ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Triad Microsystems, Inc.	)	ASBCA No. 48763
	)	
Under Contract No. DAAH01-84-C-0974	)	

APPEARANCE FOR THE APPELLANT: Richard W. Schwartzman, Esq.
Kutak Rock
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Elizabeth G. Eberhart, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

Triad Microsystems, Inc., asks us to vacate or modify, under Fed. R. Civ. P. 60, the 2 May 1997 decision and judgment we issued in this appeal. The Government opposes the motion and seeks a dismissal for lack of standing. For the reasons explained below, we deny both motions.

BACKGROUND

The present motions follow protracted litigation associated with Contract No. DAAH01-84-C-0974 and a lengthy bankruptcy proceeding in which the Chapter 11 reorganization Triad initially sought on 11 May 1988 subsequently was converted into a Chapter 7 liquidation. The bankruptcy case was closed by an order dated 2 July 1998, following the filing, on 11 March 1998, of a "Final report by the Trustee in a no asset case." (Gov't br., ex. 4)

Appellant was awarded Contract No. DAAH01-84-C-0974 by the Department of the Army in September 1984 for the production of TOW missile vehicle power conditioners. The contract was terminated for default in May 1988 based upon allegations that contract records had been falsified. Following the default, the Army took possession of the work in process inventory and demanded return of unliquidated progress payments totaling $6,251,924.78. *See Daff v. United States*, 31 Fed. Cl. 682, 687 (1994), *aff'd*, 78 F.3d 1566 (Fed. Cir. 1996).

The trustee in bankruptcy brought suit in the United States Court of Federal Claims (COFC) pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-613, seeking to set aside the Army's default termination and demand for return of unliquidated progress

payments. *Daff*, 31 Fed. Cl. at 685-86. The Government raised a special plea in fraud pursuant to 28 U.S.C. § 2514, and filed a counterclaim for damages and penalties under the False Claims Act, 31 U.S.C. §§ 2729 - 3731. The COFC sustained the default and concluded that Triad owed the Government $5,602,177.36, which represented the difference between progress payments paid and the value of the delivered units. It also found that the Government was entitled to a civil penalty of $5,000 and treble damages in the amount of $600,000 under the False Claims Act. *Daff*, 31 Fed. Cl. at 697. It subsequently taxed Triad $5,764.19 in costs. The COFC expressly declined to determine the value of the work in process inventory in the absence of a claim therefore. *Daff*, 31 Fed. Cl. at 696-97.

After the *Daff* decision, Triad submitted a claim for the work in progress inventory to the contracting officer who, in a final decision dated 27 February 1995, determined the value of the inventory to be $1,795,202.05. An appeal from that decision was filed at the Board, instead of the COFC, and docketed as ASBCA No. 48763. Triad and the Army then agreed to mediate the issues in ASBCA No. 48763 under the Board's Alternative Dispute Resolution (ADR) procedures and a monetary settlement was reached. In order to effectuate payment of this settlement from the Judgment Fund under 31 U.S.C. § 1304, we entered a consent judgment which stated, in relevant part:

> The ADR session was conducted by the Board on 14-16 April 1997 and all issues associated with the valuation of the inventory were resolved. The inventory was valued at a total of $7,021,758. The parties have agreed that the value of the inventory will be offset by $5,602,177.36 in unliquidated progress payments made to appellant during the course of contract performance, leaving a balance of $1,419,580.64.

Triad Microsystems, Inc., by Charles W. Duff, Trustee in Bankruptcy, ASBCA No. 48763, slip op. at 1 (2 May 1997, unpublished). We further noted that the parties had informed us that there was a judgment debt associated with the subject contract resulting from the prior COFC action, which included a $5,000 penalty and $500,000 in treble damages under the False Claims Act, and $6,665.56 in court costs. *Id*. In an Erattum issued on 9 May 1997, we corrected the $500,000 treble damages figure to $600,000. These three amounts were to be included as deductions on the Judgment Fund Award Data Sheet, FMS form 196, to be submitted to the Financial Management Service, Department of the Treasury, by the contracting agency, in this case the Army. In the nature of a consent judgment, we made a monetary award to Triad "in the net amount of $1,419,590.64 (value of inventory, $7,021,758, less unliquidated progress payments $5,602,177.36)." Slip op. at 2. Finally, our decision and judgment stated: "No interest shall be paid." *Id*.

For payment from the Judgment Fund, the Department of the Treasury requires, among other things, that the contracting agency submit a Certificate of Finality that has

been executed by the contractor. Triad's trustee in bankruptcy executed the Certificate of Finality on 14 May 1997 and sent it to the Army. (Gov't br., ex. 2)

On 8 August 1997, the U.S. Department of Justice wrote to counsel representing Triad and the trustee to request "Triad's consent to a Government setoff of the entire Board award against [Triad's] undisputed indebtedness to the United States." (Gov't br., ex. 2). Citing *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), the Department of Justice asserted that the Government did not have to obtain relief from the automatic stay imposed by the bankruptcy statute because it had not "effected a setoff; rather, it ha[d] withheld payment of an administrative award pending a review of its right of setoff." (*Id.*) The trustee declined to consent to the setoff and, instead, demanded that the Government "pay over to the bankrupt estate $1,419,580.64 for appropriate administration in accordance with the United States Bankruptcy Code." (Gov't br., ex. 3 at 2) It does not appear from the record now before us that the Government acceded to that demand or filed a claim of any kind with the bankruptcy court.

On 2 July 1998, Triad's president wrote to the Board, requesting a conference with the Board and the Government. The letter stated that:

> The representations made by the government during the mediation proceedings referencing Triad's indebtedness for unliquidated progress payments in the amount of $5,602,177.36 were grossly misstated. The government exercised its set-off rights, satisfying Triad's indebtedness to the United States prior to the mediation negotiations.

As we understand the letter, Triad also alleged that the Government had refused to pay it $644,000 for other "products delivered by Triad and accepted by the Army in 1988" and that it had been frustrated in its attempts to have the $1,419,580.64 judgment in this appeal applied against amounts it owed to the Internal Revenue Service (IRS).

The Board treated Triad's letter as a motion for relief from judgment under Fed. R. Civ. P. 60(b) and directed the Army to respond. The Army did so on 27 August 1998. It asserted that Triad had received credit for all amounts owed, and that its debts to the United States were greater than the $1,419,580.40 consent judgment. It also stated that the corporation had been "liquidated in Chapter 7 bankruptcy," although it provided no support therefore. It concluded that "[t]he sums awarded to Triad have been, and will continue to be, properly administered by the Government." The Army supplemented its response on 31 August 1998, suggesting that the matter is beyond our jurisdiction "to the extent that [the former president] is urging matters in his personal capacity . . . ."

In a letter dated 28 September 1998, counsel for the trustee in bankruptcy, Mr. Richard W. Schwartzman, Esq., advised us that, contrary to the Army's representation, Triad had not been liquidated; but, rather, that its bankruptcy case had

been closed. No support for the statement was provided. According to counsel, the closing "merely reinstates the corporation to its pre-bankruptcy position, and permits the corporation to carry on its business including the pursuit of any pre-petition assets which were not pursued or were suspended during the course of the bankruptcy proceedings." Counsel pointed out that, under 31 U.S.C. § 3728, the responsibility for exercising the Government's right of setoff against any judgment is vested in the Secretary of the Treasury. He advised the Board that the Army had not transmitted the consent judgment in this appeal to the Treasury Department for payment from the Judgment Fund and that its failure to do so had precluded the Treasury Department from submitting the judgment to the trustee in bankruptcy for administration as part of the bankrupt estate. He also asserted that the Army had withheld "payments from other Government contracts . . . solely as a result of the Army claim relating to this contract."

The Board met with the parties on 11 January 1999 to discuss the matters that had been raised. The Board requested written reports by 12 February 1999 and directed the Army to submit the Board's 2 May 1998 judgment, as corrected, to the Treasury Department in accordance with 31 U.S.C. § 1304.

On 13 January 1999, the IRS issued a Notice of Levy to the Defense Finance and Accounting Service listing a tax liability for Triad in the total amount of $2,921,230.79. (Gov't br., ex. 5)

The Army submitted its report to the Board on 3 February 1999. Attachment 2 thereto was a copy of the Judgment Fund Award Data Sheet, FMS form 196, it had submitted to the Treasury Department on 29 January 1999. The Data Sheet included as "deductions to be made from amounts payable from the Judgment Fund" the following: (1) $605,000 for the COFC judgment; (2) $5,764.19 for the COFC's taxation of costs; (3) $78,954, identified only as a "Setoff of Contracting Officer's Final Decision;" and (4) $2,921,230.70 for the IRS tax levy. The total amount of the claimed deductions was $3,610,230.79.

The written report for Triad, dated 10 February 1999, asserted that the Government had taken offsets totaling $9,502,695.80, and that "[t]he Government recovered all advance payments for contract DAAH01-84-0974 prior to the Federal Claims Court decision in 1994 and is currently in an over-secured position." The documentation provided with this letter was not of the type required to support such an assertion. Triad also claimed it was due $4,219,633 for a "data package," apparently a reference to the Army's alleged infringement of U.S. Patent No. 4,768,002 held by Triad, and the design data package prepared by Triad under the DAAH01-84-0974 contract, or one of its predecessors. Attachment 12 to Triad's report indicates that patent and data package claims have been filed with the Army.

On 19 February 1999, Mr. Schwartzman submitted a report addressing Triad's allegations that the Government had been overpaid, or at least over-secured, and asserting

that interest should be paid on the 2 May 1997 consent judgment given the excessively long period of time taken by the Army to submit the judgment to the Treasury Department.

On 7 May 1999, we reinstated the appeal as Docket No. 48763. Thereafter, Triad requested and was granted the opportunity to file a formal motion for relief from judgment under Fed. Rule Civ. P. 60(b). Triad was instructed to address the Board's jurisdiction in light of the Government's suggestion that the corporation had been liquidated. In its 21 September 1999 memorandum in support of its motion, Triad asks us to modify the 2 May 1997 consent judgment to "eliminate the gratuitous adjustment of $5,602,177.36 which is duplicative of the judgment of the [COFC] against Triad" and to allow post-judgment interest. (App. br. at 3-4) In the alternative, Triad asks that we reopen the record "to entertain evidence of the sums already paid to the Government by way of setoffs . . . ." (*Id*. at 4) Triad did not address the jurisdictional issue.

The Government responded on 22 October 1999 with a motion to dismiss for lack of standing and opposition to Triad's motion to vacate or modify the Board's decision and judgment. It asserts that Triad has not presented sufficient grounds to vacate or modify the consent judgment, that the motion is untimely, and that Triad is actually seeking an untimely reconsideration. (App. br. at 6-8) The Government reasserted its right to setoff against the judgment. (*Id*. at 8-10)

On 2 January 2000, the president of Triad submitted a letter to the Board which states that he recently learned that "the contracting officer for [the captioned contract] requested and received a full offset for unliquidated progress payments under 31 U.S.C. § 3728." The attached copies of Government documents do not appear to provide support for this allegation, which is the same allegation made in Triad's 2 July 1998 letter. The January letter renews the assertion that, unless we set aside our judgment, the Government will be reimbursed twice for the amount of the COFC judgment as it relates to unliquidated progress payments, and alleges that the Army took an offset for Triad's proprietary data package in 1991. Finally, it states that Triad has been "reinstated in the state of California and has resumed operations."

DISCUSSION

The Government asserts that Triad was liquidated under Chapter 7 of the Bankruptcy Act on 2 July 1998. If that were so, this case would be governed by *Terrace Apartments, Ltd*., ASBCA No. 40125R, 95-1 BCA ¶ 27,458, and the appeal dismissed. In *Terrace Apartments* we found that, although a corporation liquidated under Chapter 7 "may remain a legal entity until dissolved pursuant to state law;" it nevertheless "is otherwise treated as 'defunct' and has no legal right to conduct business, including the prosecution or defense of claims, outside the bankruptcy estate." 95-1 BCA at 136,805; *accord, Microscience, Inc.*, ASBCA No. 45264, 98-1 BCA ¶ 29,480. Nor could Triad's former president be substituted for the corporation inasmuch as he is not a contractor

within the meaning of the CDA. *See* 41 U.S.C. §§ 601(4), 606; *Sheppard's Interior Construction Co., Inc.*, ASBCA No. 45902, 97-1 BCA ¶ 28,744.

The record here, however, is such that we cannot determine Triad's present legal status. Neither the Government nor Triad has provided persuasive documentation to support their opposing contentions. And, while Triad's president has represented that the corporation has been reinstated and has resumed operations, there is nothing in the record to substantiate that representation either. We, therefore, deny the Government's motion to dismiss this appeal for lack of standing.

We likewise deny Triad's request to vacate or modify our 2 May 1997 decision and judgment. We apply Fed. R. Civ. P. 60 as a guide when deciding whether to re-open a decision. *Electronics & Space Corp.*, ASBCA No. 37352, 95-1 BCA ¶ 27,306. Fed. R. Civ. P. 60(a) governs minor clerical mistakes or errors arising from oversight or omission, while Rule 60(b) permits correction of errors of a more substantial nature. *Patton v. Secretary of the Department of Health and Human Services*, 25 F.3d 1021, 1029 (Fed. Cir. 1994).

Triad first characterizes its motion to vacate or modify our 2 May 1997 decision and judgment as a request to the Board to correct clerical mistakes and errors in judgments resulting from oversight or omission under Rule 60(a). (App. br. at 4) However, there was no clerical mistake or error here, except for the inadvertent reference to a $500,000 treble damages award, not $600,000, an error which was corrected by an erratum on 9 May 1997. The parties agreed that the value of the inventory was to be offset by the unliquidated progress payments and the judgment implemented that agreement. Rule 60(a) does not apply.

Rule 60(b) provides six reasons for relieving a party from a final judgment or order:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has

> been reversed or otherwise vacated, or it has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from operation of the judgment.

Rule 60(b) motions are to be filed within a reasonable period of time, and those relating to the first three reasons must be filed within one year after the judgment is entered. Triad did not meet the one-year requirement and the circumstances covered by 60(b)(4) and 60(b)(5) are not present. Thus, we look to the remaining catchall "any other reason justifying relief" found in 60(b)(6), which requires a finding of "extraordinary or exceptional circumstances." *See, e.g., Ackermann v. United States*, 340 U.S. 193 (1950); *Ordnance Devices, Inc.*, ASBCA No. 42709, 99-1 BCA ¶ 30,304.

Under the circumstances present here, we are not convinced that either the Army's failure to submit the 2 May 1997 judgment to the Treasury Department until directed to do so by the Board or the allegation that Triad has paid the COFC judgment twice satisfy the tests we are to apply under Rule 60(b)(6).

As to the first issue, the Army contends that the date it submitted the Board's consent judgment to the Treasury Department is irrelevant because the Government has a right to an offset. (Gov't br. at 8) Despite Triad's unsupported assertions to the contrary, the Government does have the common law right of setoff. *See United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052, 1054 (Fed. Cir. 1993). And, although we are troubled by the manner in which the Government has proceeded, we are nevertheless persuaded that Triad waited too long to seek relief under Rule 60(b). Indeed, by 8 August 1997, at the latest, Triad knew that the Government had taken the position that it was not obligated to seek relief from the automatic stay provisions of the Bankruptcy Act, 31 U.S.C. § 362(a), and that it was withholding payment of the award pending a review of its right of setoff. Inexplicably, however, Triad waited 15 months, until 2 July 1998, when the bankruptcy proceeding was closed (apparently without a Government claim of any kind ever having been submitted to the bankruptcy court) before bringing its concerns to the Board.

The lack of timeliness also defeats Triad's contention that the Government has taken improper setoffs and credits, in particular with respect to the $5,602,177.36 in unliquidated progress payments, a contention the Government has steadfastly denied. Moreover, although the Board has provided ample opportunity, neither party has presented the kind of evidentiary support necessary for us to decide these issues on the merits. That being so, even if Triad's request for relief had been made within a reasonable period of time, we certainly could not conclude that there are exceptional or extraordinary circumstances as required by Rule 60(b)(6).

Finally, as to Triad's request for post-judgment interest, the consent judgment was based upon a settlement pursuant to which the parties agreed that "[n]o interest shall be paid." Triad has provided no valid legal reason for us to reopen the judgment to change the terms of the settlement agreed to by the parties.

DECISION

The Government's motion to dismiss is denied. Triad's Rule 60 motion is likewise denied. To the extent there is any remaining confusion about our 2 May 1997 decision and judgment, the $5,602,177.36 deducted from the value of the inventory, as agreed to by the parties, represented the unliquidated progress payments that were the subject of the COFC judgment in *Daff v. United States*, *supra.*

Dated: 14 April 2000

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
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. 48763, Appeal of Triad Microsystems, Inc., rendered in conformance with the Board's Charter.

Dated:

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