UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: January 31, 2014

CBCA 3590

633 17th STREET OPERATING COMPANY, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph J. Bronesky of Sherman & Howard L.L.C., Denver, CO, counsel for Appellant.

Elyssa Tanenbaum and James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **ZISCHKAU**.

STERN, Board Judge.

633 17th Street Operating Company, LLC (appellant or 17th Street) brought this appeal from the denial by a contracting officer of the General Services Administration (GSA or respondent) of appellant's claim that it is due $25,027.82 in additional payments under its lease with the GSA. The appeal was initially filed by Toma West Management Corp. (Toma), the management agency for the lessor, 17th Street, and docketed by the Board with docket number 2910. After the Board advised the parties that it may not have jurisdiction over the appeal as filed, 17th Street filed an appeal. The Board consolidated the appeals and

accepted all documents filed by Toma that related to the motions decided herein as filed by 17th Street. All documents filed by GSA relevant to these motions were also transferred to this appeal.[1]

The parties have filed cross-motions for summary relief and submit that there is no issue of material fact for the Board to decide. The parties have also jointly filed a stipulation of facts.

Background

GSA leased 17,907 square feet of space in a building in Denver, Colorado, from appellant pursuant to the terms of a lease executed on August 9, 2001. The lease was for a ten-year term commencing on October 1, 2001. The initial rent was set at $22 per square foot, with provisions for escalation in certain future years. GSA's rent included $1.47 per square foot for base year property taxes. In 2001 the property tax assessed by the city and county of Denver on the subject property was $740,246.90.[2] The parties agreed that this would be the base for computing any property tax changes in future years. Based on the number of square feet rented by GSA, this worked out to $26,323.20 to be paid by GSA for property taxes in the base year. Certain agencies of the state of Colorado also rented space in this commercial building. The percentage of space occupied by the Colorado entities was 43.2.

The Tax Adjustment clause of the lease provided that base year taxes are "the real estate taxes for the first 12-month period coincident with full assessment or may be an amount negotiated by the parties that reflects an agreed upon base for a fully assessed value of the property." Appeal File, Exhibit 21, ¶ 3.3.

The parties further agreed that the GSA would make a lump sum payment for any increase in real estate taxes, "during the lease term over the amount established as the base year taxes." *Id.* The lease also provided for a credit to GSA for its share of any decrease in taxes:

> The Government shall be entitled to and shall receive credit for, the pro rata reduction in taxes applicable to the premises encumbered by this lease, regardless of whether the Government has made a tax payment for that year.

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[1] By separate decision on this date we dismiss the appeal filed by Toma.

[2] The figures used herein are taken from the stipulated facts and from undisputed figures set forth in the briefs filed by the parties.

Id. ¶ 3.4, E, 2. The formula for determining the extent of any increase due from, or decrease to be credited to, GSA was set forth as follows:

> The government shall pay its share of tax increases or shall receive its share of any tax decrease based on the ratio of the rentable square feet occupied by the Government to the total rentable square feet in the building or complex (percentage of occupancy). For the purpose of this lease, the Government's percentage of occupancy as of the date hereof is 3.28 percent based upon the occupancy of 17,907 rentable square feet in a building of 546,000 rentable square feet. This percentage shall be subject to adjustment to take into account additions or reductions of the amount of space as may be contemplated in this lease or amendments hereto.

Id. ¶ 3.4, F. The parties agreed at a later date to change the percentage of GSA occupancy to 3.27 percent.

To arrive at the amount that GSA owed for tax increases in any future year, the parties subtracted the base year taxes from the taxes assessed in that year (as adjusted for certain Denver Business Improvement District exclusions) and multiplied the remainder by the percentage of space occupied by GSA.

During the term of the lease, Colorado enacted a statute, effective January 1, 2009, providing that any part of real property used by the state of Colorado was exempt from the levy and collection of property taxes. The statute provided, *inter alia*,

> The part of real property that is used by the state . . . for at least a one-year term . . . and pursuant to which the subject real property is used for purposes of the state . . . shall be exempt from the levy and collection of property tax.

Colo. Rev. Stat. § 39-3-124 (1)(b)(1)(A) (2009).[3] As a result of the application of this statute, the city and county of Denver could not include the space occupied by the state tenants in the computation of the property tax to be assessed on appellant's building. Accordingly, the amount of property taxes imposed on appellant was lower than it would have been had all of the building area been subject to local property tax assessment. Similarly, appellant could no longer assess any state agency with its share of property taxes levied on the property.

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[3] GSA claims that the statute violates the Supremacy clause of the constitution. We do not address the constitutionality of the statute, as that is beyond our jurisdiction.

Colorado calculated its entitlement to a refund of the amount it had already paid for property taxes in 2009. Appellant reached an agreement with the state for a repayment of the 2009 overpayment. This appeal does not involve the 2009 tax assessment.

In 2010 appellant received a property tax invoice based on the assessment of its property without regard to the building space occupied by state tenants. Appellant sought payments from GSA using a formula that reconstructed the assessment as though the statute had not been enacted. The method used by appellant was in accordance with that part of the Colorado statute that provided,

> To the extent that real property taxes are shared and payable by one or more tenants under the lease of property that are not the state . . . real property taxes otherwise due but for the application of this [statute] shall be deemed taxes paid by the property owner or the landlord of a property leased in part to the state, a political subdivision, or a state-supported institution of higher education.

Colo. Rev. Stat. § 39-3-124(1)(b)(1)(C).

The assessment exceeded the base year's assessment even without including the space occupied by state tenants. Appellant calculated the tax due from GSA by including the taxes that would have been assessed absent the statute. Without application of the statute, GSA's increased tax liability to appellant would have been $32,441.10 for calendar year 2010.[4] GSA calculated the amount it believed it owed as a base year adjustment by simply multiplying the percentage of space it occupied by the amount that the actual property tax assessment exceeded the base year amount. Using this method, GSA paid appellant $7413.28 in added taxes. Appellant seeks the difference between the application of its formula and that of GSA, or $25,027.82. Though GSA disagrees with the application of the method used by 17th Street to compute the base tax adjustment, it does not quarrel with appellant's mathematics under its formula.

[4] The actual 2010 tax assessment was $1,016,943.57. Appellant determined that the tax assessment would have been $1,752,372.58 if the portions of the building occupied by the Colorado state agencies were included in the assessment. Appellant multiplied this amount by the 3.27 percent of space leased by GSA to determine the total amount of tax attributable to GSA rented space.

Discussion

Appellant computes the amount of additional tax due from GSA by calculating the amount of tax that would have been due if the statute had not been enacted. GSA calculates the amount due appellant by multiplying the percentage of space it occupies times the actual assessment. GSA would thereby obtain part of the advantage of the lower assessment resulting from application of the Colorado statute on appellant's property tax liability.

We are guided by the well-established rules applicable to summary relief motions. Summary relief is only appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt as to whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In this appeal, the parties have stipulated to the facts. There is no factual issue to be decided by the Board. The only matter to be decided is one of law. It is therefore appropriate for us to decide this matter on these cross-motions.

The parties established the base year taxes payable by GSA by multiplying the total property tax assessed by GSA's share of rentable building space. The total rentable building space included the space occupied by state tenants who also paid their portion of the total property taxes assessed by the municipalities. The parties agreed that in the event of a decrease in property taxes GSA would receive credit for "its share" of any decrease in real estate taxes below the amount established as the base year. The lease also provided that GSA was entitled to a credit for the "pro rata reduction in taxes applicable to the premises encumbered" by the lease. The lease set forth the method to be used to calculate GSA's share of any reduction in the amount of property taxes assessed against the property. GSA's share of the decrease was to be based on the ratio of the number of square feet it rented to the total rentable square feet in the building.

Here, a situation arose that the parties did not contemplate - namely, the exclusion by Colorado law of part of the tax base of the building, resulting in a reduction of the taxes assessed and the commensurate reduction in tenant contribution to the assessment. However, the language of the lease clearly reflects the intent of the parties in determining the amount of increase or decrease to be assessed against or credited to GSA whenever the tax assessment changed from that assessed in the base year.

We interpret agreements based on the intent of the parties. We have previously stated,

> 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 the 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 reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965).

600 Second Street Holdings LLC v. Securities and Exchange Commission, CBCA 3228, 13 BCA ¶ 35,396, at 173,662.

While under the circumstances of a normal increase or decrease in taxes, GSA would share equally with other tenants in the adjustment, here we find that such an application would yield an unfair result. GSA would receive a reduction in the adjustment to its base, though its percent of building occupancy, for assessment purposes, actually increased. There is no evidence that the parties contemplated a credit to GSA for a tax reduction imposed as the result of a loss of the tax base of a tenant that could no longer carry its fair share of the property tax burden due to state law. Rather, the language of the lease convinces us that the parties contemplated the amount of credit due to GSA in the event of a property tax decrease would be determined based on the ratio of square feet rented by GSA to the total square feet that determined the amount of the property tax assessment. The parties agreed to property tax adjustment (increase or decrease) based on GSA's share of the total space that was assessed a property tax. The language of the lease providing for a credit to GSA only if the leased area encumbered by the lease received a tax credit further supports our interpretation of the agreement, as there was no reduction in taxes applicable to the space encumbered (the GSA leased area) by the lease. Appellant's approach of adding back the state occupied area as though there was no state exemption yields the same result.[5]

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[5] Our conclusion is consistent with the provision in the Colorado statute providing that, for the calculation of taxes on properties shared by state and non-state tenants, real property taxes due, but for the application of the statute, shall be deemed taxes paid by the property owner. That calculation is to be made as though the building owner has not received any tax adjustment due to occupancy by state tenants. We base our analysis on the

We conclude that, under the terms of the lease, GSA is not entitled to share in any tax reduction that is not attributable to the space which it has rented. Therefore, GSA must pay an additional $25,027.82, for its share of property taxes due for calendar year 2010.

Decision

The appeal is **GRANTED**.

JAMES L. STERN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge

provision of the lease and, therefore, we need not address the applicability of this section of the statute to leases executed by the United States.