In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 02-773C
(Filed February 27, 2009)

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CHARLES D. YOUNG and *
ANGELA R. YOUNG, *
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Plaintiffs, *
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v. *
*
THE UNITED STATES, *
*
Defendant. *
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* *

Charles D. Young, Breckenridge, Texas, *Angela R. Young*, Little Rock, Arkansas, *pro se.*

Dawn S. Conrad, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, with whom were *Peter D. Keisler*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Deborah A. Bynum*, Assistant Director, all of Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

WOLSKI, Judge.

Before the Court is defendant's motion for summary judgment. Plaintiffs, acting *pro se*, contend that the United States Department of Housing and Urban Development ("HUD") guaranteed rehabilitation work on their residence and agreed to forbear mortgage payments for a specified time. The Court heard oral arguments from the parties via telephone, and permitted plaintiffs an additional opportunity to supplement their response to defendant's motion. The issues have now been fully briefed and for the reasons stated below, the Court **GRANTS** defendant's motion for summary judgment.

I. BACKGROUND

Greater factual detail is provided in the Court's opinion denying defendant's motion to dismiss, *see Young v. United States*, 60 Fed. Cl. 418 (2004), but the procedural history is warranted here. Plaintiffs, acting in a *pro se* capacity, filed their first complaint with the Court on July 8, 2002. After plaintiffs claimed that a letter from HUD required them to dismiss their

case for failure to exhaust administrative remedies, the Court granted plaintiffs' motion to dismiss without prejudice on October 23, 2002. Plaintiffs, however, filed a second complaint in the Court on October 8, 2002. The second complaint largely elaborated upon claims in the first complaint and included other alleged violations.

Defendant moved to dismiss the second complaint on February 7, 2003. Defendant argued that the Court lacked jurisdiction over the tort claims contained in plaintiffs' complaint, that *res judicata* applied, and that plaintiffs failed to state a claim on which relief can be granted. On June 26, 2003, the Court granted the motion in part, preserving only the breach of contract claims. On August 15, 2003, the case was reassigned to the undersigned pursuant to Rule 40.1(a) of the Rules of the United States Court of Federal Claims ("RCFC"). During the course of preparing a Joint Preliminary Status Report, defendant discovered that the United States Court of Appeals for the Eighth Circuit was considering a district court appeal brought by plaintiffs in the same matter before plaintiffs brought their case in this Court. Defendant filed another motion to dismiss on September 29, 2003, arguing that under 28 U.S.C. § 1500, this Court had no jurisdiction to hear plaintiffs' case. The Court -- having decided that plaintiffs' second complaint should have been treated as an amended complaint rather than as a new complaint filed when the Court was deprived of jurisdiction -- denied the motion to dismiss on April 19, 2004 and consolidated both of plaintiffs' cases. *Young*, 60 Fed. Cl. at 428. On December 13, 2004, the government filed its motion for summary judgment.

Though plaintiffs' *pro se* status make their claims difficult to follow, it appears that plaintiffs allege that several contracts exist between them and the government. First, plaintiffs maintain that the government was a party to the construction contract plaintiffs entered into with B&H Construction Company ("B&H"), the company that plaintiffs engaged to rehabilitate their residence. *See* Compl. at 1-2, 4. Second, plaintiffs contend that when Simmons National Bank ("Simmons"), the lender, assigned to HUD the mortgage and note, which included the Rehabilitation Rider ("Rider"), HUD accepted alleged obligations that could not later be lawfully assigned by HUD to Ocwen Federal Bank ("Ocwen"). *See id.*; Pls.' Resp. to Ct. Order Filed on July 25, 2005 ("Pls.' Resp.") Ex. A at 1-2. Third, they maintain that HUD entered into an implied-in-fact contract to make sure work was done right, and in effect guaranteed the rehabilitation work. *See* Pls.' Resp. Ex. A at 2. Fourth, plaintiffs assert that an oral forbearance agreement, made at Mr. Young's hospital bedside, to suspend payments for thirty months, was breached when the government sold the mortgage to Ocwen and did not enforce terms of this oral forbearance. *See* Transcript of November 9, 2005 ("Tr.") at 20;[1] *see also* Pls.' Resp. Ex. A at 3.

[1] At a telephonic status conference on November 9, 2005, Mr. Young informed the Court and defendant that he "begged" HUD to visit him in the hospital where he was undergoing open-heart surgery sometime in late 1997. Tr. at 20. Mr. Young maintains that a HUD official, who Mr. Young could not name at the status conference, agreed to the extension on behalf of HUD. *See id.* at 20-21.

