UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RELIEF FROM DECISION DENIED: September 24, 2015

CBCA 2866-R

WATERMARK ENVIRONMENTAL, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Melvin White of Berliner, Corcoran & Rowe, LLP, Washington, DC, counsel for Appellant.

Adria Greene, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **POLLACK**, **SHERIDAN**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

Watermark Environmental, Inc. (Watermark) asks us to "amend" our order of February 25, 2015, dismissing its appeal with prejudice based on the parties' joint request for such a dismissal. We deny the request.

Background

The Department of Agriculture's (USDA's) Natural Resources Conservation Service awarded to Watermark a contract for the rehabilitation of the George H. Nichols Multipurpose Dam in Worcester County, Massachusetts. On March 26, 2012, an agency

contracting officer partially terminated the contract for default. On June 22, 2012, Watermark appealed this decision to the Civilian Board of Contract Appeals (CBCA).

The parties eventually engaged in alternative dispute resolution (ADR), with a Board judge serving as neutral. Following an ADR session, on February 19, 2015, the parties entered into a settlement agreement. The agreement provides that "the default termination shall be retracted by the Agency and converted to a termination by agreement of the Parties. The Agency shall pay to the Contractor the sum of $687,500 no later than March 19, 2015. . . . It is further understood that neither party will assert or pursue any further claims against the other with respect to the Contract, including, but not limited to any claims under the False Claims Act. It is further understood that the parties shall file with the CBCA a joint motion to dismiss the Appeal with prejudice."

Consistent with this agreement, on February 24, 2015, the parties filed a "Joint Motion to Dismiss Appeal." In the motion, they stated that they "jointly move, pursuant to the provisions of Rule 12(c)[1] for dismissal of this appeal because the parties have settled the case." The Board granted the motion by dismissing the case with prejudice to its reinstatement on February 25, 2015.

Also consistent with the parties' agreement, USDA paid $687,500 to Watermark on March 4, 2015.

On March 17, 2015, Watermark filed a joint "Stipulation Regarding Settlement." In the stipulation, the parties acknowledged that they had settled their dispute and that USDA had paid Watermark $687,500; they requested that pursuant to Board Rule 25(b), "the Board adopt this stipulation by decision." Rule 25(b), 48 CFR 6101.25(b), provides:

> *Settlements.* When an appeal . . . is settled, the parties may file with the Board a stipulation setting forth the amount of the award. The Board will adopt the parties' stipulation by decision, provided the stipulation states the parties will not seek reconsideration of, or relief from, the Board's decision, and they will

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[1] Board Rule 12(c), 48 CFR 6101.12(c) (2014), provides, "*Dismissal, generally.* A case may be dismissed by the Board on motion of either party. . . . Every dismissal shall be with prejudice to reinstatement of the case except as specified in paragraph (d) of this section." Paragraph (d) authorizes the Board to dismiss a case without prejudice to reinstatement "[w]hen circumstances beyond the control of the Board prevent the continuation of proceedings."

not appeal the decision. The Board's decision under this paragraph (b) is an adjudication of the case on the merits.

Ten days later, on March 27, 2015, Watermark filed a "Motion to Amend February 25, 2015 Order." In this motion, allegedly pursuant to Board Rules 26 and 27 ("Reconsideration" and "Relief from Decision or Order"), Watermark "requests that the Board amend its February 25, 2015 Order of Dismissal to adopt the parties' Stipulation Regarding Settlement by decision." Also on March 27, Watermark filed an "application for attorneys' fees and expenses," allegedly pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (2012) (EAJA).

On April 1, 2015, USDA rescinded its acceptance of the March 17 stipulation. On April 2, the agency urged the Board to deny Watermark's March 27 motion to amend because none of the grounds for reconsideration or relief from decision were present.

Discussion

Board Rules 26 and 27 permit the Board to grant reconsideration or relief from a decision or order for any of the following reasons:

> (1) Newly discovered evidence which could not have been earlier discovered, even through due diligence;
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> (2) Justifiable or excusable mistake, inadvertence, surprise, or neglect;
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> (3) Fraud, misrepresentation, or other misconduct of an adverse party;
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> (4) The decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, and it is no longer equitable that the decision should have prospective application;
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> (5) The decision is void, whether for lack of jurisdiction or otherwise; or
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> (6) Any other ground justifying relief from the operation of the decision or order.

48 CFR 6101.26(a), .27(a). These reasons are essentially those stated in Rule 60(b) of the Federal Rules of Civil Procedure.

Other than citing to the stipulation and "rules of equity," Watermark does not tell us which of the reasons might justify revoking our order of dismissal and replacing it with a decision making a stipulated award. No such reasons are apparent to us.[2] In trying to comprehend what might be the appellant's justification for the motion, the best we can do is to surmise that the second category stated above, "justifiable or excusable mistake, inadvertence, surprise, or neglect," might be implicated. But the only "mistake, inadvertence, surprise, or neglect" that could be be present here is counsel's too-late recognition that a voluntary dismissal of the appeal would preclude an award of fees under the EAJA. Court decisions applying Rule 60(b) of the Federal Rules of Civil Procedure are consistent in holding that "'an attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment' under Rule 60(b)." *Pettle v.*

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[2] Watermark's apparent motivation is that without a Board decision, as may be had under Rule 25(b), the appellant cannot gain eligibility for attorney fees and costs under the EAJA. In that belief, the appellant is correct. The Supreme Court has held that a litigant cannot become a "prevailing party," and therefore eligible for recovery under a fee-shifting statute, unless the litigant has secured a judgment on the merits or a court-ordered consent decree. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605. The Court of Appeals for the Federal Circuit has held that these principles apply to applications under the EAJA. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1379 (Fed. Cir. 2002). The rulings of these courts have been applied by boards of contract appeals. *Elrich Contracting, Inc.*, ASBCA 50867, 02-2 BCA ¶ 31,950, at 157,841 (voluntary dismissal is neither a decision on the merits or in the nature of a consent judgment); *Poly Design, Inc.*, ASBCA 48591, *et al.*, 01-2 BCA ¶ 31,644, at 156,303 (noting "[t]he Board did not approve or assume oversight of the settlement or incorporate the terms of the settlement agreement in the order of dismissal"). The involvement of a Board judge in ADR proceedings is "clearly not sufficient to establish a judicial imprimatur and [does not] constitute a 'court-ordered change in the legal relationship' of the parties as *Buckhannon* requires." *Brickwood Contractors*, 288 F.3d at 1380 (referencing a judge's comments at a temporary restraining order hearing); *see also* S. Rept. No. 101-543 at 1, 8, *reprinted in* 6 U.S.C.C.A.N., 101st Cong., 2d Sess., at 3931, 3938 (ADR procedures are "informal, consensual procedures which can be used by parties in a dispute to obtain a resolution in lieu of formal litigation"; they are "in lieu of a formal, adjudicative agency proceeding").

Bickham, 410 F.3d 189, 192 (5th Cir. 2005) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986)); *see also Eskridge v. Cook County*, 577 F.3d 806, 809 (7th Cir. 2009) (it is "difficult to characterize the voluntary dismissal order as the result of excusable 'neglect,' since the district court entered that order on the [plaintiffs'] own motion); *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 684 (6th Cir. 1999); *Andrulonis v. United States*, 26 F.3d 1224, 1235 (2d Cir. 1994) ("Rule [60(b)] does not allow district courts to indulge a party's discontent over the effects of its bargain. . . . When a party makes a deliberate, strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect." (quotations and citations omitted)).

In any event, even if we were inclined to grant Watermark's motion, we could not do so because the Rule 25(b) "stipulation" is no longer a stipulation agreed to by both parties, so it is not eligible for consideration under Rule 25(b).

Decision

Watermark's motion is **DENIED**. The order of dismissal issued on February 25, 2015, remains in effect. Consequently, for the reasons explained in footnote 2, consideration of Watermark's application for attorney fees and expenses is not appropriate.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

PATRICIA J. SHERIDAN
Board Judge