

DOTCAB

EAST COAST SECURITY SERVICES, INC. APPELLANT,
v.
DEPARTMENT OF HOMELAND SECURITY, FEDERAL PROTECTIVE SERVICE, RESPONDENT.

Contract No. GS-04P-98-EYC-0029

May 16, 2006

Steven K. Leibel, Esq., Casey Gilson Leibel P.C., Attorneys at Law, Atlanta, Georgia, counsel for Appellant.

Aaron T. Marshall, Esq., U.S. Dept. of Homeland Security, Washington, DC, counsel for Respondent.

SOMERS, Administrative Judge

DECISION ON APPELLANT'S MOTION FOR AN ORDER TO ENFORCE THE SETTLEMENT AGREEMENT

East Coast Security Services, Inc., (East Coast or appellant), entered into a settlement with the Department of Homeland Security, U.S. Immigration and Customs Enforcement, (the government or respondent), which, among other things, required the government to pay appellant \$312,000 and to deposit the money directly to appellant's attorney's trust fund. The Internal Revenue Service captured a portion of the settlement proceeds to offset appellant's outstanding tax liability. Before this Board is appellant's motion for an order to enforce the settlement agreement by requiring respondent to pay to appellant the amount of money offset by the IRS. For the reasons set forth below, the Board denies appellant's motion.

FACTS

East Coast filed several appeals with the General Services Board of Contract Appeals concerning disputes arising out of its contract with the Federal Protective Service. The appeals were transferred to this Board when the Federal Protective Service became part of the Department of Homeland Security. [FN1] During the course of the litigation, the parties, under the auspices of the Board, entered into structured settlement discussions, which successfully resolved the appeals.

As a result of the negotiations, the parties executed a "Settlement Agreement" dated September 30, 2005. [FN2] The following summarizes the pertinent terms of the agreement:

1. The Respondent agreed to convert the termination to a no cost termination for the convenience of the Government, and to compensate Appellant in the amount of \$312,000, which shall include interest, attorneys' fees, and costs. The Appellant waived any and all additional and future claims for attorneys' fees or litigation costs whenever incurred in relation to the above captioned matter, as well as any and all attorneys' fees or costs incurred in relation to this Settlement Agreement.

2. The parties agreed that "payment shall be made to the trust fund of Steven K. Leibel, Casey Gilson Leibel, PC, Atlanta, Georgia."

3. The parties agreed that the "settlement agreement shall be the basis upon which the parties shall seek dismissal of Docket Nos. 4469, 4470, and 4472 with

prejudice. Such dismissal shall resolve all issues raised by the above-captioned matter and will foreclose any and all future litigation of issues by Appellant raised in the above-captioned matter."

4. The parties mutually agree to release each other from all claims arising from the litigation.

In accordance with the terms of the agreement, appellant filed a motion to dismiss the appeals with prejudice. The Board dismissed the appeals with prejudice on October 12, 2005.

By motion docketed on February 8, 2006, East Coast filed "Appellant's Motion for an Order Enforcing the Settlement Agreement" with supporting memorandum. East Coast sought an Order for Respondent to pay the settlement amount, because it had not received a settlement check within "the agreed upon time." The Board reopened the appeals under Appeal Nos. 4469R, 4470R, and 4472R in order to resolve appellant's motion.

After East Coast filed its motion for an order to enforce the settlement agreement, the agency electronically transmitted payment to the Appellant on February 10, 2006. The agency did not send deposit the proceeds to the trust fund of Steven K. Leibel, Casey Gilson Leibel, PC, as required under the settlement agreement. Rather, the agency attempted to make an electronic payment of \$312,000 directly to the appellant; however, the Internal Revenue Service (IRS) captured \$46,800 of the payment to offset an outstanding debt under the Department of Treasury (Treasury) offset program, [FN3] thus reducing the amount ultimately deposited in appellant's account to \$265,200. On February 17, 2006, the appellant transferred the \$265,200 payment to its counsel. East Coast's counsel has disbursed the \$265,200.

Analysis

Generally, Boards possess authority to enforce settlement agreements arising out of cases over which they have jurisdiction. PRC, Inc., 94-2 BCA ¶ 26613 (DOTBCA 1993). As with any contract, the court's inquiry into the scope of the settlement agreement begins with an examination of the document's own language. *Id.*; also see *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). It is well settled that, in interpreting the language of a contract, its terms must be accorded their plain and ordinary meaning. *Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998); *Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993). In other words, the contractual language must be given the meaning that a "reasonably intelligent person acquainted with the contemporaneous circumstances" would reach. *Allied Tech. Group, Inc. v. United States*, 39 Fed. Cl. 125, 138 (1997). In fact, if the language of the contract is unambiguous, so that there is only one reasonable interpretation of it, the plain language of the contract is controlling. *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1473 (Fed. Cir. 1997).

Pursuant to the terms of the settlement agreement, the government agreed to convert the contract termination for default into a no-cost termination for convenience of the government and to compensate appellant in the amount of \$312,000, inclusive of interest, attorneys' fees, and costs. In addition, the settlement agreement required payment to be made to the trust fund of Steven K. Leibel, Casey Gilson Leibel, PC, Atlanta, Georgia. The agreement expressly sought to bring "final resolution to the appeals brought by appellant arising from performance under the above referenced contract occurring prior to the effective date of the settlement .. ."

As noted above, Respondent processed payment to the contractor in the amount of \$312,000. The parties agree that the government did not comply with the express terms of the settlement agreement when it sent payment directly to the contractor rather than to appellant's counsel's trust fund. The issue here is whether the government's action constituted a material breach of the settlement agreement, and, if so, whether the contractor is entitled to the remedy it seeks based upon the breach. Because we find that the government did not materially breach the settlement agreement, we need not reach the second issue.

First, in analyzing appellant's assertion that the settlement agreement has been breached, we note that only material breaches of a settlement agreement justify rescinding the agreement. See *Thomas v. Dept. of Housing and Urban Dev.*, 124 F.3d 1439, 1442 (Fed. Cir. 1997). "Not every departure from the literal terms of a contract is sufficient to be deemed a material breach of a contract agreement, thereby allowing the nonbreaching party to cease performance and seek an appropriate remedy. *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1550 (Fed. Cir. 1992). The standard of materiality for the purposes of deciding whether a contract was breached "is necessarily imprecise and flexible." *Id.*, citing *Restatement (Second) of Contracts* § 241 cmt. a (1981). Materiality depends on "the nature and effect of the violation in light of how the particular contract is viewed, bargained for, entered into, and performed by the parties." *Stone Forest*, 973 F.2d at 1551. In sum, a material breach "relates to a matter of vital importance, or goes to the essence of the contract." *Thomas*, 124 F.3d at 1442.

The appeals in this case arose, in part, from the contracting officer's final decision to terminate the contract for default. The settlement between the contractor and the government provided that the government would convert the termination from a default termination to a no-cost termination, and would pay appellant a total sum of \$312,000. In return, the appellant agreed to dismiss the appeals with prejudice. These two provisions comprise the essence of the agreement, i.e., to resolve the disputes that formed the basis for the contractor's appeal of the contracting officer's final decision.

We find that the government did not materially breach the settlement agreement because it fulfilled the essential terms of the settlement agreement when it paid appellant \$312,000. Nonetheless, appellant suggests that the government's failure to make payment to the attorney's trust fund as provided in the settlement agreement caused the IRS to "capture" \$46,800 of the settlement. The board surmises, based upon appellant's argument, that appellant believes that if the funds had been transmitted directly to appellant's counsel's trust account, the IRS would not have been able to set-off appellant's tax liability from the proceeds.

We reject appellant's argument. The government had the right to set-off appellant's outstanding tax liability from contract proceeds owed to the contractor. The government's right to set off funds from monies owed under the contract to the contractor has been established at least since the case of *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947), and has been consistently reaffirmed in recent years. See *Cascade Pacific International v. United States*, 773 F.2d 287, 296 (Fed. Cir. 1985); *Blake Construction Co. v. United States*, 585 F.2d 998, 1005 (Ct. Cl. 1978); *Aetna Insurance Co. v. United States*, 456 F.2d 773, 775 (Ct. Cl. 1972); *Algonac Manufacturing Co. v. United States*, 428 F.2d 1241, 1250 (1970); *Barrett v. United States*, 367 F.2d 834, 836 (Ct. Cl. 1966).

The IRS's right to set off appellant's tax liability against funds owed by the government to appellant arose as soon as the parties had agreed that appellant was entitled to receive payment pursuant to the settlement agreement. See *Munsey Trust Co.*, at 239, (quoting *Gratiot v. United States*, 40 U.S. (15 Pet.) 336, 370, 10 L.Ed 759 (1841)) ("in a dispute between the United States and the contractor over a

claim to a contract balance, the United States has the "same right which belongs to every creditor" to set off funds in its hands against debts due it"). Consequently, the IRS had the right to setoff proceeds against unpaid federal taxes from East Coast prior to the funds being transmitted, regardless of whether the funds went to the trust account in accordance with the settlement agreement, or to appellant directly. See *Munsey Trust Co.*, at 239, (quoting *Gratiot v. United States*, 40 U.S. (15 Pet.) 336, 370, 10 L.Ed 759 (1841)) ("in a dispute between the United States and the contractor over a claim to a contract balance, the United States has the "same right which belongs to every creditor" to set off funds in its hands against debts due it"). Appellant has failed to show that the settlement agreement could supercede the IRS's ultimate right of offset. Consequently, we find that the government did not materially breach the settlement agreement.

In appellant's motion, it notes that East Coast is currently involved in tax litigation with the IRS, and is represented by counsel (although not the same counsel as in these appeals). Should appellant prevail in those proceedings, presumably, appellant will be able to obtain the appropriate remedy. Appellant is not entitled to the remedy it seeks here. Accordingly, we deny appellant's motion for a Board Order directing respondent to pay \$46,800 to East Coast's counsel's trust account.

CONCLUSION

For the foregoing reasons, the board denies plaintiff's motion and again dismisses the appeals with prejudice.

Jeri Kaylene Somers

Administrative Judge

Concur:

James L. Stern Chief

Administrative Judge

Chair

Eileen P. Fennessy

Deputy Chief Administrative Judge

Vice Chair

FN1. Pursuant to a memorandum of understanding, this Board has jurisdiction over appeals from the Department of Homeland Security.

FN2. The parties signed the settlement agreement over the course of several days; accordingly, the signatures reflect dates of September 28, 29, and 30.

FN3. Appellant is in a tax dispute with the IRS. Appellant has different counsel handling its tax dispute with the IRS.