In the United States Court of Federal Claims

No. 04-1569C
(Filed: June 25, 2010)

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MNS WIND COMPANY, LLC *
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Plaintiff, *
*
v. *
*
THE UNITED STATES, *
*
Defendant. *
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ORDER

This case is before the Court on Defendant's Motion for Reconsideration on Liability or, in the Alternative, Summary Judgment on Damages. For the reasons explained below, both the Motion for Reconsideration and the alternative Motion for Summary Judgment are denied.

I. Motion for Reconsideration Regarding Liability

On May 15, 2009, the Court granted partial summary judgment to MNS Wind Company, LLC ("MNS"), holding that the Government is liable to MNS for breaching an easement agreement that was to allow MNS to develop a wind-energy farm on a former nuclear testing site in Nevada. *MNS Wind Co. v. United States*, 87 Fed. Cl. 167 (2009). The Court found that by refusing to complete a review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Government failed to perform a condition precedent that it had promised to perform, thereby breaching the parties' agreement. *MNS Wind Co.*, 87 Fed. Cl. at 171. Approximately nine months later, the Government moved for reconsideration of the Court's decision. Def.'s Mot. 6.

Reconsideration of a prior decision by the Court is grounded in Rule 59(a)(1) of the Rules of the U.S. Court of Federal Claims ("RCFC").[1] The decision whether or not to grant a

[1] RCFC 59(a)(1) provides:

> The Court may . . . grant a motion for reconsideration on all or some of the issues—and to any party—as follows:
> (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court;
> (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or

motion for reconsideration is in the sound discretion of the trial court. *Yuba Natural Res. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 73 Fed. Cl. 154, 157 (2006); *Henderson County Drainage Dist. No. 3 v. United States*, 55 Fed. Cl. 334, 337 (2003); *Franconia Assocs. v. United States*, 44 Fed. Cl. 315, 316 (1999); *Fru-Con Constr. Co. v. United States*, 44 Fed. Cl. 298, 300-01 (1999); *Seldovia Native Assoc. Inc. v. United States*, 36 Fed. Cl. 593, 594 (1996).[2] The court must exercise extreme care in deciding such a motion. *See Carter v. United States*, 518 F.2d 1199, 1199 (Fed. Cir. 1975); *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Seldovia Native Assoc.*, 36 Fed. Cl. at 594. The purpose served is not to afford a party dissatisfied with the result an opportunity to reargue its case. *Roche v. District of Columbia*, 18 Ct. Cl. 289, 290 (1883); *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Seldovia Native Assoc.*, 36 Fed. Cl. at 594; *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993); *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992). A motion for reconsideration "is not intended to give an unhappy litigant an additional chance to sway the court." *Circle K Corp. v. United States*, 23 Cl. Ct. 659, 664-65 (1991); *see also Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Bishop*, 26 Cl. Ct. at 286.

The moving party must support its motion for reconsideration by a showing of exceptional circumstances justifying relief based on a manifest error of law or mistake in fact. *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Franconia Assocs.*, 44 Fed. Cl. at 316; *Fru-Con Constr.*, 44 Fed. Cl. at 300;; *Seldovia Native Assoc.*, 36 Fed. Cl. at 594; *Principal Mut. Life*, 29 Fed. Cl. at 164; *Bishop*, 26 Cl. Ct. at 286. "[T]he United States Court of Federal Claims permits reconsideration for one of three reasons: (1) that an intervening change in the controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) that the motion is necessary to prevent manifest injustice." *Parsons ex rel. Linmar Prop. Mgmt. Trust v. United States*, 174 Fed. Appx. 561, 563 (Fed. Cir. 2006); *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Bishop*, 26 Cl. Ct. at 286.

MNS opposes the Government's Motion for Reconsideration, arguing that the Motion is untimely. Pl.'s Opp'n 2. Paragraph 3(e) of the Court's Special Procedures Order requires that all motions for reconsideration be filed within 10 days. Special Procedures Order 3, Mar. 9, 2009. The Government fails to provide a sufficient justification for filing this motion out of time. It does not appear that the motion comes in response to any new factual discovery or legal development. Rather, the Government merely disagrees with or misunderstands the Court's analysis. The Government claims that good cause exists for the Court to waive its timeliness rule because otherwise the Court will "allow[] a legal error to go uncorrected until appeal." Def.'s Reply 2. However, the Government fails to convince the Court that a legal error exists.

