

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Freedom NY, Inc.) ASBCA No. 43965
)
Under Contract No. DLA13H-85-C-0951)

APPEARANCE FOR THE APPELLANT: Gilbert Ginsburg, Esq.
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
Trial Attorney
Defense Personnel Support Center
(DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE GROSSBAUM
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This dispute arises under a fixed price contract to supply a quantity of combat rations, referred to as "Meal[s], Ready-to-Eat" (MRE). The appeal was taken from a contracting officer's decision denying the contractor's certified claim for an equitable adjustment or damages in the amount of \$21,959,311, based on various alleged constructive changes and contractual breaches going back to the inception of the contract. The contract had been terminated for default. However, in a prior appeal, ASBCA No. 35671, the default termination was determined to have been improper and was converted to a termination for the convenience of the Government. Freedom, NY, Inc., ASBCA No. 35671, 96-2 BCA ¶ 28,328.

Pursuant to Rule 5(b), the Government moves for summary judgment in the instant appeal on the grounds of res judicata. The Government contends that salient issues in the instant appeal, which appellant had requested being consolidated with ASBCA No. 35671, were fully and unsuccessfully litigated as alleged defenses to the default termination. Appellant opposes the motion.

The facts alleged and the issues raised in the newly consolidated "ASBCA Nos. 35671 & 43965" were substantially identical to those originally presented in ASBCA No. 35671. The complaints in both appeals contested the propriety of the default termination and alleged, inter alia: improper Government conduct going back to the inception of the contract, emphasizing delays in making progress payments which caused

appellant to be "in a loss position" and to have suffered financial damage; the existence and the Government's breach of a series of "side agreements" to bilateral Modification No. P00025; that appellant signed Modification No. P00025 "and all subsequent modifications" (each extending the delivery schedule and containing explicit release language) under duress; Government breaches of the terms of each of these bilateral modifications; the Government's waiver of the delivery schedule; and the invalidity of the new delivery schedule set in unilateral Modification No. P00030. The prayers in the respective complaints sought only the invalidation of the default termination or its conversion to a termination for convenience, together with "appropriate monetary relief" in an unspecified amount. See Freedom, NY, Inc., ASBCA Nos. 35671, 43965, 96-2 BCA ¶ 28,502 at 142,324.

Despite the apparent duplication between the two appeals with respect to the default termination, the separate monetary claim involved in ASBCA No. 43965 reflected appellant's attempt to enlarge beyond the relief available under the termination clause its potential recovery of price adjustments or damages allegedly caused by compensable Government conduct. Proceedings under ASBCA No. 35671 had made clear to the parties that the scope of the pending appeal was limited to the propriety of the default termination, that no monetary claim by appellant was then pending, and that no remedy other than conversion of the default termination to a termination for convenience would be available to appellant. Moreover, it appeared that application of an appropriate adjustment to reflect appellant's indicated loss, as required by the termination clause, might so reduce any termination settlement as to cause appellant to owe money to the Government. For example, during at least one prehearing conference the Government presented a payments summary (showing total disbursements under the contract over \$15.9 million and acceptance of delivered MRE cases priced at approximately \$14.2 million) and explained its computation of its \$1.6 million unliquidated progress payments claim and of a loss adjustment credit exceeding \$800,000 pursuant to subparagraph (e)(ii)(C) of the applicable termination for convenience clause and DAR 8-304. Thus, among other things, Freedom's breach of contract claim in ASBCA No. 43965 sought to preserve alleged excusable causes of delay and affirmative claims that predated certain bilateral modifications extending the delivery schedule and containing explicit releases.

