

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Mark O'Connor) ASBCA Nos. 56863, 56944, 57010
)
Under Contract No. DACA45-5-04-00151)

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OPINION BY ADMINISTRATIVE JUDGE TUNKS
PURSUANT TO RULE 12.3

These appeals arise from the termination of a lease for military housing. Mr. Mark O'Connor (appellant) was the lessor and the U.S. Air Force (government) was the lessee. ASBCA No. 56863 sought restoration costs, but did not assert a "sum certain." ASBCA No. 57010 is a protective appeal which was filed to correct the jurisdictional defect in the original appeal. The amount sought for restoration is \$99,509.23. ASBCA No. 56944 is a government claim for an overpayment of \$8,798.13 relating to the utilities. The lease is subject to the Contract Disputes Act, 41 U.S.C. §§ 601-613. Appellant has elected to have its appeals processed pursuant to Board Rule 12.3. Only entitlement is before us.

SUMMARY FINDINGS OF FACT

On 1 July 2000, Mr. O'Connor purchased a "fixer upper" that was built in 1974 (R4, tab 22 at 2, 3; tr. 1/22). The main level has a living room with a gas fireplace, eat-in kitchen, office, two bedrooms, and 1½ bathrooms. The master bedroom is on the upper level and has a bedroom and a bathroom. The lower level has a family room, a bedroom,

a bathroom, and a utility room that houses the water heater and the furnace. (Tr. 1/16-18, 113, 168, 2/42, 51-53; ex. A-1, A-5 at OC 12, 13) When Mr. O'Connor purchased the house, there was a 24 by 24 foot shed in the backyard that was "ready to fall down" (tr. 1/21).

In 2004, Mr. O'Connor decided to advertise the house for rent (tr. 1/21). Prior to putting it on the market, he installed Pergo flooring in the kitchen and the adjacent hall, painted the kitchen cabinets with two coats of oil-based paint, repainted the inside of the house, bought new blinds for all the windows, bought some new curtains, installed a new furnace, and installed new carpet in all the rooms except the living room and the office (tr. 1/22-23, 181). The carpet in those rooms was a less expensive, glued-down carpet that was already installed when he purchased the property (tr. 1/107). Mr. O'Connor demolished the shed in the backyard and built a 30 by 40 foot "accessory home" (tr. 1/127). Although his building permit was for storage, Mr. O'Connor lived in the accessory house most of the time and his daughter and her boyfriend lived there "a little bit of the time" (tr. 1/126-27). The two houses are not individually metered for water, gas, and electricity (tr. 1/26).

Mr. O'Connor has had 23 years of experience in construction and is a carpenter by trade. Although he has installed many Pergo floors, he did not seal the Pergo floor in the kitchen. Mr. Edward N. Light, the government's expert, testified that Pergo floors are normally sealed to prevent moisture from seeping into the subfloor (tr. 2/172). Mr. Michael Meyer, appellant's expert, agreed (tr. 2/9). An article entitled, "Pergo Laminate Flooring - Learn How to Do a DIY Pergo Flooring Installation," confirms that the expansion spaces in bathroom and kitchen floors must be "sealed with Pergo Sealant or a similar mildew-resistant silicone product." The article also indicated that the expansion spaces between the boards should be 1/4-inch. (Ex. G-1) Mr. O'Connor testified that he thought the expansion spaces between the boards should be 1/2-inch and photographs of the kitchen floor show sizeable gaps between the boards (tr. 1/14-15, 23-24, 102; ex. A-7, appx. G at photo 22). We find that Mr. O'Connor did not properly install the Pergo flooring.

In the summer of 2004, Mr. Allen D. Thomas, a representative of the U.S. Army Corps of Engineers (COE), stopped by to check out the location of the house (tr. 1/24, 2/76-78, 81-82). The COE administered the lease on behalf of the Air Force (R4, tab 2, ¶ 1). Although he recalled that Mr. O'Connor told him over the telephone that the utilities for the two houses were not separately metered, Mr. Thomas testified that he did not have any authority for preparing the lease and that he would have told Mr. O'Connor that "there would have to be an analysis done to see...how much electricity the different [houses] used and that would have to be related to the Government at the time of the lease" (tr. 2/76, 78-79). There is no evidence that Mr. O'Connor advised the government

representative who executed the lease that the utilities for the two houses were on the same meter, and the lease does not contain any provision requiring Mr. O'Connor to reimburse the government for the utilities used by the accessory house.

On 22 July 2004, Mr. O'Connor and the government entered into Lease No. DACA45-5-04-00151. The lease provided for rent of \$1,250 per month. The lease was for one year, renewable from year-to-year with 30 days written notice until 30 June 2007. The lease was later extended until 30 June 2009. (R4, tabs 12, 13) Electricity, gas, and water were not included. Clause 4 of the lease, "TERMINATION and RENEWAL," gave the government the right to "terminate th[e] lease at any time by giving at least 30 days written notice to the Lessor." The lease did not provide for payment of lost rent in the event of early termination. Paragraph 4A of attachment A to the lease, "MAINTENANCE OF PREMISES," required the Lessor "to keep the demised premises...in good repair and in tenantable condition so that the premises will be fit for the use for which it was intended." Paragraph 4B of attachment A required the "Government's representative [to notify the Lessor] within a reasonable time...of any conditions...that are in need of repair." Paragraph 13 of attachment A, "RESTORATION," provided as follows:

Upon written notice, the Lessors may require restoration of the demised premises, ordinary wear and tear excepted.... [If] restoration is warranted, the Government shall either: (a) restore the premises to the same condition as that existing at the time of initial occupancy under this lease, or (b) pay to the Lessors a sum of money representing either the diminution in the fair market value of the property due to the failure to restore, or the actual cost of restoration, whichever is the lesser amount.

(R4, tab 12)

On 19 July 2004, Mr. O'Connor and TSgt Fred Randall, the tenant of the house, conducted a walk-through and signed a "JOINT SURVEY AND INSPECTION OF CONDITION OF GOVERNMENT LEASED PROPERTY" (ex. A-4). Mr. O'Connor noted on the form that the "walls and ceiling are in good condition; carpet in basement and upper bedroom in good condition; carpet in living room and office area is in poor condition" (tr. 1/31).

TSgt Randall, his wife, and six children moved into the house on or about 19 July 2004 (tr. 2/86). TSgt Randall had a "very good" relationship with Mr. O'Connor and considered him "almost like an uncle." They spoke on the telephone daily. (Tr. 2/90)

Mr. O'Connor came into the house at least a couple of times a year and as necessary to perform repairs. He had a key to the house and brought in the mail when the Randalls were on vacation. (Tr. 2/123) TSgt Randall notified Mr. O'Connor of any repairs that needed to be done as soon as he became aware of them (tr. 2/90). They performed a lot of projects together, including digging a septic tank, putting in a new back door, installing new screening in the gutters, and sheetrocking Mr. O'Connor's garage (tr. 2/89, 94-95, 100-02). The yard was "absolutely huge" and TSgt Randall and two of his sons performed all the lawn care and maintenance and removed all the snow (tr. 2/89-90).

Within two weeks of moving in, the seal around the dishwasher failed, leaking water onto the kitchen floor. TSgt Randall advised Mr. O'Connor of the leak, but the seal was never replaced. The Randalls solved the problem by not using the dishwasher for the four and half years they lived there. (Tr. 2/92-93) TSgt Randall also advised Mr. O'Connor that there no cranks to open the windows in the kitchen, bathroom and one of the bedrooms. The cranks were never provided. (R4, tab 20 at 2)

Mr. O'Connor testified that he told TSgt Randall not to use any water on the Pergo floor from "the day he moved in" (tr. 1/47). TSgt Randall testified that the first time he was told not to use water on the Pergo floor was in 2008, after the second piece of sheetrock fell off the basement ceiling (tr. 2/128). Although Mrs. Randall mopped the kitchen floor everyday, TSgt Randall denied that she used large amounts of water (tr. 2/128; ex. G-2 at interrogs. 14-15). Shortly after the Randalls moved in, Mr. O'Connor and his ex-wife Jane, stopped by to say "hello" (tr. 1/81). Both Mr. and Mrs. O'Connor testified that they observed Mrs. Randall mopping up some spilled orange juice on the kitchen floor with a large amount of water (tr. 1/153). Mrs. Randall did not testify. Mr. Light, the government's expert, did not find evidence that Mrs. Randall used excessive water to mop the floor in his review of the documentation (R4, tab 35, ¶ 1).

On 2 September 2004, the government conducted a walk-through and issued a "QUARTERS CONDITION INSPECTION REPORT." The report indicated that the front door was in poor condition, that the tiles around the fireplace and in the foyer were cracked, that one of the windows was chipped, that there were minor scratches on the sink and counter in the half bathroom on the main level, that the tiles in the bathroom on the main level needed to be re-grouted, that the kitchen window was missing a screen, and that the ice maker was broken. (R4, tab 15) One of the inspectors pointed out that the floor in the living room felt "weak" and suggested that TSgt Randall ask Mr. O'Connor what type of flooring was under the carpets. Mr. O'Connor replied that the flooring was ¾-inch plywood. (R4, tab 20 at 2) Appellant's expert, Mr. Meyer, testified that it was chipboard (ex. A-9 at 1 of 5).

At the hearing, TSgt Randall was shown an excerpt from AETCI32-6001 25 APRIL 2007 5, which appears to be an internal government regulation. Paragraph 7.4 requires the member to report “all maintenance and repair requirements (including health and safety issues) to the squadron or detachment for their coordination with the lessor.” (Ex. A-10) TSgt Randall testified that he had never seen the regulation before and that, during the 2 September 2004 inspection, he was told “to tell Mr. O’Connor if [he] had any problems with the house, and work things out with him” (tr. 2/139). The regulation did not require TSgt Randall to inspect the house for maintenance and repair issues on behalf of Mr. O’Connor. Moreover, any failure on the part of TSgt Randall to follow the regulation is a matter that is strictly between the government and TSgt Randall.

In 2006, a 2 x 2 foot piece of sheetrock fell off the basement ceiling from under the bathtub on the main floor (R4, tab 20; tr. 2/93). TSgt Randall advised Mr. O’Connor of the failure. Mr. O’Connor decided to defer repairing the basement ceiling until he replaced the floor in the main bathroom. TSgt Randall agreed with that decision. (Tr. 2/93) The hot water heater also stopped working in 2006 (tr. 2/96). TSgt Randall notified Mr. O’Connor of the problem. Mr. O’Connor had the hot water heater repaired, but it stopped working again. Eventually, he put in a new hot water heater. The new hot water heater stopped working after six or eight months. TSgt Randall ordered a new part, but the manufacturer sent the wrong thing. TSgt Randall sent it back, got the correct part, and installed it. Thereafter, the hot water heater worked properly. (Tr. 2/97-98)

TSgt Randall and Mr. O’Connor built a deck on the back of the house in 2006 (R4, tab 35 at 5). One of the Randalls’ sons accidentally started a fire on the deck, damaging approximately ten pieces of wood. TSgt Randall explained that “the barbecue grill got hot, and stuff went over the side, and yes, there was a fire” (tr. 2/143; ex. A-5 OC at 98, 99, 101, 102, 105). In addition, he testified that his three-year old son damaged some of the railing caps (tr. 2/143; ex. A-5 at OC-100 through OC-105).

In 2007, Mr. O’Connor had the house appraised for purposes of refinancing (R4, tab 22). During the inspection, the appraiser told Mr. O’Connor that the bathroom floor needed to be replaced and that the subflooring was not the greatest. The appraisal noted that “[t]he property is question[ab]le in structur[al] integrity but [is] generally typical in construction and quality for its age” (*id.* at 6). The house was appraised at \$265,000 (*id.* at 5). Also in 2007, the furnace stopped working (tr. 2/98). After reading the owner’s manual, TSgt Randall told Mr. O’Connor he thought the surface ignitor was faulty. Mr. O’Connor told him to go to the local supplier and get a new part. TSgt Randall got the part and installed it, which solved the problem. (Tr. 2/99)

In 2008, a second piece of sheetrock fell off the basement ceiling, this time from under the kitchen sink. After notifying Mr. O’Connor of the problem--

[A] week or two went by and he came over [and] evaluated the ceiling with me. I made the suggestion to him that maybe it [would] be just as easy...to pull down the whole ceiling....

So we both went ahead and we tore the ceiling down together.... At that point Mr. O'Connor looked up and...says, Damn it, Fred, see those beams up there? That's where your wife has been mopping too much. That's why [the floor joists are] wet up there....

(Tr. 2/94)

The floor joists had extensive water damage and mold growth. Two recessed light fixtures in the basement ceiling were rusted. (Tr. 1/49-50; ex. A-5 at OC 55, 56, 57, 58) After the ceiling was removed, TSgt Randall saw a drip coming from under the bathtub on the main floor and put a bucket under it (tr. 1/49). Mr. O'Connor thought the bathtub drain needed to be re-grouted, so he re-grouted it, but that did not stop the leak (tr. 2/103). Ultimately, they discovered a leaking P-trap:

I'm downstairs looking, he's upstairs, turns the water on, all of a sudden it starts dripping again. So I yell, Mark, we've got a leak.... So he shuts the water off.... And he looked and there was – I think it's called a P-trap, an S-shaped piece of pipe, and it appeared to have a crack in it.

So he cut it out.... [W]hat had happened was... apparently years ago it had a crack in it and somebody had just went over top of it with some type of cement or something. And he's told me that was just an old plumber's trick. [H]e bought a new P-trap and we put it in there, and we were good to go with that.

(Tr. 2/103-04; ex. A-5 at OC 59)

Towards the end of 2008, TSgt Randall notified Mr. O'Connor that he was going to be transferred to New York at the end of November (tr. 2/149). Mr. O'Connor and TSgt Randall made a list of things that needed to be done before he moved, which included replacing the bathroom tile and floor, putting in new carpet in the living room, and replacing the living room windows (tr. 2/107).

Thereafter, Mr. O'Connor and TSgt Randall replaced the basement window directly under the kitchen sink (tr. 2/149). This resulted in the discovery of another leak:

We pulled the sheetrock off and there was a piece [of] pink insulation...and...behind that was a piece of plastic. Well, lo and behold,...the plastic...was wet. [W]hile we were working on this window, we kept noticing this leak.... I went upstairs and I looked under the sink, [but] I couldn't find nothing....

[M]y father [told me] to [t]ake some paper towels and wrap around the pipes [and w]hen you find the wet paper towel, [l]ook in the area for that leak. That's exactly what I did....

[T]hat evening,..I found a wet paper towel. So, lo and behold, I look up and there is a – I call it a service line, I don't exactly know the proper plumbing term for it, but you have a copper line that comes up and there's a rubber line that connects to that and it goes up to the faucet.

[U]p at the top where it hooked on to the faucet...there's a crimp, and you could see it dripping and going down the rubber line... So I shut the water off[,] went up to...the local store [and bought a new crimp].

(Tr. 2/100-02)

In September 2008, Mr. O'Connor saw water coming from the foundation. He told TSgt Randall that he thought the toilet next to the office had overflowed.

[Mr. O'Connor] comes into the house and...goes back in there and he looks, and...no water. So he's like, We've got to have a pipe or something broke inside that wall. So we...took off the siding, [and] some of the insulation..., and, lo and behold, [we found] a piece of PVC drain pipe [that] appeared to be where somebody had, years ago, put [in] a coupling and it wasn't glued totally together, so it was leaking.... So he cut it out and he put a boot on it, and tightened the clamps, and put the insulation back up and we put the siding back on the house, problem fixed.