The Court has granted plaintiffs several opportunities to substantiate these claims. In response to plaintiffs' assertions that defendant was withholding documents and that prior attempts to obtain them proved futile, the Court accommodated Mr. Young's desire to locate these documents by facilitating a request for production of documents. *See* Order of September 8, 2004. In the same order, the Court secured agreement from defendant that it would not file a motion for summary judgment before forty-five days after the requested documents were served upon plaintiffs. *See id.* After defendant filed its motion for summary judgment, plaintiffs neglected to file a proper response, and the Court provided them another opportunity to respond nearly six months after their response was due. *See* Order of July 25, 2005 at 1. At a telephonic status hearing on November 9, 2005, the Court, mindful of Mr. Young's incarceration in prison, stayed the case until forty-five days after his release so that he could secure documents from his now-ex-wife, Mrs. Young, and third parties. *See* Order of November 10, 2005; *see also* Order of May 23, 2006. Mister Young eventually informed the Court of his release and, at his request, it further stayed the case because of a medical condition. *See* Order of May 16, 2006.

When Mr. Young requested that the Court lift the stay, it also granted plaintiffs twenty-eight days in order to obtain documents 200 miles away at the residence of Mrs. Young's relatives. Order of June 29, 2006. More than twenty-eight days later, Mr. Young informed the Court he "is unable to add further information to the court files" because "[t]oo much time has passed, and witnesses' are now deceased, long with the fact Most [sic] of the files in the case have been destroyed, as they are more than 7 years old." Pls.' Resp. to Ct.'s Order Due July 28, 2006 dated August 2, 2006 ("Pls.' Resp. to Ct.'s Order") at 1. After reviewing the filings of plaintiffs and considering defendant's motion for summary judgment, the Court scheduled a telephonic hearing and reminded plaintiffs in the order that they had yet to submit for the Court's consideration any copies of documents they received under their request for production of documents. *See* Order of February 12, 2007 at 1. In the same order, the Court instructed the government to produce updated HUD records that reflect the plaintiffs' payment history. *See id.* at 2. At the telephonic hearing, the Court gave permission to plaintiffs to supplement their position with declarations from any physicians who could corroborate Mr. Young's allegation that a HUD official orally agreed to a forbearance while Mr. Young was in the hospital. Order of March 29, 2007. Mister Young informed the Court that "[d]ue to the destruction of records under the normal seven-year course of business, the said physicians cannot add to the Court's record." Pls.' Status Report of April 17, 2007 (emphasis in original).

II. DISCUSSION

A. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RCFC 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560,

1562-63 (Fed. Cir. 1987). The Court interprets the facts and inferences therefrom "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But "[m]ere dispute over facts will not necessarily preclude summary judgment." *Progressive Bros. Constr. Co. v. United States*, 16 Cl. Ct. 549, 552 (1989).

Unless the moving party is basing its motion for summary judgment on the "absence of evidence to support the nonmoving party's case," *Celotex Corp.*, 477 U.S. at 325; *see also Anchor Savings Bank, FSB v. United States*, 59 Fed. Cl. 126, 140 (2003), the moving party must convince the Court through documentary evidence that material facts are beyond genuine dispute. *See* RCFC 56(h). For its part, the non-moving party is not obliged to "produce evidence in a form that would be admissible at trial" in order to demonstrate the existence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 324. However, if the non-moving party's evidence is "merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted); *Veit & Co. v United States*, 56 Fed. Cl. 30, 34 (2003), *aff'd*, 2003 WL 22961158 (Fed. Cir. 2003). "[M]ere denials or conclusory allegations are insufficient" to withstand motion for summary judgment. *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (citation omitted); *see also Veit*, 56 Fed. Cl. at 34.

Contractual interpretation is a proper subject of a motion for summary judgment because the interpretation of a contract is a question of law. *See Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1292 (Fed. Cir. 2002); *Calif. Fed. Bank v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001); *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993); *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985).

B. Plaintiffs Failed to Produce the Evidence Necessary to Withstand Summary Judgment

Defendant has demonstrated that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. The Court is convinced that HUD did not breach any contract, express or implied, with plaintiffs. Moreover, there is no proof to support plaintiffs' allegation that HUD orally modified any term of any contract.

1. HUD Did Not Breach Any Contract with Plaintiffs

At a minimum, any contract must contain mutual intent to agree, an offer, an acceptance, and consideration. *See Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997); *Brunner v. United States*, 70 Fed. Cl. 623, 626 (2006). Whenever the United States is a party to a contract, an additional requirement is "actual authority" of the official to bind the government. *See Trauma Service*, 104 F.3d at 1325; *Brunner*, 70 Fed. Cl. at 627. To understand the parties' agreement, it is always necessary for a court to begin by reviewing the plain language of the contract. *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *Frazier v. United States*, 67 Fed. Cl. 56, 60 (2005).

The parties and the Court concur that, as a matter of law, at least one contract between plaintiffs and defendant exists. The dispute concerns the terms of the contract, and the number of contracts, formed by the mortgage, note, Rider, and allonge whereby HUD later assigned its interest to Ocwen.

a. The Contract Terms of the Mortgage, Note, and Rider Were Observed

Executed on April 4, 1990, the mortgage identifies plaintiffs as "Borrower" and Simmons as "Lender." Def.'s App. at 1. According to the mortgage (also known as the "Security Interest"), plaintiffs owed Simmons $39,500. *Id.* In return for this sum, Simmons obtained the right to "the repayment of the debt . . . with interest, and all renewals, extensions and modifications" secured by the plaintiffs' property. *Id.* Plaintiffs were required to pay principal and interest "when due," *id.*, and, if plaintiffs failed, Simmons was entitled to "immediate payment in full." *Id.* at 3. These provisions could "bind and benefit" successors and assigns of plaintiffs and Simmons. *Id.* The Rider, which was a properly attached supplement to the mortgage, *see id.* at 5, stated in pertinent part:

> If the rehabilitation is not properly completed, performed with reasonable diligence . . . the lender is vested with full authority to take necessary steps to protect the rehabilitation improvement and property from harm, continue existing contracts or enter into necessary contracts to complete the rehabilitation. All sums expended from such protection, exclusive of the advances of the principal indebtedness, shall be added to the principal indebtedness, and [be] secured by the mortgage and be due and payable on demand with interests as set out in the note.

Id. at 5.[2]

The note was also signed by plaintiffs and Simmons on April 4, 1990. *Id.* at 7. The note evidences plaintiffs' promise to pay $39,500, and explains that the mortgage "protects the Lender from losses which might result if Borrower defaults." *Id.* at 6. In the event plaintiffs fail to pay, "then Lender may . . . require immediate payment in full of the principal balance remaining due and all accrued interest." *Id.* Simmons, however, could choose not to exercise this option and still preserve the right to exercise it in the future. *See id.* At the end of the note is an assignment clause executed by Simmons, stating: "All right, title and interest of the undersigned to the within credit instrument is hereby assigned to the Secretary of Housing and Urban Development of Washington, D.C., his/her successors and assigns." *Id.* at 7.

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[2] The Rider also states that "[i]f the borrower fails to [make any payment or to] perform any obligation under the loan, including the commencement, progress and completion provisions of the Rehabilitation Loan Agreement, and such failure continues for a period of 30 days, the loan shall, at the option of the lender, be in default." Def.'s App. at 5.

By plaintiffs' signature on the note, they assented to be bound to pay principal and interest to Simmons, secured by plaintiffs' property, with Simmons reserving the right to immediate satisfaction of the debt at Simmons' discretion. These rights were later assigned to HUD, and because plaintiffs and Simmons agreed to allow assignments in the mortgage, the assignment to HUD was valid. *See* RESTATEMENT (SECOND) OF CONTRACTS § 323(1) ("A term of a contract manifesting an obligor's assent to the future assignment of a right or an obligee's assent to the future delegation of the performance of a duty or condition is effective despite any subsequent objection."). An assignment to HUD means it is entitled to the rights of Simmons: to collect principal and interest, which is secured by plaintiffs' property, with HUD reserving the right to immediate satisfaction at its discretion.

Plaintiffs also agreed to the provisions contained in the Rider: "[T]he lender is vested with full authority to take necessary steps to protect the rehabilitation improvement and property from harm, continue existing contracts or enter into necessary contracts to complete the rehabilitation." Def.'s App. at 5. Unfortunately for plaintiffs' case, a fair reading of the Rider does not support the interpretation that plaintiffs advance -- that HUD was somehow a party to the plaintiffs' contract with B&H. The terms of the Rider did not require HUD to *ensure* the successful rehabilitation of plaintiffs' home by B&H. Rather, HUD may protect *its own* investment in the property by protecting the rehabilitation and property from harm. HUD has discretion to intervene in the event that the rehabilitation goes awry, but HUD is not required to intervene. In any event, both plaintiffs and Simmons agreed -- as evidenced by the plain language of the Rider -- to take only "necessary steps," thereby undercutting plaintiffs' claim that HUD, through its assignment from Simmons, agreed to provide a blanket guarantee against *any* construction defects. Furthermore, anything HUD expended to protect its own investment -- again, by the plain language of the Rider -- would accrue to the principal amount secured by the mortgage. *See id.* According to the Rider, plaintiffs simply cannot hold HUD accountable for an alleged breach of contract with B&H, and collect from HUD any out-of-pocket expenses incurred as a result of defective rehabilitation.

b. The Allonge Properly Assigned HUD's Rights to Ocwen

The allonge assigning HUD's rights in plaintiffs' contract is dated December 27, 1997 and states:

> Any changes in the payment obligations under the Note by virtue of any forbearance or assistance agreement, payment plan or modification agreement agreed to by HUD, whether or not in writing, is binding upon the Assignee/Payee, its successors and assigns. The Note and the Mortgage/Deed of Trust securing the Note may only be transferred and assigned to a person or entity that is either an FHA-Approved Servicer/Mortgagee/Beneficiary or who has entered into a contract for the servicing of the Note with an FHA-Approved Servicer. The Note and the Mortgage/Deed of

> Trust securing the Note shall be serviced in accordance with the servicing requirements set forth by HUD. These sales and servicing provisions shall continue to apply unless the Mortgage/Deed of Trust is modified, for consideration, with the consent of the Mortgagor/Trustor, refinanced, or satisfied of record.

Def.'s App. at 8. HUD was identified as the "present owner and holder," and the document states that "[a]s a result of [this] transfer, HUD has no further interest in the Note." *Id.* A clause in the allonge states that "[a]ny changes in the payment obligations under the Note by virtue of any forbearance assistance agreement, payment plan or modification agreement agreed to by HUD, whether or not in writing, is binding up the Assignee/Payee, its successors and assigns." *Id.*

With a few limited exceptions, a contract similar to the one used by HUD and plaintiffs may freely be assigned if the obligors have previously agreed to the possibility of an assignment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(2). By signing the mortgage, plaintiffs agreed to "benefit" successors to the contract. Def.'s App. at 3. When HUD assigned plaintiffs' contract to Ocwen, Ocwen acquired the legal authority to enforce the receipts of benefits HUD once enjoyed. Ocwen, like HUD before it, could -- according to the plain language of the forbearance agreement -- foreclose on plaintiffs' property if they were delinquent in making payments. Just as plaintiffs accepted the terms acknowledging the possibility of foreclosure by HUD, plaintiffs also accepted the terms acknowledging the possibility of foreclosure by Ocwen. In short, the assignment from HUD to Ocwen was valid and HUD retained no contractual obligations to plaintiffs after the assignment.

c. Plaintiffs Have Not Supported Their Claim of Breach of a Duty to Inspect

Plaintiffs contend that HUD was required to, and did, inspect their property. Plaintiffs allege that inspection reports prepared by HUD might reveal structural defects noted by other inspectors for which HUD would be responsible. Plaintiffs insist that this claim can be proven by an inspection report from the City of Little Rock stating that the rehabilitation "will be inspected by HUD." Pls.' Resp. Ex. A at 2-3; *see also* Def.'s App. at 29. In the alternative, plaintiffs argue that even if HUD never inspected their property, HUD required Simmons to inspect, thereby forming an implied contract between HUD and plaintiffs. *See* Pls.' Resp. Ex. A at 2.

The record before the Court does not indicate the existence of any contractual obligations requiring HUD to inspect plaintiffs' property. Plaintiffs' mere assertions that HUD has somehow incurred this obligation are insufficient to demonstrate the existence of a dispute for the purpose of surviving a motion for summary judgment. *See SRI Int'l*, 775 F.2d at 1116; *Progressive Bros. Constr. Co.*, 16 Cl. Ct. at 552; *Veit*, 56 Fed. Cl. at 34. To satisfy their burden, plaintiffs would have to show that they and HUD agreed that it would inspect their property in exchange for

something of value. *See Trauma Serv. Group*, 104 F.3d at 1325; *Brunner*, 70 Fed. Cl. at 626. Such an obligation is not contained within the express provisions of the only enforceable contract of the parties, namely, the mortgage, note, and Rider.

Nor can the duty to inspect be implied. An implied-in-fact contract is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & O.R.R. v. United States*, 261 U.S. 592, 597 (1923); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir. 1990). Moreover, "[t]he existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract." *Atlas Corp.*, 895 F.2d at 754-55. And, whenever the United States is a party to a contract, there must exist "actual authority" of an official who is capable of binding the government. *See Trauma Service*, 104 F.3d at 1325; *Brunner*, 70 Fed. Cl. at 627. Here, plaintiffs have failed to produce any evidence of conduct by HUD from which the Court could infer that the government and plaintiffs agreed HUD was responsible for inspecting the property.[3] As a preliminary matter, the representative of the government in forming the implied-in-fact contract would have had to have authority to oblige the government to inspect, and this at the very least would require evidence, not produced by plaintiffs, of the government official's position and scope of authority. But even if plaintiffs produced such evidence, HUD's inspections, which could form the implied-in-fact contract, would not displace the terms of the Rider, which forms part of the express contract, vesting HUD with the discretion to intervene for the sake of protecting the property. If HUD inspected at all, the inspections were not required, and if the inspections failed to detect shoddy rehabilitation work, the express contract provides no recourse to plaintiffs. Thus whether the alleged contractual obligation to inspect is express or implied, plaintiffs cannot prevail.

2. No Evidence Has Been Produced to Support the Existence of an Oral Modification of the HUD Contract at Mr. Young's Bedside

Mister Young's assertion -- that an official from HUD orally agreed to extend forbearance to March 2000 -- would preclude summary judgment on this issue, but only if the dispute were more than a mere allegation. *See Liberty Lobby*, 477 U.S. at 249-50; *SRI Int'l*, 775 F.2d at 1116; *Veit*, 56 Fed. Cl. at 34. On the one hand, Mr. Young represents that his recollection was so impaired by the medications attendant to open-heart surgery that he could not recall if Mrs. Young witnessed the exchange, and on the other hand asserts that he recalls the terms of the oral modification of the contract. *See* Tr. at 20-22. Even if the elements of contract modification were in this instance satisfied, the modification's validity might nonetheless be called into question by Mr. Young's incapacity to contract. *See id.* at 21 (describing how "the doctors and everybody that was there decided that it was not in [Mr. Young's] best interest to sign anything").

[3] Plaintiffs allege that three HUD inspections and written reports by HUD's inspector general are missing from defendant's appendix. Pls.' Resp. Ex. A at 2-3.

In any event, what Mr. Young has brought forth is insufficient to preclude summary judgment. Were affidavits produced these would have been considered by the Court, but Mr. Young concedes that none of the physicians who witnessed the exchange could provide declarations and that no documentation from their files would be forthcoming. Pls.' Status Report of April 17, 2007; *see also* Pls.' Resp. to Ct.'s Order Due July 28, 2006 at 1 (declaring that Mr. Young was "unable to add further information to the court files" because "[t]oo much time has passed, and witnesses' are now deceased . . . [and] Most of the files in the case have been destroyed."). And though Mrs. Young was present, *see* Tr. 21-22 (recalling with whom Mr. Young may have interacted prior to surgery), she has not submitted an affidavit regarding the event. Indeed, she does not recall what transpired during Mr. Young's conversation with a HUD official, which occurred more than nine years ago. *See id.* With no evidence identified by plaintiffs that corroborates the alleged oral modification -- and, perhaps most importantly, no evidence that could identify the HUD official who allegedly agreed to this modification, to enable the Court to determine whether the requisite authority to contract was possessed, *see Trauma Service*, 104 F.3d at 1325; *Brunner*, 70 Fed. Cl. at 627 -- the Court concludes that summary judgment is appropriate.

III. CONCLUSION

For the foregoing reasons, defendant has successfully demonstrated that there are no genuine issues of material fact and that the government is entitled to judgment as a matter of law. The Court finds that the government observed its contractual obligations with plaintiffs, and that plaintiffs identified no evidence to support the existence of a contractual right obligating HUD to guarantee the rehabilitation work undertaken on their house, or of an oral modification of the terms of the HUD contract to allow a forbearance. Therefore, defendant's motion for summary judgment is **GRANTED**. The Clerk is directed to enter judgment for defendant.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge