UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF IN CBCA 5220 AND 5313 DENIED; APPELLANT'S MOTION FOR SUMMARY RELIEF IN CBCA 5260 GRANTED IN PART; RESPONDENT'S MOTION FOR SUMMARY RELIEF IN CBCA 5260 DENIED: July 14, 2017

CBCA 5220, 5260, 5313

COMMERCE PLAZA OFFICE PARTNERS, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Ralph E. Avery of Avery Law Firm, Washington, DC, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **SOMERS**, **GOODMAN**, and **DRUMMOND**.

GOODMAN, Board Judge.

Appellant, Commerce Plaza Partners, LLC, has filed these consolidated appeals with regard to claims arising from two leases between it and respondent, Department of Veterans Affairs (VA). The parties have filed cross-motions for summary relief.

Background

The Leases

Respondent entered into two leases of premises at 755 Commerce Drive, Decatur, Georgia, a building owned by appellant. Lease V247R-0056–the clinic lease–was for the

second floor and a small portion of the first floor. The parties entered into the clinic lease on May 1, 2006, for a term of five years. The start date of the clinic lease was amended to October 13, 2006, and the term was amended for one year, with yearly options thereafter. As a provision of the clinic lease, respondent received the use of an information technology (IT) closet on the second floor to support respondent's telecommunications and data processing needs for the clinic. During the course of administering the clinic lease, the parties agreed that the lease would terminate on October 12, 2015. Respondent vacated the clinic, except for the IT closet, shortly before that date.

Lease V247R-0586–the admin II lease–was for the third and seventh floors. The parties entered into the admin II lease on July 1, 2008, for a term of five years, later amended to be an annual lease with one-year options. The admin II lease also provided for appropriate IT closet space to support respondent's telecommunications and data processing needs on the third and seventh floors. During the course of the admin II lease, the parties agreed that it would terminate on February 29, 2016. Respondent vacated the premises held under the admin II lease in mid-January 2016.

The Claims and Resulting Appeals

CBCA 5220

After the clinic lease expired, respondent continued to use the IT closet on the second floor to support the admin II lease. Respondent's contracting officer issued a final decision dated December 1, 2015, which found appellant entitled to an additional $2124.12 per month for use of the IT closet, based on a rental rate of $22.84 per square foot for the ninety-three square feet of the closet. Appellant submitted a claim to respondent dated December 4, 2015, asserting that respondent's continued occupancy of the second floor IT closet made it a holdover tenant for the space leased under the clinic lease for the remainder of the admin II lease – from October 12, 2015, to February 29, 2016. Respondent informed appellant by letter dated January 12, 2016, that the contracting officer's final decision of December 1, 2015, had disposed of its claim. Appellant appealed the final decision of December 1, 2015, on February 28, 2016, and the appeal was docketed as CBCA 5220.

CBCA 5260

After respondent vacated the clinic, but for the IT closet, the contracting officer's representative, Ms. Jennifer Bonds, walked through the second floor space on behalf of respondent and Mr. Timothy McKibans walked through the clinic space on behalf of appellant. Ms. Bonds presented her report of the walk-through to Mr. McKibans, and it was

signed by both. Mr. McKibans noted his observations of damage on the report before he signed it. The report reads in relevant part:

> The suites on the first and second floors are generally in good condition. There is damage to the walls where door numbers, soap dispensers, and hand sanitizer dispensers were removed throughout the clinic. Signs were removed from doors leaving tape/film. The damage throughout the clinic is considered normal wear and tear except for the following areas:
>
> [The following was handwritten, apparently by Mr. McKibans]
>
> Mirrors remaining in place on one wall since removing them would be more damage than letting them stay in place.
>
> Major sheet rock damage thru out suite. Almost all doors have screws in them and lobby floor scrach [sic] and gouged when moving out.

On November 5, 2015, appellant submitted a claim in the amount of $109,172 to repair the damage to the second floor. The contracting officer issued a final decision allowing the claim, but only to the extent of $15,913.40, based on an independent government estimate of the repair costs he received from the VA Engineering Department. Appellant appealed the final decision on March 24, 2016, and the appeal was docketed as CBCA 5260.

CBCA 5313

On March 1, 2016, appellant filed a claim for constructive occupancy of the second floor based on the theory that the second floor was not suitable for occupancy by another tenant in the damaged state that respondent had left it. This claim for was initially filed in the amount of $94,187.70, and was continuing in nature, calculated using the rental rate of the recently expired clinic lease for a reasonable time in which repairs could be made. The contracting officer did not respond to the claim within sixty days as required by the Contract Disputes Act, 41 U.S.C. § 7103 (f)(1) (2012). Appellant treated its claim as denied and appealed from the deemed denial on May 5, 2016. The appeal was docketed as CBCA 5313.

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. *P.J. Dick Inc. v. Department of Veterans Affairs*, CBCA 3927, et al., 16-1 BCA ¶ 36,239 at 176,814.

CBCA 5220

Respondent's contracting officer's final decision in response to this claim acknowledges that respondent continued to use the IT closet on the second floor after the clinic lease expired and determined that respondent was obligated to pay appellant the fair market value for the use of the IT closet–ninety-three square feet at $22.84 per square foot, totaling $2124.12 per month for the remainder of the admin II lease–but not rental for the entire second floor. Appellant believes it is entitled to receive total rent for the second floor for the remainder of the admin II lease because respondent's use of the IT closet rendered the entire second floor un-tenantable.

While respondent is willing to compensate appellant for the use of the IT closet, there remains a question of material fact as to whether its continued use by respondent rendered the entire second floor un-tenantable, i.e, whether another tenant could not use the IT closet concurrently with respondent, or whether another IT closet could be constructed on the second floor for use by another tenant. *See,* e.g., *Cafritz Co. v. General Services Administration*, GSBCA 13525-REM, 98-2 BCA ¶ 29,936 (where lessor fails to prove that the lessee's actions affected the lessor's use and occupancy). Accordingly, we deny the parties' cross-motions for summary relief in this appeal.

CBCA 5260

There is no dispute that during inspection of the vacated premises of the clinic lease, the party representatives jointly inspected the premises and documented damage in various areas. Appellant asserts that the parties agreed that there was damage to the premises that exceeded ordinary wear and tear. Appellant further asserts that because the contracting officer ultimately determined that damage had value–although less than appellant's evaluation–respondent is responsible for all the damage noted and appellant should be granted summary relief on the issue of liability, with the determination of damages reserved for a hearing on the merits.

Respondent asserts that while the contracting officer rendered a decision valuing the damage, that decision did not obligate respondent to pay for any damage,[1] and further asserts

[1] "Because the findings of fact in the contracting officer's final decision are not binding on the parties, the contractor bears the burden of proving by preponderant evidence 'the fundamental facts of liability and damages de novo.'" *Bay Shipbuilding Co. v.*

that since the damage was to tenant improvements initially paid for by respondent, respondent owned the tenant improvements and was not responsible for the damage, as it could have removed the tenant improvements if it wished to do so.

While there is no explicit restoration clause in the lease, "[e]very lease contains a provision, implied if not expressed, that a tenant will not commit waste by damaging the property, and therefore will, when it vacates leased space, return the space to the landlord in the same condition in which it received that space, reasonable wear and tear excepted." *A & B Limited Partnership v. General Services Administration*, GSBCA 15208, 04-1 BCA ¶ 32,439, at 160,504-05 (2003) (citing *United States v. Bostwick*, 94 U.S. 53, 65-66 (1876)). Thus, respondent had an obligation to repair the tenant improvements to the extent that any damage exceeded reasonable wear and tear, even though the payment for the tenant improvements was included in the rent.

Accordingly, in this appeal we grant appellant's motion for summary relief as to respondent's liability for damage that exceeds reasonable wear and tear, and deny respondent's motion for summary relief. Appellant's motion addressed the issue of respondent's liability, and did not address quantum. Questions of material fact remain as to whether the alleged damage to each item exceeded reasonable wear and tear, and therefore the amount of damages, if any, remains to be determined.

CBCA 5313

Appellant's continuing claim for rent for constructive occupancy of the second floor is based on the theory that the second floor was not suitable for occupancy by another tenant in the alleged damaged state that respondent had left it, and will remain so until respondent pays for repairs. As stated above with regard to CBCA 5260, questions of material fact remain as to whether the alleged damage was beyond reasonable wear and tear. If so, additional questions of material fact exist as to whether the cumulative effect of such damage rendered the premises un-tenantable, and whether appellant attempted to market the premises for lease to mitigate damages. Accordingly, we deny the parties' cross-motions for summary relief in this appeal.

Department of Homeland Security, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,743 (quoting *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc).

Decision

In CBCA 5220 and 5313, the parties' cross-motions for summary relief are **DENIED**. In CBCA 5260, appellant's motion for summary relief is **GRANTED IN PART** as to liability, with damages, if any, to be ascertained in further proceedings, and respondent's motion for summary relief is **DENIED**.

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ALLAN H. GOODMAN
Board Judge

We concur:

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JERI KAYLENE SOMERS
Board Judge

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JEROME M. DRUMMOND
Board Judge