



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED: November 24, 2008

CBCA 1056

SECOND STREET HOLDINGS LLC,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Jerry L. Shulman, Gregory B. Craig, Ari S. Zymelman, and Thomas A. Craig of Williams & Connolly LLP, Washington, DC, counsel for Appellant.

George C. Brown, John P. Sholar, and Paul Brockmeyer, Office of the General Counsel, Securities and Exchange Commission, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **GOODMAN**, and **STEEL**.

GOODMAN, Board Judge.

On January 24, 2008, appellant, Second Street Holdings, LLC, filed an appeal from a Securities and Exchange Commission (respondent or SEC) contracting officer's final decision dated October 26, 2007. Appellant has filed a motion for summary relief with regard to the applicability of a specific clause in the lease to the instant dispute. We grant the motion.

Background

The Lease, the Dispute, and the Contracting Officer's Final Decision

Appellant is a solely-owned subsidiary of Louis Dreyfus Property Group (LDPG) and the sole owner and lessor of the building known as Station Place Building One (the building), located at 100 F St., N.E., Washington, D.C. Appellant is the successor to LDPG's interest in the building and lease number SEC 003-DC (the lease), awarded to LDPG on May 29, 2001. Complaint ¶ 3. At the time of lease award, the building had not been constructed. *Id.* ¶ 9.

The lease required that the building and the leased space be constructed to be accessible to the handicapped in accordance with the Americans with Disabilities Act (ADA) Accessibility Guidelines and the Uniform Federal Accessibility Standards, and where these standards conflict, that the more stringent apply. The lease contained various provisions detailing these requirements. Appeal File, Exhibit 1 at 26. We refer in this decision to these provisions of the lease as the "accessibility requirements."

LDPG constructed the building to lease it to the SEC as its new headquarters. The building was constructed so that those entering the main atrium lobby must use stairs or a platform (wheelchair) lift in order to access the primary elevator bank. There is no elevator or ramp serving the primary elevator bank from the atrium lobby. Complaint ¶¶ 13-17.

The lease contains the following provisions:

"Substantially complete" and "substantial completion" means that the Work, the common and other areas of the building, and all other things necessary for the Government's access to the Premises and occupancy, possession use and enjoyment thereof, as provided in this Lease, have been completed or obtained, excepting only such minor matters as do not interfere with or materially diminish such access, occupancy, possession, use or enjoyment.

"Work" means all alterations, improvements, modifications, and other things required for the preparation or continued occupancy of the Premises by the Government as specified in the Lease.

Appeal File, Exhibit 1 at 81.

DELIVERY, INSPECTION AND ACCEPTANCE

As set forth in this lease, the Lease term shall begin after the Contracting Officer determines that the space or a designated portion thereof is substantially complete. . . . The Government reserves the right to determine whether the space is or is not substantially complete.

Except as expressly set forth in this Lease, the following provisions shall apply: If the Premises, while substantially complete, do not in every material respect comply with the provisions of this Lease, the Contracting Officer may elect in his discretion to withhold an amount of Service Agreement Rent equal to the Government's cost . . . to correct or complete the Premises so as to bring them into complete compliance with Lease requirements. If the Contracting Officer elects to withhold Service Agreement Rent pursuant to this clause, the Contracting Officer shall deliver to the Lessor within (ten) 10 business days following completion of the Government's inspection of the Premises, a notice specifying (1) the defects and omissions noted during such inspection (2) the Government's estimate of the cost . . . [and] (3) a date by which the Lessor shall so correct or complete. . . . The Contracting Officer shall authorize payment to the Lessor of the amount withheld, without interest, within forty-five (45) days of the Government's acceptance of the work.

Appeal File, Exhibit 1 at 83.

Both LDPG and respondent participated in the design of the building. The SEC accepted the building and the lease term commenced on April 25, 2005. Complaint ¶ 17; Appeal File, Exhibit 1 (Supplemental Lease Agreement (SLA) 5). The SEC asserts that after the lease term commenced, employees and members of the public complained that handicapped individuals and others who are not able to use the stairs must then use the platform lift after entering the atrium lobby to access the main elevator bank. Appeal File, Exhibit 22. When the SEC informed LDPG as to these complaints, LDPG responded, asserting that the building complied with the accessibility requirements of the lease. Appeal File, Exhibit 23.¹

¹ However, in this appeal appellant maintains that it “has not and is not requesting the Board to declare that the Building is ADA compliant. Although it would be procedurally proper to challenge the Contracting Officer's determination that the building is not compliant, [appellant] has chosen not to do so.” Appellant's Opposition to Respondent's Motion to Dismiss at 7 n.5.

The SEC states that during summer 2006, the Department of Justice's (DOJ) Disability Rights Section was consulted as to whether the atrium lobby and main elevator bank complied with the accessibility requirements of the lease. The DOJ performed an on-site examination of the platform lift and atrium lobby and then provided a letter dated September 12, 2006, Appeal File, Exhibit 24, which the SEC shared with appellant, *id.*, Exhibit 25, containing its opinion that use of a platform lift instead of an elevator or ramp to provide disability access between the atrium lobby and main elevator bank did not comply with accessibility requirements.

