

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Thai Hai ) ASBCA No. 53375  
 )  
Under Alleged Contract No. USARV-E )

APPEARANCE FOR THE APPELLANT: Roger G. Nord, Esq.  
Fairfax, VA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA  
Chief Trial Attorney  
MAJ Leslie A. Nepper, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ROME  
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has timely moved for reconsideration of our decision in *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971, in which we granted summary judgment to the Government and dismissed his appeal with prejudice on the ground that he had no express or implied contract with the Army for the lease of warehouse property and, thus, no cause of action under the Contract Disputes Act (CDA), 41 U.S.C. § 601, *et seq.* Appellant alleges that: (1) the Board did not address the Army’s regulatory duty to investigate and process claims for lost rent and property destruction; this duty was material to appellant’s contract claim; and “whether or not a ‘contract’ existed, the Army owed this affirmative duty to investigate and failed to do so” (mot. at 2); (2) the Board erroneously concluded that there could be no genuine dispute that the Army did not acknowledge that appellant owned the property; the Army dealt with appellant, either as the property owner or as the owner’s agent; and appellant could sue under the CDA in either capacity, and (3) appellant’s allegation that he had a contract implied in fact raises genuine issues of material fact, such as the constructive knowledge of the Army’s contracting official, Lieutenant Colonel (LTC) Wallace, about the alleged lease document; whether it was lost before it reached him, or after he signed it; and whether the Army had a history of lost rental records and mishandled payments.

The Government opposes appellant’s motion, alleging that he has not raised any newly discovered evidence or new legal theory. Indeed, we evaluate a motion for reconsideration “against the familiar standard of whether the motion is ‘based upon any newly discovered evidence or legal theories which the Board failed to consider in formulating its original decision.’” *Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219, *quoting Sauer, Inc.*, ASBCA No. 39372, 96-2 BCA ¶ 28,620 at 142,897.

Appellant raised the Army's investigatory duties in his prior briefs and categorized them as "FACTS IN DISPUTE" (initial br. at 7, 10-11; reply br. at 9). In reaching our decision, the Board reviewed all alleged disputed facts, including supporting materials, and concluded that they are not material to whether appellant had a contract with the United States. *Thai Hai*, 02-2 BCA at 157,920. The alleged investigatory duties have no contractual basis.

As we noted in our decision, appellant's alleged ownership of the property does not advance his contract claim. There is no contract document that even purports to be between the Army and appellant and no evidence of any implied contract between the Army and appellant. Further, no authorized Army official executed the draft lease document that names Mr. de Monfreid as property owner and appellant as his representative. Lieutenant Howard, who signed the document only as "witness," did not have contracting authority. *Id.* at 157,921-22. Whether or not appellant properly attempted to sue in his own name, the fact remains that neither he, nor Mr. de Monfreid, were "contractors" under the CDA.

With respect to LTC Wallace's alleged constructive knowledge, he has sworn that he has no recollection of the warehouse property or of the alleged lease. *Id.* at 157,918. Nothing in the record imputes knowledge to him of any contract with Mr. de Monfreid, let alone with appellant.

Finally, appellant bases his allegations concerning lost rental documents and delayed rental payments upon a 14-15 January 1970 daily journal signed on behalf of Colonel Robert Allen, now deceased, which records an inquiry about unidentified rental checks and the response that they had not been issued because a number of unidentified leases "had been lost by finance" (ex. 28 to initial br.). The lease alleged by appellant was to have been effective in September 1968, over a year earlier. Appellant discussed this journal, and a regulation pertaining to lost public funds, in his initial brief and categorized them as disputed facts (initial br. at 10). Again, we found them to be immaterial to appellant's contract claims. Appellant's speculation that the lease he executed on behalf of Mr. de Monfreid was lost has virtually no prospect of proof and does not further his contract claim in any event. After years of search, no fully executed lease has been located. Moreover, even if fully executed, and located, the lease would be between the Army and Mr. de Monfreid, not appellant.

Appellant has not proffered new evidence or theories. Accordingly, we deny his motion for reconsideration.

Dated: 10 December 2002

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CHERYL SCOTT ROME  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 53375, Appeal of Thai Hai, rendered in conformance with the Board's Charter.

Dated:

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