



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 7, 2016

CBCA 4878-C(3534)

COMTER SYSTEMS, INC.,

Applicant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Elmer Douglass Ellis, Washington, DC, counsel for Applicant.

Nathan C. Guerrero, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

ZISCHKAU, Board Judge.

Comter Systems, Inc., filed an application for attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012). The General Services Administration (GSA) has moved to dismiss the fee application on the basis of a failure to prosecute and also because Comter was not a “prevailing party” in the underlying action, which had been dismissed with prejudice by the Board based on a voluntary request for dismissal after settlement of the underlying dispute. We deny the fee application since Comter was not a prevailing party in the underlying action.

Background

On September 12, 2013, Comter filed a notice of appeal with the Board, challenging a contracting officer's decision denying full payment on two invoices for work completed under a letter contract. After discussions during status conferences with the Board and between the parties, GSA paid the principal invoice amount of \$73,974 to Comter on October 8, 2014. Thereafter, GSA calculated the proper interest payable to Comter on the principal amount of \$73,974, and made a separate interest payment of \$4898.08 to Comter on December 22, 2014. Over the next several months, counsel for Comter disputed the correctness of the interest calculation and payment made by GSA. The parties thereafter filed briefs on their respective interest calculations, and had discussions between themselves and with the Board. Ultimately, on June 10, 2015, Comter agreed that GSA had correctly calculated and paid the interest due Comter, and that the case should be dismissed. Comter filed a voluntary dismissal request on the same day. The Board dismissed with prejudice the underlying appeal (CBCA 3534) on June 11, 2015.

On July 17, 2015, Comter filed its application for EAJA attorney fees. Following a conference call with the parties, the Board issued an order on August 5, 2015, directing Comter to file an initial brief on September 14 and GSA to file a responding brief on September 30 regarding the question of whether Comter could be considered a "prevailing party" in light of cases such as *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), and *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1379 (Fed. Cir. 2002). Comter failed to file its initial brief. GSA filed a motion to dismiss on September 30.

Discussion

The Supreme Court has held that a litigant cannot become a "prevailing party," and therefore be 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.*, 532 U.S. at 604-06. "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*, 288 F.3d at 1379.

The Board applied these holdings in *Watermark Environmental, Inc. v. Department of Agriculture*, CBCA 2866-R, 15-1 BCA ¶ 36,113, by rejecting an appellant's request to convert a dismissal with prejudice into a stipulated judgment, and holding that a voluntary

dismissal with prejudice after a settlement cannot be deemed a judgment or decree giving a judicial imprimatur to the legal change in position that led to the parties' settlement of their dispute. *See also Elrich Contracting, Inc.*, ASBCA 50867, 02-2 BCA ¶ 31,950, at 157,841 (voluntary dismissal is neither a decision on the merits nor in the nature of a consent judgment); *Poly Design, Inc.*, ASBCA 48591, *et al.*, 01-2 BCA ¶ 31,644, at 156,303 (“[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”).

Here, GSA voluntarily chose to pay Comter the full principal amount of the unpaid invoices along with interest on that amount. The Board never ordered GSA to do so. *Cf. Brickwood Contractors*, 288 F.3d at 1380 (judge's comments at a temporary restraining order hearing did not constitute a judicial imprimatur on a party's change in conduct). Comter accepted the payment of the invoices and, after some additional discussions, accepted the interest payment paid by GSA in order to settle the dispute. Comter thereafter voluntarily requested dismissal based on GSA's payments to Comter, and the Board entered a dismissal order with prejudice. On these facts, Comter was not a prevailing party for purposes of an EAJA application for fees.

Decision

We **DENY** Comter's application for EAJA fees because Comter was not a prevailing party in the underlying action that was resolved by a voluntary dismissal with prejudice.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

JERI K. SOMERS
Board Judge

JOSEPH A. VERGILIO
Board Judge