UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY JUDGMENT GRANTED IN PART:
February 16, 2024

CBCA 6558, 7079

RITA R. WADEL REVOCABLE LIVING TRUST AND 229 JEBAVY ROAD, LLC
dba LUDINGTON INDUSTRIES BUILDING,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Adam D. Bruski, John V. Byl, and Gaëtan Gerville-Réache of Warner Norcross + Judd LLP, Grand Rapids, MI, counsel for Appellant.

James Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **KULLBERG**, and **SULLIVAN**.

BEARDSLEY, Board Judge.

Pending before the Board are the parties' cross-motions for summary judgment. The appellant moves the Board to find that the General Services Administration (GSA) breached the covenant not to commit waste by contaminating the leased building and premises at 229 South Jebavy Drive in Ludington, Michigan, and as a result, owes the appellant damages for the cost of demolishing, rebuilding, and remediating the building and premises. The appellant also moves for judgment on its claim for holdover rent. GSA moves the Board to enter judgment finding that damages for waste are limited to the diminution in the fair market

value of the building and premises and that the appellant is unable to meet its burden to prove that the building and premises suffered any diminution in value attributable to contamination of the premises during the 2007 lease term. GSA also moves for judgment on appellant's claims for lost income and holdover rent. We grant the appellant's motion for summary judgment in part and GSA's motion for summary judgment in part. We find that GSA breached the covenant not to commit waste but that the damages are limited to the diminution in fair market value of the building and premises. We find that there is a genuine issue of material fact that precludes summary judgment on the issue of the amount of damages that the appellant will recover for waste, but we dismiss the appellant's lost income and holdover rent claims.

Background

On or about November 19, 2007, GSA entered into a ten-year lease (2007 lease) with The Rita R. Wadel Revocable Living Trust U/A 2/1/91 and the Bruce F. Wadel Trust No. 1 D/B/A Ludington Industries Building for the building and surrounding premises at 229 South Jebavy Drive in Ludington, Michigan. This 2007 lease was the last in a series of leases running from 1957 through 2018 by which GSA leased the building and premises for the use of the United States Fish and Wildlife Service (FWS). The 2007 lease was amended to extend through 2018. In 2006, the Bruce F. Wadel Trust No. 1's leasehold interest in the building was transferred to the Wadel Family Trust, and in 2009, the parties executed supplemental lease agreement no. 1 that replaced the Bruce F. Wadel Trust No. 1 with the Wadel Family Trust as lessor. In November 2018, two months before the lease expired, the Wadel Family Trust's interest in the building was transferred for trust reorganization purposes to 229 Jebavy Road, LLC. The members of 229 Jebavy Road, LLC are the surviving beneficiaries of the Wadel Family Trust.

Since 1957, FWS has operated the building and premises as a biological station to combat the infiltration of sea lamprey in the Great Lakes system. FWS stored drums of a piscicide in the warehouse portion of the building for application at breeding headwaters to kill lamprey larvae. The active ingredient in this piscicide is 3-triflouromethyl-4-nitrophenol (TFM or lampricide). At some point during the 1960s and 1970s, dates unknown, significant amounts of TFM leaked into the building and the surrounding grounds. There is testimony that the containers were replaced in the 1970s, ending the TFM release, but also speculation that the leakage continued through the 1980s and 1990s – until a separate storage facility was built to store the containers of TFM.

Investigations in 1984, 1993, 1994, and 2012 documented on-site TFM residue both inside and outside of the building. In 2017, the GSA-commissioned Environmental Cleanup Study Report (report) concluded that there was evidence of TFM in the concrete core samples, in the storage and handling areas of the premises, and in some portions of the office

area. TFM was also found in the soil and groundwater surrounding the building. The appellant asserts that even though it knew that there was contamination, it did not know the extent of the contamination until the report was issued in 2017. Despite being aware of the presence of TFM on the premises, no municipal, state, or federal authority has mandated any remediation of the premises.

