

PSBCA 6146

APPEALS OF J. LEONARD SPODEK UNDER LEASE AGREEMENT (ELLIOTT, IA AND J.
LEONARD SPODEK D/B/A COLO POSTAL HOLDINGS UNDER LEASE AGREEMENT (PENDER, NE)

September 16, 2010

APPEARANCE FOR APPELLANT: Andrew Spodek

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OPINION OF THE BOARD

Respondent, United States Postal Service, leased two post offices from Appellant, J. Leonard Spodek. As the term of each neared its end, the parties tried to negotiate follow-on leases but were unsuccessful. Respondent occupied the post offices beyond the expiration of the leases, and these appeals concern the damages to which Appellant is entitled for the holdovers.

At the election of the parties, the appeals are being decided on the record without an oral hearing. 39 C.F.R. §955.12. Entitlement and quantum will be addressed (May 16, 2008 Order).

FINDINGS OF FACT

Respondent's Failure to Vacate

Elliot, Iowa

1. Appellant owned the building occupied by the Elliot, Iowa Post Office and leased it to Respondent. The term of the lease was from January 1, 1997, through December 31, 2006, at an annual rent of \$4,500. (Stipulations ("Stip.") 6-9; Appeal File, tab ("AF") 1).
2. The Elliot lease did not include a renewal option or a provision with respect to a holdover tenancy (Stip. 10, 11; AF 1).
3. In May 2005, the parties entered negotiations for a successor lease (Stip. 12). To establish its negotiation position, Respondent obtained an appraisal, identified as a "Market Rent Study," from Cushman & Wakefield (AF 7, 12; Stip. 19, 25).

4. The September 9, 2005 Market Rent Study concluded that the reasonable rent for the Elliot Post Office as of the expiration of the lease would be \$5,172 per year or \$4.80 per square foot per year for a five-year term beginning January 1, 2007, with a five-year option. Respondent offered Appellant a lease at that rent, but the parties did not reach agreement on a new lease. (AF 12, pp. 139-141; Stip. 12-26).

5. Respondent did not vacate the Elliot Post Office premises until January 31, 2008, 13 months after the lease expired (Stip. 39, 41; AF 44).

6. Throughout its holdover occupancy, Respondent sent Appellant each month a check in the amount of \$431, representing monthly payments at an annual rate of \$5,172 per year. Appellant returned each check uncashed. (Stip. 33, 34).

7. On October 12, 2007, Appellant faxed to the contracting officer a claim for holdover rent for the Elliot Post Office and the Pender, Nebraska Post Office (discussed below). For Elliot, Appellant sought holdover rent at a rate of \$786.04 per month (annual rent of \$9,432.50) from January 1, 2007, until Respondent vacated the premises. The amount Appellant claimed for the Elliot holdover as of the date he submitted the claim was \$6,998.40, plus interest. (AF 37; Stip. 32, 35).

8. By final decision dated December 6, 2007, the contracting officer denied Appellant's claim for monthly holdover rent in excess of \$431 (AF 42; Stip. 36, 37, 38).

9. Appellant's timely appeal of the final decision was docketed as PSBCA No. 6146.

Pender, Nebraska

10. Appellant owned the building occupied by the Pender, Nebraska Post Office and leased it to Respondent. The term of the lease was from February 1, 1997, through January 31, 2007, at an annual rent for the last five years of the term of \$15,720. (AF 2; Stip. 42-46).

11. The Pender lease did not include a renewal option or a provision with respect to a holdover tenancy (AF 2; Stip. 47, 48).

12. In May 2005, the parties entered negotiations for a successor lease for the Pender premises (Stip. 49). To establish its negotiation position, Respondent obtained a Market Rent Study from Cushman & Wakefield (AF 6, 19; Stip. 56, 62).

13. The Pender Market Rent Study concluded that a reasonable rent for the Pender Post Office as of the expiration of the lease was \$13,300 per year or \$4.06 per square foot per year for a five-year term commencing February 1, 2007, with a five-year option. Respondent offered Appellant a lease at that rent, but the parties did not reach agreement on a new lease. (AF 19, pp. 220- 222; Stip. 49-63).

14. Respondent did not vacate the Pender premises until June 30, 2008, 17 months after the lease expired (Stip. 77, 78).

15. Throughout its holdover at Pender, Respondent sent Appellant each month a check in the amount of \$1,310, representing monthly payments at an annual rate of \$15,720 per year. [FN1] Appellant returned each check uncashed. (Stip. 70, 71).

16. In Appellant's October 12, 2007 claim (Finding 7, above), Appellant sought holdover rent at a rate of \$3,156.56 per month (annual rent of \$37,878.75) for the Pender Post Office. The total claimed for the Pender holdover as of the date of claim submission was \$28,409.04. (AF 37; Stip. 69, 72).

17. By final decision dated December 3, 2007, the contracting officer denied Appellant's claim for holdover rent in excess of \$1,310 per month (AF 41; Stip. 73-

75).

18. Appellant's timely appeal of the final decision was docketed as PSBCA No. 6147.

Evidence of Market Rental Value

Elliot, Iowa

19. In reaching his conclusion that the reasonable rent for the Elliot Post Office as of the expiration of the lease would be \$5,172 per year, Cushman & Wakefield's licensed appraiser identified lease transactions he considered comparable to the Elliot leasehold. The appraiser acknowledged that there were few lease transactions available for comparison in the area, but he identified as comparables one lease offering (for a three-year lease) and four existing leases of commercial space (three having five-year terms and one a three-year term) in other Iowa communities. He made adjustments to the comparables' rents based on their location, condition, utility, interior improvements, and parking. In a narrative section, the appraiser explained the adjustments and how the adjusted rental rates were used in arriving at his estimate of reasonable market rent. (AF 12, pp. 139-141).

20. Cushman & Wakefield's contract with Respondent included the following provision:

8. PROHIBITION AGAINST POSTAL FACILITIES AS COMPARABLES. The Contracting Officer will listen to cogent arguments as to the rationale for using other postal facilities as comparables, but in nearly all cases the Postal Service does not typically accept other leased postal facilities as comparable rental properties for the postal facility being appraised for the simple reason that we do not expect to be competing against ourselves in the rental market. . . . If the appraiser expects to use other postal facilities as comparables, the appraiser must receive from the Contracting Officer acceptance of the idea of using other postal facilities as comparables before proceeding with the appraisal assignment.

(AF 12, p. 155). No post offices were among the comparables used in the Elliot Market Rent Study (AF 12, pp. 139-141).

21. As evidence of the reasonable market rent for the Elliot Post Office, Appellant offered a March 2010 evaluation by a licensed appraiser of a reasonable rental for the holdover period for the Elliot Post Office. In determining the reasonable rental, the appraiser considered only the rents paid at a number of post offices in other communities within Iowa, relying on information about the other post offices (location, lease term, rent, size) supplied by Appellant. All of these comparables were leases of at least 5 years. He performed only an exterior inspection of these post offices and made only minor rental adjustments based on their condition relative to the Elliot Post Office. (Appellant's Rebuttal Evidence, tab 8).

22. Based on the average adjusted rent for the other post offices he considered, Appellant's appraiser concluded that the reasonable rental value for the Elliot Post Office during the holdover period would be \$7.26 per square foot which equates to \$7,826.28 per year. (Appellant's Rebuttal Evidence, tab 8).

Pender, Nebraska

23. In reaching his conclusion that the reasonable rent for the Pender Post Office as of the expiration of the lease would be \$13,300 per year, Cushman & Wakefield's licensed appraiser identified lease transactions he considered comparable to the Pender leasehold. The appraiser acknowledged that there were few lease transactions available for comparison in the area, but identified as comparables a listing for a

month-to-month lease of a commercial building in Pender, and a listing and three commercial leases (two month-to-month and one for a five-year term) in other Nebraska communities. [FN2] He made adjustments to the comparables' rents based on their location, condition, utility, and parking relative to those of the Pender Post Office. In a narrative section, the appraiser explained the adjustments and how the adjusted rental rates were used in arriving at the annual rent. (AF 19, pp. 220-222).

24. Cushman & Wakefield's contract with Respondent for evaluation of market rent for the Pender Post Office included the instruction to avoid using post offices as comparables (Finding 20), and the Market Rent Study did not consider any post offices as comparables (AF 19, p. 238).

25. In March 2010, Appellant obtained from a licensed appraiser an evaluation of rental for the holdover period for the Pender Post Office. The format, approach and conclusions were the same as for Elliot. In determining the reasonable rental, he considered only the rents paid at a number of post offices in other communities within Nebraska, relying on information about the other post offices (location, lease term, rent, size) supplied by Appellant. All of these comparables were leases of at least 5 years. He performed only an exterior inspection of these post offices and made only minor rental adjustments based on their condition relative to the Pender Post Office. (Appellant's Rebuttal Evidence, tabs 2, 3, 7).

26. Considering the average adjusted rent for the other Nebraska post offices, Appellant's appraiser determined that the per square foot market rent for the Pender Post Office during the holdover period would be \$8.20, equating to an annual rental of \$26,863.20. (Appellant's Rebuttal Evidence, tab 7).

Replacement Post Offices

Elliot, Iowa

27. Respondent moved its Elliot Post Office operations to another building in Elliot. The lease for the new space was entered in December 2006 and was fashioned as a series of six-month occupancies at Respondent's option for two years at an annual rental of \$4,500. Six five-year option periods available to Respondent followed at rents escalating from \$4,680 for the first term (through 2013), \$5,604 for the second five-year term, up to \$9,300 for the last term ending in 2038. (Respondent's Additional Evidence, pp. 1-44; Declaration of H. Roop ("Roop Decl.") ¶ 31).

28. Respondent spent \$118,742.43 for improvements to prepare the Elliot space for use as a post office (Appellant's Rebuttal Evidence, tab 3).

29. Appellant's appraiser included a calculation purporting to show the amortized cost of the tenant improvements in Respondent's new Elliot facility. Amortizing the total cost of the tenant improvements over the first ten years of the lease would, according to the appraiser, result in a "true" rental value for the new facility of \$11.90 per square foot, or an annual rental of \$16,374.40. (Appellant's Rebuttal Evidence, tab 8).

Pender, Nebraska

30. Respondent moved its post office operations to another building in Pender. The lease for the new space was entered in December 2006 and was fashioned as a series of six-month occupancies for two years at Respondent's option at an annual rental rate of \$7,500. Six five-year option periods followed at rents escalating from \$7,800 for the first term (through 2014), \$8,760 for the second five-year term, up to \$15,000 for the last term ending in 2039. (Respondent's Additional Evidence, pp. 45-86; Roop Decl. ¶ 53).

31. Respondent spent \$215,772.31 for tenant improvements to the new post office space (Appellant's Rebuttal Evidence, tab 3).

32. Appellant's appraiser prepared a calculation purporting to show the amortized cost of the tenant improvements in Respondent's new Pender facility. Amortizing the cost of the tenant improvements over the first 10 years of the lease would, according to the appraiser, result in a "true" rental for the new facility of \$11.63 per square foot, or an annual rental of \$29,075. (Appellant's Rebuttal Evidence, tab 7).

DECISION

Market Rent

Respondent failed to vacate the Elliot and Pender premises upon the expiration of the leases (Findings 5, 14), thus breaching each lease's implied duty to vacate at the end of the lease term and entitling Appellant to damages, including the market rental value of the premises for the holdover periods. See *Prudential Ins. Co. v. United States*, 801 F.2d 1295, 1299 (Fed. Cir. 1986); *Burdette A. Rupert v. General Services Administration*, GSBICA No. 10523, 93-1 BCA ¶ 25,243, at 125,728; *United States Postal Service v. Sunshine Dev., Inc.*, 674 F.Supp. 2d 619, 627-628 (M.D. Pa. 2009). [FN3] On this the parties do not disagree. They disagree as to the market rental value of the premises during the holdovers.

Respondent argues that its Market Rent Studies (Findings 3, 4, 12, 13) establish the reasonable market rent for the post offices. It strongly discouraged, if not barred, its appraiser from considering as a comparable any other post office (Findings 20, 24), and the Market Rent Studies considered as comparables only other commercial properties; no post offices were included.

Appellant, on the other hand, argues that other post offices are the best and perhaps only facilities comparable to existing post offices for purposes of determining the market rent for the subject postal facilities. His appraiser used other post offices and no other commercial buildings as comparables in reaching his determination of market rent for the Elliot and Pender holdovers (Findings 21, 25).

Estimation of fair market rental seeks an approximation of what would be the probable rent for the premises that would result from free, arms-length bargaining between Appellant and a hypothetical lessee for the term of the holdover. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6-7 (1949); *Olson v. United States*, 292 U.S. 246, 256-257 (1934). One way to address that probable rent is to consider rentals for leases on properties comparable to the subject post offices, and each party adopted market comparisons to develop rental values for the properties. A comparable property is one that is reasonably similar to the subject property and would be a reasonable alternative for most prospective lessees who would be interested in Appellant's space. See *Encyclopedia of Real Estate Appraising*, p. 26 (Edith J. Friedman, ed., 3rd ed., 1978); *Heydt v. United States*, 38 Fed. Cl. 286, 309 (1997); *Yaist v. United States*, 17 Cl. Ct. 246, 257 (1989).

Appellant's argument that only post offices are appropriate comparables in determining the market rental of a post office building assumes that potential tenants of Appellant's buildings would only have been interested in Appellant's buildings for use as post offices, and there is no basis for that conclusion. Other retail or distribution premises of a similar size could be considered comparables. Appellant's approach fails to consider the general demand for the Elliot and Pender premises, and it is that general demand that determines the market rental value. See *R. J. Widen Co. v. United States*, 357 F.2d 988, 994 (Ct. Cl. 1966). Allowed to apply his professional judgment, Appellant's appraiser may have considered comparable commercial spaces in evaluating the market rent of the post offices at issue.

Appellant precluded him from doing so.

Respondent's Market Rent Studies are also flawed. Respondent's method of appraisal categorically excluded post offices from the appraiser's consideration (Findings 20, 24). As the Market Rent Studies were originally prepared as aids in its negotiations with Appellant for new leases, Respondent was free to place limitations on the appraiser, including a restriction on consideration of other post office leases as comparables. However, in this proceeding, Respondent is offering the Market Rent Studies as evidence of market rental value during the holdover periods, and Respondent has not provided adequate justification for categorically excluding otherwise comparable commercial properties from the appraiser's consideration simply because they are subject to a Postal Service lease. [FN4]

Both parties imposed significant restrictions on their appraisers' exercise of professional judgment in selecting comparables and in evaluating the market rent. These restrictions make it impossible for the Board to accept fully either of the appraisals. However, considered together, the appraisals establish a basis for the Board to decide Appellant's damages for the holdover periods. Aside from their arguments that the other's approach was incorrect, the parties did not challenge the details of the opposing appraisals. Neither challenged as incorrect the terms stated in the appraisals for any of the leases chosen as comparables or questioned the adjustments made by the appraisers in reaching their conclusions as to reasonable market rent.

Therefore, we can consider the evidence of the comparables in the appraisals as a basis for application of a jury verdict to determine Appellant's damages. That Appellant is entitled to damages for the holdovers is conceded; the appraisals provide the best evidence available to determine those damages; and the appraisals provide a reasonable basis for making a fair and reasonable approximation of Appellant's damages. See Real Properties MLP Limited Partnership, PSBCA No. 3453, 95-2 BCA ¶ 27,829, at 138,759-760; Burdette A. Rupert, 93-1 BCA ¶ 25,243, at 125,730. Applying a jury verdict approach in this appeal, we have averaged the results of both appraisals for each of the properties. For Elliot, averaging Respondent's appraiser's rental of \$5,172 per year with Appellant's \$7,826.28 per year results in a rental for the holdover period at an annual rental rate of \$6,499.14. This equates to a monthly rate of \$541.60 and results in reasonable market rent of \$7,040.74 for the 13-month holdover. Averaging Respondent's appraiser's rental of \$13,300 per year for Pender with Appellant's \$26,863.20 results in holdover rent at an annual rate of \$20,081.60. This equates to a monthly rent of \$1,673.47 and results in reasonable market rent of \$28,448.93 for the 17-month holdover at Pender.

Appellant argues that Respondent's proposed rentals understate his damages because the Market Rent Studies calculated market rent for each post office based on the 10-year lease term Respondent sought in its negotiations with Appellant, rather than on the short, uncertain duration of the holdovers. Appellant argues that this justifies increasing the rentals found in Respondent's appraisals. However, we note that all of the comparables considered by Appellant's appraiser were of at least a five-year term as well, and his appraiser made no adjustment for the shorter duration of the holdovers. Moreover, Appellant has not suggested what that adjustment should be or offered evidence that would support an adjustment of any particular amount. While we may apply a jury verdict approach when we can approximate Appellant's damages based on evidence in the record, any adjustment for duration and uncertainty of the holdovers based on this record would be nothing more than impermissible speculation. Appellant has failed to meet his burden of providing a rational basis for a jury verdict determination of an appropriate adjustment for the limited duration and uncertainty of the holdover occupancies. See R. W. Borrowdale Co., ASBCA No. 20264, 75-2 BCA ¶ 11,560, at 55,190; Geo-Con, Inc., ENGBCA Nos. 5749-Q, 5976-Q, 96-1 BCA ¶ 28,112, at 140,345-346.

Finally, Appellant insists that the rent for the new post offices in Elliot and Pender should be included in any determination of average or market rent. Both new

leases were entered during the holdover period. Although the rental to the lessor in each case is lower than the rental determined by Respondent's appraisers, Appellant argues that the "true" rent, figuring in the improvements paid by Respondent, would increase any determination of market rent. However, in calculating what he considered the "true" rent for the new facilities, Appellant's appraiser, without explanation, amortized the improvement costs over a ten-year period when under the new leases Respondent has the right to retain possession for 30 years at initial six-month tenancies and subsequent five year tenancies all at Respondent's option (Findings 27, 30). Using a longer amortization period would lower the rent-plus-improvements value, and we have no way of calculating the influence, if any, of the new lease rents on average or market rents. Accordingly, we decline to consider them.

Takings Clause

Appellant also argues that Respondent's holdover constitutes an illegal "taking," establishing an alternative basis for awarding him damages. The Board has no jurisdiction to entertain a claim founded upon the Takings Clause of the Fifth Amendment of the Constitution. See *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495, at 155,527; *M&M Servs., Inc.*, ASBCA No. 28712, 84-2 BCA ¶ 17,405, at 86,688; *Paul A. Mason*, PSBCA No. 1357, 85-2 BCA ¶ 17,998, n. 1.

Consequential Damages

Appellant contends he should recover consequential damages resulting from Respondent's holdover. Specifically, Appellant asserts that Respondent's failure to vacate delayed Appellant's rental of the premises to a new tenant until the real estate market had begun a downward slide. Consequential damages may be recovered if proved and if they were foreseeable at the time the lease was entered. See *Prudential Ins. Co.*, 801 F.2d at 1300. However, Appellant did not submit a consequential damages claim to the contracting officer, and, as a result, we have no jurisdiction to consider such claims. See *Linda Copman*, PSBCA Nos. 4889, 4903, 03-2 BCA ¶ 32,342, at 160,030; *Sunshine Dev., Inc.*, PSBCA No. 4200, 99-1 BCA ¶ 30,149.

Contract Disputes Act Interest

Appellant is entitled to interest under the Contract Disputes Act (41 U.S.C. §611) from the date the contracting officer received his claim (October 12, 2007) until the date of payment. See *Modeer v. United States*, 68 Fed. Cl. 131, 144-145 (2005); *Kelley v. United States*, 19 Cl. Ct. 155, 166 (1989); *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 862 (Fed. Cir. 1991).

Respondent argues that Appellant should be denied interest because he could have mitigated his damages by cashing the rent checks sent monthly by Respondent instead of returning them (Findings 6, 15). [FN5] To mitigate his contract damages the non-breaching party is required to make "those efforts that are fair and reasonable under the circumstances." *First Heights Bank, FSB v. United States*, 422 F.3d 1311, 1316 (Fed. Cir. 2005) (quoting *Home Sav. of Am., FSB v. United States*, 399 F.3d 1341, 1353 (Fed. Cir. 2005)). It is Respondent's burden to prove that Appellant's actions in this regard were not reasonable, see *Spodek v. United States*, 73 Fed. Cl. 1, 19-20 (2006), and it has not alleged or shown that in the context of rent payments by a holdover tenant it was unreasonable for Appellant to refuse payments at a rate it disputed.

Conclusion

For the 13 months of Respondent's holdover occupancy of the Elliot Post Office, Appellant is entitled to \$7,040.74, plus Contract Disputes Act interest from October 12, 2007, until paid. The appeal of PSBCA No. 6146 is sustained in that amount.

For the 17 months of Respondent's holdover occupancy of the Pender Post Office, Appellant is entitled to \$28,448.93, plus Contract Disputes Act interest from October 12, 2007, until paid. The appeal of PSBCA No. 6147 is sustained in that amount.

Norman D. Menegat

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. This was the rate under the expired lease (Finding 10). The contracting officer paid that amount notwithstanding that the Pender Market Rent Study supported a lower rate (Finding 13).

FN2. One of the month-to-month leases was of a foreclosed building leased at a nominal rate in order to preserve the only grocery store in the community. The appraiser gave little weight to this property as a comparable. (AF 19, pp. 220-222).

FN3. The parties have submitted evidence about the course of their negotiations for follow-on leases, and each argued that it was the other who acted unreasonably during those discussions and prevented agreement. Under the circumstances of these appeals, determining the reasons why the negotiations failed is not relevant to a determination of Appellant's damages for the holdover periods.

FN4. The record does not reflect that any otherwise comparable postal leases were eliminated from Respondent's appraisers' consideration because of this limitation, but the potential for distortion of the evaluation process is present in Respondent's categorical exclusion of post offices as comparables. This is the same potential for distortion of the appraisal process presented in Appellant's limitation of his appraiser's consideration to post offices, although the record does not reflect that his appraiser eliminated otherwise suitable comparables that were not post offices.

FN5. We address this argument although we are not persuaded that the statutorily-mandated Contract Disputes Act interest on awards to government contractors is an element of the contractor's "damages" that must be mitigated. There is no requirement that the contractor specifically claim or show that he incurred costs of financing performance in order to recover Contract Disputes Act interest.