(Tr. 2/114-15)

In August 2008, the furnace stopped working. Mr. David Roehrich, of Sioux Falls Heating and Cooling, installed the furnace new in 2000. Mr. O'Connor asked him "to do an inspection on the furnace, to see what condition it was in and to determine if there had been any water damage to it." (Tr. 1/181-83) The blower motor was not operating and the bottom of the cabinet was rusted. Mr. Roehrich concluded that the cabinet "definitely had been subjected to some water damage" and that there was "a high probability that high moisture content caused the electrical components in the motor, the motor itself, to become damaged" (tr. 1/184-87). He testified that the furnace was venting properly, that he did not notice that any parts were missing, and did not observe any soot (tr. 1/185-90). Mr. Roehrich stated that a furnace should be checked every one to two years and that he had not checked Mr. O'Connor's furnace since it was installed in 2000 (tr. 1/188-89).

Photographs of the carpets taken towards the end of the Randalls' tenancy showed a heavy black discoloration that was darker in the corners and on the steps (ex. A-5 at OC 65, 71, 72, 73). Photographs of the outlets in the basement, living room, master bedroom, master stairway, lower bath and a ground fault indicator in the lower bath had a black residue outlining the switchplates (ex. A-5 at OC 83 through 91). The only outlet in the house that did not have black residue around it was the outlet in the basement bedroom. Mr. O'Connor testified that the basement bedroom was the only room that was not fed by the furnace. (Tr. 1/56; ex. A-5 at OC 92) A photograph of one of the living room furnace vents (supply) also had a black residue around it (ex. A-5 at OC 93). Photographs of the ceiling vents on the main floor showed that the ceiling was black (ex. A-5 at OC 60, 68, 69, 70).

In September or October 2008, TSgt Randall helped Mr. O'Connor replace the large plexiglass front window in the living room. The window leaked and produced a lot of condensation. In her written statement, Mrs. Traci Randall indicated that she could "wipe wet of[f] the windows [and that on] a cold, or rainy day they were freezing cold[.]" (R4, tab 21) When the windows were removed, TSgt Randall observed "all kinds of black stuff" that he thought was mold (tr. 2/104-05).

Mr. O'Connor planned to replace the floor in the main bathroom at the end of October 2008. On the Saturday before he planned to begin work, he put approximately 30 boxes of tile, grout, and some underlayment in the Randalls' living room (tr. 2/112-13). TSgt Randall described what transpired as follows:

So Sunday night comes, Mr. O'Connor calls and he goes,
Man, I bet you're itching to get that floor all up.... I says,
Yeah,...I want to get her done....

[S]o he said Well, I don't mind if you...start tearing up that...bathroom floor and everything and start getting it dried out, that'd be great. So I said, All right. Cool.

I had the floor up in probably 15 to 20 minutes.... [W]hat had happened was it wasn't Mr. O'Connor's or my fault, it was done years ago, somebody didn't put down the proper cement board, they just put down plywood or OSB, and...put the tiles on top of it.....

[T]he next morning...I called [Mr. O'Connor] again, and he said, [s]tart taking that kitchen floor up....

Got most of [it] out, except for underneath the refrigerator because I couldn't move it by myself. [When] he came...we moved the refrigerator out [and] got the laminate floor up from under there....

So now we've got the...bathroom floor...and the kitchen floor tore up. So Mark goes into the bathroom and we start working. The next thing you know, he starts knocking tiles off. I'm going like, Oh, what are you doing? He's like Freddie, if we're going to do this, we're going to do this right. We're just going to redo this whole room.

(Tr. 2/108-09)

TSgt Randall observed that the bathroom tiles had been laid without any cement board, causing them to crack. In addition, no moisture resistant sheetrock was used in the house. (R4, tab 20 at 5) The toilet bolts and the metal parts that operate the stopper on the sink that were removed from the main bathroom were rusty, the bathroom countertop was delaminating, and the bathroom cabinet had extensive water damage and mold (tr. 1/42-43, 45; ex. A-5 at OC 38-42, 44, 48-51, 53).

On 28 October 2008, the government conducted a pre-final inspection. Capt Eric J. Gergen noted the following defects on the "QUARTER'S CONDITION INSPECTION REPORT:"

OUTSIDE: SHINGLES ON ROOF ON BOTH ADDITIONS IN POOR SHAPE, ROOF IS BOWED OUT IN MIDDLE WHERE ADDITION WAS ADDED

INSIDE:

LIVING ROOM SUB-FLOOR IS FALLING IN, WINDOWS IN LIVING ROOM NEXT TO FLOOR HAVE EXCESS WATER BUILT UP

WINDOWS IN LIVING ROOM ARE PLEXIGLASS...AND DRIP TONS OF MOISTURE OFF OF THEM

PLEXIGLASS WINDOWS ARE LOCATED NEXT TO SINKING SUB-FLOOR.... CARPET THROUGHOUT HOUSE HAS BLACK AROUND THE DUST BOARDS, WALKWAYS

UNABLE TO DETERMIN[E] WHETHER [P]ERGO FLOOR WAS IN BAD SHAPE HOME OWNER CLAIMS PERGO FLOORING HAD LARGE GROOVES THAT WERE OPEN DUE TO THE E[X]CESSIVE AMOUNT OF MOPPING DONE BY TENANT

DO NOT KNOW IF FLOOR WAS INSTALLED CORRECTLY. HOME OWNER DID IT HIMSELF STOVE TOP HAD A BIG CRACK IN IT

SUB-FLOOR IN BAD SHAPE, CABINET UNDER SINK IN BAD SHAPE FROM WATER DAMAGE

CABINETS LOOKED WORN DOWN AND COUNTER NEXT TO SINK LOOKED LIKE IT BOWED

BEDROOM #1 HAD BASEBALL SIZE HOLE IN WINDOW...

BEDROOM #1, #2, #3, #4, ALL HAD BLACK STAINS ON THE CARPET BATHROOM NEXT TO KITCHEN WAS COMPLETELY GUTTED EXCEPT FOR TUB...

SUB-FLOOR LOOKED DAMAGED FROM WATER AND PART OF SHEETROCK ON THE WALL

BASEMENT CEILING W[AS] GUTTED, ALL THE SHEETROCK WAS OFF

SUB-FLOOR WAS FULL OF BLACK MOLD ON ENTIRE CEILING

SHEETROCK WAS OFF SOME OF THE WALLS IN THE MAIN AREA

CARPET WAS DAMAGED IN MAIN BASEMENT AREA

SMALLER ROOM IN BASEMENT WAS OK, EXCEPT FOR CARPET STAINS

(R4, tab 16)

Ms. Madonna Merritt also participated in the inspection. She observed that some of the shingles were standing straight up. When she asked Mr. O'Connor if he had a problem with roof leaks, he indicated that he did. (Tr. 2/42) When asked why the subfloor in the living room was falling in, he told her that Mrs. Randall had "poured buckets of water on the carpet" (tr. 2/67). Ms. Merritt also asked whether the windows on either side of the fireplace in the living room were plexiglass. Mr. O'Connor indicated that they were. (Tr. 2/53). When she stood next to the windows, Ms. Merritt felt a breeze come in and observed "a huge amount of moisture build up on the plexiglass" that dripped off the windows onto the window sills and the floor (tr. 2/41, 55-56). The bottom of the fireplace, which was between the plexiglass windows, was rusted (tr. 1/56; ex. A-5 at OC 94, 95). The living room ceilings were black and the carpets in the other rooms had a black discoloration (tr. 2/68). Mr. O'Connor told Ms. Merritt that the black discoloration was caused by candle soot (tr. 2/41).

TSgt Randall testified that he and his wife cleaned the carpets with a vacuum cleaner and a Bissell carpet cleaner and that she did not use a string mop to clean the carpets (tr. 2/117-20; ex. G-2 at interros. 14, 15). At the hearing, Mr. O'Connor admitted that he had never seen Mrs. Randall mop the carpets (tr. 1/105). TSgt Randall also testified that his wife usually burned two 1½ inch by 4-inch cinnamon scented candles, one in the kitchen and one on top of the fireplace mantle (tr. 2/122). Mr. Barry Kolbeck, of Omni Restoration and Remediation, who provided an estimate for restoring the house, testified that the subfloor in the living room was so deteriorated that it was "mush" and like a "saltine cracker" and that "it was actually dangerous to walk in the family room without falling through" (tr. 1/159, 164, 179).

On 31 October 2008, the government gave Mr. O'Connor written notice that it would terminate the lease on 30 November 2008 (R4, tab 14). The Randalls moved out on 5 November 2008. Mr. O'Connor testified that TSgt Randall left a disassembled picnic table, some boxes, and some dog excrement for him to take care of. He disposed of most of those items by throwing them on his burn pile. (Tr. 1/61; ex. A-6)

Mr. Light testified that Mr. O'Connor performed "a very complete mold remediation job," that he "tore out all the materials to get to the water damage[,] removed all the moldy sheetrock and insulation and any sheetrock and insulation even near the damaged areas," doing "what essentially a mold contractor would have done" (tr. 2/180). There was so much water and mold damage behind the kitchen cabinets that

Mr. O'Connor described it as the wall with "all the mold on it" (tr. 1/44; ex. A-5 at OC 43). He testified that it looked like the kitchen sink "had been leaking for a long time" (tr. 1/44; ex. A-5 at OC 30, 31, 33, 34, 35). The bottom of the refrigerator was rusty and the flooring under the refrigerator had water damage and mold (tr. 1/45, 2/133; ex. A-5 at OC 36, 37, 45, 54).

At the hearing, Mr. O'Connor presented evidence that the Randalls damaged the garage door, broke a window in the main floor bedroom, cracked the stovetop, damaged the deck, damaged the cap rails on the deck posts, damaged the living room curtains, and damaged some sliding glass closet doors (tr. 1/56-57, 62-63, 75; ex. A-5 at OC 96, 97, 100, 102, 103, 105, ex. A-6).

Mr. Michael Meyer testified on behalf of appellant as an expert environmental consultant (1/194). He has both a Bachelor of Science and a Master of Science in geology and is a certified professional geologist (tr. 1/195-96; ex. A-8). He agreed that the study of geology is unrelated to the study of mold, but stated that he had attended many seminars relating to mold and talked to many experts (tr. 1/197). From 1978 through 1989, he worked as a hydrogeologist for the South Dakota Department of Environment and Natural Resources. In 1989, he took a job with GeoTek Engineering & Testing Services (GeoTek), where he is presently a senior project manager. Among other things, GeoTek tests air samples for mold remediation firms. (Tr. 1/195) In the last ten years, he has performed about 1,000 indoor air and mold investigations (*id.*).