The parties disagree as to whether the building and premises were contaminated with TFM during the 2007 lease term. GSA asserts that the contamination that occurred prior to the inception of the 2007 lease continued during the 2007 lease term but "affirmatively disputes that appellant[] ha[s] established that supplemental contamination occurred during" the 2007 lease term. GSA contends that even if supplemental contamination occurred, it was de minimis. The appellant's witnesses testified, when deposed, that the FWS employees continued to contaminate the building with TFM by tracking TFM into the building on their clothing and shoes and by cleaning vehicles, equipment, and protective gear in the building. Although the carpets in the building were replaced in 2007, there were traces of TFM found on the new carpet in 2017. Repeated efforts taken by the FWS to remove, contain, or otherwise render the TFM innocuous have been unsuccessful.

FWS evacuated its office staff from the building in January 2017 due to the dangers of exposure to TFM and began to only use the building for the storage of TFM. In December 2018, the Government ceased all use of the building. The appellant maintains that because of the TFM contamination in the building and surrounding land, it has been unable to rent the building or premises since the Government left. The appellant claims that the building and the premises are uninhabitable and unusable for any commercial purpose, and it has valued the premises at zero dollars for property tax purposes. GSA disputes these conclusions, noting, for example, that a Wadel family member stores a boat on the property and that the appellant has failed to engage a broker or real estate agent to market the building or premises. There is no indication that the appellant has made any effort since the 2007 lease expired to restore the property, treat the contamination, or mitigate the damage.

In 2017, FWS estimated a cost of $14,737,823 to demolish the existing building and parking lot ($595,556), remediate approximately three feet of soil underneath the building and parking lot ($4,393,172), and design and replace the existing facility and parking lot with one similar in size and scope ($9,749,095).

The appellant submitted its initial certified claim to the GSA contracting officer in March 2019. Rita R. Wadel Revocable Living Trust and 229 Jebavy Road, LLC (not the Wadel Family Trust) submitted the initial claim, and the trustee of each entity certified the claim. On July 9, 2019, the appellant appealed the deemed denial of the claim to the Board, which was docketed as CBCA 6558. The Board directed GSA to issue a final decision on the claim, and GSA issued a final decision on September 11, 2019, denying the claim in full.

The final decision was addressed to Rita R. Wadel Living Trust and 229 Jebavy Road, LLC and responded to the "claim in which Rita R. Wadel Living Trust and 229 Jebavy Road, LLC, dba Ludington Industries Building ('Lessor') seeks compensation." There was no mention in the final decision of the Wadel Family Trust or that 229 Jebavy Road, LLC was not the lessor.

On January 25, 2021, the appellant submitted a claim to GSA for holdover rent. Rita R. Wadel Revocable Living Trust and 229 Jebavy Road, LLC (not the Wadel Family Trust) also submitted this second claim, and the trustee of each entity certified the second claim as well. The holdover rent is an alternative theory of recovery to the lost income theory submitted in the initial claim. GSA denied the claim on March 10, 2021, and the appellant appealed the final decision to the Board, which was docketed as CBCA 7079. The final decision was addressed to Rita R. Wadel Living Trust and 229 Jebavy Road, LLC, and it also responded to the "claim in which Rita R. Wadel Living Trust and 229 Jebavy Road , LLC, dba Ludington Industries Building ('Lessor') seeks compensation." There was no mention in the final decision of the Wadel Family Trust nor did the final decision object to 229 Jebavy Road, LLC as the lessor. The Board consolidated the two appeals.

In the initial appeal, the appellant seeks $15,337,896.14 in damages. This damages calculation used the FWS's remediation and rebuilding estimates and applied adjustments for soil remediation and the age of the building as well as lost income due to the appellant's inability to use or rent the building. The appellant claimed holdover rent for two years,[1] beginning in 2019, in the amount of $834,118. GSA has provided an affidavit from a certified real estate appraiser to support a finding that the fair market value of the property in 2019, if uncontaminated, would be $570,000. The appellant has stated that it does not "currently have an opinion as to the fair market value of the premises."

Discussion

The summary judgment standard is well established. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* Rule 8(f) (48 CFR 6101.8(f) (2022)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[1] The appellant indicated that the holdover rent of $417,059 dollars per year would continue to accrue "as long as the Government remains in constructive possession of the Premises."

