UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: September 22, 2022

CBCA 7374

GC COLUMBIA, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Wilhelm Dingler of Bullivant Houser Bailey PC, Seattle, WA, counsel for Appellant.

Kelly Y. Burnell, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **SHERIDAN**, and **KULLBERG**.

SHERIDAN, Board Judge.

Through this appeal, GC Columbia, LLC (Columbia or appellant), seeks to recover $722,860.53, plus interest, from the General Services Administration (GSA or respondent) for real estate tax payments. GSA moves to dismiss the appeal for failure to state a claim for which relief may be granted, alleging that Columbia failed to substantiate payment of the real estate tax payments within the contractually-required sixty-day period.

Background

GSA awarded lease GS-10B-06680 (dated December 2, 2004) to EOP Columbia Center, LLC, and the following four leases to Columbia Center Property, LLC—GS-10B-

07135 (dated April 27, 2010), GS-10B-07198 (dated August 6, 2010), GS-10P-LWA07471 (dated April 30, 2015), and GS-10P-LW08047 (dated August 30, 2013)—all five for space at Columbia Center, 701 Fifth Avenue, Seattle, Washington. Appeal File, Exhibits 1–5.[1]

The leases include clauses for payment of adjustments for changes in real estate taxes which require GSA to pay its share of increases and receive its share of decreases in real estate taxes for the Columbia Center Property. Each lease contained a tax adjustment clause that allowed the taxes to be adjusted annually, provided certain conditions were met.

The Tax Adjustment clauses were set forth at section 3.4 of contract GS-10B-00680, section 4.2 of contracts GS-10B-07135 and GS-10B-07198, and section 2.07 of contracts GS-10P-LWA07471 and GS-10P-LWA08047. Each lease contained language to the effect that, in order to obtain a tax adjustment, the lessor was required to furnish the contracting officer with copies of all paid tax receipts, or other similar evidence, and a proper invoice for the requested tax adjustment. Each lease also provided that all such documents must be received by the contracting officer within sixty calendar days after the last date the real estate tax payment is due from the lessor to the taxing authority without payment of penalty or interest. Lease GS-10B-06680 warned: "FAILURE TO SUBMIT THE PROPER INVOICE AND EVIDENCE OF PAYMENT WITHIN SUCH TIME FRAME SHALL BE A WAIVER OF THE RIGHT TO RECEIVE PAYMENT RESULTING FROM AN INCREASED TAX ADJUSTMENT UNDER THIS PARAGRAPH." Leases GS-10B-07135 and GS-10B-07198 advised: "FAILURE TO SUBMIT THE PROPER INVOICE AND EVIDENCE OF PAYMENT WITHIN SUCH TIME FRAME SHALL CONSTITUTE A WAIVER OF THE LESSOR'S RIGHT TO RECEIVE A TAX ADJUSTMENT PURSUANT TO THIS CLAUSE FOR THE TAX YEAR AFFECTED." Leases GS-10P-LWA07471 and GS-10P-LWA08047 cautioned: "FAILURE TO SUBMIT THE PROPER INVOICE AND EVIDENCE OF PAYMENT WITHIN SUCH TIME FRAME SHALL CONSTITUTE A WAIVER OF THE LESSOR'S RIGHT TO RECEIVE A TAX ADJUSTMENT PURSUANT TO THIS PARAGRAPH FOR THE TAX YEAR AFFECTED."

Leases GS-10B-06680, GS-10B-07135, and GS-10B-07198 each contained General Services Administration Acquisition Regulation (GSAR) 552.270-4, Definitions (SEP 1999), which sets forth several definitions, including a definition for excusable delay:

> (g) "Excusable Delays" means delays arising without the fault or negligence of Lessor and Lessor's subcontractors and suppliers at any tier, and shall include, without limitation:

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[1] All exhibits are in the appeal file unless otherwise noted.

> (1) acts of God or of the public enemy,
> (2) acts of the United States of America in either its sovereign or contractual capacity,
> (3) acts of another contractor in the performance of a contract with the Government,
> (4) fires,
> (5) floods,
> (6) epidemics,
> (7) quarantine restrictions,
> (8) strikes,
> (9) freight embargoes,
> (10) unusually severe weather, or
> (11) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Lessor and any such subcontractor or supplier.

48 CFR 552.270-4(g) (2014) (GSAR 552.270-4(g)); *see* Exhibits 1 at 65, 2 at 247, 3 at 428. These clauses, in pertinent part, are associated with GSAR 552.270-29, Acceptance of Space, which occurs after all alterations, improvements, and repairs needed to meet each lease are completed. Leases GS-10P-LWA07471 and GS-10P-LW08047 do not have terms defining excusable delay or contain other clauses explaining when an excusable delay clause might apply. Lease GS-10P-LW08047 contains clause 10, which addresses "Default by Lessor" and states which circumstances are not considered valid excuses for the lessor's failure timely to deliver the space, perform a service, provide an item, or satisfy any provision of the lease. Exhibit 4 at 558.

Columbia's real estate tax payment was due to King County Taxing Authority on October 31, 2020. The taxes were paid in full on October 20, 2020.

On March 31, 2021, Columbia, through its manager, Urban Renaissance Property Company, LLC, sent an email to GSA requesting payment of real estate tax adjustments, submitting the evidence of payment, and detailing the 2020 annual tax adjustments for each lease agreement, totaling $722,860.53. Complaint ¶¶ 5, 7; Exhibit 8. Columbia subsequently resubmitted its payment request to the GSA contracting officer as a certified claim. Exhibit 10. The contracting officer issued a final decision on April 11, 2022, denying the claim and stating that "[t]he contracting officer was not provided with a proper invoice and evidence of payment by the lessor within the time frame set forth in the lease. Failure to do so is deemed a waiver of the right to receive payment resulting from an increased tax adjustment under [the] clause, therefore the claim is denied." Exhibit 11 at 982.

Discussion

A motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369, 1373-74 (Fed. Cir. 2000). The Court of Appeals for the Federal Circuit has held that, "[i]n reviewing a dismissal for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Icenogle Construction Management, Inc.*, VABCA 7534, 06-2 BCA ¶ 33,325, at 165,271.

This Board and one of its predecessor boards, the General Services Board of Contract Appeals (GSBCA), have dismissed appeals involving a tax adjustment clause with language similar to that set forth in sections 3.4 and 4.2 of appellant's leases that "expressly warns that the contractor will lose rights if a submission is not made in the prescribed period of time," which "has been construed to contain a binding notice requirement that is strictly enforced." *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,934 (citing *Roger Parris v. General Services Administration*, GSBCA 15512, 01-2 BCA ¶ 31,629, at 156,259-60; *Riggs National Bank of Washington, D.C. v. General Services Administration*, GSBCA 14061, 97-1 BCA ¶ 28,920, at 144,179; *Universal Development Corp. v. General Services Administration*, GSBCA 12138(11520)-REIN, et al., 93-3 BCA ¶ 26,100, at 129,739-40).

The record shows that appellant failed to submit to GSA an invoice and documentation proving payment of excess real estate taxes within sixty calendar days of the date payment was due. Under the terms of the leases, Columbia was on notice as to the consequences of failing to submit a timely request for reimbursement of any payment of taxes in excess of the tax base. The consequence was that Columbia waived its right to receive payment resulting from an increased tax adjustment.

Columbia maintains that the clauses defining excusable delay in some of the leases provide for deviations from the leases' strict terms as they relate to reimbursement of real estate tax payments. The circumstances in which deviations are permitted, Columbia posits, include epidemics, quarantine restrictions, and delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the lessor and any such subcontractor or supplier.

The fact that the leases contain a clause defining events that may constitute excusable delays does not affect the time frames set forth in the leases for the submission of tax reimbursement requests. We know from the prescription associated with GSAR 552.270-29, Acceptance of Space, that excusable delays may relate to "alterations, improvements, and repairs needed to meet the lease." Except for clause 10, in lease GS-10P-LW08047 addressing "Default by Lessor (APR 2012)," however, there is no language in the leases indicating that there are other instances where excusable delays apply. Historically, excusable delays relate to contract performance and provide contractors relief from default where excusable delays are found to exist. Hence, under GSAR 552.270-29, a government lessee could not default a lessor if there were excusable delays associated with acceptance of the space. Here, we have no threat of default to which to apply the clause and therefore find the Excusable Delay clause's definition inapplicable to the circumstances relating to payment of tax adjustments. Having made this finding, we do not need to address appellant's argument that a "course of dealing" can be used to extend the clauses to the leases that do not contain the clauses.

Even had we found that the Excusable Delay clauses here related to the Real Estate Tax Payments clauses and may have applied to provide Columbia relief, there are also indications in this record that the lapse that occurred here was the fault of the lessor. A contract's excusable delay clause is not triggered where the contractor or subcontractor bears responsibility for the delay. *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1365 (Fed. Cir. 2008); *American Medical Equipment, Inc. v. United States*, 160 Fed. Cl. 344 (Fed. Cl. 2022), *appeal docketed*, No. 22-2194 (Fed. Cir. Sept. 8, 2022). The record shows no reason why Columbia could not provide to the GSA contracting officer in a timely fashion documentation proving that the real estate taxes had been paid. Indeed, Columbia paid its taxes on time, notwithstanding COVID. There is no indication that GSA would not have been able to accept the documentation. Columbia does not allege that GSA was closed for business because of COVID. Appellant made its own decision not to provide the documentation in a timely fashion, and that decision was not caused by COVID. We have stated recently that "[m]erely citing the word 'COVID,' without more, does not provide a basis for excusing a failure." *United Facility Services Corp. v. General Services Administration*, CBCA 5272, 22-1 BCA ¶ 38,090, at 184,977 (appellant sought to excuse its failure to respond to discovery and Board's order), *appeal docketed*, No. 22-1911 (Fed. Cir. June 17, 2022).

Columbia has failed to convince the Board that the clause defining excusable delay applied to its failure timely to submit evidence of real estate taxes payments or that COVID impacted its ability to submit the timely proof required to obtain an adjustment for real estate taxes. The language in the leases and long-standing case law make clear that if such evidence is not provided to the contracting officer in a timely fashion, rights to recover adjustments to real estate tax payments are waived.

Appellant made its own decision not to provide the documentation in a timely fashion. As such, Columbia is not without fault associated with its delay, and, even if we found the Excusable Delay clause applicable here, which we do not, relief would be denied.

Decision

GSA's motion to dismiss for failure to state a claim is granted, and the appeal is **DISMISSED FOR FAILURE TO STATE A CLAIM**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge