UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 31, 2015

CBCA 3041

MLJ BROOKSIDE, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen O. Cole of Macfarlane Ferguson & McMullen, Clearwater, FL, counsel for Appellant.

Elyssa Tanenbaum and Leonard Lucas, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

This appeal arises from a lease agreement between MLJ Brookside, LLC (MLJ), the appellant, and the General Services Administration (GSA), the respondent. With its appeal, MLJ seeks to overturn GSA's decision to terminate the lease for default and receive as damages rent payments it would have received if GSA had not terminated the lease. GSA has filed a motion for summary relief, pursuant to Rule 8(a) of the Rules of the Civilian Board of Contract Appeals (48 CFR 6101.8(a) (2013)), seeking a determination that the termination for default was proper as a matter of law and MLJ should repay rent amounts paid after the breach of the lease agreement. The Board grants GSA's motion in part and denies MLJ's appeal.

Background

The Lease

MLJ is the owner of Brookside Professional Building, located in Wesley Chapel, Florida (the premises). Amended Complaint ¶ 3. On August 3, 2007, GSA and MLJ entered into lease no. GS-04B-47858 for the premises (the lease). Appeal File, Exhibit 1 at 1-2.[1]

The lease contained several terms that govern the resolution of this appeal. The lease provided that MLJ would provide the premises for the period of the lease "to be used for such purposes as determined by the General Services Administration." Exhibit 1 at 1. The term of the lease was ten years, from February 2, 2009, to February 1, 2019, but beginning on February 1, 2014, GSA could terminate the lease after giving the lessor sixty days' notice. Exhibit 3 at 1-2.[2] The lease also incorporated by reference a clause that permitted GSA to substitute any agency tenants for those that may have been named on the original lease. Exhibit 1 at 60 (48 CFR 552.270-25 (1999) (GSAR 552.270-25), Substitution of Tenant Agency).

The lease further provided that GSA could obtain a reduction in the rent if the premises were vacant, prior to the expiration of the term of the lease, with notice of thirty days to the lessor:

> A. 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 term of the lease, the rental rate will be reduced.
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> B. The rate will be reduced by that portion of the costs per [American National Standards Institute/Building Owners and Managers Association] Office Area square foot of operating expenses not required to maintain the space. Said reduction shall occur after the Government gives 30 calendar

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[1] All exhibits are found in the appeal file, unless otherwise noted. The page numbers cited are the Bates numbers indicated on the exhibits.

[2] The initial term of the lease was from February 1, 2008. Respondent's Statement of Uncontested Facts ¶ 10. However, the parties executed a modification, adjusting the term to begin on February 2, 2009, when the first tenant agency took occupancy of the premises. *Id.* ¶¶ 11, 12; Exhibit 3 at 1.

> days prior notice to the Lessor and shall continue in effect until the Government occupies the premises or the lease expires or is terminated.

Exhibit 1 at 3, 22 (GSAR 552.270-16, Adjustment for Vacant Premises). Notice was defined in the lease as "written notice sent by certified or registered mail, Express Mail or comparable service, or delivered by hand." *Id*. at 60 (GSAR 552.270-4, Definitions).

The Government could terminate the lease for default if the lessor failed to maintain the premises as required by the lease:

> (a) 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.

Exhibit 1 at 60 (GSAR 552.270-22, Default by Lessor During the Term). This clause further provided that "the Government shall be entitled to damages specified in the Default in Delivery-Time Extensions clause." *Id*. The Default in Delivery-Time Extensions clause provided that the Government would be entitled to, as damages, the difference between the costs of a replacement lease and the terminated lease or "other, additional relief provided for in this lease, at law, or in equity." *Id*. (GSAR 552.270-18).

The lease contained several special requirements for the premises because the Federal Bureau of Investigation (FBI) was to occupy the space initially. For example, the FBI required specialized doors and locks to be installed by the lessor. Exhibit 1 at 54-55. The FBI did not permit the lessor or the property management company to maintain keys to the space. *Id*. at 52. The lease also required MLJ to maintain the premises "in good repair and condition," "except in case of damage arising out of the wilful act or negligence of a Government employee," and provided that MLJ would be provided access to the space for the purpose of maintaining the premises. *Id*. at 60 (GSAR 552.2701-6, Maintenance of Building and Premises—Right of Entry). MLJ installed specialized equipment required by the FBI, at a cost of $382,000. Amended

Complaint ¶ 6. GSA reimbursed MLJ for a portion of these costs and amortized the remaining amount to be paid across the first five years of the lease. *Id*.; Exhibit 3 at 1-2.

Finally, the lease expressly provided that officials of the tenant agencies could only place orders when specifically authorized to do so by the contracting officer and warned that "Tenant Agency officials are not authorized to deal with the Lessor on any other matters." Exhibit 1 at 19. In addition, GSA sent MLJ two letters, dated August 3 and August 17, 2007, advising MLJ of the specific individuals authorized to administer or approve changes to the terms of the lease:

> [O]nly warranted Contracting Officers are delegated authority to administer, change and/or issue decisions under the terms of this contract on a case-by-case basis. Such actions will be in writing or in emergencies oral and confirmed in writing. Their authority will be confirmed by the title "Contracting Officer" in the signature block.

Exhibit 5[3] at 15-16; *see also* Exhibit 1 at 60 (GSAR 552.270-4, definition of contracting officer).

Events Leading to Termination

The FBI took occupancy on February 2, 2009. Respondent's Statement of Uncontested Facts ¶ 12. MLJ was notified around September 20, 2011, through its real estate agent and property manager, ProCorp Realty, Inc. (ProCorp),[4] that the FBI intended to vacate the premises. Amended Complaint ¶ 8. The FBI notified GSA on October 5, 2011, that it would vacate on February 2, 2012. Exhibit 5 at 1.

According to MLJ, "in response to the notice from the FBI of its intent to vacate," MLJ's agent, ProCorp "quickly began to identify potential replacement tenants." Amended Complaint ¶ 11. ProCorp also arranged for a replacement tenant to inspect the premises with the knowledge and the assistance of an individual at the

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[3] Although the contracting officer's decision on the termination for default and its attachments are designated as Exhibit 5 in the index to the appeal file, the pages are marked "Ex. 10." Similarly, the notice of appeal and its attachments are designated as Exhibit 6 in the index to the appeal file but the pages are marked "Ex. 11."

[4] ProCorp was MLJ's authorized agent in negotiations with GSA regarding the lease. Exhibit 6 at 14.

FBI. Amended Complaint ¶ 12. This FBI representative also provided information directly to the potential replacement tenant. *Id*. ¶ 13.

On November 4, 2011, by email, ProCorp asked the GSA contracting officer what would happen with the lease in light of the FBI's plan to vacate the space. Exhibit 6 at 16. On the same day, the GSA contracting officer responded that GSA would either seek to negotiate a termination of the lease or keep the property in its inventory for another federal tenant:

> We wouldn't send a check for the amount through year 5, but someone from my office will be in touch to discuss an early buyout in which we negotiate a lump sum to terminate early and release the space. If a deal cannot be made in that regard we would keep the space in our inventory at the vacant space rate until we can either backfill or terminate.

Id. at 15-16. ProCorp acknowledged GSA's response. *Id*.

In January 2012, a GSA property manager contacted ProCorp to schedule a meeting at the premises. Amended Complaint ¶ 15. On January 19, 2012, as the FBI vacated the premises, the GSA property manager replaced the locks and gave the keys to the ProCorp representative without retaining a set of keys for GSA. *Id*. ¶ 16. The GSA property manager also executed a condition survey report, in which he noted that "[t]he lessor has accepted the space back as is with no problems or repairs needed. We have returned the keys to the lessor at this time and date." *Id*.; Exhibit 6 at 92. The contracting officer explained in his second decision that a key was provided to ProCorp so "that the Lessor had proper access to continue to maintain the space per the Lease terms." Amended Complaint, Exhibit B at 2.

After the FBI vacated the space, MLJ leased the premises to two tenants. The first tenant occupied a portion of the premises beginning March 1, 2012, at a monthly rate of $3532.42. Amended Complaint ¶ 13; Appellant's Response to Board's August 1, 2014, Order at 8-9. The second tenant occupied the remaining space for the period May 23 through November 15, 2012, at a monthly rate of $1600. Amended Complaint ¶ 19.

GSA paid rent for the premises for March through May 2012. Amended Complaint ¶¶ 10, 20; Respondent's Statement of Uncontested Facts ¶¶ 17, 18, 20. On May 29, 2012, a GSA contracting officer contacted ProCorp to schedule a time to show the premises to two potential federal tenants and was informed that the vacant space had been leased to another party. Exhibit 5 at 1.

After this point, counsel for the parties and the contracting officer exchanged correspondence regarding the emerging dispute. In a letter dated June 20, 2012, GSA counsel advised MLJ's counsel that GSA considered MLJ's actions to lease the premises to third parties to be a breach of the lease between GSA and MLJ that entitled GSA to terminate the lease. Respondent's Response to Board's August 1, 2014, Order, Exhibit E. In response, by letter dated July 5, 2012, counsel for MLJ offered to terminate the leases of the replacement tenants and make the space available again to GSA. Appellant's Statement of Uncontested Facts ¶ 28; Appellant's Supplemental Record on Appeal at 4 ("if GSA wants the space back, we will terminate the existing leases").

On July 13, 2012, the contracting officer issued a decision terminating the lease, effective February 29, 2012, pursuant to the Default clause in the contract. Exhibit 5 at 3. In this decision, the contracting officer sought reimbursement of the rent paid by GSA for March and April in the amount of $23,067.60. *Id*.

Course of Proceedings before the Board

On October 5, 2012, MLJ filed a notice of appeal. In addition to appealing the contracting officer's decision on the termination for default, MLJ sought with its appeal more than $100,000 in damages for the remaining costs of the custom building improvements and nine months of rental payments that it believed it was owed for the period July 2012 through March 2013. Complaint ¶¶ 24-27. GSA moved to dismiss MLJ's complaint for lack of jurisdiction because MLJ had not submitted its claim for damages to the contracting officer.

MLJ submitted a certified claim for monetary damages to the contracting officer on December 18, 2012. The contracting officer issued a second decision on January 29, 2013, denying MLJ's claim for damages and increasing the amount that GSA sought to be reimbursed as a result of MLJ's default to $37,397.96. Amended Complaint, Exhibit B at 4. The amount sought equaled the rent that GSA paid to MLJ after March 1, 2012, the date that the lease with the other tenants was effective, plus the difference between the full rental rate and the vacant rental rate that GSA asserts it was entitled to pay because the premises were vacant from January 19 to March 1, 2012. On April 3, 2013, MLJ filed an amended notice of appeal, seeking to challenge the contracting officer's decision on its claim for damages.

On April 25, 2013, GSA moved for summary relief, seeking a ruling that (1) MLJ breached the lease by leasing the property to third parties during the term of the lease, and (2) GSA is entitled to $37,397.96 for "overpayment and damages."

In supplemental briefing, GSA confirmed that rent was paid in arrears and that GSA made payments on April 2, May 1, and June 1, 2012, for the rental of the property from March 1 through June 1, 2012. Respondent's Response to the Board's August 1, 2014, Order at 6. Based upon payment data provided in the appeal file by GSA, the Board determines that GSA paid to MLJ $34,534.59 for the period March 1 to June 1, 2012. Exhibit 8. GSA also paid a total of $2732.06[5] more than the vacant space rate from January 19, 2012, the date the FBI vacated the premises, to March 1, 2012, the date of MLJ's alleged breach. Amended Complaint, Exhibit B, Attachment H. Appellant does not dispute that these payments were made or challenge respondent's calculation in either its original or supplemental briefing on the motion for summary relief.

Discussion

Standard of Review

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on the undisputed material facts. *George P. Gobble v. General Services Administration*, CBCA 528, 07-2 BCA ¶ 33,675, at 166,725. 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). 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 after a hearing." *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,571. When "the facts are undisputed, the determination of whether there has been material non-compliance with the terms of a contract, and hence breach, necessarily reduces to a question of law." *Gilbert v. Department of Justice,* 334 F.3d 1065, 1072 (Fed. Cir. 2003).

The parties do not dispute any material facts that led to the termination of the contract. Instead, the dispute centers upon the legal import of the parties' actions and the resulting termination.

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[5] The amount of rent paid and the amount of overpayment do not add up to the $37,397.96 demanded by the contracting officer. The difference of $131.31 appears to be a "CPI catchup payment" made by GSA on April 26, 2012. Amended Complaint, Exhibit B, Attachment H. Despite the Board's request for an explanation of the amounts paid after March 1, 2012, Board's Conference Memorandum (Aug. 1, 2014) at 2-3, GSA did not explain what this payment was and whether it was part of the rent payments.

Burden of Proof

Termination for default is a drastic sanction. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government bears the initial burden of proving that the contract properly was terminated for default. *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 13 BCA ¶ 35,382, at 173,624 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Florida Engineered Construction Products Corp. v. United States*, 41 Fed. Cl. 534, 538 (1998)). If the Government is able to establish a prima facie case to support the default termination, the contractor then bears the burden of establishing that its failure to perform should be excused. *Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363, at 169,699 (citing *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Lisbon Contractors*, 828 F.2d at 764)). The Government also bears the burden to prove its claim for damages arising from the default. *Cascade Pacific International v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985).

GSA Properly Terminated the Lease Following MLJ's Breach

GSA terminated the contract pursuant to the default termination provision, which provides in part that GSA may terminate the lease for any failure to perform any requirement of the lease. GSAR 552.270-22(a)(1). The lease required MLJ to make the property available for a period of ten years for any purpose for which GSA wanted to use it. GSA continued to pay rent. MLJ's actions to re-lease the property to third party tenants constituted a failure to meet these requirements because, while the property was leased to and occupied by other parties, GSA did not have use of the property as it saw fit.

"A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract." *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,175 (2014) (quoting *Thomas v. Department of Housing and Urban Development,* 124 F.3d 1439, 1442 (Fed. Cir. 1997)). A party to a contract has the right to discontinue performance of its contractual obligations and seek legal redress if the other party commits a material breach. *Id.* at 175,177 (citing *Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548, 1550 (Fed. Cir. 1992)). MLJ's breach of the contract was material because its actions to re-let the space deprived GSA of the essence of the contract, which was to use the space as it saw fit. As of the date MLJ allowed the replacement tenant to take occupancy of the space leased to GSA, it breached the contract. It was as of this date that GSA no longer had use of the property. On these undisputed facts regarding MLJ's lease of the space to

third party tenants, GSA has met its burden to establish that the termination of the contract for this breach was proper.

The Default clauses in the contract permitted termination if MLJ failed to cure the breach within thirty days of receiving notice from the contracting officer. GSAR 552.270-22(a)(1). GSA asserts that it put MLJ on notice that it was in breach of the lease when it learned on May 29, 2012, that the space was occupied by other tenants. Respondent's Statement of Uncontested Facts ¶ 29; Respondent's Response to the Board's August 1, 2014, Order at 5. This notice was only through telephone conversation, however. Respondent's Response to the Board's August 1, 2014, Order at 5. GSA counsel, in correspondence, further advised counsel for MLJ that GSA considered MLJ's actions to constitute breach. However, the contracting officer did not provide written notice of the default and a thirty-day opportunity to cure.

The failure to provide a proper opportunity to cure is not fatal to GSA's default termination based upon MLJ's breach. "If a contractor makes an assignment for the benefit of its creditors, inexcusably abandons performance, or removes equipment needed to perform, such actions are evidence of an anticipatory repudiation even if unaccompanied by words, because such affirmative acts by a contractor leave it unable or apparently unable to perform." *Geo-Marine, Inc. v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048, at 163,831; Restatement (Second) of Contracts § 250 cmt. c. (1981) ("In order to constitute a repudiation, a party's act must be both voluntary and affirmative, and must make it actually or apparently impossible for him to perform."). MLJ's actions constituted repudiation because, with the space leased to third parties, MLJ could not meet its contractual obligation to provide the space to GSA. "[W]here the contractor manifests an intention not to perform the contract the Government need not issue a cure notice before terminating the contract for default." *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,744; *Reddy-Buffaloes Pump, Inc.*, ENG BCA 6049, *et al.*, 96-1 BCA ¶ 28,111, at 140,334 (1995) (cure and show cause notices "not required where the contractor abandons performance"). Given that MLJ had abandoned performance of the contract by leasing the premises to third parties, GSA was not required to give MLJ an opportunity to cure prior to termination.

MLJ Cannot Establish Anticipatory Repudiation or Estoppel

MLJ argues that it should not be found in breach or default for two reasons. One, GSA surrendered the property and, as evidenced by a series of actions, repudiated its obligations under the lease and finally stopped paying the rent. Therefore, GSA was in breach, and MLJ's actions to re-let the property were properly undertaken to mitigate

its losses on the lease. Two, even if GSA did not surrender the property and repudiate its lease obligations, GSA should be estopped from asserting breach because government officials knew of the actions to re-let the space and did not tell MLJ to stop. MLJ cannot prevail on either of these theories and avoid the consequences of its breach.

Anticipatory Repudiation. MLJ argues that GSA breached the contract and that MLJ only undertook efforts to re-let the space in the face of GSA's clear intent to relinquish the space and to abandon its contractual obligations. MLJ highlights the facts that the GSA representative provided the condition survey report with the language releasing the space back to MLJ and that GSA did not retain a set of keys. Appellant's Statement of Uncontested Facts ¶¶ 15, 16. MLJ acknowledges that the GSA contracting officer indicated GSA would attempt to negotiate a termination of the lease, but instead of doing so, GSA "changed the locks and turn[ed] over the key, clearly evidencing its decision to abandon the [p]remises." *Id*. ¶¶ 6, 17. As MLJ explains, it procured replacement tenants only after GSA "abandoned the premises and relinquished sole possession to MLJ." Appellant's Response to Respondent's Motion for Summary Relief at 3. Then, GSA stopped paying rent in June 2012. Appellant's Statement of Uncontested Facts ¶ 23. Based upon these actions by GSA, MLJ argues that, when it learned that the FBI would be vacating the space, it undertook efforts to obtain new tenants to "mitigate the losses faced by both parties." Appellant's Response at 2.[6]

[6] In the exchange of correspondence before the contracting officer's termination for default, MLJ's counsel asserted that MLJ's actions were justified under a common law theory of surrender. Respondent's Response to the Board's August 1, 2014, Order, Exhibit F. Such a theory would be unavailing here for two reasons. One, federal lease disputes are governed by federal contract law, rather than state law and commercial common law principles. *Keydata Corp. v. United States*, 504 F.2d 1115, 1123 (Ct. Cl. 1974) ("though a lease may concern and convey a property interest, it is also very much a contract—and it is settled that the contracts of the Federal Government are normally governed, not by the particular law of the states where they are made or performed, but by a uniform federal law."). Two, even if common law principles did apply, the facts here—the FBI vacated the space, but GSA continued to pay rent—cannot be construed to constitute surrender or abandonment of the lease at common law. *See, e.g.*, *URS Rental Services Co. v. Dongieux*, 480 So. 2d 1034, 1039 (La. Ct. App. 1985) (although space vacated, the fact that lessee continued to pay rent and utilities defeated claim of abandonment); *Smith v. Hegg*, 214 N.W.2d 789, 792 (S.D. 1974) (same).

MLJ's defense is one of anticipatory repudiation, in which GSA's actions to surrender possession of the property purportedly signaled GSA's intent not to fulfill its obligations pursuant to the lease. Anticipatory repudiation occurs when one party to a contract communicates to the other party "a distinct and unequivocal absolute refusal to perform the promise." *Dingley v. Oler,* 117 U.S. 490, 503 (1886); 4 Arthur L. Corbin, *Corbin on Contracts* § 973 (1964). A party to a contract has the right to discontinue performance of its contractual obligations and seek legal redress if the other party anticipatorily repudiates the contract. *United States v. Dekonty Corp.*, 922 F.2d 826, 827-28 (Fed. Cir. 1991) (citing *Dingley,* 117 U.S. at 499-500). "The obligation to mitigate damages arises '[o]nce a party has reason to know that performance by the other party will not be forthcoming.'" *Stockton East Water District v. United States*, 109 Fed. Cl. 760, 803 (2013) (quoting *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1375 (Fed. Cir. 2005); Restatement (Second) of Contracts § 350, cmt. b). If GSA had breached its obligations first through anticipatory repudiation, MLJ's actions would not constitute a breach of its lease obligations. *Malone v. United States*, 849 F.2d 1441, 1446 (Fed. Cir.), *modified*, 857 F.2d 787 (Fed. Cir. 1988) (prior material breach can relieve a party of a default termination and its consequences).

The problem with MLJ's theory is that surrender of possession does not constitute anticipatory repudiation by the Government pursuant to the terms of the lease. The lease provided that GSA could substitute federal agency tenants and that the property could remain vacant. These clauses gave GSA the right to hold the property for at least a five-year term and leave it vacant if it wanted to do so. While GSA has not explained why it did not retain a key upon the re-keying of the locks when the FBI vacated the space, this undisputed fact alone cannot constitute repudiation, particularly when GSA had communicated that it would negotiate an early termination or replace the tenants. Exhibit 6 at 15. The provision of the inspection report by itself cannot bind the Government. *Chester Barrett*, IBCA429-3-64, 66-1 BCA ¶ 5503, at 25,776 (instruction from inspector on contract cannot modify terms of contract). And, as MLJ acknowledges, GSA continued to pay rent until it discovered that MLJ had leased the premises. In light of the lease terms and the events surrounding the FBI's move, the surrender of possession of the space does not constitute a "distinct and unequivocal absolute refusal to perform." *Dekonty Corp.*, 922 F.2d at 828; *Kap-Sum Properties, LLC v. General Service Administration*, CBCA 2544, 13 BCA ¶ 35,446, at 173,833 (lessor must demonstrate a "reasonable basis to conclude that the agency would not fulfill its obligations under the contract."). MLJ's actions to obtain replacement tenants, no matter how well intentioned, are not excused based upon a theory of anticipatory repudiation by GSA.[7]

[7] MLJ points to the fact that GSA turned over the keys upon the FBI's departure on January 19, 2012, as evidence of GSA's repudiation, which prompted MLJ's need to

Estoppel. MLJ also alleges that GSA had constructive notice that MLJ was planning to or had re-let the space. Appellant's Statement of Genuine Issues at 1.[8] MLJ asserts that, because FBI representatives knew about and assisted MLJ's agent in the efforts to re-let the space, GSA should have known of those efforts. Amended Complaint ¶¶ 12, 13. The Board construes MLJ's defense to be one of equitable estoppel. Because it did not object to the efforts to find replacement tenants, MLJ argues that GSA cannot now claim that MLJ breached the contract.

To prevail under the theory of equitable estoppel, MLJ must establish three elements:

> (1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

Mabus v. General Dynamics C4 Systems, Inc., 633 F.3d 1356, 1359 (Fed. Cir. 2011); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Department of the Interior*, CBCA 2012-ISDA, 11-1 BCA ¶ 34,685, at 170,845. Further, "it is well

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mitigate. However, it appears that MLJ's efforts to obtain replacement tenants began before the FBI vacated the space because, as MLJ alleges, the discussions with the replacement tenant took place in the presence of the FBI representative. Amended Complaint ¶¶ 12,13. By this time, GSA had already told MLJ's broker, ProCorp, that GSA planned to negotiate a termination to the lease or backfill the space with another tenant.

[8] With its response to GSA's motion for summary relief, MLJ filed a pleading titled, "Statement of Genuine Issues." Such a pleading is permitted by the Board's rules but it is intended to be a pleading in which a party opposing a motion for summary relief identifies disputes concerning material facts that preclude the granting of the motion. Rule 8(g)(3) ("separate document titled Statement of Genuine Issues. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement and give its version of the facts."). Rather than identifying material facts in dispute, MLJ provided the Board with a list of questions and legal issues. The Board has considered this statement as part of MLJ's response to GSA's motion, but finds that MLJ has failed to identify a material factual dispute that precludes the Board from granting summary relief.

settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services of Crawford County, Corp.*, 467 U.S. 51, 60 (1984). "Beyond a mere showing of acts giving rise to an estoppel, [the contractor] must show '*affirmative misconduct* [as] a prerequisite for invoking equitable estoppel against the government.'" *Rumsfeld v. United Technologies, Inc.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003) (quoting *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000)). The conduct upon which MLJ relies to establish estoppel must "be made by officers or agents of the United States who are acting within the scope of their authority." *Associated Products Supply Co. v. Department of the Treasury*, GSBCA 14614-TD, 99-1 BCA ¶ 30,177, at 149,312 (1998) (citing *Emeco Industries, Inc. v. United States,* 485 F.2d 652, 657 (Ct. Cl. 1973)).

MLJ does not allege affirmative misconduct on the part of GSA that induced MLJ to undertake the actions that led to the breach of the lease.[9] The failure to allege such misconduct is fatal to its estoppel argument. *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553, at 166,172.

Beyond that, MLJ does not allege sufficient facts to satisfy the traditional elements of equitable estoppel. MLJ does not allege that the GSA contracting officer or any authorized representatives actually knew of MLJ's plans to re-let the premises, let alone acted in a manner that led MLJ to believe that GSA approved of those efforts. Amended Complaint ¶¶ 12-14. MLJ does not even allege that the GSA property manager had knowledge of its plans. Instead, MLJ alleges that, because an individual at the FBI had knowledge, GSA should be charged with constructive knowledge of MLJ's plans.

The fact that an FBI official knew of MLJ's intent to re-let and participated in those efforts does not impute constructive knowledge to the GSA contracting officer because the FBI official was not an authorized representative of the GSA contracting officer. *Compare California Business Telephones,* 07-1 BCA at 166,172 (conduct of program analyst irrelevant to estoppel analysis because individual lacked authority for contract matters), *with Casson Construction Co.*, GSBCA 4884, et al., 83-1 BCA ¶ 16,523, at 82,130 (knowledge of project superintendent, individual specifically authorized by contract terms to act on behalf of contracting officer, could be imputed to the contracting officer). Even

[9] MLJ does allege that GSA's rejection of its offer to cure constitutes bad faith and evidences GSA's attempt to avoid its own obligations under the lease. Appellant's Response at 4. Putting aside the issue as to whether MLJ's offer was a proper offer to cure, MLJ's allegations regarding GSA's rejection of this offer are not allegations regarding affirmative misconduct on the part of GSA that induced MLJ to undertake the actions that led to the breach.

if agents for the FBI actively participated in these efforts, the contract clearly states that GSA is only bound by the actions of the contracting officer and the actions authorized by the contracting officer, and representatives of the tenant agencies were not authorized to deal with the lessor. Exhibit 1 at 19. GSA warned MLJ twice at the time of contract award that only a GSA contracting officer could undertake actions with regard to the administration or interpretation of the contract. Exhibit 5 at 15, 16. Moreover, to impute constructive knowledge to the contracting officer based upon the knowledge of tenant agency personnel would undercut the requirement that government contractors are responsible for ascertaining "the extent of and limits upon the [government] employee's authority." *Engage Learning, Inc. v. Department of the Interior*, CBCA 1165, 12-1 BCA ¶ 34,960, at 171,867 (2010) (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *California Business Telephones*).

MLJ also asserts that it offered to cure the breach on July 5, 2012, but GSA rejected its offer. Appellant's Statement of Uncontested Facts in Opposition to GSA's Motion for Summary Relief, ¶ 28; Appellant's Response Board's August 1, 2014, Order at 3. MLJ's offer to cure was contained in a letter from its counsel to GSA counsel in which counsel stated that MLJ would terminate the leases with the third parties if GSA wanted the space back. *Id*.; Appellant's Supplemental Record on Appeal at 4. A proper offer to cure required both a stated intention and a current ability to make the space available. *See Geo-Marine, Inc.*, 05-2 BCA at 163,831. This offer by counsel does not constitute a proper offer to cure because MLJ would have to undertake an additional step of terminating the leases with third parties before it could make the property available. MLJ's conditional offer to cure does not invalidate GSA's default termination.

Damages Flowing from MLJ's Breach

Having found GSA's default termination to be valid and not excused under the theories articulated by MLJ, the Board examines GSA's demand for damages to assess its validity and whether it is properly quantified.

Rent Refund Owed to GSA. By operation of the Default clauses in the contract, GSA may obtain as damages the difference between the rent on the existing lease and rent at a replacement property or "other, additional relief provided for in this lease, at law, or in equity." GSAR 552.270-18(a), -22(b). Default clauses using this or similar phrasing, "relief provided for at law," have been widely interpreted to allow the recovery of common law damages for breach of contract, separate and apart from the recovery of reprocurement costs allowed by default clauses. *Cascade Pacific*, 773 F.2d at 293 (reference to "other rights and remedies provided at law" "can reasonably be read to permit the Government to proceed against a Contractor under other than specific contractual remedies, including the

common law cause of action for breach of contract damages") (citing *Rumley v. United States*, 285 F.2d 773, 777 (Ct. Cl. 1961)); *Astro-Space Laboratories, Inc. v. United States*, 470 F.2d 1003, 1019-20 (Ct. Cl. 1972) (finding contractor liable on Government's counterclaim for breach of contract damages arising from default termination). The Government is permitted to seek breach of contract damages because "an unexcused default is a breach" of contract. *Marley v. United States*, 423 F.2d 324, 335 (Ct. Cl. 1970) (citing *Rumley*, 285 F.2d at 776). Thus, because MLJ's breach of the lease constitutes a material breach of contract, GSA may recover the rent paid after the breach if these costs are damages flowing from the breach.

The costs of reprocurement or replacement performance, forms of expectation damages, are the damages commonly flowing from a termination for default. *Hideca Trading, Inc.*, ASBCA 24161, et al., 87-3 BCA ¶ 20,040, at 101,449. However, "[r]eliance damages provide another way for a non-breaching party to recover losses suffered as the result of a breach of contract." *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1308 (Fed. Cir. 2004) (citing Restatement (Second) of Contracts § 344 (1981)). "Reliance damages include expenditures the non-breaching party made in performance or in anticipation of performance of the contract that was breached." *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123, at 153,740 (expectation and reliance damages "are available as alternative forms of recovery"). To recover costs as reliance damages, the non-breaching party must establish that the losses, both in type and magnitude, were foreseeable. *Landmark Land Co. v. Federal Deposit Insurance Corp.*, 256 F.3d 1365, 1378 (Fed. Cir. 2001). A loss is foreseeable if "it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." *Id*. (citing Restatement (Second) of Contracts § 351(2)). The non-breaching party must also establish a causal link between the breach and the loss alleged. *Castle v. United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002).

The rent refund that GSA seeks is a form of reliance damages because GSA seeks to recover costs incurred in performance of the contract.[10] GSA paid the rent in reliance on the lease. The loss to GSA is the rent paid for the space while it was leased to a third-party tenant. The loss was both a foreseeable result of and caused by MLJ's actions to lease the

[10] This claim is akin to government claims for unliquidated progress payments sought after default terminations, wherein the Government seeks the refund of payments made for a product that was never delivered. *See, e.g.*, *Daff v. United States,* 78 F.3d 1566, 1574 (Fed. Cir. 1996) (leaving undisturbed award of unliquidated progress payments as damages arising from default termination); *Laka Tool & Stamping Co. v. United States*, 639 F.2d 738, 744 (Ct. Cl. 1980).

space to third parties and the refund of rent is a proper measure of damages flowing from MLJ's breach of the lease. Accordingly, GSA may recover $34,534.59 for the period from March 1 to June 1, 2012.

Refund of rent paid over vacant space rate. In the second decision on appeal, the contracting officer also issued a demand for the amounts that GSA paid in rent over the vacant space rate between January 19 and March 1, 2012.

GSA may not recover this amount as damages because this overpayment amount was not caused by MLJ's breach. Until March 1, 2012, the date of the breach, GSA still had use of the space. The fact that GSA paid rent amounts over the vacant space rate between January 19 and March 1, 2012, is a consequence of GSA's failure to give notice and enforce the terms of the contract, rather than the result of actions by MLJ.

GSA's failure to give notice is also fatal to its claim for a refund of this amount. As noted, the applicable clause provides that the reduction shall occur after the Government gives thirty days' notice to the lessor, and the contract defines notice as written notice delivered by hand or registered mail. The record on appeal does not contain any such notice to MLJ.[11] The only correspondence from the contracting officer is the email message to MLJ's representative, in which the contracting officer acknowledges the FBI's plan to vacate the space on an unspecified date in the future and states that GSA would occupy the space at the vacant space rate, if the parties were unable to negotiate an early termination of the lease. Exhibit 6 at 15.

The Government may seek to make adjustments to a contract price, even after the date of final contract payment, but only when the provision at issue does not provide a specific time frame for the adjustment or require notice. *American Western Corp. v. United States*, 730 F.2d 1486, 1488 (Fed. Cir. 1984). In contrast, the clause at issue here provides both that the adjustment is to be in effect only until the lease is terminated and requires thirty days' notice. GSA is seeking the adjustment after the lease has been terminated and without the required notice. Although the long-standing rule has been that "notice provisions in contract-adjustment clauses [should] not be applied too technically and illiberally," *Hoel-Steffen Construction Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972), more recent precedents have focused upon whether the notice requirement should be construed as binding. *See K-Con Building Systems, Inc. v. United States*, No. 2014-5062,

[11] This clause was revised subsequently "to clarify when and how adjustments" would be made. 74 Fed. Reg. 63,704, 63,705 (Dec. 4, 2009). The revised clause clarifies that the notice to be given is "notice of reduction to the rent," rather than simply the intent to vacate. GSAR 552.270-16 (2011).

2015 WL 570935, at *7 (Fed. Cir. Feb. 12, 2015) (finding no extenuating circumstances as to why time limit should not be enforced); *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,936. Based upon the language of the clause at issue, the Board construes this clause with its notice provision strictly and denies GSA's claim for the rent overpayment.

Decision

GSA's motion for summary relief is **GRANTED IN PART** and MLJ's appeal is **DENIED**. MLJ owes GSA $34,534.59 as damages flowing from MLJ's breach of the lease.

MARIAN E. SULLIVAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

PATRICIA J. SHERIDAN
Board Judge