

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

MOTION FOR SUMMARY RELIEF DENIED: April 11, 2003

GSBCA 15334

LONG LANE LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Dalton F. Phillips, 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, respondent, terminated the parties' lease agreement in bad faith. 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 to dismiss the appeal on the basis that the lease's termination clause gave GSA the unconditional right to terminate the lease and "was not conditional on the exercise of any motive or faith, good, bad or indifferent." Respondent's Motion for Summary Judgment at 4.

For the reasons discussed below, we deny GSA's 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 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 of similar replacement space. Long Lane seeks discovery in connection with these allegations.

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).

GSA has moved to dismiss this appeal because, according to GSA, the contract's termination clause gave the agency the right to terminate the lease for any reason, including reasons involving bad faith. Thus, GSA argues, even if Long Lane could prove that GSA acted as Long Lane alleges, the agency would still be entitled to judgment as a matter of law.

We disagree. In every aspect of its contract-related activities, the Government has an implied duty of good faith and fair dealing:

[The implied covenant of good faith and fair dealing] is merely an obligation, or promise, that is implicitly contained within an existing contract. As stated in the case of Tymeshare, Inc. v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.) (emphasis added):

[It is] clear that the doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in a particular form of conduct which . . . constitutes "bad faith."

This implied obligation of good faith is present in all contracts

Travelers Indemnity Co. v. United States, 16 Cl. Ct. 142, 149 (1988); see 6800 Corp., GSBCA 5880, 83-2 BCA ¶ 16,581.

Proving 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.

Decision

GSA's motion for summary relief is **DENIED**.

ROBERT W. PARKER
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge