned to inspect the sale area, review the requirements of the sample sale contract, and take other steps as may be reasonably necessary to ascertain the location, estimated volumes, construction estimates, and operating costs of the offered timber or forest product. Failure to do so will not relieve the Bidder from responsibility for completing the contract.

> The Bidder warrants that this bid/offer is submitted solely on the basis of its examination and inspection of the quality and quantity of the timber or forest product offered for sale and is based solely on its opinion of the value thereof and its costs of recovery, without any reliance on Forest Service estimates of timber or forest product quality, quantity or costs of recovery. Bidder further acknowledges that the Forest Service: (i) expressly disclaims any warranty of fitness of timber or forest product for any purpose; (ii) offers this timber or forest product as is without any warranty of quality (merchantability) or quantity and (iii) expressly disclaims any warranty as to the quantity or quality of timber or forest product sold except as may be expressly warranted in the sample contract.[2]
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> The Bidder further holds the Forest Service harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.

Grasser submitted a bid in the amount of $1,310,519.90, predicated in part on a rate of $940.07 per CCF for black cherry timber – nearly 44% higher than the FS's estimate for the stated volume. Grasser believed that it could maximize its profit by selling black cherry as veneer and export logs. The parties entered into their contract on December 3, 2008.

Grasser cut approximately two-thirds of the trees in the designated area and says that it has received total revenue of about $950,000, of which $921,026.28 was from black cherry trees. After initial sales, the contractor was unable to sell the black cherry timber as veneer and export logs. The contractor asserts that defoliation rings – the result of insect infestation – caused kiln-dried lumber to separate, making the timber unacceptable to customers as veneer or export logs. In its opposition to the FS's motion, Grasser says that it "has incurred or will incur a loss of at least $650,000" on the contract. Appellant's Statement of Genuine Issues ¶ 23.

The FS relies heavily on the Disclaimer of Estimates and Bidder's Warranty of Inspection in advancing its motion. The agency notes that the disclaimer required Grasser to warrant that its bid was submitted solely on the basis of its own opinion and provided that the FS disclaimed various warranties of fitness, quality, or quantity of the timber. The FS notes that with regard to issues regarding volume estimates, this Disclaimer has been held to be "explicit and unambiguous," and that "[r]eliance by the purchaser on the . . . estimates

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[2] Neither party has referenced the sample contract, so we assume that it does not contain any statements which are relevant to the matter before us.

in pricing its bid is not reasonable." *Lance Logging Co., Inc.*, AGBCA 98-137-1, et al., 01-1 BCA ¶ 31,356, at 154,847-48, *aff'd sub nom. Lance Logging Co. v. Veneman*, 30 F. App'x 908 (Fed. Cir. 2002); *see also Cochran Lumber Co. v. Department of Agriculture*, CBCA 895, 09-2 BCA ¶ 34,154. The FS suggests that "[a]ll of the allegations contained in the complaint filed by Grasser . . . , and all of the legal theories put forth in the response to the [FS] Motion are based on ignoring the contract which governs in this case." Respondent's Reply at 2.

The FS addresses in its motion each of the four counts in Grasser's complaint. Count I implicates contract clause BT8.12, "Liability for Loss." This provision states in pertinent part:

> If Included Timber is destroyed or damaged by an unexpected event that significantly changes the nature of Included Timber, such as fire, wind, flood, insects, disease, or similar cause, the party holding title shall bear the timber value loss resulting from such destruction or damage; except that such losses caused by insect or disease after felling of timber shall be borne by Purchaser, unless Purchaser is prevented from removing such timber for reasons that would qualify for Contract Term Adjustment.

The FS points out that the Court of Federal Claims has held that "clause B8.12 merely sets out the common-law principle that the party holding title bears the risk of loss" and applies "after the contract of sale is entered into." *Trinity River Lumber Co. v. United States*, 66 Fed. Cl. 98, 113 (2005) (regarding a slightly different version of BT8.12). The nature of the included timber was not changed after the contract was entered into, the FS asserts, because the black cherry was advertised as sawtimber and was sold by Grasser as sawtimber. The FS also maintains that Grasser's interpretation of the phrase "unexpected event" is unreasonable because it would qualify, under the liability for loss provision, any event occurring over the lifetime of the growth period of trees.

Count II of the complaint makes an argument similar to the one made in count I, except with reference to contract clause BT3.32. This clause requires the contracting officer to adjust contract rates in the event of catastrophic damage. Such damage is defined in clause BT2.133, which we addressed in our decision on Grasser's motion for summary relief. Catastrophic damage is a "major change or damage to Included Timber" which meets two requirements. It must be (a) "[c]aused by forces, or a combination of forces, beyond control of Purchaser, occurring within a 12-month period, including, but not limited to, wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon" and (b) "[a]ffecting the value of any trees or products meeting Utilization Standards, within Sale Area and estimated to total either: (i) More than half of the estimated timber quantity stated

in AT2 [the volume estimates] or (ii) More than two hundred thousand cubic feet (2,000 CCF) or equivalent." We held in our earlier decision that this provision cannot apply here because the timber alleged to have been damaged by forest pest epidemic did not meet the test of element (b) – the black cherry timber was less than half of the estimated timber quantity (1357 CCF is less than half of 3003 CCF) and less than 2000 CCF. Further, the FS contends, any insect damage occurred over a period of three decades, not "within a 12-month period," so the damage is not "catastrophic" under the test of element (a), either.

Count III asserts a mutual mistake. *Cochran Lumber* explains that:

> The elements of mutual mistake of fact that would, if proven, allow for relief include: (1) the parties to the contract were mistaken in their belief regarding an existing fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of mistake on the party seeking reformation.

09-2 BCA at 168,837 (quoting *CH2M Hill Hanford Group, Inc. v. Department of Energy*, CBCA 708, 08-2 BCA ¶ 33,871, at 167,666 (citing *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994))). The FS notes that in *Cochran*, the Board held that "[w]here the FS makes clear throughout the contract that it is not warranting [an] estimate and that the purchaser was assuming risks, even if the estimate was in error, appellant is unable to establish a mutual mistake of fact." *Id.*

Count IV alleges misrepresentation. The FS cites to *Joseph M. Hutchison v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,341, for the proposition that "[t]o constitute misrepresentation the Government had to represent as true certain elements which it knew were false." The FS says that with regard to this timber sale, it did not represent as true anything which it knew was false.

Grasser opposes the motion strenuously. It maintains that the disclaimer which the FS believes is key to resolution of this case does not apply because the contractor is claiming that the black cherry timber was damaged. Grasser contends further that granting summary relief to the FS is premature because the contractor has not yet had an opportunity to complete discovery by taking the deposition testimony of three current or former representatives of the agency. In this regard, it calls to our attention this passage from *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993) (quotations and citations omitted):

> The Supreme Court has made clear that summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery. Indeed, summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.

Grasser also posits that summary relief is inappropriate because genuine issues of material fact exist as to various issues. These issues are, at a minimum:

> (1) the black cherry trees in the Re-Ad Timber Sale [the sale with which we are concerned] suffered (and were continuing to suffer) catastrophic damage; (2) the [FS] failed to disclose the material fact that the black cherry trees had suffered (and were continuing to suffer) damage due to defoliation rings resulting from multiple past defoliation events caused by forest pest epidemic; (3) the [FS] misrepresented the minimum price of the black cherry saw timber in the Re-Ad Timber Sale; (4) the [FS] gave an express warranty that the black cherry timber was not damaged, was "high value" and could be sold at higher-than-market price; or, (6) alternatively, the [FS] and Grasser were mutually mistaken regarding the fact that black cherry trees were not damaged.

Appellant's Brief in Opposition at 2-3.[3]

Discussion

As we noted in our decision on Grasser's motion for summary relief:

> Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

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[3] Later in its opposition, Grasser says that "there are genuine disputes of material fact on the issues of: (1) defoliation rings in black cherry trees constitute 'damage,' not internal defects; (2) damage occurred to the black cherry trees during a 12-month period; and (3) damage to the entire 'estimated quantity' of black cherry trees in the Timber Sale Contract satisfies the definition of catastrophic damage." Opposition at 12.

Grasser, 15-1 BCA at 175,485.

In considering the FS's motion, we address the four counts of Grasser's complaint in reverse order.

Count IV asserts that the FS misrepresented the condition of the timber. According to Grasser, the FS knew from its own records and research, and the fact that it had conducted three salvage sales in the same general area, that the black cherry trees in the sale area "had suffered multiple defoliation events caused by forest pest epidemic." Opposition at 1. The FS did not disclose this information, Grasser says, "but, instead, advertised black cherry trees as a green sale with above-average minimum. In fact, the [FS] further affirmatively represented those black cherry trees as 'high value.'" *Id.* The contractor says further that "the words and conduct of the [FS] created an express warranty to Grasser that the black cherry timber was not damaged, was 'high value' and could be sold for higher than market price." *Id.* at 24.

The "high value" assertion evidently derives from two facts. First, five months prior to advertising this sale, the FS had advertised an identical sale with an estimated value for black cherry timber of nearly twice the amount posited for the sale at issue in this case. Second, the estimated value for the black cherry timber for the sale in question was slightly above the average market price at the time. Grasser says that "when the [FS] reduced the minimum price for the black cherry in the [sale in question] to an amount that was closer, but still higher than, average market price, Grasser submitted a bid in reliance upon the representation that the black cherry trees were of high value." Opposition at 6.

We do not find any misrepresentation here. The FS provided prospective bidders (including Grasser) with estimates of the quantity and value of timber in the sale area – nothing more. Grasser does not complain about the quantity estimate. As to the value estimate for black cherry timber, the timber was worth somewhat more than the FS had projected, despite the insect damage.[4] In any event, Grasser warranted that its bid was

[4] Grasser devotes a great deal of attention, in a lengthy exhibit to its Opposition, to the argument that in estimating the value of the black cherry timber, the FS did not follow its own guidelines or act consistently with the way in which it estimated the value of timber in other sale areas. This matter is important, the contractor says, because the procedures used by the FS to establish market value "constituted an affirmative misrepresentation of the minimum price of timber in the . . . Sale." Opposition at 24. The agency's failure to follow its procedures is the one matter which the contractor says it needs depositions to explore. *Id.*
(continued...)

"submitted solely on the basis of its examination and inspection of the quality and quantity of the timber . . . offered for sale and [was] based solely on its opinion of the value thereof and its costs of recovery, without any reliance on [FS] estimates." The FS expressly disclaimed any warranty of quality, quantity, or fitness of the timber. Grasser extrapolated from various facts to come to its own conclusions about the value of the black cherry timber. Those conclusions may have been overly optimistic, resulting in a business decision which the contractor now regrets – but that is not the FS's fault. The Government does not guarantee the value of timber products. Nor does it guarantee a contractor's profits in timber sales or other contracts. *Hearthstone, Inc. v. Department of Agriculture*, CBCA 3725, 15-1 BCA ¶ 35,895, at 175,481 (quoting *Natus Corp. v. United States*, 371 F.2d 450, 458 (Ct. Cl. 1967)).

Count III of the complaint, alleging mutual mistake, fails for similar reasons. In attempting to justify this count and fit within the legal standards for claims of mutual mistake, Grasser makes assertions which we consider unfounded. *See* Opposition at 25-26. Given the disclaimer language, the Board cannot conclude that the FS knew or believed that the black cherry timber was "high value timber that could be sold at higher-than-market price, particularly as veneer and export logs" – the FS knew that Grasser had this belief, but it never indicated any concurrence in the thought. Thus, saying, as the contractor does, that both parties were mistaken in this belief is not correct.[5] Further, the contract put the risk of mistake on the contractor, not the FS. The FS's citation to our statement in *Cochran* applies

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[4] (...continued)
Whether Grasser's contention about failure to follow procedures is true or not is irrelevant to our resolution of this case; even if it is true, that does not affect the outcome. The FS expressly made no representation; under the Disclaimer of Estimates clause, the risk that the ultimate value of the timber might be less than estimated was assumed by the contractor. Further, even if the FS estimate of the value of the black cherry timber could be deemed a representation on which a contractor might rely, this estimate was lower than the actual value of the timber, so it cannot have constituted a misrepresentation which prejudiced Grasser. Given these conclusions, any information which could be derived from depositions would not be "information that is essential to [the contractor's] opposition," *Burnside-Ott*, 985 F.2d at 1582, so ruling on the motion for summary relief without affording the contractor the opportunity to take depositions is not precluded.

[5] The contractor strains credulity with another argument as to this point. It says that the insect damage "rendered the black cherry of little or no value." Opposition at 27. By its own admission, the contractor derived from selling the black cherry timber it cut under this contract nearly one million dollars – more than the FS had estimated. That value cannot conceivably be considered "little or no."

to the situation here: "Where the FS makes clear throughout the contract that it is not warranting [an] estimate and that the purchaser was assuming risks, even if the estimate was in error, appellant is unable to establish a mutual mistake of fact." 09-2 at 168,837.

In Count II, Grasser maintains that the black cherry timber suffered catastrophic damage, such that a change in the contract's rate of payment is required. To constitute "catastrophic damage," as that term is defined in contract clause BT2.133, damage must meet two separate tests. In our earlier decision in this case, we determined that the second of these tests, which we labeled (b), could not be met because the allegedly damaged timber was insufficient in volume. Grasser disagrees with this conclusion and asks us to revisit it. The first requirement for timber to have been the subject of catastrophic damage, which we labeled (a), is that it must have been "[c]aused by forces, or a combination of forces, beyond control of Purchaser, occurring within a 12-month period, including, but not limited to, wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon." Grasser raises two points regarding this requirement. First, it suggests that the term "within a 12-month period" is ambiguous, so reading it to mean "a 12-month period during the life of the contract" is unreasonable; the ambiguity should be construed against its drafter, the FS. Second, says Grasser, we should follow the decision in *Don Dwyer Development Co.*, AGBCA 2000-107-1, 02-2 BCA ¶ 31,980, and hold that insect damage that is progressive and occurs after (as well as before) a timber sale contract is entered into constitutes catastrophic damage.

We decline to revisit our conclusion as to requirement (b). Grasser did not timely ask us to reconsider it, *see* Board Rule 26(c) (48 CFR 6101.26(c) (2014)), and it advances no arguments on the matter which are different from the contentions it made earlier. We do not agree with either of Grasser's arguments as to requirement (a). We discuss the first here and the second with regard to count I, below. A contract provision which is not patently ambiguous may be construed against the drafter under the rule of contra proferentem.

> The essential ingredients of the rule are: (1) that the contract specifications were drawn by the Government; (2) that language was used therein which is susceptible of more than one interpretation; (3) that the intention of the parties does not otherwise appear; and (4) that the contractor *actually and reasonably construed the specifications* in accordance with one of the meanings of which the language was susceptible.

HPI/GSA-3C, LLC v. Perry, 364 F.3d 1327, 1334 (Fed. Cir. 2004) (quoting *W. Contracting Corp. v. United States*, 144 Ct. Cl. 318, 326 (1958) and adding emphasis). Grasser does not meet the last part of this test. It argues in its Opposition that "a defoliating event is necessarily an event that occurs 'within a 12-month period' because the defoliation only

occurs during the leaf growing season, which is always less than 12-months in the . . . location of the Sale Area." Opposition at 16. This interpretation is not reasonable. It essentially reads the twelve-month period requirement out of the contract clause, for if defoliation can only occur during such a period, any major damage by insects at any time would be catastrophic. Even if, as Grasser suggests, the FS could be better served by stating in the clause when the twelve-month period can begin (or end), the agency has not made the argument the contractor poses as a straw man. Documentation Grasser has appended to its Opposition makes clear that sources which were publicly available prior to the FS's advertisement of this sale noted and discussed insect damage in the area of the sale as occurring since the 1980s and extensively in the 1990s. Whenever the twelve-month period might be construed to run, it is clear that the insect damage to the black cherry trees in the sale area has a far lengthier history than any particular twelve-month period. Thus, even if we were wrong in concluding that the damage cannot be deemed "catastrophic" under the volume test ((b)), the damage is not "catastrophic" under the other test ((a)).

Count I fares no better than count II. Here, we are asked to focus on clause BT8.12's statement that with a specified exception, "[i]f Included Timber is destroyed or damaged by an unexpected event that significantly changes the nature of Included Timber, such as . . . insects, . . . the party holding title shall bear the timber value loss resulting from such destruction or damage." *Don Dwyer* discussed the application of a clause like BT8.12 at length. It concluded that the clause in Dwyer's contract did not preclude a finding that insect damage (blue stain, there) which began before the contract period and continued into that period justified a rate adjustment. In *Dwyer*, the FS argued that the damage had to be unexpected to qualify, but the board held that because the clause did not contain the word "unexpected," the agency's reading was not persuasive. 02-2 BCA at 158,042-43. The board noted, "[I]f the FS wants to put the risk of loss for expected insect and disease deterioration on the purchaser . . . , it can insert language in its future contracts to do that." *Id.* at 158,044-45. That is exactly what the FS has done here: it has inserted the word "unexpected" into the clause. Because the extensiveness and long duration of insect damage was known (at least through the published documents cited in a study included in the exhibit to Grasser's Opposition), finding that damage during the contract period cannot be considered unexpected. *Dwyer* is consequently not controlling.

Decision

We conclude that while there are clearly disputes between the parties as to the matters raised in Grasser's complaint, there are no genuine issues of material fact which prevent our resolving any of these disputes on the Forest Service's motion for summary relief. The issues

advanced by Grasser concern matters of law and issues which are irrelevant to the case. We grant the motion, thereby **DENYING THE APPEAL**.

STEPHEN M. DANIELS
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

H. CHUCK KULLBERG
Board Judge