> "The fact that both parties have moved for summary judgment[,]" as in this appeal, "does not mean that the [Board] must grant judgment as a matter of law for one side or the other . . . ." *Mingus Constructors, Inc.* [*v. United States*], 812 F.2d [1387, 1391 (Fed. Cir. 1987)]. Rather, "each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered." *Marriott International Resorts, L.P. v. United States*, 586 F.3d 962, 968-69 (Fed. Cir. 2009).

Wu & Associates, Inc. v. General Services Administration, CBCA 6760, 21-1 BCA ¶ 37,965, at 184,383.

I. Standing – 229 Jebavy Road, LLC

A party must be in privity with the United States to have standing to sue the Federal Government under a contract claim. *See Southern California Federal Savings & Loan Assoc'n v. United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005). GSA contends that 229 Jebavy Road, LLC is not a party to the 2007 lease and, therefore, has no standing to pursue this appeal at the Board. However, "[s]tanding is determined at the time of commencement of an action." *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652, et al., 13 BCA ¶ 35,370, at 173,569 (citing *Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1334 (Fed. Cir. 2005)). In order for 229 Jebavy Road, LLC to have standing in this appeal, "the claims must have been validly assigned" to 229 Jebavy Road, LLC, and GSA "must have accepted the assignment, constructively or expressly by agreement, at the time of the appeal." *Id.* at 173,570.

GSA argues that the assignment of the Wadel Family Trust's interest in the lease to 229 Jebavy Road, LLC was invalid under the Anti-Assignment Act, 41 U.S.C. § 6305(a) (2018), and the Assignment of Claims Act, 31 U.S.C. § 3727. "The Acts serve two primary purposes – 'first, to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government; and second, to enable the United States to deal exclusively with the original claimant instead of several parties.'" *ATS Trans LLC v. Department of Veterans Affairs*, CBCA 7163, 22-1 BCA ¶ 38,151, at 185,291 (quoting *Johnson Controls World Services, Inc. v. United States*, 44 Fed. Cl. 334, 343 (1999)). When the "purposes [of the anti-assignment statutes] are not impinged, a transfer should be allowed to stand." *United International Investigative Services v. United States*, 26 Cl. Ct. 892, 898 (1992); *see Keydata Corp. v. United States*, 504 F.2d 1115, 1118-19 (Ct. Cl. 1974). Here, there is no risk of fraud or multiple litigants, and the purposes of the Acts are not impinged.

"Despite the bar created by these statutes, it has been held that the Government may recognize an assignment as valid, either directly or constructively, through its actions." *John*

Lewinger v. Department of Veterans Affairs, CBCA 4794, 16-1 BCA ¶ 36,413, at 177,545 (quoting *Summit Commerce Pointe, LLC*, 13 BCA at 173,569). The record indicates that the contracting officer in both final decisions, and without objection or mention of the Wadel Family Trust, recognized 229 Jebavy Road, LLC as one-half of the lessor. Thus, we find that an implied-in-fact novation occurred which effectively substituted 229 Jebavy Road, LLC for the Wadel Family Trust in the lease. "It is well established . . . that even in situations where there has not been a formal novation, the Government may still recognize validly a successor in interest to the original contractor." *Broadlake Partners*, GSBCA 10713, 92-1 BCA ¶ 24,699, at 123,270-71 (1991) (citing *Albert Ginsberg*, GSBCA 9911, 91-2 BCA ¶ 23,784, at 119,127).

The transfer was also valid by operation of law, exempting the assignment from the Anti-Assignment Acts' application. *ATS Trans LLC*, 22-1 BCA at 185,292 (citing *Westinghouse Electric Co. v. United States*, 56 Fed. Cl. 564, 569 (2003), *aff'd*, 97 F. App'x 931 (Fed. Cir. 2004); *Lewinger*). Transfers by operation of law occur when "the contract continues with the same entity, but in a different form," *Westinghouse Electric Co.*, 56 Fed. Cl. at 569, such as "the passage of claims to heirs and devisees" or "transfers by the succession of one business entity for another." *Keydata Corp.*, 504 F.2d at 1118 (citing *Erwin v. United States*, 97 U.S. 392, 397 (1878); *Consumers Ice Co. v. United States*, 475 F.2d 1161, 1163 (Ct. Cl. 1973)). The Wadel Family Trust to 229 Jebavy Road, LLC was nothing more than a reorganization of trust assets between the same parties and, therefore, a transfer by operation of law. 229 Jebavy Road, LLC has standing to bring these appeals.

II. Entitlement

The appellant moves for summary judgment, alleging that GSA breached the covenant not to commit waste in the building and on the premises and that the appellant is entitled to the costs necessary to restore the building and premises. GSA moves for summary judgment, arguing that damages for waste are limited to the diminution in the fair market value of the building and premises and that the appellant is unable to prove that the building and premises suffered any diminution in value attributable to contamination of the premises during the 2007 lease term.

There was no restoration clause in the 2007 lease. "Every lease, [however,] contains a provision, implied if not expressed, that a tenant will not commit waste by damaging the property, and therefore will, when it vacates leased space, return the space to the landlord in the same condition in which it received that space, reasonable wear and tear excepted." *A&B Ltd. Partnership v. General Services Administration*, GSBCA 15208, 04-1 BCA ¶ 32,439, at 160,504-05 (2003) (citing *United States v. Bostwick*, 94 U.S. 53, 65-66 (1876)). Waste is "generally defined as 'the destruction, alteration, misuse, or neglect of property by one in rightful possession to the detriment of another's interest in the same property.'" *White*

Mountain Apache Tribe v. United States, 249 F.3d 1364, 1379 (Fed. Cir. 2001) (quoting 8 Richard R. Powell & Michael A. Wolf, *Powell on Real Property* ¶ 636, at 56-3 (2000)), *aff'd*, 537 U.S. 465 (2003).

Here, GSA committed waste by returning to the appellant at the end of the lease a building and premises in a changed condition from when the parties executed the 2007 lease – a building and premises obviously contaminated with higher levels of TFM than previously realized. In 2007, the property was considered usable, safe, and rentable, even though both parties suspected that there was some TFM contamination in the building. The extent of the contamination worsened, however, becoming evident throughout the 2007 lease term. A 2017 report confirmed the extent of the contamination. The damage and resultant waste that caused the fair market value of the premises to decline was the result of the worsened state of the TFM contamination. GSA failed to remedy this contamination or return the building to its 2007 state before the lease expired in 2018.

GSA contends that the appellant's inability to prove that the contamination occurred during the 2007 lease precludes recovery for the appellant's claims. The appellant, however, has provided unrefuted testimony that the FWS continued to contaminate the building with TFM during the 2007 lease period. Although GSA has questioned the testimony of the appellant's witnesses that such contamination occurred, it provided no testimony from FWS to counter this evidence. "[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc.*, 812 F.2d at 1390-91. FWS, the building's tenant for fifty years, is in the best position to provide evidence as to the timing and level of contamination. However, such evidence is missing from the record.

Because there was a material change in the condition of the building and premises, beyond ordinary wear and tear, that injured the lessor's interest, *HG Properties A, L.P. v. General Services Administration*, GSBCA 15219, 01-1 BCA ¶ 31,376, at154,924, GSA breached the implied duty not to commit waste, and the appellant is entitled to compensation for this breach.

III. Damages

A. The Appellant's Recovery is Limited to the Diminution in the Fair Market Value of the Building and Premises

The appellant argues that, for breach of the covenant not to commit waste, it is entitled to the cost of demolishing the building and parking lot, soil remediation, and construction of a new parking lot and building. GSA contends that, in order to prevent a windfall, the

appellant's recovery must be limited to the diminution in the fair market value of the property.

A breach of the implied covenant not to commit waste "requires restoration of the premises to the lessor in the same condition as received, reasonable wear and tear excepted." *Brooklyn Waterfront Terminal Corp v. United States*, 90 F. Supp. 943, 949 (Ct. Cl. 1950); *see Bostwick*, 94 U.S. at 65-66. There is an exception to the general rule, however, if an award of restoration costs would give the appellant a windfall. *Missouri Baptist Hospital v. United States*, 555 F.2d 290, 294-95 (Ct. Cl. 1977).

> To recover the claimed amount, [lessor] must also demonstrate that the cost of repairs of damages caused by the Government does not exceed the diminution in the building's fair market value that resulted from that damage. The purpose of this rule is to avoid windfall recoveries. *Missouri Baptist Hospital v. United States*, 555 F.2d 290, 294-95 (Ct. Cl. 1977). "[R]epair costs are subjected to a ceiling. That ceiling is the diminution in fair market value attributable to defendant's breach." *Id.* at 295; *see also San Nicolas v. United States*, 617 F.2d 246, 249 (Ct. Cl. 1980); *Dodge Street Building Corp. v. United States*, 341 F.2d 641, 645 (Ct. Cl. 1965); *Banisadr Building Joint Venture v. United States*, 38 Fed. Cl. 392, 395 (1997); *Adelaide Blomfield Management Co.* [*v. General Services Administration*, GSBCA 13125], 97-1 BCA [¶ 28,914,] at 144,145.

A&B Ltd. Partnership, 04-1 BCA at 160,506.

The appellant argues that *San Nicolas* and *Grand Acadian*, *Inc. v. United States*, 93 Fed. Cl. 637 (2010), require us to award the full cost of restoring the property to its pre-waste condition and ignore the diminution in fair market value rule. Both of these decisions, however, recognize that recovery for breach of the implied covenant not to commit waste, absent a restoration clause in the lease that assigns the cost of restoration to the Government, is limited to the diminution in fair market value. In *Grand Acadian*, the restoration clause in the lease governed the Government's damages owed for committing waste. *Grand Acadian*, 93 Fed. Cl. at 641 (holding that "the diminution in market value rule is irrelevant to the question of damages, because the terms of the lease agreement clearly establish that . . . the government is contractually obligated to pay the full cost."). The court in *San Nicolas* also recognized that recovery "is limited to the diminution in fair market value in cases where the defendant has breached the implied covenant not to waste the lessor's estate." *San Nicolas*, 617 F.2d at 249. Since the 2007 lease does not include a restoration clause, the appellant's recovery for the waste committed by the Government in the building and surrounding premises is limited to the diminution in fair market value ceiling.

B. The Calculation of the Diminution in the Fair Market Value Is Disputed

In order to limit a lessor's recovery, the lessee must establish that the diminution in fair market value is less than the lessor's costs of restoration. *KMS Development Co.*, GSBCA 12584-R, 97-1 BCA ¶ 28,968, at 144,260 (citing *Three & One Co. v. Geilfuss*, 504 N.W.2d 393 (Wisc. Ct. App. 1993); *Ault v. Dubois*, 739 P.2d 1117 (Utah Ct. App. 1987)). GSA argues that the appellant is unable to meet its burden to show that the building suffered any diminution of value during the 2007 lease. The appellant's burden of proof for damages for breach of the covenant not to commit waste, however, was satisfied when it presented evidence of the costs of restoration. *KMS Development Co.*, 97-1 BCA at 144,260. Because GSA argues that the appellant's true damages are not accurately measured by the costs of restoration and that the appellant's recovery should be limited by the diminution in the fair market value of the property, the burden shifted to GSA to introduce evidence of diminution in market value. *Id.*

"The fair market value of a piece of property is the price that an unrelated seller is willing to accept and an unrelated buyer is willing to pay on the open market and in a bona fide arm's-length transaction." *A&B Ltd. Partnership*, 04-1 BCA at 160,507 (citing *Riverside Research Institute v. United States*, 860 F.2d 420, 423 (Fed. Cir. 1988); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 335 (Ct. Cl. 1980); *Houser v. United States*, 12 Cl. Ct. 454, 472 (1987); Black's Law Dictionary 1549 (7th ed. 1999)). The diminution in value remedy is typically formulated as "the difference between the value of the land before the injury and its value after the injury." *In re September 11 Litigation*, 802 F.3d 314, 328 (2d Cir. 2015) (citations omitted). GSA contends that the damage suffered by the building and premises during the 2007 lease was de minimis and insufficient to support the appellant's restoration damages or a diminution in fair market value. To determine the diminution in fair market value, however, the parties should compare the fair market value of the building and premises in 2007 and the fair market value in 2018.

GSA's certified real estate appraiser valued the property in 2019, if uncontaminated, at $570,000. Based on this valuation, GSA asserts that the building and premises suffered a diminution in value of no more than $570,000. The appellant takes issue with this valuation because it has not had the opportunity to review the appraiser's conclusions or qualifications. As a result, the fair market value of the property and the diminution in that fair market value remain in dispute and cannot be resolved on summary judgment.

IV. Lost Income

The appellant claims that it is entitled to lost income because of a reasonable expectation that it would have continued to receive rental income from the Government had

the Government not left the property contaminated. The appellant contends that it expected to rent the premises to the Government through at least 2028 and claims $2,755,145, which includes a "reasonable extrapolation of rental payments, prior expense history, and standard cost of living increases" for the ten-year period.

> The test for lost profits requires the non-breaching party to establish, by a preponderance of the evidence, that (1) its loss was the proximate result of the breach, (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting, and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Michael Johnson Logging v. Department of Agriculture, CBCA 5089, et al., 21-1 BCA ¶ 37,904, at 184,092 (citing *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1325 (Fed. Cir. 2002)). For lessors "to recover lost income as damages for a breach of contract, the losses must be directly related to the contract that was breached." *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698, at 166,825. "Lost profits are not recoverable if they result only from a contractor's hope of additional contracts." *Id.*

The claim for lost income is based on the assumption that the Government intended to lease the premises for ten more years but for the breach of the 2007 lease. A ten-year follow-on lease, however, is too speculative to allow recovery of lost income. While the appellant argues that it had a reasonable expectation that the Government would have renewed the lease but for the breach, given that (1) the Government had rented the premises for over fifty years and had continually adapted it to its own specific needs; (2) when the 2007 lease ended, FWS had to move their operations to multiple sites; and (3) the Government sought a new building lease for 2020, GSA points to deposition testimony that FWS was encouraged to build its own buildings, instead of hold ten-year leases, and ultimately did so in Ludington to house the TFM and the FWS team. The appellant cannot establish by a preponderance of the evidence that it lost ten years of rental income from the Government as a proximate result of the breach. Lost income is not recoverable.

V. Holdover Tenant

As an alternative theory of recovery to lost income, the appellant contends that it is entitled to rent from GSA under a theory of constructive holdover tenancy for every year that the building and surrounding premises remain contaminated, even though GSA has vacated the property. GSA, conversely, maintains that because the 2007 lease does not contain a restoration clause, the appellant may only recover money damages under the theory of waste.

"Longstanding precedent holds the Government liable for continued rent, as a holdover tenant, during the time needed to restore leased property after it is vacated, at least where that period is not unduly extended." *Kirk Ringgold v. Department of Agriculture*, CBCA 5259, 17-1 BCA ¶ 36,629, at 178,367 (citing *Hoover v. United States*, 3 Ct. Cl. 308, 311 (1867)). Here, the appellant is not entitled to compensation for GSA holding over because the property is not being restored. Instead, the appellant is entitled to the remedy for breach of the covenant to commit waste, which is money damages. We have found no authority to support a claim that waste gives rise to a holdover tenancy as well. Moreover, the length of the holdover tenancy is too speculative, never-ending, and unduly extended. *Cf. Hoover*, 3 Ct. Cl. at 311 (calculating the holdover tenancy as the time it takes to restore the property); *WRD Venture LLP v. General Services Administration*, GSBCA 16179, et al., 05-1 BCA ¶ 32,807, at 162,352 (2004) (granting six and three-quarters months of rent during restoration); *Richard & Terry Ponce*, DOT BCA 2039, 90-1 BCA ¶ 22,517, at 113,011 (1989) (granting three months and one week of rent during restoration). Thus, GSA is not liable for rent for an incalculable and extended amount of time under a theory of a constructive holdover tenancy.

Decision

The appellant's motion for summary judgment is **GRANTED IN PART** as to entitlement to damages for GSA's breach of the covenant not to commit waste in the building or surrounding premises. GSA's motion for summary judgement is **GRANTED IN PART** as to the appellant's claim for lost income and holdover rent and the measure of damages for the appellant's claim of waste. The issue of the fair market value of the property and the diminution in that value remains to be decided.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge