



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED: September 23, 2021

CBCA 6867

3 CRESCENT DRIVE OWNER I LLC, 3 CRESCENT DRIVE OWNER II LLC,
3 CRESCENT DRIVE OWNER III LLC, 3 CRESCENT DRIVE OWNER IV LLC,
3 CRESCENT DRIVE OWNER V LLC, 3 CRESCENT DRIVE OWNER VI LLC,
and 3 CRESCENT DRIVE OWNER VII LLC,

Appellants,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Brett D. Orlove and Kumail Mirza of Grossberg, Yochelson, Fox & Beyda, LLP,
Washington, DC, counsel for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, San
Francisco, CA, counsel for Respondent.

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

DRUMMOND, Board Judge.

This case, between seven 3 Crescent Drive companies (appellants) and the Department of Agriculture (agency), concerns what the parties describe as a dispute over the fair market value of property that the agency has not vacated at the end of a lease, as the parties view this to be a holdover tenancy. The parties have submitted the case on the written record with the appellants asking the Board to compel the agency to vacate immediately and surrender the premises in the condition required under the lease and to remit payment for the

holdover rental period commencing February 23, 2020, and continuing each month thereafter until the premises are vacated.

Of significance to the resolution of this case, although not addressed by the parties, are the underlying alleged claim and a contract amendment postdating both the end of the prior lease and the claim. First is the lack of a claim. At the time the appellants submitted their purported claim to the contracting officer, they were not contractors. Therefore, under regulation (which specifies that a claim is made by a contractor), there is no claim, such that the Board lacks authority to resolve the dispute. Further, the appellants seek relief the Board cannot provide under these facts and the law. Not only did the original lessor and appellants waive and release all claims existing prior to a novation, but also, the agency was not a holdover tenant (a lease amendment and novation with the appellants established a lease and price). The Board cannot compel the agency to vacate the space. In summary, the lease terms and pricing on the effective date of the amendment control; the parties entered into the agreement making the agency a tenant under the lease. The agency is not a holdover tenant, and the fair market value is not applicable. The Board dismisses the appeal.

Findings of Fact

1. The agency and L/S Three Crescent Drive, LP, entered into a lease for a fixed term of ten years, amended to reflect the actual lessor, acceptance, and start and completion dates, with a final day of February 22, 2020. Appeal File, Exhibit 1 at 1-6, 9, 12.¹

2. The agency did not vacate the premises by February 22, 2020. It has occupied the premises at least through the submission of briefs. For this period, the agency has paid rent at the rate in effect in February 2020.

3. On March 18, 2020, the appellants submitted to the contracting officer what they style as a claim stating that the lease expired on February 22, 2020, and the agency has failed to vacate the premises. The appellants demanded that the agency immediately vacate the premises and pay a stated monthly amount for the holdover period. Exhibit 2. At that time, the appellants were not the lessors or a party to the lease.

4. With an effective date of April 14, 2020, a lease amendment formally recognized the appellants as the contractor/lessor under the lease, with all terms and conditions of the lease remaining in full force and effect, and the original lessor releasing the Government from any claims and rights against the Government. The amendment includes an explicit recognition that the appellants are bound by the terms and conditions of the lease

¹ All exhibits referenced in this decision are found in the appeal file.

and includes a novation agreement, with the same effective date, in which the original lessor releases the Government from any and all claims and rights against the Government. Payments and reimbursements made by the Government and prior actions taken by the Government under the lease fully discharge the Government's obligations under the lease. Further, "[t]he Lease shall remain in full force and effect, except as modified by this agreement." Exhibit 1 at 15-28.

5. The contracting officer denied the claim by decision dated June 5, 2020. On July 2, 2020, the appellants filed this appeal.

Discussion

Although the parties treat this as a dispute involving a holdover tenant requiring the agency to pay the fair market value for the property during the holdover, with the appellants also seeking a Board directive requiring the agency to immediately vacate the premises, the Board views the facts and the law differently. The Board is compelled to dismiss this action because there is no claim underlying this appeal, and the appellants seek relief not available under the actual circumstances—namely, a lease exists, so that the agency is not a holdover tenant, and the Board cannot compel the agency to vacate.

Lack of claim

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), defines the jurisdiction of the Board but does not define the term "claim." Regulations address the authority of the Board. The Federal Acquisition Regulation specifies that the word claim "means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 2.101(b) (2020). Here, a contracting party did not submit a claim. The appellants became contracting parties after the submission of the claim. Therefore, the Board lacks the authority to resolve the dispute. *See Tyler House Apartments, Ltd. v. United States*, 38 Fed. Cl. 1, 7-9 (1997) (in a non-CDA case, rejecting argument that a third party can file a contract action before it has standing to do so, later become the contract holder by assignment, and then "relate back" its new contract-holder status to render its original filing valid and effective).

Relief not available

The appellants seek two forms of relief: a monthly payment beginning in February 2020, through the date the agency vacates the premises in the condition required under the initial lease, and a directive that the agency immediately vacate the premises. Of note, the dispute does not appear to be as described by the parties, who fail to reconcile a contract

amendment with their positions. As of April 14, 2020, in the novation agreement, the transferor (initial lessor) “waives any claims and rights against the Government that it now has or may have in the future in connection with the Lease.” Exhibit 1. The appellants accept all actions previously taken by the transferor prior to the novation. Further, “[t]he Lease shall remain in full force and effect, except as modified by this agreement.” Exhibit 1 at 21-22.

With the novation and lease amendment, the lease which had expired as of February 22, 2020, came back into existence on April 14, 2020, the initial lessor and appellants waived any right to additional payment prior to that time, and the appellants accepted the terms and conditions of the new lease, which included payment at the rate in existence as of February 22, 2020. With the novation, the underlying claim was waived and released, and the agency was not a holdover tenant, but a tenant under the lease as amended. The appellants have failed to demonstrate a basis to recover fair market value from a holdover tenant, given that the agency is not a holdover tenant, or to permit the Board to direct the agency to vacate the premises, with or without the new lease.

Decision

The Board **DISMISSES** the appeal.

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge