

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Laumann Manufacturing Corporation) ASBCA No. 50246
)
Under Contract No. DAAA08-96-C-0015)

APPEARANCE FOR THE APPELLANT: Norman A. Steiger, Esq.
Goldberg & Connolly
Rockville Centre, NY

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Ralph J. Tremaglio, III, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER ON APPELLANT'S
MOTION TO DISMISS WITHOUT PREJUDICE UNDER RULE 30

Appellant has moved for the dismissal of this appeal without prejudice under our Rule 30. In its terse, one page motion, appellant represents only that it “has been advised of an on-going criminal investigation by the U.S. Department of Justice concerning, in part, Appellant’s performance under the above referenced contract. Appellant believes that continuation with this appeal at this time could be extremely prejudicial with respect to its defense of the criminal action.” (Motion at 1) No supporting affidavit, documents, or evidence of any kind is provided. Appellant further advises that respondent has no objection to the relief requested.

We deny the motion for two reasons.

First, appellant has failed to establish any of the elements required for a stay or dismissal without prejudice due to a pending criminal prosecution or investigation. To support the relief requested, appellant “must show a compelling need to protect the criminal litigation which overrides any injury to [the non-moving party]; that there must be substantially similar issues, facts and witnesses in both proceedings; and that there must be a clear case of hardship . . . in being required to go forward.” *Container Systems Corporation*, ASBCA Nos. 40614, 43694, 93-2 BCA ¶ 25,798 at 128,382; *see also DEL Manufacturing Company, Inc.*, ASBCA Nos. 43515, 43801, 93-3 BCA ¶ 26,004 at 129,265 (summarizing elements).

While “the moving party must present facts and evidence in support” of the requested dismissal or stay, *Fleischzentrale Sudwest GmbH*, ASBCA No. 37273, 89-3 BCA ¶ 21,956, appellant’s motion is manifestly insufficient to establish any of the foregoing elements.

With respect to the compelling need, no mention whatever is made. With respect to substantial similarity, there is no identification of any of the issues, facts and witnesses that might be similar in both this appeal and the criminal investigation. While appellant does state that the criminal investigation “concern[s], in part, Appellant’s performance under the above referenced contract” (motion at 1), our cases are clear that “[r]eliance on generalities is insufficient, even granting the likelihood of some commonality of issues between this appeal and the [criminal] investigation.” *Fleischzentrale, supra*, 89-3 BCA at 110,444. Finally, with respect to the hardship element, appellant fails to make a clear case but simply asserts that going forward “could be extremely prejudicial.” (Motion at 1)

Second, “[a] Rule 30 dismissal without prejudice is discretionary with the Board.” *Airborne Industries, Inc.*, ASBCA Nos. 45491 *et al.*, 95-1 BCA ¶ 27,496 at 137,032. There is no warrant for exercising that discretion as requested because the record in this default termination appeal reveals repeated delay. The appeal was filed four and one half years ago, in October 1996. The issues framed by the pleadings were narrow. After issue was joined, the parties each engaged in an initial round of document discovery. They thereafter repeatedly failed to honor the projected discovery completion dates that they furnished to the Board. Under extensive prodding from the Board, the parties finally proposed an April 2000 hearing date, which the Board later extended to August 2000. Thereafter, based upon the scheduled surgery of appellant’s president, appellant sought a postponement of that hearing date to February 2001. Subsequently, apparently citing the same criminal investigation that is invoked in the present motion, appellant also sought, with respondent’s concurrence, a suspension until February 2001. The Board granted that requested suspension. Upon its expiration, the Board established the present June 2001 trial date with the concurrence of both parties. In these circumstances, it is foreseeable that granting the present motion will only add several more years to the time required for disposition of this appeal.

Accordingly, appellant’s motion to dismiss without prejudice under Rule 30 is denied.

Dated: 3 May 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50246, Appeal of Laumann Manufacturing Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals