



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND  
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON AUGUST 7, 2023**

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED;  
APPELLANT'S MOTION FOR SUMMARY JUDGMENT GRANTED IN PART;  
APPEAL GRANTED IN PART: July 25, 2023

CBCA 7135

THE HEIRS OF BAHAWOUDDIN, SON OF NEYAZ MOHAMMAD,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Roia Shefayee of Wellspring Advisers, PC, Alameda, CA, counsel for Appellant.

Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions,  
Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SULLIVAN**.

**SULLIVAN**, Board Judge.

The Heirs of Bahawouddin, Son of Neyaz Mohammad (the Heirs or appellant), filed a motion for summary judgment, seeking, as a matter of law, the payment of unpaid rent and the costs to rebuild a building on property leased to the Department of State (DOS or respondent). DOS filed a motion for partial summary judgment, asserting that the Heirs' claim for the destruction of the building was untimely and contrary to the terms of the lease

and that it did not owe the Heirs rent for the period after the lease was assigned. We grant DOS' partial motion, grant in part the Heirs' motion, and grant in part the appeal.

### Background

In December 2013, DOS entered into a lease with the Heirs for residential property in Kabul, Afghanistan, referred to as the "Jill-Fab." Appeal File, Exhibit 1 at 12.<sup>1</sup> Mr. Mohammad Tariq Baha, appointed through a power of attorney, signed the lease on behalf of the Heirs. *Id.* at 12. The lease term was for ten years, starting March 1, 2014, and rent was \$120,000 per year. *Id.* at 1-2.

Several lease provisions control the resolution of the parties' dispute. Article eight provided that DOS would return the property "as is" at the end of the lease and had the right to demolish any structure on the premises, at its own discretion, without any requirement to compensate the Heirs:

C. The TENANT will not be responsible for restoring the Premises to any condition or for any changes or damages to the Premises. The Premises are leased in "as is" condition and may be returned in the "as is" condition as of the date of lease expiry or termination.

D. The TENANT may demolish, at its discretion and cost, any buildings on the Premises, without paying compensation, with no responsibility to rebuild at a future time.

Exhibit 1 at 4. Article nine provided that DOS may "assign its interest in the Premises . . . to any party without the prior consent of the LANDLORD" and that it would provide the Heirs with notice of the assignment. *Id.* at 5.

The lease also contained two provisions pertaining to the choice of law to be employed in resolving any disputes arising under the lease. Article fifteen provided that "all disputes arising under or relating to this Lease shall be resolved exclusively under" the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), and that claims by the landlord "shall be submitted within [six] years after accrual of the claim." Exhibit 1 at 7-8. If claims were found due, article fifteen also provided for DOS to pay CDA interest calculated from the date of receipt of the claim. Article sixteen provides that "[t]he terms of this lease shall be construed in accordance with the local laws of Afghanistan." *Id.* at 10.

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<sup>1</sup> All exhibits are found in the appeal file, unless otherwise noted.

On June 27, 2019, DOS assigned its interest in the lease to the Federal Republic of Germany (FRG). Exhibit 2 at 45. In the notice to the Heirs, DOS stated that all future rent payments would be made by FRG and that DOS would no longer have any further responsibility for or liability under the lease. *Id.* DOS made five annual payments pursuant to the lease, a total of \$600,000, for rent owed through February 28, 2019. Appellant's Statement of Undisputed Material Facts ¶ 3. In response to the claim, DOS acknowledged that it had not paid the rent owed from March 1, 2019, through the date of the assignment because of concerns about Mr. Baha's authority to receive those payments. Exhibit 3 at 4. According to Mr. Baha, FRG made two additional payments, a total of \$240,000. Declaration of Mohammad Tariq Baha (date) ¶ 20. The Heirs seek payment of \$360,000, in unpaid rent, for two periods: March 1–June 30, 2019, and July 1, 2021–February 29, 2024. *Id.* ¶ 23.

At some point during the lease, DOS demolished the Jill-Fab. On September 28, 2014, Mr. Baha emailed DOS' contact in Kabul, stated that the house on the property had been demolished, and asked for an explanation. Exhibit 18; Appellant's Response to Respondent's Statement of Undisputed Material Facts ¶ 25. In a reply the next day, DOS' contact stated that DOS would not be compensating the Heirs because, "[a]ccording to . . . article 8 section D, it is clearly written that we have the right to demolish your house with no cost." Exhibit 18; *see* Appellant's Reply to Respondent's Motion for Summary Judgment at 6-7.

On October 14, 2020, the Heirs submitted a claim to DOS' contracting officer, seeking compensation for the demolished building and rent owed for the months preceding and subsequent to DOS' assignment to FRG. Exhibit 2 at 21.

### Discussion

#### I. The Heirs' Claim for Demolition of the Jill-Fab is Untimely

DOS moves for dismissal of the Heirs' claim arising from the demolition of the Jill-Fab as untimely because the Heirs' claim was submitted more than six years after the claim for demolition of the property accrued. Pursuant to the CDA, "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). The lease included this requirement in article 15. "A party's failure to submit a claim within six years of accrual is an affirmative defense to the claim." *ThinkGlobal Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489, at 177,793 (citing *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789), *reconsideration granted in part*, 17-1 BCA ¶ 36,642.

Whether and when a claim has accrued is determined according to the Federal Acquisition Regulation (FAR), the language of the contract, and the facts of the particular case. *Kellogg Brown & Root Services., Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016). The FAR defines the “accrual of a claim” as “the date when all events, that fix the alleged liability of . . . the Government . . . and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.” 48 CFR 33.201 (2021) (FAR 33.201). “[O]nce a party is on notice that it has a potential claim, the limitations period begins to run.” *ThinkGlobal*, 16-1 BCA at 177,793 (quoting *Cardinal Maintenance Service, Inc.*, ASBCA 56885, 11-1 BCA ¶ 34,616, at 170,610 (2010)).<sup>2</sup>

“[T]o determine when appellant’s claims accrued, and the events that fixed the alleged liability, we start by examining the legal basis for each particular claim.” *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,007 (quoting *Environmental Safety Consultants, Inc.*, ASBCA 54615, 07-1 BCA ¶ 33,483, at 165,984). The Heirs’ claim for the demolition of the Jill-Fab is based upon a purported violation of Afghan law and a breach of the lease. “Generally, ‘[i]n the case of a breach of a contract, a cause of action accrues when the breach occurs.’” *Id.* (quoting *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir.1998)); see *Brighton Village Associates v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (“These claims accrued on the dates the alleged breaches occurred.”). The cause of action accrues at the time of breach because that is when the party suffers the injury. *Crane & Co.*, 16-1 BCA at 178,008 (“[I]n the usual case the contractor suffers damages upon the occurrence of the breach . . .”).

Appellant’s claim for the demolition accrued, at the latest, at the time that Mr. Baha learned that the building on the property had been demolished, sometime on or before September 28, 2014. At this point, the injury had occurred (the building had been demolished), and the time within which to file a claim began to run. Since appellant did not

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<sup>2</sup> The DOS contracting officer did not deny the claim for the demolition of the property because it was untimely. New legal theories may be raised in response to newly acquired information. See *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); *Crane & Co.*, 16-1 BCA at 178,006 (allowing respondent to argue for the first time that appellant’s new claims were untimely in response to a motion to amend). The Heirs did not include in the claim the date that Mr. Baha learned of the Jill-Fab’s demolition, and DOS learned of this information in discovery after the appeal was filed. Respondent’s Statement of Undisputed Material Facts ¶ 42.

submit its claim until October 14, 2020, more than six years later, the claim for the demolition of the property is untimely. 41 U.S.C. § 7103(a)(4)(A).

Appellant disputes that the Heirs all had notice of the demolition, asserting that only Mr. Baha knew, so the claim did not accrue until all of the Heirs were informed (a date not provided by appellant). Appellant's Response to Respondent's Statement of Undisputed Material Facts ¶ 27. In general, knowledge acquired by an agent acting within the scope of his or her agency is imputed to the principal, and the latter is bound by that knowledge even if the information is never actually communicated. *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1249 (Fed. Cir. 2007). Once an agent has knowledge of the existence of a claim, the statute of limitations begins to run. *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281, 1287 (Fed. Cir. 2007); see *Florida Dehydration Co. v. United States*, 101 F. Supp. 361, 363 (Ct. Cl. 1951) (dismissing plaintiff's petition as untimely when it was filed more than six months after plaintiff's attorney received notice of denial). The critical factor is whether the knowledge was within the scope of the authority granted to the agent. *Immunocept*, 504 F.3d at 1287. The Heirs granted Mr. Baha broad powers of attorney that "give him unfettered and unconditional authority to make decisions about, and supervise, and maintain, and rent." The Board has previously ruled in this case that this grants Mr. Baha the power to file claims on appellant's behalf with respect to and arising under the lease. *The Heirs of Bahawouddin, Son of Neyaz Mohammad v. Department of State*, CBCA 7135, 22-1 BCA ¶ 38,212, at 185,565-66. Mr. Baha had authority to bring the claim for damages for the demolition; therefore, Mr. Baha's knowledge of this claim is imputed to all of the Heirs.

The Heirs also assert that the claim should not accrue until the lease ended; at the time the building was demolished, there were still nine years remaining on the lease. Appellant's Reply to Respondent's Motion for Summary Judgment at 7. The Heirs' assertion is contrary to the law on the accrual of claims. In a continuing contract, claim accrual happens at the time of the breach and does not require contract completion. *United Liquid Gas Co. v. General Services Administration*, CBCA 5846, 18-1 BCA ¶ 37,172, at 180,941. The remaining time on the lease did not forestall the accrual of a claim.

The Heirs argue that the term "accrual" is not defined in the CDA or in Afghan law so the Board has no means of determining when the claim accrued. Appellant's Reply to Respondent's Motion for Summary Judgment at 6. The lease uses the word accrual in specifying the period within which the lessors must file a claim and provides that disputes would be resolved in accordance with the CDA. We interpret the contract term "accrual" to be consistent with the FAR definition and case law. See, e.g., *Triple Canopy, Inc. v. Secretary of the Air Force*, 14 F.4th 1332, 1338 (Fed. Cir. 2021); *Amec Foster Wheeler*

*Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, at 181,366.

Finally, the Heirs assert that the breach occurred not when the Jill-Fab was demolished but when the property was abandoned in 2021 with the withdrawal from Afghanistan. Appellant's Brief in Response to Respondent's Motion for Partial Summary Judgment at 5.<sup>3</sup> According to the Heirs, the claim arose when DOS failed to return the premises in the "as is" condition of the property when it was first leased. This argument runs counter to the Heirs' claim, which asserted that the destruction of the building was the breach. This argument also is not supported by the lease, which provides that DOS may return the premises in the "as is" condition it is when the lease is terminated, not the "as is" condition it was at the beginning of the lease. The provision is a right granted to DOS to return the property in whatever condition it is without any obligation to restore it.

Because we determine that the claim for the demolition of the building is untimely, we do not reach the merits of the Heirs' claim.

## II. DOS Does Not Owe the Heirs Rent After the Assignment

The Heirs assert that DOS remained obligated to pay the rent after the assignment of the lease to FRG and, therefore, that DOS is liable for the rent unpaid by FRG. Appellant's Motion for Summary Judgment at 4. In essence, the Heirs assert that DOS' assignment was of the rights to use the property, not the obligation to pay the rent.

To decide this claim, we first look to the language of the assignment provision within the lease to determine DOS' remaining obligations, if any. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009); *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). Article nine of the lease provides that DOS could "assign" its interest in the premises at any time but does not state whether the assignment could include all of DOS' obligations. We next look to Afghan law to define the term and determine the scope of DOS' permitted assignment because the parties agreed that the lease would be construed in accordance with Afghan law. *The Heirs of Bahawouddin*, 22-1 BCA at 185,565

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<sup>3</sup> DOS moves to strike this reply brief as untimely, pursuant to Board Rule 8(g) (48 CFR 6101.8(g)). Counsel for the Heirs correctly observed that the Board's November 16, 2022, scheduling order that adopted dates proposed by the parties set the date for the filing of reply briefs as June 19, 2023, rather than requiring the parties to follow the requirements of Rule 8(g). Since June 19, 2023, was a federal holiday, appellant's reply brief was timely filed on June 20. DOS' motion to strike is denied.

(citing *Sam Gray Enterprises, Inc. v. United States*, 43 Fed. Cl. 596, 601 (1999) (finding that the lease states that Afghan law would be followed in interpreting the contract), *aff'd*, 250 F.3d 755 (Fed. Cir. 2000)). Afghan law provides that, “[i]n case of assigning lease, assignee shall succeed lessee with regards to his relationship with lessor on rights and obligations arising from lease contract.” Afghan Civil Code, Article 1381 (1977) (Elite Legal Services, Ltd., Mohammad Fahim Barmaki trans., Stanford University Law School 2014).<sup>4</sup> Afghan law further provides that the assignor “shall be recognized as guarantor of assignee regarding fulfillment of his obligations” but that the lessee “shall be recognized as acquitted against lessor . . . [w]hen rent is paid by assignee or sub-lessee, without expressing retention of his rights against the first lessee.” *Id.* arts. 1381, 1383.<sup>5</sup> There is no evidence of any reservation of rights when FRG paid—and the Heirs accepted—the rent for the two years after the assignment. Accordingly, DOS was permitted to and did assign all of its rights and obligations under the lease and is not liable for the rent after the assignment.

### III. DOS Owes the Heirs Rent for the Period for March 1, 2019 until the Assignment

As noted above, there are two periods of unpaid rent—the three months before the assignment and the months after the assignment. In its motion, appellant moved for summary judgment on DOS’ liability for \$360,000 in unpaid rent—the amount owed, but unpaid from both before and after the assignment. Appellant’s Motion for Summary Judgment at 2. DOS moved for partial summary judgment regarding its liability for rent after the assignment but did not address the period before the assignment in its briefing. DOS has acknowledged liability for the rent prior to the assignment but expressed concerns regarding Mr. Baha’s authority to receive the rent payment on behalf of the Heirs. In a prior ruling, the Board required Mr. Baha to provide notice of the appeal to all of the Heirs, and DOS had the

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<sup>4</sup> The compilation of the Afghan Civil Code was provided as exhibit 11 in the Rule 4 file.

<sup>5</sup> Article 1383 also provides that a lessee can be acquitted against a lessor if the lessor explicitly accepts the assignment. The Heirs offer the opinion of an expert in Afghan law, who opines that these two provisions of Article 1383 must be read together so that DOS had to both have the Heirs accept the assignment and FRG pay the rent without reservation for DOS to be “acquitted against the lessor.” Appellant’s Motion, Exhibit 1. This interpretation is contrary to both the provision itself and the terms of the lease. Article 1383 states that the first lessee “shall be acquitted against the lessor in the following cases” and then lists the two options. The phrase “in the following cases” indicates that the provisions are to be read in the disjunctive. The lease allows DOS to assign its interest in the property without the Heirs’ approval, so to construe a requirement for approval would be contrary to the parties’ agreement.

opportunity to depose at least one of the Heirs during discovery. Respondent's Motion for Partial Summary Judgment at 1. DOS did not raise any issue in its briefing regarding Mr. Baha's authority to receive the rent owed. None of the other heirs have come forward during the pendency of the appeal to challenge Mr. Baha's authority.

Since DOS has not raised an objection to the Heirs' motion for the payment of the rent prior to the assignment, the Board accepts DOS' prior acknowledgment that it is liable for this portion of the unpaid rent and grants the Heirs' motion in part. Neither party quantified in its briefing the amount owed for this period. The annual rent was \$120,000, which averages to \$10,000, per month. On this basis, DOS owes the Heirs \$30,000, plus CDA interest calculated from October 14, 2020, the date of the Heirs' claim.

Decision

DOS' motion for partial summary judgment is **GRANTED**, the Heirs' motion for summary judgment is **GRANTED IN PART**, and the appeal is **GRANTED IN PART**.

*Marian E. Sullivan*  
MARIAN E. SULLIVAN  
Board Judge

We concur:

*Erica S. Beardsley*  
ERICA S. BEARDSLEY  
Board Judge

*Joseph A. Vergilio*  
JOSEPH A. VERGILIO  
Board Judge