Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: June 3, 2004

GSBCA 15334

LONG LANE LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Sam Zalman Gdanski, Suffern, NY, counsel for Appellant.

Dalton F. Phillips and Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER, HYATT,** and **DeGRAFF**.

PARKER, Board Judge.

Long Lane Limited Partnership alleges in this appeal that the General Services Administration (GSA) acted in bad faith in connection with a lease agreement. According to Long Lane, GSA, along with the building's tenant, the Social Security Administration (SSA), conspired to punish Long Lane for pursuing a dispute in connection with another property by (1) terminating the lease, (2) procuring similar space for the same tenants, and (3) purposely drawing the area of consideration for the new space such that Long Lane's building was just outside the area and unable to compete. GSA has moved for summary relief on the grounds that there is no dispute regarding any material fact and GSA is entitled to judgment as a matter of law. We agree with GSA and, thus, grant the motion.

Background

In 1989, Long Lane Limited Partnership contracted to lease to GSA approximately 5830 square feet of net usable space on the third floor of the American Square Building in Upper Darby, Pennsylvania. The term of the lease was ten years, with a starting date of January 22, 1990.

The lease provided that, after five years of occupancy, GSA had the right to terminate the lease "at any time by giving at least 90 days' notice in writing to the Lessor." GSA terminated the lease after seven years by providing such notice, although the exact date of receipt of the notice is in dispute.

At some point, Long Lane became involved in a dispute with the Government involving another property in Upper Darby. According to Long Lane, after the company's position in the other dispute was "vindicated," the building's tenant, SSA, enlisted GSA's help in embarking on a campaign "intentionally, maliciously, [and] specifically to injure" Long Lane. Long Lane alleges that the campaign was carried out by terminating in bad faith the lease that is the subject of this appeal, while at the same time excluding Long Lane from a procurement for similar replacement space.

On April 11, 2003, the Board denied a previous GSA motion for summary relief. There, GSA moved to dismiss the appeal solely on the basis that the lease's termination clause gave GSA the right to terminate the lease for any reason, including reasons involving bad faith. The Board denied the motion, holding that an implied covenant of fair dealing and good faith is implicitly contained within every Government contract, including the lease at issue in the appeal. Long Lane Limited Partnership v. General Services Administration, GSBCA 15334, 03-1 BCA ¶ 32,247. We also stated, however, that

> [p]roving that the Government acted in bad faith is not an easy task. It is well-established that the courts and boards will not lightly depart from the presumption that Government officials perform their duties in good faith to conclude that a particular Government action was taken in bad faith. Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977); Trans-Atlantic Industries, Inc., GSBCA 10803, 91-1 BCA ¶ 23,412 (1990). In order to overcome this presumption, a contractor must present "clear and convincing evidence" of bad faith. Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002). The burden to establish that Government action or inaction amounted to bad faith is exceedingly weighty -- so much so that "contractors have rarely succeeded in demonstrating the Government's bad faith." Krygoski Construction Co. v.

> United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996), cert. denied, 520 U.S. 1210 (1997).
>
> Though difficult, proving that the Government acted in bad faith is possible. Most tribunals, including this Board, have recognized that such a finding requires evidence of specific animus or malice toward the contractor. That is, "proof of 'bad faith' involves more than sloppy contract administration and requires showing some specific intent to injure the contractor or 'a showing of malice or conspiracy.'" Lopez Machine Works, Inc., ASBCA 45509, 97-1 BCA ¶ 28,622, at 142,910; accord Benju Corp., ASBCA 43648, et al., 97-2 BCA ¶ 29,274, at 145,657, aff'd, 178 F.3d 1312 (Fed. Cir. 1999) (table).
>
> As it stands, Long Lane has stated a cause of action because it alleges that GSA terminated the lease maliciously, with the specific intent to injure the contractor, and for no legitimate business reason. Because genuine issues of material fact exist as to whether GSA acted as Long Lane alleges, summary relief is not appropriate at this juncture. If, however, after a reasonable amount of additional discovery, GSA believes that Long Lane lacks specific evidence to support its allegations, the agency may renew the motion.

Id. at 159,445-46.

GSA has now renewed its motion on the basis that it is entitled to judgment as a matter of law because Long Lane has failed to discover and make a showing of sufficient evidence of bad faith.

Discussion

It is well-settled that resolving a dispute on a motion for summary relief is appropriate only 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); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986). In considering motions for summary relief, all reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977.

The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. Vivid Technologies, Inc. v.

American Science & Engineering, Inc., 200 F.3d 795, 806 (Fed. Cir. 1999). Thus, summary relief is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). A party may not rest its opposition upon allegations, conclusions, and denials contained in its pleadings; once the moving party demonstrates an absence of material facts, the burden shifts to the non-moving party to support its position with affidavits, declarations, or appeal file exhibits. Id.; Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Rule 108(g) (48 CFR 6101.8(g) (2003)).

After more than three years of discovery, Long Lane has come up empty with respect to the Government's motivations for terminating the lease. Its proffered evidence, consisting of contract-related documents, deposition testimony, and responses to interrogatories, does not reasonably suggest that GSA terminated the lease with malice or a specific intent to injure the contractor, even with all ambiguities resolved in Long Lane's favor. The evidence amounts to nothing more than appellant's speculation, which, at this stage of the proceedings, is not sufficient to maintain the appeal.

At trial, Long Lane would have the burden of proving with "clear and convincing evidence" that GSA acted in bad faith. Long Lane at 159,445. Based on the lack of sufficient evidence, it has become clear that further proceedings would be a waste of time because only one outcome can ensue. GSA's motion for summary relief is therefore granted.

Decision

The appeal is **DENIED**.

_____
ROBERT W. PARKER
Board Judge

We concur:

_____
CATHERINE B. HYATT
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge