



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 25, 2014

CBCA 2809, 3221

JANE KIM & CO.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jane Kim, President of Jane Kim & Co., Los Angeles, CA, appearing for Appellant.

Claire L. O'Donnell, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

ZISCHKAU, Board Judge.

Appellant, Jane Kim & Co. (Jane Kim), seeks to recover \$78,189.94 in lost rent following the termination of lease no. GS-09B-01276 by respondent, the General Services Administration (GSA). In addition, Jane Kim seeks \$5850 for property damage that allegedly occurred during the course of GSA's tenancy. GSA has moved for summary relief, arguing that the uncontested facts entitle it to prevail on both claims as a matter of law. Jane Kim has not responded to the motion. For the reasons set forth below, we conclude that there are no material facts in dispute and that appellant cannot prevail on its claims. Thus we grant GSA's motion and deny the appeals.

Background

Pursuant to the lease with appellant, GSA rented office and related space located at 874 Hobson Way, Blythe, California, for use by the Social Security Administration (SSA). Two lessors previously had leased the building space to GSA. On December 18, 2009, Jane Kim became the new owner of the leased premises. The parties documented this change of ownership in a lease change of lessor form agreement effective April 9, 2010.

Following the transfer of ownership, SSA experienced a number of significant issues with the leased property, including an extremely strong and persistent odor of sewage gas in the SSA office space; significant recurring roof leaks; stained and disintegrating ceiling tiles from the recurring roof leaks; birds nesting on the interior and exterior of the building; fire extinguishers that needed to be inspected, tagged, and properly mounted; loose caulking/sealing strips on several of the exterior windows; emergency exit doors that did not close securely; and office perimeter doors that were neither weather tight nor properly fitted to the frames, allowing exposure to outdoor elements and intruders. Appeal File, Exhibits 6, 11, 26, 30, 35, 50, 51, 60, 91 (all exhibits are found in the appeal file); Respondent's Statement of Uncontested Facts (RSUF) at 4.

Many of the deficiencies predated appellant's ownership of the premises. Respondent's Motion for Summary Relief at 7-8; Appellant's Response to GSA's First Request for Interrogatories at 8. However, once appellant assumed ownership of the property as successor-lessor, GSA put appellant on notice of these issues beginning in May 2010. RSUF at 4. Of the many problems experienced by SSA, the persistent odor of sewer gas and the leaking roof were the most significant.

The Sewer Gas Problem

On May 18, 2010, GSA sent a letter to appellant identifying a "pungent smell coming up from a floor drain in the main corridor area." Exhibit 6 at 1; RSUF at 9. Appellant responded in a letter dated June 11, 2010, that appellant would examine the issue. Exhibit 7 at 1; RSUF at 9. The continued presence of the odor was noted in an SSA pending facility issues report from early 2011. Exhibit 9 at 2; RSUF at 9. On April 25, 2011, SSA sent GSA an email message regarding the odor, noting symptoms experienced by employees and complaints from the public. Exhibit 25 at 1; RSUF at 9. These issues persisted through September 2011, despite GSA's warnings to appellant that its inattention to the matter would affect employees' health and lead to "a potential office shut down." Exhibits 26-27; RSUF at 9. In an email message to GSA dated September 19, 2011, appellant's owner responded, "I will see [w]hat I can do." Exhibit 45 at 2; RSUF at 10. On September 20, the City of Blythe building inspector issued a complaint form indicating "extreme sewage odor in

building.” Exhibit 107; RSUF at 11. On September 21, the building inspector issued a notice of violation of City of Blythe Ordinance section 8.28010(E) for airborne emissions causing damage. Exhibit 108; RSUF at 11. The building inspector issued thirteen additional notices to appellant for failure to remedy the problem. Exhibits 106-119; RSUF at 11. The building inspector’s case ledger reveals over seventy entries documenting his attempts to direct appellant to comply with the applicable building and safety regulations. Exhibit 110; RSUF at 11.

On September 28, 2011, GSA requested that appellant provide a plan of action regarding the odor by September 30. Exhibit 48; RSUF at 11. The City of Blythe recommended plumbers to appellant to remedy the sewage smell, but, as revealed by the case ledger, appellant was unwilling to pay the amount necessary for these plumbing services. Exhibit 110 at 4; RSUF at 12. Appellant was issued another notice of violation on October 3. Exhibit 109; RSUF at 12. In a cure notice letter dated October 4, 2011, the contracting officer notified appellant that ten maintenance items remained unresolved, including: “There is a foul smell entering the office. The source of the smells needs to be identified and the solution to stop the odor from entering the office needs to be found.” A response from appellant was due October 11. Exhibit 50 at 2-3; RSUF at 12. In an October 5 letter, GSA directed that appellant provide GSA a corrective action plan for eliminating the odors in SSA’s office space by October 12. Exhibit 51 at 2. The only response in the record is an email message sent the evening of October 5 from appellant’s president stating that she had spoken to an SSA employee the day before and “seems like it is all right.” Exhibit 51 at 3. We are aware of no other response by appellant in the record.

On December 8, SSA again contacted GSA regarding the odor. Exhibit 58 at 2; RSUF at 12. On December 9, by email and letter, GSA stated to appellant that the odor issue had to be corrected by December 16. Exhibit 60 at 3; RSUF at 13. On December 12, appellant’s president provided a short and rather vague response: “Thank you for your concern. We just fix [sic] the ventile [sic] connection.” Exhibit 60 at 4; RSUF at 13. On December 12, the same day that appellant notified GSA that it presumably had repaired the office ventilation, a City of Blythe inspector became ill from inhaling the sewage fumes and required medical attention. Exhibit 110 at 3; RSUF at 13. On December 14, appellant was again issued a notice of violation for lack of maintenance and citing the presence of sewer odors. Exhibit 111; RSUF at 13. On December 15, the local gas company visited the leased premises and detected methane in the air. However, the gas company could not locate its source. Exhibits 75, 81; RSUF at 13. Between December 15 and December 29, 2011, appellant was issued eight additional notices of violation for lack of maintenance, each citing the presence of sewer gas in the building. Exhibits 112-119; RSUF at 14-15. On December 28, SSA placed all employees on administrative leave pending confirmation that the odor was not harmful. Exhibits 83-85, 91; RSUF at 15.

The Leaking Roof

A pending facility issues report from early 2011 notes the problem of the roof leaking and indicates that the agency “made contact with landlord who promised the repair after the rain season but has not fulfilled such promise.” Exhibit 9 at 2; RSUF at 4. In March 2011, appellant stated that it would send a repairman to repair the leaks in the roof. Exhibits 15 at 1-2; 19 at 5. An internal email message within GSA dated March 21, 2011, noted that appellant and the repairman identified the area near an agency roof antenna/dish as the source of the leak, that the repairman attempted to repair the roof without having to relocate the device, and that GSA would be notified if the device needed to be relocated. RSUF at 5. On April 7, appellant sent an action plan to GSA regarding several deficiencies, stating that a general contractor inspected and sealed the leaks in the roof. Exhibit 23; RSUF at 5. However, a July 6 email exchange between appellant and a GSA employee revealed that the leaks were not permanently resolved. Appellant responded on July 7, stating that the repairs would be made. Exhibit 33 at 2-3; RSUF at 5. After water again leaked into the SSA offices, GSA requested, on August 3, that appellant provide a status report on the roof repairs. Exhibit 37 at 1; RSUF at 6. Appellant responded on August 4 that it had made arrangements to have the damage investigated. Exhibit 37 at 2; RSUF at 6. On September 13, an SSA employee wrote to GSA stating, “It’s been raining in the Blythe area today and the water is now seeping through the already damaged ceiling tiles.” Exhibit 44 at 4; RSUF at 6. On September 20, the chief building inspector and fire marshal for the building department of the City of Blythe opened a case file for the space leased to GSA in response to multiple complaints from SSA. Exhibit 110; RSUF at 6. The contracting officer’s October 4, 2011 cure notice notes that the “roof continues to leak during rains” and that with winter months approaching, there is “concern that the roof leaks will cause damage inside the [SSA] office.” Exhibit 50 at 2; RSUF at 6. There is no indication in the record that appellant responded to the cure notice.

On December 12, SSA sent another email message to GSA noting further rain damage to the already damaged area. Exhibit 64 at 1; RSUF at 7. On December 14, the City of Blythe building inspector observed in his case notes that “ceiling tile has fallen to the floor below, the roof is leaking water at various locations due to a prolonged rainy period.” Exhibit 110 at 3; RSUF at 7. Although Jane Kim’s president promised to visit the leased space on December 14 with a roofer to survey the damage, neither she nor the roofer showed up. Exhibit 70; RSUF at 7. On December 21, the building inspector visited the site to issue a building code violation regarding the deficient roof and spoke directly with Jane Kim’s president, who promised to attend to the roof deficiencies. Exhibit 79; RSUF at 7. The City of Blythe ultimately issued more citations because the leaks remained uncorrected. Exhibits 69, 79, 84, 91, 104, 106-119; RSUF at 7. Appellant assigned the task of repairing the leak

to another one of appellant's tenants, who owned and managed a gym in the same shopping center. Exhibits 70 at 6, 78, 80; RSUF at 8. This person was not the maintenance person for the facility nor did he have specialized knowledge on the subject of roofing. Exhibits 70, 80; RSUF at 8. The tenant replaced the ceiling tiles on December 15, and noted that the leak was coming from the area on the roof near the SSA's antenna installation. Exhibit 80; RSUF at 8. On December 19, an SSA employee stated that there had been more rain over the weekend, which caused the new ceiling tiles to get wet. Exhibit 75; RSUF at 8.

Lease Termination

On January 4, 2012, the City of Blythe posted an order and notice for the property along with a notice to repair for violations of local code and potential health and safety risks. Exhibits 88-89; RSUF at 15. The notice of repair "classified [the building] as a substandard structure" in accordance with state law based on (1) the building's likelihood to fail, become detached or dislodged, or collapse, and (2) the fire marshal's determination that the building posed a fire hazard. *Id.* In a final decision letter of January 13, 2012, the GSA contracting officer notified appellant that GSA was terminating the lease effective January 15, 2012, on the basis of untenantability of the leased premises. The letter noted the presence of eight continuing, significant deficiencies, including an "extremely strong and persistent odor from sewer gas" and "significant recurring roof leaks." Exhibits 91, 101 at 3; RSUF at 16.

Discussion

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 nonmoving party. To oppose a motion for summary relief, the nonmovant must set out in an affidavit, or otherwise, what specific evidence could be offered at trial. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984). Summary judgment must be entered

after adequate time for discovery and upon motion . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

P&C Placement Services, Inc. v. Social Security Administration, CBCA 391, 07-1 BCA ¶ 33,492, at 166,010 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) (internal quotation marks omitted)).

Here, summary relief in favor of respondent is appropriate because appellant has failed to show any disputed material fact which would permit a reasonable fact finder to decide in appellant's favor. Appellant has offered no evidence to contradict GSA's evidence that the leased property was untenable and that the Government justifiably vacated the property. Similarly, appellant has failed to identify any facts to support its claim that GSA was responsible for the alleged roof leaks and resulting property damage.

Appellant's response to GSA's termination of the lease was that if GSA had requested it, appellant could have found different office space for SSA or GSA could have remedied the sewer gas problem itself and offset the costs against its rent. In addition, appellant expressly concedes in responses to discovery that the sewer gas problems and other problems existed and were not remedied by appellant prior to the termination. Appellant alleges that GSA is responsible for both the damage to the roof and the presence of sewer fumes in the building. It claims that SSA negligently placed bricks on the roof, leading to the damage that caused the leaks and that the sewer smell remained trapped in the building due to roof pipe caps placed by either SSA or its agents. Appellant's allegations, however, lack any factual support. Appellant identifies no document or communication during the lease period in which it notified respondent of these allegations. Nor is there any evidence for us to make a reasonable inference on behalf of appellant, as the nonmoving party, that the Government caused either the sewer gas or roof leak problems. Thus, GSA's statement of undisputed facts stands unrefuted and we conclude that there are no disputed issues of material fact.

Decision

In view of the unrebutted record, we conclude that respondent is entitled to summary relief because appellant has failed to demonstrate the existence of any disputed material fact regarding its claims for unpaid rent and damage to the roof. Accordingly, we grant the respondent's motion and **DENY** the appeals.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

PATRICIA J. SHERIDAN
Board Judge