(C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

[2] Although the cases cited in this paragraph and the next predate the current version of RCFC 59(a)(1), the substance of the rule remains unaltered.

The Government argues that reconsideration is warranted because "[t]he Court's analysis did not consider whether the United States, by terminating the NEPA process, *unjustly* prevented the occurrence of a condition precedent." Def.'s Mot. 8 (emphasis added). The Government explains, "the 'Prevention Doctrine' applies only where a party *unjustly* prevents the occurrence of a contractual condition." *Id.* at 7. The Government maintains that it was justified in terminating NEPA prematurely because it did so to keep MNS, which was paying for the NEPA studies, from incurring further costs unnecessarily. *Id.* at 9.

But whether the Government was right or wrong to terminate the NEPA process prematurely bears little on the question of whether the Government did or did not breach the agreement. "[C]ontract liability is strict liability." Richard A. Posner, *Economic Analysis of the Law* 128 (7th ed.); *XCO Int'l Inc. v. Pac. Scientific Co.*, 369 F.3d 998, 1002 (7th Cir. 2004) ("liability for breach is strict"); *Spalding & Son, Inc. v. United States*, 28 Fed. Cl. 242, 248 (1993) ("we begin by noting that contract liability is generally equated with strict liability"). "[C]ontract breakers often are innocent in a moral sense." *XCO Int'l Inc.*, 369 F.3d at 1002. A contract breaker who does so in the name of efficiency or mitigation may not be doing anything wrongful but still be held liable to compensate the non-breaching party. *See id.* at 1001 (explaining why efficient breaches should be encouraged).

Moreover, the Government is complaining about misapplication of a doctrine that was never actually applied by the Court. The Government claims that the Court erred in applying the "prevention doctrine." Def.'s Mot. 7-8. Yet the prevention doctrine, though rooted in the same fundamental principle that the Court found applicable, was never actually applied in this case. "The prevention doctrine is a generally recognized principle of contract law according to which if a promisor prevents or hinders fulfillment of a condition to his performance, the condition may be waived or excused." *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000).

In this case, the Court found that the circumstances presented did not warrant application of the prevention doctrine. Here, the NEPA condition was never waived. MNS never sought to treat it as having been waived, and it is doubtful that such a statutory obligation even could have been waived by conduct. As these circumstances suggest, waiver of the condition is not the only possible consequence of its nonoccurrence. Another possibility is that the "failure to perform a condition precedent may be construed as a breach of contract." *MNS Wind Co.*, 87 Fed. Cl. at 171 (quoting *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628, 633 (7th Cir. 1992)). Here, the Court found that it was appropriate to construe the Government's refusal to perform the NEPA condition as a breach. *Id.*

Certainly, the rule providing for the Court to construe this sort of nonperformance as a breach is rooted in the same "principle of fundamental justice" as the prevention doctrine. George A. *Fuller Co. v. Brown*, 15 F.2d 672, 678 (4th Cir. 1926) (quoting 2 Williston on Contracts, § 677). That is, "if a promisor is himself the cause of the failure of performance . . . of a condition upon which his own liability depends, he cannot take advantage of the failure." *Id.* (quoting Williston, § 677). But the branches of this principle diverge as it is applied in varying circumstances. The prevention doctrine is particularly appropriate to apply when the

contract called for a third party to perform a condition and the question becomes whether one of the contracting parties prevented that third party's performance. *See* 8 Corbin on Contracts (Conditions) § 40.17 ("Promises may be conditional on approval by a third person. Cases deal similarly with one party's prevention of such approval."). In such circumstances, the nature of the prevention may require detailed analysis and factors including whether the contracting party's actions were justified may well be relevant.

In this case, by contrast, the Government's contractual obligation to complete the NEPA process rested entirely with the Government and not some third party. Inquiring into whether the Government "prevented" the condition's performance would have been silly for it was completely clear that the Government itself flatly refused to perform its own obligation. *See MNS Wind Co.*, 87 Fed. Cl. at 170. It was clear to the Court that the manner in which the Government announced it would not perform[3] the NEPA condition it had undertaken a duty to perform is properly construed as a breach of contract. The Government's Motion for Reconsideration, filed untimely and without sufficient justification, is denied.

