

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Stephen Kangeter Builders, Inc. ) ASBCA No. 53940  
 )  
Under Contract No. NAFBA1-00-C-0073 )

APPEARANCE FOR THE APPELLANT: Mr. Stephen Kangeter  
President

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA  
Chief Trial Attorney  
CPT Peter G. Hartman, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS  
ON APPELLANT'S MOTION TO REINSTATE

This appeal was withdrawn and dismissed with prejudice on 17 March 2004 pursuant to an 11 March 2004 dismissal request filed by appellant through its counsel, Leonard W. Childs, Jr., Esq., and titled Voluntary Dismissal With Prejudice. Within days of the dismissal, Mr. Stephen Kangeter, appellant's president, sent a letter addressed to seven recipients, including CPT Hartman and the Chairman, ASBCA, seeking to rescind the dismissal. Although the ASBCA never received the letter directly, it was provided to the Board as an attachment to a response from CPT Hartman opposing reinstatement of the appeal. The Board has sought clarification on several points from appellant. As those attempts have not been satisfactory, we deny appellant's request.

Statement of Facts

The above-captioned appeal was set for hearing on 23 March 2004. Appellant's counsel apprised the Board on 8 March 2004 that he had been unable to contact his client. The Board directed the parties to proceed apace and tentatively scheduled another telephone conference for 12 March 2004. (Mem. of tele. conf. and order dtd. 8 March 2004) On 11 March 2004 the Board received a message from appellant's counsel advising that the appeal would be withdrawn (Bd. order dtd. 12 March 2004). The matter was discussed with counsel for the parties and Mr. Childs informed the Board and Army counsel that his client had directed him to withdraw the appeal and that he would file a voluntary dismissal with prejudice. When asked by the Board if he objected to the procedure, Army counsel stated that he did not. (Bd. order dtd. 26 March 2004; gov't

response dtd. 20 April 2004; response from Mr. Childs dtd. 24 April 2004) On 15 March 2004 the Board received from appellant through its counsel a filing dated 11 March 2004, as follows:

VOLUNTARY DISMISSAL WITH PREJUDICE

COMES NOW, STEPHEN KANGETER BUILDERS,  
INC., Claimant in the above-styled action, and voluntarily  
dismisses the above-styled appeal with prejudice.

Appellant's counsel, who had filed the notice of appeal and his appearance on 13 September 2002, signed the motion. The Board dismissed the appeal with prejudice by "ORDER OF DISMISSAL" dated 17 March 2004.

Thereafter, the Board received from the government a 24 March 2004 filing titled "Government's Response for Motion to Reinstate Appeal." The response opposed reinstatement. Attached was a 23 March 2004 letter from Stephen Kangeter seeking rescission of the dismissal. By Order of 26 March 2004 the Board requested certain information from the parties, including from Mr. Kangeter clarification as to who represented appellant on 11 March 2004 and from appellant's counsel a statement as to events leading to the dismissal. The Board received from Mr. Childs a statement dated 24 April 2004 in which he explained in detail the events that led to his 11 March 2004 request for dismissal. Mr. Childs reported:

Ultimately, Mr. Kangeter called [Mr. Childs] and directed that the present appeal be withdrawn and dismissed with prejudice. Issues relating to costs . . . were matters of great concern to Mr. Kangeter. Additionally, fear of the existing circumstances, the potential for significant costs, and a desire to simply put this matter behind him impacted Mr. Kangeter's actions.

During the course of the conversation and direction to withdraw the present appeal, I attempted to assure myself that Mr. Kangeter[']s directions were based upon a reasoned, knowledgeable, coherent evaluation of circumstances. I repeatedly sought assurances that his desire was to dismiss the action.

. . . .

It is my belief that Mr. Kangeter was facing very stressful circumstances immediately prior to the dismissal of the present appeal. He was faced with significant difficulties relating to other issues. His actions prior to dismissal had been dictated by the hope that this matter would be resolved through negotiations. . . . Upon reflection, he has now determined that [the dismissal] was not in his best interests and seeks withdrawal and reinstatement of his appeal.

(*Id.* at 8, 10-11)

Mr. Kangeter provided a 2 June 2004 letter to the Board in which, *inter alia*, he reiterated the request for reinstatement and asserted there were “some miscommunications and misunderstandings that . . . brought this case . . . to its[] present standing” (*id.* at 4 of 4). The letter did not address representation as the Board’s 26 March 2004 Order had requested and provided no specifics as to the alleged miscommunications. As a result the Board issued a 28 June 2004 Order seeking that information. The Order told Mr. Kangeter that an affidavit was the preferred method for placing the information in the record.

In a 27 July 2004 response Mr. Kangeter failed to provide the requested information, referring to inaccuracies in previous documents. Mr. Childs filed a 29 July 2004 response explaining that he had presented an “AFFIRMATION” to Mr. Kangeter to submit with Mr. Childs’ 24 April 2004 filing, and that the “AFFIRMATION” contained an incorrect contract number. It is presumably that inaccuracy to which Mr. Kangeter referred in his 27 July 2004 response.

The Board issued a 4 August 2004 Order suspending action for 30 days to permit discussions which might lead to an agreement resolving Mr. Kangeter’s request and the appeal. When this proved unsuccessful the Board issued a 15 September 2004 Order giving Mr. Kangeter “one last chance” to provide an affidavit or declaration stating who represented appellant and the specific miscommunication between Mr. Kangeter and Mr. Childs which led to the dismissal. In an 11 October 2004 letter Mr. Kangeter professed that he did not understand what the Board was asking while stating that he had represented appellant since 24 March 2004. By Order of 27 October 2004 the Board informed Mr. Kangeter that it wanted to know within 10 days “under penalty of perjury, what you remember as the specific conversation between you and Mr. Childs that led to Mr. Childs submitting the voluntary dismissal.” Mr. Kangeter has not responded.

## Decision

On the basis of Mr. Childs' statement and Mr. Kangeter's failure to provide specific information regarding the miscommunication he alleges resulted in the dismissal, we are led inexorably to the finding that Mr. Childs was directed by Mr. Kangeter to withdraw the appeal with prejudice. We are also inexorably led to the finding that Mr. Childs represented Mr. Kangeter at the time he filed the request for dismissal with prejudice. On this record, there is simply no basis for a contrary finding, although the record amply reflects that the Board provided appellant with multiple opportunities to provide support for Mr. Kangeter's position. We must, therefore, determine whether we should set aside a voluntary dismissal with prejudice because a party "[u]pon reflection . . . determined that [the dismissal] was not in his best interests" (Mr. Childs' statement dtd. 24 April 2004). We conclude that we cannot in the circumstances vacate the dismissal.

While we have treated requests for reinstatement as motions under FED. R. CIV. P. 60(b) and have reinstated appeals deemed to be dismissed with prejudice under Rule 30<sup>1</sup> when the parties missed the three-year deadline (*e.g.*, *Jurass Co.*, ASBCA No. 51527, 04-2 BCA ¶ 32,663), we have treated voluntary withdrawals as "an abandonment by appellant of its right to appeal [that] left appellant in the position of not having filed a timely appeal. Such a voluntary withdrawal, we [have also] held, rendered the final decision from which the appeal was taken, final and conclusive."<sup>2</sup> *RXDC, Inc.*, ASBCA No. 33356, 88-2 BCA ¶ 20,738 at 104,784, and cases cited therein. The apparent distinction between a request for rescission of a voluntary withdrawal and dismissal with prejudice, as here, and a late Rule 30 request for reinstatement is that under Rule 60(b) excusable neglect may provide a basis for reinstatement under Rule 30. In the instant appeal excusable neglect is not an issue, as the action was voluntary and intentional, not the result of neglect, excusable or otherwise.

We have distinguished *RXDC* and reinstated an appeal dismissed with prejudice that was voluntarily withdrawn where the letter seeking withdrawal did not specify whether the dismissal sought was with or without prejudice and neither party had filed pleadings:

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<sup>1</sup> Under that rule appeals may be dismissed without prejudice and the parties are given three years to reinstate. Failure to reinstate within that period results in the dismissal being deemed with prejudice.

<sup>2</sup> As such, the timeliness of Mr. Kangeter's letter *vis-a-vis* Rule 29, Motion for Reconsideration, is not a factor here.

The general rule is that a dismissal with prejudice is a complete adjudication of the issues presented by the pleadings and bars further action by the parties. *GSE Dynamics, Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059; *Bulloch International*, ASBCA No. 44210, 93-2 BCA ¶ 25,692. However, in this case, the parties did not discuss the nature of the dismissal, nor was appellant given notice upon applying for voluntary withdrawal that the appeal would be dismissed with prejudice. We have previously held under similar circumstances that appellant should have been given notice, converted the dismissal from with prejudice to without prejudice, and reinstated the appeal. *Carolina Security & Fire, Inc.*, ASBCA No. 46154, 95-2 BCA ¶ 27,712. Moreover, the dismissal in this appeal cannot be considered an adjudication on the merits warranting application of *res judicata* principles because there has been no pleadings filed or evidence presented. *GSE Dynamics Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059. We have inherent authority similar to Rule 60(b)(1) of the Federal Rules of Civil Procedure to modify a previous dismissal to one without prejudice. *Larry D. Paine*, ASBCA No. 41273, 93-3 BCA ¶ 26,161.

The Government's reliance on RXDC is misplaced because in that appeal appellant did not oppose dismissal with prejudice and did not argue that its withdrawal was mistakenly made. Instead, appellant in RXDC only objected to express language in the order of dismissal which would find appellant liable to the Government in the amount of the Government claim. Therefore, RXDC is inapposite to the issue presented in this appeal.

*Five Star Building Services*, ASBCA No. 50588, 98-1 BCA ¶ 29,372 at 146,006-07.

Unlike *Five Star* the appellant here had filed pleadings and was on its way to trial, appellant's actions, through its counsel, in withdrawing the appeal and requesting dismissal with prejudice were deliberate and voluntary, and Mr. Kangeter does not say that he did not understand the consequences of a dismissal with prejudice. Moreover, appellant's counsel had engaged not only his client but the Board and opposing counsel in the process, and there exists no question of notice with respect to the consequences of appellant's actions. Although given opportunities to do so, Mr. Kangeter does not assert

that he represented appellant at the time of the dismissal. He does not dispute that Mr. Childs represented appellant until 24 March 2004 and does not dispute Mr. Childs' authority to act during the relevant period. Finally, while not specifically excepting to Mr. Childs' contrary statement, Mr. Kangeter, in the most summary and general of terms, alleged there was a misunderstanding or miscommunication between him and Mr. Childs that led to the dismissal. The Board attempted to seek out and place in the record the misunderstanding or miscommunication alleged in a fashion sufficiently trustworthy and unambiguous as to permit evaluation of the probity and legal import of the alleged misunderstanding or miscommunication. The Board's attempts were unavailing. Accordingly, we deny Mr. Kangeter's request to rescind the dismissal with prejudice.

Dated: 3 December 2004

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CARROLL C. DICUS, JR.  
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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MONROE E. FREEMAN, JR.  
Administrative Judge  
Acting 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. 53940, Appeal of Stephen Kangeter Builders, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals

