In the United States Court of Federal Claims

No. 11-191C

(Filed: July 13, 2012)

(NOT TO BE PUBLISHED)

****

COAKLEY & WILLIAMS CONSTRUCTION, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

****

Barry J. Miller, Benesch Friedlander Coplan & Aronoff LLP, Cleveland, Ohio, for plaintiff.

Jessica R. Toplin, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With her on the motion were Stuart F. Delery, Acting Assistant Attorney General, Civil Division, Jeanne E. Davidson, Director, and Todd M. Hughes, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

ORDER

LETTOW, Judge.

Pending before the court is the United States' ("the government's") Motion to Dismiss for Failure to Prosecute, filed June 25, 2012. The government seeks dismissal of plaintiff's complaint with prejudice for failure to prosecute pursuant to Rule 41(b) of the Rules of the Court of Federal Claims ("RCFC").

BACKGROUND

On March 28, 2011, Coakley & Williams Construction, Inc. ("Coakley & Williams"), filed a complaint in this court disputing an adverse decision of a contracting officer on a certified claim, as provided in 28 U.S.C. § 1491(a)(2) and 41 U.S.C. § 7104(b)(1). Coakley & Williams's claim is a pass-through brought on behalf of and for the benefit of its subcontractor, L.H.

Cranston & Sons, Inc. ("Cranston"). Compl. ¶ 4. Coakley & Williams alleges that the National Security Agency materially breached a contract by failing to pay for power equipment that had been purchased by Cranston to satisfy contractual obligations. Compl. ¶¶ 39-42. By "de-exercising" an option in the contract, Coakley & Williams contends that the government constructively terminated an option in the contract for convenience, costing Cranston nearly $2 million. Compl. ¶¶ 44-50. It avers that the contracting officer's denial of its certified claim was "unreasonable, an abuse of discretion, and/or not in accordance with the terms of the Contract and the relevant law and facts." Compl. ¶ 52. In addition, Coakley & Williams seeks an equitable adjustment for costs incurred in storing and maintaining the power equipment purchased by Cranston. Compl. ¶ 54.

Following commencement of this action, the entirety of Cranston's assets were liquidated and sold. As a result, Cranston's monetary claims were assigned to its lender. Due to this assignment, Coakley & Williams's counsel, Barry J. Miller, reportedly became unable to secure his continued representation of plaintiff. *See* Pl.'s Mot. to Withdraw as Counsel at 2. The lender's attorneys communicated to Mr. Miller that they were conducting their own analysis of the claim, that they did not want the case dismissed, and that Mr. Miller could withdraw as counsel. *Id.* Ex. A-2, at 1. Consequently, on February 6, 2012, Mr. Miller moved to withdraw as counsel for Coakley & Williams.

Because a corporation must be represented by counsel, *see* RCFC 83.1(a)(3), (c)(1), and no affidavit of substitute counsel was filed with the motion, *see* RCFC 83.1(c)(4), this court denied the plaintiff's motion to withdraw as counsel on February 7, 2012. Coakley & Williams was given sixty days, until April 9, 2012, to obtain substitute counsel or else face an order to show cause why the case should not be dismissed for failure to prosecute. Order of Feb. 7, 2012, ECF No. 15. Coakley & Williams has failed to respond to the court's order to obtain substitute counsel.

On June 11, 2012, 63 days after the court's deadline to obtain counsel, the government corresponded with the lender's attorneys and Mr. Miller seeking clarification "as [to] whether plaintiff intends to proceed with this litigation." Def.'s Mot. to Dismiss for Failure to Prosecute Ex. A, at 1. In its letter, the government's counsel notified plaintiff that it would consider filing a motion to dismiss for failure to prosecute if the plaintiff failed to respond by June 18, 2012. *Id.* When Coakley & Williams failed to respond, the government filed a motion to dismiss for failure to prosecute on June 25, 2012.

ANALYSIS

A plaintiff's failure to comply with filing obligations arising under the court's rules or its failure to respond to the court's orders may result in the dismissal of its case for failure to prosecute under RCFC 41(b). *See Julien v. Zeringue*, 864 F.2d 1572, 1574-75 (Fed. Cir. 1989). Such a dismissal may be entered on the court's initiative or on the defendant's motion. RCFC 41(b). Both an order to show cause and a motion to dismiss provide the plaintiff with sufficient notice that a dismissal is imminent and that failure to respond will likely be fatal to its case. *See*

Kadin Corp. v. United States, 782 F.2d 175, 176 (Fed. Cir. 1986); *Carpenter v. United States*, 38 Fed. Cl. 576, 578 (1997).[1]

Corporations must be represented by counsel to bring and pursue a claim in this court. *See* RCFC 83.1(a)(3). A corporation's failure to be represented by counsel results in dismissal of the case. *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001). A plaintiff corporation should be given sufficient time to obtain substitute counsel before the court acts to dismiss the case, but ultimately the court cannot waive compliance with RCFC 83.1. *See id*. (citing *Richdel, Inc. v. Sunspool Corp.*, 699 F.2d 1366 (Fed. Cir. 1983); *Finast Metal Prods., Inc. v. United States*, 12 Cl. Ct. 759, 762 (1987)).

Here, Coakley & Williams has been given ample notice that its failure to respond to the court's order and the government's motion could result in dismissal of this case. It was notified by the court on February 7, 2012 that it needed to obtain substitute counsel within 60 days or the court would consider issuing an order to show cause why the case should not be dismissed. Coakley & Williams was then notified by the government on June 11, 2012 that if it failed to respond to the government's inquiry and failed to clarify whether it planned to continue with the case, the government would consider filing a motion to dismiss for failure to prosecute. Lastly, when the government filed its motion to dismiss for failure to prosecute on June 25, 2012, Coakley & Williams was notified that it had until July 12, 2012 to respond or have the case dismissed. In each instance, Coakley & Williams has failed to take action. Consequently, its case will be dismissed.

CONCLUSION

For the reasons stated, the government's motion to dismiss with prejudice for failure to prosecute is GRANTED. The Clerk of the Court is directed to enter final judgment for defendant in accord with the motion. No costs.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge

[1]Even where plaintiff has not received such notice, any resulting dismissal would not be void absent a showing that the court had abused its discretion. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962).