UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED: February 9, 2021

CBCA 6433

1425-1429 SNYDER REALTY, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul Jay Cohen of Cohen Marraccini, LLC, Southampton, PA, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA; and Donald Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **ZISCHKAU**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Pending before us is the motion for summary judgment of respondent, the Department of Veterans Affairs (the VA), that seeks, as a matter of law, a ruling that appellant, 1425-1429 Snyder Realty, LLC (Snyder), is not entitled to costs under a supplemental lease agreement because, among other reasons, the agreement lacked consideration and was properly rescinded. Because we find that there are genuine issues of material fact regarding the parties' intentions when they executed the agreement, we deny the motion.

Background

On September 22, 2011, the VA and Snyder entered into a contract for leased space in Philadelphia, Pennsylvania. The contract required Snyder to provide:

> A fully built-out space as described, all services, utilities, maintenance, operations, alterations and other considerations, as set forth in the Solicitation for Offers (SFO) VA244-11-RP-0196 and all amendments. All costs associated with services, utilities, maintenance, repair, replacement, inspections and any other requirements specified in the lease. Lessor will obtain the parking permits from the DOT for the designated handicap parking for spaces in front of entrance to the property. Lessor will negotiate parking for VA at nearby parking facilities. Parking is reimbursable to Lessor at cost.

Upon completion of construction, the VA would occupy the first through fourth floors of the property, paying monthly rent at a rate of $36,677.08, for a fixed term of ten years and two five-year option periods.

On October 25, 2012, the parties executed a supplemental lease amendment (SLA), SLA0001, which stated:

> Reference Purchase Order 642C20709. Additionally, the amendment covers the additional consideration for unlimited access to the basement. The additional access increases the rental amount to cover the boiler room access for an additional consideration of $5,000.00 per month.

Four years later, the VA issued amendment P00015, which unilaterally rescinded SLA0001, including the additional monthly consideration of $5000. The contracting officer reasoned that SLA0001was redundant since the lease already provided for access to the basement and boiler room through FAR clause 552.270-10, Failure in Performance (Sept 1999) and FAR clause 552.270-9, Inspection-Right of Entry.

Snyder filed a claim with the contracting officer for $130,000, which represented back rent from November 2016, through December 2018, at $5000 per month. Snyder also requested an additional $5000 per month beginning January 1, 2019, for each month of unpaid rent going forward. In support of its claim, Snyder stated the following:

> Through Lease Amendment No. P00015, the VA improperly rescinded SLA0001 and unilaterally tried to amend the lease which reduces the rented space and the Lease payments by five thousand dollars ($5000.00) per month. . . . The VA has no right under the Lease Agreement to reduce the space and/or the monthly rent. Section 34 of the Lease Agreement states that: "(a) the Contracting Officer may at any time, by written order, make changes within the general scope of this Lease in any one or more of the following: . . . (4) Amount of space, provided the Lessor consents to the change." (Emphasis added). The Landlord does not consent to this change. Additionally, the parties met at the leased premises and it was determined that in fact, the VA was still using the space it wanted the credit for.

The contracting officer did not respond to Snyder's request for a final decision, and Snyder appealed to the Board the deemed denial of its claim. During discovery, Snyder explained that the true purpose of SLA0001 was not for unlimited access to the basement or the boiler room as indicated on the document itself, but rather, it was executed for the purpose of compensating Snyder for additional expenses that it incurred which were not part of the original scope of work. According to Snyder, during the build-out phase of the space, which houses a veterans rehabilitation center, there were significant cost overruns caused by the additional work requested by the VA, and to cover those costs, the parties executed SLA0001. The VA disputed this account based on a lack of evidence and urged the Board to deny the appeal because the rescission was proper.

Discussion

Before us is the VA's motion for summary judgment, which we decide based upon well-established guidance. The purpose of summary judgment is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999); *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986); *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, et. al., 20-1 BCA ¶ 37,533. A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139. When deciding a motion for summary judgment, all reasonable inferences and presumptions are resolved in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377.

Among other reasons cited as a basis for granting its motion, the VA contended that SLA0001 lacked consideration, that there was no meeting of the minds as to its purpose, and that Snyder produced no evidence of additional build-out costs. In opposing the VA's motion, Snyder argued that SLA0001 was a valid agreement between the parties, and that it should be upheld despite any concerns raised by the language in the document—which the VA drafted, signed, and complied with for four years.

Contract interpretation is a question of law generally amenable to summary judgment. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002). However, the Board has previously held that when matters of contract interpretation require us "to examine the conduct and the intent of the parties in order to resolve the issue, any genuine questions of material fact that arise will jettison the possibility of granting summary judgment to the moving party." *Mission Support Alliance LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657 (citing *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727).

The VA's interpretation of SLA0001 and FAR clauses 552.270-9 and 552.270-10, is that they provide for the same access, and that no additional square footage was intended by the parties when they executed the amendment. Snyder argues that they are not the same because SLA0001 provided for *unlimited* access to the basement and boiler room, whereas access under the FAR clauses was for the limited purpose of inspection or repair, which required prior notice for access. Snyder also noted that the VA was currently using the space for storage purposes, as demonstrated by a recent walkthrough of the space. The VA did not refute this allegation, but only stated that it was not advised to vacate the area, to which Snyder replied that it had no reason to evict the VA from the basement in light of their enforceable agreement under SLA0001.

While this case presents several perplexing issues, the one introduced by this motion is straightforward: whether a dispute exists concerning a material issue of fact. The question here is what the parties intended when they executed SLA0001. They have different views on that question, and the plain language of that amendment does not resolve the dispute. We note that the same VA contracting officer executed both the lease and SLA0001, and that the two FAR clauses at issue were terms of the lease at the time the amendment was signed. These facts cast doubt on the VA's redundancy claim and raise important questions of fact about the parties' motives in entering into such an arrangement and enforcing it over many years. Furthermore, until we know whether a grant of unlimited access to the basement and boiler room increased the amount of space under the lease, we cannot decide whether the VA's unilateral rescission of SLA0001 was improper or consistent with its authority—a question at the heart of this case.

There is also the matter of Snyder's allegation that SLA0001 served as compensation for an additional or alternate purpose other than that stated on the face of the document—an understanding wholly inconsistent with the amendment's language and absent in its claim to the contracting officer. Yet, without a contracting officer final decision or an affidavit from the contract specialist, we cannot find that there was no meeting of the minds between the parties when they executed SLA0001, especially since the parties' conduct evidenced compliance with its terms.

"The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created." *Systems Management & Research Technologies Corp. v. Department of Energy,* CBCA 4068, 16-1 BCA ¶ 36,333 (quoting *600 Second Street Holdings LLC v. Securities & Exchange Commission*, CBCA 3228, 13 BCA ¶ 35,396). Under the circumstances here, and in light of our duty to draw all reasonable inferences in favor of Snyder, additional investigation is required to ascertain the parties' intentions when they executed SLA0001. For these reasons, we find that genuine issues of material fact exist and preclude us from granting summary judgment.

Decision

The VA's motion for summary judgment is **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge