In the United States Court of Federal Claims

Case No. 01-220C
(Filed: September 13, 2005)
NOT TO BE PUBLISHED

****
INVERSA, S.A. *
*
and *
*
ASSEMBLY OF TORRE MIRAMAR *
CONDOMINIUM, *
Plaintiffs, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *
*
****

Jon W. van Horne, Gaithersburg, M.D., Counsel for Plaintiffs.

William K. Olivier, Commercial Litigation Branch, Department of Justice, Washington, D.C., attorney of record for the Defendant. With him on the briefs were ***Peter D. Keisler***, Assistant Attorney General, ***David M. Cohen***, Director, ***Robert E. Kirschman, Jr.***, Assistant Director, and ***James W. Poirier***, Attorney.

Tahmineh I. Maloney, law clerk.

OPINION

BASKIR, Judge.

This case concerns disputes arising out of the landlord-tenant relationship between the U.S. Department of State, Office of Foreign Buildings Operations (FBO), and the Plaintiffs. In Count Two of the Complaint, the Plaintiffs allege that the United States breached the terms of a Settlement Agreement which required it to make "security and safety enhancements" to the leased premises in excess of $2,000,000.

On September 15, 2004, the Defendant filed its Motion for Partial Summary Judgment Regarding Count Two. In its motion, the Defendant proffered evidence that it spent over $3.3 Million on security and safety enhancements in accordance with the terms of the Settlement Agreement.

After extensive briefing, including supplemental briefing on Panamanian law, we conclude that the Plaintiffs failed to create a dispute of material fact with respect to the Defendant's expenditures. **Accordingly, we hereby GRANT the Defendant's Motion for Partial Summary Judgment Regarding Count Two and find that the Defendant spent over $2,000,000 on security and safety enhancements in accordance with the terms of the Settlement Agreement.**

Standard of Review

We apply the well-known legal standards for resolving motions for summary judgment. *See generally* Rule 56 of the Rules of the U.S. Court of Federal Claims (RCFC); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986). One precept precludes a decision on the merits of the motion if material facts are in dispute. RCFC 56(c). However, the disputed fact must be material to the issue. *See Anderson*, 477 U.S. at 247-48 ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact").

The Plaintiffs allege that disputes of material fact exist that would preclude this Court from granting the Defendant's Motion for Summary Judgment. Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A non-moving party may not rest upon the pleadings themselves. *Id.* Nor may it establish a factual dispute merely by disagreeing with the movant's assertion, or by a general denial: "[t]he party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of fact or facts set forth in detail in an affidavit by a knowledgeable affiant." *Barmag Barmer Maschinenfabrik AG v. Murata Machincery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984). "Mere denials or conclusory statements are insufficient." *Id.* The non-movant must offer contrary facts, putting the movant's assertion in doubt, and requiring a resolution by the trier of fact.

Discussion

On August 17, 1990, the FBO entered into a Settlement Agreement with the owners of ten floors of the Torre Miramar Building and others (Owners) in order to resolve disputes regarding a pre-existing lease for space in the Torre Miramar Building, located in the City of Panama, Republic of Panama.

The Settlement Agreement provided for the execution of a new lease:

> 3. Execution of Permanent Lease. Simultaneously with the execution of this Agreement, FBO and the Owners shall execute the permanent lease for ten floors of the Torre Miramar Building. The initial term of the permanent lease runs from March 15, 1990 through March 14, 1998. The rent for the first six years of the initial term of the permanent lease is the sum of Three Million Two Hundred Twenty Two Thousand Four Hundred Eighty Six Dollars ($3,222,486.00), which amount is included in the settlement amount of $7,853,000.00.

Settlement Agreement at ¶ 3. The Settlement Agreement also included a provision requiring the FBO to expend $2,000,000 in security and safety enhancements:

> 6. Occupancy and Enhancement Project. As of April 9, 1990, FBO was occupying 366.42 square meters of the ground floor and all rentable areas of floors one through four and six. As of the date of the execution of the Memorandum of Negotiations, FBO took possession of the remaining areas as provided in the permanent lease and began installation of security and safety enhancements to the building. *FBO has budgeted and shall expend during the initial term of the permanent lease for the security and safety enhancements an amount in excess of $2,000,000.*

Settlement Agreement at ¶ 6 (emphasis added).

The Defendant presents three arguments in support for its motion for summary judgment. First, the United States is entitled to summary judgment because, in accordance with the lease, it spent in excess of $2,000,000 for security and safety enhancements. Alternately, the Defendant argues that the Plaintiffs' claims are barred by the doctrines of accord and satisfaction and waiver or estoppel - we note that the briefing of these arguments relies, inappropriately, on American law. *See* Settlement Agreement, ¶ 18.2 (requiring the agreement to be interpreted and construed in accordance with the laws of the Republic of Panama).

In support of its motion, the Defendant presented undisputed evidence of expenditures that it categorizes as security and safety expenditures totaling $3,312,913.33. The types of expenditures listed by the Defendant include the installation of security doors and windows, hardline walls, fire alarm systems, security alarm systems, emergency lighting, and asbestos abatement.

The Plaintiffs concede that the "Defendant's obligation to restore the premises is not an issue under Count Two." *Id.* at 14. Despite any assertions to the contrary by their experts in latter papers, in their opposition the Plaintiffs did not argue that the Defendant's breach included a claim for a failure to construct a stairway. *Id.* at 11 ("Plaintiffs are not arguing that there was an enforceable contractual obligation on Defendant to construct the stair tower as originally conceived in 1990 and 1991...").

The Plaintiffs oppose the Defendant's motion on the grounds that they disagree with the Defendant's definition of security and safety enhancements:

> The phrase of the Settlement Agreement, "security and safety enhancements to the building," is not defined in the Settlement Agreement and must be interpreted in the context of the contemporaneous circumstances of the execution of the Settlement Agreement and the Lease and consistently with the expectations of the parties at the time of the execution of the Settlement Agreement and the Lease.

Pl.'s Opp. (Oct. 14, 2004) at 9.

The Plaintiffs define the meaning of "security and safety enhancements" as "refer[ring] to the expectations of potential commercial lessees in Panama." Pl.s' Opp. at 2. Accordingly, they rely on "experts" in that field - experts that offer no accounting for the items that in their opinions failed to enhance the property.

The Plaintiffs offer no persuasive substantiation for this "definition" and we do not believe it is an accurate statement of Panamanian law. But even assuming this definition, the Plaintiffs utterly fail to refute the Defendant's well-documented expenditures by presenting specific dollar amounts in dispute. Nor do they dispute the actual expenditure of those amounts. We have no basis to determine whether the Plaintiffs are disputing expenditures that cost $1,000 or $1,000,000 in total.

We find that the Plaintiffs have attempted to create disputes of fact, but have done so in a legally inadequate manner. Rule 56(h)(3) states:

> In determining any motion for summary judgment, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established, except to the extent that such material facts are controverted by affidavit or other written or oral evidence.

The Plaintiffs fail to offer evidence contrary to the Defendant's assertion that it expended over $2,000,000 on security and safety enhancements. They quibble with the Defendant's definition while failing to provide the Court with *any* evidence that their interpretation would result in a finding that the Defendant breached the contract by failing to expend $2,000,000. For Rule 56 purposes, the Plaintiffs' denial is only a general denial and insufficient to create a dispute of fact.

Accordingly, we hereby GRANT the Defendant's Motion for Partial Summary Judgment on Count Two.

IT IS SO ORDERED.

LAWRENCE M. BASKIR
Judge