



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: November 12, 2008

CBCA 803

FIRST FLIGHT LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Edward V. Gregorowicz, Jr. of The Law Offices of Edward V. Gregorowicz, Jr., Fairfax, VA, counsel for Appellant.

Heather R. Cameron and Dalton F. Phillips, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

SOMERS, Board Judge.

This appeal involves a dispute arising out of a lease for warehouse storage space between appellant, First Flight Limited Partnership (First Flight), and the General Services Administration (GSA or the Government). The leased space at issue was used by the Department of State (State Department) primarily for the long-term storage of household effects and related items. Over the course of approximately twelve months, GSA withheld \$481,398.60 in rent based upon its determination that First Flight had failed to prevent roof leaks within a portion of the warehouse area of the leased premises. First Flight contends that GSA breached the lease agreement by withholding the rent. Both parties have filed motions for summary relief. We deny the motions for the reasons set forth below.

Background

GSA and First Flight entered into lease no. GS-03B-40113 on August 19, 1994. Under the terms of the lease, the Government obtained the use of 195,500 net usable square feet (NUSF)¹ of warehouse space, 1500 net usable square feet of office space, and fifteen outside parking spaces at the complex known as the Topflight Airpark, with occupancy by the State Department.² The Airpark is located in Hagerstown, Maryland. Appeal File, Exhibit 3. The lease term ran from February 16, 1995, through February 15, 2005. *Id.*, Exhibit 5. The lease provided for annual rent in the amount of \$906,200 at a rate of \$75,516.66 per month, plus annual operating cost and real estate tax adjustments. *Id.* Per the lease, the Government had the option to renew the lease for two five-year terms, at a rate of \$5.80 per NUSF, for an annual rent of \$1,142,600, plus annual operating cost and real estate tax adjustments. *Id.*, Exhibit 3, ¶ 5. The Government used the leased premises for storage of household goods. Appellant's Statement of Uncontested Facts (ASUF) ¶ 2; Respondent's Statement of Genuine Issues and Statement of Uncontested Facts (RSGI) ¶ 2.

The leased premises are part of a complex featuring over one million square feet of multiple connected buildings built in the 1950's. AUSF ¶ 6. The roof has apparently leaked from the beginning of this lease. Appeal File, Exhibit 4. From the start of the lease, when the roof would leak, the Government would notify First Flight of the leaks, and First Flight would repair the leaks. ASUF ¶ 24; RSGI ¶ 24. The parties disagree about the extent of the roof leaks. Appellant characterizes the roof leaks as "occasional" while respondent describes them as "continuous and unabated." Since the commencement of the lease in 1995, the State Department has received four claims for water-damaged goods, totaling \$2405. ASUF ¶ 44; RSGI ¶ 44. The Government contends, however, that the Government limited greater potential damages by moving crates from under roof leaks or by unpacking and repacking boxes. RSGI ¶ 44.

Early in the initial lease term, in February 1996, GSA informed First Flight that, due to the age of the roof and the numerous roof leaks that were occurring, the roof should be replaced. Appeal File, Exhibit 21. First Flight acknowledged that the roof should be

¹ "Net usable space" is the method of measurement for the area for which GSA pays a square foot rate. Appeal File, Exhibit 3, ¶ 3.8.

² Under a separate lease, GSA leased an additional 171,950 usable square feet of adjacent warehouse space and 3,560 usable square feet of mezzanine space at Topflight Airpark. ASUF ¶ 1, n. 1.

replaced at that time. *Id.*, Exhibit 24. Over the years, GSA would notify First Flight that if the roof was not repaired, it would enforce paragraph 15 of the lease and would begin deducting costs for roof repair from the rental payments. Respondent's Statement of Uncontroverted Facts (RSUF) ¶¶ 4, 9, 10-13; Appellant's Reply and Opposition to Respondent's Opposition to Appellant's Motion for Summary Relief, or, in the Alternative Motion for Partial Summary Relief (Respondent's Opposition) at 8. Paragraph 15, entitled "Failure in Performance," states:

The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are interdependent. In the event of any failure by the Lessor to provide any service, utility, maintenance, repair or replacement required under this lease the Government may, by contract or otherwise, perform the requirement and deduct from any payment or payments under this lease, then or thereafter due, the resulting cost to the Government, including all administrative costs. If the Government elects to perform any such requirement, the Government and each of its contractors shall be entitled to access to any and all areas of the building, access to which is necessary to perform any such requirement, and the Lessor shall afford and facilitate such access. Alternatively, the Government may deduct from any payments under this lease, then or thereafter due, an amount which reflects the reduced value of the contract requirement not performed. No deduction from rent pursuant to this clause shall constitute a default by the Government under this lease. These remedies are not exclusive and are in addition to any other remedies which may be available under this lease or at law.

Appeal File, Exhibit 3.

The roof continued to leak even in the parts of the warehouse where First Flight completely replaced the roof, although not as much. ASUF ¶ 25; RSGI ¶ 25. Thus, on November 29, 2004, representatives from GSA and the State Department met to discuss the roof leaks. The meeting focused upon an 81,344 square-foot area of the building where the roof had not yet been replaced and which respondent contends leaked more than the other areas in the warehouse. ASUF ¶¶ 28, 29; RSGI ¶ 29. GSA decided that for every building systems failure, disrepair, and/or negligence of the landlord, GSA would "issue a resulting cure-letter [sic] with a suspense date for each occurrence. Failure of the landlord to affect [sic] a cure by the due date will result in GSA withholding funds from the rent for the

Government to use in implementing the cure.” Appeal File, Exhibit 175. The memorandum stated, in part, as follows:

If the “1st block” of space continues to be the source of problematic roof leaks, the Program Manager will relocate existing household effects storage from the affected area to the “2nd block” of space where roof leaks are not a problem.

Id.

The Government exercised the first of its renewal options on January 7, 2005, extending the lease term for five years beginning on February 16, 2005, and ending on February 15, 2010. Appeal File, Exhibit 176. On February 3, 2005, after exercising the first renewal option, the contracting officer wrote a letter to First Flight, requesting First Flight to perform “corrections” to the roof and to provide GSA with a “certification by a registered Professional Engineer that the roof has been repaired or replaced . . . by February 23, 2005.” *Id.*, Exhibit 179. First Flight responded on February 11, 2005, and stated that it would continue remedial patching and repairs to the roof during the winter, and indicated that it planned to re-roof the section in the spring, as soon as weather would permit. *Id.*, Exhibit 180.

After receiving the letter, the contracting officer decided to vacate the 81,244 square feet of space, and advised the State Department of this decision by electronic mail dated February 14, 2005. Appeal File, Exhibit 181. On February 28, 2005, the contracting officer informed First Flight that the 81,344 square-foot section was “being vacated,” that the Government would not pay rent on the 81,344 square-foot section, and that the Government would further deduct \$14,621 in “administrative costs” from the rent. *Id.*, Exhibit 184. The Government moved the goods stored in storage crates from the 81,344 square-foot area to other areas within the building. Appellant asserts that after the Government removed the goods, it continued to use the space until May 18, 2005, “for trucking operations.” Appellant’s Exhibit 2 at 181-82. GSA does not dispute that the Government used at least some portion of the 81,344 square-foot area from March 23, 2005, until the contracting officer placed tape around the area on May 18, 2005, but asserts that it could not use the area to store household goods during that time period. RSGI ¶¶ 59, 61.

GSA did not pay rent on 81,344 square feet of the leased premises from March 23, 2005, to March 10, 2006, a total of \$481,398.60. ASUF ¶ 4; RSGI ¶¶ 4, 31. Included in the total was \$7976.52 for administrative costs, which GSA contends represents the administrative costs associated with moving the stored goods from the 81,344 square-foot

area to other areas within the warehouse. *Id.* GSA did not incur additional storage costs for the goods removed from the 81,344 square-foot area. ASUF ¶¶ 35, 36; RSGI ¶¶ 36.

The contracting officer informed the State Department that it should not move into any portion of the 81,344 square-foot space until the entire roof was repaired and certified. Appeal File, Exhibit 196. On December 28, 2005, First Flight notified the contracting officer that the roofing project was complete. *Id.*, Exhibit 247. In a letter dated January 9, 2006, the contracting officer responded to First Flight and stated that “rent will not be paid . . . until . . . receipt of Certification by a Registered Professional Engineer that the roof has been repaired or replaced.” *Id.*, Exhibit 203. First Flight provided a letter from a roof manufacturer confirming that the roof replacement would keep the building in a dry, watertight condition. *Id.*, Exhibit 249. After extensive correspondence and conversations between First Flight and the contracting officer, the contracting officer agreed to reinstate the rent after First Flight purchased a warranty in lieu of providing a certification by a registered professional engineer. Appellant’s Motion for Summary Relief, or, in the Alternative Motion for Partial Summary Relief, Exhibit 2 (Deposition of the Contracting Officer (May 21, 2008) at 170, 174-75); Appeal File, Exhibits 249, 251, 253; ASUF ¶ 80; RSGI ¶ 80. First Flight provided the warranty on March 10, 2006. ASUF ¶¶ 81, 82, 83; RSGI ¶¶ 82, 83. At that point, the Government reinstated rent payments. ASUF ¶ 82; RSGI ¶ 82. In sum, GSA withheld a total of \$481,398.60 from First Flight.

In addition to paragraph 15, detailed above, the lease included the following relevant clauses:

Miscellaneous Clause ¶ 3.12 - Adjustment for Vacant Premises

If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part prior to expiration of the firm term of the lease, the rental rate shall be reduced.

The rate shall be reduced by that portion of the costs per square foot of operating expenses not required to maintain the space. Said reduction shall occur after the Government gives 30 days prior notice to the Lessor, and shall continue in effect until the Government occupies the premises or the lease expires or is terminated.

