



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR RECONSIDERATION DENIED: April 4, 2022

CBCA 5272-R

UNITED FACILITY SERVICES CORPORATION  
dba EASTCO BUILDING SERVICES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William Weisberg of Law Offices of William Weisberg PLLC, McLean, VA, counsel for Appellant.

Brett A. Pisciotta and Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **SHERIDAN**, and **ZISCHKAU**.

**LESTER**, Board Judge.

Appellant, United Facilities Services Corporation doing business as Eastco Building Services (Eastco), requests that we reconsider our decision dated February 16, 2022, dismissing this appeal for failure to prosecute. As the basis for its request, Eastco once again cites difficulties arising from the COVID-19 pandemic for its failure to respond to interrogatories that respondent, the General Services Administration (GSA), served on May 6, 2021. Eastco, however, again provides no specific details about the reasons for its inability to respond, either fully or partially, to interrogatories that were served eleven months ago and does not mention its failure to respond to the Board's prior show cause

order. Merely citing the word “COVID,” without more, does not provide a basis for excusing a failure to respond to discovery or to the Board’s orders. In our decision dismissing this appeal, we criticized Eastco’s failure to provide any details about its efforts to respond to the interrogatories or to explain the reasons that COVID-19 rendered its employees unable to respond either in whole or in part. Because Eastco continues to provide no such information in its request for reconsideration, Eastco’s request is denied.

### Discussion

The Board is sensitive to the impact that the COVID-19 pandemic has had and continues to have on litigants and attorneys, and it has granted extensive accommodations to parties when justified. Those accommodations are evident in this case from the chronology of events identified in the decision that Eastco is asking us to reconsider.

In its request for reconsideration, Eastco’s counsel again tells us that COVID-19 has created “significant challenges” for Eastco, Appellant’s Request for Reconsideration (Mar. 18, 2022) at 2, but, like in its response to GSA’s motion to dismiss, Eastco provides no details about how the pandemic precluded Eastco from responding to interrogatories. Eastco’s counsel represents that Eastco “is a critical, front-line business” with “a workforce that was among the hardest hit by COVID” and that staffing and supply chain issues “literally consumed all of the small management staff’s time and attention,” *id.*, but provides no declarations from Eastco employees or more detailed explanations in support. In our prior show cause order, dated December 1, 2021 (to which Eastco never responded), we directed Eastco to detail its efforts to attempt to develop responses to the interrogatories, and, even now, Eastco provides no explanation.

“[S]imply say[ing] the word ‘COVID-19’ [is not], in and of itself, . . . justification to excuse delays and dereliction without providing any support.” *Martinez v. Costco Wholesale Corp.*, 336 F.R.D. 183, 188 (S.D. Cal. 2020). “While the effects of the COVID-19 pandemic could conceivably present extraordinary circumstances,” a party cannot excuse its delays in meeting its litigation obligations “simply by making a passing reference to the pandemic or the resulting lockdown.” *Hines v. United States*, No. 17-CR-364-2, 2021 WL 2456679, at \*2 (S.D.N.Y. June 16, 2021) (citation omitted); *see Curran v. Bernhardt*, No. 5:20-CV-05009-JLV, 2022 WL 93671, at \*6 (D.S.D. Jan. 10, 2022) (“While the court understands the challenges posed by the COVID-19 pandemic, it is no excuse to delay any sort of [discovery] response for nine months.”); *Adriaenssens v. Jimenez*, No. A-3744-20, 2022 WL 533314, at \*3 (N.J. Sup. Ct. Feb. 23, 2022) (“While challenging for the world and counsel, the pandemic and remote work was not, standing alone, an ongoing extraordinary circumstance sufficient to avoid statutory requirements” where “plaintiffs did not explain how circumstances from pandemic challenges created delay in the individual case.”).

If an appellant cannot meet discovery deadlines established by the Board's rules and orders, it has to request additional time and establish good cause for the request. Fed. R. Civ. P. 6(b). As the delays in this litigation became more and more extensive, and certainly as part of its request that we reconsider our dismissal of this appeal, the burden was on Eastco to provide detailed explanations establishing good cause in support of its need for more time and of its request to reinstate the appeal. *See, e.g., United States v. Reyes*, 307 F.3d 451, 456-57 (6th Cir. 2002) (finding post hoc explanation by party that it missed deadline established by court order "due to the press of other business and personal business" to be too vague to justify reinstatement of case); *Middle Market Financial Corp. v. Marino d'Orazio, Spiegel, Pergament, Brown, & Basso*, No. 96-CIV-8138, 1997 WL 442133, at \*1 (S.D.N.Y. Aug. 5, 1997) ("[A] vague, generalized statement simply does not establish good cause for an extension."). Eastco did not satisfy that obligation.

Some case law indicates that, if an appellant moves quickly to cure a deficiency that formed the basis of a dismissal for failure to prosecute, a tribunal could be more willing to give the appellant another chance and reinstate the appeal. *See Buck v. U.S. Department of Agriculture*, 960 F.2d 603, 609 (6th Cir. 1992). Here, though, Eastco still has not provided responses to GSA's interrogatories and has not identified any date by which it thinks it might respond. Eastco asks us to reinstate the appeal but with an open-ended period of time within which it might respond to the unanswered interrogatories, if ever. Eastco's failure to detail the reasons that it has not responded, to show that it is taking action to remedy that failure, and to set forth a realistic plan for responding to the unanswered interrogatories gives us no basis for reinstating the appeal.

Important to our decision to dismiss this appeal for failure to prosecute was that the only realistic alternative sanction – to deem all matters addressed in the unanswered interrogatories as decided adversely to Eastco – would mean that Eastco could not prevail on the merits of this appeal. As we recognized in our prior decision, were we to preclude Eastco from presenting evidence responsive or related to GSA's unanswered interrogatories, it would effectively preclude Eastco from proving that it was damaged by GSA's alleged breach, and "[t]he result would effectively be the same as a dismissal." *United Facility Services Corp. v. General Services Administration*, CBCA 5272, slip op. at 8-9 (Feb. 16, 2022); *see Puritan Associates v. United States*, 215 Ct. Cl. 976, 978 (1977) ("Even if . . . the assessment of damages is reserved for the quantum phase of the case, the plaintiff as part of its proof of entitlement, must show it was damaged to some extent, by defendant's derelictions . . ."). That fact weighs strongly against Eastco's current request to reinstate this appeal. *See Nieves v. Thorne*, 790 F. App'x 355, 358 (3d Cir. 2019) ("[T]he assessment of the [lack of] meritoriousness of [the plaintiff's] claims weighed heavily in favor of dismissal [for failure to prosecute].").

Decision

For the foregoing reasons, Eastco's request for reconsideration is **DENIED**.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.

Board Judge

We concur:

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

*Jonathan D. Zischkau*

JONATHAN D. ZISCHKAU

Board Judge