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UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: March 2, 2017

CBCA 5272

EASTCO BUILDING SERVICES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Todd J. Canni of Pillsbury Winthrop Shaw Pittman, LLP, Washington, DC; Michael R. Rizzo of Pillsbury Winthrop Shaw Pittman, LLP, Los Angeles, CA; and Alexander B. Ginsberg of Pillsbury Winthrop Shaw Pittman, LLP, McLean, VA, counsel for Appellant.

Catherine Crow and Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

LESTER, Board Judge.

On January 5, 2017, respondent, the General Services Administration (GSA), filed a motion to dismiss this appeal for lack of jurisdiction, asserting that the named appellant, Eastco Building Services (EBS), is not the current contract holder for the schedule contract, blanket purchase agreement (BPA), and associated task order at issue in this appeal. Because EBS lacks privity of contract with the Government, GSA argues, EBS cannot maintain an appeal before the Board. It also complains that EBS, as a trade name, lacks capacity to sue.

We deny GSA's motion, but will recaption the appeal to identify the corporate entity that holds the contract with GSA as the appellant.

Background

In March 2010, GSA awarded a contract (no. GS-21F-0129W) under the Federal Supply Schedule to an entity named "Eastco Building Services, Inc." (EBS-INC). That entity was incorporated through the New York State Department of State, Division of Corporations, State Records and Uniform Commercial Code (NYS DOS).

Effective December 1, 2012, GSA, exercising its rights under EBS-INC's schedule contract, established a blanket purchase agreement (BPA) and issued a task order for operations and maintenance at three federal buildings in Miami, Florida. When GSA issued the BPA and task order, it did not know that, on October 19, 2012, EBS-INC had legally changed its name to "United Facility Services Corporation" (UFSC). Appeal File, Exhibit 26 at 7-9.[1] The record contains a copy of a certificate of amendment from the NYS DOS of ESB-INC's certificate of incorporation, changing ESB-INC's name to UFSC. In addition, as evidenced by a filing receipt that is in the record, UFSC, on or about March 6, 2013, also filed a request with the NYS DOS for an "Assumed Name Certificate," through which UFSC obtained authority to use "Eastco Building Services," or EBS, as an assumed name. Exhibit 29 at 10.

By letter dated April 22, 2013, EBS-INC informed the GSA contracting officer for the schedule contract that EBS-INC had successfully completed a name change and was now known as "United Facility Services Corp., dba Eastco Building Services," but that the newly named entity had retained the same owner, tax identification number (TIN), and Data Universal Numbering System (DUNS) number as EBS-INC. Exhibit 26 at 1-2. By letter dated May 6, 2013, an attorney for EBS-INC again notified GSA of the name change from EBS-INC to UFSC, although, in that letter, the attorney did not mention that EBS would be used as an assumed, or "doing business as," name. Exhibit 27 at 1. GSA then entered into bilateral contract modifications of the schedule contract on May 8, 2013, and of the BPA on May 31, 2013, recognizing "United Facility Services Corp. dba Eastco Building Services" as the contract and BPA holder. Exhibit 28 at 1-2; Exhibit 29 at 1-10. GSA has represented, though, that all subsequent contract, BPA, and task order modifications only identified the contractor as UFSC, without the addition of the words "dba Eastco Building Services."

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[1] All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

On or about December 15, 2015, GSA received a certified claim seeking an equitable adjustment under the task order in the amount of $758,536.72, signed by Steven R. Brown as President and Chief Executive Officer (CEO) of "Eastco Building Services." Exhibit 56 at 1. Nowhere in the claim was UFSC identified or mentioned. By decision dated February 16, 2016, the GSA contracting officer denied that claim, addressing the letter containing the decision to "United Facility Services Corp. dba Eastco Building Services, Attn: Steven Brown." Exhibit 57 at 1.

Mr. Brown signed a notice of appeal of the contracting officer's decision, which was filed with the Board on April 5, 2016. The notice was filed in the name of "Eastco Building Services," rather than in UFSC's name. Nevertheless, attached to EBS's appeal notice was a copy of the February 16, 2016, decision addressed to "United Facility Services Corp. dba Eastco Building Services."

