



**UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS**

GRANTED: August 22, 2013

CBCA 3228

600 SECOND STREET HOLDINGS LLC,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

Timothy C. Hutchens, Executive Vice President of CBRE, Federal Lessor Advisory Group, Washington, DC, counsel for Appellant.

George C. Brown and John P. Sholar, Office of the General Counsel, Securities and Exchange Commission, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **POLLACK** and **McCANN**.

McCANN, Board Judge.

Appellant, 600 Second Street Holdings LLC (appellant or 600 SSH), appeals the Securities and Exchange Commission (SEC) contracting officer's final decision regarding the interpretation of a lease agreement.

Findings of Fact

1. On November 26, 2002, 600 SSH and the SEC entered into a lease for all of the office space in the office building known as Station Place II located at 600 2nd Street, N.E., Washington, D.C. The lease also granted the SEC the right to thirty-three parking spaces in the Station Place II garage. The lease term was for fourteen years, commencing on January 7, 2006, and expiring on January 6, 2020.

2. The lease contemplates that 600 SSH will contract with SEC employees and other affiliated entities (SEC parkers) for the rental of additional spaces in the garage. The rights granted to the SEC and the SEC parkers with respect to the garage and parking in the garage are set forth in paragraph K.1 of the lease:

K. Parking and Loading Docks

1. Permitted Parkers. For security purposes, the Government shall control the Building Two Garage, as well as access to the Building Two Garage and security in and for the Building Two Garage. The Government or any Government-affiliated third-party entity or entities (including Government employees, Government employee organizations, contractors, consultants and authorized visitors), designated or approved by the Government for participation in the Government's parking security program ("Affiliated Parking Tenants"), shall pay \$220 per month to the Lessor, with a three percent (3%) escalation annually throughout the term of the Lease for Building Two, plus any applicable taxes per space, for each space in the Building Two garage that either the Government or Affiliated Parking Tenants may elect to contract for in excess of the thirty-three (33) spaces already provided in the Building Two Rental Rate.

3. In the first seven years of the lease term, the monthly base rate for parking has differed from the \$220 base rate established by the lease. For the first half of 2006, the rate was the \$220 rate stipulated in the lease. In the second half of 2006, the rate was lowered to \$175. In 2007, the rate was further lowered to \$147 and this price was maintained through 2010. In 2010, the rate was raised to \$173.79, which was maintained through 2012.

4. From 2006 to 2012, the number of SEC parkers fluctuated from a low of five in the first half of 2006 to a high of 132 in 2010. In mid-November 2012, 600 SSH notified each individual SEC parker of its intention to raise the base parking rate for 2013 to \$270.57. This rate was calculated by taking the \$220 base rate in the lease and multiplying it by a three percent escalation for each of the seven years the lease had been in effect ($\$220 \times 1.03 \times 1.03$

$x 1.03 \times 1.03 \times 1.03 \times 1.03 \times 1.03 = \270.57). This proposed rate represented about a fifty-six percent increase from the 2012 rate.

5. On November 30, 2012, the SEC's contracting officer sent a letter to 600 SSH to notify it that the proposed rate for 2013 was not authorized by the lease and that 600 SSH could not charge SEC parkers more than a three percent increase from current rates. After 600 SSH reiterated its intention to continue with the plan of raising the base rate, the SEC's contracting officer issued her final decision determining that 600 SSH's rate increase was not permitted by the lease. In response, 600 SSH provided SEC parkers with a notice that until further notice the rate for 2013 would increase only three percent from the 2012 rate. This appeal followed.

Discussion

The issue to be decided here is whether appellant waived any of its rights under the lease by charging less than the rate set forth in the lease. In other words, was appellant free, under the terms of the lease, to charge an amount less than the amount set forth in the lease and still retain the right to charge the stated lease amount at a later date? We find that appellant retained that right.

Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created. *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987); *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 06-2 BCA ¶ 33,320. The language of the agreement "must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965);

The lease states that parkers "shall pay \$220 per month to the Lessor, with a three percent (3%) escalation annually." Obviously, this language allows the lessor to charge \$220 per month plus escalation. However, a reasonable interpretation of this language does not demand that the lessor charge the entire amount. We do not believe that the parties, when they entered into this lease, intended to compel the lessor to always, without exception, charge third party parkers the stated lease amount. That would mean that 600 SSH would have to charge an amount that was more than it wished to charge, more than it was to its advantage to charge (because charging less would increase revenue), and more than would have been beneficial to the parkers. We find it very doubtful that had 600 SSH initially come

to the SEC and indicated that it wanted to reduce parking rates temporarily, but would eventually return to the maximum stated rate, the SEC would have contested 600 SSH's contractual authorization to do so. Accordingly, the most reasonable interpretation of the lease is that the \$220 plus escalation was a maximum. Charging less than the maximum does not violate the lease or waive any rights. The lessor is free to return to the maximum whenever it chooses to do so.

Respondent also argues that the yearly increase in rent is limited to three percent over the previous year's rent. The lease could easily have said that, but it did not. The lease simply says that 600 SSH can charge \$220 plus a three percent escalation per year. The two terms, the base (\$220) and the escalation, are not separable. Together, they constitute the maximum. There is nothing in the lease that limits the increase to three percent over the previous year, unless the maximum was charged the previous year.

The only reasonable interpretation that can be applied to this lease is that the clause "\$220 per month to the Lessor, with a three percent (3%) escalation annually" is a maximum. Accordingly, any previous charge of less than this maximum does not affect the maximum that 600 SSH can charge in any given year. We have considered respondent's other arguments and find them to be without merit.

Decision

The appeal is **GRANTED**.

R. ANTHONY McCANN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

HOWARD A. POLLACK
Board Judge