II. Motion for Summary Judgment Regarding Damages

Alternatively, the Government asks the Court to grant summary judgment in its favor regarding damages, asserting that its breach did not result in any damages to MNS. Def.'s Mot. 11. Summary judgment is appropriate when there is "no genuine issue as to any material fact" and the movant is "entitled to judgment as a matter of law." Rule 56(c)(1) of the Rules of the United States Court of Federal Claims; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The Government asserts that its breach resulted in no damages to MNS. Def.'s Mot. 11. In the Government's view, this is because had the NEPA process been completed, the "no-action" alternative would have been selected. *Id.* Thus, "no wind farm would have been constructed." *Id.* at 12.

While the Court holds no doubt that the Government was going to prohibit implementation of the project contemplated by the easement, the Government seems to miss the point. Neither in its two paragraph argument here, *id.* at 11-12, nor at any time previously has the Government been able to explain how it could have accomplished this without either compensating MNS or rendering itself liable for breach of contract. Accordingly, the Government has failed to demonstrate entitlement to judgment as a matter of law. Its Motion for Summary Judgment regarding damages is denied.

[3] The Court's conclusion that the circumstances presented warrant construing the Government's nonperformance as a breach is bolstered by considering that had MNS elected to do so, it could have obtained the same liability judgment by characterizing the Government's actions as a repudiation. *See Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 608 (2000) (repudiation creates a claim for total breach).

III. Request for Clarification Regarding the Measure of Damages

Finally, the Government asks the Court to clarify that "if damages must be addressed in this action, ordinary breach of contract principles apply." Def.'s Mot. 12. "MNS agrees that the Court should determine the correct measure of MNS' damages in advance of trial." Pl.'s Opp'n 14. "Resolving this issue now will allow the parties to focus their damages experts on the crucial damages calculation, and avoid wasting time and money on other theories that ultimately will not be permitted at trial," MNS advises. *Id.*

While the Court shares the parties' desire to avoid unnecessary costs, it can only offer limited guidance at this stage. As the parties are aware, MNS filed a Complaint alleging a breach of contract. Compl. ¶¶ 44-49. MNS then moved for partial summary judgment on the basis that the Government breached the parties' agreement. Pl.'s Mot. for Partial Summ. J. 1, Oct. 5, 2005 ("MNS Wind seeks a judgment that the United States . . . materially breached the agreement"). The Court granted MNS the judgment it sought on contractual liability. *MNS Wind Co. v. United States*, 87 Fed. Cl. 167, 168 (2009). Thus, the Court now expects MNS to present proof of its damages organized around one or more accepted theories of contract damages. *See United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) ("damages are always the default remedy for breach of contract").

In its brief, MNS argues that "just compensation pursuant to eminent domain law is the correct measure of the damages the United States owes to MNS." Pl.'s Opp'n 14. However, MNS ties this theory directly to the contract, explaining that its "damages should be determined in accordance with the express intent of the parties as stated in the plain language of the Easement." *Id.* Without question, contracting parties have power to fix liquidated damages by contract. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

However, it may be helpful to the parties to note that, while recognizing that MNS's eminent domain theory has yet to be fully explained, the Court is somewhat mystified by MNS's apparent dedication to it. MNS explains that under its proposed standard, it would receive the amount a willing buyer would pay a willing seller at the time of the taking. Pl.'s Opp'n 17-18. If, at the relevant time, it had become clear that the Government would not permit the easement to be used to build a wind farm, the Court wonders how much value a potential buyer could have seen in an easement providing for construction of a wind farm.

Notwithstanding its curiosity, the Court reiterates that it has not yet been fully presented with this theory, or any other for that matter. On the information presented thus far, the Court sees no basis to exclude this theory or any other as impermissible. It is MNS's prerogative to advance any and all theories of contract liability it deems appropriate. Nonetheless, the parties should keep in mind that some theories carry a lower likelihood of success than others. For example, expectancy damages, including lost profits, are notoriously difficult to recover based on breach of a government contract. *See, e.g.*, *Glendale Fed. Bank v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004) ("experience suggests that it is largely a waste of time and effort to attempt to prove [expectation] damages").

In short, the Court is unable at this stage to either endorse or exclude any particular theory of contract damages. Regrettably, preparation of alternative theories of damages is often a cost of litigation. The Court applauds the parties' earlier efforts to reach a settlement and in light of the foregoing comments, suggests to the parties that they may both be well-served to explore or re-explore a settlement based on reliance damages.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge