

In the United States Court of Federal Claims

No. 03-287C

Filed June 22, 2005

NOT TO BE PUBLISHED

ASSET 42302 LLC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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Breach of Contract;
Summary Judgment;
28 U.S.C. § 1491(a)(1);
RCFC 8(a);
RCFC 56(c).

Eugenia S. Nathanson, Washington, D.C., for plaintiff, Asset 42302 LLC.

Michael F. Kiely, Washington, D.C., for defendant, United States Postal Service.

MEMORANDUM OPINION AND ORDER

BRADEN, *Judge*.

RELEVANT FACTS AND PROCEDURAL BACKGROUND¹

A. Factual Background.

On June 27, 1991, First Lawrence Partnership leased Brightmoor Station, a postal facility in Detroit, Michigan to the United States Postal Service (“USPS”). *See* Am. Compl. Ex. A. The lease

¹ The relevant facts herein were derived from the following portions of the record: Plaintiff’s June 30, 2003 Amended Complaint (“Am. Compl.”); Defendant’s July 29, 2003 Answer (“Answer”); Plaintiff’s October 19, 2004 Motion for Summary Judgment (“Pl. MSJ”); Plaintiff’s December 22, 2004 Proposed Findings of Uncontroverted Fact (“Pl. Prop. Findings”); Defendant’s April 1, 2005 Opposition to Plaintiff’s Motion for Summary Judgment (“Gov’t Opp.”); Defendant’s April 1, 2005 Response to Plaintiff’s Proposed Findings of Uncontroverted Fact (“Gov’t Resp. to Pl. Prop. Findings”); and Plaintiff’s April 21, 2005 Reply Affidavit in Further Support of Summary Judgment (“Pl. Reply Aff.”).

was for the ten-year period of September 1, 1991 through August 31, 2001, and had no renewal options. *Id.*

In April 1997, Asset 42302 LLC (“Asset”)² purchased the real estate and building of the Brightmoor Station and assumed the June 27, 1991 lease. *See* Am. Compl. ¶¶ 2-3; *see also id.* at Ex. A, B. On or about November 1, 2000, Asset received notice of USPS’s intent to terminate the Brightmoor Station Lease as of November 30, 2000. *See* Am. Compl. ¶ 4; *see also id.* at Ex. B ¶ 2. On December 14, 2000, USPS and Asset entered into the “Detroit, Michigan Brightmoor Station Settlement Agreement” (“Settlement Agreement I”), wherein the parties mutually agreed to terminate the lease for Brightmoor Station on November 30, 2000:

in exchange for payment by the USPS in the amount of \$37,141.29 (inclusive of all interest) plus taxes due for the period of occupancy with each party to bear its own costs, attorney fees, and expenses. As part of the settlement . . . Asset agree[s] that [it] will not file or pursue any claim for restoration, monetary or otherwise, on the Brightmoor Station, Detroit Michigan property.

Am. Compl. Ex. B ¶ 5.

Settlement Agreement I further provides:

Upon satisfaction of the terms set forth in paragraph 5 . . . Asset releases, waives, and abandons all claims against the United States and the USPS, their officers, agents, and employees, arising out of or related to the claims referred to in paragraph 4 and/or to the termination of the lease, including any restoration claim, on the Brightmoor Station, Detroit, Michigan property, regardless of whether they were included in the claim, including but not limited to any claims for costs, expenses, attorney fees, compensatory damages, and exemplary damages.

Id. at ¶ 6.

On December 26, 2000, a principal of Asset obtained a key to Brightmoor Station from an employee of a new USPS station located across the street. *See* Pl. Reply Aff. ¶¶ 1, 6-7. Thereafter, Asset prepared and submitted a Personal Inspection Report (“Inspection Report”) detailing USPS’s alleged failure to maintain the plumbing system at the Brightmoor Station that caused: (1) flooding of 90% of the interior floor; (2) floor swelling; (3) damaged bathroom fixtures; and (4) water leaking out of the front window to the exterior. *See* Am. Compl. ¶ 7; *see also id.* at Ex. C.

Thereafter, on January 8, 2001, Asset and USPS signed a second Settlement Agreement (“Settlement Agreement II”), superseding Settlement Agreement I. *See* Gov’t Resp. to Pl. Prop.

² Asset 42302 LLC is a registered Limited Liability Company under the laws of the State of New York. *See* Am. Compl. ¶ 1.

Findings Ex. B-1. The Government's obligation to pay Asset \$37,141.29, inclusive of all interest, and other provisions of Paragraph 5 of Settlement Agreement I remained the same, but excluded the following language: "As part of this settlement, Mr. Spodek and Asset 42302 LLC agree that they will not file or pursue any claim for restoration, monetary or otherwise, on the Brightmoor Station, Detroit Michigan property." Am. Compl. Ex. B ¶ 5; *see also* Gov't Resp. to Pl. Prop. Findings Ex. B-1 ¶ 5. In addition, Paragraph 6 was amended to provide: "Asset . . . releases, waives, and abandons all claims against the United States and the USPS . . . arising out of or related to the claims referred to in paragraph 4 and/or to the termination of the lease, on the Brightmoor Station, Detroit, Michigan property[.]" Gov't Resp. to Pl. Prop. Findings Ex. B-1 ¶ 6; *see also* Am. Compl. Ex. B ¶ 6.

On June 13, 2002, Asset filed a claim letter with USPS. *See* Am. Compl. Ex. D. On July 25, 2002, USPS denied Asset's June 13, 2002 claim. *See* Am. Compl. Ex. E. On August 20, 2002, Asset submitted a revised claim reciting additional damages due. *See* Am. Compl. Ex. F. On September 9, 2002, Asset's revised claim also was denied:

This is the final decision of the contracting officer pursuant to the Contract Disputes Act of 1978 and the clause of your contract entitled Claims and Disputes. You may appeal this decision to the Postal Service Board of Contract Appeals by mailing or otherwise furnishing written notice . . . to the contracting officer within 90 days from the date you receive this decision. . . . Alternatively, you may bring an action directly in the United States Court of Federal Claims within 12 months from the date you receive this decision.

Am. Compl. Ex. G.

B. Procedural Background.

On February 10, 2003, Asset timely filed a Complaint in the United States Court of Federal Claims alleging that USPS breached the Settlement Agreement I by failing to vacate and surrender Brightmoor Station, as required therein, *i.e.*, on November 30, 2000. *See* Am. Compl. ¶¶ 4, 6. The case was assigned to the Honorable Emily C. Hewitt. On June 30, 2003, Asset filed an Amended Complaint seeking damages:

- (a) pursuant to the Settlement Agreement paragraph 5, the ten percent discount in rent granted to the USPS for its early vacating must be reimbursed for the months of December 2000 and January 2001; and
- (b) pursuant to the Settlement Agreement paragraph 5, the tax reimbursements for December 2000, and January, 2001 must be awarded to Asset 42302 LLC; and

- (c) the difference between the insurance payment received by Asset 42302 LLC as a result of the cascading water leak, and the actual loss incurred by Asset 42302 LLC as a result of damage to the premises while under the USPS' control; and
- (d) utility (including but not limited gas, electric, water and sewer use[])] payments for December 2000, and January 2001; and
- (e) interest upon the foregoing.

Am. Compl. ¶ 8(a)-(e).

On July 29, 2003, the Government filed an Answer.

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On August 15, 2003, the case was reassigned to the undersigned judge. On October 24, 2003, the parties filed a Joint Preliminary Status Report. On October 30, 2003, the court issued a Scheduling Order establishing: April 30, 2004 as the end of factual discovery; June 30, 2004 as the end of expert witness discovery; July 31, 2004 as a deadline for dispositive motions; and October 4, 2004 for commencement of trial.

On March 23, 2004, the court issued a Pretrial Order: scheduling the pre-trial conference for September 27, 2004; requiring the Government to respond to any motions filed by plaintiff by September 7, 2004; and plaintiff to reply by September 14, 2004. On April 30, 2004, USPS filed an Unopposed Motion for Extension of Time to Conduct Fact Discovery until June 30, 2004. On May 5, 2004, the court granted the motion.

On August 30, 2004, USPS filed an Unopposed Motion for a Status Conference. On September 13, 2004, the court convened a Status Conference and thereafter issued a September 14, 2004 Scheduling Order requiring all Dispositive Motions and Counterclaims to be filed by October 12, 2004.

On October 19, 2004, Asset filed a Motion for Summary Judgment, asserting that the USPS failed to conclude fact discovery, but failed to file Proposed Findings of Uncontroverted Fact. On October 19, 2004, the court ordered Asset to file proposed findings, as required by RCFC 56(h)(1), but Asset failed to do so. On November 4, 2004, the court issued another Scheduling Order and again ordered Asset to file Proposed Findings of Uncontroverted Fact by November 12, 2004.

On December 2, 2004, the court convened a status conference to ascertain the cause of plaintiff's continued failure to file Proposed Findings of Uncontroverted Fact. On December 3, 2004, the court issued a Scheduling Order to allow Asset leave to file Proposed Findings of Uncontroverted Fact by January 3, 2004. On December 22, 2004, Asset filed the required Proposed

Findings of Uncontroverted Fact. The same day, the Government filed a Motion for Extension of Time until January 31, 2005 to respond to Asset's October 19, 2004 Motion for Summary Judgment. On January 24, 2005, the court granted the Government's motion.

On January 31, 2005, Asset filed a Motion to Stay the Proceedings to Conduct Settlement Discussions. On February 2, 2005, the court granted the Motion to Stay and ordered a Status Report by March 17, 2005. In addition, the Government was ordered to respond to Asset's Motion for Summary Judgment by April 1, 2005, if a settlement was not reached prior to that date. The Government filed a Status Report on March 17, 2005, reporting that the parties had not reached a settlement, although they had conducted discussions and planned to conduct more discussions in the future.

On April 1, 2005, the Government filed an Opposition to Plaintiff's Motion for Summary Judgment and Response to Plaintiff's Proposed Findings of Uncontroverted Fact. On April 21, 2005, Asset filed a Reply Affidavit in Further Support of Summary Judgment.

DISCUSSION

The United States Court of Federal Claims is authorized under the Tucker Act, 28 U.S.C. § 1491(a)(1), to render judgment and money damages on any claim against the United States based on the United States Constitution, an Act of Congress, a regulation of an executive department, or an express or implied contract with the United States. *See United States v. Testan*, 424 U.S. 392, 397-98 (1976). This Act, however, is only a "jurisdictional statute" and does not create any substantive right for monetary damages. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). Therefore, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages in order for the court to have jurisdiction. *See Khan v. United States*, 201 F.3d 1375, 1377 (Fed. Cir. 2000); *see also James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998).

The Amended Complaint seeks damages but fails to state a legal claim or cause of action, a jurisdictional prerequisite. *See* RCFC 8(a). To the extent the Amended Complaint seeks to enforce Section 5 of Settlement Agreement I, Asset's rights to enforce the terms thereof were superseded by Settlement Agreement II.

Pursuant to Settlement Agreement II, the Government was required to pay plaintiff "\$37,141.29 (inclusive of all interest) plus taxes due for the period of occupancy[.]" *See* Gov't Resp. to Pl. Prop. Findings Ex B-1 ¶ 5. The Amended Complaint does not allege that this amount was ever paid to Asset. The Government does not claim otherwise in the July 29, 2003 Answer or April 1, 2005 Opposition. If no consideration was paid by the Government, Settlement Agreement II is not a contract under which either party may assert any rights. The June 27, 1991 lease is the only contract in the record before the court, pursuant to which plaintiff may have a cause of action for breach. At present, however, the Amended Complaint fails to set forth a legal claim regarding the June 27, 1991 lease over which the court has jurisdiction, much less over Asset's October 19, 2004

Motion for Summary Judgment. On the other hand, if the Government paid \$37,141.29, the Amended Complaint needs to reflect that fact and specify that plaintiff is seeking to enforce Settlement Agreement II.

The court will grant plaintiff leave to file a Second Amended Complaint stating a legal claim or cause of action complying in all respects with RCFC 8(a) on or before September 1, 2005 and to amend Asset's October 19, 2004 Motion for Summary Judgment and Proposed Findings of Fact. If plaintiff fails to comply, this case will be dismissed. *See* Answer ¶ 15 (affirmative defenses).³ The Government will have 30 days thereafter to conform the April 1, 2005 Opposition and Proposed Findings in Response.

CONCLUSION

The Clerk of Court is ordered to enter an order consistent with this Memorandum Opinion.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge

³ Although Asset is represented by counsel, it is apparent to the court that counsel does not understand the fundamentals of drafting a breach of contract complaint, nor appears to have any interest in complying with the rules of the court. Therefore, the court is treating the Amended Complaint as one filed by a *pro se* plaintiff. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980). The court will not afford Asset another opportunity to file an Amended Complaint that complies with basic pleading requirements of our rules.