



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: January 17, 2023

CBCA 7330, 7348

MATHER ENTERPRISES,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John M. Duggan and David L. Ballew of Duggan Shadwick Doerr & Kurlbaum LLC, Overland Park, KS, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA; and Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **CHADWICK**.

GOODMAN, Board Judge.

Appellant, Mather Enterprises, appealed from a decision of a contracting officer of respondent, Department of Veterans Affairs, dated January 28, 2022, and that appeal was docketed as CBCA 7330. Respondent has filed a motion to dismiss CBCA 7330 for failure to state a claim for which relief can be granted.¹ We deny the motion.

¹ Although CBCA 7330 is consolidated with CBCA 7348, this motion only addresses CBCA 7330.

Background

This appeal concerns the lease of a building in Leavenworth, Kansas, that appellant leases to respondent as a facility to supply prescription medications to veterans. The lease commenced in 2001. In 2013, the parties entered into an agreement entitled “Stipulation of Settlement” (the stipulation) to resolve a previous appeal concerning the lease. Portions of the stipulation were included in supplemental lease agreement (SLA) 57, which was executed simultaneously with the stipulation. The current appeals involve a dispute as to the scope of maintenance that each party is obligated to perform as agreed in the stipulation and SLA 57.

The Relevant Lease Provisions

The lease contained the following provisions to which the parties refer in their briefing of the motion to dismiss:

7.2 MAINTENANCE BY LESSOR:

Building equipment and maintenance requirements are to be met by the lessor. The lessor must have a building superintendent or a local, designated representative available to promptly correct deficiencies or attempt to correct deficiencies within three (3) hours after written or oral notice of such condition from the VA. If no substantial attempt has been made to correct the deficiencies within the specified time, action will be taken by VA to correct such deficiencies and the cost of repairs will be deducted from the next month’s rental payment.

The lessor is responsible for total maintenance of the leased premises in accordance with paragraph 14, GSA Form 3517. Such maintenance and repairs includes, but is not limited to, exterior care of the building and the site: all sidewalks, parking areas, driveways, private access roads, lawns and shrubbery, including all repair and replacements. All equipment and systems shall be maintained to provide reliable service without unusual interruption, disturbing noises, exposure to fire or safety hazards, or unusual emissions of dirt. The lessor’s maintenance responsibility includes initial supplies of all items, materials, and equipment necessary for such maintenance. All maintenance work will be done in accordance with applicable codes, and inspection certificates will be displayed as appropriate. The lessor shall provide the labor, material and supervision to adequately maintain the structure, the roof, the exterior walls, windows, doors and any other necessary building appurtenances to provide watertight integrity, structural soundness, and acceptable appearance.

Without any additional charge, the Government has the right to require the lessor or his representative to test once a year, with proper notice, such systems as fire alarm, sprinkler, [deleted by parties] etc., to ensure proper operation. Upon request, appropriate operations and maintenance manuals shall be made available for the Government's review during these tests. A representative of the Contracting Officer shall witness these tests.

14. 552.270-6 – MAINTENANCE OF BUILDING AND PREMISES – RIGHT OF ENTRY (SEP 1999)

Except in case of damage arising out of the willful act or negligence of a Government employee, Lessor shall maintain the premises, including the building, building systems, and all equipment, fixtures, and appurtenances furnished by the lessor under this lease, in good repair and condition so that they are suitable in appearance and capable of supplying such heat, air conditioning, light, ventilation, safety systems, access and other things to the premises, without reasonably preventable or recurring disruption, as is required for the Government's access to, occupancy, possession, use and enjoyment of the premises as provided in the lease. For the purpose of so maintaining the premises, the Lessor may at reasonable times, enter the premises with the approval of the authorized Government representative.

The Stipulation

On October 3, 2013, the parties entered into the stipulation. The stipulation contained the following provisions relevant to the current appeals and the provisions of the lease quoted above.

4. Beginning August 1, 2013 through November 30, 2013, Lessor shall continue to perform routine maintenance, which shall include all manufacturer recommended and industry accepted preventative maintenance, on the premises (excepting and excluding improvements added by SLA 40 on or about 2/16/10). Specifically excluded from the Lessor's obligation to perform routine maintenance under the Lease during this period is that Lessee will take immediate action to maintain, repair or make any necessary changes to the fire alarm system to insure that the fire alarm system is tested, inspected and operational in accordance with local and national code and requirements.

5. . . . Effective December 1, 2013 until the end of the Lease term and vacating of the leased premises the Lessee is solely responsible for all

maintenance, repairs, replacement, real estate taxes, and costs associated with routine and preventative maintenance of the leased premises.

....

7. Effective December 1, 2013, SFO Section 7.2 shall be amended to replace the word “Lessor” in this clause with “Lessee”, such that the Section 7.2 shall be entitled “Maintenance by Lessee” and all other instances of the word “Lessor” shall be replaced with “Lessee” in this clause. The Lessee shall maintain the building, premises, grounds and parking lot consistent with the standards set out in the Lease.

8. Effective December 1, 2013, GSA Form 3517B Paragraph 14 shall be amended to replace the word “Lessor” in this clause with “Lessee,” such that the Section 7.2 shall be entitled “Maintenance by Lessee” and all other instances of the word “Lessor” shall be replaced with “Lessee” in this clause. However, the last Sentence of GSA Form 3517, paragraph 14 shall be amended to read: “Lessor may at reasonable times enter the premises with approval of the authorized Government representative in charge and will observe all applicable VA security policies during these visits.”

SLA 57

SLA 57, executed on October 3, 2013, contained these same provisions from the stipulation.

The Claim

Appellant filed a claim with respondent’s contracting officer on October 19, 2021, alleging that respondent has failed to meet its maintenance obligations to keep the leased premises in “good repair and condition” so that it is “suitable in appearance” and capable of supplying “heat, air conditioning, light, ventilation, safety systems, access and other things to the premises, without reasonably preventable or recurring disruption.” The claim further alleges breach of contract and the duty of good faith and fair dealing, requests declaratory relief, and includes a monetary claim. The contracting officer denied the claim on January 28, 2022, and appellant appealed to this Board.

Discussion

Respondent has filed a motion to dismiss CBCA 7330 for failure to state a claim for which relief can be granted. The basis of respondent’s motion is that the maintenance which

appellant was required to perform before entering into the stipulation, and which respondent agreed to perform as the result of the stipulation, was “as is required for the Government’s access to, occupancy, possession, use and enjoyment of the premises as provided in the lease,” as stated in paragraph 14. Thus, respondent asserts that, before the stipulation, appellant was only obligated to perform maintenance that benefitted respondent, and after the stipulation, respondent was only required to and only performed maintenance that it determined was necessary for its own benefit. Therefore, respondent maintains that the maintenance which appellant asserts was not performed was that which was required solely for appellant’s benefit and was not respondent’s obligation. Respondent asserts that “[t]here is no language in the lease requiring the Government, in operating the building, to provide specific services for the benefit of the landlord.” Respondent’s Motion to Dismiss at 7.

Appellant’s position is that respondent does not, as respondent claims, have the “complete and unfettered discretion to perform whatever maintenance it desires to benefit itself” but rather must perform the “total maintenance of the leased premises.” Appellant’s Opposition to the Motion at 2-3.

The Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance in deciding a motion to dismiss for failure to state a claim. Board Rule 8(e) (48 CFR 6101.8(e) (2021)). Thus, in considering this motion, we must assume that all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant. Under this standard, appellant’s claim must be plausible on its face when drawing all reasonable inferences in favor of the appellant. *OWL, Inc. v. Department of Veterans Affairs*, CBCA 7184, 22-1 BCA ¶ 38,013, at 184,614 (2021); *see ITS Group Corp v. Department of Agriculture*, CBCA 6621, 20-1 BCA ¶ 37,602, at 182,552.

We find appellant’s claim plausible on its face when drawing all reasonable inferences in favor of appellant. There is clear and unambiguous language in the stipulation and SLA 57 that resolves the motion. Both documents state: “Effective December 1, 2013 until the end of the Lease term and vacating of the leased premises, the Lessee is solely responsible for *all* maintenance, repairs, replacement, real estate taxes, and costs associated with routine and preventative maintenance of the leased premises.” (Emphasis added.) Therefore, the stipulation and SLA are clear that the lessee (respondent) is responsible for all maintenance.²

² Both parties cite case law in support of their positions. In further support of its motion, respondent also notes that appellant asserts remedies provided in paragraphs 15 and 16 of the lease. While these paragraphs provide remedies for respondent and were not mentioned in the stipulation, appellant argues in its claim and in response to the motion that these paragraphs were amended to provide remedies to appellant. We need not address the case law or additional arguments in order to resolve the motion. The clear and unambiguous

While paragraph 14 of the lease, after the stipulation and SLA, continues to state that maintenance is to be performed “as is required for the Government’s access to, occupancy, possession, use and enjoyment of the premises as provided in the lease,” this does not mean that there are specific maintenance tasks that would benefit appellant and not respondent, as respondent suggests. Such would be an unreasonable interpretation, in light of the amendment to the last sentence of paragraph 14. This sentence originally read: “For the purpose of so maintaining the premises, the Lessor may at reasonable times, enter the premises with the approval of the authorized Government representative.” The amended sentence read: “Lessor may at reasonable times enter the premises with approval of the authorized Government representative in charge and will observe all applicable VA security policies during these visits.” The deletion in the amended sentence of the phrase “for the purpose of so maintaining the premises” is consistent with the previously quoted language in the stipulation and SLA that “the Lessee is solely responsible for all maintenance, repairs, replacement, real estate taxes, and costs associated with routine and preventative maintenance of the leased premises.” Respondent’s obligation is reiterated by the last sentence of paragraph 7 of the stipulation, included in SLA 57, which reads: “The Lessee shall maintain the building, premises, grounds and parking lot consistent with the standards set out in the Lease.”

Decision

Respondent’s motion to dismiss for failure to state a claim for which relief can be granted is **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge

language of the stipulation and SLA 57 states respondent’s obligation to perform all maintenance, the breach of which would provide a remedy to appellant.