Throughout proceedings under these consolidated appeals the Board and the parties understood that any possible relief under appellant's affirmative monetary claim in ASBCA No. 43965 depended on its establishing the invalidity of Modification No. P00025 and two later bilateral modifications, Nos. P00028 and P00029. Tr. 1/26, 2/6-8; See Freedom, NY, Inc., ASBCA Nos. 35671, 43965, 96-2 BCA at 142,324. Otherwise, any claims or excusable delays based on compensable Government conduct predating those modifications might be barred by the doctrine of accord and satisfaction. Cf. Case, Inc. v. United States, 88 F.3d 1004, 1007, 1011-12 (Fed. Cir. 1996) (modification

statement that contractor's "delinquency . . . is not excusable" construed broadly as accord and satisfaction encompassing various claims or excuses based on Government conduct). Appellant's proposed witness list included several Government officials who had been involved in the negotiation of these modifications and several of appellant's former officers, including its president, Mr. Henry Thomas, and an outside consultant who had participated in the negotiations leading to Modification No. P00025.

During a six day hearing on the propriety of the default termination appellant was given a full and fair opportunity to present evidence relating to all issues presented in its original and amended pleadings that could serve as defenses to the default termination. Both parties litigated fully issues concerning the validity of bilateral modifications P00025, P00028 and P00029, alleged "side agreements" reached in connection with Modification No. P00025, and various alleged Government breaches that predated these modifications. Among other things, appellant cross-examined the Government's procuring contracting officer (PCO) and administrative contracting officer (ACO) concerning each of these issues. However, appellant presented only the testimony of its president in its direct case, even though Mr. Thomas had not participated personally "at the April and May 1985 [sic- 1986] negotiations at DLA" leading to Modification No. P00025. Freedom, NY, Inc., ASBCA No. 35671, 96-2 BCA at 141,466 (finding 49). The outside consultant who represented appellant at these negotiations was present throughout most of the hearing, but was never called to testify. A perusal of the hearing transcript and the argument section of appellant's brief indicates that much of the testimony adduced by appellant and most of its argument was devoted exclusively to the aforementioned issues. (*See, e.g.*, tr. 2/101-293; 4/113-177, 5/247-278, 6/6-8; app. br. at 141-165, 169-190)

Because the issues concerning the validity of the bilateral modifications and alleged Government breaches predating those modifications were recognized and treated as important by the parties, who expended great effort in addressing these issues, the Board made specific determinations with respect to these issues in reaching its decision on the propriety of the default termination.¹ Among other things, the Board found specifically that: the Government had never agreed to any proposed "side agreements" in connection with Modification No. P00025; the PCO cautioned Mr. Thomas not to sign Modification No. P00025 if he thought that there were any outside agreements; and there was no persuasive evidence showing Government coercion or duress or that appellant accepted the terms of modifications P00028 or P00029 involuntarily. Freedom, NY, Inc., ASBCA No. 35671, 96-2 BCA at 141,466-69 (findings 51, 54, 62, 71). In addition, the Board also concluded, *inter alia*, that: the ACO had a 'reasonable basis' for suspending progress payments during the early months of the contract and for regularly requiring prepayment audits of each progress payment request; Modification No. P00025 did not include any alleged "side agreements"; and appellant had failed to persuade us that the

challenged bilateral modifications had been entered into under duress or were otherwise unenforceable because of mistake or unconscionability. Id. at 141,475-76.²

Notwithstanding the foregoing findings and conclusions, the Board determined:

that no valid, enforceable delivery schedule existed at the time of the termination and that the Government could not properly have terminated the contract for "fail[ure] to make progress" [and that appellant's] alleged failure to perform inventory control and property management requirements imposed by the Government Property clause and other related provisions of the contract was excused by the Government's interference.

Id. at 141,478. Accordingly, we held that the default termination was improper and converted the termination to "one for convenience of the Government." Id. at 141,479.

The Government's summary judgment motion is based on the related doctrines of collateral estoppel and res judicata. Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, (1979). Application of both doctrines is central to the conclusive resolution of disputes by civil tribunals.

To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana, 440 U.S. at 153-54. The Restatement of Judgments speaks of res judicata as "claim preclusion" and of collateral estoppel as "issue preclusion." See Restatement (Second) of Judgments § 27 (1982) comment b; United States v. Mendoza, 464 U.S. 154, 159 n.3 (1984).

Claim preclusion is clearly inapplicable to the instant appeal. Despite the fact that ASBCA No. 43965 arose out of the same underlying facts and involved similar

allegations as did ASBCA No. 35671, the two cases involve different causes of action. Freedom, NY, Inc., ASBCA Nos. 35671, 43965, 96-2 BCA at 142,324.

However, the Government also argues that appellant should be barred from relitigating various elements of its breach of contract claim in ASBCA No. 43965 under the doctrine of "issue preclusion," which is articulated as follows:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27

The Government contends that all facts and issues relevant to appellant's breach of contract claim in ASBCA No. 43965 were "actually litigated" and determined in proceedings under ASBCA No. 35671, "since each element of that claim also served as a defense to the Government's termination action." The Government also asserts that the Board "addressed each defense . . . in its decision" and that all of its "findings and holdings were essential to determining whether the contract was properly terminated." (Motion at 15-16) We do not agree with the latter assertion.

The facts and issues appellant raised in its pleadings as excusable delays or other defenses to the Government's default termination of the contract were substantially identical in both ASBCA No. 35671 and ASBCA No. 43965. The parties were given a full and fair opportunity to litigate all these issues. The issues were actually litigated and the Board determined most of the issues, although the determination of several issues was based on a failure of proof by the proponent. See Restatement (Second) of Judgments § 27 comment *d*.

However, the Board's determination of the issues concerning the validity of the challenged bilateral modifications was not essential to its holding in ASBCA No. 35671 that the default termination was improper. The decision did not depend on those determinations, which proved irrelevant to the outcome. Since the decision sustaining the appeal from the default termination was favorable to appellant, appellant has no opportunity to appeal the Board's adverse determination of ancillary issues which it litigated vigorously. Therefore, relitigation of those issues in a subsequent action between the parties is not precluded. "The interest in providing an opportunity for a

considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation." Id. comment *h*.

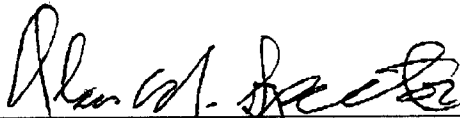
Accordingly, the Government's motion for summary judgment is denied. To facilitate the expeditious resolution of the dispute, the scope of this appeal will extend to issues involving both liability and damages. Pursuant to Rule 7, appellant is directed to file, within 45 days from receipt of this decision, a more definite statement of its complaint, setting forth with particularity the amount of the adjustment or damages it claims with respect to each and every allegedly compensable Government act or omission and describing fully the manner by which it computed such adjustment or damages.

Dated: 29 September 1997



JOHN J. GROSSBAUM
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



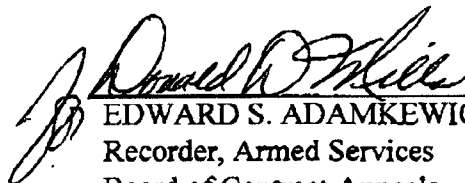
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

1. See Restatement (Second) of Judgments § 27 (1982) comment j.
2. In opposing the Government's motion, appellant suggests that these findings and conclusions simply reflected repeated statements "that there is no evidence in the record on several crucial portions of Appellant's breach claim" and that "Appellant's failure to present evidence regarding its breach claim was excusable" (Opposition at 7 n.2). These suggestions are without merit.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 43965, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated: 30 SEP 1997


EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals



ARMED SERVICES BOARD OF CONTRACT APPEALS

SKYLINE SIX
5109 LEESBURG PIKE
FALLS CHURCH, VA 22041-3208

7m6011.DOC

Telephone: (703) 681-8502
30 September 1997

CERTIFIED MAIL
RECEIPT REQUESTED

✓ Gilbert J. Ginsburg, Esq.
Attorney at Law
1227 25th Street, NW, Suite 800
Washington, DC 20037

Kathleen Hallam, Esq.
Office of Counsel
Defense Personnel Support Center
P.O. Box 8419
Philadelphia, PA 19101-8419

Re:ASBCA No. 43965
Appeal of Freedom NY, Inc.
Under Contract No. DLA13H-85-C-0591

Dear Counsel:

Enclosed is one authenticated copy of the Board's decision.

Very truly yours,


EDWARD S. ADAMKEWICZ
Recorder

Enclosure