UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 24, 2017

CBCA 4079

ASHEVILLE JET CHARTER AND MANAGEMENT, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Frank G. Podesta of FGP Law, LLC, Roswell, GA, counsel for Appellant.

John J. Hockberger, Jr., Office of the Solicitor, Department of the Interior, Boise, ID, counsel for Respondent.

Before Board Judges **SOMERS**, **SULLIVAN**, and **LESTER**.

SULLIVAN, Board Judge.

In a previous decision, *Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 16-1 BCA ¶ 36,373, the Board determined that the contracting officer of the Department of the Interior (DOI or agency) properly found that Asheville Jet Charter and Management, Inc. (Asheville) was in default under its contract to provide flight services to DOI. We could not determine, based upon the record at the time, whether Asheville had established a valid defense under the excusable delay clause, sufficient to have us invalidate the contracting officer's decision to terminate the contract for cause. Specifically, we could not evaluate the reasons for the resignations of its key personnel and whether they were beyond Asheville's control. *Id*. at 177,303. Based upon additional discovery taken since that ruling, DOI has moved for summary relief, asserting that Asheville has no evidence to support its contention that a strike or a similar labor action

occurred that was beyond its control and for which it should not be held responsible.[1] For the reasons that follow, the Board grants DOI's motion and denies the appeal.

Background

We presume familiarity with our previous decision, in which we set forth undisputed facts regarding the contract and the events that led to the termination. Since we issued that decision, the parties have deposed the current and former owners of Asheville and supplemented the appeal file.[2] We set forth here additional facts alleged by Asheville in opposition to DOI's motion based upon this further evidence.

The remaining focus of the parties' dispute is whether the actions of Asheville's former personnel constituted a strike that renders Asheville's failure to perform excusable. Three key personnel resigned from Asheville–its operations director, its chief pilot and its maintenance chief. Appellant's Statement of Genuine Issues of Fact ¶¶ 42, 54. Without personnel in these three positions, Asheville was required to notify the Federal Aviation Administration (FAA) of these resignations, and the FAA suspended Asheville's license to fly. *Id*. ¶ 55. Without this license, Asheville could not perform scheduled flights to and from the Midway Islands. *Id*. ¶ 57.

Asheville contends that these key personnel resigned on the same day (June 14, 2014), in concert with one another and without any notice to any Asheville management. Appellant's Statement of Genuine Issues of Fact ¶¶ 42-43. Asheville first learned of the

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[1] DOI fashions its motion as one for reconsideration, asking the Board to reconsider its decision that there are facts that need to be developed regarding the strike issue before a decision can be reached. Because the parties have undertaken discovery and supplemented the record since the original summary relief briefing, the Board views DOI's motion as a new motion for summary relief on the issue of the excusability.

[2] DOI also submitted the declarations of the three former employees of Asheville. Asheville moved to strike these declarations because DOI did not identify these individuals in response to an interrogatory seeking the names of all persons that "may have knowledge of any facts or circumstances concerning any and all claims or defenses made in this action." Appellant's Motion to Strike, Attachment A. Because the Board does not consider these declarations in resolving DOI's motion to strike, we deny the motion to strike as moot.

resignations from an individual at the Nature Conservancy and never received formal notice from the individuals themselves.[3] *Id*. ¶¶ 43, 45, 49.

Asheville further contends that these individuals resigned as an attempt to wrest control of the company out of the hands of the new management and restore the former president of the company. As evidence of this motive, Asheville points to the list of requirements that was drafted during a phone call on June 19, 2014, after the employees resigned, between the current owner of Asheville, the former owner of Asheville, and the former director of operations to secure the return of these key employees. Appellant's Statement of Genuine Issues of Fact ¶¶ 51, 79; Exhibit 135 at 21-22. Based upon the evidence in the record, it appears that the former owner represented that the key employees would return to their positions if Asheville agreed to certain conditions, including removing two of the current owners from control and returning the former owner as president. Exhibit 100. Asheville rejected this offer because it required the current owners to cede control. Appellant's Statement of Genuine Issues of Fact ¶ 52.

The chief mechanic and the chief pilot returned to work for Asheville two weeks later. The operations director never returned to Asheville. Appellant's Response at 2; *see also* Notice of Appeal (two of the three individuals returned to work for Asheville two weeks later). Asheville does not allege that these employees made further demands to secure their re-employment.

Asheville acknowledges that a dispute arose between the current and former owners of Asheville in the spring of 2014. Appellant's Statement of Genuine Issues ¶ 38. This dispute was resolved in September 2015, after the parties filed lawsuits against each other in Georgia state court. Exhibits 143B-D. Asheville alleges that the three former employees took the side of the former owner in the dispute. Appellant's Statement of Genuine Issues ¶ 40. The current owners of Asheville also sued the former employees in Georgia state court in June 2016, alleging tortiuous interference, breach of fiduciary duty, and conspiracy. The record is silent as to the status of that suit.[4] Asheville did not have employment contracts

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[3] In addition to the contract at issue, Asheville held contracts with DOI and the Nature Conservancy to provide flights to and from Palmyra Atoll. Appeal File, Exhibit 143E (all exhibits are found in the appeal file unless otherwise noted).

[4] The Board notes that the facts set forth in the complaint filed in a separate lawsuit against the three former employees contain discrepancies regarding the timing and the description of the events surrounding the employees' resignations and subsequent discussions regarding the conditions under which the employees would return to the company. Exhibit 143H.

with these three individuals and considered them to be at-will employees. Appellant's Supplemental Statement of Facts (Aug. 8, 2017).

Discussion

I. Standard of Review

"Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based the undisputed material facts." *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,622. It is the moving party's burden to demonstrate the absence of genuine issues of material fact, and all justiciable inferences must be drawn in favor of the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Only those facts which might affect the outcome of a case are material, and "an 'issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing.'" *MLJ Brookside*, 15-1 BCA at 175,622 (quoting *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,571). The moving party may meet its burden by "'showing' . . . that *there is an absence of evidence to support the nonmoving party's case*." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987) (quoting *Celotex*, 477 U.S. at 325).

"When the moving party has shown an absence of evidence supporting the non-moving party's case, the burden shifts to the other party to establish that there is a genuine issue of material fact." *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175-7 (citing *Celotex*, 477 U.S. at 324; *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 585-88 (1986)). "[M]ore than mere allegations are necessary to defeat a properly supported motion for summary [relief]." *Id*. at 166,175. The non-moving party must "go beyond the pleadings" and establish that there is a genuine issue for trial based upon affidavits or other evidence. *Id*. at 166,176.

II. Asheville Cannot Establish That Its Failure To Perform Was Excusable

In our previous decision, we found that DOI's finding that Asheville was in default was proper. As a result, Asheville now bears the burden to establish that its failure to perform is excusable. *Asheville Jet Charter & Management, Inc.*, CBCA 4079, 16-1 BCA at 177,299 (citing *MLJ Brookside*, 15-1 BCA at 175,623). To establish that its failure should be excused, Asheville must show, by a preponderance of the evidence, that its inability to perform resulted from causes beyond its control and without its fault or negligence. *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,553 (citing *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)), *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016).

A strike is one of the activities that may excuse a failure to perform, provided it is "beyond the reasonable control of the Contractor and without its fault or negligence." 48 CFR 52.212-4(f) (2014). A strike is generally defined as follows:

> An organized cessation or slowdown of work by employees to compel the employer to meet the employees' demands; a concerted refusal by employees to work for their employer, or to work at their customary rate of speed, until the employer grants the concessions that they seek.

Black's Law Dictionary 1648 (10th ed. 2014). The contractor seeking to establish that an excusable delay resulted from conditions comparable to a strike must show the following:

> (1) there was in fact a strike [or a comparable situation], (2) the strike directly affected Appellant's ability to perform the contract requirements, (3) the strike was beyond Appellant's control and did not result from Appellant's fault or negligence, and (4) . . . there was no other source than the [one] affected by this strike from which Appellant could have [obtained and provided the necessary services] in accordance with the contract.

Otis Elevator Co., Material Handling Division, VACAB 1157, 76-1 BCA ¶ 11,738, at 55,995.

Asheville has failed to allege facts sufficient to establish that an excusable delay resulted from a strike. As we previously noted, Asheville alleges that these three employees resigned in concert, without notice to Asheville. As defined above, a strike is an action taken by employees of a firm, who are otherwise obligated to work. However, in this case, the individuals resigned. Asheville acknowledges that these employees were at-will employees without employment contracts and, therefore, were free to resign when they wanted. Moreover, two of the employees returned to work for Asheville, and there is no evidence that they extracted demands for their return after Asheville rejected the original terms for all three to return. In sum, Asheville has not alleged facts necessary to establish that this action was a strike or a comparable situation.

Asheville also has not alleged facts to show that the inability to perform was beyond its control. Although Asheville found the terms under which the former employees offered to return to work for Asheville unacceptable, it made a choice not to accept them or to negotiate further. Asheville had control over the situation and made a choice to reject the terms and default on the contract. Asheville cannot demonstrate that the resignations of the employees and their demands for conditions to return were beyond its control and without its fault or negligence. *Carolina Security Patrol, Inc.*, GSBCA 5602, 81-1 BCA ¶ 15,040, at 74,420. Moreover, Asheville chose not to sign employment contracts with these

individuals to prevent these resignations and ensure the availability of these key personnel. *KSC-TRI Systems, USA, Inc.*, ASBCA 54638, 06-1 BCA ¶ 33,145, at 164,260 (2005); *Aero Aircraft Manufacturing Co.*, ASBCA 19356, 75-1 BCA ¶ 11,038, at 52,540.

In its briefing, Asheville appears to suggest that the Government was somehow at fault for its employees' resignations and that, as a result, the Government should be barred from terminating the contract for default. There is nothing to indicate that the Government was involved in the resignations of these employees. To shift the risk of loss of key personnel to the Government, Asheville would have to show that the Government caused the resignations of these employees. *The NTC Group, Inc.*, ASBCA 53720, et. al, 04-2 BCA ¶ 32,706, at 161,810; *New England Tank Industries, Inc.*, ASBCA 6670, 61-2 BCA ¶ 3233, at 16,761. Asheville alleges that the contracting officer was aware of the resignations before Asheville itself and continued to communicate with the former employees as well as the owners of Asheville to determine whether the flight services could be performed. Yet, Asheville has not expressly alleged or submitted evidence in response to DOI's summary relief motion to suggest that the Government caused the resignations. On this record, there is no basis to shift the risk of the loss of key personnel to the Government by excusing Asheville's failure to perform.

Decision

For the reasons discussed above, respondent's motion for summary relief is granted. The appeal is **DENIED**.

MARIAN E. SULLIVAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

HAROLD D. LESTER, JR.
Board Judge