Appeal File, Exhibit 3. An identical clause is located at general clause ¶ 34.

General Clause ¶ 7 - No Waiver:

No failure by either party to insist upon the strict performance of any provision of this lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent or other performance by either party during the continuance of any such breach shall constitute a waiver of any such breach of such provision.

....

General Clause ¶ 9 - Mutuality of Obligation:

The obligations and covenants of the Lessor, and the Government's obligation to pay rent and other Government obligations and covenants, arising under or related to this Lease, are interdependent. The Government may, upon issuance of and delivery to Lessor of a final decision asserting a claim against Lessor, set off such claim, in whole or in part, as against any payment or payments then or thereafter due to the Lessor under this lease. No setoff pursuant to this clause shall constitute a breach by the Government of this lease.

General Clause ¶ 10, Delivery and Condition:

(a) Unless the Government elects to have the space occupied in increments, the space must be delivered ready for occupancy as a complete unit. The Government reserves the right to determine when the space is substantially complete.

(b) If the premises do not in every respect comply with the provisions of this lease the Contracting Officer may, in accordance with the Failure in Performance clause of this lease, elect to reduce the rent payments.

....

General Clause ¶ 13, Effect of Acceptance and Occupancy:

Neither the Government's acceptance of the premises for occupancy, nor the Government occupancy thereof, shall be construed as a waiver of any requirement of or right of the Government under this Lease, or as otherwise prejudicing the Government with respect to any such requirement or right.

....

General Clause ¶ 16, Default by Lessor during the Term:

Each of the following shall constitute a default by Lessor under this lease:

- (1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or an authorized representative.
- (2) Repeated and unexcused failure by Lessor to comply with one or more requirements of this lease shall constitute default notwithstanding that one or all such failures shall have been timely cured pursuant to this clause.

....

General Architectural Clause § 4.3 - Building Systems Certification:

Whenever requested, the Lessor shall furnish at no cost to GSA a certification by a registered Professional Engineer(s) that the building and its systems as designed and constructed will satisfy the requirements of this lease.

Id.

Discussion

Each party has asked the Board to resolve this appeal by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The mere fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001). Once the non-moving party offers enough evidence to establish that its position could prevail, summary relief must be denied. *Second Street Holdings LLC v. Securities and Exchange Commission*, CBCA 1056, 08-2 BCA ¶33,913; *Chanhassen Venture, Ltd. v. Department of Commerce*, CBCA 789, 08-1 BCA ¶33,826.

First Flight asserts that GSA improperly relied upon paragraph 15 of the general clauses of the lease to withhold rent. Appellant's Memorandum of Points and Authorities in Support of Its Motion at 20. First Flight argues, in pertinent part, that "the Lease does not permit the Government to withhold rent . . . without using that money to remedy the lease requirement allegedly not performed"; that "the Lease does not permit the Government to withhold 100% of the rent without any reasonable relationship between the amount withheld and the value of the alleged failure in performance by the lessor"; that "the Lease does not permit the Government to terminate the Lease to remedy a Lease requirement allegedly not performed" or "fail to pay rent for a portion of the 81,344 square feet" if a portion of the space is tenantable; and that "the Lease does not permit the Government to withhold 100% of rent . . . pending submission of a 'certification' or warranty" as may be requested by the Government under section 4.3 of the SFO contained in the lease. *Id.*

The Government contends that First Flight had a duty to maintain the leased premises in good repair and condition per paragraph 14 of the lease. It argues that, contrary to First Flight's assertions, paragraph 15 of the lease did not require GSA to repair and then deduct the cost of repairs from the lease in the event that the lessor fails to maintain the premises properly. Respondent's Opposition at 9-10. Rather, the Government states that because First Flight failed to prevent roof leaks from occurring over that area, which impaired the

State Department's ability to use the leased premises for their intended purpose, i.e., the storage of household goods, the Government was "constructively evicted" from the 81,344 square-foot area. *Id.* at 11. GSA claims that it relies upon the section of paragraph 15 which permits the Government to "deduct from any payments under this lease, then or thereafter due, an amount which reflects the reduced value of the contract requirement not performed." *Id.* at 10. As to the contracting officer's requirement that First Flight provide a certification before resuming rent payments, the Government claims that it required the certification as assurance that the roof had been properly repaired or replaced prior to reoccupying the space. *Id.* at 12.

Both parties agree that the lease agreement requires First Flight to maintain the roof and the roof structure so that the premises would be in good repair and condition. The issue, however, of whether or not the roof leaks caused the leased premises to be untenantable, which might be a cause for default by the lessor under general clause ¶ 16 of the lease, needs to be resolved on a more fully developed record. Default by the lessor could result in the Government's entitlement to reduce rent payments under various lease provisions in the contract, including general clause ¶¶ 10, 13, and 15. Because of the disagreement as to material facts, the ultimate responsibility of the parties arising therefrom cannot be resolved on summary relief.

Decision

The motions for summary relief are **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge