ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Jurass Company	)	ASBCA No. 51527
	)	
Under Contract No. SPO600-98-D-1000	)	

APPEARANCE FOR THE APPELLANT: Ms. Natalia Krantz
Director

APPEARANCE FOR THE GOVERNMENT: Louise E. Hansen, Esq.
Assistant Counsel
Defense Energy Support Center
Defense Logistics Agency
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL
ON DEEMED MOTION FOR REINSTATEMENT

On 13 November 2000, the Board dismissed this appeal pursuant to Board Rule 30. Rule 30 provides that "unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice." By letter dated 27 November 2003, appellant informed the Board that it "renew[ed] the appeal of Jurass Company under contract SPO600-98-D-1000, ASBCA No. 51527" despite having missed the three-year deadline. Said notice of renewal was received by the Board on 1 December 2003. We treat appellant's 27 November 2003 "renew[al]" notice as a motion for reinstatement despite having missed the three-year deadline. We grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 3 November 1997, the Defense Fuel Supply Center[*], Ft. Belvoir, VA, awarded Contract No. SPO600-98-D-1000 to Jurass for the delivery of winter grade diesel fuel conforming to specification GOST305-82Z (R4, tabs 3-4).

2. On 31 December 1997, the government issued orders to appellant for the deliveries of fuel from 5 January to 4 February 1998 (R4, tab 7). On 23 January 1998 and 2 February 1998, samples of the fuel appellant proposed to deliver were tested, *inter alia*, for "cloud point and distillation" (*id*.). The parties disagree, *inter alia*, as to whether

[*] The Defense Fuel Supply Center is now the Defense Energy Support Center.

appellant's proposed fuel conformed to the specification GOST305-82Z cloud point and distillate requirements (*id.*).

3. On 5 February 1998, appellant requested the government's "approval or refusal of the fuel" (R4, tab 7).

4. On 12 February 1998, the contracting officer, pursuant to the "Termination for Cause" provision thereof, terminated subject contract due to appellant's "failure to meet the scheduled delivery date and failure . . . to supply a winter grade diesel fuel conforming to the required GOST305-82Z specification" (R4, tabs 1 at ¶ I1.03-1(m), 8). The government "has not and will not issue a claim for excess reprocurement costs stemming from the termination for cause" according to counsel for the government (gov't br. at 6).

5. By letter dated 11 May 1998, received and docketed by the Board on 14 May 1998, appellant timely appealed the contracting officer's 12 February 1998 final decision to terminate subject contract for cause (Bd. corres. file). Said notice of appeal was sent to the government's contracting officer by appellant on 11 May 1998 via facsimile transmission and to the Board via "DHL Worldwide Express" (*id.*). The appeal was docketed as ASBCA No. 51527.

6. The government submitted its Rule 4 file to the Board and appellant by letter dated 11 June 1998. On 9 July 1998, appellant stated that it had not received its copy of the Rule 4 file. On 13 July 1998, the government sent appellant another copy thereof via Federal Express.

7. By letter to appellant, dated 21 August 1998, the Board informed appellant that its complaint was overdue in violation of Board Rule 6. Appellant's undated "COMPLAINT Government's Rule 6 File" was thereafter received by the Board on 31 August 1998. The government's answer, dated 28 October 1998, was received by the Board on 29 October 1998.

8. By letters, to the parties, dated 12 November 1998 and 10 February 1999, the Board directed the parties to advise, *inter alia*, whether an oral hearing and discovery was desired.

9. The government responded to the Board's 10 February 1999 letter on 1 March 1999 requesting an oral hearing and discovery. Then counsel for the government (Ms. Kathleen A. Murphy) also contacted appellant's director, Ms. Natalia Krantz, who advised that appellant was attempting to obtain an attorney and anticipated "accomplishing this by 4 March 1999."

10. On 16 April 1999, counsel for the government informed the Board that it was "notified on 15 April 1999 that appellant has retained Mr. Joseph J. Brigati as counsel" and that "the Government is prepared to enter into settlement discussions, when appropriate." On 22 April 1999, Mr. Brigati entered his appearance on behalf of appellant. On 2 June 1999, Mr. Brigati wrote that some questions had arisen concerning his retention as counsel and his authority to act for appellant. He requested a suspension of proceedings until those questions could be resolved. On 4 August 1999, Mr. Brigati notified the Board that "a misunderstanding had arisen concerning our engagement to represent Jurass Company . . . and that, in fact, we do not represent the Company." Mr. Brigati further stated that it was his belief that appellant would retain other counsel. On 20 August 1999, Ms. Krantz notified the Board by facsimile that yet another law firm, Kane Kessler LLP, would not be able to represent appellant in its appeal. She requested postponement of the hearing "until we retain alternative legal assistance."

11. On 31 January 2000, the Board notified appellant that it would not continue to carry the appeal on the active docket for an extended period. It directed appellant to inform the Board by 18 February 2000 whether it desired to move forward or sought dismissal pursuant to Rule 30 or 31. Said 31 January 2000 Board letter was returned opened and marked "unknown," possibly due to an incomplete address. By letter dated 7 April 2000, the government noted that appellant had not communicated with government for more than eight months. It further noted that in early 1999, appellant indicated a need to retain counsel:

> However, it does not appear that appellant has been able to retain private counsel. In addition, it does not appear that the appellant intends to proceed as a *pro se* appellant. For these reasons, the government requests that the Board dismiss this appeal pursuant to Board Rule 30 or 31.

12. On 4 May 2000, the Board issued an Order to Show Cause. The Board noted that it had not received any communication from appellant since appellant's 20 August 1999 letter requesting the Board continue the appeal while it sought counsel. The Board directed that appellant show cause within 21 days why the appeal should not be dismissed for lack of prosecution. On 23 May 2000, appellant stated that it wanted to proceed with the appeal, and stated that "the delay in support of the process has taken place in connection with suspicion and later confirmed of incorrect behaviour offered to us from the American intermediary for link with the attorneys and control of correspondence." On 24 May 2000, appellant's "Law Agency <<Ucom>>" by its "President," Ivan P. Shkrum, reported that Peter Sessions, appellant's president, had died. Mr. Shkrum requested consideration of the difficulties that resulted from Mr. Session's death in collecting documents and continuing the appeal.

13. On 25 May 2000, the Board directed the parties to advise how they wished to proceed with the appeal. The government responded to the Board's letter on 22 June 2000 noting that appellant had not communicated with the government for nearly a year prior to the show cause Order, and that the government was unable to successfully contact Mr. Ivan Shkrum, President of Law Agency <<Ucom>> using the email address identified in his 24 May 2000 correspondence to the Board. The government stated that it considered the "use of alternative dispute resolution (ADR) procedures appropriate for this appeal." Appellant did not respond to the Board's letter.

14. The Board provided its facsimile transmission (FAX), telephone number to appellant's "Law Agency <<Ucom>>" on 6 November 2000.

15. On 8 November 2000, appellant's director, Ms. Krantz, referenced the Board's 6 November 2000 communication to appellant's "Law Agency <<Ucom>>" in her reply FAX to the Board and stated, "I inform you to postpone the [appeal herein] until further notice from our company by director Natalia Krantz." Counsel for the government agreed, on 9 November 2000, that subject appeal should be dismissed pursuant to Board Rule 30. Neither party then requested the Board to dismiss the appeal with prejudice.

16. On 13 November 2000, the Board dismissed the appeal without prejudice pursuant to Rule 30 stating that "[u]nless 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." The Board transmitted its 13 November 2000 Order of Dismissal by FAX transmission and by certified mail to Ivan P. Shkrum, Esq., Law Agency <<Ucom>>, Apt. 2, 48 Volodymyrska Str., Kyiv, Ukraine 01034, on 13 November 2000. The FAX transmission was completed on 13 November 2000. The certified mail receipt establishes that the order was received by the above-described "Law Agency <<Ucom>>" on 27 November 2003.

17. By letter to the Board dated 27 November 2003, appellant's director, Natalia Krantz, attempted to "renew" appellant's appeal. Appellant sent a copy of its "renewal" request by FAX to counsel for the government on 1 December 2003 and requested her to "transmit" said renewal to the Board. The Government forwarded said "renewal" request by FAX on 1 December 2003. Director Krantz stated:

> Also I ask to take into account, that from 24 Nov till 27 Nov 2003, I tried to ask the fax number directly from ASBCA and at 27 Nov 2003 from Your office, but unfortunately could not receive neither number of the fax nor e-mail address.

Ms. Krantz requested that future communications be "carried out through my e-mail address or Mr. Hendrik Ybema" and provided Mr. Ybema's mailing address, e-mail

address, FAX number and telephone number. Finally, she stated that in "[t]he coming days my lawyers will give you all necessary information." To date, Mr. Ybema has not entered an appearance on behalf of appellant with the Board. Nor have Ms. Krantz's "lawyers" provided any "information."

18. On 4 December 2003, the Board provisionally reinstated the appeal to consider appellant's "renewal" request. On 10 December 2003, the Board directed the parties to file briefs with the Board by 16 January 2004. We specifically called the parties' attention to our recent decision in *Walter Louis Chemicals*, ASBCA No. 51580, 03-2 BCA ¶ 32,374. Both parties filed briefs setting forth their positions.

19. Appellant's director, Ms. Natalia Krantz, states, *inter alia*, in her brief, as follows:

> On February 2003 N. Krantz acquired Kathleen A. Murphy, Trial Attorney of DLA-DESC on condition of the appeal ASBCA No. 51527 on the Contract SPO600-98-D-1000. She was replied that <<the ASBCA dismissed the JURASS appeal without prejudice in November 2000. You can obtain further information regarding the dismissal of the JURASS appeal from the Armed Services Board of Contract Appeals>>.
>
> As N. Krantz continued to gather and renew the documents, she decided to use the time till the end of November 2003. Absence of the contact from the side of N. Krantz cannot be explained as an impossibility or lack of wish to complete the case to the end, nor as the demonstration of irrespect to the representatives of the Government and ASBCA, but only as a legal difference in interpretation of the Rules, which N. Krantz interpreted litterally [sic] and was sure that she disposed three years to renew the process on appeal.
>
> As for the suggested legal proceeding of the case ASBCA No. 51580 [*i.e*,. the appeal of *Walter Louis Chemicals*, *supra*], and possible application to the appeal ASBCA No. 51527, JURASS considers that the circumstances which entailed such long delays from the side of JURASS (death of the owner and director of the Company, loss of the documents, conditions of the work on the appeal and conditions of the termination of the cause, legal and linguistic differences in interpretation, as well as significant distance and insatisfactory [sic] work of the post in the residence country of JURASS), the case ASBCA No. 51580

> cannot be fully applied concerning the verdict to the Contract SPO600-98-D-1000.

(App. br. at 6-7).

20. The present counsel for the government (Ms. Louise E. Hansen, Esq.) states, *inter alia*:

> . . . the Government will be prejudiced by reinstatement of the appeal. Six years have already passed since the contract was terminated and almost six years have passed since the termination was appealed. Reinstatement now is prejudicial to the Government's ability to present its case. Witnesses' memories have almost certainly faded and witnesses are increasingly unavailable. Many of the contracting and quality personnel involved in the decision to terminate the contract are no longer employed by DESC, no longer assigned to Ukraine or retired from Government service. DESC is currently unaware of several witnesses' whereabouts. . . .

(Gov't br. at 20, see also at 14)

DECISION

Appellant attempted to "renew" its appeal on 27 November 2003, three years and two weeks after it was dismissed without prejudice pursuant to Board Rule 30 at the request of its director, Ms. Krantz, and with the consent thereto of government counsel (findings 15-16). The Order of Dismissal provided that the dismissal was to be deemed one with prejudice if the appeal was not reinstated within three years from 13 November 2000, the date of the dismissal order (*id.*). Appellant seeks relief from this result.

Board 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.

In the *Walter Louis Chemicals* case, *supra*, the appellant and the government continued to engage in good-faith settlement negotiations for approximately one year after the three-year deadline for the conversion of the Rule 30 dismissal therein to a dismissal with prejudice. *Walter Louis Chemicals*, *supra* at 160,185-86. An audit of the claim therein had been completed during the 3-year period specified in the Rule 30 dismissal order (*id.*). The appellant moved to reinstate its appeal exactly two weeks after "it became apparent that the parties would not be able to immediately agree on the terms of a settlement" (*id.*). We concluded that the above-described circumstances suggested "the possibility of 'excusable neglect'" as that term is used in FED. R. CIV. P. 60(b). 03-2 BCA ¶ 32,374 at 160,187. We further concluded that appellant's motion to reinstate was made timely under Rule 60(b)(1) since it was made within "a reasonable time of the slowdown in settlement discussions in April 2003 . . . and within one year of the deemed conversion of the dismissal to one for prejudice (5 May 2002)." *Id.* We then applied, by way of balancing *vice* disjunctively, the factors that the Federal Circuit adopted in *Information Systems and Networks Corp. v. United States*, 994 F.2d 792 (Fed. Cir. 1993), as the test for determining the existence *vel on* of "excusable neglect" under Rule 60(b)(1):

> . . . 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]

03-2 BCA ¶ 32,374 at 160,187, quoting 994 F.2d at 795. After stating that "culpable conduct consists of a willful disregard for the court's rules and procedures as opposed to mere negligence" and that meritorious defense "does not mean 'a likelihood of success' . . . . [and] may mean as little as 'a hint of a suggestion' which, if proven, would have merit," we concluded that "appellant should be allowed its day in court." (*Id.)* We reached this conclusion because the government had failed to identify "any prejudice to it from reinstatement of the appeal. Appellant's conduct has not been culpable." We could not and did not address the "merits" of appellant's claim. *Walter Louis Chemicals*, *supra* at 160,187.

We conclude that our *Walter Louis Chemicals* decision is controlling precedent herein.

As an initial matter, we find that appellant's attempt to "renew" its appeal within two weeks of the deemed conversion of the Rule 30 to one for prejudice was timely in

that it occurred within a *per se* reasonable time (two weeks) when compared with the time period that elapsed in *Walter Louis Chemicals*, *supra*, and within one year of the deemed conversion (findings 16-17). *See* 03-2 BCA ¶ 32,374, *supra* at 160,186-87 and cases cited therein; *White v. American Airlines, Inc.*, 915 F.2d 1414, 1425 (10th Cir. 1990); 3 JAMES WM. MOORE ET AL., MOORE'S MANUAL, FEDERAL PRACTICE AND PROCEDURE § 26.61(3)(b)(2) (Matthew Bender & Company, Inc. 2002).

We now apply and balance the three factors identified by the Federal Circuit for determining the existence *vel non* of excusable neglect.

We reject the government's contention that reinstatement now is prejudicial to its case. We note that counsel for the government consented to the Rule 30 dismissal for three years of appellant's case (findings 15-16) despite the lack of meaningful progress beyond the filing of pleadings (*i.e.*, complaint and answer) and the government's Rule 4 file during the approximate two and one-half year period that elapsed between 14 May 1998 (the date of docketing) and 13 November 2000 (the date of the Rule 30 dismissal) (findings 5-15). The government has not shown how the passage of an additional two weeks before the filing of the deemed motion to reinstate the appeal herein is either prejudicial to its case or can serve to convert the preceding three years of dismissal without prejudice status into prejudicial delay.

With respect to the meritorious defense factor, here, as in *Walter Louis Chemicals*, "there is no reason to believe . . . that the claim does not meet the threshold requirements of a Rule 60(b)(1) motion based on excusable neglect." 03-2 BCA ¶ 32,374 at 160,187. Certainly the government's apparent willingness to enter into settlement negotiations/alternative dispute resolution procedures (findings 10, 13) and the parties' contemporaneous and apparent good-faith disagreement regarding the conformance of appellant's proposed fuel with the applicable specification requirements (findings 2-5) amount to the "hint of a suggestion" of the possible existence of a meritorious defense.

With respect to the culpability *vel non* of appellant's tardy attempt to "renew" the appeal, we do not view Ms. Krantz's decision, while representing her company on a *pro se* basis, "to use the time till the end of November 2003" to "gather and renew the documents" as constituting "willful disregard for the Board's rules and procedures" (finding 19). *See Walter Louis Chemicals*, *supra* at 160,187. Her attempt to "renew" the appeal within two weeks of the passage of the Rule 30 three-year deadline does not constitute culpable conduct. *Id.*; *compare Phoenix Petroleum Co.,* ASBCA No. 45414, 02-1 BCA ¶ 31,835 (five-year delay on reinstating appeal).

The particular circumstances involved herein simply do not merit the extreme result of a dismissal with prejudice.

CONCLUSION

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

Dated: 5 May 2004

J. STUART GRUGGEL, JR.
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. 51527, Appeal of Jurass Company, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals