UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED: January 19, 2022

CBCA 6357, 6721

MELD, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Charles Rennick and Samuel C. DeFillippo of Robles, Rael & Anaya, P.C., Albuquerque, NM, counsel for Appellant.

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

Before Board Judges **BEARDSLEY** (Chair), **DRUMMOND**, and **CHADWICK**.

CHADWICK, Board Judge.

The respondent, General Services Administration (GSA), issued a decision purporting to terminate a lease for default. GSA asks the Board to rule on partial summary judgment that (1) GSA properly terminated the lease, (2) GSA did so "as of" the date that the asserted condition of default arose, and (3) the lessor and appellant, Meld, LLC (Meld), owes GSA rent that GSA paid while Meld was in default. Meld argues that GSA could not terminate the lease for default because GSA had previously ended the lease when the tenant agency vacated the building. The record before us is sparse and does not support summary judgment. Accordingly, we deny GSA's motion.

Background

These facts are undisputed except as noted. In 1997, GSA agreed to lease a building to be constructed in Albuquerque, New Mexico, as a Social Security Administration office. The lease was eventually novated to Meld. The lease stated that the term of occupancy would end in November 2018.

In April 2014, GSA notified Meld's predecessor that GSA would terminate the lease for the convenience of the Government effective in March 2015. Negotiations followed. Meld states that GSA notified the original lessor in May 2015 of GSA's intent to terminate the lease as of August 31, 2015. Meld cites as support for this statement, however, a letter that is not in the appeal file and is, therefore, not part of the record. *See* Board Rules 4, 9(a)(1)(i) (48 CFR 6101.4, .9(a)(1)(i) (2020)).[1] In July 2015, the original lessor advised GSA that it "intend[ed] to hold GSA responsible for damages in the amount of the remaining term of the lease should the Social Security Administration vacate the premises prior to the conclusion of the twenty (20) year lease agreement."

In September 2015, a GSA contracting officer wrote in a letter to Meld that the tenant agency had "vacated your premises . . . under" the lease and that, pursuant to an Adjustment for Vacant Space clause, "the operating rent of this lease will be reduced by $4.00 per rentable square foot, per annum. The total reduction of rent will be $101,016.00 per annum ($4.00 X 25,254 RSF) and will become effective September 1, 2015."

GSA states that "GSA continued to pay rent monthly after September 1, 2015." The only document cited by GSA to support this assertion, however, is a contracting officer's final decision, which the Board has repeatedly held we cannot treat as evidence in a case. *E.g.*, *CSI Aviation, Inc. v. Department of Homeland Security*, CBCA 6292, et al., 20-1 BCA ¶ 37,520 (citing cases); *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468. Meld generally denies the paragraph in which GSA says it paid the rent. If there is evidence of the payments in the record, GSA does not cite it.[2] The

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[1] By orders of the presiding judge, the "last day to supplement the appeal file" was in March 2021 and "[t]he appeal file will be the documentary evidence for the case" absent a "showing of good cause," which Meld has not attempted to make.

[2] *Cf. Albrechtsen v. Board of Regents of University of Wisconsin System*, 309 F.3d 433, 436 (7th Cir. 2002) ("Judges are not like pigs, hunting for truffles buried in the record." (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam))), *quoted in Olaplex, Inc. v. L'Oréal USA, Inc.*, 855 F. App'x 701, 712 (Fed. Cir. 2021); *Trace, Inc.*, ASBCA 56594, 09-1 BCA ¶ 34,128.

asserted fact is, therefore, not established and is genuinely in dispute for purposes of summary judgment. *See* Rule 8(f).

In March 2018, a GSA contracting officer emailed Meld that the space at issue "is currently occupied by" a school, and that "[t]his lease is being terminated effective August 9, 2017." Meld admits under Rule 8(f)(2) that it entered into a lease with the new tenant "effective as of August 9, 2017." Meld disputed the GSA termination, although the grounds on which it did so are unclear in the record.

On October 22, 2018, a GSA contracting officer determined in a final decision that Meld "materially breached the Lease terms by contracting for and consenting to the Charter School's occupancy and use of the Leased Premises" and "owes GSA the total amount of $218,392.08" for rent and tax reimbursement paid to Meld "from August 9, 2017 through February 28, 2018." Meld appealed from that decision in January 2019 (CBCA 6357). In February 2020, the Board consolidated that appeal with a related appeal by Meld regarding a claim for damages under the lease (CBCA 6721). Discovery in the combined case ended in the spring of 2021. The parties timely included forty-one exhibits in the Rule 4 appeal file. After engaging in mediation, the parties briefed GSA's motion for partial summary judgment from November 2021 to January 2022.

Discussion

We may grant summary judgment on all or part of a claim if the moving party shows it "is entitled to judgment as a matter of law based on undisputed material facts." Rule 8(f). A party opposing summary judgment need only show that "one or more" facts on which the moving party relies are "genuinely in dispute" and legally "material." *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1368 (Fed. Cir. 2006). A "non-movant is required to provide opposing evidence . . . only if the moving party has provided evidence sufficient, if unopposed, to prevail as a matter of law." *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1369 (Fed. Cir. 2006).

The record evidence cited to us does not support partial summary judgment for GSA. GSA asks us to rule "that it properly terminated its lease with the Appellant, and that it is entitled to a return of all rent that it paid after the Appellant leased the government's space to another tenant." The evidence summarized above, construed in Meld's favor, presents a genuine dispute of fact as to whether, as Meld asserts, the tenant agency vacated the space at the end of August 2015 and GSA attempted in September 2015 to revive the already abandoned lease with a unilateral vacant space adjustment. We can see from the scant record that the parties were discussing an end to the lease in mid-2015. As Meld writes, however, GSA "has not presented any evidence to support Meld's acceptance of [an] offer to invoke the vacant space provision in lieu of termination." Evidence that Meld continued to accept

rent from GSA after August 2015 would be strong and possibly decisive evidence that both parties treated the lease as continuing and not terminated. As noted above, however, GSA cites no cognizable evidence that the payments continued.

Without knowing whether GSA remained a valid lessee in March 2018 or October 2018, when it sent the notices of termination, we cannot determine whether those actions complied with the lease and are otherwise effective, as GSA bears the burden to prove. Evidence of GSA's conduct might also be relevant to GSA's burden to demonstrate damages, as we presently lack evidence that, if GSA paid rent for the vacant space after August 2015, it "paid the rent in reliance on the lease" rather than for some other reason. *See MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935. We will not speculate as to what further development of the record might show.

Decision

We **DENY** GSA's motion for partial summary judgment.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge