ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Walter Louis Chemicals	)	ASBCA No. 51580
	)	
Under Contract No. N00406-93-C-0688	)	

APPEARANCE FOR THE APPELLANT: James P. Rome, Esq.
James P. Rome, Ltd.
Wilmette, IL

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Craig D. Haughtelin, Esq.
Trial Attorney
Fleet & Industrial Supply Center,
Puget Sound
Bremerton, WA

OPINION BY ADMINISTRATIVE JUDGE THOMAS
ON MOTION FOR REINSTATEMENT

On 5 May 1999, the Board dismissed this appeal pursuant to Board Rule 30. Rule 30 provides that "[u]nless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice." On 23 April 2003, appellant moved to reinstate the appeal despite having missed the three-year deadline. We grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 24 August 1993, the Navy awarded Contract No. N00406-93-C-0688 to Walter Louis Chemicals (appellant) for two water demineralizer and polisher systems. Appellant completed performance in December 1995. (R4, tabs 1, 44 at 4)

2. On 26 December 1997, appellant submitted a delay claim for $98,121 plus claim preparation costs amounting to $6,500 (R4, tab 46).

3. On 6 June 1998, appellant filed a notice of appeal from the deemed denial of its claim. The appeal was docketed as ASBCA No. 51580.

4. The pleadings were complete on 31 July 1998 and the parties began discovery.

5. On 29 December 1998, the government advised the Board that a Defense Contract Audit Agency (DCAA) audit was scheduled for January, the parties were postponing further depositions in the meantime, and the parties intended to engage in settlement negotiations after review of the audit.

6. On 30 March 1999, appellant reported that the audit was tentatively scheduled to begin on 15 April 1999.

7. On 28 April 1999, appellant reported that the audit was expected to begin on 15 May 1999 subject to DCAA and appellant establishing a specific date.

8. On 4 May 1999, the Board initiated a telephone conference call with the parties. The government was unable to confirm a date when DCAA would be able to start the audit. The Board asked the parties whether, since the appeal was not moving forward on the docket, they would agree to a Rule 30 dismissal pending completion of the audit and settlement negotiations. The parties agreed to a dismissal on that basis.

9. On 5 May 1999, the Board issued the following order:

> ORDER OF DISMISSAL WITHOUT PREJUDICE
>
> On 4 May 1999, the parties informed the Board that they anticipate an audit and settlement negotiations in the near future and have suspended discovery proceedings. They are unable to forecast a date by which discovery will resume, if settlement is unsuccessful, and agree to a dismissal without prejudice under Board Rule 30.
>
> Accordingly, the above appeal is hereby dismissed without prejudice pursuant to Board Rule 30. Unless either party or the Board acts to reinstate the appeal within 3 years from the date of this Order, the dismissal shall be deemed with prejudice.
>
> Dated: 5 May 1999

On 6 May 1999, the Board sent an authenticated copy of the order to the parties.

10. In July 1999, DCAA completed the audit. Appellant considered the audit seriously flawed. In early September 2000, appellant transmitted a critique of the audit report to the government. According to appellant, for the next 2-1/2 years (*i.e.*, until about March 2003):

> . . . Appellant maintained regular contact with Respondent regarding the audit critique, and whether Respondent intended to request a re-audit. Appellant relied on these actions as evidence of Respondent's continued interest in negotiating a settlement. However, Respondent has never conveyed its intentions to Appellant regarding acceptance of the initial audit, or ordering another audit, and now appears to have abandoned the idea of a negotiated settlement altogether.

(App. reply at 2)

11. The government states that:

> . . . On or about 9 April 2003 Respondent informed Appellant that the instant case may have been dismissed with prejudice approximately a year earlier as a result of the May 1999 Order. When Appellant indicated an intention to immediately move to reinstate the case Respondent suggested that the outcome of that motion might hinder our ability to settle the case. When it became apparent that the parties would not be able to immediately agree on the terms of a settlement, Appellant filed its motion to reinstate.
>
> . . . Throughout the course of the entire matter the parties both entertained and pursued settlement in good faith. The Herculean task of delineating the claim to the satisfaction of the Respondent, however, proved illusive.

(Gov't resp. to app. reply at 2)

12. On 23 April 2003, appellant moved to reinstate the appeal. After recounting the events leading to dismissal of the appeal, appellant stated:

> Since [5 May 1999], the parties have continued to engage in efforts to conclude their dispute, and believe that they are within sight of such a resolution.
>
> However, Appellant has noted that the three year time frame for re-instating a Rule 30 Order has lapsed, and that the Rule's self-executing provision converting the dismissal from "without prejudice" to "with prejudice," has come to pass.

> In order to protect its rights to have its claim determined on the merits in the remote event the parties are unable to conclude a negotiated settlement, Appellant hereby moves the Board Re-instate ASBCA No. 51580.
>
> Appellant-Movant states its failure to ask for reinstatement within three years of issuance of the May, 1999 Rule 30 Order was not a failure to prosecute under Rule 31, nor was its failure contumacious or contemptuous behavior towards the Board.

(Mot. at 2)

13. On 28 April 2003, the Board provisionally reinstated the appeal pending resolution of the motion. The government opposed the motion and the parties filed papers setting forth their positions.

14. There is no evidence that appellant intentionally waived the right to seek a decision on the merits of its appeal in the absence of successful settlement negotiations.

DECISION

Appellant moved to reinstate the appeal more than three years after it was dismissed without prejudice pursuant to Board Rule 30. The order of dismissal provided that the dismissal was to be deemed one with prejudice if the appeal was not reinstated within three years. Appellant seeks relief from this result.

Rule 30 provides:

> The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

The parties have cited two cases in which the Board has decided whether to reinstate an appeal after a Rule 30 dismissal has, by its terms, been deemed a dismissal with prejudice: *Cosmic Construction Co.*, ASBCA Nos. 24014 *et al*., 84-1 BCA ¶ 17,028, and *Phoenix Petroleum Co.*, ASBCA No. 45414, 02-1 BCA ¶ 31,835. In *Cosmic* the appeal was reinstated; in *Phoenix Petroleum* it was not.

In *Cosmic*, appellant initially filed three appeals, one from a termination for default and two from denials of delay and equitable adjustment claims. On 25 February and 10 April 1980, the Board dismissed the appeals pursuant to Rule 30 at appellant's request. In June 1982, appellant filed a fourth appeal from an assessment of excess reprocurement costs. On 27 June 1983, appellant moved to reinstate the original appeals. Appellant argued that "it was waiting for the assessment of reprocurement costs before proceeding with the appeals and when the assessment was made, it made efforts to reach a settlement with the Government. Only when settlement discussions did not materialize, did appellant proceed to reinstate the appeals." (84-1 BCA at 84,797) Granting appellant's motion, the Board pointed to the following facts in support of its decision: appellant did not pursue the original appeals "because of other then pending action, the assessment of reprocurement costs," appellant did not request dismissal with prejudice, there was "nothing in the appellant's conduct that could be termed contumacious or contemptuous towards the Board," and the validity of the termination for default "possibly could nevertheless be litigated" in the fourth appeal because of the *Fulford* doctrine (*id*. at 84,798, 84,799 n.1). The Board concluded that "[a]lthough appellant may have been less than diligent by not adhering to the Rule 30 three-year limitation for reinstatement, in these circumstances this may not be a sufficient reason for denying appellant the opportunity to present and argue the merits of its case and obtain a resolution based on the merits." Citing *GSE Dynamics, Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059, and FED. R. CIV. P. 60(b), the Board stated it would be fair and appropriate to modify the effect of the dismissal orders and reinstate the appeals. (*Id*. at 84,799)

In *Phoenix Petroleum*, appellant filed appeals from a termination for default and assessment of excess reprocurement costs. On 18 March 1993, on joint motion of the parties, the Board dismissed the appeal from the assessment of excess reprocurement costs pursuant to Rule 30 "subject to reinstatement within 90 days after the Board has decided" the appeal from the termination for default (02-1 BCA at 157,284). The Board decided that appeal on 11 April 1996, resulting in a deadline of 10 July 1996 for reinstatement of the second appeal. Appellant had filed a voluntary petition for reorganization, and on 15 June 2001, the government notified the Board that the Bankruptcy Court had deferred fixing the government's allowed claim for excess reprocurement costs pending any proceedings at the Board. The Board restored the second appeal to the docket for the limited purpose of deciding whether to reinstate it and issued an order to show cause why the appeal should not be barred. In response, appellant argued that the government was responsible for seeking reinstatement on a timely basis and, in any event, there was good cause for reinstatement. In deciding whether to reinstate the appeal, the Board looked to FED. R. CIV. P. 60(b) for

guidance. The Board said that under Rule 60(b), "the criteria for granting relief is a balancing test: the need for finality is weighed against the need to render a just decision on the basis of all the facts" (02-1 BCA at 157,286). It said that "[a]ppellant's sole excuse is that it believed the Government was responsible for reinstating the appeal. However, neither ignorance of the rules nor the law constitutes good cause. [Citation omitted] We are also cognizant of the fact that this contract was awarded in 1991 and that almost six years have passed since our decision became final." (*Id.*) Weighing all these factors, the Board concluded that appellant had not demonstrated good cause for reinstating the appeal. The Board distinguished *Cosmic* as follows: "the delay [in *Cosmic*] involved only three to four months and the default termination could be litigated under another appeal by virtue of the *Fulford* doctrine. The delay in this case is almost six years" (*id.*).

The facts here are closer, except for the element of the *Fulford* doctrine, to those in *Cosmic* than those in *Phoenix Petroleum.* The parties agreed to the dismissal at the Board's request so that the appeal would not be in suspense on the docket while they obtained an audit and pursued settlement negotiations. During the period subsequent to the order of dismissal and up until the time of the motion for reinstatement, the parties were engaged in obtaining the audit, critiquing the audit, and pursuing settlement negotiations. Settlement negotiations were continuing as of April 2003 and the government's initial reaction to the idea of reinstatement was that it would impede those negotiations. When the negotiations faltered, appellant moved to reinstate the appeal. The government states that "[t]hroughout the course of the entire matter the parties both entertained and pursued settlement in good faith." (Finding 11) In sum, as in *Cosmic*, appellant did not pursue the appeal because it was waiting for the audit and pursuing settlement negotiations, appellant did not request dismissal with prejudice, and there was nothing in appellant's conduct that could be termed contumacious or contemptuous towards the Board.

Both *Cosmic* and *Phoenix Petroleum* looked to FED. R. CIV. P. 60(b) for guidance. Rule 60(b)(1) permits relief for "mistake, inadvertence, surprise, or excusable neglect" where a motion is made within a reasonable time and "not more than one year after the judgment" was entered. Appellant moved for reinstatement within a reasonable time of the slowdown in settlement discussions in April 2003 (finding 11) and within one year of the deemed conversion of the dismissal to one for prejudice (5 May 2002). Accordingly, as in *Cosmic*, Rule 60(b)(1) may be applicable. It was not applicable in *Phoenix Petroleum*, where the parties waited almost five years to reinstate the appeal.

Here the facts suggest the possibility of "excusable neglect." The Federal Circuit examined this concept in *Information Systems and Networks Corp. v. United States*, 994 F.2d 792 (Fed. Cir. 1993). The Claims Court had entered a default judgment against the contractor. The contractor moved for relief on grounds of excusable neglect. The Claims Court denied the motion. Reversing, the Federal Circuit said:

> Other circuits that have considered the issue of excusable neglect for purposes of Rule 60(b)(1) have held that a court should consider three factors: (1) whether the nondefaulting party will be prejudiced; (2) whether the defaulting party has a meritorious defense; and (3) whether culpable conduct of the defaulting party led to the default. [Citations omitted] The Claims Court utilized these factors and we adopt them as well.

(*Id*. at 795) The Federal Circuit held that a tribunal should not apply these factors disjunctively; rather, the tribunal should balance them. It explained that culpable conduct consists of a willful disregard for the court's rules and procedures as opposed to mere negligence. (*Id*. at 796) It did not address the requirements of the other two factors since they were not in issue. It is clear, however, that "meritorious" does not mean "a likelihood of success." Depending upon the circuit, it may mean as little as "a hint of a suggestion" which, if proven, would have merit. *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C. Cir. 1980) (Markey, J.), quoting *Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969).

We apply the factors identified by the Federal Circuit. The government has not identified any prejudice to it from the reinstatement of the appeal. Appellant's conduct has not been culpable. The Board is unable to assess, and expresses no opinion on, the merits of appellant's claim. There is no reason to believe, however, that the claim does not meet the threshold requirements of a Rule 60(b)(1) motion based on excusable neglect. Balancing the factors, we conclude that appellant should be allowed its day in court.

CONCLUSION

The motion to reinstate the appeal is granted and the dismissal with prejudice is vacated.

Dated: 10 September 2003

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

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

I concur

RONALD JAY LIPMAN
Administrative Judge
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. 51580, Appeal of Walter Louis Chemicals, rendered in conformance with the Board's Charter.

Dated:

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