ARMED SERVICES BOARD OF CONTRACT APPEALS

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| 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 THE GOVERNMENT'S MOTION TO DISMISS

Thai Hai has appealed pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 606, from the contracting officer's (CO's) denial of his claim that the U.S. Army breached a lease and associated back rent agreement with him entered into during the Vietnam War. The Army denies the alleged agreements and moves to dismiss the appeal "with prejudice" for lack of subject matter jurisdiction. The record consists of the Rule 4 file and supplemental documents; the Army's deposition of appellant; and affidavits from appellant, former Vietnam residents, and current and former Army personnel. For the reasons discussed below, we treat the Army's motion as one for summary judgment, grant it, and dismiss the appeal with prejudice.

STATEMENT OF UNDISPUTED FACTS AND ALLEGATIONS FOR PURPOSES OF THE MOTION

The facts that follow are not in dispute. Like the Army, we also accept appellant's following allegations as true, for purposes of deciding the Army's motion.

In October 1962, Marcel de Monfreid of Paris, France, appointed appellant, then a resident of South Vietnam, to serve as his proxy, on his behalf and in his name, in the conduct of his business, property and financial matters in Vietnam (R4, tab 37). Mr. de Monfreid owned two office buildings and two warehouse buildings, on approximately 4800 square meters of land he owned at Nha Trang, Vietnam (hereafter, collectively, the "warehouse property") (R4, tab 31; Gov't attach. 1 at 7).

During 1965 the Government of South Vietnam (GVN) began negotiations with appellant and others for the acquisition of property, including the warehouse property, in connection with a Vietnamese oil refinery company (ESSO/Shell) project. The U.S. Military Assistance Command Vietnam (MACV) considered that it had reached an agreement with GVN in August 1965 to occupy the project property, including the warehouse property, on a rent-free basis. Appellant alleges that he purchased the warehouse property from Mr. de Monfreid in September 1965, for $1 million, but that he decided not to contest the belief that the property was owned by Mr. de Monfreid because "it was easier" to sign documents for him. By letter to appellant dated 7 December 1965, on the subject of "Mr. De Monfried's [sic] Property," COL Deason, Commander of the U.S. Army Support Command in Nha Trang, referred to an earlier letter (not in the record) and to a meeting that day at the office of the Vietnamese Province Chief among appellant, attending as Mr. de Monfreid's representative; U.S. military personnel, including LTC Huddleson and others; and Vietnamese military personnel, including MAJ Hung, who was Province Chief, and CPT Thanh, identified as "High Command." COL Deason advised appellant that the Army Support Command would take possession of the project property by 31 December 1965. (R4, tab 4 at 1, tab 35; Gov't attach. 1 at 6-7, 28-29, 58-61, 74; app. attachs. 10, 15, 24)

On 23 December 1965, GVN, Central Executive Committee, issued Decision No. 2279-TC authorizing the purchase of private land and buildings owned by several individuals, and GVN's contribution of the property for the Vietnamese oil refinery project, including the warehouse property, stated to be owned by Mr. de Monfreid. The total purchase price was $1,613,748.60, with $956,988.00 attributed to the warehouse property. The decision stated that the Commissioner of Finance was to sign purchase documents. (App. attach. 24) Appellant alleges that the sale of the warehouse property was not consummated because GVN had offered $1 million, but he had sought $20 million, to which GVN would not agree (Gov't attach. 1 at 60-61).

On 25 November 1966, responding to a letter from appellant (not in the record), LTC Paul D. Nefstead, Area Real Estate Officer for the Army Support Command in Cam Ranh Bay, wrote to appellant that:

> [A]fter much research, the following information is submitted:
>
> a. The property that was owned by Mr. De Monfreid was taken over by the Vietnamese Government on 28 December 1965, by decree number 2279TC. Therefore any payment due Mr. De Monfreid, will have to come from the Vietnamese Government. As the land is Government owned land, the US Forces occupy it without payment.

> b. The electricity bills that were submitted by you have been turned over to the proper agency for processing and payment will be made on these in the near future.

(Gov't attach. 5)

Appellant replied on 9 October 1967 to the U.S. Area Real Estate Officer in Nha Trang. Referring to "Compensation for the occupation of Mr. De Monfreid's landed property," appellant stated:

> I would confirm with you that the Government of the Republic of Vietnam published a Decision on the purchase of the above said landed property for the construction of an oil refinery factory but to this date the purchase hasn't been implemented yet and as such that property remains to Mr. De Monfreid's possession and I, the undersigned, is his agent. In this case the land proprietor continues to maintain his right of use of and to get revenues from that landed property until it is formally transferred to the new proprietor.

(Gov't attach. 6) Appellant signed the letter as "Mr. De Monfreid's agent."

On 29 May 1968 appellant wrote to the U.S. Area Real Estate Officer in Nha Trang, referring to "Payment for the lease of Mr. De Monfreid's real estate." He stated that the procedural steps for GVN's acquisition of Mr. de Monfreid's property had not yet occurred and that, on Mr. de Monfreid's behalf, he was requesting payment for the Army's lease of the property from 1 January 1966 to date. He signed "By delegation of authority from Mr. M. De Monfreid" and included among his attachments a copy of the authority delegation and an "Extract of the landed property title." (App. attach. 15) The title extract is not part of the record.

As Mr. de Monfreid's representative, appellant signed a joint survey of the condition of buildings "utilized by United States Forces" dated 1 July 1968, in which the space for identification of "Lease No." is blank. The survey identifies the property owner as "Mr. Marcel de Monfried [sic], represented by Mr. Thai HAI by power-of-attorney." The Army does not contest that the signature of the "US Representative," virtually illegible, is that of Clarence E. Howard, Jr., then an Army first lieutenant. (R4, tab 34)

On 2 September 1968, GVN, Office of the Prime Minister, issued Decision No. 911/ND/TC which modified the above Decision No. 2279-TC by increasing the purchase price for some of the properties, but not for that of Mr. de Monfreid, whom the decision continued to list as property owner. The decision provided that the Ministers of Economy and Finance were to implement it. GVN supplied a copy to appellant as

the "agent of Mr. De Monfreid" and to MAJ Hung's successor as Province Chief, LTC Le Khanh, who signed it on 11 September 1968. (Gov't attach. 1 at 74; app. attach. 25) However, by letter dated 21 September 1968 to the Army Support Command's Area Real Estate Office, referring to "Request for Free Occupation of Premises and Land by Area Real Estate Office," LTC Le Khanh stated:

> Further to your inquiry I wish to inform you that the property in question is in fact a private property belonging to HAI VAN KHANH HOA. The Provincial Administration has no competence in this matter.
>
> Would you please therefore settle the lease in favour of the owner of the property.

(App. attach. 17) The referenced inquiry is not in the record. Appellant Thai Hai is also known as Hai Van Khanh Hoa (app. attach. 18).

Regardless of LTC Le Khanh's statement that the warehouse property belonged to appellant, on 30 September 1968 appellant executed a back-rent "AGREEMENT Between Mr. Marcel de Monfreid and THE UNITED STATES OF AMERICA." Appellant signed as "Representing, Mr. Marcel de MONFREID." LT Howard signed as "WITNESS." The document refers to "property belonging to Mr. Marcel de Monfreid" purchased on 20 December 1942, registered in Saigon on 7 January 1943. It notes that appellant, "representing the owner, Mr. De Monfreid," had paid electrical bills from 1 January 1966 through 15 August 1966 and was to be reimbursed. It provides for what is described as an equitable rent settlement for the period 1 January 1966 through 30 September 1968; for Mr. de Monfreid's release of any claims; and that "a rental agreement shall be drawn up and executed to cover any periods of continued occupancy of said property by United States Forces after 1 October 1968." (R4, tabs 32, 33) The utilities and back rent amount to be paid was 7,181,274.03 $VN, alleged to be about $89,765.00 (complaint, ¶ 3). The document includes what appear to be two blank signature lines below LT Howard's and appellant's signature blocks. (R4, tab 33)

LT Howard as "WITNESS" and "Thai HAI, for Marcel de Monfreid, LESSOR," executed a lease document which states that it was entered into on 30 September 1968 between the United States as lessee and "Mr. Marcel de Monfreid, represented by Mr. Thai HAI," as lessor, and that Mr. de Monfreid is "owner in fee simple." It covered:

> One two story and one, one story brick and masonry buildings suitable for office space and two brick and masonry warehouse buildings . . . constructed on approximately 4800$m^2$ of land situated at Chutt-Nha Trang; registered 7 Jan 43 in Saigon in book 251, page 25, entry 17; for use as operational

> and office area by U.S. Forces, or for other similar uses. PREMISES ARE LEASED UNFURNISHED.

(R4, tab 31 at 1) The term was 1 October 1968 through 30 September 1969, and, unless the lessee terminated the lease, it was to be extended from year to year "for a maximum duration of 4 years" (*Id*. at 2). The monthly rent, to be tendered to appellant, was 209,744.25 $VN, alleged to be about $2,689.00 (complaint ¶ 5). The document stated that a joint inventory and condition report of the premises was to be made on the date of the lessee's occupancy. The lessee was to return the premises in as good a condition as at the time of the lease, except for reasonable, ordinary wear and tear and damages caused by circumstances over which the lessee had no control. The lessee was not liable for property damage that was not due to its willful or negligent act. Any damage claim was to be made within 15 days after the lessee vacated the premises. Any conflict over property ownership was to be settled by the Vietnamese courts. The document provided that:

> In the event of any conflict arising pursuant to this agreement, the laws of the United States of America shall govern and any unresolved conflicts shall be reduced to writing by the Lessor and presented to the Commanding General, US Army Engineer Construction Agency Vietnam (Prov), or his appointed successor, whose decision shall be determinative of the conflict.

(R4, tab 31 at 5 ¶ 16) The document contained a signature block for "THE UNITED STATES OF AMERCA, LESSEE," with a signature line for LTC Robert J. Wallace, which was not signed (R4, tab 31; app. attach. 6).

Former LT Howard was a local area real estate officer, stationed at Nha Trang, from March 1968 to February 1969. His duties included negotiation of leases between private property owners and the U.S. military, negotiating land use agreements with GVN as to rent-free property it owned, and claims settlement. He worked on 200-300 leases. He does not recall the warehouse property or the inventory, lease and back rent documents, but they are typical of those the Government used at the time. The Army characterizes LT Howard as an "apparent contracting officer's representative." He had no written contract authority. He was not authorized to enter into or to sign contracts on behalf of the United States. He negotiated them and then sent them to "higher headquarters," particularly to his supervising officer, LTC Robert J. Wallace, Chief of Real Estate Division, U.S. Army Engineer Construction Agency Vietnam. U.S. Army Vietnam Regulation No. 405-5, dated 23 May 1968, provided that all lease requests were to be forwarded through channels to headquarters for approval. When LT Howard left Vietnam in February 1969, he was replaced by CPT Pfefer, who was killed in action within a few months. (R4, tab 4 at 8; Gov't attachs. 7, 8; app. attachs. 8, 9, 27 at 6.a.; Gov't br. at 3, 9)

LTC Wallace, who was stationed in South Vietnam from about May 1968 to May 1969, primarily at Long Binh, near Saigon, was the CO in charge of leases and had written authority to sign contracts. He handled thousands of properties and has no recollection of the warehouse property or the inventory, lease and back rent documents. It was the general practice for LT Howard to forward such documents originating in his area to LTC Wallace for review and signature. LTC Wallace states that:

> the copy of the foregoing Lease indicates that I did not sign it. It is possible that the Lease did not come to me or that it was not consummated. To the best of my recollection, I did sign all such leasing documents that were actually presented to me.

(App. attach. 8 at 2)

Appellant alleges that he informed LT Howard that he owned the warehouse property, but acknowledges that it was his own decision to sign the documents on behalf of Mr. de Monfreid (R4, tab 4; Gov't attach. 1 at 28-29). In his 15 October 2001 deposition, appellant described LT Howard's function as follows:

> A He was a local officer and in the scope, in the domain of his functions, activities, he could do the research and he did the gathering of information to a conclusion, drafted the contract, and then had to submit it to his supervisor for signature.

(Gov't attach. 1 at 17)

> A Lt. Howard signed as a witness, he was the one who put the draft together. He was the one in charge.
>
> . . . .
>
> Q You did know that he had to submit it to his superiors for it to be approved.
>
> A Yes, that's right.
>
> Q Did you ever get an approved copy back?
>
> A I kept on asking, but - - There was no response. There was no response up to the day where I contacted the Headquarters and then I received the letter you see here from Col. Paul [sic, *see infra*] in 1970.

(Gov't attach. 1 at 18-19) In his 9 November 2000 affidavit appellant stated that "Lt. Howard informed me that he would pass the agreement to his Divisional Head, LTC Wallace." (R4, tab 4) In his later deposition appellant alleged that LT Howard did not tell him to whom he was sending the lease and back rent documents for signature, but that appellant believed that the next step would be that the agreements would be signed and the Government would start paying rent and its back rent debt (Gov't attach. 1 at 68).

By letter to CPT Pfefer dated 18 March 1969, appellant enclosed what he described as a land registration certificate, stating that it showed that he owned the "property de Monfreid" under a registration dated 15 March 1969. He requested that CPT Pfefer convert the lease to his name. (App. attach. 16) That land registration certificate is not in the record. The record does contain a registration certificate issued on 2 April 1969, by the head of the Vietnamese Khanh-Hoa Land Office, pursuant to a request by appellant on 1 April 1969. The certificate describes the registration of certain property on 15 March 1969 and states that appellant and his wife owned the property "according to the ACT made at Nhatrang, certified on September 2, 1965 and recorded at Nhatrang on September 7, 19 [year cut off.]" The property described covered 4800 square meters and included brick buildings. (App. attach. 3)

In July 1969 appellant left Vietnam and moved to France. He has not returned to Vietnam. Prior to leaving, he gave what he described as his power of attorney (not in the record) and his records to MAJ Nguyen Thanh Hung, his brother-in-law, who inquired of MACV in Saigon about the matter at issue on 11 April 1970, apparently in appellant's name. (Gov't attach. 1 at 20-24, 64, 74; app. attachs. 10, 12) By letter to appellant dated 4 June 1970 (to a Saigon address), CPT E.C. Paul, Acting Director of Construction at MACV, responded:

> This is in reply to your letter of 11 April 1970 concerning a claim for payment of rent on land previously owned by Mr. Marcel de Monfreid, whom you represent (Incl. 1).
>
> MACV use of the Nha Trang Esso area was negotiated with GVN on a rent free basis in August 1965 to meet urgent U.S. military requirements. The area includes the parcel of land and house for which rent is claimed. Any indemnification is the responsibility of GVN.

(App. attach. 10) CPT Paul is now deceased (Gov't attach. 4).

Mr. de Monfreid died sometime in 1970 (Gov't attach. 1 at 5). By letter dated 28 May 1971 to MACV, a Vietnamese attorney hired by appellant inquired about the Government's payment to appellant for its occupation of the warehouse property. He stated that the above decision dated 21 December 1965 "did authorize the State of Viet Nam to

purchase the said landed estate. However, the purchase has not been completed yet, due to differences over the price of purchase." He asked that MACV reconsider the problem and pay appellant "a fair compensation on the basis of the draft agreement and lease that have been forwarded to my client in 1968." (R4, tab 27; *see also* R4, tab 4; Gov't attach. 1 at 20, 24) The record does not contain a response from the Government.

Appellant agreed with the following summary by Government counsel:

> Q So as I understand it, the entire property, the United States took it thinking that it was all part of this Vietnamese oil refinery.
>
> A That is the misunderstanding which needs to be corrected.
>
> Q So the problem here is that the United States took a big tract of land that it thought the Government of South Vietnam owned, but your little piece of that big tract of land, they did not own.
>
> A That is exactly the case.
>
> Q Did you explain that to the United States Government?
>
> A I continued to explain, but nobody listened.

(Gov't attach. 1 at 75)

The Army had ceased to occupy the warehouse property by April 1973 (Gov't attach. 1 at 49; answer, ¶ 7). In 1975, Saigon fell to the North Vietnamese forces; appellant's attorney fled Vietnam; and appellant's brother-in-law was captured by the North Vietnamese (R4, tabs 1, 2; Gov't attach. 1 at 21-23). Upon his release, said to be in about 1990, he provided copies of the lease documents at issue to appellant (R4, tab 4 at 3; Gov't attach. 1 at 23, 63-64).

## PROCEDURAL BACKGROUND AND APPELLANT'S STATEMENTS OF HIS CLAIM

On 3 August 1990, appellant filed a claim, ultimately processed by the U.S. Navy under the Foreign Claims Act, 10 U.S.C. § 2734 (1988), for unpaid rent and property destruction. It was denied on 3 March 1993 as untimely. (R4, tabs 24-26) On 8 August 1997 appellant wrote to the U.S. Ambassador in Vietnam concerning the Army's occupancy

of the warehouse property and the alleged violation of his lease (R4, tab 21). In 1998, the Navy advised appellant that his claim appeared to involve a contract dispute with the Army and that he might wish to file a claim there (R4, tabs 17, 19, 20). Various procedural detours, including a prior appeal filed with this Board and dismissed without prejudice at the parties' request, and delays occasioned by the parties' attempts to locate witnesses and gather information, followed (R4, tabs 6-14). Appellant searched the National Archives for records (app. reply br. at 10).

Ultimately, appellant filed a claim with the CO dated 22 February 2001, certified on 1 March 2001, for back rent; rent due under the lease; the value of the warehouse property, allegedly destroyed due to the Army's negligence; and accrued interest. Appellant alleged that the Army negotiated the lease and back rent agreements with him; that he owned the premises; and that he was the lessor. (R4, tabs 39, 41) By final decision dated 18 April 2001, the CO denied the claim, which she calculated at $2,278,394.92, on the ground that appellant did not have a contract with the United States (R4, tab 40).

Appellant timely appealed to the Board on 9 May 2001, based upon "the Lease and Back Rent Agreement," which he identified as one contract (R4, tab 42). The appeal was docketed accordingly and, for purposes of this motion, we consider the alleged back rent agreement as part of the alleged lease. In his complaint appellant averred that he had signed the agreements on behalf of Mr. de Monfreid but owned the property himself, and that the Army had breached the agreements (complaint, ¶¶ 3-6). The Army answered the complaint; the parties engaged in discovery; then the Army filed the instant motion. In briefing, appellant appears to allege only that he had an implied-in-fact contract with the Army or that the Army institutionally ratified an implied-in-fact contract by accepting the benefit of its alleged bargain with appellant and continuing to occupy the warehouse property buildings (app. br. at 12, 15 *et seq*.; app. reply br. at 1, 4-8).

## DISCUSSION

The Army has moved to dismiss this appeal with prejudice for lack of subject matter jurisdiction on the ground that it did not have any contract with appellant. Appellant bears the burden to prove by a preponderance of the evidence that the Board has jurisdiction under the CDA to entertain his appeal. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746 (Fed. Cir. 1988). The scope of the appeal, and our jurisdiction, are determined "by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom." *Stencel Aero Engineering Corporation*, ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315. While an appellant's complaint and briefs cannot expand our jurisdiction, *Magnavox Government and Industrial Electronics Company*, ASBCA No. 32834, 91-2 BCA ¶ 23,758 at 118,989, "we are not limited to considering only the legal theories presented to the contracting officer," *Stencel, supra*, 84-1 BCA at 84,315. The complaint and briefs can elucidate the basis for appellant's claims. *See Pegram v. Herdrich*, 530. U.S. 211, 230 n.10 (2000).

The CDA grants us jurisdiction to decide appeals from decisions by COs "relative to a contract." 41 U.S.C. § 607(d). Appellant has alleged that he had an express or an implied-in-fact contract with the Army. Our jurisdiction is intertwined with determining the merits of his allegations and we clearly have jurisdiction to determine whether the alleged contract exists. *See Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910. When the predicate jurisdictional facts are in dispute, as here, we may consider relevant evidence extrinsic to the pleadings. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994); *Reynolds, supra.*

Although the Federal Rules of Civil Procedure do not apply to the Board as an administrative tribunal, we can look to them for guidance, particularly in areas our rules do not specifically address. *Dennis Anderson Construction Corp.*, ASBCA Nos. 48780, 49261, 96-1 BCA ¶ 28,076 at 140,188. Under the circumstances, when the Army has challenged the evidentiary basis of appellant's contract claim and is seeking a dismissal with prejudice, which would be on the merits, its motion is more akin to a motion to dismiss for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b)(6) than to a motion to dismiss for lack of subject matter jurisdiction. A dismissal for failure to state a claim is on the merits and carries *res judicata* effect, while a dismissal for lack of jurisdiction does not. *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989); *see also Lewis v. United States*, 70 F.3d 597 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 67 F.3d 925 (Fed. Cir. 1995). In considering a motion to dismiss for failure to state a claim, we assume jurisdiction to decide whether appellant's allegations state a cause of action upon which we can grant relief as well as to determine issues of fact pertinent to the controversy. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that appellant cannot prove any set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

We have noted that, unlike a motion to dismiss for lack of jurisdiction, a motion to dismiss for failure to state a claim upon which relief can be granted can be converted to a summary judgment motion. *Aries Marine Corporation*, ASBCA No. 37826, 90-1 BCA ¶ 22,484 at 112,846. This is consistent with FED. R. CIV. P. 12(b), which provides that, if, on a motion to dismiss for failure to state a claim under Rule 12(b)(6), matters outside the pleadings are presented and not excluded by the tribunal, the motion shall be treated as one for summary judgment. We have treated motions to dismiss, made on the grounds that an alleged contract with the Government did not exist, where we in effect rule on the merits of the appeal, as summary judgment motions. *See Ortiz Enterprises, Inc.*, ASBCA No. 52049, 01-1 BCA ¶ 31,155; *Balboa Systems Company, Inc.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715.

The parties themselves have treated the Army's motion like one for summary judgment. The Army has submitted proposed findings of fact, supported by documentation

and deposition and affidavit testimony. It alleges that all relevant evidence is before the Board. Appellant has responded with a statement of facts not in dispute; a statement of facts in dispute; documentation; and deposition and affidavit testimony. The facts that appellant alleges are in dispute are not material to his contract claim. Appellant alleges that he would offer witnesses at a hearing to corroborate elements of his claim, although he does not specify the elements to be addressed. All but one of the witnesses appellant proposes to call have been deposed (appellant), or have submitted one or more affidavits (appellant and others, including former LT Howard, LTC Wallace, LTC Le Khanh, and MAJ Nguyen Thanh Hung, appellant's brother-in-law), which note the nature of their involvement in the matters at issue. The only named potential witness who has not submitted an affidavit is LTC Huddleson, who attended the 7 December 1965 meeting concerning the Army's occupation of the warehouse property, which was well prior to September 1968, when appellant alleges that he entered into a contract with the Army.

Accordingly, we consider the Army's motion to be one for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The burden is upon the movant, but when it has supported its motion with evidence that would establish its right to judgment, the non-movant must proffer countering evidence sufficient to create a genuine factual dispute. *Sweats Fashions, Inc. v. Pannill Knitting Co*., 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). In ascertaining whether summary judgment is appropriate, we do not weigh the evidence to find facts, but examine it to determine whether a genuine dispute exists as to any material fact. Even if there is a genuine dispute, the disputed fact is only material if it might make a difference in the result of a case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986). While we are to draw all reasonable inferences in favor of the party opposing summary judgment, *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157-59 (1970), "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," summary judgment in favor of the moving party is proper. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

Preliminarily, appellant's contract claim potentially falls under the scope of the CDA. Despite the facts that the alleged contract originated in September 1968; the lease document contains a disputes clause calling for a different resolution of conflicts; and the CDA generally applies to contracts entered into after 1 March 1979; the statute contains the exception that, regardless of any provision in a contract made before the Act's effective date, the contractor can elect to proceed under the CDA with respect to any claim then pending before the CO or initiated thereafter. 41 U.S.C. § 601 note. Further, although the CDA now provides that a contractor's claim is to be submitted within six years after it accrued, 41 U.S.C. § 605(a), and appellant advances a contract breach claim, which accrues at the time of breach, *Franconia Associates v. United States*, 122 S.Ct. 1993, 2001 (2002), the six-year limitation applies only to contracts entered into on or after 1 October 1995. 41 U.S.C. § 251 note. Moreover, when the Government enters into a lease for the use of a building, it generally is considered to have entered into a contract for the

procurement of property, other than real property in being, that is subject to the CDA. 41 U.S.C. § 602(a)(1); *Forman v. United States*, 767 F.2d 875 (Fed. Cir. 1985); *see also Visicon, Inc., d/b/a Hope Hotel & Conference Center*, ASBCA No. 51706 (2002 ASBCA LEXIS 71, 7 June 2002).

There are impediments to appellant's CDA claim that he cannot overcome, however. As relevant here, the CDA applies only to claims by a "contractor" against the Government, under a qualifying express or implied Government procurement contract, and affords a "contractor" the right to appeal from a CO's decision. 41 U.S.C. §§ 602(a), 605(a)(1), 606, 609(a)(1). The Act defines a "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). To maintain a cause of action under the CDA, appellant must prove that he was in privity of contract with the Government. *See United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983); *Stan's Contracting, Inc.*, ASBCA No. 51475, 01-2 BCA ¶ 31,556.

Appellant filed his claim with the CO and appealed to the Board in his own name. However, he acknowledges that he did not execute any written contract with the Army in his own name. Appellant has included among his "Facts Not in Dispute" that he signed the lease documents "as agent for de Monfreid;" that "[w]ritten contract authority resided in Wallace;" and that "[t]he lease document contains a signature line for Wallace, but there is no evidence that he signed it." (App. br. at 5-6, ¶¶ 8, 10-11) The record so reflects, along with the fact that the lease documents state that they were between the United States and Mr. de Monfreid. Thus, appellant's contention that he had an express contract with the Army founders because he was not the named contractor on the lease documents.

Appellant's allegations fail for the additional reason that he does not allege that LT Howard had the requisite contracting authority. This is fatal to his implied-in-fact contract claim as well as to his express contract claim. It is established that:

> An implied-in-fact contract is one "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." . . . Like an express contract, an implied-in-fact contract requires "(1) mutuality of intent to contract; (2) consideration; and, (3) lack of ambiguity in offer and acceptance." . . . When the United States is a party, a fourth requirement is added: the government representative "whose conduct is relied upon must have actual authority to bind the government in contract."

*Lewis, supra*, 70 F.3d at 600 (citations omitted). It is appellant's burden to show that the Government's representative had the requisite contracting authority. *See City of El Centro*

*v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). Apart from the deficiencies in appellant's contract allegations, there is no genuine issue as to whether LT Howard, who signed the lease documents only as "witness," had actual authority to bind the Army. He did not, and he so advised appellant, as appellant acknowledged in his affidavit and in his deposition. This direct notice to appellant also negates that LT Howard had any implied actual authority, under the limited circumstances when such authority will suffice to bind the Government. *See H. Landau & Company v. United States*, 886 F.2d 322 (Fed. Cir. 1989).

Moreover, there was never any mutuality of intent to contract with appellant in his individual capacity and there was never any unambiguous offer and acceptance. As noted, the draft lease documents reflect that LT Howard contemplated an agreement with Mr. de Monfreid and that he owned the property. CPT Paul's response to the inquiry made on appellant's behalf in 1970 reflects that the Army was persisting in its original belief, right or wrong, that GVN had control over the property and had authorized the Army to occupy it rent free. Regardless of whether appellant actually owned the warehouse property at the time of his alleged contract with the Army, there can be no genuine dispute that the Army did not acknowledge that he owned it.

Appellant's arguments that the Army institutionally ratified an implied-in-fact contract with him also fail. With respect to ratification in general, under certain circumstances, "[a]greements made by government agents without authority to bind the government may be subsequently ratified by those with authority if the ratifying officials have actual or constructive knowledge of the unauthorized acts." *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). However, it is established that LT Howard did not even purport to make the particular agreement alleged by appellant, unlike in the cases upon which appellant relies for his ratification claim, *Philadelphia Suburban Corp. v. United States*, 217 Ct. Cl. 705 (1978), and *Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1955), *cert. denied*, 349 U.S. 938 (1955). Further, there is no evidence that LTC Wallace had actual or constructive knowledge of any lease agreement between the Army and appellant. Indeed, it is clear from LTC Wallace's two affidavits that appellant would not even be able to establish that he had knowledge of the draft lease agreement between the Army and Mr. de Monfreid.

Finally, with respect to the rare circumstance of "institutional ratification" of an implied-in-fact contract, appellant has not shown that any official promised to pay him for the use of the warehouse property, let alone that the Army ratified a promise of payment by an unauthorized person by accepting the benefits of the unauthorized bargain. *See Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998); *City of El Centro v. United States*, 922 F.2d 816, 821 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). Indeed, the Army's expressed institutional belief was that it occupied the property rent free by agreement with GVN, not that it was accepting benefits from appellant.

In sum, there are no facts in dispute that are material to whether appellant had an express or implied-in-fact contract with the Army. We are persuaded that it appears beyond doubt that he did not and that appellant can prove no set of facts that would establish that he has a contract cause of action under the CDA.

DECISION

We grant summary judgment to the Army and dismiss appellant's appeal with prejudice.

Dated: 23 August 2002

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
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 No. 53375, Appeal of Thai Hai, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals