



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 14, 2014

CBCA 3229

EURASIA PARTNERS, LLC,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Emanuel S. Benjamin of Benjamin Law Group, PL, Miami, FL, counsel for Appellant.

Marianna Lvovsky, Office of Chief Counsel, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

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

POLLACK, Board Judge.

This appeal arises out of the purchase of an oil painting by Eurasia Partners, LLC (Eurasia or appellant) at a Department of the Treasury (Treasury or Government) online auction. The appeal raises issues as to misdescription; timeliness of the claim; and alternatively, misrepresentation.

The Government has moved for summary relief, asserting that the painting was neither misdescribed nor misrepresented. The Government has also asserted that even if the painting was misdescribed, appellant cannot prevail because appellant failed to comply with the timeliness standard set out in the contract for submitting such a claim.

The amount of recovery under this provision is limited to the purchase price of the inaccurately described property. The Purchaser is not entitled to any payment for loss of profit or any other money damages, including special, direct, indirect, incidental, or consequential.

For Purchasers claiming recovery under the warranty of description, no refund will be made unless the Purchaser:

a) submits a written notice to the Contractor within 30 calendar days of the date of removal that explains in what manner the property was inaccurately described.

b) If the government agrees, then a full refund of the money received will be returned.

If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined after removal, the Government will refund any money paid if the Purchaser takes the property at his/her expense to a location specified by the Contractor. The Purchaser must maintain the property in the same condition as when removed.

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25. FALSE ADVERTISING AND UNFAIR OR DECEPTIVE ACTIONS:

The use of false or misleading advertisements in commerce or other unfair or deceptive practices are unlawful (15 U.S.C. 45, et seq.). In disposing of any property purchased from the Government, purchasers should exercise extra caution in preparing advertisements to ensure that they do not violate applicable Federal, state or foreign government laws

Eurasia removed the painting from the storage vendor's facility by September 1, 2011, which was within the time frame set out in the auction documents. At the time of purchase, appellant believed the painting was an original by Jose Mijares, a prominent Cuban painter. Sometime thereafter, Eurasia contacted representatives of Mr. Mijares' estate. The Mijares representatives evidently examined the painting and advised appellant on May 25, 2012, that the painting had not been painted by Mr. Mijares. According to appellant, it was told the painting was a forgery. In further support of the forgery claim, appellant points out that the

back of the painting bears the date of “7/28/04.” That date postdates Mr. Mijares’s date of death. Appellant asserts that the date thereby establishes that the painting could not have been by Mr. Mijares, or met the other description elements in the catalog, such as being of his period and ascribed to him.

On June 12, 2012, Eurasia contacted VSE to request a refund. VSE refused, replying that “the [painting] was not misdescribed.” VSE further asserted that the “authenticity of the piece was not guaranteed at the time of sale.” VSE cited the general terms and provisions for the sale—specifically the Property Descriptions clause—and directed appellant to contact the agency contracting officer (CO) if it wished to dispute the matter further. Eurasia contacted the CO on June 26, 2012, to request a refund. On December 19, 2012, the CO denied the request, finding that VSE accurately described the painting. The CO stated that Inspection of Property clause of the sale terms and provisions precluded reimbursement. Eurasia appealed the CO’s decision to the Board on January 31, 2013.

After pleadings and the appeal file were submitted, counsel for Treasury filed a motion for summary relief. The motion, filed on February 13, 2013, argued that there was no misdescription and, further, that the materials provided to bidders contained a number of provisions which clearly established that the Government was not guaranteeing that the painting was an original by Mijares. Eurasia challenged the motion, contending that granting summary relief would be improper, that the painting was misdescribed in the catalogue, and that the Government used false and misleading advertising in its description of the painting. Eurasia additionally asserted that the catalog’s disclaimer that the “Authenticity is Not Certified” was not sufficient to put prospective bidders on notice that the painting was a forgery. As to the latter point, Eurasia asserted that art is frequently sold without corresponding certificates of authenticity, and a reasonable bidder would not expect the Government to sell a forgery.

During preparation of the ruling in this matter, the presiding judge recognized that even though timeliness of the claim had not been raised by the Government, the record showed that timeliness was an issue. The auction had been held in August 2011, and the claim had not been submitted until June 2012. The Property Descriptions clause provides that where a claim is based on misdescription, the claim must be submitted within thirty days of removal. Having recognized a potential problem, the Board issued to the parties an order, dated September 12, 2013, where we pointed to substantial Board precedent which has uniformly enforced time limits in cases of misdescription. The Board stated that even if it found in favor of appellant on its defense of the motion as to misdescription, that would appear to at best be a pyrrhic victory. Citing *Alliance Business Enterprises, LLC v. GSA*, CBCA 1101, 08-2 BCA ¶ 33,994, the Board provided that board decisions appear to have recognized an exception to the strict application of time in those instances where an appellant

can prove knowing misrepresentation or fraud on the part of the Government. The Board continued that to qualify for the exception, appellant would have to establish that the Government knew that the painting was not as described and that the Government knowingly provided details which misrepresented what was being sold. The Board concluded that proving such misrepresentation is a much more difficult matter than establishing an error in the description, and noted that in the filings by appellant to that point, the Board saw no evidence or allegation as to knowing misrepresentation.

Because the Government had not raised timeliness in either its pleadings or its motion, and given that appellant had not had an opportunity to address timeliness, appellant was given time to address timeliness; examine its case; and if warranted, amend its pleadings. The Board specifically stated that misdescription and misrepresentation are very different theories. The Board gave appellant thirty days to respond to the order and stated that the Board would then assess what further actions would be taken as to the motion, including whether the Government could file a response.

On October 11, 2013, the Board received appellant's amended response to respondent's motion for summary relief. In the three-page filing, appellant reiterated its various arguments as to misdescription and cited the Board to information appellant relied upon to establish that the description was both false and misleading. Appellant did not, however, specifically argue misrepresentation, nor did it provide any evidence showing Treasury or VSE had knowledge that the descriptive language placed in the advertisement was false. Appellant did, however, argue that the timeliness provision in the Property Descriptions clause should not be operative under the facts of this case, asserting that time should be measured from the date of reasonable discovery. The Government then filed a short reply.

Discussion

Summary relief is only appropriate where there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary relief. A fact is considered to be material if it "will affect [the Board's] decision," and an issue is genuine if "enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing." *William W. Caswell v. General Services Administration*, CBCA 479, 07-2 BCA ¶ 33,679, at 166,746. In considering a motion for summary relief, all justifiable inferences are to be determined in favor of the nonmoving party. *Anderson* at 249, 255. The moving party has the burden of stating the basis for summary relief and identifying evidence within the record that

demonstrates the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The nonmoving party is then required to rebut the motion by articulating specific facts that show there is a genuine issue for trial. *Id.* at 324.

Eurasia contends that the description in the auction catalogue is in error in a number of fundamental respects. For purposes of deciding the motion for summary relief, we accept those contentions as true. However, even accepting the matters as true, the evidence and arguments, presented by Eurasia, provide a classic claim for misdescription; and, as we said in the Board's September 12, 2013, order, even if we were to find that the Government misdescribed the painting, appellant still could not prevail. That is because the record shows that Eurasia's claim was not submitted within the thirty-day time frame required by the Property Descriptions clause, the clause covering available relief due to misdescription. We have consistently held that where a party fails to timely file its claim under clauses such as the Property Description clause, the claim must be denied, even if misdescription is otherwise established. *Everett M. Myers v. General Services Administration*, CBCA 940, 08-1 BCA ¶ 33,841, at 167,477; *Joseph M. Hutchinson v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,341; *Danny R. Mitchell v. General Services Administration*, GSBCA 16122, 04-1 BCA ¶ 32,511, at 160,827-28 (2003).

Eurasia bought the painting on August 11, 2011, and removed it by September 1, 2011. It did not seek reimbursement until the following June. It did not take this last action within the thirty days specified under the controlling clause and therefore cannot recover. We have considered appellant's argument that in a case of this nature, dealing with artwork, time should not be measured by the sale date, but instead should be measured on the basis of when the defect could have been discovered. The Board has considered that argument in other cases and has rejected the application of the actual discovery date as the starting point. *See Alliance*, 08-2 BCA at 168,119.

Normally, our analysis would end here, and given the law and evidence, we would rule in favor of the Government as to its motion. However, we stated in our September 2013 order to the parties that a claim of misrepresentation, if it could be proven, might defeat the timeliness defense. *Alliance*, 08-2 BCA at 168,119. Since we raised the matter, we address it briefly in this ruling.

There are two types of misrepresentation, fraudulent and material. In regard to fraudulent, the test is that the Government has to represent, as true facts, information that the Government knew was false. *Hutchinson*, 08-1 BCA at 167,341. In this appeal, appellant has advanced no evidence from which we could reasonably find or infer knowledge on the part of the Government as to the falsity of anything it said. Appellant has failed to raise such evidence. Accordingly, there can be no finding of fraudulent misrepresentation.

As to material misrepresentation, that requires the misrepresenting party to make an assertion that is not in accord with the facts. It further requires the party claiming misrepresentation to establish that it justifiably relied upon the false information. *Morris v. United States*, 33 Fed. Cl. 733, 744-47 (1995) (cited in *Danny R. Mitchell*, 04-1 BCA at 160,995). In this appeal, appellant is stating it read the description language to convey that the painting was an authentic Mijares and painted by him. However, reading the auction description as a positive assertion that the painting was by Mijares is simply not reasonable. Use of words such as “attributed to,” “can be ascribed,” “on the basis of style,” and finally, “Authenticity is Not Certified,” all combine to clearly convey a lack of guarantee and the presence of uncertainty. When that is combined with the warning in the Property Description clause, one cannot find either an affirmative assertion or justifiable reliance. While it is unfortunate that appellant did not get what it expected, the warning language and lack of certainty was there. Eurasia simply failed to heed it. The Government conveyed that the painting might be by Mr. Mijares, but it certainly did not state that as a fact upon which any reasonable bidder could rely. Moreover, while not necessary for our result, had Eurasia observed the date on the back of the painting, by its own assertion, it could have determined that Mr. Mijares was not the painter. Accordingly, we find that, on this record, there is no evidence upon which could support a finding of material misrepresentation

In addition to the arguments as to misdescription, appellant has also asserted that the motion should be denied because the Government violated the False Advertising clause. A reading of the clause makes clear that the clause provides no mechanism for relief.

Decision

We grant the Government’s motion and **DENY** the appeal.

HOWARD A. POLLACK
Board Judge

We concur:

JERI K. SOMERS
Board Judge

JOSEPH A. VERGILIO
Board Judge