On January 4, 2017, GSA filed its motion to dismiss this appeal for lack of jurisdiction, arguing that only UFSC could file an appeal and that GSA was not in privity of contract with EBS. In its motion, GSA did not originally mention or complain that the claim underlying this appeal was also submitted in the name of "Eastco Building Services," rather than in the name of UFSC, but, in its reply brief, it argues that the original claim submission was invalid because it was submitted by EBS, rather than by UFSC. Nevertheless, GSA suggests that, if we deny its motion to dismiss, it would not oppose a request by appellant to recaption the appeal in the name of UFSC, but that EBS has declined GSA's suggestion that it make such a recaptioning request.

Discussion

I. The Privity Issue

In its motion, GSA asks us to dismiss this appeal because GSA and EBS lack contractual privity. The Board's jurisdiction to consider contractor claims is derived from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), which defines the term "contractor" as "a party to a Federal Government contract other than the Federal Government." *Id.* § 7101(6). An entity that does not meet that definition of a "contractor" is "not in privity of contract with the government" and "cannot avail [itself] of the CDA's appeal provisions." *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1371 (Fed. Cir. 2009). The Board lacks jurisdiction to entertain an appeal by an entity that is not in privity of contract with the Government. *Kristen Allred v. Department of Veterans Affairs*, CBCA 4952, 15-1 BCA ¶ 36,108, at 176,282-83.

Originally, the contractor in privity with GSA with regard to the contract, BPA, and task order at issue here was EBS-INC. In 2013, GSA executed two contract modifications recognizing "United Facility Services Corp. dba Eastco Building Services" as the new name of EBS-INC, and the contract modifications retitled the recognized contract holder as UFSC, recognizing its actual corporate name, and added EBS as its "dba" assumed name.

Although GSA argues that it lacks privity with EBS, GSA expressly modified the contract and BPA to define EBS as an alternative name for the contracting party.[2] To the extent that GSA is concerned that EBS is a party separate and distinct from UFSC and that UFSC must be joined in the appeal to establish privity, that concern is unfounded. "The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name." *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1387 (D. Neb. 1977), *aff'd*, 578 F.2d 721 (8th Cir. 1978); *see Nelson v. Ace Steel & Recycling, Inc.*, 842 F. Supp. 2d 1182, 1185 (D.S.D. 2012) ("When a corporation does business under another name, it does not create a distinct entity." (quoting 18 C.J.S. *Corps.* § 133 (2011))). "There is . . . nothing illegal whatsoever about transacting business under a fictitious name if the purpose is not to defraud. It is a common business practice." *United States v. Dunn*, 564 F.2d 348, 354 n.12 (9th Cir. 1977). "Transactions and contracts so entered into under an assumed or fictitious name are generally held to be valid and enforceable." 57 Am. Jur. 2d *Name* § 66 (2017). That is because "the trade name user is the same entity as its owner." *TicketNetwork, Inc. v. Darbouze*, 133 F. Supp. 3d 442, 451 (D. Conn. 2015); *see Duval*, 425 F. Supp. 2d at 1387 ("Doing business under another name does not create an entity distinct from the person operating the business."); *Worm World, Inc. v. Ironwood Productions, Inc.*, 917 So. 2d 274, 275 (Fla. Dist. Ct. App. 2005) (trade name is a "fiction involving the name of the real party in interest, and nothing more" (citation omitted)); 18A Am. Jur. 2d *Corps.* § 230 (2017) ("A corporation's use of a fictitious or assumed business name . . . does not create a legal entity separate from the corporation.").

Here, the name of the contractor, as identified in GSA's contract modifications, is "United Facility Services Corporation dba Eastco Building Services." GSA plainly recognized that EBS is a trade, or assumed, name for UFSC. In such circumstances, there is no basis for GSA to argue that EBS (as the assumed name for UFSC) is not the party with

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[2] To the extent that GSA did not amend the task order to reflect UFSC's name (after amending the contract and BPA), it does not matter. Typically, "[t]he change of a corporation's name is not a change of the identity of a corporation and has no effect on the corporation's property, rights, or liabilities." *Alley v. Miramon*, 614 F.2d 1372, 1384 (5th Cir. 1980). Accordingly, even if the task order still reflects EBS-INC's corporate name, it does not affect who the true contracting party is.

which it holds a contract. EBS and UFSC are one and the same. We reject GSA's privity argument.

II. The Issue of Capacity to Sue

A. Whether Capacity Is Jurisdictional

Although we cannot accept GSA's privity argument, there is a question about whether an entity is entitled, or has the capacity, to maintain a suit or an appeal *solely* in its assumed name. Capacity to sue relates to an entity's legal ability to sue and be sued:

> "Capacity to sue" refers to the status of a person or group as an entity that can sue or be sued and is not dependent on the character of the specific claim alleged in the lawsuit. A party has capacity to sue when it has the legal authority to act regardless of whether it has a justiciable interest in the controversy. As a general matter, capacity to sue concerns a litigant's power to appear and bring its grievance before the [tribunal].

59 Am. Jur. 2d *Parties* § 26 (2017). "Certain it is that a nonexistent person can no more sue than he can be sued." *Woodbury Granite Co. v. United States*, 59 F. Supp. 150, 152 (Ct. Cl. 1945).

In most circuits, a lack of capacity is typically viewed as a type of procedural issue that can be waived if no timely objection is raised. *See, e.g.*, *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 478 n.2 (6th Cir. 2014); *E.R. Squibb & Sons, Inc. v. Accident & Casualty Insurance Co.*, 160 F.3d 925, 936 (2d Cir. 1998); *Summers v. Interstate Tractor & Equipment Co.*, 466 F.2d 42, 50 (9th Cir. 1972).[3] "Some early decisions suggested that a

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[3] Capacity differs from standing, which is clearly a jurisdictional issue. "The 'gist of the question of standing' is whether the plaintiff has a sufficiently 'personal stake in the outcome of the controversy' to ensure that the parties will be truly adverse and their legal presentations sharpened." *State of Washington v. Trump*, No. 17-35105, 2017 WL 526497, at *3 (9th Cir. Feb. 9, 2017) (quoting *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). "Standing is one component among the broader justiciability or case or controversy requirements that are a condition of the exercise of judicial power under Article III of the Constitution." *SWR, Inc.*, ASBCA 56708, 12-1 BCA ¶ 34,988, at 171,945. Conversely, capacity focuses not upon an entity's personal stake in the outcome, but upon the entity's legal ability to sue and be sued. 59 Am. Jur. 2d *Parties* § 26.

defect in capacity deprives [a tribunal] of subject-matter jurisdiction, since a real case or controversy does not exist when one of the parties is incapable of suing or being sued," but "more recent authority" in most circuits "has rejected that characterization." 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1559, at 605-06 (3d ed. 2010). Instead, in most circuits, capacity is now viewed as "dealing with the personal qualifications of a party to litigate and typically is determined without regard to the particular claim or defense being asserted." *Id.* at 604-05.

The Supreme Court, reviewing a decision from the Court of Claims, recognized that the Government could waive a lack of corporate capacity by failing timely to raise the issue, indicating that it viewed capacity as a procedural issue, "[a]nd [that] such is the established practice of the Court of Claims." *United States v. Home Insurance Co.*, 89 U.S. 99, 101 (1874); *see Woodbury Granite*, 59 F. Supp. at 151 (the defense of *nul tiel* corporation "would ordinarily be raised by a special plea, absent in this case, under the rule that the issue raised by a general traverse admits capacity to sue"); *Hebrew Congregation Benai Berith Jacob v. United States*, 6 Ct. Cl. 241, 245 (1870) (claimant need not prove capacity unless defendant has "specially traversed," or pled in its answer to the claimant's complaint, the lack of capacity). Nonetheless, the Court of Claims in *Mather Construction Co. v. United States*, 475 F.2d 1152 (Ct. Cl. 1973), subsequently dismissed a suit by three plaintiff corporations that lacked capacity to sue "for lack of jurisdiction," *id.* at 1155, and it reiterated the jurisdictional nature of capacity in *Coos Lumber Co. v. United States*, 202 Ct. Cl. 1116, 1117 (1973). Since then, both the boards and the Court of Federal Claims have viewed capacity to sue as a jurisdictional issue. *See, e.g.*, *International Federation of Professional & Technical Engineers v. United States*, 111 Fed. Cl. 175, 181 (2013); *Computer Products International, Inc. v. United States*, 26 Cl. Ct. 518, 529 (1992); *Valenzuela Engineering, Inc.*, ASBCA 54939, et al., 08-1 BCA ¶ 33,801, at 167,334. The Court of Claims did not explain in either *Mather Construction* or *Coos* why it viewed capacity to sue as jurisdictional or attempt to distinguish the earlier precedent.

Because there seems to be conflicting past precedent from the Court of Claims (whose published decisions are binding upon us) on whether capacity is jurisdictional or procedural, we will analyze EBS's capacity under the standards applicable to each of them.

B. Whether EBS Has Capacity To Sue

EBS initially argues that, because GSA did not raise EBS's capacity earlier than it did, GSA has waived the issue. To the extent that capacity is jurisdictional, neither a party nor the Board can waive it. *Starobin v. United States*, 662 F.2d 747, 750 (Ct. Cl. 1981); *Worth Construction Co.*, VABCA 3455, 92-1 BCA ¶ 24,579, at 122,611 (1991). Even if capacity is subject to waiver, GSA did not waive it. GSA identified the capacity issue in June 2016

as a defense in its answer to EBS's original complaint (as well as in its November 2016 answer to EBS's amended complaint), and it discussed the issue during a telephonic status conference with the Board before filing its motion to dismiss. It would take a much more significant delay during litigation to justify finding a capacity waiver (if such a waiver is possible). *See Lewis v. Russell*, 838 F. Supp. 2d 1063, 1068-71 (E.D. Cal. 2012) ("The court is aware of no case . . . in which a court has rejected a[n] . . . incapacity defense when it was presented well before trial.").[4]

When an entity's capacity is challenged, it is the appellant's burden to establish its capacity. *International Federation*, 111 Fed. Cl. at 181. In considering capacity, we apply the guidance of Federal Rule of Civil Procedure (FRCP) 17(b), *see Systems Integration & Management, Inc. v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417, at 173,755, which "sets forth rules for determining the capacity of a party to sue or be sued in the federal district courts." 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1559, at 602 (3d ed. 2010).[5]

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[4] EBS asserts that GSA waived the capacity issue by not complaining when the certified claim underlying this appeal was submitted in EBS's name, rather than UFSC's name. For reasons that we will discuss below, there is no legal preclusion against transacting business, or submitting a claim, solely in a trade name in the circumstances here. Because GSA had no basis for objecting to use of the trade name in the claim, GSA did not waive its objection to a legal action filed solely in the trade name.

[5] EBS argues that, in evaluating EBS's ability to maintain an appeal in its own name, we should create our own capacity standard that would permit appeals by entities that might otherwise lack capacity to sue in state or federal courts. Our rules of procedure do not expressly address capacity to sue, but they indicate that we will "take[] into consideration those [FRCP] which address matters not specifically covered" by our rules. 48 CFR 6101.1(d) (2015). As EBS notes, we are not inexorably bound by the FRCP, *see N&P Construction Co.*, VABCA 2578, 92-1 BCA ¶ 24,447, at 121,981 (1991), and, because we "are generally of a somewhat less formal nature" than federal courts, there are likely situations in which the formality of a particular Federal Rule should not apply to a situation before the Board. *Id.* Here, though, the federal rule on capacity was developed after significant discussion and evaluation by experts in civil legal procedure, *see* 4 Charles Alan Wright, Arthur R. Miller, & Adam N. Steinman, *Federal Practice & Procedure* §§ 1004-1005, at 21-29 (4th ed. 2015) (discussing development of the FRCP), making it a useful guide for our evaluation. We decline EBS's invitation to create a different way of looking at capacity.

Under FRCP 17(b)(2), tribunals review "the capacity of [a] corporation to maintain an action" based upon "the laws of the state under which [the corporation] was organized." *Systems Integration*, 13 BCA at 173,755 (quoting *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630, at 166,567). Here, the corporation associated with the EBS trade name is incorporated in New York. Because, as previously discussed, a trade name is viewed as the same entity as the corporation using the trade name, *TicketNetwork, Inc.*, 133 F. Supp. 3d at 451, and because the corporation associated with the EBS trade name is incorporated in New York, we believe it appropriate to look to New York law to consider whether EBS should be able to sue in its individual capacity.[6]

Under New York law, the question of whether an entity can sue in only its registered trade name appears somewhat unsettled. Although section 130 of New York's General Business Law (NYGBL) provides that a corporation can conduct business under a trade name if it has registered the name with the NYS DOS, N.Y. Bus. Corp. Law § 130(1) (McKinney 2011), New York courts appear split as to whether an entity registered under that section can maintain a lawsuit solely in its trade name. *Compare Provosty v. Lydia E. Hall Hospital*, 91 A.D. 2d 658, 659, 457 N.Y.S. 2d 106, 108 (N.Y. App. Div. 1982) (trade name registered under NYGBL § 130 can neither sue nor be sued independently of its owner), *aff'd*, 59 N.Y.2d 812, 464 N.Y.S.2d 754, 451 N.E.2d 501 (1983), *and Flint Creek Campground v. Cator*, No. 2010-303, 2010 WL 4243446, at *1 (N.Y. County Ct. Oct. 27, 2010) (same), *with Anyika v. Moneygram Payment Systems, Inc.*, No. 13467/08, 2009 WL 3817464, at *1 (N.Y. Sup. Ct. Nov. 16, 2009) (stating that company can maintain action in assumed name if it is registered under NYGBL § 130), *and Victor Auto Parts, Inc. v. Cuva*, 148 Misc. 2d 349, 351, 560 N.Y.S.2d 269, 270 (N.Y. Sup. Ct. 1990) (same).

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[6] At least one court has looked to FRCP 17(b)(3)(A), which relates to the capacity of entities other than individuals and corporations, in considering the capacity of a trade name to sue and be sued as an independent entity. *See Ramirez v. Chip Masters, Inc.*, No. 2011-CV-5772, 2012 WL 5448190, at *1 (E.D.N.Y. Nov. 7, 2012). Under that rule, capacity is determined "by reference to the law of the state where the court is located" rather than the state of incorporation, Fed. R. Civ. P. 17(b)(3)(A), which the Board has previously held would require us to look to District of Columbia law on capacity. *Western States Federal Contracting, LLC v. Department of Veterans Affairs*, CBCA 4612(3359)-REM, 15-1 BCA ¶ 36,094, at 176,227, *rev'd on other grounds*, No. 2016-1042, 2016 WL 3774072 (Fed. Cir. July 15, 2016). Because a trade name is so closely tied to the corporate entity for which it serves as an alter ego, we find it more appropriate to consider EBS's capacity by reference to whether it could sue in its home state.

Fortunately, we need not resolve this conflict because the defect about which GSA complains, if it exists, is easily fixed. Pursuant to FRCP 17(a)(1), "an action must be prosecuted in the name of the real party in interest," which has generally been defined as "the person who, according to the governing substantive law, is entitled to enforce the right." 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *supra*, § 1543, at 475. It is clear from the record here that UFSC is the corporate contracting party, is in privity of contract with GSA, and is the proper real party in interest. It is also clear that EBS is the alter ego of UFSC. Generally, a tribunal "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action," Fed. R. Civ. P. 17(a)(3), and that rule has been applied in suits improperly captioned in a trade name in New York courts. *See, e.g.*, *Kroetz v. AFT-Davidson Co.*, 102 F.R.D. 934, 936-37 (E.D.N.Y. 1984); *Ragin v. Harry Macklowe Real Estate Co.*, 126 F.R.D. 475, 480-81 (S.D.N.Y. 1989). This rule, through which the substituted party's submission is treated as "relating back" for limitations period purposes to the original filing date of the suit or appeal, "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." Fed. R. Civ. P. 17 advisory committee notes, 1966 amendment. Although sovereign immunity issues might affect the availability of substitution in CDA cases in certain circumstances, *see Dual, Inc.*, ASBCA 53827, et al., 06-1 BCA ¶ 33,243, at 164,764, we see no reason to bar substitution when the entity that filed the original appeal is the assumed name of the real party in interest.[7]

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[7] To the extent that the Court of Claims' decision in *Mather Construction* and its progeny make capacity to sue a jurisdictional issue, it is one that the Court appears to have approached differently from other jurisdictional issues. Typically, subject-matter jurisdiction is determined by reference to "the time that a notice of appeal is filed." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,563, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016). While indicating that capacity is a jurisdictional requirement, the Court in *Mather Construction* held that capacity "is not only the power to bring an action, but is also the power to maintain it." *Mather Construction*, 475 F.2d at 1155. It recognized that, if an appellant loses its capacity to sue during the pendency of an appeal (through, for example, a suspension of the corporation's charter by the state of incorporation), the tribunal should afford the appellant time to correct the deficiency and regain its capacity before dismissing the appellant's case. *See id.* ("A motion for a continuance is normally granted when corporate incapacity is brought to the attention of the court so as to permit the party to cure his disability."). As one of our predecessor boards recognized, "*Mather* does not stand for the proposition that all actions of [an entity that lacks capacity] are a nullity, but merely that legal proceedings will be continued for a reasonable period to afford the [entity] an opportunity to rectify its condition." *Allied Production*

Although substitution is unlikely to relate back if the original appellant intentionally, knowingly, and with a lack of good faith filed in the wrong name, *see Lans v. Digital Equipment Corp.*, 252 F.3d 1320, 1328-29 (Fed. Cir. 2001), the mistake that Mr. Brown, UFSC's President and CEO, made in using his company's trade, rather than corporate, name is the type of honest mistake that the "relation back" rule is intended to cover. Plainly, to the extent that EBS is not a proper appellant on its own, it is understandable that a non-lawyer like Mr. Brown, who originally filed this appeal and served as the company representative (without the benefit of counsel) in prosecuting the appeal upon behalf of his company, would not realize that he had to use UFSC's corporate name in the caption of this appeal.

EBS has not filed a motion seeking to substitute or identify UFSC as the party appellant, but it has informed us that it will not object to such a substitution or recaptioning if the Board finds it appropriate. As set forth in FRCP 21, courts have the authority, *sua sponte*, to replace a misidentified party with the real party in interest in certain circumstances, even without the parties' acquiescence. *See, e.g.*, *Taylor v. Bank of America, N.A.*, No. 13-CV-0369, 2014 WL 1418321, at *1 n.1 (E.D. Wash. Apr. 14, 2014); *Zuk v. Gonzalez*, No. 07-CV-732, 2007 WL 2163186, at *2 (N.D.N.Y. July 26, 2007); *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1040-41 (N.D. Cal. 2006); *Reichenberg v. Nelson*, 310 F. Supp. 248, 251 (D. Neb. 1970). The boards of contract appeals have ordered such recaptioning in the past. *See, e.g.*, *Jardineria Iglesias, S.L.*, ASBCA 42967, 93-3 BCA ¶ 26,244, at 130,554; *Applied Precision Optics, Inc.*, ASBCA 21635, 77-2 BCA ¶ 12,695, at 61,607; *see Lewinger v. Department of Veterans Affairs*, CBCA 4794, 16-1 BCA ¶ 36,413, at 177,548 n.1. That is particularly appropriate in the type of situation here, where, because the assumed name in the case caption is the alter ego of the real party in interest, there is no issue as to whether the real party in interest had adequate timely notice or knowledge of the suit. *See Boai Zhong Yo Acupuncture Services, P.C. v. Dollar Rent A Car*, No. 2006-888, 2007 WL 3010595, at *1 (N.Y. Sup. App. Term Oct. 2, 2007) ("if a defendant has been actually served with the summons and complaint but is named therein only as a trade name, jurisdiction has been obtained and the action need not be dismissed, but the pleadings (and judgment) should be amended to substitute the real party in interest"); *Ralph Ferrara, Inc. v. Bermuda Limousine Co.*, 184 A.D.2d 301, 301, 584 N.Y.S.2d 313, 313 (N.Y. App. Div. 1992) (approving substitution of corporate real party in interest for "a party which existed only as a trade

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Management, Inc., & Richard E. Rowan, Joint Venture, DOT BCA 2466, 92-1 BCA ¶ 24,585, at 122,679 (1991); *see Management Technology, Inc.*, DOT CAB 73-28, et al., 74-1 BCA ¶ 10,490, at 49,637 (holding dismissal in abeyance for ninety days to provide appellant time to restore its corporate power to sue). "Even a suspension," or loss of capacity, "which precedes suit initiation is not fatal" if the capacity issue can be corrected during the suit. *Allied Production*, 92-1 BCA at 122,678.

name"). In fact, the change here is not really a substitution of one party for another, but merely the correction of "a misnomer of a party who was actually before the [Board] at all times under [its] assumed fictitious name." *Thune v. Hokah Cheese Co.*, 260 Iowa 347, 351, 149 N.W.2d 176, 178 (1967).

Because recaptioning this appeal to identify UFSC as the party appellant would resolve any question about the capacity of the appellant in this appeal, and because neither party objects, we recaption this appeal to name "United Facility Services Corporation dba Eastco Building Services" as the appellant. It is permissible to include UFSC's "doing business as" name in the case caption, following UFSC's name, for clarity and as an additional identification of the corporate real party in interest. *Lopinyukelis II, LLC v. Merchant Capital Funding, LLC*, No. 500478/12, 2013 WL 692958, at *3 (N.Y. Sup. Ct. Feb. 13, 2013).

III. The EBS Name on the Certified Claim

The appellant has indicated a concern that, if the name on the appeal is changed to reflect UFSC as the real party in interest, the appellant's name will not match the name on the certified claim, which was submitted solely in EBS's name. Changing the name of the appellant to USFC, the appellant fears, could create a jurisdictional defect. For its part, GSA has argued that the claim submission in EBS's name, without a reference to UFSC, renders the claim submission null and void. We do not see any problem with the claim having been submitted in the EBS trade name, and we see no jurisdictional issue in adding UFSC to the case caption here.

The rules that may bar an entity from using only its trade name to institute or maintain a suit or appeal do not apply to general business transactions. As previously discussed, contracts entered and transactions made using a trade name are enforceable against the corporate entity to which that trade name applies. *Dunn*, 564 F.2d at 354 n.12; 57 Am. Jur. 2d *Name* § 66; *see Gotthelf v. Shapiro*, 136 A.D. 1, 4, 120 N.Y.S. 210, 213 (N.Y. App. Div. 1909) (when entity signs mortgage in an assumed name, it is the same as if the entity had subscribed its own name and is binding upon the entity as the real party in interest). Further, GSA was aware at all times that UFSC and EBS were one and the same, as evidenced by the fact that, in its decision on EBS's claim, it addressed the decision to UFSC doing business as EBS. Accordingly, there was no problem with UFSC submitting a claim in its assumed name, given that the signatory, Mr. Brown, is UFSC's President and CEO, and his actions under the EBS moniker are binding upon UFSC. *See Cedar City Amusements, LLC v. Bartholomew County 4-H Fair, Inc.*, No. 10-CV-392, 2011 WL 1527917, at *4 (S.D. Ind. Apr. 20, 2011) (application using "doing business as" moniker is effective where reviewing entity was not confused about the real identity of other party to the contract). EBS's

submission of a claim was effective with regard to, and is binding upon, UFSC, and the contracting officer's decision upon that claim – addressed to UFSC doing business as EBS – was effective to start the clock on UFSC's appeal time. To the extent that UFSC may not use EBS's trade name (in lieu of its own) in the case caption of a lawsuit or appeal, that is a technicality that does not alter GSA's understanding of who was the real party in interest for purposes of claim submission. Accordingly, the fact that only the trade name that UFSC uses appeared on the claim has no effect upon our jurisdiction or authority to entertain an appeal captioned in UFSC's name, rather than the trade name.

Decision

For the foregoing reasons, GSA's motion to dismiss is **DENIED**. The caption for this appeal will be amended to reflect "United Facility Services Corporation dba Eastco Building Services" as the party appellant.

HAROLD D. LESTER, JR.
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge