UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: November 3, 2009

CBCA 1680

SAGE WESTERN INVESTMENTS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Clayton E. Bailey and Alexander M. Brauer of Baker & McKenzie LLP, Dallas, TX, counsel for Appellant.

Jay N. Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **POLLACK**, and **GOODMAN**.

GOODMAN, Board Judge.

Respondent, the General Services Administration (respondent or GSA), moves the Board to dismiss the complaint filed in this appeal by appellant, Sage Western Investments (appellant), on the grounds that the causes of action pled by appellant in its complaint fail to state claims upon which relief can be granted by this Board, or state claims over which this Board lacks jurisdiction. Appellant has filed a response to the motion, and respondent has filed a reply. We deny the motion.

Background

Appellant leases a building to respondent. In its complaint, appellant alleges that it performed its contractual obligations under the lease by providing overtime heating, ventilation, and air conditioning (HVAC) services requested by respondent at the rate set forth in the lease, but that respondent breached its contractual obligations by refusing to pay for the overtime HVAC services it ordered, thereby causing appellant actual damages. In addition to seeking recovery for breach of contract, appellant alternatively seeks recovery based upon quantum meruit, unjust enrichment, and promissory estoppel. While appellant did not plead a specific cause of action for contractual relief in its complaint, it does allege the existence of the clause of the lease that it believes entitles it to payment of its claim (Appeal File, Exhibit 1, page 5) and bases the quantum of its claim on that clause. Complaint ¶ 4. The certified claim relies upon this clause and calculates the claim accordingly. Complaint, Exhibit 2.

Respondent asserts in its motion that the cause of action for breach of contract cannot be maintained because there is a clause in the lease which authorizes changes by the contracting officer and thereby affords a remedy of contractual relief. Consequently, even if the contracting officer directed appellant to operate the HVAC on a 24/7 basis (which GSA disputes), such directive did not constitute a breach of contract as claimed in the complaint, but rather a change that could be directed by the contracting officer under specific clauses in the lease. Respondent further asserts that appellant cannot maintain its causes of action for quantum meruit, unjust enrichment, and promissory estoppel because pursuit of these equitable remedies is precluded by the existence of an express contract between the parties, which deals with the subject matter that forms the basis for these claims, and which therefore establishes the remedies, if any, recoverable by appellant should it be so entitled.

Appellant counters respondent's arguments as to breach of contract by acknowledging that the lease contained a clause which allowed the contracting officer to order the services that were in fact ordered, but emphasizing that the breach was respondent's alleged refusal to pay for such services, a remedy for which is not provided for in the contract. Additionally, with regard to the other causes of action for quantum meruit, unjust enrichment, and promissory estoppel, appellant asserts, *inter alia*, that a party is entitled to plead alternative and even inconsistent theories of recovery.

Discussion

Respondent's motion seeks to dismiss the four causes of action in the complaint. Respondent relies in part upon pre-Contract Disputes Act case law for the assertion that we must dismiss causes of action pled upon breach of contract if there are applicable contractual

relief clauses in the contract.[1] In *GEM Engineering Co. v. Department of Commerce*, GSBCA 13566-COM, 97-1 BCA ¶ 28,637 (1996), a decision of one of our predecessor boards, GSA made a similar motion to dismiss, relying upon pre-Contract Disputes Act case law, *Edward R. Marden Corp. v. United States*, 194 Ct. Cl. 799 (1971). The General Services Administration Board of Contract Appeals (GSBCA) held:

> The *Marden* decision is not applicable. At the time that decision was written, boards of contract appeals could grant contractual relief pursuant to specific contract provisions, but claims for breach of contract damages were within the jurisdiction of the Court of Claims. The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, broadened the scope of the boards' jurisdiction to "all claims . . . relating to a contract," *id*. § 605, and appellants may therefore plead both contractual relief and breach of contract as alternative theories at this board, as well as other boards. *See, e.g.*, *Tefft, Kelly and Motley, Inc.*, GSBCA 6562, 83-1 BCA ¶16,177 (1982). That we might ultimately find that the claim may be redressable under the Changes clause does not bar appellant from pleading an alternative theory of recovery and is not grounds to dismiss the claim for breach of implied warranty. The motion to dismiss the claim for breach of implied warranty of sufficiency of the plans and specifications is denied.

97-1 BCA at 142,980.

In *GEM Engineering*, the GSBCA also set forth the standard for evaluating the merits of a motions to dismiss before the Board:

> In addressing respondent's contention that appellant has failed to state a claim upon which relief may be granted, we are mindful of the presumptions applicable to this motion. The standard for measuring whether dismissal of an action on this basis is appropriate has been stated as follows:

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[1] Respondent cites *Hoel-Steffen Construction Co. v. United States.*, 197 Ct. Cl. 561 (1972) and *Utley-James, Inc. v. United States*, 14 Cl. Ct. 804 (1988), which bar breach claims if an administrative remedy is available under the contract. Both decisions involve pre-Contract Disputes Act contracts and the jurisdictional scheme which existed before the passage of the Contract Disputes Act. Other court and board cases cited by respondent simply hold that if recovery pursuant to a contractual clause is available, recovery will be allowed as contractual relief rather than as a breach of contract.

> As a general rule, a motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted. Therefore, the question is whether in the light most favorable to plaintiff and with every doubt resolved in plaintiff's behalf, the complaint states any claim for relief. [It] . . . should be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
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> *Balboa Insurance Co. v. United States*, 3 Cl. Ct. 543, 545 (1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), *accord Embarcadero Center Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362.

97-1 BCA at 142,980-81.

Appellant is therefore free to plead alternative and even inconsistent theories of recovery, as it has done in the instant case. Appellant's cause of action for breach is not barred by the fact that there are contractual clauses which may afford relief, nor is appellant barred from seeking recovery pursuant to alternative, inconsistent theories. It does not appear beyond doubt that appellant can prove no set of facts in support of its claim. The pleadings are sufficient to permit appellant to pursue recovery of its claim.

Decision

Respondent's motion to dismiss the complaint is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

HOWARD A. POLLACK
Board Judge