Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

RESPONDENT'S MOTION FOR SUMMARY RELIEF
GRANTED IN PART: June 5, 2001

GSBCA 15208

A&B LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Allen E. Ertel of Allen E. Ertel & Associates, Williamsport, PA, counsel for Appellant.

Ruth Kowarski, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

GOODMAN, Board Judge.

The dispute in this appeal arises from a lease for office space entered into by appellant, A&B Limited Partnership (appellant or A&B), as lessor, and respondent, General Services Administration (respondent or GSA), as lessee. The appeal before the Board arises from a deemed denial of appellant's certified claim pursuant to the Contract Disputes Act seeking compensation for damage to property and for costs of purchasing and installing property allegedly wrongfully removed from the property when respondent terminated the lease in 1999. Respondent has filed a motion for summary relief seeking to dismiss the appeal. As set forth below, we deny respondent's motion as to appellant's claim for damage to property, as material facts remain in dispute, and grant respondent's motion as to appellant's claim for costs of purchase and installation of property, as there are no material facts in dispute and appellant is not entitled to recovery of this portion of its claim as a matter of law. Accordingly, we deny this portion of appellant's claim seeking costs for purchase and installation of property which was allegedly wrongfully removed by respondent.

Findings of Undisputed Fact

1. Pursuant to Lease No. GS-03-B-6457 dated July 2, 1974, GSA leased 66,000 square feet of office space in a building in Wilkes-Barre, Pennsylvania, known as Penn Place. The lease was for a period of ten years commencing on the date of GSA's occupancy and allowed for two renewal option periods of five years each. The lessor was Wideman Associates. Appeal File, Exhibit 15 at 1.

2. The lease as originally executed reads in relevant part:

> 2. Maintenance of Premises.
>
> The Lessor shall maintain the demised premises, including the building and any and all equipment, fixtures, and appurtenances, furnished by the Lessor under this lease in good repair and tenantable condition, except in case of damage arising from the act or the negligence of the Government's agents or employees. For the purpose of so maintaining said premises and property, the Lessor may at reasonable times, and with the approval of the authorized Government representative in charge, enter and inspect the same and make any necessary repairs thereto.
>
> . . . .
>
> 4. Alterations.
>
> The Government shall have the right during the existence of this lease to make alterations, attach fixtures and erect additions, structures, or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government.

Appeal File, Exhibit 1 at 3.

3. GSA commenced occupancy on September 15, 1975. Appeal File, Exhibit 2 at 4.

4. On or about May 29, 1984, the Government recognized a transfer of this lease contract to a successor landlord, W/B Associates. Appeal File, Exhibit 2 at 11.

5. On July 10, 1987, the respondent and W/B Associates entered into Supplemental Lease Agreement (SLA) No. 14 for the renovation and electrical upgrade of room 2227, the Social Security Administration claims area located on the second floor of the leased building. Appeal File, Exhibit 2 at 15-38.

6. SLA No.14 states in part:

> Whereas, the parties hereto desire to amend the above Lease. . . .

> NOW THEREFORE, these parties . . . covenant and agree that the said Lease is amended, effective upon execution of this Supplemental Lease Agreement by the Government as follows: . . . .
>
> All other terms and conditions of the lease shall remain in force and effect.

Appeal File, Exhibit 2 at 15.

7. Paragraph 5 of SLA No. 14 states:

> It is understood and agreed that the Government retains title to all removable property covered by this agreement. At the termination of this lease, the Government shall at its own expense restore the premises to their approximate original condition, fair wear and tear excepted; or the Government shall pay the Lessor the lesser cost of such restoration or the diminution in the market value of the leased premises resulting from the Government's failure to restore the premises.

Appeal File, Exhibit 2 at 16.

8. On or about October of 1991, the respondent and W/B Associates negotiated SLA No. 15, providing for alterations of the Department of Health and Human Services' Office of Hearings and Appeals (OHA), which was located on the third floor of Penn Place. Pursuant to this agreement, the lessor was charged with the responsibility for cleaning and maintaining the carpet per the lease specifications. Appeal File, Exhibit 2 at 41 (¶ 7).

9. During the course of performing the work required under SLA No. 15, W/B Associates sought compensation for additional items of work required under SLA No. 15. SLA No. 19, dated May 4, 1993, provided additional funds to W/B Associates for provision of, among other things, additional carpet selections and upgrading of chair rails in the OHA. Appeal File, Exhibit 2 at 71.

10. According to respondent, in September of 1997, GSA vacated the entire space occupied by GSA tenants with the exception of approximately 2000 square feet of space located on the second floor of the building. The 2000 square feet of space remaining was used to house the Federal Probation Office. The remaining second floor space stayed vacant and unoccupied by GSA until the expiration of GSA's lease with appellant. Respondent's Motion for Summary Relief, Attachments F, G.

11. On or about February 12, 1998, GSA, acting through its contractor, Keating Development Company, commenced renovation of the third floor of Penn Place to provide temporary space for the United States Bankruptcy Courts, Court of Appeals, District Court, and Marshals Service. According to the respondent, the contract required construction of three chamber suites, courtrooms, attorney conference rooms, jury suites, records storage rooms, a library, and a vault. Also required was the relocation of approximately forty-two wooden bookshelf units and counter space, under-counter shelving, Magistrate and Bankruptcy Court benches, and a desk and jury box located at the former work spaces of these tenants, the Max Rosenn U.S. Courthouse, 197 S. Main Street, Wilkes-Barre,

Pennsylvania. Respondent's Motion for Summary Relief, Attachments D, L. The renovation project also involved the installation of two Government-owned temporary holding cells for use by the U.S. Marshals Service in carrying out its law enforcement function. These holding cells were relocated from the U.S. Courthouse in Albany, New York, to Penn Place. Respondent's Motion for Summary Relief, Attachments E, G, L.

12. A representative of the appellant examined the property before the appellant purchased the property on March 13, 1998, for the sum of $1,600,000. Appellant has submitted an affidavit from its representative which states in relevant part:

> I examined Penn Place just days before the . . . [s]ale, including the plans for remodeling the third floor. I understand what reasonable wear and tear on a building means.

Affidavit of William Brown (Brown Affidavit) (Mar. 14, 2001) ¶ 2.

13. On April 23, 1998, GSA and its contractor, Keating Development Company, conducted a walk-through of the newly renovated third floor court spaces and signed a condition survey report. Move-in to the third floor commenced on April 25, 1998. Respondent's Motion for Summary Relief, Attachments J, K.

14. On June 3,1998, respondent and appellant entered into SLA No. 23, modifying the lease to make GSA responsible for routine maintenance and incidental repairs for those areas of interior space occupied by the Government. The term "incidental repairs" was defined as "unscheduled work items defined as $250 or less for materials and parts only." The Government also assumed responsibility at this time for routine cleaning of and janitorial services for the space occupied by the Government. Appeal File, Exhibit 2 at 78.

15. On November 17, 1998, GSA advised appellant of its intention to terminate the lease on May 17, 1999. Appeal File, Exhibit 2 at 79.

16. On May 10, 1999, GSA sought and obtained an extension of its lease to allow for a July 16, 1999, lease termination date. Respondent's Motion for Summary Relief, Attachment C.

17. On July 21, 1999, after GSA's departure from the premises, appellant advised GSA's Contracting Officer that it believed the building had been "plundered." The letter attached a list of difficulties and problems pertaining primarily to the second floor of the building allegedly in need of correction and stated that pictures and a video depicting the problems had been taken previously and that none of the problems had been corrected. Appeal File, Exhibit 3.

18. Appellant's representative who examined the building prior to purchase states in his affidavit:

> When the Government vacated the building, subsequent to their lease, the building was basically trashed, structural items removed, and it was damaged beyond ordinary wear and tear. . . . [Appellant] sold the building at a

> discounted price because of its terrible condition, which condition was created by the Government. Although we had prospects go through the building, once they saw it, we did not hear from them again.

Brown Affidavit ¶¶ 5, 6.

19. On or about August 9, 1999, a GSA contracting officer received photographs that she believes were sent from appellant. The photographs allegedly depict problematic building conditions at Penn Place. Respondent's Motion for Summary Relief, Attachment F; Appeal File, Exhibit 6.

20. On August 13, 1999, GSA requested that it be permitted to conduct a final walk-through inspection of Penn Place. The walk-through took place on August 18, 1999. Appeal File, Exhibit 7; Respondent's Motion for Summary Relief, Attachment G.

21. On August 20, 1999, appellant submitted a proposal to GSA in the amount of $239,000 for the renovation of the second and third floors of Penn Place. Appeal File, Exhibit 8.

22. On September 27, 1999, GSA wrote to appellant offering to provide a payment of $16,032 as compensation for the repair of items enumerated in appellant's list of July 21, 1999. Appeal File, Exhibit 10.

23. On November 2, 1999, having received no reply from appellant, GSA advised that it would pay appellant the sum of $16,032 and close out this matter. Appeal File, Exhibit 11.

24. GSA authorized the payment on the same date. Respondent alleges that its records indicate that such payment was received by appellant. Respondent's Motion for Summary Relief, Attachment H.

25. Appellant subsequently sold the property on November 24, 1999, to Mericle, d/b/a Mericle for the sum of $1,800,000. Respondent's Motion for Summary Relief, Attachment O.

26. On December 20, 1999, appellant submitted an uncertified claim appealing GSA's November 2, 1999, payment notification and seeking compensation in the amount of $400,000.

27. On June 19, 2000, appellant submitted to GSA a certified claim under the Contract Disputes Act seeking compensation in the amount of $340,413.30. Specifically, appellant demanded payment for refurbishment of Penn Place (estimated at $239,000) and for purchase and installation of the following property (estimated at $101,413.30):

(1) two temporary holding cells;
(2) built-in bookshelves;
(3) judges' bench material; and
(4) electric door strikes, locks, and control buttons for 10 doors.

Respondent's Motion for Summary Relief, Attachment N.

28. The only built-in bookshelves ever installed in the building were forty-two Government-owned wooden bookshelves previously located at the Max Rosenn U.S. Courthouse, which were removed and relocated by GSA as part of the third floor renovation project. Respondent's Motion for Summary Relief, Attachments D, G, I.

29. The only judges' benches that were ever installed at Penn Place were two benches previously located at the Max Rosenn U.S. Courthouse. These benches were relocated by GSA's contractor, Keating Development Corporation, as part of GSA's build-out project providing temporary court space on the third floor of Penn Place. One bench was removed and relocated back to the refurbished Max Rosenn U.S. Courthouse prior to GSA's termination of the Penn Place lease. Respondent's Motion for Summary Relief, Attachments D, F, G, I, L.

30. Appellant also seeks compensation for ten unidentified electric strikes, locks, transformers, and door control buttons that were allegedly removed by GSA. As was the case with the other items of property discussed above, GSA paid for the acquisition and installation of electric door strikes, locks, transformers, and control buttons, as part of the third floor build-out of temporary court space. Respondent's Motion for Summary Relief, Attachments D,G.

31. The appeal was originally docketed on December 28, 1999, as GSBCA 15208. Pursuant to Board Order dated May 22, 2000, the appeal was temporarily suspended to allow appellant time to make an election on whether it wished to proceed under the Contract Disputes Act or under the terms of the disputes clause set forth in the lease agreement. Appellant elected to proceed under the CDA and thereafter, on June 19, 2000, submitted a certified claim to GSA's contracting officer, Laurie Ney. Pursuant to a Board Order dated August 29, 2000, the matter was reinstated on a deemed denial basis.

Discussion

It is well established that resolving a dispute on a motion for summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996); Copeland Enterprises, Inc. v. CNV, Inc., 945 F.2d 1563, 1565-66 (Fed. Cir. 1991); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986). When reviewing a summary judgment motion, courts and boards of contract appeals draw all justifiable inferences in favor of the nonmoving party. Anderson, 472 U.S. at 255.

Appellant's claim in this case consists of a demand for the costs of 1) repairing damage to the building and 2) purchasing and installing specific property said to have been wrongfully removed by respondent. The Government moves for summary relief because it believes there is no dispute regarding any material facts and it is entitled to judgment as a matter of law. The basis of the Government's motion is that it believes that "GSA was not

contractually obligated to restore the second and third floors of the building upon termination of the lease [and GSA] . . . was contractually entitled to remove built-in bookshelves, judges' benches and temporary detention cells previously furnished and installed in Penn Place by GSA." Memorandum in Support of Respondent's Motion for Summary Relief at 2.

Appellant's Claim for Damages

With regard to the appellant's claim for damages, the Government contends that this claim is actually a claim for restoration of the property which respondent is not contractually obligated to perform. In support of this position, respondent asserts that the lease when first executed, before appellant became the lessor, contained neither a "restoration" nor a "renovation" clause. Rather, the respondent notes that the Maintenance of Premises clause made the lessor generally responsible for the maintenance of the property. Specifically, the lessor was responsible for maintenance of the demised premises inclusive of all equipment, fixtures, and appurtenances furnished by the lessor. The only exception was damage arising from acts of negligence of Government agents or employees.[1] Memorandum in Support of Respondent's Motion for Summary Relief at 5.

While respondent does acknowledge that SLA No. 14, executed by the Government and appellant's predecessor in interest, does contain restoration language,[2] the Government interprets this language of the SLA to apply only to the area of the building to which the SLA was applicable. The Government states in its motion for summary relief:

> In 1987, ten years after the lease was executed, the GSA and the then current lessor negotiated a supplemental lease agreement (SLA) 14 for the renovation and electrical upgrade of the Social Security Administration claims area located on the second floor of the leased building. During the negotiation of SLA 14 the parties agreed to a restoration clause that was placed on the second page of the SLA at paragraph 5. This restoration clause was neither referenced to nor incorporated in any of the 9 subsequent SLAs negotiated by the parties.

Memorandum in Support of Respondent's Motion for Summary Relief at 6.

In support of its position that the restoration clause in SLA 14 was specific to that SLA only, the Government states:

> Acceptance of any interpretation that SLA No. 14 resulted in the addition of a general restoration clause to the lease, renders meaningless the sentence in SLA 14 that "All other terms and conditions of the lease shall remain in force and effect." . . .
>
> The general lease that included the general build out of the space contained no restoration clause and therefore placed no obligation on GSA to restore. The

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[1] The full text of this clause is set forth in Finding 2.

[2] The full text of this provision is set forth in Finding 7.

> lease also failed to place any duty on GSA to renovate the property. Indeed the general lease authorized GSA to make alterations to the property, and remove such alterations at the end of the lease with no obligation to repair, renovate or restore the premises subsequent to removal of the improvement. In other words, the general lease was explicit in its exclusion of any Government obligation to restore or renovate the premises.[3]
>
> A restoration clause was not inserted in the general lease, but in a specific SLA: SLA 14. SLA 14 stated that "all other terms and conditions of the lease remained in full force and effect." The objective meaning of this phrase, considering the words of this sentence and the language of the lease itself, is that the scope of the restoration applies only to the items listed in SLA 14. Any other interpretation voids the meaning of the phrase in SLA 14 that all other terms of the lease shall remain in effect. It also ignores the meaning of the general lease's explicit omission of any Government obligation to restore or renovate the premises.

Memorandum in Support of Respondent's Motion for Summary Relief at 6-8.

The Government states further:

> Moreover, such an interpretation fails to give meaning to the first sentence of paragraph 5 [of SLA 14] stating in pertinent part that "[T]he Government retains title to all removable property covered by this agreement." The only objective interpretation that can be gleaned from reading this sentence in conjunction with the SLA 14 sentence stating that all other terms and conditions of the lease remain in effect, is that the agreement covered by SLA 14 is the only agreement that was intended to be covered by the language of SLA 14. SLA 14 was never intended to amend the overall lease contract to include a restoration clause.
>
> Interpreting SLA 14 as imposing a general obligation to restore or renovate produces an unjust result and is unreasonable.

Memorandum in Support of Respondent's Motion for Summary Relief at 8-10.

The Government analogizes this situation to one which this Board dealt with previously. The Government states:

> Had the parties intended to add a general restoration clause to the lease this would have been a significant amendment since it would have imposed a significant contingent liability on the Government as is suggested by the proposed $239,000.00 amount sought by Appellant to restore the premises. SLA 14 cost the Government $70,169.50. Certainly no prudent person would have agreed to assume such an extensive contingent liability without any

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[3] This is a reference to paragraph 4 of the lease, set forth in Finding 2.

> consideration on the part of the lessor in the form of a rental reduction or some other credit.
>
> The present appeal presents a set of facts similar to those analyzed by the Board in Adelaide Blomfield Management Company, 97-1 BCA 28,914; GSBCA No. 13125. In Adelaide Blomfield, the Board was also asked to interpret and give effect to restoration language included within the scope of a post lease award supplemental lease agreement. In performing this analysis the Board stated that "[t]he unexpressed, subjective or unilateral intent of one party is insufficient to bind the other party." Rather than giving weight to the parties' post dispute subjective intent, the Board gave weight to the objective intent of the parties derived from the base lease's lack of a restoration clause and SLA language stating that all other terms and conditions of the lease remained in effect. Based on this analysis the Board concluded that the scope of the restoration applied only to the items specified in the SLA. Applied to the present case, it is clear, by looking at the unambiguous language of SLA 14 and the lack of a restoration clause in the base lease that the SLA restoration language must also be limited to the renovation work performed under SLA 14.
>
> The SLA 14 work scope was confined to renovation and electrical upgrade of room 2227, the Social Security Administration's claim area located on the second floor of the building. GSA's only restoration obligation was limited to restoring room 2227, rather than floors two and three of the building. Accordingly, Respondent is entitled to Summary Disposition and denial of Appellant's claim for restoration.

Memorandum in Support of Respondent's Motion for Summary Relief at 8-10.

In response to respondent's arguments, appellant contends it has a contractual basis for compensation for damages. Appellant states that the lease does in fact contain a contractual requirement that obligates respondent to pay for restoration, as it interprets paragraph 2 of the lease as an obligation of the Government to be responsible for the acts or negligence of its employees. In addition to the contractual provision, the appellant states that "a lease of real property implies that it will be returned in the same condition in which it was given, ordinary wear and tear excepted."[4] Appellant's Memorandum in Opposition to Summary Judgment at 3.

Additionally, appellant interprets paragraph 5 of SLA 14 quoted above to be a restoration clause which applies to the entire leased premises. Appellant notes:

> the language of the clause uses the word "lease," not supplemental lease agreement; thus it applies to the lease as a whole. Secondly, there was no length of the term of the lease in the supplemental lease agreement; therefore there is no termination unless you look to the original lease which this

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4 No authority is cited for this proposition.

> amendment was to amend. Thirdly, the supplemental lease agreement states: "The parties hereto desire to amend the lease"; which is clear they intended clause five to amend the lease. Fourthly, the supplemental lease agreement makes a distinction between the lease and supplemental lease agreement inasmuch as in the supplemental lease agreement itself it uses the term "supplemental lease agreement" as distinguished from the word lease. Not only are these distinctions maintained throughout the supplemental lease agreement, but also in the preceding paragraph [of SLA 14 which] . . . refers to the supplemental lease agreement and in paragraph 5 it refers to the lease. The supplemental lease agreement makes a distinction between the two terms, thus the government's argument that the language only applies to SLA 14 fails of its own weight.

Appellant's Memorandum in Opposition to Summary Judgment at 4-5.[5]

With regard to the Adelaide Blomfield decision cited by respondent, appellant notes that the case was not decided on a motion for summary relief. Rather, the Board in that case held a two-week trial during which the entire background of the lease and addendum at issue was considered, together with the negotiation history, testimony of appellant, and a detailed factual determination as to the condition of the building in various stages of occupancy.

Appellant's point is well taken. The Board in Adelaide Blomfield reached its conclusion only after allowing extensive discovery to take place and inquiring into the negotiation of the lease and the relevant SLA. We have not had the opportunity to develop the record in this case, and the instant case presents a different factual circumstance.

In Carmon Construction, Inc., GSBCA 13412, 96-2 BCA ¶ 28,354, this Board ruled on a summary relief motion in which the Government asserted that the interpretation of a contract provision was clear and unambiguous, or alternatively, if the provision was ambiguous, the ambiguity was patent, not latent, creating an affirmative duty on the part of the contractor to clarify. Denying the Government's motion, the Board stated:

> Under the scheme of interpretation we follow, once the meaning of a given contractual provision is properly brought into dispute, we must ascertain the meaning each party intended to convey by its assent to the language of the contract. While this search for meaning need not invariably lead to a factual inquiry, it obviously tends in that direction, and as a general matter the need for a factual inquiry increases in proportion to the obscurity of the contractual scheme. . . .
>
> As this Board stated in Tera Advanced Services Corp., GSBCA 6713-NRC, 83-1 BCA ¶ 16,300, at 81,004, "[i]n an opinion on a motion for summary

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[5] Appellant makes additional arguments, pertaining to the language of the lease and SLAs, in its opposition to the motion for summary relief, which are not discussed herein, as the Board does not find it necessary to address these arguments in order to resolve the motion.

> judgment, we do not have to get all the way to the bottom -- it is sufficient to acknowledge that on the present state of the record we cannot do so. . . . [i]f there are legitimate questions about what the contract means . . . we must make further inquiry before deciding that issue." The present case requires precisely such further inquiry.

96-2 BCA at 141,585-86.

The instant case presents a similar situation. The respondent interprets the lease such that it does not include a general restoration clause, and appellant interprets the lease to include such a clause, albeit in a SLA that was entered into after the original lease execution and before the appellant purchased the property. This gives rise to issues of material fact as to what interpretation, if any, the parties to the lease had regarding this provision when it was executed. What has been presented by respondent in support of this motion is its counsel's interpretation of the contract and the SLA. No evidence has been submitted from the individuals who negotiated the original lease or SLA 14 on behalf of the respondent or the previous lessor. Additionally, the condition of the building both before and after the purchase has also been raised as an issue on summary relief, without the record being adequately developed. Findings 12, 18. Accordingly, as issues of material fact are in dispute, respondent's motion as to this portion of appellant's claim is denied.

Appellant's Claim for Purchasing and Installing Specific Property

The second portion of appellant's claim is compensation for purchasing and installing specific property allegedly wrongfully removed by respondent in the amount of $101,413.30. The property allegedly wrongfully removed included two temporary holding cells; built-in bookshelves; judges' bench material; and various door strikes, locks, and control buttons for ten doors. Finding 27. The holding cells, bookshelves, and judges' bench material were previously located at other Government facilities and installed during the respondent's lease. The door components were installed during the build-out of the third floor. Findings 28-30.

Respondent makes various arguments as to its right to remove this property. The first is that the articles of property were "trade fixtures," i.e., articles annexed to realty by a tenant for the purpose of carrying on a trade or business which are considered personalty rather than being part of the realty, and are therefore removable by the tenant. Respondent also relies upon the Alterations clause in the original lease, which reads as follows:

> The Government shall have the right during the existence of this lease to make alterations, attach fixtures and erect additions, structures, or signs in or upon the premises hereby leased, which fixtures, additions, or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government.

Finding 2.

Appellant responds as follows:

> Respondent attempted to state that certain items were removable by the Government without considering the lease. The lease provides, "It is understood and agreed that the Government retains title to all removable property covered by this agreed agreement. SLA 14, Clause 5, Exhibit 2. . . . At no time does the Government attempt to define removable property. Moreover, the Government by its contract did not intend to retain title (ownership) to non-removable property. . . . Consequently the Government's argument about trade fixtures is inapplicable to this case. . . . If removable means what it says, the items here are not removable in the common sense of the word. The jail cells were built-in, the bookcases were built-in, the judges' benches were built-in, and also the locks and strikes were part of the doors. In any event, these items need to be subject to discovery to determine their status. By merely labeling them doesn't prove anything. Respondent labels jail cells as temporary, yet they were built into place as were the other items. . . . Without discovery no one can tell how these items were attached to the realty, but it had to believe that a cell is part of the trade of a U.S. Marshall [sic]. Nowhere is trade or business defined by the respondent. Thus the articles are not trade fixtures because the burden is on respondent to establish this fact and there is no undisputed facts to support this contention. In summary, the title only remains in the Government in removable items, which these are not, and there is [sic] no undisputed fact saying they are, and secondly, even if trade fixtures are removable, these have not been proven to be trade fixtures.

Appellant's Memorandum in Opposition to Summary Judgment at 10-12.

Both parties' arguments on this issue fail to analyze the issue properly. Neither respondent's nor appellant's arguments focus on the primary issue necessary to resolve this claim for removal of property - whether the items are fixtures. We need not determine whether the items at issue are a special type of fixture - "trade fixtures" - as suggested by respondent, nor must we determine if the items are "removable," as suggested by appellant. We need only determine if the items are fixtures, because the Alterations clause of the original lease clearly and unambiguously gives the Government the right during the existence of this lease to "make alterations, attach fixtures and erect additions, structures . . . in or upon the premises . . . which fixtures, additions, or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government." Finding 2.

Appellant cites in its Opposition to Summary Judgment a state court decision, Appeal of Sheetz, Inc., 657 A. 2d 1011 (Pa. Commw. Ct. 1995), which discusses the concept of fixtures in real estate law. The court stated:

> A fixture is an article in the nature of personal property which has been so annexed to the realty that it is regarded as part and parcel of the land. Black's Law Dictionary 575 (5th Ed. 1979).
>
> In addressing whether chattel or an article of property becomes so affixed to the land that it becomes part of the real estate, we stated in Gore v. Bethlehem

Area School District, 113 Pa. Commonwealth Ct. 394, 398, 537 A.2d 913, 915 (1988) that:

> The considerations to be made in determining whether or not a chattel becomes a fixture include (1) the manner in which it is physically attached or installed, (2) the extent to which it is essential to the permanent use of the building or other improvement, and (3) the intention of the parties who attached or installed it.

657 A.2d at 1013. This explanation is consistent with the general principles of law governing fixtures. See Lemmons v. United States, 496 F. 2d 864 (Ct. Cl. 1974).

Without belaboring this issue, personal property which is attached to realty either remains personal property of the tenant or becomes a fixture and part of the realty, depending upon the three considerations above. Generally, if the items are so attached as to become fixtures, they become property of the landlord. Appellant attempts to suggest that because the items at issue are permanently affixed, and not "removable," they are therefore fixtures - - the Government does not have the right to remove them, because the items are not the Government's property and become that of the landlord. Appellant would be correct but for the Alterations clause of the lease, which expressly gives the Government the right to attach fixtures, retain title to the property, and remove that property if it desires. There is no need to make the factual inquiry suggested by appellant to determine how these items were affixed to the realty. If they were affixed such that they were easily removable, they would not be fixtures but remain personal property and the Government would have the right to remove them. If they were affixed so they were not removable, and therefore fixtures, by operation of the Alterations clause of the lease they still remain the property of the Government and may be removed by the Government.

As there are no material facts at issue as to this portion of the claim, and appellant is not entitled to recovery as a matter of law, appellant's claim in the amount $101,413.30 for purchasing and installing specific property allegedly wrongfully removed by respondent is denied.

Decision

Respondent's motion for summary relief is **GRANTED IN PART** as stated herein.

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ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge