



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR SUMMARY RELIEF GRANTED IN PART: March 11, 2010

CBCA 1312

TOLANO ANDERSON CONTRACTING,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Tolano D. Anderson, owner of Tolano Anderson Contracting, Dover, DE, appearing for Appellant.

Kate Gorney, Office of the Regional Counsel, Department of Veterans Affairs, Philadelphia, PA, counsel for Respondent.

Before Board Judges **SOMERS**, **GILMORE**, and **STEEL**.

**GILMORE**, Board Judge.

This appeal was filed by Tolano Anderson Contracting (Anderson or appellant) from a final decision of a contracting officer of the Department of Veterans Affairs (VA or respondent) denying Anderson's two claims for costs allegedly incurred under two lease agreements with the VA. The VA has moved for summary relief on both claims, contending that the material facts are not in dispute and respondent is entitled to relief as a matter of law.

In the first claim, appellant alleges that the VA wrongfully terminated a lease agreement between appellant and the VA for building space in Dover, Delaware, to house an outpatient clinic. Appellant alleges that it proceeded to perform renovations to a building to prepare the site for occupancy and encountered delays that were beyond its control which

entitled it to a time extension. Appellant alleges that the VA accepted the reasons it provided for the delay as justifiable, but then decided to terminate the lease anyway and refused to pay \$96,554 allegedly expended by appellant to prepare the space for occupancy. In its motion for summary relief, respondent contends that there are no material facts in dispute, that the facts show that appellant did not timely proceed with preparing the site for occupancy by the July 2007 occupancy date stated in the lease, and that appellant did not respond to respondent's show cause notice with an acceptable reason for the delay. Respondent, thus, contends that the termination was proper and asks the Board to decide appellant's first claim in its favor. Appellant contends that the facts show that it was proceeding timely and that the delays encountered were due to delays associated with the Dover Planning Department and were beyond appellant's control. Appellant asserts that it met with VA representatives and local authorities who were concerned about the issues involved in the project and, in that meeting, the VA agreed to an extension of time. Appellant contends that the facts show that the Dover lease was wrongfully terminated and that respondent's motion for summary relief should be denied.

In the second claim, appellant alleges that it entered into an oral agreement with a VA contracting officer for the lease of building space for an outpatient clinic in Georgetown, Delaware, with the understanding that it could proceed with the planning and construction build-out of the site while the written lease was being prepared. Appellant contends that before it received the written lease, the VA terminated its earlier agreement with appellant and refused to pay the \$93,800 appellant expended on preparing the site prior to the termination. In its motion for summary relief, respondent contends that there are no material facts in dispute and that the material facts show that the VA did not enter into a lease agreement, either oral or written, with appellant for the lease of space in Georgetown, Delaware, and that appellant did not have the legal capacity to enter into a lease because it did not own the building in question. Respondent, thus, asks the Board to decide appellant's second claim in its favor. Appellant contends that the facts show that the VA entered into an oral lease agreement under which appellant and the VA agreed that appellant would proceed with preparation work while the written lease was being prepared and that the Board should deny respondent's motion for summary relief.

For reasons set forth below, we deny respondent's motion for summary relief on the first claim involving the lease in Dover, Delaware, and grant respondent's motion for summary relief on the second claim involving the alleged lease in Georgetown, Delaware.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* In

considering a motion for summary relief, it is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id.* at 249. All reasonable inferences are to be resolved in favor of the non-moving party. *Id.* at 255. The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions in the file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is then required to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

### Dover Lease

We will first address respondent's motion for summary relief as to appellant's first claim alleging wrongful termination by the VA of a lease for building space in Dover, Delaware.

In support of its motion, respondent relies upon the lease agreement for the Dover property that sets forth an occupancy date of July 2007 and the declaration of Toni Wilson, the VA contracting officer, that the building was not ready for occupancy by July 31, 2007, and that Anderson had not yet obtained the necessary permits from the city of Dover at the time the lease was terminated. Ms. Wilson further stated in her declaration that she terminated the lease in accordance with the terms of the lease, giving thirty days notice, and that she determined it was in the best interest of the Government to terminate the lease.

In response to the motion, appellant disputed the facts presented by respondent and provided sufficient evidence to show that there are material facts in dispute that bear upon the propriety of the VA's termination of the Dover lease and refusal to pay appellant any costs incurred in preparing the site for occupancy. The evidence presented by appellant shows that the original lease was signed on April 19, 2007, and that a second lease was signed on May 10, 2007, with appellant agreeing to the same occupancy date. The lease provided that the "[l]essor shall provide a valid Occupancy Permit within forty-five (45) calendar days after Government Inspection and Acceptance of the Space for the intended use of the Government" and that the "[l]essor shall complete any necessary alterations within 60 to 120 calendar days after receipt of approved layout drawings from the Government." It is not clear from the present record when the Government gave approval of the layout drawings which, in turn, would determine when the 60 to 120 days in which to complete renovations would begin to run. The record also shows that appellant had a valid dispute with the local planning authorities that it was attempting to resolve and that VA representatives were involved in the dispute resolution process. Also, respondent's exhibit 7 to its motion is an e-mail message sent by the VA contracting officer on September 24, 2007, stating that the

occupancy date on the Dover project had been extended to October 1, 2007. This contradicts respondent's position that appellant did not meet the July 2007 occupancy date. There is also evidence in the record supporting appellant's argument that it was told to suspend work at Dover because of the urgency to finalize plans for the Georgetown clinic. Because there is a genuine dispute as to whether appellant's delays were excusable, and whether the termination, and failure of the VA to pay for appellant's costs incurred prior to termination, were proper, we deny respondent's motion for summary relief on appellant's first claim involving the Dover lease.

#### Georgetown Lease

Respondent, in support of its motion for summary relief involving appellant's claim of an oral lease of space in Georgetown, Delaware, has set forth facts which establish that no employee from the VA with contracting authority entered into a contract with appellant, either oral or written, for the lease of the Georgetown property in question. Also, respondent has presented evidence with its motion establishing that, at the time of the alleged oral lease agreement, appellant did not own the property it had allegedly leased to the VA.

Appellant, in its response to the motion, agrees that there was no written lease agreement, but asserts that the VA contracting officer knew that it was attempting to purchase the property to lease to the VA and that it was involved with another VA representative in negotiating the lease terms. Mr. Anderson, the owner of Tolano Anderson Contracting, stated in appellant's response to the motion that he was the "equity owner" of the Georgetown property and was scheduled to settle on the property upon receipt of a lease draft from respondent. Mr. Anderson contends that VA representatives visited the site and approved it for the clinic and that he was told to proceed with the renovation plans while the lease was being finalized.

Once respondent presents evidence it believes supports its contention that there are no genuine issues in dispute, appellant is required to come forward with evidence that it contends refutes those facts presented by respondent. Here, appellant has failed to put forth such evidence. Appellant admits it did not have a written agreement with the VA. Appellant also acknowledges that it had not yet purchased the property in question during the period it alleges an oral agreement came into existence. Appellant relies on a series of e-mail messages to establish that it had an oral agreement with the VA to lease space and manage a VA clinic in Georgetown, Delaware. These e-mail messages, however, only show that there were on-going negotiations between the Assistant to the Director of the VA Medical Center in Wilmington, Delaware, and Mr. Anderson about providing space for the clinic in a building appellant was attempting to purchase.

These negotiations, however, did not rise to the level of a contract. Appellant did not provide evidence of the terms of the alleged lease agreement, or provide a date on which the alleged oral agreement was entered into. It has been held that the requirements for either an oral express contract or an implied in fact contract are the same: 1) mutuality of intent to contract, 2) consideration, 3) unambiguous offer and acceptance, and 4) actual authority on the part of the Government's representative to bind the Government. *Presidio County, Texas v. General Services Administration*, CBCA 1209, 08-2 BCA ¶ 33,976, at 168,060 (citing *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (*en banc*)).

The e-mail messages provided by appellant in its response do not establish that the parties ever reached an agreement on the total square footage to be provided, the building layout, the lease costs, or the lease term. Additionally, where the Federal Government is one of the parties to a contract, appellant must show that the officer whose conduct is relied upon had actual authority to bind the Government. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984). Appellant has not provided any evidence that it entered into a lease agreement with a VA employee who had actual authority to bind the Government.

Respondent, in its motion, provided evidence that established that an oral lease agreement did not exist between the VA and appellant. The evidence put forth by appellant in its response to the motion did not establish that there was a material fact in dispute bearing on this issue. We conclude that a lease agreement did not exist between appellant and the VA, and thus grant respondent's motion for summary relief in its favor on the second claim involving the Georgetown property.

#### Decision

Respondent's **MOTION FOR SUMMARY RELIEF** is **GRANTED IN PART**. The motion is denied as to appellant's first claim regarding a lease of the Dover, Delaware, property and granted as to appellant's second claim regarding an alleged lease for property in Georgetown, Delaware.

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BERYL S. GILMORE  
Board Judge

We concur:

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JERI K. SOMERS  
Board Judge

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CANDIDA S. STEEL  
Board Judge