On 5 November 2008, GeoTek received air samples taken by another firm for testing. The samples were collected in the basement, the kitchen, and the outside air. GeoTek reported a total spore count of 65,757 in the basement, a total spore count of 14,237 in the kitchen, and a total spore count from the outside air of 3,306. Additional samples were collected on 10 September 2009. These samples had a total undisturbed spore count of 2,237 in the basement, a total undisturbed spore count of 4,318 in the kitchen, and the outside air had a spore count of 16,157. (Tr. 1/205-07; ex. A-7)

Based on the results of the testing performed by GeoTek on 5 November 2008, Mr. Meyer concluded that the house had suffered extensive water and mold damage. He testified that the 10 September 2009 test results were "pretty good" and "not bad" (tr. 1/210). He recommended that the house be professionally cleaned. Since pipe leaks and window leaks were usually localized in his experience, the only conclusion he could reach with respect to the cause of the damage was that the tenant had used excessive water on the Pergo flooring and carpeting. When asked how long it would take for mold like that found in the Mr. O'Connor house to develop, he responded as follows:

THE WITNESS: [T]o grow it only takes a matter of days[,] but to damage particle board, you're usually looking at months, and if you're damaging solid wood, it's usually in the range of years.

(Tr. 1/224-25)

Mr. Edward N. Light testified on behalf of the government. He is an expert in industrial hygiene, specializing in the assessment and control of the indoor environment, particularly mold and water damage. He has a Bachelor of Science and a Master of Science in environmental science. He is certified by the American Board of Industrial Hygiene and has been appointed a senior fellow of the American Industrial Hygiene Association and has been qualified as an expert in approximately 30 litigations. He was appointed as the state industrial hygienist for the State of West Virginia in 1982 and held that position for 20 years. After leaving state government, he formed Building Dynamics, LLC, and serves as its president. He has performed indoor environmental assessments at the White House, Blair House, and several federal buildings near the site of the World Trade Center attacks. He wrote the basic guidance manual on investigating indoor air quality for the Environmental Protection Agency and the National Institute of Occupational Safety and Health. He also authored the American National Standards Institute (ANSI) standard for managing indoor air quality for occupied buildings under construction. (R4, tab 33; tr. 2/155-60)

Mr. Light agreed that the house suffered extensive water and mold damage. However, he attributed the damage to hidden plumbing leaks, movement of water through gaps in the Pergo flooring, window moisture, and roof leaks, instead of excessive mopping. He also concluded that the house had extensive soot damage caused by failure to properly maintain the furnace. His findings (paraphrased) were as follows:

- (1) The Pergo flooring was routinely cleaned with a damp mop consistent with the manufacturer's recommendations. There was no evidence that excessive water was used.
- (2) The carpets were cleaned with a vacuum cleaner and a Bissell carpet cleaner. Cleaned carpets were properly dried and there was no evidence that excessive water was used.
- (3) Bathroom water damage was caused by plumbing leaks and inadequate maintenance. Failure to use moisture-resistant sheetrock promoted mold growth. Most of the damage occurred in the main bathroom, where removal of the

floor and vanity revealed extensive mold growth on subflooring and drywall, not associated with tenant cleaning.

(4) Ongoing plumbing leakage also occurred by the kitchen sink. Mr. O'Connor deferred investigation and repair of the problem until water damage was observed while replacing the basement window. When the kitchen floor and cabinets were removed and the basement ceiling opened, the darkest mold growth was observed under the sink and the adjacent bathroom. The leaks were then identified and repaired.

(5) When the living room windows were replaced in 2008, water damage and mold were observed on the trim and drywall below. The windows had apparently not been sealed properly. Another potential contributor was window condensation. There were no kitchen or bathroom exhausts in the home, increasing the moisture level.

(6) The heaviest suspect growth on the living room subfloor was in an area under an intermittent roof leak. This was described as a "soft spot" in 2004. No major spills or flooding were reported during 2004-2008. Before this time, there may have been roof leaks or other water damage not detected until the carpet was lifted in 2008. Living room carpet was reported as being in poor condition in 2004.

(7) Minor suspect spotting was present on the kitchen subflooring away from the sink. However, this was not observed in the adjacent hall where Pergo flooring was subject to the same cleaning. Gaps were observed between flooring sections, and the floor did not extend to the walls. These factors may have allowed water to penetrate the flooring.

(8) When the basement ceiling was removed in 2008, the areas under the sink and bathroom leaks were described by the tenant as wet. Suspect growth on joists was darkest in those two areas. Lighter staining on other joists was consistent with the kitchen floor above.

(9) Under carpet staining in the main floor southwest bedroom appeared to be consistent with minor water stains (normal wear and tear).

(10) Non-mold, dark staining was present on ceilings, walls, and carpets throughout the home (heaviest near diffusers). This apparently accumulated gradually since 2004. Mr. O'Connor originally alleged that this was candle soot containing lead, although the Randalls did not use candles excessively and no tests for lead were conducted. Mr. O'Connor later described this as mold, although surface testing was negative. This material is more likely to be soot or dirt released from the heating/cooling system. No preventative maintenance of the heating/cooling system was reported since 2004. In 2006, the furnace exhaust was obstructed by construction of a deck and the furnace repairman reported that the make-up air tube was closed, which would generate soot.

(11) Repair of ongoing bathroom and kitchen sink leaks did not begin until fall 2008 when Mr. O'Connor started remodeling the kitchen and replacing windows. Both these projects uncovered suspect growth. In 2009, he disinfected moldy joists with bleach solution, dried damp areas, and sealed residual stain with encapsulant. He also removed flooring in the kitchen and living room.

(12) Repair work reported by Mr. O'Connor appears to have removed and/or treated suspect growth uncovered in 2008. Because the homeowner did not take precautions to contain the spread of dust during demolition, the home should be sanitized to complete restoration.

(13) On 5 November 2008, Steamway collected two air samples. Although these were relatively elevated, testing occurred after moldy materials were accessed and while renovation was ongoing. When this mold growth was previously covered over, no air quality impact would be expected. GeoTek also took two "tape" samples on 28 May 2009. Both contained mold spores normally present in house dust. Contrary to Mr. O'Connor's speculation, localized

mold growth did not cause mold to grow in other areas. Mold growth only occurs where surfaces remain wet.

(R4, tab 35)

Mr. Light criticized Mr. Meyer's interpretation of the 5 November 2008 tests because he did not take the conditions under which the samples were collected into account. Mr. Light testified that mold is normally present inside a house and that the spore count is extremely variable, going up and down in relation to many factors, such as the dust and the condition of the house, and the indoor and outdoor environment. In addition, mold which is inside a house and covered up does not generally get into the air. When areas with mold are opened up, however, the spore count will substantially increase. For example, the 5 November 2008 samples were collected on the day the Randalls moved out and shortly after several moldy areas had been uncovered. (Tr. 2/182) The 5 November 2008 spore counts were 65,757 in the basement and 14,237 in the kitchen. The 10 September 2009 spore counts were collected at a time when no one was moving in or out and no new moldy area had been opened up. The spore counts were 2,237 (undisturbed) in the basement and 4,318 (undisturbed) in the kitchen. (Ex. A-7)

Mr. Light was also dubious about the relevance of the two "tape" tests (living room fan blade and second floor switchplate) taken by GeoTek on 28 May 2009. GeoTek examined the samples under a microscope and listed all the different types of mold it could identify. Simply naming the types of mold in a sample does not address the key question, which is whether or not mold is growing. Mr. Light testified that GeoTek should have performed a more sophisticated test to determine "whether or not mold structures, the threads were actually found in the microscope" (tr. 2/184). Although GeoTek reported that the fan blade had heavy concentrations of various molds, including *Stachybotrys*, and that the switchplate had medium concentrations of various molds, Mr. Light testified that the type of mold cannot be conclusively or accurately determined by examining a sample through a microscope (ex. A-9, appx. A at 1, 2). In order to reliably identify the type of mold, the sample must be cultured, which GeoTek did not do (tr. 2/185). Citing guidelines issued by the Center for Disease Control, Mr. Light also testified that, contrary to popular belief, *Stachybotrys* mold is not more toxic or dangerous than other molds (tr. 2/192-94).

On 25 November 2008, Mr. O'Connor requested the government to restore his house without clearly specifying a dollar amount (R4, tab 3). On 15 May 2009, the contracting officer denied most of the request (R4, tab 2). Mr. O'Connor appealed the denial to this Board on 26 June 2009, where it was docketed as ASBCA No. 56863 on 29 June 2009.

In response to an inquiry from Mr. O’Connor, counsel for the government advised Mr. O’Connor on 27 February 2009 that he was free to make repairs to his home and “that no one from the Government has ever represented to you that you [could] not make repairs to your rental home after the final inspection, which took place on November 7, 2008” (R4, tab 6).

On 1 September 2009, the contracting officer issued a final decision asserting a government claim for \$8,798.13. The contracting officer indicated that the government had erroneously paid the utilities for the main house and the accessory house, which were not separately metered. Since the accessory house made up about 30 percent of the square footage of livable space between the two houses, the contracting officer assessed Mr. O’Connor 30 percent of the electricity, gas, and water bills, which amounted to \$3,510.05, \$3,129.92, and \$1,085.85, respectively. He also found that Mr. O’Connor was responsible for the electricity and gas from 1 December 2008 through 25 February 2009, because the government did not occupy the house after 30 November 2008. Mr. O’Connor appealed the final decision to this Board on 14 September 2009 and we docketed the appeal as ASBCA No. 56944 on 15 September 2009.

A hearing was held in Sioux Falls, South Dakota, on 24 and 25 September 2009.

On 9 November 2009, Mr. O’Connor filed a protective claim to correct the potential jurisdictional defect in the original appeal. We docketed the appeal as ASBCA No. 57010 on 20 November 2009. Mr. O’Connor’s claimed restoration costs of \$99,509.23, broken down as follows:

Steamway Restoration Specialists (Mold Remediation)	\$21,930.61
Omni Restoration and Remediation (Reconstruction)	<u>\$53,123.34</u>
	\$75,053.95
Additional damages not in the above estimates:	
New bath tub on main level	\$ 750.00
Broken window in the main floor	120.00
Fire damage on deck	228.00
Front storm door	170.00
Garage door	650.00
Fireplace	1,842.28
Southwest bedroom door	120.00
Furnace	2,395.00

Sliding glass closet doors	170.00
Curtains (living room)	140.00
Damaged rail caps on deck posts	70.00
Cleaning/trash removal	300.00
Lost rent from 1/1/09 through 2/28/2010	<u>17,500.00</u>
	\$ 99,509.23

(Ex. A to Claim)

On 18 November 2009, the contracting officer denied the claim with the exception of \$650 for the damaged garage door, \$592.46 for the cracked stovetop, \$120 for a damaged door in the southwest bedroom, \$170 for damaged sliding glass closet doors, \$140 for curtains, and \$120 for the broken window in the bedroom. The contracting officer also denied the claim for fire damage to the deck and the damage to the rail caps on the grounds that the deck was built after the lease was executed and was, therefore, not part of the lease. All three appeals have been consolidated for decision.

DECISION

The lease required the government to restore any damage that exceeded “ordinary wear and tear.” As with any claim against the government, the party seeking recovery must prove a causal connection between the damages alleged and the government by a preponderance of the evidence. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *see also Gene Walz and Gail Walz*, PSBCA No. 5289, 08-1 BCA ¶ 33,836 at 167,462. The first part of Mr. O’Connor’s claim consists of the cost of remediation and restoration of the water and mold damage to the house. The second part consists of a laundry list of additional damages.

We are satisfied that the water and mold damage to the house was caused by multiple hidden leaks that undoubtedly predated the tenancy of the Randalls. Moreover, neither the lease nor the internal Air Force regulation cited by appellant required TSgt Randall to inspect the house for maintenance and repair problems. This responsibility fell squarely on Mr. O’Connor as the lessor. We have considered Mr. O’Connor’s contention that Mrs. Randall excessively mopped the kitchen floor with large amounts of water, damaging the Pergo floor. We are convinced that the damage was caused by inadequate installation of the flooring. Both Mr. Light and Mr. Meyer indicated that Pergo flooring in a kitchen must be sealed and should not have wide gaps between the boards. Mr. O’Connor admitted that he did not seal the expansion spaces between the boards and the photographic evidence establishes that he left sizeable gaps between the boards. As a result, water from whatever source was able to saturate the kitchen flooring and the subflooring.

Mr. O'Connor did not prove that the water/mold damage in the main bathroom or the living room was caused by the Randalls. The problems in the bathroom were caused by poor maintenance and poor construction. The bathtub leaked. There was no cement board under the tiles. The tiles cracked and leaked, allowing water to enter the subflooring. Ultimately, the leaks, including the leak in the kitchen, saturated the subflooring and damaged the floor joists, causing parts of the basement ceiling to fall off. Exacerbating the problem, no moisture resistant sheetrock was used, there were no exhaust fans in the kitchen or the bathrooms, and Mr. O'Connor did not provide cranks to open many of the windows. In addition, there was an intermittent leak from the roof in the living room that caused the chipboard subflooring to disintegrate. The soft spot caused by the leak was pointed out by the government during its 2 September 2004 inspection and the record strongly suggests that the leak predated the Randalls tenancy. By the time the Randalls moved out, the subflooring in the living room had deteriorated to the point where Mr. Kolbeck of Omni described it as "mush" and like a "saltine cracker" that was dangerous to walk on. The living room windows were plexiglass and were not properly sealed. As a result, they produced copious quantities of condensation that dripped onto the living room carpeting, providing a fertile environment for the development of mold. There is no evidence that the Randalls caused any of these leaks. With respect to the first part of the claim, we hold that Mr. O'Connor is not entitled to the cost of remediation and restoration of the water and mold damage to the house.

With respect to the second part of the claim, there is no evidence that the Randalls damaged the bath tub, the front storm door, the fireplace, or the furnace. These claims are denied. The claims relating to the curtains and the cleaning/trash removal fall under the category of ordinary wear and tear and are denied. Mr. O'Connor is entitled to damages for the broken window, the garage door, the bedroom door, and the sliding glass closet doors. In view of TSgt Randall's admission that his sons damaged the deck, we find that the government is liable for the damage to the deck and rail caps. Finally, the lease did not provide for payment of lost rent in the event of early termination. This claim is denied.

With respect to ASBCA No. 56944, the contracting officer found that the government had mistakenly paid the utilities for the accessory house. Since the accessory house had approximately 30 percent of the square footage of livable space between the two houses, the contracting officer found that Mr. O'Connor was liable for 30 percent of the utilities. Because the government did not occupy the house after 30 November 2008, the contracting officer also found that Mr. O'Connor was responsible for the utilities from 1 December 2008 through 25 February 2009. Mr. O'Connor did not present any rebuttal evidence. We hold that the government is entitled to recover \$8,798.13.

CONCLUSION

ASBCA No. 56863 is dismissed for lack of jurisdiction. ASBCA No. 57010 is sustained and denied as indicated below:

Mold Remediation	Denied
Reconstruction	Denied

Additional damages:

New bath tub on main level	Denied
Broken window in the main floor	Sustained
Fire damage on deck	Sustained
Front storm door	Denied
Garage door	Sustained
Fireplace	Denied
Southwest bedroom door	Sustained
Furnace	Denied
Sliding glass closet doors	Sustained
Curtains (living room)	Denied
Damaged rail caps on deck posts	Sustained
Cleaning/trash removal	Denied
Lost rent from 1/1/09 through 2/28/10	Denied

ASBCA No. 56944 is denied. The government is entitled to recover \$8,798.13.

The appeals are remanded to the contracting officer to negotiate quantum. In the event that the parties cannot reach agreement on quantum, the contracting officer is directed to issue a final decision from which further appeal may be taken.

Dated: 16 December 2009

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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 Nos. 56863, 56944, 57010, Appeals of Mark O'Connor, rendered in conformance with the Board's Charter.

Dated:

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