The SEC obtained an additional assessment from Bill Hecker, AIA, an outside expert. Mr. Hecker also performed an on-site examination of the atrium lobby and provided an opinion dated November 22, 2006, which the SEC shared with appellant, that concluded that the use of the platform lift was noncompliant with the accessibility requirements of the lease. Appeal File, Exhibit 33; Complaint ¶ 21. Mr. Hecker provided a supplemental report dated May 25, 2007, analyzing potential cures for the alleged noncompliance. This report, which the SEC shared with appellant, concluded that only an elevator or ramp between the atrium lobby and main elevator bank would provide compliant access between the two levels. Appeal File, Exhibits 32, 33; Complaint ¶ 21.

The SEC contracting officer issued a letter entitled "Final Decision and Notice to Cure" dated October 27, 2007, in which she set forth the SEC's interpretation of the lease's accessibility requirements in conjunction with its study, including consultation with the DOJ's Disability Rights Section and Mr. Hecker, and concluded that the use of the platform lift did not comply with the accessibility requirements and that LDPG had a continuing obligation to bring the building into compliance. Appeal File, Exhibit 33. Additionally, the contracting officer's decision stated:

[LDPG's] use of a platform lift between the atrium lobby and the main elevator bank in [the building] is in violation of the Lease and applicable accessibility requirements. [LDPG] is obligated at its sole expense to correct this breach. Accordingly, pursuant to Clause 15 of the [lease], [LDPG] is directed to implement the steps indicated below to cure this default within sixty (60) days of the date of this Contracting Officer's Final decision.

Potential cures of the current non-compliance may involve construction of an additional elevator to connect the atrium lobby with the main elevator bank on the ground level, or constructing a new building entrance on the lower level which will connect the Building One main elevator bank to the common connector corridor linking all three Station Place Buildings.

Appeal File, Exhibit 35. The contracting officer's decision concluded by stating appeal rights pursuant to the Contract Disputes Act and a direction to comply with the cure notice portions of the decision pursuant to the Disputes clause, clause 36 of the lease.² *Id.*

Clause 15 of the lease reads in relevant part:

552.270-10 FAILURE IN PERFORMANCE (VARIATION)

Service Agreement Matters

(a) In the event of any failure by the Lessor to provide any service, utility, maintenance, non-capital repair or non-capital replacement required under this Lease for a period of thirty (30) days following the Lessor's and the Lessor's Lendor's receipt of Notice thereof from the Contracting Officer (CO) or CO's authorized representative, then such failure shall constitute a default by the lessor under this lease. . . .

Space Lease Matters

(b) If, during the Lease term^[3], any physical element or condition either within or affecting tenantability of the Premises deteriorates or fails such that a capital repair or replacement is necessary, and if Lessor fails to repair or replace such element(s) or cure or correct the condition after the Government has provided Lessor with reasonable notice, then such failure shall constitute default under the lease.

Appeal File, Exhibit 1 at 85.

By letter dated November 16, 2007, Robert H. Braunholer, Regional Vice President of LDPG, responded to the contracting officer's final decision, stating in part:

² Clause 36 reads in relevant part: "The Contractor shall proceed diligently with performance of this Contract, pending final resolution of any request, claim, appeal or action arising under the contract, and comply with any decision of the contracting officer." Appeal File, Exhibit 1 at 98.

³ The lease term commenced on April 25, 2005, when the SEC accepted the building. Complaint ¶ 17; Appeal File, Exhibit 1 (SLA 5).

Your Final Decision is styled as a Notice to Cure under Clause 15 . . . of the Lease. However, Clause 15 simply does not apply to disagreements such as this one, and its misapplication here is both clearly erroneous and materially detrimental to Second Street Holdings LLC (the “Lessor”). . . . Clause 15 of the Lease is titled “Failure in Performance” and is . . . a “repair and deduct” provision which applies only to (a) a failure to provide contracted for services, utilities, or maintenance, and (b) a failure to repair or replace a physical element or condition of the property that has deteriorated or failed. The Clause is thus totally inapposite to the current dispute, which involves neither a failure to provide a service nor an issue of repair or replacement. . . . If you, as the Contracting Officer, conclude (incorrectly, in our view) that the Lessor has breached an obligation under the Lease because it has failed to comply with some legal standard regarding access, then the only applicable provision of the Lease would be Clause 18 (Compliance with Applicable Law)^[4]. . . . If, in the alternative, you were to order the Lessor to undertake specific work as a “Change” to the premises under Clause 33 of . . . the Lease^[5], you would then be required to provide materially more detail as to the Change to be effected and would be required to follow the procedures set out in that Clause; the Lessor then could make a demand for payment that could eventually be resolved in the usual manner. . . .

Appeal File, Exhibit 36.

The contracting officer’s response, dated December 12, 2007, read in part:

I disagree with your assertion that Clause 15 does not apply to the current dispute. . . . Under Clause 15(b), when a “physical element or condition either within or affecting the tenantability of the Premises deteriorates or fails such that a capital repair or replacement is necessary” and Dreyfus does not “cure or correct the condition” . . . failure becomes a default under the lease. . . . Dreyfus can appeal my Final Decision and seek to recover its costs as a “constructive change” under the Changes clause if the Board of Contract Appeals or the Court of Federal Claims determines that my interpretation is incorrect, but Dreyfus cannot refuse to comply with the directives under the Disputes Clause.

⁴ Appeal File, Exhibit 1 at 87.

⁵ Appeal File, Exhibit 1 at 96.

Appeal File, Exhibit 38.

Appellant's Appeal and Complaint

Appellant filed a notice of appeal with this Board on January 24, 2008, and a complaint on February 28, 2008. In its complaint, appellant asserts that clause 15 of the lease is not the correct contractual clause applicable to this dispute. Rather, the complaint asserts that clause 33 (Changes) of the lease would be the proper clause, and the contracting officer's final decision was not sufficient direction to proceed pursuant to this clause. Complaint ¶ 26.

The Parties' Dispositive Motions

On March 28, 2008, respondent filed a motion to dismiss or in the alternative for summary affirmance. Appellant filed an opposition to the motion and a motion for summary relief with regard to the applicability of clause 15 of the lease to the instant dispute. The Board denied respondent's motion. *Second Street Holdings LLC v. Securities and Exchange Commission*, CBCA 1056, 08-2 BCA ¶ 33,913. In this decision, we rule on appellant's motion for summary relief.

Discussion

The purpose of summary relief is to resolve a matter on the law where there are no specific factual issues which could vary the result. The Board does not weigh evidence when considering whether to grant summary relief. *Chanhassen Venture, Ltd. v. Department of Commerce*, CBCA 789, 08-1 BCA ¶ 33,826.

Contract interpretation is said to begin with the plain language of the contract, and that language must be read in accordance with its express terms and plain meaning. *See BGK Main Street Operating Associates v. General Services Administration*, GSBCA 16238, 04-2 BCA ¶ 32,658, at 161,654; *James A. Prete v. General Services Administration*, GSBCA 15724, et al., 03-1 BCA ¶ 32,163, at 159,028; *Saul Subsidiary II Ltd. Partnership v. General Services Administration*, GSBCA 13544, 98-2 BCA ¶ 29,871, at 147,860. It is not the subjective intent of any one party that is controlling. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971).

The basis of appellant's motion for summary relief is that it contends that it has been directed to install an elevator pursuant to clause 15 of the lease, which it believes is not applicable to this dispute. The motion states:

This is not a dispute over *whether* the Contracting Officer may demand that work performed under government contracts comply with them. The question is *how* Respondent can demand such work in the context of a dispute over completed and accepted designs under *this* contract. Respondent has given the wrong answer by insisting that it may apply Clause 15. That erroneous determination has denied Appellant important rights it bargained for under the contract, and granted proportionally damaging powers to Respondent. Namely, respondent has reclaimed to itself the right to use the threat of default to address general compliance issues.

Appellant's Motion for Summary Relief at 8.

We review the plain meaning of clause 15 of the lease to determine if its provisions apply to the circumstances of the current dispute. Clause 15 refers to two categories of failures that occur during the lease term. Paragraph (a) of this clause deals with failure by the lessor to provide any service, utility, maintenance, non-capital repair, or non-capital replacement required under the lease. Paragraph (b) refers to deterioration or failure of a physical element during the lease term and the lessor's failure to repair or replace same.

Respondent characterizes the design and construction that is allegedly not compliant with the accessibility requirements of the lease as failures during the lease term under both paragraphs of clause 15. The parties initially briefed the issue of whether the dispute involved a deterioration or failure of a physical element as defined by paragraph 15(b). Respondent asserted that the need for an elevator to meet the accessibility requirements was necessary to correct the "failure of the lobby to provide access." Respondent requested and was granted leave to assert an additional interpretation that the dispute involved a failure by the lessor as enumerated in paragraph 15(a), alleging that the need to supply an additional elevator was a failure by the lessor to provide a "utility or service."

We find that respondent's interpretations of clause 15 are contrary to the plain meaning of the provisions of that clause. The building was designed and constructed before the lease term commenced, i.e., before the SEC inspected and accepted the building. The alleged failure of the design and construction to comply with the accessibility requirements of the lease therefore occurred before the lease term commenced and cannot be a deterioration or failure of a physical element during the lease term or a failure by the lessor to provide a utility or service during the lease term. The fact that the allegedly non-compliant design and construction was not identified until after the lease term commenced, thereby requiring any remedy to be performed during the lease term, does not convert a failure that has occurred before the lease term commenced into one that occurs during the lease term. The circumstances of the instant dispute are not addressed by either paragraph of clause 15.

We find that clause 15 of the lease is not applicable to the dispute in this appeal.

Decision

Appellant's motion for summary relief is **GRANTED**.

ALLAN H. GOODMAN
Board Judge

We concur:

JAMES L. STERN
Board Judge

CANDIDA S. STEEL
Board Judge