ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Minesen Company	)	ASBCA No. 56346
	)	
Under Contract No. NAFBA3-93-C-0001	)	
Lease No. DACA84-1-91-14	)	

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OPINION BY ADMINISTRATIVE JUDGE PAUL
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
RESPONDENT'S MOTION TO DISMISS

Appellant The Minesen Company (Minesen) filed a motion for partial summary judgment, contending that the Army's Morale Welfare and Recreation Fund (Fund) had, once again, breached the parties' contract. The Fund not only opposes Minesen's motion but also has filed a motion to dismiss the above-captioned appeal.

BACKGROUND

This is a protracted litigation whose origins reach back more than a decade. After a five-week hearing, the Board issued a published decision, 07-1 BCA ¶ 33,456, in which it concluded that the government had breached the parties' lodging facility concession contract by implementing a travel regulation that allowed official travelers to stay at lodging facilities other than at Minesen's guesthouse without having to sacrifice a portion of their per diem. It thus eliminated a core provision of Minesen's contractual benefit of the bargain. Familiarity with this lengthy decision is presumed. At the conclusion of the opinion, the Board remanded to the parties for a determination of quantum.

The Board's opinion was promulgated on 20 November 2006. Less than two years later, on 10 March 2008, Minesen filed another notice of appeal and complaint. In

paragraph 28 of its complaint, Minesen alleged: "The Army has taken no steps in the intervening 15 months since the Board's November 20, 2006 decision to cure its breach of the core of the Contract by instituting a compensation scheme consistent with the core of the Contract or exercising the termination for convenience provisions in the Contract." In the following paragraph, Minesen stated: "For 15 months, the Army has failed knowingly to resolve a breach of the core of the Contract" (compl. ¶ 29). Minesen went on to allege: "The Army's knowing breach of the core of the Contract since the Army was informed that its breach went to the core of the Contract on November 20, 2006 and the Army's knowing failure to cure the breach is, in and of itself, a material breach of the Contract as of no later than December 31, 2007" (compl. ¶ 41). Minesen's new appeal was docketed as ASBCA No. 56346.[1]

On 7 July 2008, Minesen filed a motion for partial summary judgment on entitlement under Count I in ASBCA No. 56346. In the motion, it largely tracked the allegations stated in its complaint. Specifically, Minesen stated:

> The dispute in this appeal is both factually and legally simple. Since the Board's November 20, 2006 decision, the Army has been aware that it is in breach of its contract with Minesen and that the breach goes to the core of Minesen's benefit of the bargain. Despite the Board's clear ruling, the Army has done absolutely nothing in the intervening nineteen months to cure its continuing breach. Indeed, the Army has not even approached Minesen to propose a remedy. The Army's knowing failure to cure, in and of itself, has created a new, independent claim for material breach and, as a matter of law and undisputed fact, constitutes material breach. Accordingly, Minesen is entitled to judgment on entitlement under Count I for material breach as a matter of law.

(Mot. at 1-2)

In support of its allegations, Minesen cited the following "UNDISPUTED MATERIAL FACTS":

> 13. During the period from November 20, 2006 through January 28, 2008, the Contract was not modified to remedy the breach established by the Decision for the

[1] Minesen's allegation in this regard constituted Count I of its complaint. Through Count II of the complaint, Minesen contended that the Fund had engaged in anticipatory repudiation of the contract (compl. ¶¶ 45-47).

remaining period of the Contract. Affidavit of A.P. Jensen ("Jensen Affidavit"), attached hereto, at ¶ 4.

14. During the period from November 20, 2006 through January 28, 2008, the Army did not propose any contractual modification to remedy the breach established by the Decision for the remaining period of the Contract. Jensen Affidavit, at ¶ 5.

15. During the period from November 20, 2006 through January 28, 2008, the Army did not discuss with or propose to Minesen any alternatives to remedy the breach established by the Decision for the remaining period of the Contract. Jensen Affidavit, at ¶ 6.

16. During the period from November 20, 2006 through January 28, 2008, the Army did not offer Minesen any assurance that the Army intended to comply with the Contract for the remaining period of the Contract. Jensen Affidavit, at ¶ 7.

....

17. On January 29, 2008, Minesen submitted a certified claim to the Contracting Officer, alleging material breach of the Contract based on the Army's failure to cure its breach of the core of the Contract within a reasonable time after Decision while, without waiver of its claim, stating that Minesen would continue to perform for a reasonable period in order to mitigate its damages (the "Certified Claim"). R4, Tab 4.

18. On February 11, 2008, the Contracting Officer denied Minesen's Certified claim (the "Final Decision"). R4, Tab 5.

19. The Final Decision is silent regarding any Army action taken prior to the Certified Claim to fashion a contractual remedy, whether by contract modification, a proposed contract modification or proposed alternatives for modifying the Contract, to cure the ongoing breach of the Contract. R4, Tab 5.

20. The Final Decision did not provide Minesen any assurances of future performance of the Contract. R4, Tab 5.

21. The Final Decision did not deny that the Breach of the Contract found by the Decision remained ongoing. R4, Tab 5.

22. Minesen timely appealed the Final Decision. R4, Tab 6.

23. The Army's May 12, 2008 Answer to Minesen's Complaint in this appeal (the "Answer") did not allege any Army action taken prior to the Answer to fashion a contractual remedy, whether by contract modification, a proposed contract modification or proposed alternatives for modifying the Contract, to cure the ongoing breach of the Contract. SR4, Tab 11.

24. The Answer did not provide to Minesen any assurances of future performance of the Contract. SR4, Tab 11.

25. The Answer did not deny that the breach of the Contract found by the Decision remained ongoing. SR4, Tab 11.

Using these allegedly undisputed facts to bolster its argument that the Fund had "done absolutely nothing" to cure its breach, Minesen concluded that it was "entitled to summary judgment on Count I of its Complaint as a matter of law." (Mot. at 2-6)

In its extensive brief, the Fund disputes most of these facts and supports its allegations with substantial documentation. For example, with respect to Minesen's contention through undisputed fact 13 that the Fund has not modified the contract, the Fund correctly cites our opinion and concludes that "the Board decision did not require a contract modification stemming from the finding of breach" (gov't br. at 9, emphasis deleted). The Fund goes on to state in this regard that it has engaged in significant discovery, that it "has engaged DCAA in an effort to obtain a complete audit of

Appellant's Statement of Costs on Quantum," and that Minesen's document productions have been incomplete[2] (gov't br. at 10, emphasis deleted).

Regarding Minesen's undisputed fact 15 that the Fund "did not discuss with or propose to Minesen any alternatives to remedy the breach," the Fund "denies any suggestion that [it] ceased its efforts to conduct discovery and ascertain a reasonable and rational remedy" in response to the Board's decision. The Fund also notes that it "has engaged in countless discussions and correspondence with Minesen to keep Minesen advised of its efforts to calculate damages." The Fund also cites extensively to the parties' pleadings and correspondence to support its allegations. (Gov't br. at 22-26, emphasis deleted)

With respect to Minesen's undisputed fact 16 that the Fund did not offer it any assurance that it intended to comply with the contract for its remaining term, the Fund responds that it "has regularly kept Minesen informed of the status of its efforts to calculate damages, and thus, has provided adequate assurances of a remedy." In responding to this allegation, the Fund also refers to its extensive response to facts 14 and 15. (Gov't br. at 26, emphasis deleted)

Regarding Minesen's undisputed facts 17 through 21 which referred to the contracting officer's (CO) decision of 11 February 2008 denying Minesen's new breach claim, the Fund noted that the claim did not represent a "new dispute" and that the CO determined that the claim simply duplicated existing claims on which the Board had already rendered a decision on the merits (gov't br. at 26-27, emphasis deleted). As for facts 19 through 21, which merely track facts 14, 15, and 16, the Fund previously disputed these allegations.[3]

Minesen's undisputed fact 23 states that the Fund's answer to its complaint in this appeal did not refer to any Fund "action taken prior to the Answer to fashion a contractual remedy, whether by contract modification, a proposed contract modification or proposed alternatives for modifying the Contract, to cure the ongoing breach of the Contract" (mot. at 6). This fact is redundant, as it merely tracks the language contained in undisputed facts 13, 14, and 15, which, as we have already demonstrated, were disputed by the Fund (gov't br. at 9-26).

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[2] The Fund repeats its response to fact 13 with respect to Minesen's statement in fact 14 that it had not proposed a factual modification (gov't br. at 10-11).

[3] Minesen's undisputed fact 22—"Minesen timely appealed the Final Decision"—is indeed, undisputed (gov't br. at 28).

Minesen's undisputed fact 24 states that the Fund's "Answer did not provide to Minesen any assurances of future performance of the Contract" (mot. at 6). This fact is duplicative, as it repeats the language contained in undisputed fact 20, which, as shown above, was disputed by the Fund (gov't br. at 28).

Finally, undisputed fact 25 alleges: "The Answer did not deny that the breach of the Contract found by the Decision remained ongoing" (mot. at 6). This language merely tracks that contained in undisputed fact 21 which was disputed by the Fund (gov't br. at 28).

In addition to opposing Minesen's partial motion for summary judgment, the Fund also moves to dismiss ASBCA No. 56346 as duplicative. It contends:

> There is essentially no material difference between ASBCA Nos. 56346 [sic] and the two quantum appeals currently before the Board: ASBCA Nos. 55996 and 55997. The facts supporting both appeals are directly related to the Board's entitlement decision in ASBCA Nos. 52488 and 52811. Moreover, the only "new" facts the Appellant cites are those related to the amount of time the parties are taking to resolve the controversy in ASBCA Nos. 55996 and 55997. However, the length of litigation in and of itself does not render a new cause of action. As such, there is no reason to waste judicial resources by treating ASBCA No. 56346 it [sic] as a separate matter. *Freedom NY, Inc.*, ASBCA No. 52438, [00-1 BCA] ¶ 30,873...; *Viktoria Schaefer Internationale Spedition*, ASBCA Nos. 47792, 48283, 97-1 [BCA] ¶ 28,805 at 143,680, *aff'd*, 168 F.3d 1316 (Fed. Cir. 1998)....

(Gov't br. at 49)

In its reply brief on the motion for partial summary judgment, Minesen contended that "despite the Army's lengthy response," it had not raised any genuine issues of material fact and that the facts that it did allege were immaterial (app. reply br. at 16-19). Also, in its response to the Fund's motion to dismiss, Minesen asserts that "the claims asserted in Appeal No. 56346...are based on new and different operative facts which were not and could not have been the basis for the claims asserted in entitlement in Appeals Nos. 52488 and 52811 and in quantum in Appeal Nos. 55996 and 55997" (app. resp. at 1).

DECISION
MOTION FOR PARTIAL 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. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Factual inferences are drawn in favor of the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, the basic premise of Minesen's motion is that the Fund "has done absolutely nothing...to cure its continuing breach." Minesen then concludes from this premise, as a matter of law, that the Fund's "knowing failure to cure, in and of itself, has created a new, independent claim for material breach." (Mot. at 1) Unfortunately for Minesen, our inquiry into the Fund's actions subsequent to the entitlement decision is necessarily a factual—rather than a legal—one. In response to Minesen's statement of undisputed facts—many of which are redundant—the Fund has provided a wealth of data demonstrating that it has actively pursued discovery, conducted a DCAA audit, and responded to Minesen's discovery requests. Based upon the underlying record, the Fund has successfully contradicted Minesen's basic premise that it "has done absolutely nothing...to cure its continuing breach." Moreover, in doing so, the Fund has created genuine disputes of almost all of Minesen's "UNDISPUTED FACTS." On this basis, Minesen's motion must be denied.

MOTION TO DISMISS

We also agree with the Fund that Minesen's "new" claim in ASBCA No. 56346 is duplicative. The factual premise of this claim is in dispute, as is its legal conclusion that it has identified "a new, independent claim for material breach." As the Fund states in its brief, "the only 'new' facts the Appellant cites are those related to the amount of time the parties are taking to resolve the controversy in ASBCA Nos. 55996 and 55997" (gov't br. at 49). ASBCA No. 56346, thus, is not a new cause of action, is duplicative, and must be dismissed.

CONCLUSION

Appellant's motion for partial summary judgment is denied, respondent's motion to dismiss is granted, and the appeal is hereby dismissed.

Dated: 16 July 2010

MICHAEL T. PAUL
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. 56346, Appeal of The Minesen Company, rendered in conformance with the Board's Charter.

Dated:

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